LET'S GIVE THEM SOMETHING TO TALK ABOUT: AN EMPIRICAL EVALUATION OF PREDELIBERATION DISCUSSIONS

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Every American citizen is qualified to be an elector, a juror, and is eligible to office. The system of the jury, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. These institutions are two instruments of equal power, which contribute to the supremacy of the majority.

—Alexis de Tocqueville[1]

Jurors are chosen from every conceivable walk in life. The butcher, the baker, the merchant, the taxi driver, the day laborer, the farmer, the mechanic, the accountant, the barber, the hotel clerk, the cobbler, and the gas station attendant may make up the jury in a criminal case, but however it be composed it must be borne in mind that the jurors are unschooled and inexperienced as to their duties in a criminal case, and they are not instructed as to those duties until all the evidence has been received . . . .

—Winebrenner v. United States[2]

In the overwhelming majority of American courts, jurors are strictly forbidden from discussing the case before them until the time designated for deliberations, after the parties have presented all of the evidence. Since 1995, however, a few states have authorized jurors to discuss the case during recesses from trial. This innovation has sparked debate over the merits of permitting such predeliberation discussions.

After explaining the traditional view of jury deliberations, and introducing the few studies on predeliberation discussions that have been conducted, the author evaluates the arguments on both sides of the debate, not only on their own merits, but also in light of social and cognitive psychology. Ultimately, the author recommends a change in the existing majority rules, so that courts can reap the vast benefits of predeliberation discussions.

1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 225 (Bruce Frohnen, ed., Henry Reeve, trans., Regnery Publ'g 2003) (1889).

2. Winebrenner v. United States, 147 F.2d 322, 327 (8th Cir. 1945).

I. INTRODUCTION

At least as far back as the Magna Carta, the jury has been a prominent feature of the Anglo-American jurisprudential landscape.[3] The right to a jury trial was explicitly protected by all twelve of the written state constitutions that predated the Declaration of Independence,[4] and it is the only right to appear in both the main body of the Constitution[5] and the Bill of Rights.[6] Central to the perceived efficacy and legitimacy of the jury is its impartiality; the Sixth Amendment specifies not only that criminal defendants are entitled to a jury, but to an "impartial jury."[7] American courts have struggled to preserve this impartiality against attempts by parties and attorneys to bias the jury through jury selection,[8] bribery,[9] coercion,[10] and improper trial techniques.[11] However, through all of these concerns about improper influences corrupting the jury from the outside, the inner workings of the jury have generally been treated as a "black box" into which courts will not inquire, except in the most extreme of circumstances.[12]

Despite the apparent reluctance of the courts to get involved in the internal processes of juries, rules about juror behavior have been set out across the country by statutes, courts, and jury instructions. For example, jurors are prohibited from performing their own investigations into the circumstances or facts presented by the trial.[13] Similarly, American juries are warned that they may not discuss the trial with anyone outside of the trial until after they have reached a verdict.[14] These imperatives are somewhat intuitive, flowing easily from our conception that justice is best served by an adversarial presentation, governed and limited by a neutral judge and the uniform rules of court, to a neutral and select jury

3. W.S. Robinson, *Bias, Probability, and Trial by Jury*, 15 AM. SOC. REV. 73, 73 (1950).

4. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994).

5. U.S. CONST. art III, § 2.

6. *Id.* amend. VI.

7. *Id.*

8. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994); Batson v. Kentucky, 476 U.S. 79, 82 (1986).

9. *See, e.g.*, Remmer v. United States, 347 U.S. 227, 228 (1954).

10. *See, e.g.*, Owen v. State, 381 N.E.2d 1235, 1241 (Ind. 1978).

11. *See, e.g.*, Sisk v. Ball, 371 P.2d 594, 596–98 (Ariz. 1962).

12. *See, e.g.*, FED. R. EVID. 606(b); Tanner v. United States, 483 U.S. 107, 120–22 (1987).

13. *E.g.*, MISS. MODEL JURY INSTRUCTIONS—CRIMINAL § 1.1 (Miss. Judicial Coll. 2007) ("You are not permitted to visit or view any scene or location involved in this case or make any independent investigation. Your duty is to decide this case solely on the basis of the testimony and evidence presented here in open court and not on some matter gathered outside the courtroom.").

14. *See, e.g.*, 1 ALA. PATTERN JURY INSTRUCTIONS CIVIL 1.11 (Ala. Pattern Jury Instructions Comm. Civil, 2d ed. 2007) ("If members of your family or friends or anyone else should ask you about the case, you should tell them that you are under the Court's instruction not to discuss it . . . . The attorneys, parties and witnesses are not permitted to talk to you during the trial."); COLO. JURY INSTRUCTIONS, CRIMINAL ch. 1:04 (Colo. Supreme Court Comm. on Criminal Jury Instructions 1993) ("First, do not discuss the case either among yourselves or with anyone else during the course of the trial.").

that should be guided only by its own experience and knowledge. One nearly universal prohibition on jurors, however, is less intuitive: in most jurisdictions, jurors are not allowed to discuss the case, parties, or evidence *with one another* as the case is presented.[15] The overwhelming majority of state and federal courts specifically prohibit "predeliberation discussions" among jurors, even in long and complex cases, arguing that such discussions are wholly incompatible with the jury's directive to refrain from making any judgment until all of the evidence has been presented.[16]

Some states, however, have begun to question the conventional wisdom about predeliberation discussions.[17] In 1995, Arizona became the first state to officially authorize such discussions when it adopted Arizona Rule of Civil Procedure 39(f), which provides:

> 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 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.[18]

Arizona's rule precipitated the adoption of similar provisions by several other states[19] and the American Bar Association,[20] and it has fueled a steady debate on the virtues and vices of predeliberation discus-

15. *E.g.*, CAL. CIVIL JURY INSTRUCTIONS 0.50 (Comm. on Cal. Civil Jury Instructions 2007) ("You must not converse among yourselves, or with anyone else, on any subject connected with the trial, until the case has been submitted to you for your decision by the court, following arguments by counsel and jury instructions."); PATTERN INSTRUCTIONS KAN. 3D CIVIL 101.10 (Kan. Judicial Council PIK-Civil Advisory Comm. 2005) ("Do not make up your mind or attempt to reach a decision until the conclusion of the entire case and its submission to you for deliberation. Before that time do not discuss the case among yourselves.").

16. *See, e.g.*, Winebrenner v. United States, 147 F.2d 322, 327 (8th Cir. 1945).

17. Here, it is important to distinguish among varied terminology. Throughout this Note, the term "deliberations" will refer only to the traditional period at the end of the trial, after all of the evidence, arguments, and instructions on the law have been presented; when jurors debate the merits of the case and choose a verdict (or, in some cases, ultimately fail to do so). On the other hand, "discussions," or "predeliberation discussions," will refer to conversations among jurors throughout the trial, such as those authorized by the Arizona rule discussed *infra*. Similarly, juries who are permitted to discuss the case during the trial may be referred to as "discussing juries," while those who are specifically forbidden from doing so may be referred to as "traditional juries."

18. ARIZ. R. CIV. P. 39(f).

19. *E.g.*, IND. JURY R. 20(a)(8) ("[J]urors, including alternates, are permitted to discuss the evidence 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. The court shall admonish jurors not to discuss the case with anyone other than fellow jurors during the trial."); N.D. R. CT. 6.11 ("In a civil case, the court may, without objection, allow the jury to engage in predeliberation discussion.").

20. AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS 13(F) (2005).

sions. This Note evaluates the "Arizona innovation"[21] from the rich empirical background of social and legal psychology. Part II addresses the legal history of predeliberation discussions and highlights the few empirical studies that deal directly with the subject. Part III expounds upon the solid base provided by those studies and evaluates the arguments for and against predeliberation discussions in light of the wealth of existing research on juries and other deliberative groups. Finally, Part IV proposes a method for implementation that will allow courts to take advantage of the many benefits of predeliberation discussions while avoiding the pitfalls that opponents and empirical evidence suggest are most likely.

II. BACKGROUND

Understanding the current debate requires an understanding of the traditional views on the topic of juror discussions, as well as a familiarity with the legal and psychological arguments that led to and immediately followed the adoption of the Arizona rule.

A. Sausages and Law: The Traditional View of Discussions

Due perhaps in part to our enduring sense of reverence for the jury and its integrity, or perhaps more likely as a corollary of the oft-repeated warning that "two things you don't want to see made are sausages and the law,"[22] relatively little legal or scholarly work has dealt directly with the topic of juror discussions before deliberations. In criminal cases, predeliberation discussions have been (and are still) viewed with great suspicion; several courts have held that such discussions are inherently prejudicial or even unconstitutional.[23] In the first reported federal case on the issue, *Winebrenner v. United States*,[24] the Eighth Circuit held that the trial court's failure to forbid jurors from discussing the evidence before deliberations in the defendants' seven-week trial for conspiracy to defraud the United States constituted reversible error.[25] The court focused on the risk of prejudice to the defendants, due largely to the perceived inability of the jury to discuss the evidence without forming premature opinions as to the defendants' guilt:

> If, however, the jurors may discuss the case among themselves, either in groups of less than the entire jury, or with the entire jury, they are giving premature consideration to the evidence. By due

21. Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 3–5 (2003).

22. *See, e.g.*, KINLY STURKIE & LOIS PAFF BERGEN, PROFESSIONAL REGULATION IN MARITAL AND FAMILY THERAPY 43 (2001).

23. *E.g.*, Winebrenner v. United States, 147 F.2d 322, 329 (8th Cir. 1945); Gallman v. State, 414 S.E.2d 780, 782 (S.C. 1992).

24. *Winebrenner*, 147 F.2d at 322.

25. *Id.* at 329.

> process of law is meant 'a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' The jury should not discuss the case among themselves because, first, they have not heard all of the evidence; second, they have not heard the instructions of the court as to how this evidence is to be considered by them, and neither have they heard the arguments of counsel.[26]

The *Winebrenner* rationale has since been adopted by a number of state courts, who also refuse to conduct harmless error inquiries when criminal jurors have discussed the case before deliberations.[27]

Similarly, courts in civil cases have rarely viewed predeliberation discussions among jurors favorably, although, in the absence of state statutes or rules specifically precluding such discussions in civil cases, courts have been reluctant to find that predeliberation discussions alone are sufficient to warrant reversal.[28] Although no cases explicitly discuss the distinction between civil and criminal cases when it comes to discussions, it is not surprising that the courts have generally applied more lenient standards in civil cases. The actual risk of prejudice to the parties may be no different than in criminal court, but the consequences of potential prejudice are not as severe as they are to a defendant facing loss of liberty or life.[29]

This disdain for predeliberation discussions is, however, difficult to separate from the context in which it is generally presented: juror misconduct. The fear behind strict enforcement of the discussion rules seems to be that jurors who disregard the court's instructions on something so basic and easy to understand as discussion cast doubt on the ability of the entire jury to follow the law and apply it to complex facts.[30] In this light it is unsurprising that, despite historical reluctance to allow juror discussion, surveys reveal that judges in some jurisdictions actually favor rules that permit predeliberation discussions.[31] In fact, one survey of Arizona judges, conducted after the adoption of Rule 39(f), found that over ninety-two percent of judges surveyed supported discussions in civil

26. *Id.* at 328.

27. *See, e.g.*, People v. Monroe, 270 N.W.2d 655, 657 (Mich. Ct. App. 1978).

28. *See, e.g.*, City of Pleasant Hill v. First Baptist Church, 82 Cal. Rptr. 1, 32–34 (Cal. Ct. App. 1969) (noting that juror discussions were "misconduct" but refusing to reverse).

29. Perhaps because of this increased risk and circumspection when it comes to criminal trials, predeliberation discussions have been suggested only in civil trials to date. Therefore, although all of the benefits and detriments discussed are applicable to criminal trials, this Note addresses only the addition of discussions to civil trials. Perhaps if discussions gain general acceptance in civil trials, researchers may begin to explore whether they are likely to have unique effects in criminal trials.

30. Natasha K. Lakamp, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?*, 45 UCLA L. REV. 845, 861 (1998).

31. *Id.* at 871–72. However, judges in other states may not be as supportive of juror discussions as Arizona judges. For example, a 2004 survey of judges in Missouri, where discussions are not allowed, found that eighty percent opposed the adoption of a measure like Rule 39(f). W. Dudley McCarter, *Civil Jury Reform: Is Missouri Ready for Changes?*, 61 J. MO. B. ASS'N 254, 260 (2005).

cases.[32] Interestingly, the surveyed judges also generally expressed a great deal of support for jurors' abilities to avoid prejudgment, even when jurors are permitted to discuss evidence during trial.[33]

Scholars, like many courts, have generally shied away from the topic of juror discussions. Although legal and psychological journals have devoted many pages to the function of discussions *during* jury deliberations,[34] very few investigators had attempted to determine the effect of *predeliberation* discussions until recently.

B. Exploring the Effects of the Reform Directly

Arizona's adoption of Rule 39(f), and the Arizona Supreme Court's subsequent willingness to open the courts of Arizona to empirical research, created a unique and fascinating opportunity for jury research outside of the laboratory. Several researchers took advantage of the opportunity, generating some of the most comprehensive studies on the content and results of juror deliberations and, in particular, the content and results of predeliberation discussions.[35]

In the first study of discussions conducted in the Arizona courts, actual civil cases were randomly assigned to one of two conditions. In the first condition, jurors were instructed that they may discuss the case, pursuant to Rule 39(f).[36] The remaining jurors were given the traditional instruction not to discuss the trial before deliberations.[37] After the verdict, all jurors were surveyed about their discussions and deliberations.[38] Researchers, led by Paula Hannaford, Director of the Center for Jury Studies at the National Center for State Courts, found no evidence that allowing jurors to discuss produced significant differences in verdicts, awards, or the degree to which judges agreed with the jury's decisions.[39]

32. Lakamp, *supra* note 30, at 871–72.

33. *Id*.

34. *See, e.g.*, John Gastil et al., *Do Juries Deliberate? A Study of Deliberation, Individual Difference, and Group Member Satisfaction at a Municipal Courthouse*, 38 SMALL GROUP RES. 337 (2007).

35. *See* Paula L. Hannaford et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 L. & HUM. BEHAV. 359 (2000); Diamond, *supra* note 21.

36. Hannaford, *supra* note 35, at 363–64.

37. *Id*.

38. *Id*.

39. *Id*. at 372. Jurors who were allowed to discuss the case during the trial did report more disagreements among themselves than those who were required to wait until deliberations. *Id.* While Hannaford offers no explanation for the increase in discord, it is unlikely that the jurors who engaged in predeliberation discussions simply disagreed with one another's opinions more than those in "traditional" juries. Instead, the difference in reported disagreement may reflect more willingness on the part of jurors to express disagreement. This increased willingness, in turn, may be due to the fact that the jurors are more comfortable with one another from having been permitted to have natural discussions with each other over the issue they have most in common: the trial. Alternatively, the increase in reported disagreement may simply reflect the fact that jurors who discuss the evidence throughout the trial, as compared to jurors who must wait to discuss the evidence until deliberations, have more opportunities to disagree. Either possible explanation is encouraging to supporters of discussions, be-

An even more comprehensive study of the Arizona courts was later conducted by Northwestern University professor and prominent legal psychologist Shari Seidman Diamond.[40] Diamond's study, like those before, assigned Arizona civil trials to a "Discuss" or "No Discuss" condition.[41] Unlike the previous studies, however, Diamond and her colleagues were able to videotape entire trials, including jury discussions and deliberations.[42] The result was an unprecedented look into the jury room, and it produced several important insights into the role of predeliberation discussions. For example, an overwhelming eighty-nine percent of juries allowed to discuss the case before deliberations took advantage of the opportunity,[43] although they did not always follow Rule 39(f)'s directives to only discuss the case when all jurors were present and to refrain from discussing a verdict preference before deliberations.[44] In fact, jurors in sixty-three percent of the "Discuss" cases reviewed engaged in at least a "technical" violation of the rule against discussing verdict issues,[45] although an average of just 5.74 such statements appeared in each case.[46] Similarly, almost half of the juries assigned to the "No Discuss" condition discussed the case in spite of the judge's instructions,[47] although their discussions were almost always perfunctory and never included a verdict preference.[48] Moreover, in almost every "No Discuss" case in which jurors discussed the case, they also discussed the rules *against* discussing the case,[49] which may help explain why their discussions remained so cursory. Despite these rule violations, juries in the two conditions did not differ significantly in verdicts or awards.[50]

Both the Hannaford and Diamond studies provide valuable insights into the potential benefits and pitfalls of allowing jurors to engage in predeliberation discussions. The studies created a thorough record of the content and nature of the jurors' discussions, as well as some indica-

cause they both suggest that jurors who engage in predeliberation discussions may have more thorough and comprehensive debates about the evidence and arguments at trial.

40. Professor Diamond has produced several papers and articles based on the research she performed in the Arizona courts. *See, e.g.*, Diamond, *supra* note 21.

41. *Id*. at 17.

42. *Id*. at 18.

43. *Id*. at 26.

44. *Id*. at 28, 51.

45. *Id*. at 51. A "technical" violation of the rule, as described by Professor Diamond, is one in which the speaking juror is not actually expressing a verdict preference, but instead inviting a preference from other jurors. For example, the question "Who would not award the plaintiff anything?" would be a "technical" violation. *Id.*

46. *Id.*

47. *Id.* at 23. In fact, while the Hannaford study, which surveyed jurors, found that jurors in just fourteen percent of trials admitted to discussing the case with one another, analysis of the videotapes produced by the Diamond study found that, in the "No Discuss" conditions, the case was mentioned by jurors at least once in sixty-nine percent of cases and the case was discussed multiple times in fully forty-six percent of cases. *Id.*; *see also* Hannaford, *supra* note 35, at 371 tbl.3.

48. Diamond, *supra* note 21, at 51.

49. *Id*. at 27.

50. *Id*. at 63.

tion of their impact in the courts of Arizona. They therefore provide an excellent starting point for an evaluation of the arguments that courts and commentators often raise about predeliberation discussions. Through the lens of psychology, the normative and empirical claims made both for and against predeliberation discussions can be tested, and the likely impact of discussions can be estimated.[51] Existing research also suggests a number of additional areas that may be less intuitive to lawyers and judges in which discussions may have an impact. This Note therefore attempts to add to the insights of the Arizona studies by evaluating predeliberation discussions in light of the vast bodies of available data, theory, and literature in the fields of legal and cognitive psychology.

III. ANALYSIS

Proponents of predeliberation discussions have an arsenal of arguments in favor of allowing them. In *Jurors: The Power of Twelve*, the published report of the Arizona Supreme Court Committee that recommended the adoption of Rule 39(f), the Committee cites several potential advantages of discussions.[52] It argued that discussions would: (1) increase juror comprehension;[53] (2) allow jurors to share questions and impressions before they are forgotten;[54] (3) provide a mechanism for testing tentative and preliminary judgments;[55] and (4) inhibit the formation of side groups and cliques that may be produced by "fugitive" discussions under the traditional rule.[56] Researchers and scholars have also noted that predeliberation discussion may: (5) encourage active information processing, making jurors more active and invested in the trial process;[57] (6) aid in the selection of a foreperson in deliberations; (7) facilitate group cohesion and reduce conflict among jurors; and (8) reduce deliberation time.[58]

Conversely, opponents argue that—in addition to allowing jurors to discuss the evidence without the aid of the specific laws to be applied or

51. As Professor Diamond points out, empirical assumptions about juries underlie many of the arguments made on either side of the predeliberation discussions debate. For example, both sides' arguments assume that jurors will use opportunities to discuss the case if permitted. *Id*. at 10–13. While the Diamond and Hannaford studies were able to investigate some of these empirical claims, those studies left many of the cognitive and social assumptions unexplored, which is where this Note attempts to fill in the gaps.

52. ARIZ. SUPREME COURT COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF TWELVE (1994) [*hereinafter* JURORS: THE POWER OF TWELVE], *available at* http://www.supreme.state.az.us/jury/Jury/jury.htm.

53. *See infra* Part III.B.2.

54. *See infra* Part III.B.2.

55. *See infra* Part III.A.1.

56. JURORS: THE POWER OF TWELVE, *supra* note 52, at Recommendation 36. This last claim is left for future study.

57. *See infra* Part III.B.2.

58. Diamond, *supra* note 21, at 9–10. The last three claims, which pertain generally to the quality of the jurors' interactions rather than the quality of their performance, are not discussed in this Note.

the court's explanations of how to apply those laws[59]—predeliberation discussions may: (1) encourage premature judgment;[60] (2) amplify the weaknesses of active information processing, such as selective recall;[61] (3) reduce the quality of deliberations as jurors become more familiar with each others' views; (4) erode the role of the adversarial process as jurors debate both sides of issues without all of the evidence; (5) allow non-seated alternate jurors, who are not permitted to participate in deliberations, to influence the jury; (6) open the door to rule violations such as discussing the evidence with only some jurors or with those unconnected with the trial; and (7) allow an aggressive juror to dominate discussion and deliberation.[62]

The arguments on both sides of the debate fall roughly into two categories: (1) concerns about the effect of discussions on jury processes; and (2) concerns about the effect of discussions on the quality of the jurors' interactions with one another. The first category would include arguments about, for example, the risk of premature judgment or the potential to improve juror comprehension. The second category, then, includes arguments such as those about aiding in the selection of a foreperson and inhibiting the formation of cliques. Clearly, thorough discussion of every point raised on both sides of the debate would fill volumes. This Note focuses instead on the impact discussions may have on the jury processes, leaving the social-relational issues raised by the second category of arguments for future discussion.

Therefore, this Section examines several arguments about the effect predeliberation discussions may have on jury processes in light of existing cognitive and legal psychology. First, it considers several of the most common and most frightening arguments used to oppose predeliberation discussions, including fears that discussions may lead to premature judgment, a proplaintiff bias, or uninformed conclusions about the law. Then, it explores some of the areas in which discussions may improve jury performance, by leading to fairer consideration of the evidence, better understanding of the law and facts, and more effective elimination of inadmissible evidence. When all of the claims are evaluated in light of existing psychological principles, it becomes clear that many of the fears about discussions are misplaced. When used properly, discussions can provide real and tangible benefits to jury trials.

59. Winebrenner v. United States, 147 F.2d 322, 328 (8th Cir. 1945); Diamond, *supra* note 21, at 12.

60. *See infra* Part III.A.1.

61. *See infra* Parts III.A.1, III.B.2.

62. Diamond, *supra* note 21, at 12. The last several of these complaints, many of which are not unique to *predeliberation* discussions, are not covered in this Note.

A. The Sky Is Falling: What Could Go Wrong with Predeliberation Discussions

If there were nothing to lose by altering one of the basic assumptions about the modern jury—that silence is necessary to its function—it is hard to imagine that any court would refuse to at least give discussions a try. The main concerns raised by opponents of predeliberation discussions, however, paint a bleak picture of a postdiscussion world. Opponents first argue that juries will be encouraged to make uninformed snap judgments, without giving the evidence the full consideration it deserves. Second, opponents of discussion argue that jurors who discuss the evidence will play into the hands of plaintiffs, who present evidence earlier in the trial, thereby subverting a concept at the very core of our democratic system: the burden of proof.[63] This Section addresses each of those stark concerns in turn: (1) the risk of premature judgment, (2) the concern about the burden of proof, and (3) the argument that juror discussions are uninformed.

1. Discussions Encourage Premature Judgment

The single most common objection to allowing predeliberation discussions, found in *Winebrenner v. United States* and several cases since, is that predeliberation discussions encourage or allow jurors to reach premature conclusions and judgments, thus denying the parties a fair and impartial jury.[64] As the court in *Winebrenner* stated, "By due process of law is meant 'a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.'"[65] Such criticism is at least mildly supported by the Diamond study's finding that jurors who were allowed to engage in predeliberation discussions occasionally made verdict-preference statements before all of the evidence had been presented, while jurors who discussed the trial despite receiving instructions not to do so made no such statements.[66]

Dedicated supporters of the jury system, however, earnestly believe that early verdict preferences do not indicate that the jury is somehow tainted; instead, popular images of juries, such as that presented in the classic movie *12 Angry Men*, paint a picture of a jury that, though predisposed to a verdict, can be persuaded by one "correct" juror.[67] Although scientists and lawyers realize that such a dramatic scenario is rare if it ex-

63. Diamond, *supra* note 21, at 11–12.

64. *Winebrenner*, 147 F.2d at 327–28; *see also, e.g.*, United States v. Resko, 3 F.3d 684, 689–90 (3d Cir. 1993).

65. *Winebrenner*, 147 F.2d at 328.

66. *See supra* notes 44–49 and accompanying text.

67. 12 ANGRY MEN (Orion-Nova 1957).

ists at all,[68] data indicate that jurors generally keep an open mind, even while making tentative and early judgments. For example, nearly fifty percent of jurors "did not make up their minds until final deliberation, and over seventy-five percent reported that they waited at least until after the evidentiary portion of the trial."[69]

Anecdotal evidence from jurors also supports our common belief that the jury's first impressions of a case, though enduring, are not inflexible. For example, one juror in a capital case described the process by which the jury arrived at the guilty verdict as follows:

> Throughout my notes I had written that the murder was an accident [and] that he didn't mean to kill him. I thought that I would be the only hold out. Surprisingly, a number of my fellow jurors also thought it might be an accident. We had taken a vote shortly after beginning deliberation. Over the next two days, the evidence and testimony was reviewed. The court reporter came in and read us testimony from the two witnesses and from the defendant. The defendant's story was not adding up and was not credible.[70]

This account supports the fondest hope of jury supporters: the juror's initial verdict preference, apparently formed early in the trial and reiterated "throughout" the juror's trial notes, was tested and ultimately changed by his fellow jurors. Although perhaps less dramatic than film and television accounts, the juror's change of heart is no less significant. It indicates that, despite forming a verdict preference during trial, the juror remained open to other possibilities.

Therefore, it is unclear that initial verdict preferences are necessarily the herald of a tainted jury that some predeliberation discussions opponents claim. Moreover, although it is clear that jurors often do form verdict preferences before the close of evidence, there is no reason to believe that allowing juror discussions results in any significant increase in the formation of such preferences. For example, in one study of 172 actual trials, fifty-one percent of jurors reported that they began leaning toward a particular verdict before the close of evidence; another thirteen percent began leaning before hearing the judge's instruction on the law.[71] Less than half of jurors reported that they made their final decision during deliberations.[72] Instead, nearly one-fourth made a final decision before closing arguments were given.[73] Importantly, these results held true *regardless* of whether the jurors were permitted to discuss during trial;

68. STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM xiv (1994).

69. Paula L. Hannaford et al., *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627, 638 (2000).

70. Posting of Misanthrope to Toner Mishap, http://tonermishap.blogspot.com (Oct. 26, 2007, 00:23 PST) (removed as of Mar. 12, 2008) (on file with author).

71. Hannaford, *supra* note 69, at 628, 637 fig.1.

72. *Id*. at 640.

73. *Id*.

researchers found no statistically significant difference between jurors who discussed and those who did not.[74] The Diamond study, which also looked at discussion juries and traditional juries, found that, although the traditional juries' discussions never included a verdict preference statement, fifty-five percent of jurors in the discussion condition who expressed a verdict preference during the trial actually *changed their minds* by time the jury took its final vote.[75]

Therefore, the argument that predeliberation discussions lead to the formation of premature opinions and judgments is not persuasive; such opinions form with or without predeliberation discussions, and they are not necessarily indicative of a closed mind. But there remains the concern that discussions may interact in some harmful way with premature judgments. For example, opponents argue that discussions may bias the jury in favor of one party or the other,[76] or that public commitment to an initial verdict preference may make jurors less likely to keep an open mind later.[77]

Some empirical evidence suggests that public expression of a juror's views may indeed lead to less flexibility in that juror's information processing.[78] Studies show that a person who publicly commits to a position is likely to adopt that position privately as well, leading to biased information analysis;[79] that is, jurors internalize publicly asserted positions and may seek out favorable information at the expense of contradictory information.[80] Yet this, too, is not unique to jurors who are permitted to discuss the evidence during trial. Confirmation bias, the psychological phenomenon that prompts individuals to seek out and credit information which supports their beliefs while discounting or ignoring evidence to the contrary, has been well-documented in a variety of situations.[81] Several researchers suggest that jurors, however much they may try to remain unbiased, are not exempt.[82] For example, after reaching a verdict, mock jurors were more likely to "remember" a statement as having been pre-

74. *Id*. at 633 n.47.

75. Diamond, *supra* note 21, at 65.

76. Although concerns about subverting the burden of proof seem to flow naturally from concerns about premature judgments, the former raises distinct psychological issues, and this Note will therefore deal with it independently. *See infra* Part III.A.2.

77. Diamond, *supra* note 21, at 64.

78. *See* Wendy Wood, *Attitude Change: Persuasion and Social Influence*, 51 ANN. REV. PSYCHOL. 539, 542 (2000).

79. *Cf.* Sharon R. Lundgren & Radmila Prislin, *Motivated Cognitive Processing and Attitude Change*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 715, 716–17, 721 (1998).

80. *See id*.

81. *See generally* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998). Confirmation bias may affect other aspects of the legal system as well. For example, one study found that investigators who are asked to name their "prime suspect" early in a criminal investigation may suffer the effects of confirmation bias throughout the remainder of the process. Barbara O'Brien & Phoebe C. Ellsworth, Confirmation Bias in Criminal Investigations 16–17 (Sept. 19, 2006) (unpublished manuscript), *available at* http://ssrn.com/abstract=913357.

82. *See* Nickerson, *supra* note 81, at 177.

sented at trial when the statement was consistent with their chosen verdict; this was true regardless of whether the statement was *actually* presented at trial.[83]

Finally, supporters of predeliberation discussions point out that allowing jurors to discuss the case also provides an opportunity for jurors to monitor one another for improper bias; a juror who appears to be forming a premature conclusion may be reminded of the court's instructions to remain neutral.[84] Studies of the Arizona courts' experience with discussions provide some evidence for this suggestion. Although, as mentioned above, jurors who were permitted to discuss the evidence during the trial still discussed the evidence when some jurors were not present or discussed premature verdict preferences, in violation of Rule 39(f),[85] jurors also frequently reminded each other of the rules pertaining to discussions.[86] Jurors in the "No Discuss" condition, however, also actively monitored themselves—indeed, nearly all of the cases that included an improper discussion of the case among jurors also included a specific reminder about the prohibition against such discussions.[87]

It is clear that premature judgments and early, tentative opinions are as much a part of the American trial as the jury itself. Although there does seem to be some evidence that suggests discussions may encourage such formation, or at least act to cement the expressed preferences of individual jurors, there is also plenty to suggest that discussions would not substantially increase formation. Moreover, allowing discussions of the trial may permit jurors to more effectively police one another, thus reducing the risk and influence of premature judgment.

2. Juror Discussions Undermine the Burden of Proof

Even more frightening to opponents of predeliberation discussions than the specter of premature opinion formation is the idea that, because of the structure of American trials, such an early preference will inherently bias the jury against the defendant, undermining the burden of proof at trial. Specifically, opponents worry that allowing jurors to discuss evidence as it is presented will reinforce the strength of the earliest evidence, and thereby encourage jurors to internally or collectively adopt the story of the case advanced by the party that presents first: the plaintiff.[88] Although this assessment makes sense in an intuitive way, it is im-

83. *Id.* at 194 (citing Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making, in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 192 (R. Hastie, ed., 1993)).

84. *See, e.g.*, JURORS: THE POWER OF TWELVE, *supra* note 52, at Recommendation 48.

85. Diamond, *supra* note 21, at 33.

86. *Id*. at 31–32.

87. *Id*. at 27.

88. *Id*. at 11–12.

portant to evaluate the argument in light of what is known about the way in which jurors actually process the trial.

Attempts to determine the way in which juries deal with evidence and case theories have led many researchers to conclude that jurors use a "story model" of information processing.[89] The story model builds on the general consensus that, rather than acting as some sort of purely passive filing system, putting each item of evidence away until deliberations, jurors constantly seek to make sense of the information they are given.[90] The model further proposes that jurors create one or more plausible narratives, or stories, that best fit the evidence presented.[91] As evidence is presented, each juror compares the evidence to the story or stories she has created.[92] Evidence that is consistent with the juror's current narrative is simply added to the story.[93] Evidence which contradicts or conflicts with the story must either be discounted in some way or the story must be adjusted to account for the evidence.[94] Throughout the trial, jurors constantly evaluate their stories in light of the evidence and their own experiences. Stories that are high in "coverage," the extent to which they account for all or most of the items of evidence presented, as well as "coherence," the extent to which they are complete and make sense in light of the juror's own opinions and views, become the most important stories in the juror's mind.[95]

The story model suggests that, at the end of the case, each juror must weigh the plausible narratives against one another to decide which single story best fits all of the evidence presented.[96] This final determination also takes into account the judge's instructions on the law and considerations such as the presumption of innocence and reasonable doubt.[97] The selected story is compared to the court's instructions on the law and the possible verdict categories provided to the jury, and the verdict category which best describes the selected story becomes the juror's preference.[98]

89. *See, e.g.*, REID HASTIE ET AL., INSIDE THE JURY 22 (1983).
90. *See id.*
91. *Id.*
92. *Id*. at 20.
93. *Id.*
94. *Id*. at 20, 22. Assessments of witness credibility, therefore, should play a major role in how the juror's story progresses.
95. Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189, 190–91 (1992). For a discussion of how the story model of jury decision making may fit into a broader "parallel constraint satisfaction" model, see Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1152–53 (2003).
96. HASTIE ET AL., *supra* note 89, at 22.
97. Pennington & Hastie, *supra* note 95, at 191–92.
98. HASTIE ET AL., *supra* note 89, at 22.

Although researchers have proposed other models to explain the cognitive processes that jurors use to make sense of trial evidence,[99] the story model is the most widely accepted.[100] One of the main reasons for this acceptance is that strong empirical support for the story model has been found in a variety of different mock juror studies. For example, jurors are more confident in their verdicts when the evidence was presented in a way that makes story construction easier; when story construction is more difficult, jurors looking at the same evidence are less confident in their verdicts.[101] This evidence strongly supports the conclusion that jurors rely on stories to evaluate the evidence and come to conclusions. In addition, researchers have shown that jurors remember evidence collectively rather than item-by-item, suggesting that jurors are integrating the evidence as it is presented,[102] as the story model predicts.

In this way, "[t]he stories jurors tell are . . . related to the verdicts they choose, and the causal relations between events referenced by trial evidence are central in the juror's representation of the decision-relevant evidence base."[103] Because the stories created by jurors are formed organically, taking into account each piece of evidence as it is presented, stories early in the trial are likely to reflect the heavy influence of early evidence, which in turn should reflect the plaintiff's version of events (assuming, of course, that the attorney in question has done a good job framing the evidence). Jurors who discuss these early stories may bolster each other's views, thereby lending support to the concern that such discussions will lead jurors to improperly credit the evidence which is presented first.

According to the story model, however, jurors do not construct just one plausible story to account for the evidence.[104] Instead, jurors may construct several plausible models, working through each story both internally as evidence is presented and with other jurors during discussions and deliberations. These multiple stories make it unlikely that jurors will decide on the same single story very early in the trial. Moreover, outside of television crime dramas, the evidence presented by the plaintiff rarely benefits that party uniformly. Witnesses may be cross-examined by the defense, exposing weaknesses in credibility and flaws in the evidence. Additionally, concerns about the proplaintiff bias rest on the presumption that every juror will react the same way to the evidence, which simply is not the case. Jurors come to the jury box from all walks of life and with all types of experiences, and therefore they approach evidence in

99. *See* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 624 (2001).

100. *Id.*

101. Pennington & Hastie, *supra* note 95, at 202.

102. *Id*.

103. HASTIE ET AL., *supra* note 89, at 23.

104. Pennington & Hastie, *supra* note 95, at 189–92.

different ways.[105] Different interpretations of the evidence mean that jurors will construct different stories; their discussions are therefore as likely to challenge each other as they are to bolster each other.

Finally, the empirical evidence does not support the fear that jurors will fall victim to a first-party-to-present bias. Recall that the Diamond study found no difference in verdicts or awards between cases where predeliberation discussions were allowed and cases where they were not allowed,[106] suggesting that discussing jurors were no more likely to be proplaintiff than traditional jurors. Additionally, in cases where the juries were permitted to discuss, fully fifty-nine percent of juror statements that (improperly) expressed a verdict preference before deliberations actually favored the *defense*;[107] on the issue of liability alone, jurors' preferences favored the defendant sixty-six percent of the time.[108] Rather than blindly internalizing the plaintiff's story, these results suggest that discussing jurors view the plaintiff's case with a healthy dose of skepticism.

3. Juror Discussions Are Uninformed

Although there may be no greater risk of bias or premature judgment among jurors who discuss the evidence during trial, opponents of juror discussions point out that jurors are uninformed about the particular issues of law that they will be asked to determine.[109] This is one criticism which supporters of discussions simply cannot counter; instructions on the law are almost uniformly given only at the close of evidence. Additionally, many of the potential benefits of jury discussions, such as increasing juror understanding, may be frustrated by jurors who are unfamiliar with the requirements of the law; discussions may focus on issues of fact that are ultimately not relevant to the legal determination. The Diamond study illustrated how jurors who do not receive instructions on the law in advance may nonetheless discuss the applicable law, as in this excerpt in which jurors wonder about the admissibility of evidence relating to the defendant's liability insurance[110] (jurors in this jurisdiction are allowed to submit questions for the witnesses):

105. In addition to the intuitive appeal of the claim that different people often interpret the same evidence differently, one need look no farther than any mock jury study to find empirical evidence that mock jurors, even when presented with the exact same evidence under the exact same conditions, seldom react uniformly. For an example of this, see Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. EXPERIMENTAL PSYCHOL. 91, 95–96 (2001) (presenting mean distortion for jurors in each condition because jurors' reactions were not uniform).

106. Diamond, *supra* note 21, at 63.

107. *Id.* at 52 tbl.6.1.

108. *Id.* at 52.

109. *Id.* at 12.

110. Evidence of the defendant's liability insurance (or lack thereof) is, of course, generally inadmissible in most jurisdictions. *See, e.g.*, FED. R. EVID. 411.

> JUROR 2: [T]hat's the part I wish I knew something about. That's the kind of thing you just can't ask about. I dunno if we can ask if he has liability insurance.
>
> JUROR 4: I am sure once everything is cut and dried, we can ask. Because that's gotta pertain to our decision.
>
> JUROR 2: It should. It should be our responsibility.
>
> JUROR 4: Well, if we rule in favor of the defendant and all and she [plaintiff] has had some assistance, I don't think we oughta give her too much more assistance than where if she had none she would need more.
>
> JUROR 2: I don't know if that is real pertinent. It is, but really?
>
> JUROR 6: In their eyes.
>
> JUROR 2: The thing is, if we come to a settlement in all of this, it's our decision. So, we need to know this stuff.[111]

Even where the issues of law may be comparatively simple or generally familiar, the instructions given by the court at the close of evidence play a vitally important role. In one study of mock criminal jurors, researchers found that the particular way in which "reasonable doubt" was explained to the jury had a direct impact on the percentage of juries that found the (mock) defendant guilty.[112] Each version of the reasonable doubt instruction was based on examples found in American case law,[113] which further underscores the extent to which the court's instructions may affect the jury. Therefore, the danger of allowing jurors to effectively begin deliberations, through predeliberation discussion, before they have been properly instructed by the court is not trivial.

Proponents of jury reform, however, often argue that juries should be provided with instructions on the law at the beginning of trial.[114] Indeed, pre-instructing juries on the law would help give juries direction and focus in their discussions, amplifying the benefits of such discussions. The court's instructions provide the jury with a framework into which the evidence and arguments can be placed, and giving those instructions at the beginning of the trial allows the jury to begin with such a framework; psychologically, this may aid in many of the necessary cognitive tasks that jurors must undertake, including the creation of stories as predicted by the story model.[115] Moreover, studies of pre-instruction indicate that

111. Diamond, *supra* note 21, at 29.

112. Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standard and Jury Verdicts*, 21 LAW & HUM. BEHAV. 655, 666 (1996).

113. *Id*. at 658–61.

114. For example, pre-instruction was among the list of jury reforms that the Arizona Supreme Court Committee suggested along with predeliberation discussions. *See* JURORS: THE POWER OF TWELVE, *supra* note 52.

115. *See supra* Part III.A.2.

giving instructions before trial helps all jurors understand the evidence.[116] For example, several studies have demonstrated that juries who are given their instructions before trial are better able to differentiate among multiple plaintiffs in a complex suit than those who receive instructions only at the end of the case.[117] Pre-instructed jurors also remember trial facts more accurately and do a better job recognizing statements that had *not* been presented at trial.[118] By giving jurors a preview of the issues they will be asked to decide and the legal framework in which they will have to decide them, pre-instructing the jurors could therefore help to allay the fears that uninformed jurors who discuss the evidence will misinterpret and mangle the evidence and law.[119]

B. Everything's Coming Up Roses: The Problems Discussions May Solve

Clearly, the American jury system, as it exists today, is imperfect. Juries constantly fail to reach the perceived "correct" result.[120] While critics of predeliberation discussions are right to assert that discussions will not fix every imperfection, there are some areas in which discussions may actually help to alleviate some of the current problems. Notably, discussions may help: (1) ensure that jurors give full and fair consideration to all of the evidence presented, (2) improve juror comprehension of

116. *See, e.g.*, Lynne ForsterLee & Irwin Horowitz, *Enhancing Juror Competence in a Complex Trial*, 11 APPLIED COGNITIVE PSYCHOL. 305, 317 (1997); Lynne ForsterLee et al., *Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality*, 78 J. APPLIED PSYCHOL. 14, 18 (1993).

117. ForsterLee & Horowitz, *supra* note 116, at 317; ForsterLee et al., *supra* note 116, at 19.

118. ForsterLee et al., *supra* note 116, at 18.

119. Some researchers have raised concerns that pre-instruction may create a proplaintiff bias. Although there is little direct evidence of such an effect, the theory is that when jurors are instructed before a trial as to the elements that a plaintiff must prove, they create a mental "checklist" of those items and check them off as the plaintiff presents evidence. If the plaintiff "checks off" each of the items, jurors may decide that the plaintiff has won before the defendant even begins to present evidence in rebuttal. Moreover, such a checklist may create a kind of confirmation bias, causing jurors to seek out evidence that supports the plaintiff's case. *See* ForsterLee & Horowitz, *supra* note 116, at 306. At least in criminal trials, however, the effect seems to work in the *opposite* direction: criminal jurors who are instructed on reasonable doubt before trial are actually *less* likely to convict. *See* Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 J. PERSONALITY & SOC. PSYCHOL. 1877, 1881 (1979). Of course, the analogy from criminal to civil trials is somewhat limited given that the prosecution's burden of proof in a criminal case is much higher than the plaintiff's burden in a civil case.

120. The trials of O.J. Simpson and Michael Jackson, who were both acquitted, are prime examples. For a relatively mild criticism of the verdict in the Rodney King case, as another example, see Morton I. Greenberg, Letter to the Editor, *King Verdict Shows Uncertainty of Jury Trials*, N.Y. TIMES, May 15, 1992, at A28. For a general overview of how concerns about the jury have led to changes in the role of the jury in the area of assessing punitive damages, see Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411 (2002). O.J. Simpson himself, speaking to reporters after a pretrial hearing in which a Justice of the Peace ruled that Simpson could be tried for kidnapping, armed robbery and other charges in November 2007, said this about juries: "If I have any disappointment it's that I wish a jury was here. As always, I rely on the jury system." *Simpson Ordered to Face Trial in Alleged Vegas Heist: Simpson Charged with Kidnapping, Armed Robbery, Other Crimes*, MSNBC, Nov. 14, 2007, http://www.msnbc.msn.com/id/21788130/.

evidence and instructions on the law, and (3) increase the efficacy of limiting instructions and instructions to disregard the evidence.

1. Discussions Improve the Extent to Which Jurors Consider the Evidence

Regardless of whether the jurors' decision-making processes, as described by the story model, are easily swayed by early discussions, allowing jury discussions may change or interfere with the way in which jurors remember evidence and arguments at trial. Psychologists studying memory have observed a "serial position effect" when information is presented one item at a time, as is the case when advocates are presenting evidence to a jury.[121] The serial position effect manifests in two somewhat familiar ways: primacy and recency. Primacy refers to the tendency of items that appear at the beginning of a list, or early in a presentation, to be remembered better than items in the middle of the list or presentation.[122] Recency, on the other hand, refers to the complementary tendency of items that appear last, or nearest to the time when recall is tested, to be remembered better than those in the middle of the list.[123] While recency has historically been explained as a function of short-term memory strength,[124] primacy is often explained as a function of the participant's ability to rehearse the information presented.[125] Intuitively, this explanation makes sense: the first item in the list may be rehearsed, or considered by the participant or juror, by itself; the second item may be rehearsed or considered alongside only the first item; the third item, however, must be considered along with the first and second; and so on. Therefore, the items that come early in the presentation are best remembered, because the listener can consider them in isolation or near-isolation; the addition of later items or pieces of evidence creates more opportunity for confusion and less opportunity to learn the information in relative isolation.

Although the concepts are based largely on research in which participants were asked to memorize lists of words or related ideas, both primacy and recency have been demonstrated in juries as well.[126] While interfering with the traditional or "normal" way in which jurors process

121. MALCOLM HARDY & STEVE HEYES, BEGINNING PSYCHOLOGY 63 (5th ed. 1999).

122. DANIEL J. O'KEEFE, PERSUASION: THEORY AND RESEARCH 253 (2d ed. 2002).

123. *Id.*

124. Tim Shallice & Giuseppe Vallar, *The Impairment of Auditory-Verbal Short-Term Storage*, *in* NEUROPSYCHOLOGICAL IMPAIRMENTS OF SHORT-TERM MEMORY 11, 35 (Giuseppe Vallar & Tim Shallice eds., 1990).

125. *E.g.*, Geoff Ward & Lydia Tan, *The Effect of Length of To-Be-Remembered Lists and Intervening Lists on Free Recall: A Reexamination Using Overt Rehearsal*, 30 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 1196, 1196 (2004).

126. *See* Jose H. Kerstholt & Janet L. Jackson, *Judicial Decision Making: Order of Evidence Presentation and Availability of Background Information*, 12 APPLIED COGNITIVE PSYCHOL. 445, 451–52 (1998).

and remember evidence may initially seem dangerous, there is a strong argument that, at least in the context of the serial position effect, such interference may actually make jury verdicts more fair. The application of primacy and recency effects to jury deliberations means that, after the jury has been presented with a series of evidence and arguments, they do not remember and weigh each item equally. Instead, the serial position effect causes evidence presented very early and very late in the trial to be remembered best.[127]

Predeliberation discussions, however, increase the amount of time and energy jurors spend on information *throughout* the trial. Such discussions, like rehearsing the items in a list, may actually increase the extent to which evidence in the middle of the trial is remembered. If that is the case, then deliberations are likely to be fairer by including a more thorough consideration of more pieces of evidence. This conclusion is further supported by research demonstrating that the primacy effect is reduced when participants know they will be held personally accountable for the judgment they render based on the information presented serially.[128] Jurors who expect to discuss each item of evidence, rather than simply expressing their overall views at the end, may experience a similar reduction in the primacy effect, indicating more equal consideration of all of the evidence. Moreover, the Hannaford study, which surveyed jurors in both discussing and traditional juries, found a more pronounced recency effect in traditional juries than in their discussing counterparts.[129] This, too, indicates that discussions may help jurors recall information from throughout the trial, making the consideration of evidence more complete and, therefore, more fair.

2. Discussions Help Jurors Understand and Remember Key Trial Facts

Proponents also argue that prohibiting predeliberation discussions creates unnecessary confusion and error in jury deliberations. And indeed, empirical research suggests that this may be accurate: it is eminently clear that juries, particularly in complex cases, struggle to sort out the many facets of civil trials. Jurors misinterpret jury instructions,[130] mistakenly recall evidence,[131] fail to distinguish among multiple plaintiffs,[132] misuse character evidence,[133] ignore legal directions about excluded evi-

127. *Id*.

128. Donna M. Webster et al., *On Leaping to Conclusions When Feeling Tired: Mental Fatigue Effects on Impressional Primacy*, 32 J. EXPERIMENTAL & SOC. PSCHOL. 181, 190 (1996).

129. Hannaford, *supra* note 35, at 370.

130. *See* James Frank & Brandon K. Applegate, *Assessing Juror Understanding of Capital-Sentencing Instructions*, 44 CRIME & DELINQ. 412, 423 (1998).

131. *See* Mary E. Pritchard & Janice M. Keenan, *Does Jury Deliberation Really Improve Jurors' Memories?*, 16 APPLIED COGNITIVE PSYCHOL. 589, 600 (2002).

132. ForsterLee et al., *supra* note 116, at 19.

133. *See* Jennifer S. Hunt & Thomas Lee Budesheim, *How Jurors Use and Misuse Character Evidence*, 89 J. APPLIED PSYCHOL. 347, 358 (2004).

dence,[134] and misunderstand key facts.[135] For example, after a 1978 trial in which IBM had been accused of monopolizing various computer markets, the jurors reported to the judge that they were unable to assemble the five months of technical and complicated evidence to reach a verdict:

> Before allowing a mistrial, Judge Samuel Conti called the jurors into his chambers to find out how much they had understood about the case. "Mr. Vasilev, what is software?" the judge asked when the jurors were gathered around him.
>
> "That's the paper software," the juror responded.
>
> The judge continued: "Do you know what an interface is?" He was referring to the connection between a computer and an auxiliary piece of equipment, a concept that had been discussed at length during the trial.
>
> Vasilev answered: "Well, if you take a blivet, turn it off one thing and drop it down, it's an interface change, right?"[136]

Proponents of predeliberation discussions argue that some of these problems may be alleviated by allowing jurors to discuss throughout the trial, rather than requiring jurors to wait until the trial has been completed.[137]

One way in which psychologists often recommend that instructors and teachers improve student understanding is by encouraging active information processing.[138] They argue that an audience that participates more in the presentation of information becomes more interested and more invested in the presentation, and therefore they understand and retain more information.[139] Indeed, empirical evidence appears to support the claim that participation leads to a better understanding of the issues raised.[140] Supporters of predeliberation discussions therefore point to discussion as a way that the courts may encourage active information processing in jurors. Discussions, it is argued, will allow jurors to engage the evidence and information presented at trial as it is presented, which may lead jurors to a better understanding of the evidence and arguments presented by the parties.[141]

Importantly, the Diamond study[142] demonstrated that discussions were useful to jurors' understanding and recall of the facts, particularly in

134. Dae Ho Lee et al., *The Effects of Judicial Admonitions on Hearsay Evidence*, 28 INT'L J.L. & PSYCHIATRY 589, 598–99 (2005).

135. *See* ADLER, *supra* note 68, at 119–20.

136. *Id*. at 119.

137. *E.g.*, Diamond, *supra* note 21, at 10.

138. Claire E. Weinstein & Vicki L. Underwood, *Learning Strategies: The How of Learning*, *in* 1 THINKING AND LEARNING SKILLS 241, 243 (Judith W. Segal et al. eds. 1985).

139. *E.g.*, Diamond, *supra* note 21, at 10.

140. *See* Weinstein & Underwood, *supra* note 138, at 243. Educational psychologists have long relied on interactive and participatory tasks to increase understanding and comprehension. *See, e.g.*, Ellen R. Hart & Deborah L. Speece, *Reciprocal Teaching Goes to College: Effects for Postsecondary Students at Risk for Academic Failure*, 90 J. EDUC. PSYCHOL. 670, 670–72 (1998).

141. *E.g.*, Natasha K. Lakamp, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?*, 45 UCLA L. REV. 845, 861 (1998).

142. Diamond, *supra* note 21, at 47–48.

complex cases, where discussions may be most likely to occur.[143] For example, in one of the complex cases reviewed by the Diamond study, jurors who were allowed to discuss evidence asked each other questions about the facts of the case ninety-five times.[144] Twice jurors did not answer the questions, and in four instances the answer jurors gave were either ambiguous or could not be verified by the researchers based on the trial transcript.[145] In the remaining eighty-nine instances (or ninety-four percent), however, the jurors decided on the "correct" answer, the one that was supported by the trial transcript.[146] In another trial, which involved complex testimony and contradictory experts, jurors made thirty factual inquiries.[147] Of those, all but two instances (or ninety-three percent) resulted in jurors reaching the correct answer; the remaining two were inconclusive.[148] One exchange from that trial shows how the jurors used discussions both to clarify facts for one another and to attempt to parse out the implications of those facts:

> JUROR 8: I'm saying the letter wasn't signed until the [twelfth]. How could they notify him or fax him until after they knew it?
>
> JUROR 2: What would they have said to him on the phone? I would think. . .
>
> JUROR 6: [interrupting] They said working days, so I'm wondering if it was a Tuesday or a Wednesday.
>
> JUROR 3: Well, I remember when [Witness X] was testifying, they asked her if she remembered what day it was, and she said it was a Thursday, so that means there must have been a weekend in there, too.
>
> JUROR 3: Well, that must be why the letter didn't get signed. That seems so confusing.
>
> JUROR 6: [referring to her notes] It was during the week, so there were five days. . .
>
> JUROR 8: Well the other calls were on a Friday, so that is more than five days they had to read it.
>
> JUROR 1: But they didn't use the mail; they faxed it.
>
> SEVERAL JURORS: The letter was faxed but the contract was returned on Monday.
>
> JUROR 5: They faxed the letter but the contract was returned on Monday. That was a reasonable amount of time.
>
> JUROR 9: The critical time is how long after the letter was received. That's the critical information.[149]

143. *Id*. at 45; *see also* Hannaford, *supra* note 35, at 368–69.
144. Diamond, *supra* note 21, at 45.
145. *Id*.
146. *Id.*
147. *Id.* at 46.
148. *Id.*
149. *Id.* (brackets in original).

As in the other instances in this trial in which jurors asked one another questions, the factual details that the jurors in this excerpt settled on were correct.[150] These results suggest that supporters of discussions are right to argue that allowing jurors to discuss the evidence improves juror comprehension by permitting jurors to clarify confusing material immediately or nearly immediately.

Despite the encouraging evidence that participatory jurors are, in fact, better jurors, opponents of predeliberation discussions point out that active information processing is not a universally good thing.[151] For example, active information processing opens the door for cognitive distortions, including confirmation bias.[152] Further, without active information processing, it would not be possible for a juror to reach a premature judgment; purely passive information processing would lead a juror to simply take in the evidence as it is presented, then switch into a critical thinking and processing mode only when instructed to by the court, just before deliberations. This model would allow no opportunities for premature judgments.

Yet, to require such passive collection of evidence of jurors would obviously be unreasonable and unrealistic. It is clear from the research that some degree of active information processing takes place even in the most constrained of courtrooms.[153] For example, active information processing is an important assumption underlying the story model of juror comprehension, which has been empirically supported.[154] Moreover, such passive acceptance of evidence would eliminate opportunities to rehearse information and would therefore amplify the already-prevalent primacy and recency effects,[155] resulting in more uneven recall and weighting of evidence.

C. Discussions Help Jurors Follow Instructions

Although American jurisdictions have constructed elaborate schemes of rules to define what a jury should and should not hear,[156] inadmissible evidence inevitably slips into trials anyway.[157] Rather than

150. *Id.*

151. *Id.* at 12.

152. *See* discussion *supra* Part III.

153. *See, e.g.*, Nickerson, *supra* note 81. A finding that the juror is biased relies on the juror's application of that bias to the presented evidence, and therefore confirmation bias is a tell-tale sign that the decision-maker, in this case the juror, is actively engaging with information as it is presented, even if the juror is unaware of the activity.

154. *See, e.g.*, Pennington & Hastie, *supra* note 95, at 202–03.

155. *See* discussion *supra* Part III.B.1.

156. For example, the Federal Rules of Evidence prohibit the introduction of certain types of hearsay and character evidence, as well as most evidence of liability insurance, offers to settle, or plea discussions. FED. R. EVID. 802, 404, 411, 408, 410.

157. *See, e.g.*, Vasquez v. Rocco, 836 A.2d 1158, 1163–67 (Conn. 2003) (discussing the admission of defendant's liability insurance at trial); Unmack v. Deaconess Med. Ctr., 967 P.2d 783, 785–86 (Mont. 1998) (holding that admission of character evidence was not harmless error).

confront such inadmissible evidence head on, for example by ordering a mistrial, courts choose instead to rely on the "fiction" of limiting instructions,[158] instructing the jurors to disregard the inadmissible evidence and lend no credence to it during deliberations.[159] Ample evidence suggests, however, that such instructions are at best ineffective; at worst, limiting instructions may actually *increase* the impact that inadmissible evidence has on the jury.[160]

One early study of jurors' abilities to disregard inadmissible evidence presented mock jurors with a transcript of a criminal trial.[161] In the control condition, the prosecution presented only weak circumstantial evidence and no mock jurors voted to convict.[162] When the prosecution also presented a wiretap in which the defendant made incriminating statements, twenty-six percent of mock jurors voted to convict, even though defense counsel argued that the wiretap was illegal.[163] But when the same evidence was presented and the same arguments were made that the wiretap was illegal, jurors voted to convict thirty-five percent of the time if the court ruled that the evidence was inadmissible and instructed the jury to disregard.[164] These results indicate that the jury instruction not only failed to reduce the extent to which jurors considered the inadmissible evidence, but it may actually have led to more weight being given to the illegally obtained wiretap.

Although there is no consensus, several theories have been proposed to explain this result. Example explanations include: jurors may not be persuaded by legal directives to disregard when they independently believe the evidence is reliable;[165] jurors may experience a psychological phenomenon known as "reactance," where people who perceive their liberty has been restricted actively resist the limitation attempt;[166] or ju-

158. Dannye R. Holley, *Judicial Anarchy: The Admission of Convictions to Impeach: State Supreme Courts' Interpretive Standards, 1990–2004*, 2007 MICH. ST. L. REV. 307, 341–42; Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1451–52 (2007).

159. For an example of such a limiting instruction, see ILL. PATTERN JURY INSTRUCTIONS: CIVIL § 2.02 (2006). Proper limiting instructions are often held by reviewing courts to be sufficiently curative for otherwise reversible errors. *See, e.g.*, State v. Lemay, 938 A.2d 611, 617 (Conn. App. Ct. 2008); Reay v. State, 176 P.3d 647, 653 (Wyo. 2008). In fact, some courts have held that no error exists where the defendant *could have* asked for a limiting instruction. *See, e.g.* State v. Giddens, 922 A.2d 650, 656 (N.H. 2007) ("We presume that, had the defendant requested a limiting instruction, and had the trial court given it, the jury would have followed it.").

160. *See* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 689–91 (2000).

161. S. Sue et al., *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOL. 345, 346–48 (1973).

162. *Id.* at 348–50.

163. *Id.* at 350.

164. *Id.*

165. *See, e.g.*, Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1047 (1997).

166. Lieberman & Arndt, *supra* note 160, at 693–94.

rors may credit inadmissible evidence, particularly the fruits of illegal searches, because they have the benefit of hindsight and the knowledge that the search led to relevant (if inadmissible) evidence.[167]

Despite the bleak picture that these results paint of how inadmissible evidence is really processed by juries, researchers have demonstrated that jury deliberations moderate the effects of inadmissible evidence.[168] For example, in one experiment designed by psychology researchers Kamala London and Narina Nunez to measure the effects of deliberation on inadmissible evidence, sixty percent of mock jurors indicated they would vote to convict the defendant based on a trial that included incriminating evidence that the jurors were instructed to disregard.[169] When the same jurors were allowed to deliberate, however, only twenty-eight percent of the resulting mock juries returned guilty verdicts.[170] In the control condition, in which the jury was not presented with the inadmissible evidence, jurors before and after deliberations voted for conviction thirty-three percent and seventeen percent of the time, respectively.[171] Therefore, London and Nunez concluded, deliberations reduced the effect that the inadmissible evidence had on the jury.[172]

The dramatic effect that deliberations have on the weighing of inadmissible evidence makes sense, both intuitively and in the context of legal psychology. Intuitively, it is clear that it is more difficult for jurors to use inadmissible evidence in their decision making when that decision making takes place publicly, as part of a deliberating jury. When jurors must justify their verdict choice to other jurors, who have been similarly instructed to disregard the inadmissible evidence, any obvious influence of the inadmissible evidence will be pointed out by the other jurors. Researchers have also pointed out that the effect of deliberations fits into the story model of juror decision making.[173] When jurors are presented with relevant evidence, even if it is inadmissible and the jurors are instructed to disregard it, they may adjust their stories subtly or even disregard some stories altogether[174]—jurors' stories are, after all, attempts to evaluate the basic "truth" of the situation, not necessarily attempts to evaluate the legal presentations. Deliberations provide an opportunity for the jurors to revisit those discarded stories as they are presented by other jurors and in the light of all of the evidence and all of the law. Therefore, it is not surprising that deliberations are able to accomplish

167. *Id.* at 692–93.

168. Kamala London & Narina Nunez, *The Effect of Jury Deliberations on Jurors' Propensity to Disregard Inadmissible Evidence*, 85 J. APPLIED PSYCHOL. 932, 937 (2000).

169. *Id*. at 934 tbl.1.

170. *Id.*

171. *Id.*

172. *Id.* at 937.

173. *Id.*

174. *Id.*

what limiting instructions alone could not: moderation of the effects of the inadmissible evidence.

Under a traditional jury model, however, jurors must wait until the end of the trial to begin considering the stories that their peers have developed, and therefore the moderating effects of discussing the evidence must also wait. This delay opens the door to biased information processing, including confirmation bias, and the effects of that bias cannot be fully undone with limiting instructions or even deliberation. This is evident from the London and Nunez study, in which the juries that had been "tainted" by the inadmissible evidence voted to convict the defendant in twenty-eight percent of the cases, as compared to a seventeen percent conviction rate by untainted juries, even after both groups were allowed to deliberate.[175] Predeliberation discussions, however, may be able to increase the impact of limiting instructions by fostering *throughout* the trial the same moderating effects that deliberations generate *after* the trial. When jurors are allowed to discuss their ongoing reactions to the trial, they will be faced with alternate stories from the beginning and thus will be less likely to adopt the cognitive biases that may interfere with their ability to impartially interpret subsequent evidence. Similarly, jurors who may be considering inadmissible evidence can be reminded by other jurors of the court's admonition to disregard the evidence.[176] Discussions, therefore, should amplify the effect of limiting instructions and reduce the actual prejudice created by the introduction of inadmissible evidence.

IV. RESOLUTION

The jury is the heart of the American trial, revered at least since the days of Alexis de Tocqueville as an expression of democracy as iconic as universal suffrage.[177] At the same time, however, the specter of twelve lay persons, untrained in the law and privy only to selected facts, taking total control of the courtroom, still makes many in the legal community uneasy.[178] With so much at stake, it is hardly surprising that predeliberation discussions raise such vehement arguments on both sides; in many ways, allowing jurors to discuss evidence as it is presented could fundamentally alter how cases are tried and decided. Yet, psychological theory and literature suggest not only that predeliberation discussions are unlikely to have the devastating effects some courts have predicted,[179]

175. *Id.* at 934 tbl.1.

176. As discussed above, the argument that jurors can better monitor themselves and one another when they are permitted to discuss the evidence is also often used to respond to claims that predeliberation discussions may encourage the formation of premature judgment. *See*, *e.g.*, JURORS: THE POWER OF TWELVE, *supra* note 52.

177. DE TOCQUEVILLE, *supra* note 1, at 225.

178. *See* Winebrenner v. United States, 147 F.2d 322, 327–28 (8th Cir. 1945).

179. *E.g.*, *id.*

but also that changing the way juries consider evidence by allowing them to discuss can actually make that consideration fairer and more complete.

Ultimately, most arguments against allowing jurors to engage in predeliberation discussions are unfounded. The most persuasive allegation, that jurors who discuss the case without the benefit of the court's instructions on the law are likely to misconstrue evidence,[180] carries some weight, but this problem is easily remedied. Discussions should be permitted, but jurors who discuss the evidence must also be instructed on the law before the trial and the discussions begin. Pre-instruction not only gives jurors a framework within which to consider and analyze evidence, but it also ensures that discussing jurors are operating within the law applicable to the case. The benefits of pre-instruction have been demonstrated even in traditional juries, improving juror comprehension and memory,[181] and employing pre-instruction in discussing juries promises to have the additional benefit of calming parties' and judges' fears about runaway discussions.

Proper pre-instruction would take advantage of the available psychological knowledge on how to maximize the effectiveness of such instructions. Although the court should have the discretion to craft instructions in a way that is both comfortable for the court and appropriate to the case, ideal pre-instructions should mirror the court's end-of-trial charge to the jury as closely as practical given that no evidence will have been presented. Such instructions would include general "nonsubstantive" instructions, such as a reminder that corporations are "persons" under the law, as well as specific instructions that may be applicable to the case, such as the plaintiff's burden of proof.[182] By giving the jury the most information possible, courts can ensure that jury discussions are as productive and accurate as possible.[183] Not only will the instructions help prevent misguided jurors from misinterpreting evidence, they can actually improve the effectiveness of the discussions themselves, allowing jurors to focus on the facts that are most relevant under the law. There-

180. *See supra* Part III.A.3.

181. ForsterLee & Horowitz, *supra* note 116, at 317.

182. *Id.* at 310.

183. Legal and cognitive psychologists have proposed and empirically tested several other methods for maximizing the efficacy of jury instructions that might be incorporated into the court's pre-instructions to jurors. For example, several experiments have demonstrated that jurors are better able to apply limiting instructions and rules when such directions are explained. *See* Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 545 (1992); Duane T. Wegener et al., *Flexible Corrections of Juror Judgments: Implications for Jury Instructions*, 6 PSYCHOL. PUB. POL'Y & L. 629, 646 (2000); Roselle L. Wissler et al., *The Impact of Jury Instructions on the Fusion of Liability and Compensatory Damages*, 25 LAW & HUM. BEHAV. 125, 134–35 (2001). Therefore, pre-instructions to juries might be more effective if the court explains not only the law, but also, for example, the reasons that jurors should only discuss the case when all jurors are present (e.g., so that everyone can learn from the discussions).

fore, the concern that juror discussions are uninformed, however accurate, is easily cured through pre-instruction.

Other arguments against allowing discussions also fall short. The threat of premature judgment is no more prevalent in juries who are permitted to discuss the evidence as it is presented than it is in traditional juries.[184] Although the extent to which discussions may interact with the tendency to judge evidence prematurely remains unclear, discussions present unique opportunities for jurors to police one another and monitor themselves for the influence of inappropriate bias. Thus, even if, as in traditional juries, premature judgments begin creeping in as evidence is presented, jurors who are allowed to discuss their reactions can be more aware of the influence of such pre-judgments and actively seek to avoid passing judgment before the evidence is complete. Moreover, implementing a jury system that also directs the court to instruct the jury at the beginning of the trial means that jurors will be aware of relevant legal concepts such as the burden of proof throughout their discussions; this knowledge may further remind them to withhold their judgment until all of the evidence has been presented.

Similarly, the argument that jurors who are allowed to discuss will internalize the plaintiffs' versions of the story does not hold up to the scrutiny of established juror psychology. The story model of juror decision making, supported by ample empirical data,[185] supports the view that jurors are capable of processing information as it is presented and continuing to adjust their analysis in light of all of the evidence. In addition, as with the risk of premature judgment, any risk of proplaintiff bias that does exist may be alleviated in part by the self-monitoring qualities of the discussions themselves. Therefore, although encouraging jurors to prejudge the evidence or subverting the burden of proof at trial are certainly both bleak potential consequences, the empirical evidence simply does not support the argument that predeliberation discussions will cause them.[186]

Beyond simply not causing many of the calamitous problems courts have feared, predeliberation discussions may actually improve jury trials in many ways. Discussing the evidence as it is presented may help stimulate more thorough consideration of the case by countering the effects of primacy and recency. Discussions also help encourage more active engagement with the evidence and arguments presented at trial—and active information processing, aided by predeliberation discussions, promotes better understanding and retention.[187] Moreover, discussions can amplify the effects of limiting instructions and instructions to disregard evidence, ensuring that inadmissible evidence has as little impact on the jury as

184. Hannaford, *supra* note 69, at 637.
185. *E.g.*, Pennington & Hastie, *supra* note 95, at 202–03.
186. *See supra* Part III.A.
187. *See* Weinstein & Underwood, *supra* note 138, at 243.

possible. Indeed, jury discussions, aided by pre-instructions, may succeed in improving the quality of jury decision making in fundamental ways, to say nothing of the extent to which allowing jurors to talk may make jury service more pleasant for jurors.[188]

V. CONCLUSION

Despite courts' historical circumspection when it comes to jury discussions, the "Arizona innovation" has led some scholars to question the conventional wisdom.[189] Legal and cognitive psychologists have established a rich background with which to evaluate the empirical validity of arguments on both sides of the discussions debate, and the results are overwhelmingly positive for predeliberation discussions. Although some restrictions on jurors, such as the prohibition on discussing the evidence with those outside the jury, must remain fixed to ensure the integrity of the jury, predeliberation discussions, such as those permitted by Rule 39(f), may actually improve jury trials. In fact, when combined with pretrial instructions to the jury on the law, predeliberation discussions can increase juror comprehension and consideration of the evidence. They can also provide a mechanism by which jurors can monitor their own biases and guard against premature judgment, helping to preserve one of the American legal system's most valued institutions.

188. *See, e.g.*, Patricia Lee Refo, *A Roadmap for Trials: The Ethical Treatment of Jurors*, 36 STETSON L. REV. 821, 828–29 (2007). It is generally assumed, and has been demonstrated, that jurors would prefer to be allowed to discuss the case. *See* Hannaford, *supra* note 35, at 376. Moreover, the jurors' desire to discuss the case may be manifesting in other, less desirable, ways when jurors are not permitted to discuss, such as in discussions about the case with friends and family not related to the case. This suggestion is supported by the fact that jurors who are permitted to discuss report fewer such outside discussions than those who were forbidden from discussing the case with one another. *Id*.

189. *See, e.g.*, Lakamp, *supra* note 141, at 861.