

# Judicial Nullification? Judicial Compliance and Non-Compliance with Jury Improvement Efforts

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|------|--|-----|
| I.   | INTRODUCTION.....  | 407 |
| II.  | THE NCSC <i>STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS</i> ..... | 410 |
| III. | WHAT CAUSES VARIATION IN TRIAL COURT PRACTICES? .....                        | 413 |
| IV.  | JUDICIAL NULLIFICATION?.....   | 420 |
| V.   | CONCLUSIONS .....  | 423 |

## I. INTRODUCTION

Over the past two decades, the American jury system has received a significant resurgence in attention from judicial and legal policymakers, academicians, and the general public. The reason for the renewed attention may be attributed to several factors. Some concerns have been raised about juries' ability to understand trial evidence and to render informed and unbiased verdicts.<sup>1</sup> More recently, judicial and bar organizations have noted the precipitous decline in the number and rate of jury trials in state and federal courts and have raised concerns about its implication for the continued viability of the rule of law in the American justice system.<sup>2</sup>

To address these concerns, many states and federal court districts established bench or bar commissions to examine the health and vitality of the jury system in their respective jurisdictions.<sup>3</sup> The recommendations debated and issued by these commissions addressed every conceivable aspect of contemporary jury service.<sup>4</sup> They suggested ways to facilitate the ability of

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1. NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 16 (2007).

2. *See generally* 3(1) J. EMPIRICAL LEG. ST. (2004) (discussing the causes and implications of reduced trial rates in state and federal courts based on presentations at the American Bar Association Symposium on Vanishing Trials).

3. G. Thomas Munsterman, *a Brief History of Jury Reform Efforts*, 79 *JUDICATURE* 216 (1996).

4. *See infra* notes 5-10 and associated text.

citizens to participate in the justice system through jury service (e.g., through reduced terms of service, increased juror compensation, and strengthened incentives for employer support for employees to serve as trial jurors).<sup>5</sup> They promoted efforts to treat jurors with dignity and respect through improved use of jurors' time and the recognition of jurors' legitimate expectations for privacy.<sup>6</sup> They supported procedures designed to secure jury pools that better mirror the demographic and attitudinal characteristics of their communities.<sup>7</sup> They endorsed voir dire techniques designed to improve juror comfort and candor, thus facilitating the empanelment of fair and impartial juries,<sup>8</sup> and they advocated giving jurors decision-making tools with which to better understand the more complex evidence and law often presented in contemporary jury trials.<sup>9</sup> Many of these recommendations were ultimately implemented in their respective jurisdictions either formally through additions and amendments to statutes and court rules, or informally through judicial and bar education programs.<sup>10</sup>

Not all of these efforts have been universally successful, however. The American justice system consists of a unique and complex mix of autonomous state court systems and a separate federal court system, all of which jealously guard their respective legal autonomy and independence. Tension between the bench and bar in these jurisdictions further complicates these affairs. Specifically, with respect to jury system improvements, each of the state and federal courts began at different starting points in the process and reflected differing commitments to their success. For example, twenty states have an established office or formal standing committee on jury management and trial procedure, many of which operate independently of state or local commissions or task forces.<sup>11</sup> Thirty-eight states created statewide

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5. See, e.g., N.Y. STATE UNIFIED COURT SYS., JURY REFORM IN NEW YORK STATE: A PROGRESS REPORT ON A CONTINUING INITIATIVE (1996).

6. See, e.g., *In the Matter of Amendment of Rules of Pleading, Practice and Procedure*: Wis. Stat. § Ch. 756, Juries, No. 08-01 (Wis. Jan. 4, 2008); FLA. SUPREME COURT, FINAL REPORT: WORK GROUP ON STANDARDS FOR JURY PANEL SIZES 9, 16-17 (2006).

7. See, e.g., PAULA L. HANNAFORD-AGOR & G. THOMAS MUNSTERMAN, ASSESSMENT OF PWS SYSTEM EFFECTS ON THE RANDOM SELECTION OF JURORS AND THE DEMOGRAPHIC CHARACTERISTICS OF THE JURY POOL IN THE SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY (2006); PAULA L. HANNAFORD-AGOR & G. THOMAS MUNSTERMAN, THIRD JUDICIAL CIRCUIT OF MICHIGAN JURY SYSTEM ASSESSMENT (2006).

8. See, e.g., COUNCIL FOR COURT EXCELLENCE, D.C. JURY PROJECT, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEMS IN WASHINGTON, D.C. (2008).

9. See, e.g., ARIZ. SUPREME COURT, COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12 (1994).

10. GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 10 tbl.5 (2007) [hereinafter STATE-OF-THE-STATES SURVEY].

11. *Id.* at 9.

commissions over the past decade to assess and make recommendations for jury system improvements.<sup>12</sup> In addition, more than half (52%) of all local courts reported some type of jury improvement activities on a local level.<sup>13</sup> Some of these efforts resulted in wholesale changes to state or local jury procedures,<sup>14</sup> while others made only modest recommendations with little thought or attention to effective implementation.

Finally, most decisions concerning actual jury operations and trial practices are not easily documented through traditional reviews of state statutes, state or local court rules, or case law. Rather, these decisions are left to the discretion of individual courts and judges to be implemented on a court-by-court, judge-by-judge, or even trial-by-trial basis. Additionally, although the terminology used by courts and judges to describe jury operations and practices may be the same (e.g., jury summons, qualified juror, voir dire), in reality these terms often mask a tremendously diverse range of practices.

To obtain a reasonably accurate picture of jury practice and improvement efforts, the National Center for State Courts (NCSC) Center for Jury Studies undertook its *State-of-the-States Survey of Jury Improvement Efforts*.<sup>15</sup> The degree to which common recommendations for jury trial improvements—especially discretionary trial practices—were being implemented and employed was a particular interest of the survey. For example, the NCSC has known for years which states permit jurors to take notes during trial,<sup>16</sup> but until the *State-of-the-States Survey* was conducted, it could not report with any accuracy the degree to which judges exercised their discretion to actually permit jurors in individual trials to take notes.

In light of the NCSC's collective knowledge about variation in state courts generally, it was not overly surprising to see a great deal of variation in juror note taking as well as in other jury trial practices.<sup>17</sup> What was surprising, however, was the degree of judicial non-compliance in jurisdictions that either mandated or expressly prohibited certain practices. The present article explores the formal and informal factors that contribute to variation in state and local jury trial practices, and especially judicial compliance

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12. *Id.*

13. *Id.* at 17.

14. States that are widely recognized as leaders in jury improvement efforts include Arizona, Colorado, Indiana, New York, and Wyoming.

15. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 1.

16. ERICK B. LOW, BIBLIOGRAPHY ON JUROR NOTETAKING AND QUESTIONING WITNESSES (1996), *available* at <http://www.ncsconline.org/WC/CourTopics/ResourceGuide.asp?topic=JurInn#806>.

17. Overall, jurors were permitted to take notes in 69% of state court trials and 71% of federal court trials. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 32 tbl.24. Yet this rate varied from a low of 19% in Rhode Island to a high of 96% in Wyoming. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 83.

with mandatory practices and prohibitions. Part II describes the *State-of-the-States Survey of Jury Improvement Efforts*, its methodology, and its basic findings concerning the variation in use of different trial practices. Part III discusses how various formal and informal factors affect the judicial use of those practices. Because the practice of permitting jurors to submit written questions to witnesses has received greater attention, and generated greater debate and dissension in both case law and state and local commission and task force discussions, that practice is used as a specific illustration to discuss judicial compliance and non-compliance more generally. Finally, Part IV discusses the implications of judicial acceptance of, or resistance to, jury improvement efforts for the future of the American jury system.

## II. THE NCSC STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS

The *State-of-the-States Survey of Jury Improvement Efforts* was a multi-year effort by the National Center for State Courts to gauge the status of jury improvement efforts in the nation's state courts.<sup>18</sup> It consisted of three separate components. The first was a Statewide Survey completed by all fifty states and the District of Columbia.<sup>19</sup> The survey focused on the state legal and institutional infrastructure related to jury system management and trial procedures, as well as recent statewide jury improvement efforts such as the existence and activities of state jury commissions or task forces.<sup>20</sup>

The second component was a survey administered to each state general jurisdiction court in the country (the Local Court Survey).<sup>21</sup> This survey focused on the technical details of local jury operations including the rates at which those courts summon, qualify, and require citizens to report for jury service; use of jury automation; types and frequency of follow-up procedures for people who fail to respond to their jury summons; and the availability of accommodations for jurors with disabilities.<sup>22</sup> In all, the NCSC received surveys from 1396 courts representing 1546 individual counties from forty-nine states and the District of Columbia.<sup>23</sup> On average, these courts reflected 65% of their respective state populations and collectively their geographic jurisdictions encompassed 70% of the total U.S. population.<sup>24</sup>

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18. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 2.
  19. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 2.
  20. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 2.
  21. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 2.
  22. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 2.
  23. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 3.
  24. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 3.

The final component, and the one most significant to the present article, was the Judge & Lawyer Survey.<sup>25</sup> In this component, judges and lawyers were asked to describe the actual jury practices employed in their most recent jury trial.<sup>26</sup> The survey questions requested information about the respondent (e.g., judge or attorney, primary location where judge presides or lawyer practices), about the trial (e.g., criminal or civil, state or federal court, degree of evidentiary and legal complexity), and detailed information about the practices employed during voir dire (e.g., who questioned the jurors, was the examination conducted en masse or individually, was a written voir dire questionnaire used, etc.) and during trial (e.g., were jurors permitted to take notes or to submit written questions to witnesses, when were jurors instructed on the law, were jurors given written copies of instructions, etc.).<sup>27</sup> The final dataset for this component consisted of 11,752 surveys describing the trial practices employed in state and federal courts in all fifty states, the District of Columbia, and Puerto Rico.<sup>28</sup> Most of these trials took place between 2002 and 2006.<sup>29</sup>

The trial practices that were the primary focus of the Judge & Lawyer Survey were those that have received the most sustained attention and discussion in state and national efforts to improve jury service. The rationale for each practice may differ slightly from practice to practice. For example, juror note-taking improves jurors' ability to recall evidence, but does not necessarily improve juror comprehension of that evidence.<sup>30</sup> Both juror submission of questions to witnesses and juror discussion of evidence during trial improve juror comprehension of evidence.<sup>31</sup> Instructing jurors on the substantive law before the evidentiary portion of the trial improves juror comprehension of the law.<sup>32</sup> As a general matter, all of these practices are designed to improve juror attentiveness, performance, and satisfaction with jury service.<sup>33</sup>

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25. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 3.

26. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 3-4.

27. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 3-4, 27.

28. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 4.

29. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 4.

30. See NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS 126-27 (G. Thomas Munsterman, Paula L. Hannaford-Agor & G. Marc Whitehead eds., 2d ed. 2006).

31. Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials*, 18 L. & HUMAN BEHAV. 142 (1994); Shari Seidman Diamond et al., *Jury Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 9-11, 74-75 (2003).

32. NATIONAL CENTER FOR STATE COURTS, *supra* note 30, at 132-33.

33. Most of these practices have been endorsed as "best practices" by the American Bar Association in its *Principles for Juries and Jury Trials*. AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS 91-124 (2005). The commentary to Principles thirteen through sixteen provide a brief, but comprehensive, summary of the empirical literature discussing the effectiveness of these practices and the absence of any prejudice to the parties or disruption to the trial generally. *Id.* Also see NATIONAL CENTER FOR STATE COURTS, *supra*

In each survey, judges and lawyers were asked to report, among other things, whether jurors:

- Were permitted to take notes;
- Were provided materials with which to take notes (notepads, writing utensils);
- Were provided with a trial notebook containing one or more of the following: a glossary of unfamiliar terms, names and short biographies of witnesses, copies of documentary evidence or exhibits, preliminary or final instructions, and notepaper for taking notes;
- Were permitted to submit written questions to witnesses;
- Were permitted to discuss the evidence among themselves before final deliberations;
- Were given substantive instructions on the law before the evidentiary portion of the trial;
- Were instructed on the law before or after closing arguments;
- Were given guidance on how to deliberate;
- Were given at least one copy of the final jury instructions; and
- Were all given copies of the final jury instructions.<sup>34</sup>

Table 1 presents the results of these questions for state and federal courts, which indicate fairly broad support for some practices such as juror note-taking and providing at least one copy of written instructions for deliberating jurors. However, other practices—notably, juror discussions, juror notebooks, juror questions, and pre-instructions—have much less support.

| <b>Table 1: Jury Trial Practices</b>                   | <b>State Courts</b> | <b>Federal Courts</b> |
|--|---------------------|-----------------------|
| <i>Survey Size (n=)</i>                                | 10,395              | 884                   |
| <b>Note taking (%)</b>                                 |                     |                       |
| Jurors could take notes                                | 69.0                | 71.2                  |
| Jurors given paper for notes                           | 63.7                | 68.4                  |
| Jurors given a notebook                                | 5.8                 | 11.2                  |
| <b>Allowed juror questions during trials (%)</b>       | 15.1                | 10.9                  |
| Criminal Trials  | 14.0                | 11.4                  |
| Civil Trials   | 16.1                | 10.9                  |
| <b>Could discuss evidence before deliberations (%)</b> | 1.5                 | .9                    |
| Criminal Trials  | .7                  | .3                    |
| Civil Trials   | 2.2                 | 1.3                   |
| <b>Juror instruction methods (%)</b>                   |                     |                       |
| Preinstructed on substantive law                       | 17.7                | 16.9                  |
| Instructed before closing arguments                    | 41.2                | 35.5                  |
| Given guidance on deliberations                        | 54.4                | 52.7                  |
| At least 1 copy of written instructions provided       | 68.5                | 79.4                  |
| All jurors received copy of written instructions       | 32.6                | 39.0                  |

note 30, for a description of these and other techniques, examples of legal authority for their use, and references to commentary and empirical studies.

34. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 67-68.

Aggregating statistics on a national basis, however, tends to mask a great deal of underlying variation in these measures. In state courts, for example, juror note taking is highly favored in Wyoming where jurors in 96% of trials were permitted to take notes, but strongly disfavored in New Hampshire where jurors in only 15% of trials were permitted to do so.<sup>35</sup> Similar variations occur among the federal circuits. All jurors serving in the Twelfth Circuit were permitted to take notes, but Second Circuit jurors were permitted to do so in only slightly more than half (56%) of the trials.<sup>36</sup> These types of extreme variation in the use of trial practices are apparent in every one of the practices highlighted in Table 1.<sup>37</sup>

### III. WHAT CAUSES VARIATION IN TRIAL COURT PRACTICES?

As a general matter, trial judges are accorded a great deal of deference with respect to their decisions to employ specific procedures during trial. This deference permits trial judges to tailor trial procedures to meet the needs of the litigants and their counsel efficiently and effectively given the unique circumstances of each case. This also holds true for the vast majority of trial practices surveyed in the *State-of-the-States Survey*. Trial practices such as permitting jurors to take notes, permitting jurors to submit questions to witnesses, pre-instructing jurors on the substantive law before the evidentiary portion of the trial, and providing jurors with written copies of the final instructions generally fall within the sound discretion of the trial court. Only a few courts have determined that the use of these practices constitutes an abuse of judicial discretion.<sup>38</sup> By the same token, very few courts mandate their use in every instance.<sup>39</sup> Non-compliance with mandates and prohibitions of these practices will be addressed shortly, but first, some of the factors that contribute to variation in the use of trial practices in those states that leave the decision to the trial judge will be explored. For this purpose, the practice of permitting jurors to submit written questions to witnesses in state court trials provides a useful example.

Several factors come immediately to mind as having the potential to foster or discourage the practice of permitting jurors to submit questions to

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35. Analyses performed by author on Jan. 30, 2008 from the *State-of-the-States Survey* dataset of Judge & Lawyer Surveys.

36. *Id.*

37. See State Ranking Tables of key jury practice measures at [http://www.ncsconline.org/D\\_Research/cjs/state-survey.html](http://www.ncsconline.org/D_Research/cjs/state-survey.html).

38. See, e.g., *State v. Costello*, 646 N.W.2d 204, 215 (Minn. 2002) (prohibiting juror questions in criminal trials); *State v. Kipf*, 450 N.W.2d 397, 415 (Neb. 1990) (prohibiting juror note-taking without explicit consent of counsel).

39. In most jurisdictions that mandate jury trial practices, there is some provision to permit judges to withhold permission "for good cause." See, e.g., ARIZ. R. CIV. PRO. 39(b)(10), 39(f).

witnesses. One would certainly hope that the existence or absence of case law opining on the practice would be an obvious candidate, particularly any subtle or not-so-subtle dicta expressing the general views of the appellate bench. A review of the case law on the merits of juror questions found opinions in forty states and the District of Columbia. Five of the states had case law prohibiting the practice outright as per se reversible error.<sup>40</sup> The opinions in nine states formally held that permitting juror questions was within the sound discretion of the trial court, but opined in dicta that the practice held considerable potential for prejudice to the defendant and should generally be used sparingly and with great caution.<sup>41</sup> In contrast, six opinions found no error and appeared to endorse the practice as helpful to jurors and without prejudice to the parties.<sup>42</sup> The remaining opinions articulated both sides of the debate, but offered no particular opinion on the merits other than to say that the practice was within the discretion of the trial court.<sup>43</sup> A number of states have further validated the permissibility of juror questions by enacting statutes, court rules, or other positive law or legal imprimatur to that effect.<sup>44</sup>

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40. *State v. Williamson*, 279 S.E.2d 203, 204 (Ga. 1981); *State v. Costello*, 646 N.W.2d 204, 215 (Minn. 2002); *Wharton v. State*, 734 So. 2d 985, 990 (Miss. 1998); *State v. Zima*, 468 N.W.2d 377, 380 (Neb. 1991); *Morrison v. State*, 845 S.W.2d 882, 888-89 (Tex. Crim. App. 1992).

41. *State v. LeMaster*, 669 P.2d 592, 597-98 (Ariz. Ct. App. 1983); *State v. Hayes*, 883 P.2d 1093, 1102 (Kan. 1994); *Commonwealth v. Urena*, 632 N.E.2d 1200, 1205-06 (Mass. 1994); *State v. Graves*, 907 P.2d 963, 966-67 (Mont. 1995); *State v. Jumpp*, 619 A.2d 602, 610-13 (N.J. Super. Ct. App. Div. 1993); *White v. Little*, 268 P. 221, 222-23 (Okla. 1928); *Day v. Kilgore*, 444 S.E.2d 515, 517-19 (S.C. 1994); *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978); *State v. Martinez*, 326 P.2d 102, 103-04 (Utah 1958).

42. *Medina v. People*, 114 P.3d 845, 853-57 (Colo. 2005); *Spitzer v. Haims & Co.*, 587 A.2d 105, 112-14 (Conn. 1991); *Yeager v. Greene*, 502 A.2d 980, 985-86 (D.C. 1985); *Stamp v. Commonwealth*, 253 S.W. 242, 246 (Ky. 1923); *State v. Kendall*, 57 S.E. 340, 341 (N.C. 1907); *Sommons v. Friedman*, 493 N.W.2d 393, 400-01 (Wis. Ct. App. 1992).

43. *Nelson v. State*, 513 S.W.2d 496, 498 (Ark. 1974); *Ferrera v. State*, 101 So. 2d 797, 801 (Fla. 1958); *Carter v. State*, 234 N.E.2d 650, 652 (Ind. 1968); *Randolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 555-56 (Iowa 1980); *Carter v. Lulia*, 16 Haw. 630, 632 (1905); *People v. Heard*, 200 N.W.2d 73, 76 (Mich. 1972); *Sparks v. Daniels*, 343 S.W.2d 661, 667 (Mo. Ct. App. 1961); *State v. Nevada*, 965 P.2d 901, 902-03 (Nev. 1998); *State v. Rodriguez*, 762 P.2d 898, 901 (N.M. 1988); *People v. Knapper*, 245 N.Y.S. 245, 251 (N.Y. App. Div. 1930); *State v. Wayt*, 615 N.E.2d 1107, 1112 (Ohio Ct. App. 1992); *Boggs v. Jewell Tea Co.*, 109 A. 666, 668 (Pa. 1920); *State v. Parker*, 545 A.2d 512, 519 (Vt. 1988); *Williams v. Commonwealth*, 484 S.E.2d 153, 154-56 (Va. Ct. App. 1997); *Washington v. Munoz*, 837 P.2d 636, 639-40 (Wash. Ct. App. 1992); *See California v. Cook*, 139 P.3d 492, 512-13 (Cal. 2006); *Cathcart v. State Farm Mutual Automobile Insurance Co.*, 123 P.3d 579, 592-95 (Wy. 2005).

44. FLA. STAT. § 40.50(3) (2002) (noting the rule for civil cases only); OR. REV. STAT. § 136.330 (2007); ARIZ. R. CIV. P. 39(b)(10); ARIZ. R. CRIM. P. 18.6(e); COLO. R. CIV. P. 47(u); COLO. R. CRIM. P. 24(g); HAW. R. CIV. P. 47(c); HAW. R. PENAL P. 26(b); IDAHO CRIM. R. 30.1; IDAHO R. CIV. P. 47(q); IND. JURY R. 20(a)(7); IND. R. EVID. 614(d); MO. R.

Interestingly, the holdings in these cases do not necessarily coincide with each state's response on the *State-of-the-States Survey of Jury Improvement Efforts*. Kansas, Oklahoma, and South Carolina indicated on the Statewide Survey that juror questions are prohibited in both civil and criminal cases, which is perhaps not surprising insofar as the relevant opinions in those states tended to discourage their use.<sup>45</sup> Those cases may have been interpreted over time as a general prohibition on the practice, although the precise holdings state otherwise.<sup>46</sup> The Michigan and North Carolina Statewide Surveys also indicated that juror questions were prohibited, but the opinions for those states all held that the practice was permitted.<sup>47</sup> The North Carolina opinion even appeared to endorse the practice, indicating it was routinely employed in North Carolina trial courts (at least in 1907) and that jurors often asked "pertinent and helpful questions."<sup>48</sup>

Even more curious was the apparent position on the merits for six states that had neither case law nor positive law addressing the practice of juror questions. Louisiana and Maine both indicated on their Statewide Surveys that the practice was prohibited,<sup>49</sup> while New Hampshire, Rhode Island, South Dakota, and West Virginia indicated that the practice was permissible in the discretion of the trial judge for both civil and criminal trials. None of these states provided legal authority for the position, and a search of relevant case law, court rules, and statutes failed to uncover any bases for the states' responses on this question. Delaware was the only state that indicated no position on the merits of the practice in its Statewide Survey.

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CIV. P. 69.04; N.J. R. CT. 1:8-8(c); N.M.R. 14-101; N.D. R. CT. 6.8; OHIO CIV. R. 47(F); OHIO CRIM. R. 24(J); OR. R. CIV. P. 58B(9); TENN. R. CIV. P. 43A.03; TENN. R. CRIM. P. 24.1(c); UTAH R. CIV. P. 47(j); UTAH R. CRIM. P. 17(i); 1 ALA. PATTERN JURY INSTR. CIV. 1.15 (2d ed.); N.Y. PATTERN JURY INSTRUCTION CIV. 1:104; 1 CONN. PRACTICE, SUPER. CT. CIV. RULES § 16-7 (2008 ed.); 4 CONN. PRAC., CRIMINAL PROCEDURE § 42-9 (3d ed.). Washington State indicated in its Statewide Survey that juror questions are permissible by court rule, but did not provide a citation; further investigation was unable to locate the specific provision.

45. See *State v. Hayes*, 883 P.2d 1093, 1101-02 (Kan. 1994); *White v. Little*, 268 P. 221, 222-23 (Okla. 1928); *Day v. Kilgore*, 444 S.E.2d 515, 517-19 (S.C. 1994).

46. *Id.*

47. *People v. Heard*, 200 N.W.2d 73, 76 (Mich. 1972); *State v. Kendall*, 57 S.E. 340, 341 (N.C. 1907).

48. *State v. Kendall*, 57 S.E. 340, 341 (N.C. 1907) ("[Permitting jurors to ask questions] has always been followed without objection . . . in the conduct of trials in our superior courts, and there is not only nothing improper in it when done in a seemly manner and with the evident purpose of discovering the truth, but a juror may, and often does, ask a very pertinent and helpful question in furtherance of the investigation.").

49. The permissibility of juror questions was raised in *State v. Johnson*, 458 So. 2d 539, 545 (La. Ct. App. 1984), but the court refused to rule on the merits, finding that the defendant failed to object to the practice at trial, thus waiving the issue on appeal. *Johnson*, 458 So. 2d at 545.

To what extent does the existence or absence of legal authority, and the direction of that authority, affect the propensity of judges to permit jurors to submit questions to witnesses? For states that indicated that juror questions are permissible, Table 2 provides a breakdown of the percentage of state criminal and civil trials in which jurors were actually permitted to submit questions to witnesses based on the type of prevailing legal authority.<sup>50</sup> The results of this analysis are quite surprising, especially with respect to civil trials. Language discouraging the practice of juror questions, or opinions that simply fail to express an opinion on the practice, appear to inhibit judges' willingness to permit jurors to submit questions to witnesses in criminal trials, but the practice was used in nearly twice as many trials in states where the case law endorsed the practice. In civil trials, however, the language of existing case law had exactly the opposite effect. One-third of civil trials in states with case law discouraging juror questions actually employed the practice at trial, while only 19% did so when the case law endorsed the practice and only 14% did so when the case law was neutral on the question.

|  | Criminal Trials |             | Civil Trials |             |
|--|-----------------|-------------|--------------|-------------|
|  | N               | % of Trials | N            | % of Trials |
| Court Opinion ...                              |                 |             |              |             |
| Discourages Juror Questions                    | 436             | 14          | 487          | 33          |
| Is Neutral Concerning Juror Questions          | 1,800           | 11          | 1,621        | 14          |
| Encourages Juror Questions                     | 239             | 32          | 382          | 19          |
| Other Positive Law Authorizing Juror Questions |                 |             |              |             |
| Yes  | 1,477           | 13          | 1,359        | 25          |
| No   | 1,831           | 14          | 1,691        | 12          |
| No Legal Authority for Juror Questions         | 448             | 14          | 276          | 12          |

The existence of some form of positive law authorizing the practice did not affect the frequency of its use in criminal trials, but did in civil trials. It is possible that the enactment of positive law authorizing juror ques-

50. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 32 tbl.24. For criminal trials, three states mandate juror questioning, eleven prohibit it, and the remaining states indicated that juror questions were permitted in the discretion of the trial judge. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 34-35. In civil trials, four states mandate the practice, ten states prohibit it, and the remaining states permit them in the discretion of the trial judge. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 34-35.

tions overcomes the effects of prior case law discouraging the practice, but it is not clear why the impact on the actual use of the practice should appear only in civil trials. Those states that have no legal authority for the practice whatsoever employ it in roughly the same proportion of trials as those states that discourage its use, or that maintain a neutral position on the matter.

Clearly, the existence of legal authority for the practice has some measurable impact on actual trial proceedings, but it is not nearly as strong or as predictable as one might assume about an event as quintessentially legal as a jury trial. Using statistical regression techniques to investigate the possibility of other factors that explain the use of juror questions at trial while controlling for prevailing legal authority, the study found that local community practice has the single biggest impact on actual trial practices for both criminal and civil trials.<sup>51</sup> Trial judges, it seems, take their cues about how best to exercise their discretion primarily from their peers, rather than from more formal legal authority. To some extent, local community practice prevails even in spite of formal legal authority, as seen in Table 3, which compares the frequency with which various trial practices were employed based on whether the practice is prohibited, permitted in the sound discretion of the trial court, or mandated in each state.<sup>52</sup>

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51. The statistical model for the use of juror questions in both civil and criminal trials included the existence and direction of case law, the existence of other positive law, the average use of juror questions within the local legal community, as well as case-specific variables such as evidentiary and legal complexity and trial notoriety. Approximately 24% of the variance in both civil and criminal trials can be explained by these six factors. In the criminal trial model, the only statistically significant factors were local legal culture (Wald=367.696,  $p<.001$ ), the existence of positive law (Wald=24.093,  $p<.001$ ), and the existence and direction of case law (Wald=5.116,  $p=.024$ ). In the civil trial model, the only statistically significant factors were local legal culture (Wald=386.491,  $p<.001$ ), the existence and direction of case law (Wald=10.840,  $p=.001$ ), the level of evidentiary complexity (Wald=8.966,  $p=.003$ ), and the existence of positive law (Wald=8.156,  $p=.004$ ). The level of evidentiary complexity had a marginal effect in criminal trials and trial notoriety had a marginal effect in civil trials.

52. The Statewide Survey for the *State-of-the-States Survey of Jury Improvement Efforts* requested information about whether specific trial practices were required, permitted, or prohibited, and the legal authority supporting that information. The categories in Table 3 are based on the responses to those questions. Trial practices in states for which the Statewide Survey indicated no information about their permissibility are excluded from Table 3. Likewise, federal court trials are excluded from Table 3.

|   | <b>Practice Prohibited</b> |                    | <b>Practice Permitted</b> |                    | <b>Practice Mandated</b> |                    |
|---|----------------------------|--------------------|---------------------------|--------------------|--------------------------|--------------------|
|   | <b>n</b>                   | <b>% of Trials</b> | <b>n</b>                  | <b>% of Trials</b> | <b>n</b>                 | <b>% of Trials</b> |
| <b>Juror note taking</b>                            |                            |                    |                           |                    |                          |                    |
| Criminal trials                                     | 206                        | 27.2               | 4,170                     | 68.9               | 350                      | 95.4               |
| Civil trials  | 36                         | 41.7               | 4,945                     | 70.3               | 247                      | 96.8               |
| <b>Juror submission of questions to witnesses</b>   |                            |                    |                           |                    |                          |                    |
| Criminal trials                                     | 1,171                      | .4                 | 3,337                     | 13.1               | 325                      | 83.7               |
| Civil trials  | 1,394                      | 5.8                | 3,090                     | 17.7               | 213                      | 86.2               |
| <b>Juror discussions before final deliberations</b> |                            |                    |                           |                    |                          |                    |
| Criminal trials                                     | 3,718                      | .6                 | 981                       | 1.2                | n/a                      |                    |
| Civil trials  | 1,394                      | .9                 | 3,090                     | 0.8                | 247                      | 29.6               |
| <b>Jurors pre-instructed on substantive law</b>     | 640                        | 6.7                | 7,313                     | 17.7               | 1,039                    | 30.3               |
| <b>Jurors instructed before closing arguments</b>   |                            |                    |                           |                    |                          |                    |
| Criminal trials                                     | 381                        | 5.0                | 2,425                     | 30.7               | 1,451                    | 81.2               |
| Civil trials  | 466                        | 7.7                | 2,668                     | 30.7               | 1,021                    | 70.0               |
| <b>Jurors given written copies of instructions</b>  |                            |                    |                           |                    |                          |                    |
| Criminal trials                                     |                            |                    |                           |                    |                          |                    |
| At least 1 copy of instructions                     | 343                        | 16.0               | 2,380                     | 59.5               | 2,382                    | 90.6               |
| All jurors given copies of instructions             | 343                        | 7.9                | 2,380                     | 25.2               | 2,382                    | 51.1               |
| Civil trials  |                            |                    |                           |                    |                          |                    |
| At least 1 copy of instructions                     | 208                        | 18.3               | 3,019                     | 53.5               | 2,063                    | 89.2               |
| All jurors given copies of instructions             | 208                        | 8.2                | 3,019                     | 18.5               | 2,063                    | 47.2               |

In some respects, Table 3 presents a predictable pattern of infrequent use of these practices in states that prohibit them, considerably higher use in states that mandate them, and intermediate use in states that leave the decision to the discretion of the trial court. More troubling, however, is the clear evidence of non-compliance with both mandates and prohibitions of all of these practices. In spite of a prohibition in Pennsylvania and South Carolina, jurors were permitted to take notes in 27% of criminal trials and 42% of

civil trials in those states!<sup>53</sup> Judicial compliance with prohibitions was somewhat improved for other trial practices, but only those concerning juror questions in criminal trials and juror discussions about the evidence before final deliberations reflect widespread adherence to those prohibitions. If anything, judicial compliance with mandates was adhered to even less rigorously, especially with respect to permitting civil jurors to discuss the evidence among themselves before final deliberations, permitting jurors to submit questions to witnesses, pre-instructing jurors before the evidentiary portion of the trial, and instructing jurors before closing arguments.

It is possible that some of these deviations reflect errors on the part of the judges or lawyers who filled out the survey; they may not have recalled what happened at trial or simply checked the wrong box on the questionnaire. Also, the Judge & Lawyer Survey did not provide extensive descriptions of these trial practices, so it is also possible that some respondents were mistaken about what the practice actually entails (e.g., pre-instructions refers to the substantive law that jurors will be asked to apply, rather than preliminary instructions on procedural matters related to trial). However, these types of errors should have been distributed randomly across all of the questions on the survey. The pattern of substantially higher deviations on some practices as compared to others suggests that most of them actually occurred, even if the judge or lawyer did not realize that the practices were prohibited or mandated at the time.

These deviations may have also occurred for reasons other than deliberate judicial refusal to follow state rules concerning trial practices. As noted earlier, several states indicated prohibitions and mandates on trial practices in the Statewide Survey without specifying their legal authority, and subsequent reviews of relevant statutes and court rules failed to identify the bases for these responses.<sup>54</sup> In those instances, it may be that the individual who completed the Statewide Survey was mistaken in his or her response. Alternatively, it may indicate a great deal of uncertainty on the part of the trial bench and bar about the existence of a prohibition or mandate. Also, some of the apparent departures from mandatory practices may, in fact, reflect the use of legitimate exceptions to the policy. For example, the Arizona rule mandating that judges inform jurors of their right to submit questions to witnesses contains a clause that permits judges to “prohibit or limit the submission of questions to witnesses” for “good cause.”<sup>55</sup> In Colorado and Indiana, the timing of the survey may explain some of the non-compliance

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53. In fact, jurors were given note taking materials in 23% of those trials regardless of the type of trial. STATE-OF-THE-STATES SURVEY, *supra* note 10, at 33.

54. See *supra* note 51.

55. ARIZ. R. CRIM. P. 18.6(e).

as some of the trials in those states took place before the rules mandating those practices took effect in 2003.

Some of these responses, however, undoubtedly reflect the deliberate decisions of judges to disregard statewide rules and policies concerning jury trial practices. To the extent that this is true for any or all of these trial practices, what implications do these examples of judicial non-compliance have for the justice system generally and for jury improvement efforts in particular?

#### IV. JUDICIAL NULLIFICATION?

The term “jury nullification” refers to a jury’s deliberate and willful refusal to follow the law provided by the trial judge in rendering its verdict. In most instances, it occurs in the context of a criminal trial in which the evidence and law unambiguously point to a conviction, but the jury returns a verdict of acquittal.<sup>56</sup> The term is also sometimes used to describe a jury’s conviction in the face of evidence and law that would normally require an acquittal,<sup>57</sup> as well as a jury’s refusal to follow the law in a civil case.<sup>58</sup> It is a well-recognized fact that jurors have *the power* to acquit an otherwise guilty defendant, but a quiet, yet vigorous, debate has existed for more than a century about whether jurors have *the right* to do so. Jury nullification enjoys historical respect for its role as a check on the judiciary, as protection against potential overreaching by the prosecution, and as a means to legitimize the validity of democratically enacted laws.<sup>59</sup> From a practical perspective, jury nullification occurs only rarely and then only under the most exceptional circumstances.<sup>60</sup> Given this general definition of jury nullification, does the failure of judges to follow the law concerning trial practices amount to a form of “judicial nullification?”

As a starting point for this discussion, it is useful to consider how judicial non-compliance with mandatory trial procedures differs from jury nullification, both in terms of how it is accomplished and the objectives that non-compliance purports to serve. With respect to the former, it is impossible to disregard the likely participation of trial attorneys. In states that either

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56. Nancy S. Marder, *The Myth of the Nullifying Juror*, 93 NW. U. L. REV. 877, 881-87 (1999).

57. D. GRAHAM BURNETT, *A TRIAL BY JURY* (2001).

58. Marder, *supra* note 56, at 881.

59. See generally CONRAD S. CLAY, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* (1998).

60. See Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249 (2003) (examining public and legal opinion about jury nullification and judicial responses to instances of nullification).

prohibit or mandate one or more of these practices, the failure to comply would necessarily provide an opportunity for the losing party to appeal the verdict, something which judges are understandably reluctant to do out of fear of reversal. Thus, many deviations from mandatory practices may have come about with the tacit, if not explicit, consent of the attorneys. A stipulation by the parties to deviate from a particular trial practice, even if otherwise prohibited or mandated, generally serves to waive any right to appeal on that issue.<sup>61</sup>

A further complication in the interpretation of these data is the difficulty in determining the underlying motivation for non-compliance. Does it reflect active judicial resistance to or advocacy for these trial practices? Or is the non-compliance intended as a statement of judicial independence against state encroachment on local judicial decision making? Perhaps some of the non-compliance is the result of inadequate training and education for judges about the objectives of mandatory trial procedures.

On a substantive level, it may be possible to make a principled distinction between collusive efforts by the trial judges and attorneys to employ jury trial practices that are otherwise prohibited and similar efforts to avoid practices that are mandated based on whose rights or interests are violated by the non-compliance. If one accepts the proposition that these types of jury trial practices are intended to facilitate informed deliberations and verdicts, deliberate refusal to follow mandated practices deprives jurors of necessary tools with which to carry out their tasks; it elevates the interests of the parties to control the trial proceedings over those of the jurors to fulfill their role as community participants in a public trial. On the other hand, deliberately disregarding established prohibitions on trial practices (either through collusion with or coercion of the attorneys) suggests that the collective interests of the participants (judges, lawyers, litigants, and jurors) in each individual case and the supervisory powers of the trial judge are more important than procedural uniformity and conformity with established court policies.

The tension between these two positions is perhaps best expressed by the normative question, “whose trial is it, really?” Is a trial an essentially private matter in which the preferences of the litigants regarding trial practices and procedures should dominate? If so, a decision to deviate from an established policy of the trial court is justifiable provided that the trial attorneys consent. But if a trial is a formal court event—that is, the court “owns” the trial and its participants (judges, lawyers, litigants, and jurors) are merely invited to adjudicate their case within the confines of its estab-

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61. In some rare instances, the deviation may even be accomplished over the objection of one or both parties if the judge determines that an appeal on that basis alone is unlikely.

lished policies—then those policies should be universally and uniformly enforced, regardless of the individual preferences of the participants. Perhaps a trial is a public event in which jurors, serving as representatives of their community in the administration of justice, are the principal participants. If so, then policies that facilitate fair and informed decision-making by jurors should be rigorously enforced, and those that fail to do so, should be routinely disregarded. Of course, it could be the case that the trial serves these multiple interests simultaneously, which begs the question, how should these interests be balanced when they conflict? More to the point, who should decide how to balance them?

Normative judgments about the value of these practices and their purported role in jury trials aside, it is difficult to argue that a judge's decision to disregard an established prohibition on one or more of these trial practices is more or less justifiable than a decision to disregard a mandated practice. Unlike jury nullification, it is not clear that such instances of judicial nullification provide an equivalent check on potential abuse by judges, prosecutors, or legislators. On the contrary, one of the primary justifications for jury nullification is to curb and control judicial lawlessness. Moreover, judges are repeat players in the justice system, making judicial nullification more dangerous for the justice system in the long run. A judge's routine refusal to follow the law is more pernicious than a single verdict rendered by twelve jurors, randomly selected from the community, who are then released from service, unlikely to serve again in the near future. This is precisely why judges, unlike juries rendering a general verdict, are required to explain in great detail their rationale for judgments or other dispositive decisions in bench trials. Thus, when judges decide to disregard an established court policy concerning jury trial practices, they should likewise be required to explain their reasoning explicitly and on the record.

This is not to say that judicial nullification, if the term can be accurately applied to a deliberate decision to disregard a prohibited or mandatory trial practice, should be uniformly condemned. Certainly judges should be permitted to test these policies, particularly in those jurisdictions where the legal authority for the policy is obscure—for example, in states such as Louisiana and Maine, where the prohibition on juror questions is unknown. Similarly, judges should be permitted to challenge the applicability of prohibitive or mandatory policies if their application or practice, given the particular circumstances of the case, would not further the policy's objective. In *White v. Little*, for example, the objection of the Oklahoma Supreme Court to juror questions was premised on the practice of allowing oral questions from jurors with no opportunity for the attorneys to object to a question out of the presence of the jury.<sup>62</sup> In most jurisdictions, the contempo-

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62. *White v. Little*, 268 P. 221 (Okla. 1928).

rary practice requires jurors to submit their questions in writing, providing attorneys an opportunity to review the questions and make objections out of the presence of the jury.<sup>63</sup> But when policies concerning jury trial practices are unambiguous and supported by valid legal authority, trial judges should ordinarily comply when presiding over a trial. However, they can continue to raise their support for, or opposition to, those policies through other judicial policymaking venues and ongoing judicial education.

## V. CONCLUSIONS

Courts have expended a great deal of effort to improve jury operations and trial procedures in recent years. In particular, the bench and bar have undergone a sea change with respect to their views about how jurors function during trial and the jury's role in the justice system. In many states, this change has led to increased advocacy for trial practices that aid jurors' comprehension, performance, and satisfaction.

The *State-of-the-States Survey of Jury Improvement Efforts* documented the extent to which those practices are routinely employed in jury trials in state and federal courts. We found a great deal of variation in the use of these practices. Some of the variation no doubt reflects preexisting practices and opinions in each jurisdiction, but it may also illustrate the difficulty in implementing wholesale change in a culture as zealously independent as the American justice system. It may also reflect the effectiveness of judicial leadership to educate the bench and bar about the benefits of these practices and to encourage their use.

In jurisdictions that have implemented explicit prohibitions or mandates on a particular practice, however, judicial non-compliance with these policies raises different concerns. These focus not on the legitimacy of the trial itself, but rather on fundamental questions about the limits of judicial authority and the means through which that authority can be effectively and legitimately curtailed. When judges believe they can disregard established court policies in the interest of one or more of the trial participants, courts become potential breeding grounds for cynicism and arrogance, ultimately undermining respect for the justice system.

But does the problem of noncompliance begin with irascible judges and lawyers? Or does it begin with bad policies? Prohibitions and mandates have an immediate attraction to judicial policy makers because, by definition, they carry the weight of the law. Once enacted, it is assumed that all will comply, however begrudgingly. These analyses show, however, that this is not necessarily the case. Unless courts are willing to commit substantial levels of judicial leadership and educational efforts to jury improve-

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63. NATIONAL CENTER FOR STATE COURTS, *supra* note 30, at 128-29.

ment, they face an uphill battle to overcome bench and bar resistance to new ideas. In the long run, it may be more effective to leave trial practices, “in the sound discretion of the trial court,” and then to vigorously encourage their use until such time that these practices become the community norm.