LET JURORS TALK: AUTHORIZING PRE-DELIBERATION DISCUSSION OF THE EVIDENCE DURING TRIAL

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I am by no means enamored of jury trials . . .[,] but it is certainly inconsistent to trust them so reverently as we do, and still to surround them with restrictions which if they have any rational validity whatever, depend upon distrust.[2]

I. Introduction

The modern trend in jury trials is "to reduce the passive role of jurors."[3] Following this trend, the military has been on the forefront of juror innovations for the last twenty years.[4] Military jurors (known as "members")[5] may request to call or recall witnesses, interrogate witnesses, take notes during trial and use them in the deliberation room, request during deliberations that the court-martial be reopened and portions of the record be read to them or additional evidence introduced, and take written

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2. Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, *in* LECTURES ON LEGAL TOPICS: 1921-1922, at 89, 101 (James N. Rosenberg et al. eds., 1926).

instructions with them into the deliberation room.[6] The essential purpose behind the innovations is to improve juror comprehension.[7]

A new, cutting-edge innovation, adopted for civil trials by Arizona in

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3. Douglas E. Motzenbecker, *Letting Jurors Join the Fray*, ABA LITIGATION NEWS, Nov. 1999, at 7. The argument in favor of the active, as opposed to the passive, juror model has been encapsulated as follows:

> Most of the reforms occurring . . . around the country are based on positions relating to effective adult learning that have been accepted by social scientists for many years. These experts have long been critical of the traditional legal model of trials. In this model, jurors are passive observers. Communications are one-way only. There is no feedback allowed, and instructions are not provided until the trial is virtually over. Critics contend that this model flies in the face of what studies about adult learning have proven. The educational model of learning, in contrast to the legal model, has demonstrated conclusively that active learners are better learners. This model rejects the *tabula rasa* vision of jurors as "blank slates" and recognizes the reality that jurors bring with them their own frames of reference. The existence of these frames of reference underscores the need to have continuous feedback and the need to provide a legal frame of reference as early in the trial as possible.

Jacqueline A. Connor, *Jury Reform: Notes on the Arizona Seminar*, 1 J. LEGAL ADVOC. & PRAC. 25, 25-26 (1999). *See* Valerie P. Hans, *U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 ST. LOUIS U. PUB. L. REV. 85, 87-90 (2002) (distinguishing between active and passive jury systems); Paula L. Hannaford, Valerie P. Hans, Nicole L. Mott & G. Thomas Munsterman, *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627, 629-33, 650 (2000) (describing the legal and story models of juror decision-making; adding a third model, the "Schema-Tailored" model, based on the view that jurors make up their minds right after opening statements; and concluding that "the data appear far more consistent with the Story Model of juror opinion formation than with either the Legal Model or the Schema-Tailored Model").

4. These juror innovations originated in the 1984 edition of the *Manual for Courts-Martial* (*Manual*). *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984). The 1984 *Manual* implemented the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, and "made sweeping changes in court-martial practice" and "introduced numerous new procedures." Thomas J. Feeney & Captain Margaret L. Murphy, *The Army Judge Advocate General's Corps, 1982-1987*, 122 MIL. L. REV. 1, 26 (1988).

5. Jurors in the military court-martial process are referred to as "members." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103(14) (2002) [hereinafter MCM] ("The members of a court-martial are the voting members detailed by the convening authority."). For ease and clarity of discussion, the term "jurors" will be used interchangeably with court-martial panel "members."

6. *Id.* MIL. R. EVID. 614(a)-(b), R.C.M. 913(c)(1)(F), 920(d), 921(b).

7. *See* Jacqueline A. Connor, *Los Angeles Trial Courts Test Jury Innovations and Find They Are Effective*, 67 DEF. COUNS. J. 186, 187 (2000).

1995 and Colorado in 2000 and employed to a limited extent in Washington, D.C., is the practice of permitting jurors to deliberate as the case progresses, a practice contrary to the standard practice of preventing jurors from discussing the case until all the evidence has been presented and the case submitted to them.[8] To date, however, no jurisdiction has adopted a rule authorizing jurors in a criminal trial to discuss a case as it progresses. Should the military take the first revolutionary step? A review of the following matters will assist in answering this question: (1) the traditional basis for the prohibition against pre-deliberation discussion; (2) case law on the subject; (3) the Arizona, California, District of Columbia, and Colorado jury reform projects; (4) social science research; and (5) current military practice.

II. Traditional Prohibition

The earliest English juries could investigate the facts, talk with the parties and themselves, and question the witnesses without leave of court.[9] By the mid-sixteenth century, however, "[n]umerous controls were imposed on jury autonomy and activism, and rules of evidence emerged as a means to limit and control the information made available to jurors."[10] When the jury model was imported to the colonies in America, that model "was based on nearly complete passivity."[11] Of the many controls aimed at regulating the flow of information to the jury, one was a rule prohibiting

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8. Paula L. Hannaford, Valerie P. Hans & G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 L. & HUM. BEHAV. 359, 360 (2000); COLO. CIV. JURY INSTR. 1:4, 1:8; Marc Fisher, *Designer Juries Are Made for Shabby Justice*, WASH. POST, Oct. 14, 2000, at B1 (noting that Judge Gregory Mize, of the D.C. Superior Court, "allows jurors to discuss the case among themselves during breaks in the trial"); E-mail from Gregory Mize, Senior Retired Judge, Superior Court of the District of Columbia, to author (Sept. 18, 2002) [hereinafter E-mail from Gregory Mize] (on file with author).

9. B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1231-33 (1993).

10. B. Michael Dann, *Free the Jury*, LITIG., Fall 1996, at 5. *Accord* Dann, *supra* note 9, at 1234.

11. Dann, *supra* note 10, at 5. *Accord* Dann, *supra* note 9, at 1235.

jurors from discussing the case with other jurors until the case was submitted to them for formal deliberations.[12]

The primary justification for this rule is to prevent jurors from making premature judgments about the case or an issue in the case before hearing all of the evidence, the judge's instructions on the law, and the argument of counsel.[13] In addition to this basic justification, numerous other reasons have been proffered: (1) "[S]ince the prosecution's [or plaintiff's] evidence is presented first, any initial opinions formed by the jurors are likely to be unfavorable to the defendant, and there is a tendency for a juror to pay greater attention to evidence that confirms his initial opinion.";[14] (2) "[O]nce a juror declares himself before his fellow jurors[,] he is likely to stand by his opinion even if contradicted by subsequent evidence.";[15] (3) "[T]he defendant is entitled to have his case considered by the jury as a whole, not by separate groups or cliques that might be formed within the jury prior to the conclusion of the case.";[16] (4) "An aggressive, overpowering juror might dominate discussions and have undue influence on the views of others.";[17] (5) "Allowing juror discussions prior to deliberations may detract from the ideal of the juror as a neutral decision[-]maker.";[18] (6) "The quality of deliberations may decline as jurors become more familiar with each other's views.";[19] (7) "[Pre-deliberation] discussions might produce a narrower and more confined set of final deliberations.";[20] and (8) "Juror stress might increase because of the conflicts produced by prior discussions."[21] At the heart of all these reasons is the goal of maintaining the open-mindedness of the jurors until the close of the case.[22]

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12. *See* Dann, *supra* note 9, at 1235-36, 1262; Robert D. Myers & Gordon M. Griller, *Educating Jurors Means Better Trials: Jury Reform in Arizona*, JUDGES' J., Fall 1997, at 14.

13. Janessa E. Shtabsky, Comment, *A More Active Jury: Has Arizona Set the Standard for Reform with Its New Jury Rules?*, 28 ARIZ. ST. L.J. 1009, 1028 (1996); *see* Dann, *supra* note 9, at 1262; William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 593 (1990); Winebrenner v. United States, 147 F.2d 322, 328 (8th Cir. 1945).

14. Commonwealth v. Kerpan, 498 A.2d 829, 831 (Pa. 1985).

15. *Id.*

16. *Id.*

17. JURY TRIAL INNOVATIONS 139 (G. Thomas Munsterman et al. eds., 1997).

18. *Id.*

19. *Id.*

20. *Id.* at 140.

21. *Id.*

22. *See* Schwarzer, *supra* note 13, at 593.

III. Case Law

Over the last six decades, both federal and state courts have examined the issue of pre-deliberation jury discussions. The cases fall into three categories. The first category involves those cases in which the trial court simply omits to admonish the jury against pre-deliberation discussions.[23] The second category involves those cases in which jurors fail to abide by such an admonition.[24] The final category involves those cases in which the court affirmatively advises the jury that pre-deliberation discussions are permissible.[25] Although the first two categories offer some tangential insight into judicial philosophies about the propriety of or necessity for an admonition against pre-deliberation instructions, the last category, consisting of six federal cases and about a dozen state cases, directly illustrates

23. United States v. Abrams, 137 F.3d 704 (2d Cir. 1998); United States v. Weatherd, 699 F.2d 959 (8th Cir. 1983); United States v. Carter, 430 F.2d 1278 (10th Cir. 1970); United States v. Rotolo, 404 F.2d 316 (5th Cir. 1968); United States v. Viale, 312 F.2d 595 (2d Cir. 1963).

24. United States v. Gigante, 53 F. Supp. 2d 274 (E.D.N.Y. 1999); United States v. Williams-Davis, 90 F.3d 490 (D.C. Cir. 1996); United States v. Bertoli, 40 F.3d 1384 (3d Cir. 1994); United States v. Resko, 3 F.3d 684 (3d Cir. 1993); United States v. Abcasis, 811 F. Supp. 828 (E.D.N.Y. 1992); United States v. Armstrong, 909 F.2d 1238 (9th Cir. 1990); United States v. Oshatz, 715 F. Supp. 74 (S.D.N.Y. 1989); United States v. Piccarreto, 718 F. Supp. 1988 (W.D.N.Y. 1989); Stockton v. Virginia, 852 F.2d 740 (4th Cir. 1988); United States v. Wiesner, 789 F.2d 1264 (7th Cir. 1986); United States v. Yonn, 702 F.2d 1341 (11th Cir. 1983); United States v. Edwards, 696 F.2d 1277 (11th Cir. 1983); United States v. Pantone, 609 F.2d 675 (3d Cir. 1979); United States v. Chiantese, 582 F.2d 974 (5th Cir. 1978); United States v. Nance, 502 F.2d 615 (8th Cir. 1974); United States v. Klee, 494 F.2d 394 (1974); Goodloe v. Bookout, 980 P.2d 652 (N.M. Ct. App. 1999); State v. Aldret, 509 S.E.2d 811 (S.C. 1999); State v. Newsome, 682 A.2d 972 (Conn. 1996); Hunt v. Methodist Hosp., 485 N.W.2d 737 (Neb. 1992); Holland v. State, 587 So.2d 848 (Miss. 1991); People v. Rohrer, 436 N.W.2d 743 (Mich. Ct. App. 1989); People v. Saunders, 467 N.Y.S.2d 110 (N.Y. Sup. Ct. 1983); People v. Gordon, 430 N.Y.S.2d 147 (N.Y. App. Div. 1980); Commonwealth v. Scanlon, 400 N.E.2d 1265 (Mass. App. Ct. 1980).

25. United States v. Wexler, 657 F. Supp. 966 (E.D. Pa. 1987); United States v. Meester, 762 F.2d 867 (11th Cir. 1985); United States v. Lemus, 542 F.2d 222 (4th Cir. 1976); State v. Thomas, 414 S.E.2d 783 (S.C. 1992); Gallman v. State, 414 S.E.2d 780 (S.C. 1992); State v. Joyner, 346 S.E.2d 711 (S.C. 1986); State v. Pierce, 346 S.E.2d 707 (S.C. 1986); State v. Castonguay, 481 A.2d 56 (Conn. 1984); State v. Washington, 438 A.2d 1144 (Conn. 1980); State v. Gill, 255 S.E.2d 455 (S.C. 1979); People v. Monroe, 270 N.W.2d 655 (Mich. Ct. App. 1978); People v. Blondia, 245 N.W.2d 130 (Mich. Ct. App. 1976); Wilson v. State, 242 A.2d 194 (Md. Ct. Spec. App. 1968); People v. Hunter, 121 N.W.2d 442 (Mich. 1963).

the nature of judicial opinion on the use of an affirmative advisement permitting pre-deliberation discussions.

A. Federal Cases

The first reported federal case to consider an affirmative advisement for pre-deliberation discussions was *Winebrenner v. United States*,[26] a criminal conspiracy case involving two defendants. In *Winebrenner*, the trial court instructed the jurors, over defense objection, that although they could not discuss the case with others, they could discuss the case among themselves; the court also declined to admonish the jury not to form or express an opinion as to the guilt or innocence of the defendant until the case had been submitted to them.[27] The defendants were later convicted and appealed. The U.S. Court of Appeals for the Eighth Circuit, in a 2-1 decision, reversed the convictions based solely on the court's finding that this instruction was improper, without testing for either prejudice or harmless error.[28]

In the opinion of the appellate court, the instruction of the trial court authorizing pre-deliberation discussions had three flaws. First, the jurors were authorized to discuss the case without any preliminary instructions on the presumption of innocence or the burden and quantum of proof. Second, the jurors were not prohibited from discussing the case in groups of less than the entire jury. And third, the jurors might form premature judgments about the evidence, thereby "in effect shift[ing] the burden of proof and plac[ing] upon the defendants the burden of changing by evidence the opinion thus formed."[29] The court concluded: "The effect of the admonition given in this case is, of course, impossible of ascertainment, but as it violates the principle that an accused is entitled to be heard before he is condemned, and the essentials to a fair trial, the judgments appealed from must be reversed."[30]

The dissent disagreed with the reversal, finding that there was "no hint or suggestion [in the record] that any of the jurors in this case [made up their minds before the evidence was in], or that any one of them spoke an improper word throughout the trial."[31] As the dissent viewed the case,

26. 147 F.2d 322 (8th Cir. 1945).
27. *Id.* at 327.
28. *Id.* at 329.
29. *Id.* at 328.
30. *Id.* at 329.

in the absence of evidence to the contrary, the jurors could be presumed to have obeyed the court and not committed their minds until all the evidence was in, and the majority had "no right to assume the contrary."[32] Thus, "the right of the defendants to open minded deliberation was preserved to them," and "[t]hey were not prejudiced."[33]

In *United States v. Lemus*, [34] the trial judge instructed the jury, over defense objection, that discussion among the jury members prior to deliberation was "entirely proper."[35] The instruction was accompanied by "a lengthy admonition to the jury" that "advanced all of the reasons why jurors should not discuss the evidence and instructed them to refrain from reaching any conclusions until all the evidence was submitted and an appropriate charge given."[36] Reviewing this instruction on appeal, the U.S. Court of Appeals for the Fourth Circuit cited *Winebrenner* and found that if the instruction had been given "in the abstract," it would have "clearly jeopardized defendant's right to a fair trial."[37] However, because the instruction included an admonition as to open-mindedness, the court found that any danger to the defendant had been minimized and that any error in the instruction had been rendered harmless.[38]

In *Meggs v. Fair*,[39] the trial court instructed the jury, without objection, that "it's perfectly all right to talk about a witness'[s] testimony" during recesses.[40] Accompanying that instruction was the qualification that the jurors should not arrive at any conclusions until all of the evidence was in. On appeal, the petitioner contended that the instruction "undermined his [S]ixth [A]mendment right to a fair trial before an impartial jury."[41] Noting that the two federal courts which had previously considered the issue of an affirmative pre-deliberation instruction, *Winebrenner* and *Lemus*, were "divided," the U.S. Court of Appeals for the First Circuit "decline[d] to take a definitive stand on this delicate issue."[42] Instead, the

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31. *Id.* at 330.

32. *Id.*

33. *Id.* The dissenting judge commented on human nature to support his opinion: "No normal honest Americans ever worked together in a common inquiry for any length of time with their mouths sealed up like automatons or oysters." *Id.*

34. 542 F.2d 222 (4th Cir. 1976).

35. *Id.* at 223-24.

36. *Id.* at 224.

37. *Id.* (citing *Winebrenner*, 542 F.2d at 326-29).

38. *Id.*

39. 621 F.2d 460 (1st Cir. 1980).

40. *Id.* at 463.

41. *Id.*

court rejected the petitioner's contention by concluding that "the judge's admonition to the jury members not to commit themselves until [they had heard all the evidence, argument, and instructions] minimized any danger to the defendant."[43]

In *United States v. Broome*,[44] the trial judge informed the jurors, without objection, that they could discuss the case among themselves "at breaks and at other times," but they were not to try "to arrive at any judgment or decision about the facts in this case until the case [was] completely tried."[45] On appeal, the U.S. Court of Appeals for the Fourth Circuit held that because the instruction had not been challenged at trial, "the issue of its propriety was not preserved."[46] Even if the issue had been preserved, the court stated that it would follow the *Lemus* precedent and find only harmless error.[47]

Next, in *United States v. Meester*,[48] the trial court instructed the jury, without objection, that there was "nothing wrong with chit chat" during breaks in the trial.[49] That instruction included a warning not to reach any conclusions until the end of the trial:

> Until we reach that point, don't do anything to make up your mind. We know it's normal for fourteen people to talk about the case when you're together at a break, talk about a witness or in general. There's nothing wrong with chit chat. The prohibition is that you do nothing to make up your mind as to whether or not you will believe a witness or more than one witness or whether or not it then looks like somebody is guilty or innocent. Just keep those decisions in reserve until we reach the end of the case.[50]

The appellants contended that the "chit chat" instruction "denied them their [S]ixth [A]mendment right to trial by an impartial jury."[51] The U.S.

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42. *Id.* at 463-64.
43. *Id.* at 464.
44. 732 F.2d 363 (4th Cir. 1984).
45. *Id.* at 366.
46. *Id.*
47. *Id.*
48. 762 F.2d 867 (11th Cir. 1985).
49. *Id.* at 880.
50. *Id.*
51. *Id.*

Court of Appeals for the Eleventh Circuit disagreed, finding no plain error in the instruction. Because the jurors had received "a lengthy admonition" to refrain from reaching a decision until the end of the case, the appellate court found that the trial court had "minimized any danger of jury partiality by repeatedly emphasizing the need for the jurors to keep an open mind until the conclusion of the case."[52]

Finally, the last reported federal case to consider this issue is *United States v. Wexler*.[53] In *Wexler*, the district court judge instructed the jurors that they could talk with each other about the case but that they could not have private conversations or make up their minds "until they had heard all of the evidence, the arguments of counsel, the court's charge, and the viewpoints of their fellow jurors."[54] After being convicted of drug distribution, the defendant requested a new trial, contending that his right to a trial by a fair and impartial jury had been denied as a result of that instruction.[55] In denying the request for a new trial, the district court judge provided a detailed explanation as to why he "decided not to prohibit jury discussion during the course of the trial."[56]

First, he believed that his instruction, with its caveats that the jurors could only discuss matters when they were all together and that they could not make any decisions until after the case was completed, was adequate "to overcome the reasons traditionally given for not allowing jurors to consult with each other during the progress of the case."[57] With respect to the reason that because the prosecution's evidence is presented first, any initial opinions formed by juror's are likely to be unfavorable to the defendant, he disagreed and offered the following comment:

> [This reason] really refers to the order in which the evidence is presented and is no more a reason for prohibiting jury discussion than it is for encouraging it. It assumes that discussion will inevitably lead a juror to an opinion but that the absence of discussion will mean that no juror will reach an opinion on anything. This is an unvarnished non-sequitur which needs only to be stated to be exposed.[58]

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52. *Id.*
53. 657 F. Supp. 966 (E.D. Pa. 1987).
54. *Id.* at 967.
55. *Id.*
56. *Id.* at 969.
57. *Id.*
58. *Id.* at 968.

As to the reason that once a juror declares himself before his fellow jurors, he is likely to stand by his opinion even if contradicted by subsequent evidence, the judge again disagreed and offered the following analysis:

> [This reason] has the ring of pop psychology but is based upon an assumption which is, to my knowledge untested and, to my mind, unbelievable. It assumes that the juror who states an opinion is less likely to change his mind than the juror who has an opinion but does not state it. That would follow only in the rare instance where a need for self-vindication overwhelms a juror's sense of duty. I believe that the vast majority of jurors are concerned, responsible, conscientious citizens who take most seriously the job at hand. I find it difficult to believe that as a group they are more interested in justifying their own loosely formed notions than in doing justice.[59]

The second reason given by the judge for allowing pre-deliberation jury discussions was his belief that jurors "could discharge their responsibilities in a better way if they were permitted to discuss matters as the trial progressed."[60] He argued that if jurors were permitted to discuss the case among themselves, they might (1) "alert each other as to matters which may affect credibility[;]" (2) be "more attentive, more apt to be interested and involved, [and] more likely to focus on the issues as they unfold[;]" and (3) aid each other in assimilating, comprehending, and recollecting the evidence.[61] Finally, he stated that to tell jurors that they are not to discuss the case "runs contrary to what they would normally be expected to do," and

> [t]o give jurors instructions that run counter to human experience and common sense, is to make them suspicious of all the admonitions of the court[:] To expect them to listen to testimony which they recognize is to form the basis of perhaps the most important decisions about the lives of other people that they will ever make, and not discuss it with their fellow decision makers until they have had an ample chance to forget the subtleties, nuances, and actual words must strike them as being extraordinary. I firmly believe that jurors are more likely to do that which

59. *Id.*
60. *Id.* at 969.
61. *Id.*

> makes sense than to follow a command which is never explained because it is completely unexplainable.[62]

On appeal, the *Wexler* decision was reversed on other grounds.[63] Nonetheless, in a footnote, the U.S. Court of Appeals for the Third Circuit commented that it "believe[d] that the firmly-rooted prohibition against premature jury discussion [was] well-founded," and that "[a]n instruction that permits the jurors to discuss the evidence before conclusion of the case [was] erroneous."[64]

B. State Cases

In a series of criminal cases, the Supreme Court of South Carolina overturned convictions in which the trial judge instructed the jurors that they could discuss the case among themselves before deliberations provided they did not make up their minds about the case before it was submitted to them.[65] The court held in each case that such an instruction was "inherently prejudicial" because it, in essence, invited the jurors to begin deliberations before the close of the case, and it required reversal.[66] The fact that the judge cautioned the jurors against making up their minds "d[id] not cure" the improper instruction.[67] The court articulated its reasoning for juror silence before deliberations as follows:

> The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation.[68]

In Connecticut, the supreme court, heavily relying on the reasoning in the federal *Winebrenner* case, held that if a trial judge expressly instructs jurors that they may discuss the case among themselves prior to its submis-

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62. *Id.* at 970 (citation omitted).

63. United States v. Wexler, 838 F.2d 88 (3d Cir. 1988).

64. *Id.* at 92.

65. State v. Thomas, 414 S.E.2d 783 (S.C. 1992); Gallman v. State, 414 S.E.2d 780 (S.C. 1992); State v. Joyner, 346 S.E.2d 711 (S.C. 1986); State v. Pierce, 346 S.E.2d 707 (S.C. 1986); State v. Gill, 255 S.E.2d 455 (S.C. 1979).

66. *Gallman*, 414 S.E.2d at 782.

67. *Pierce*, 346 S.E.2d at 710.

68. State v. McGuire, 253 S.E.2d 103, 105 (S.C. 1979).

sion to them, that instruction jeopardizes a defendant's right to an impartial trial and is an "error of constitutional magnitude," even if the jurors are cautioned not to come to any conclusions during their discussions.[69] The court reasoned that "the danger of allowing the jurors to discuss the case before all the evidence is presented and the court instructs on the law is that in the course of the discussion a juror may form and state an opinion before he has heard the countervailing evidence and may then be reluctant to be persuaded otherwise, either by the evidence or by other jurors."[70]

In Michigan, the court of appeals held that an instruction permitting the jury to discuss the case among themselves during the trial was reversible error. In arriving at this conclusion, the court adopted the rationale of the federal *Winebrenner* case.[71]

The only reported state court case not to condemn an instruction permitting pre-deliberation discussions is *Wilson v. State*.[72] In this case, the Maryland Court of Special Appeals held that a criminal defendant was not denied a fair and impartial trial when the trial judge advised the jurors that they could talk about the case throughout the trial, so long as they were alone among themselves or in the jury room.[73] The court stated that it was "not persuaded by *Winebrenner* that the right to due process of law is properly extended to embrace the matter," and it noted that an admonition against pre-deliberation discussions was not required "constitutionally or by statute, rule or decision."[74]

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69. State v. Washington, 438 A.2d 1144, 1149 (Conn. 1980). *Accord* State v. Castonguay, 481 A.2d 56, 66 (Conn. 1984).

70. *Castonguay*, 481 A.2d at 66.

71. People v. Monroe, 270 N.W.2d 655, 657 (Mich. Ct. App. 1978); *see* People v. Blondia, 245 N.W.2d 130 (Mich. Ct. App. 1976); People v. Hunter, 121 N.W.2d 442 (Mich. 1963).

72. 242 A.2d 194, 196-200 (Md. Ct. Spec. App. 1968).

73. *Id.* at 198-99.

74. *Id.* at 199.

IV. Jury Reform Projects

A. The Arizona Jury Reform Project

In 1993, the Arizona Supreme Court established the Committee on More Effective Use of Juries (Committee) to review Arizona's jury system and jury trial procedures.[75] Two of the principal concerns of the Committee were "enforced juror passivity during trials and unacceptably low levels of juror comprehension."[76] After a year and a half of study, the Committee issued a final report that contained fifty-five recommendations designed to totally reform the Arizona jury system.[77]

One of the Committee's recommendations was to allow structured pre-deliberation discussions of the evidence among the jurors in both civil and criminal cases. [78] The formal recommendation stated: "After being admonished not to decide the case until they have heard all the evidence, instructions of law and arguments of counsel, jurors should also be told, at the trial's outset, that they are permitted to discuss the evidence among themselves in the jury room during recesses."[79]

The Committee anticipated four benefits from this recommendation: (1) "Juror comprehension will be enhanced, given the benefits of interactive communication;" (2) "Questions can be asked and impressions shared on a timely basis rather than held until deliberations or forgotten;" (3) "A juror's tentative or preliminary judgments might surface and be tested by the group's knowledge;" and (4) "Divisive 'fugitive' conversations and cliques might be reduced, given the opportunities for 'venting' in the presence of the entire jury in the jury room."[80] The Committee offered the following rationale for its recommendation:

> The traditional admonition that forbids any and all discussions about the case among jurors until deliberations commence is a corollary of the "passive juror" model. Through enforced passivity, jurors are expected to merely store all evidence for later use and to suspend all judgments until the trial is over. The

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75. ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, at 2, 5-6 (1994) [hereinafter ARIZONA SUPREME COURT COMMITTEE].

76. *Id.* at 2.

77. *Id.* at 3, 19-28.

78. *Id.* at 96.

79. *Id.*

80. *Id.* at 97-98.

> assumption is that pre-deliberation discussions of the evidence by jurors will inevitably lead to premature judgments about the case.
>
> The committee concluded that this limitation of all discussions among trial jurors and the accompanying assumption that jurors can and do suspend all judgments about the case are unnatural, unrealistic, mistaken and unwise. Behavioral researchers agree that the juror's natural tendency is to actively process information as and after it is received, forming at least tentative preferences or judgments about the evidence as they do. By their own admissions to jury researchers, at least 11 to 44% of jurors discuss the evidence among themselves before deliberations.
>
> We agree with those who favor permitting structured or regulated discussions of the evidence among jurors during trial as long as they are told that it is important to reserve final judgment until all the case has been presented and *why* it is important to do so. These authorities conclude that the traditional rule forbidding *all* discussions is anti-educational, nondemocratic and not necessary to ensure a fair trial.[81]

In 1995, as a result of this recommendation, the Arizona Supreme Court amended its procedural rules to permit pre-deliberation discussions of the evidence among jurors in civil, but not criminal, trials.[82] Under the amended rule, the discussions had to be only among the jurors, with all the jurors present, and only behind the closed doors of the deliberation room. The trial judge retained the discretion to proscribe such pre-deliberation discussions if that proscription was believed "necessary to preserve a fair trial."[83] The amended rule currently remains in effect and provides as follows:

> If the jurors are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with or permit themselves to be addressed by any person on any subject connected with the trial; except that the jurors shall be instructed that they will be permitted to discuss the evidence

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81. *Id.* at 96-97 (citation omitted).

82. B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 281, 283 (1996); ARIZ. R. CIV. P. 39(f); ARIZ. R. CRIM. P. 19.4.

83. Dann & Logan, *supra* note 82, at 283.

> among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. Notwithstanding the foregoing, the jurors' discussion of the evidence among themselves during recesses may be limited or prohibited by the court for good cause.[84]

Contrary to the recommendation of the Committee, the Arizona Supreme Court declined to amend its rules of criminal procedure to allow pre-deliberation discussions among jurors in criminal cases. The court expressed "concerns about a division among the federal courts of appeals on the question whether permitting juror discussions deprives the defendant of the Sixth Amendment right to an impartial jury."[85]

In late 1996, the Committee reconvened to consider a number of additional jury reform issues.[86] In its final report filed in 1998, the Committee once again favored pre-deliberation discussions of the evidence among jurors in criminal cases. The Committee noted that "[a]necdotal reports from judges, jurors, and most lawyers" with respect to this reform in civil trials were "very positive."[87] Based on two years of experience with the civil reform, the Committee cited seven benefits to jurors from pre-deliberation discussions: (1) "Enhanced jury comprehension of evidence and preliminary instructions on the law as a result of interactive communication;" (2) "Memories and impressions of testimony are better shared and questions are answered on a timely basis;" (3) "Jurors get to know each other better and some 'bonding' occurs;" (4) "Group questions can be better framed and submitted to the Court;" (5) "Juror stress is reduced;" (6) "'Fugitive' conversations are reduced;" and (7) "Deliberations are more focused and efficient since the jurors have already dealt with much of the 'evidentiary foreground.'"[88] Nonetheless, despite these cited benefits, the

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84. ARIZ. R. CIV. P. 39(f). A comment to the rule offers this advice to judges: "In exercising its discretion to limit or prohibit jurors' permission to discuss the evidence among themselves during recesses, the trial court should consider the length of the trial, the nature and complexity of the issues, the makeup of the jury, and other factors that may be relevant on a case by case basis." *Id.*

85. Dann & Logan, *supra* note 82, at 283.

86. ARIZONA SUPREME COURT COMMITTEE ON THE MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, PART TWO, at ii (1998).

87. *Id.* at 8.

88. *Id.* at 8-9.

Arizona Supreme Court to date has not approved pre-deliberation discussions among jurors in criminal trials.[89]

B. The California Jury Reform Project

In 1995, the Judicial Council of California created a Blue Ribbon Commission on Jury System Improvement (Commission) "to conduct a comprehensive evaluation of the jury system and to make timely recommendations for improvement."[90] In a report completed in 1996, the Commission issued twenty-two recommendations, many of which mirrored those issued by the Arizona Committee.[91] With respect to pre-deliberation discussions among jurors, however, the Commission's beliefs diverged from those of the Arizona Committee.

The Commission analyzed the pros and cons of pre-deliberation discussions among jurors as follows:

> Human beings process new information and reduce stress in part by talking to other persons. The proscription against jurors talking amongst themselves about the case thus runs contrary to basic human psychological needs. It is ironic that the one thing which jurors have in common—they are all sitting together watching a case develop—is precisely the one thing they are not permitted to talk about. The stress on jurors is particularly acute in longer trials. Several studies suggest that the rule is violated by substantial numbers of jurors.
>
> To address this issue, some advocate permitting jurors to discuss a case while the case is still on-going, which is the ordinary practice in England. This might be accomplished in several ways. First, jurors could simply be permitted to talk to each other infor-

89. *See* ARIZ. R. CRIM. P. 19.4 ("The court shall admonish the jurors not to converse among themselves . . . until the action is finally submitted to them.").

90. BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT: JUDICIAL COUNCIL OF CALIFORNIA, FINAL REPORT 1 (1996) [hereinafter BLUE RIBBON COMMISSION], *reprinted in* J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1434 (1996). *See* Natasha K. Lakamp, Comment, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model*, 45 UCLA L. REV. 845, 847 (1998).

91. Lakamp, *supra* note 90, at 848-49. *Compare* BLUE RIBBON COMMISSION, *supra* note 90, at 2-11, *with* ARIZONA SUPREME COURT COMMITTEE, *supra* note 75, at 19-28.

> mally about the case. Second, in long trials, the court could schedule periodic times (e.g., the end of the day or just after lunch) when the jury could engage in discussions as a group.
>
> The proposal to permit pre-deliberation discussions among jurors raises serious concerns. Delaying discussion until deliberation is intended to help jurors maintain an open mind. Pre-deliberation discussions might encourage jurors to become locked into positions before all of the evidence is in. Civil and criminal defendants would arguably be particularly disadvantaged because the jury would probably have had several discussions before the defense even begins to put on its case. Finally, the distinction between discussions and deliberations is tenuous at best. If a jury is permitted to retire to the jury room mid-trial for "discussions," it is easy to imagine those discussions quickly turning into deliberations. In fact, it is difficult to imagine how such discussions could avoid becoming deliberations.[92]

Believing that the risks connected with pre-deliberation discussions outweighed the benefits, the Commission recommended retaining the California rule barring discussions about a case before deliberations.[93] Notwithstanding this recommendation, the Commission "acknowledge[d] the value to jurors of permitting discussions, particularly in long cases," and "encouraged" California judges "to experiment in long civil trials with scheduled pre-deliberation discussions upon stipulation of counsel."[94] The Commission also recommended that the Judicial Council reconsider the issue at a later time when it could review "the experience in Arizona."[95]

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92. BLUE RIBBON COMMISSION, *supra* note 90, at 90 (citation omitted).

93. *Id*. A jury-reform task force in Texas similarly rejected the idea of pre-deliberation jury discussions: "In recognition of the potential harm to the impartiality of Texas trial proceedings, the Jury Task Force recommends that the current rule of procedure barring discussions among and by jurors about a case prior to deliberations remain in place." Tom M. Dees, III, *Juries: On the Verge of Extinction? A Discussion of Jury Reform*, 54 SMU L. REV. 1755, 1783 (quoting SUPREME COURT OF TEXAS JURY-REFORM TASK FORCE, FINAL REPORT 138 (1997)).

94. BLUE RIBBON COMMISSION, *supra* note 90, at 90.

95. *Id.* at 91.

C. The District of Columbia Jury Project

The Council for Court Excellence, a Washington, D.C. nonprofit, nonpartisan civic organization, initiated the D.C. Jury Project in 1996 by assembling a thirty-six member Jury Project Committee (Project Committee) "to evaluate and strengthen the institution of the jury in the District of Columbia."[96] After a year of study, research, and debate, the Project Committee proposed thirty-two jury improvement recommendations.[97] On the issue of pre-deliberation discussions, it commented that based on both social science research and anecdotal reports from jurors, the traditional prohibition against these discussions "runs contrary to human nature and is a source of frustration for jurors, especially in long or complicated trials."[98] It listed three advantages to the practice: (1) "improved juror comprehension and recollection of the evidence[;]" (2) "enhanced juror satisfaction and jury cohesion[;]" and (3) the "opportunity for the court to more effectively regulate juror discussions that may already be taking place."[99] In counterbalance, the Project Committee identified three disadvantages: (1) "the potential for jurors to become locked into positions before all the evidence is in, thus presenting the possibility for unfairness to the party who has not completed his or her case[;]" (2) "reduced quality of deliberations resulting from jurors having already become familiar with each other's views[;]" and (3) "a detraction from the ideal of the juror as a neutral decision maker."[100] In assessing the merits of the issue, the majority of the Project Committee determined that "[b]ecause the potential impacts of allowing pre-deliberation discussions are not yet well understood," it would be "premature to make a recommendation" until a written evaluation of the Arizona experiment in this area was published.[101] Although this evaluation has been completed, no further recommendation has been forthcoming.[102]

To date, the D.C. courts have not adopted any formal change with respect to pre-deliberation discussions. In D.C. Superior Court, whether to

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96. COUNCIL FOR COURT EXCELLENCE, DISTRICT OF COLUMBIA JURY PROJECT, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEMS IN WASHINGTON, D.C. v-vi, 75 (1998), *available at* http://www.courtexcellence.org/juryreform/juries2000_final_report.pdf.

97. *Id.* at v-xi.

98. *Id.* at 63.

99. *Id.*

100. *Id*.

101. *Id*.

102. E-mail from Gregory Mize, *supra* note 8.

allow pre-deliberation discussions has been left to the discretion of the particular trial judge. Three judges on that court have invoked this discretion in civil trials. One of these judges, Judge Gregory E. Mize, has arrived at several conclusions about the procedure after allowing its use in approximately 100 civil trials. First, he observed that attorneys rarely raised any objection to it. Second, he calculated from post-trial jury discussions that juries exercised the procedure in about half of the cases, and more often in the longer trials. And finally, he noted that several jurors commented after trial that the procedure allowed them the opportunity to formulate witness questions when witnesses returned to the stand after a recess.[103]

D. The Colorado Jury Reform Project

In 1996, the Colorado Supreme Court created the Committee on the Effective and Efficient Use of Juries in Colorado (Jury Committee) to study its jury system and recommend improvements designed, *inter alia*, "to enhance the effectiveness of communication with jurors."[104] Following a year of study, the Jury Committee proposed twenty-six reforms, one of which recommended that Colorado courts experiment with allowing juror pre-deliberation discussion: "Upon stipulation of counsel, or in pilot courtrooms, courts should experiment in civil trials with permitting juror pre-deliberation discussions, particularly in lengthy or complex cases."[105] In arriving at this recommendation, the Jury Committee debated both sides of the issue:

> Jurors are presently prohibited from talking among themselves about the case until the judge directs them to deliberate. Prohibiting jurors from talking about the case as the trial progresses may be contrary to basic human psychological needs and the adult learning process.
>
> Some commentators have urged that, because pre-deliberation discussions will occur regardless of whether they are permitted,

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103. *Id*.

104. REPORT OF THE SUPREME COURT COMMITTEE ON THE EFFECTIVE AND EFFICIENT USE OF JURIES IN COLORADO 3 (1997) [hereinafter COLORADO SUPREME COURT COMMITTEE REPORT], *available at* http://www.courts.state.co.us/supct/committees/juryreformdocs/juryref.pdf. *See also* AMERICAN JUDICATURE SOCIETY, ENHANCING THE JURY SYSTEM: A GUIDEBOOK FOR JURY REFORM 6 (1999).

105. COLORADO SUPREME COURT COMMITTEE REPORT, *supra* note 104, at 3-4, 48.

> the interests of justice are better served by giving jurors guidance on when and how such discussions should take place.
>
> The contrary view recognizes that all trials are a piece-by-piece presentation of evidence, with one of the parties going first and the other(s) waiting to present their evidence at a later time. The fear is that if the jury discusses the matter prior to hearing all of the evidence, the arguments of counsel, and the instructions on the law of the particular case, the jury could reach a decision and become intractable, or certain jurors could dominate the process.[106]

In 1997, the Colorado Supreme Court adopted the Jury Committee's pre-deliberation discussion recommendation in principle,[107] and in 1998, it authorized a one-year pilot study to evaluate the procedure in civil cases in selected courtrooms.[108] That study involved fifty-three civil jury trials, thirteen judges, and eleven different jurisdictions. The outcome of the study weighed heavily in favor of pre-deliberation discussion:

> Ninety-three percent of the jurors found that informal, pre-deliberations discussions helped them better understand the evidence and resolve confusion about the evidence during trial. Ninety-four percent believed that the information discussions improved formal deliberations. Only 6 percent of the jurors reported that all jurors' points of view were not thoroughly considered during informal discussions. Fourteen percent of the jurors believed that informal discussions encouraged jurors to make up their minds before all the evidence was presented, although 62 percent strongly disagreed with this conclusion.
>
> The support of the judges involved in the pilot was also very strong. Based on their experience, only 7 percent expressed opposition to the reform, while 33 percent were neutral, and 60 percent were strongly supportive. Attorneys involved in the pilot were less enthusiastic than the jurors and the judges, but strong support increased from 19 percent before any experience

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106. *Id*. at 48-49 (citation omitted).

107. *Id*. at 4.

108. JURY REFORM IN COLORADO IMPLEMENTATION PLAN 4 (1998), *available at* http://www.courts.state.co.us/supct/committees/juryreformdocs/98_jury_imp.pdf; Rebecca L. Kourlis & John Leopold, *Colorado Jury Reform*, COLO. LAW., Feb. 2000, at 22.

> with the reform to 32 percent after the attorneys' involvement in a pilot trial.[109]

Based on these results, the Pilot Study Committee recommended in March 2000, that the Colorado Supreme Court modify the jury instructions "to permit jurors in civil cases to discuss the evidence among themselves in the jury room when all jurors are present, as long as they reserve judgment about the outcome of the case until deliberations commence."[110] The Colorado Supreme Court approved this recommendation, and now pre-deliberation jury discussions are permitted in civil trials.[111] The current Colorado jury orientation instruction in civil trials provides the following pre-deliberation admonition:

> You may discuss the evidence during the trial, but only among yourselves and only in the jury room when all of you are present.
>
> You must not, individually or as a group, form final opinions about any fact or about the outcome of this case until after you have heard and considered all of the evidence, the closing arguments, and the rest of the instructions I will give you on the law. Keep an open mind during the trial. Form your final opinions only after you have discussed this case as a group in the jury room at the end of the trial.[112]

V. Social Science Research

Three studies have been conducted to examine Arizona's experience with pre-deliberation jury discussions. The first study involved a survey while the second and third studies involved actual field experiments. Each study is discussed below.

A. Lakamp Survey

In December, 1996, the editor-in-chief of the UCLA Law Review conducted a survey of 208 Arizona state court judges with respect to Ari-

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109. Kourlis & Leopold, *supra* note 108, at 22.

110. COLO. CIV. JURY INSTR. 1:4 n.2.

111. *Id*.

112. *Id.* INSTR. 1:4; *see also id.* INSTR. 1:8 (providing a similar admonition for recesses).

zona's pre-deliberation discussion reform. Of the ninety judges who returned the survey, thirty-eight had actual experience with civil jury trials in which pre-deliberation discussions were permitted. Of those thirty-eight judges, the vast majority felt that based upon their experiences, the pre-deliberation discussion reform was a positive development that should be continued in civil trials.[113] Some of the benefits of the reform observed by the judges included increased juror attentiveness, increased juror comprehension, increased juror happiness, and a decrease in deliberation time to reach a verdict.[114] In addition, the majority felt that neither side had any opposition to the rule. In fact, none of the judges believed that the reform benefited one party over the other.[115] Although most of the responding judges indicated that the pre-deliberation discussion reform did not create any problems, some risks were noted. One risk was a danger that jurors might arrive at a firm judgment before hearing all the evidence. Another was that because jurors were allowed to talk among themselves, they might conclude that they also could talk about the case with others.[116] Even with these noted risks, however, the survey results "provide[d] positive support that, in practice, the benefits of the predeliberation proposal outweigh[ed] the potential concerns."[117]

B. National Center for State Courts Field Experiment

From June 1997 to January 1998, researchers from the National Center for State Courts (NCSC), in cooperation with the Arizona Supreme Court, conducted a field experiment on pre-deliberation discussions in civil jury trials in the superior courts of four Arizona counties.[118] In this six-month study, trials were randomly assigned a "Trial Discussions" designation, signifying a trial in which jurors were instructed that they could discuss the evidence before final deliberations, or a "No Discussions" designation, signifying a trial in which pre-deliberation discussions were prohibited. Pre-deliberation discussion juries were advised that they could

113. Lakamp, *supra* note 90, at 871.

114. *Id*. at 871-73.

115. *Id*. at 873.

116. *Id*. at 874.

117. *Id*. at 875. The author specified two limitations of her survey. First, "those judges with success in implementing the reform and who originally supported enacting the measure [may have been] more inclined to respond to the survey than those who did not favor the reform measure." *Id.* at 874. Second, "there may exist a propensity on the part of the Arizona judiciary to overemphasize or overexaggerate the success of its reform program." *Id*. at 875.

only discuss the evidence in the jury room and only when all of the other jurors were present. After every trial, questionnaires asking for a variety of information about the case were distributed to jurors, judges, attorneys, and litigants. Approximately 160 civil trials were studied.[119] Based on an evaluation of the results of the questionnaires, the researchers offered the following findings about pre-deliberation discussions among jurors.[120]

First, the researchers found that many of the juries that were permitted to discuss the case before deliberations did not. This result was related to the length and complexity of the cases. "Jurors in short, uncomplicated trials were less likely to discuss the evidence during the trial" than were jurors in complex, lengthier cases.[121]

Second, the researchers found that "to a much greater degree than previous[ly] estimate[d]," jurors from both groups violated the judge's pretrial admonition not to have informal discussions with other jurors or to discuss the case with family or friends.[122] Nonetheless, jurors in the Trial Discussions group were "less likely to talk about the evidence with family and friends than jurors [in the No Discussions group], which suggests that being allowed to discuss the evidence provides an outlet that reduces the need to discuss the case with family and friends."[123]

Third, the researchers found that the vast majority of both judges and jurors who supported the pre-deliberation discussions reform believed that the discussions improved juror comprehension and thought that the discussions did not encourage premature judgments about the evidence.[124] About half of the lawyers and litigants did not support the reform, but agreed that juror discussions improved juror comprehension. The majority

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118. Paula L. Hannaford-Agor, Valerie P. Hans & G. Thomas Munsterman, *"Speaking Rights": An Evaluation of Arizona's Rule Permitting Juror Discussions in Civil Trials*, 85 JUDICATURE 237, 238 (Mar.-Apr. 2002) [hereinafter *"Speaking Rights"*]; Hannaford, Hans & Munsterman, *supra* note 8, at 363-65; Valerie P. Hans, Paula L. Hannaford & G. Thomas Munsterman, *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J.L. REFORM 349, 365-66 (1999) [hereinafter *Arizona Jury Reform*].

119. *"Speaking Rights"*, *supra* note 118, at 238.

120. *Id*. at 238-43.

121. *Id*. at 239.

122. *Id*.

123. *Id*.

124. *Id*.

of them, however, felt that the pre-deliberation discussions would encourage premature decision-making.[125]

Fourth, the researchers "found no clear evidence that jurors who [were] permitted to discuss the evidence with one another before final deliberations reach[ed] conclusions about the evidence earlier than jurors who [were] prohibited from discussing the evidence."[126] "Contrary to fears that trial discussions might solidify early opinions, jurors assigned to the Trial Discussions group reported that they changed their minds just as often as those assigned to the No Discussions group."[127]

Fifth, the researchers found that jurors perceived that pre-deliberation discussions were "very helpful for resolving confusion about the testimony and evidence presented during trial."[128] Whether pre-deliberation discussions actually improved juror comprehension, however, is unknown because the study was not designed to assess that factor. The researchers did compare jury verdicts from both the Trial Discussions group and the No Discussions group with judicial assessments of the evidence presented at trial, but the comparison between the two groups was statistically insignificant. As a result, "at least according to the judges' assessments, there was no evidence in this study that juror discussions either improved or reduced the accuracy of jury verdicts."[129]

Finally, the researchers found "no evidence of greater cohesiveness among jurors who discussed the evidence during the trial."[130]

In view of these findings, the researchers arrived at three conclusions. First, pre-deliberation discussions among jurors did not appear to lead to premature judgments about the evidence and the verdict. Second, such discussions may aid juror comprehension. And third, such discussions may reduce a juror's need to discuss the case with non-jurors. The researchers offered this summary:

> Discussions about the evidence during civil jury trials did not appear to lead to prejudgment or prejudice, at least to the extent we were able to measure in our study. Nor did we detect dra-

125. *Id*. at 240.
126. *Id*. at 240-41.
127. *Id*. at 241.
128. *Id*. at 242.
129. *Id*.
130. *Id*.

> matic improvements in jury decision making across cases that affected jury verdicts. Nevertheless, if the jurors' own reports are to be believed, this technique may be quite helpful to jurors both for understanding the evidence and as an appropriate outlet for jurors' thoughts and questions that might otherwise be discussed with family or friends.[131]

C. Pima County Field Experiment

Instead of relying solely on surveys or questionnaires, a third research project evaluated the Arizona pre-deliberation discussion reform by videotaping the jury in addition to using post-trial questionnaires.[132] This research project, authorized by the Arizona Supreme Court in 1998 and completed in 2002, was conducted in Pima County, Arizona.[133] In this project, the researchers videotaped the trial and all juror discussions and deliberations in fifty actual civil trials.[134] Thirty-seven of these trials permitted pre-deliberation discussions and were referred to as "Discuss" trials. The other thirteen trials prohibited the use of pre-deliberation discussions and were referred to as "No Discuss" trials.[135] After each trial, the judge, jurors, and lawyers were asked to complete a questionnaire about the trial and their personal reactions to it.[136] To analyze the effects of the discussion reform, the researchers compared the pre-deliberation discussions, final deliberations, and jury verdicts of the Discuss juries with the No Discuss juries.[137] Based on an assessment of the trials, videotapes,

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131. *Id*. at 243. The researchers noted several questions that remained unanswered:

> (1) Would the introduction of a unanimity requirement for verdicts (Arizona requires a 3/4 majority in civil cases while many other jurisdictions require unanimity) alter the findings?; (2) Would the differences in the burdens of proof between civil (preponderance of the evidence) and criminal (beyond a reasonable doubt) trials affect the impact of trial discussions?; and (3) Would the greater risk involved in a criminal trial (loss of liberty as opposed to a monetary loss in a civil trial) affect the impact of trial discussions?

Id. at 242-43.

132. SHARI SEIDMAN DIAMOND ET AL., JUROR DISCUSSIONS DURING CIVIL TRIALS: A STUDY OF ARIZONA'S RULE 39(F) INNOVATION iv (2002), *available at* http://www.law.duke.edu/pub/vidmar/ArizonaCivilDiscussions.pdf.

133. *Id*. at 21.

134. *Id*. at iv, 21.

135. *Id*. at 21.

136. *Id*. at 23.

and questionnaires, the researchers provided the following findings about pre-deliberation discussions among jurors.[138]

First, the researchers found evidence that the discussion reform "encouraged jurors to exchange relevant information without coming to fixed and unchangeable preferences."[139] "The Discuss jurors spent very substantial amounts of time and energy engaged in discussions about the trial," and "[t]he longer and more complex the trial, the more Discuss jurors talked about the case."[140]

Second, the researchers found that the No Discuss jurors abided by the prohibition against discussing the case before deliberations. Although some jurors made occasional remarks about the case, these remarks were "brief and perfunctory."[141]

Third, the researchers found that the Discuss jurors often violated the judge's instruction not to discuss the case unless all of the jurors were present. "[M]any substantive discussions occurred when a sizeable number of the jurors were not present in the jury room."[142]

Fourth, the researchers found that although on occasion the Discuss jurors expressed final positions in violation of the judge's instruction to withhold judgment until the end, they also found that such early verdict statements "did not uniformly predict the positions that jurors took . . . during deliberations."[143] In fact, the researchers "found no clear indication that [early verdict statements] were responsible for altering case outcomes."[144]

Fifth, the researchers found that "the verdict patterns, as well as the rate of agreement with judicial verdict preferences did not differ" between the Discuss and No Discuss juries.[145] Discuss jurors were no more likely to favor the testimony presented at the beginning of trial (the "primacy

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137. *Id*. at 102.
138. *Id*. at 45, 64-66, 80-81, 99, 101-05.
139. *Id*. at 99, 103.
140. *Id*. at 103.
141. *Id*.
142. *Id*.
143. *Id*.
144. *Id*. at 104.
145. *Id*.

effect"), than they were to favor what they heard immediately at the end of trial before deliberations (the "recency" effect).[146]

Finally, the researchers found that Discuss jurors (1) "reported no less inclination to discuss the case outside the jury room than did No Discuss jurors, although only a small minority in both groups reported any outside conversations;" (2) "were somewhat more inclined to take an early first vote and completed their deliberations more swiftly than did No Discuss juries, but the differences were not statistically significant;" (3) "perceived their juries as more open-minded and thorough [than No Discuss juries], but the difference was not statistically significant;" and (4) "were somewhat more likely to be unanimous, suggesting greater cohesiveness, than the No Discuss juries."[147]

In light of these findings, the researchers concluded, as did the NCSC research project, that pre-deliberation discussions may aid juror comprehension and did not appear to lead to premature judgments.[148] They also suggested that the two shortcomings noted by the project, discussions by jurors when all were not present and early verdict statements, might be reduced or eliminated by two changes of procedure. First, a written copy of the preliminary instruction outlining the limits of pre-deliberation discussions could be given to each juror and posted in the jury room; and at recesses in the trial, the judge could repeat this instruction to the jurors.[149] Second, the jurors could be instructed to choose an interim foreman who would have the responsibility to ensure that no discussions took place until all the jurors were present.[150]

VI. Military Practice

Under the Uniform Code of Military Justice (UCMJ),[151] two types of courts-martial employ a panel of members (jury), the general court-martial and the special court-martial.[152] The general court-martial consists of a military judge and at least five members.[153] The special court-martial consists of a military judge and at least three members.[154] The member senior in rank

146. *Id*.
147. *Id*.
148. *Id*. at 104-05.
149. *Id*. at v, 105.
150. *Id*. at v, 106.
151. The Uniform Code of Military Justice comprises sections 801 to 946 of Title 10, United States Code. 10 U.S.C. §§ 801-946 (2000).

on each court-martial serves as president of the panel.[155] Who may serve as a member on a court-martial is governed by Article 25, UCMJ, which permits the convening authority—the official who exercises prosecutorial discretion in the case—personally to select the members of the court-martial panel.[156] The convening authority is required to select members who "are best qualified by reason of age, education, training, experience, length of service, and judicial temperament."[157]

"Courts-martial are not a part of the judiciary of the United States within the meaning of Article III of the Constitution," but instead "derive their authority from the enactments of Congress under Article I of the Constitution, pursuant to congressional power to make rules for the government of the land and naval forces."[158] As a result, the Sixth Amendment right to trial by jury does not apply to courts-martial.[159]

Nothing in the UCMJ or the *Manual for Courts Martial* (*Manual*) prohibits a military judge from allowing court-members to discuss the case among themselves before formal deliberations. Although a discussion section to Rule for Courts-Martial (RCM) 502(a)(2) of the *Manual* suggests that "members should not discuss any part of a case with anyone until the

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152. UCMJ art. 16 (2000). A general court-martial has jurisdiction over every service member and offense under the Uniform Code of Military Justice and can prescribe any punishment permitted by that Code and the President. *Id.* art. 18. A special court-martial has similar jurisdiction, but its punishment authority is limited to confinement for one year, forfeiture of two-thirds pay per month for a period of one year, and a bad-conduct discharge. *Id.* art. 19.

153. *Id.* art. 16(1)(a). The minimum five-member requirement is true for all general courts-martial except those in which the death penalty is authorized. A court-martial panel in a capital case shall consist of at least twelve members, unless twelve members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five. *Id.* art. 25(a).

154. *Id.* art. 16(2)(a). A special court-martial may convene without a military judge, but only if a military judge cannot be detailed because of physical conditions or military exigencies. Such a court cannot adjudge a discharge. MCM, *supra* note 5, R.C.M. 201(f)(2)(B).

155. MCM, *supra* note 5, R.C.M. 502(b)(1). Any need for an interim foreman identified in the Pima County Field Experiment is fulfilled in military practice by the president of the court-martial.

156. UCMJ art. 25.

157. *Id.* art. 25(c)(2).

158. United States v. Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973).

159. *Id.*; *see* United States v. New, 55 M.J. 95, 103 (2001); United States v. Kirkland, 53 M.J. 22, 24 (2000); United States v. Loving, 41 M.J. 285 (1994); United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988).

matter is submitted to them for determination," that section is not "binding on any person, party, or other entity."[160] The standard preliminary instruction from the *Military Judges' Benchbook* (*Benchbook*) prohibits pre-deliberation discussions:

> During any recess or adjournment, you may not discuss the case with anyone, not even among yourselves. You must not listen to or read any account of the trial or consult any source, written or otherwise, as to matters involved in this case. You must hold your discussion of the case until you are all together in your closed session deliberations so that all of the panel members have the benefit of your discussion. . . . If anyone attempts to discuss the case in your presence during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session.[161]

Like the discussion section, however, the *Benchbook* pattern instructions are not binding.[162] As noted in the introduction to the *Benchbook*, none of the instructions are intended "to be a substitute for the ingenuity, resourcefulness, and research skill of the military judge."[163]

The issue of pre-deliberation discussions in the military has been raised in only one unpublished case. In *United States v. Richards*,[164] a juror approached a prosecutor after trial and "expressed concern that some members had discussed the case during breaks before findings deliberations."[165] In a post-trial session dealing with other matters, the military judge declined to address the pre-deliberation discussion issue. On appeal, the Air Force Court of Criminal Appeals found that based upon the prohibitions in Military Rule of Evidence (MRE) 606(b), the military judge did not abuse his discretion by not pursuing the issue of possible informal discussion of the case.[166] Under MRE 606(b), a judge is prohibited from taking juror testimony about what occurred during deliberations unless that testimony concerns "whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial,

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160. MCM, *supra* note 5, R.C.M. 502(a)(2) discussion; pt. I, ¶ 4 discussion.

161. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK paras. 2-5, 2-6-1 (1 Apr. 2001) [hereinafter BENCHBOOK].

162. *See id*. at i, para. 1-1.

163. *Id*. para. 1-2.

164. No. ACM S29209, 1996 CCA LEXIS 401 (A.F. Ct. Crim. App. Dec. 27, 1996).

165. *Id.* at *2.

166. *Id*. at *7.

whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence."[167]

VII. Summary and Recommendation

Should the military become the first jurisdiction to adopt a rule permitting pre-deliberation discussions among jurors in criminal cases? From the standpoint of case law, most of the opinions that have considered the propriety of a pre-deliberation discussion instruction authorizing discussions among jurors have been "disapproving;"[168] however, many of these cases rely on the first federal case to consider the issue, *Winebrenner*, and the precedential value of that case should be limited to its unique facts: The trial judge failed to caution the jurors against making premature judgments about guilt or innocence or discussing the case unless all of the jurors were present, and he failed to give any preliminary instructions on the burden of proof and presumption of innocence. The bad facts of *Winebrenner* can be remedied with appropriate cautionary and preliminary instructions. In any event, a minority of opinions support a pre-deliberation rule and can be relied on as precedence for a change.

From a military law standpoint, no constitutional, statutory, regulatory, or case-made rules are an impediment to authorizing pre-deliberation discussions among jurors. In addition, because the Sixth Amendment right to a trial by jury does not apply to the military, the precedential value of *Winebrenner* and its progeny to courts-martial practice is, arguably, nil.

From the standpoint of jury reform projects, the verdict is mixed, but clearly leaning toward change. The Arizona project specifically favored the use of the pre-deliberation discussions in criminal cases. The Colorado project resulted in Colorado adopting the pre-deliberation discussions for civil trials, and the District of Columbia project resulted in D.C. Superior Court judges having the discretion to allow pre-deliberation discussions in civil cases. Although the California project rejected the change, it nonetheless acknowledged the value of permitting pre-deliberation discussions,

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167. MCM, *supra* note 5, MIL. R. EVID. 606(b). Federal courts may also decline, by way of Federal Rule of Evidence 606(b), to pursue an inquiry into whether pre-deliberation discussions occurred. *See* United States v. Williams-Davis, 90 F.3d 490, 504-05 (D.C. Cir. 1996); United States v. Gigante, 53 F. Supp. 2d 274, 276-78 (E.D.N.Y. 1999); FED. R. EVID. 606(b).

168. *Arizona Jury Reform*, *supra* note 118, at 360.

and it encouraged experimentation with the change in trials where the parties would agree.

From the standpoint of social science research, a survey and two field experiments support a change. Based on this research, pre-deliberation discussions may aid juror comprehension and should not lead to premature judgments. The potential risks of the change (discussions by jurors when all are not present and early verdict statements) could be reduced or eliminated through procedural modifications that would accompany the change.

Finally, from the standpoint of history and tradition, a change authorizing pre-deliberation discussions would serve to help move the jury back toward its active-jury roots. "Jurors need not and should not be merely passive listeners in trials, but instead should be given the tools to become more active participants in the search for just results."[169]

The military should remain on the forefront of jury innovations and become the first jurisdiction to specifically sanction regulated pre-deliberation discussions among jurors. The addition of the following two sentences to the end of RCM 502(a)(2) in the *Manual* would accomplish this result:

> Members shall be instructed that they are permitted to discuss the evidence among themselves in the members room during recesses from trial, when all are present, as long as they reserve judgment about the guilt or innocence of the accused until formal deliberations begin. Notwithstanding the foregoing, the members' discussion of the evidence among themselves during recesses may be limited or prohibited by the military judge for good cause.[170]

Like the Arizona rule, this rule would only permit structured discussions. Discussions could only occur in the deliberation room and only with all of the members present. The military judge is entrusted with the discretion to limit or proscribe pre-deliberation jury discussions in any case in which

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169. BROOKINGS INSTITUTION, REPORT FROM AN AMERICAN BAR ASSOCIATION/BROOKINGS SYMPOSIUM, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 3 (1992). *See* Dann, *supra* note 9, at 1238-47 (comparing the passive and active jury models).

170. This proposed rule is adapted from a similar one proposed for use in Arizona by the Committee on More Effective Use of Juries. *See* ARIZONA SUPREME COURT COMMITTEE, *supra* note 75, at 98.

such discussions might interfere with the impartiality of the members or when other good cause is shown.[171]

To accompany this rule change to RCM 502(a)(2), the sentence in its discussion section, "Except as provided in these rules, members should not discuss any part of a case with anyone until the matter is submitted to them for determination," should be deleted. To replace it, the following preliminary jury instruction should be added to the end of that rule's discussion section:

> In preliminary instructions, the military judge should advise the members substantially as follows: "During the court-martial, you may discuss the evidence, but only among yourselves in the members room when all of the members are present. The kinds of things you may discuss include the witnesses, their testimony, and the exhibits. However, you must not, individually or collectively, make up your minds about the guilt or innocence of the accused until you have heard all the evidence, my instructions on the law, the arguments of counsel, and your formal deliberations have begun. Keep an open mind during the trial. Only form your final opinions after you have deliberated as a group in the members room at the end of trial. Not only would it be unfair to the accused, but it would also be illogical and unwise to decide the case until you have heard everything." A written copy of this portion of the preliminary instructions should be given to each member and posted in the members room. In addition, the president of the court-martial should be advised to ensure that no discussions occur unless all the members are present in the deliberations room.[172]

This instruction should also replace the one currently proscribing predeliberation discussions among members in the *Military Judges' Bench-*

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171. *See* Lakamp, *supra* note 90, at 876.

172. The proposed instruction is adapted from several sources: (1) the current predeliberation instruction used in Colorado civil trials; (2) the instruction proposed for use in Arizona by the Committee on More Effective Use of Juries; and (3) the instruction used by the National Center for State Courts in evaluating the effect of the Arizona rule. *See* COLO. CIV. JURY INSTR. 1:4, 1:8; ARIZONA SUPREME COURT COMMITTEE, *supra* note 75, at 99, app. G; *"Speaking Rights"*, *supra* note 118, at 243. The last sentence of the proposed instruction is added because "people are more likely to follow instructions if they are given a reason to do so." Elizabeth F. Loftus & Douglas Leber, *Do Jurors Talk?* 22 TRIAL 59, 60 (1996). *See* Diamond et al., *supra* note 132, at v, 104-05; Lakamp, *supra* note 90, at 876.

book.[173] It not only informs the members of their ability to conduct pre-deliberation discussions, but also of the importance of reserving final judgment until all the evidence has been presented and of the reason for its importance.[174]

This rule and accompanying change in instructions will legitimize pre-deliberation discussions for courts-martial. The comprehension, competence, and confidence of the members should benefit thereby, and will advance the rule of law accordingly.

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173. Military preliminary instructions already include instructions on the burden of proof and presumption of innocence, remedying one of the noted *Winebrenner* deficiencies. *See* BENCHBOOK, *supra* note 161, para. 2-5.

174. ARIZONA SUPREME COURT COMMITTEE, *supra* note 75, at 97.