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ESSAY

JURY REFORM: THE IMPOSSIBLE DREAM?

*Nancy S. Marder**

I. Introduction

In his essay, *Asking Jurors To Do the Impossible*,¹ Peter Tiersma identifies several ways in which jurors have difficult, if not impossible, roles to play and suggests several steps that courts could take to aid jurors in performing these roles. He offers a number of recommendations, such as having judges instruct jurors in plain and specific language, allowing jurors to ask questions about the instructions, and explaining to jurors the reasons for certain rules.² His recommendations are sensible, and courts would do well to follow his advice. With the exception of his call for the creation of expert juries in technical cases,³ I agree with his recommendations, though I think there are good reasons to go even further than Tiersma does with several of the reforms he proposes.

Although Tiersma's recommendations provide a useful starting-point for courts, courts should engage in those jury reforms that foster any of the following three basic principles: (1) courts should be honest with jurors; (2) courts should give jurors the tools that they need to be

* Professor of Law, Chicago-Kent College of Law. I want to thank the *Tennessee Journal of Law & Policy* for inviting me to participate in "The 2009 Summers-Wyatt Symposium: Asking Jurors To Do the Impossible." I also want to thank Jeremy Eden for his comments on an early draft of this essay and Lucy Moss for her library assistance.

¹ Peter Tiersma, *Asking Jurors To Do the Impossible*, 5 TENN. J.L. & POL'Y 105 (2009).

² *Id.* at 142-45, 146.

³ *Id.* at 139-40.

engaged in the trial and deliberations; and (3) courts should seek jurors that are broadly drawn from the community. Jurors from all walks of life will bring an array of perspectives and approaches to jury deliberations. In addition, only if the process of selecting jurors appears fair and above-board will the parties and members of the community accept the jury's verdict even when they disagree with it. If courts follow these three basic principles, then jurors would be better able to perform their job even though it is difficult, and at times, seemingly impossible. To the extent that Tiersma's recommendations are consistent with these principles, they should be followed. However, to the extent that his recommendations fall short of having courts carry out these basic principles, his recommendations need to go further. Only one of his recommendations—his call for the creation of expert juries—should be rejected. Although jurors would be better off with most of Tiersma's reforms than without them, it would be a shame for courts to miss an opportunity to undertake the kind of reforms that would truly aid jurors in the performance of their difficult role.

I begin by looking at Tiersma's jury reforms that are consistent with the above principles, but that should go even further. Reforms that are consistent with these principles will lead jurors to perform their job more effectively and will lead members of the community to feel more satisfied with juries and the verdicts they reach. Then, I consider the one jury reform—the creation of expert juries—that Tiersma suggests, but that should be rejected because it would limit who could serve as jurors and would undermine the effort to seek jurors drawn broadly from the community.

II. Courts Should Be Honest with Jurors

Tiersma identifies several moments when courts do not level with jurors. These include when courts fail to instruct jurors on the jury's power to nullify,⁴ when courts fail to inform jurors whether a case is a "three-strikes" case,⁵ and when courts fail to acknowledge to jurors that they are being asked to perform a task that is particularly difficult, if not impossible.⁶ In several of these instances, Tiersma recommends that courts should be honest with jurors. I agree with this approach. In one instance, however, when judges instruct jurors that they must follow the law and do not tell them that they have the power to nullify, Tiersma is undecided about the steps courts should take.⁷ In this situation, I think courts should be honest with jurors and instruct them on the jury's power to nullify.⁸ In three-strikes cases, Tiersma suggests juries may have a role to play.⁹ I agree, and would go further and urge courts to be honest with jurors about three-strikes cases.¹⁰

A. Instructing Juries on Nullification

One instance when courts are not honest with jurors is when they instruct jurors that they must follow the law, but do not instruct jurors on the jury's power to nullify.

⁴ *Id.* at 122, 130.

⁵ *Id.* at 112.

⁶ *See id.* at 108-22.

⁷ *Id.* at 130.

⁸ For a detailed discussion of nullification and why courts should instruct juries on their power to nullify, see Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U.L. REV. 877 (1999).

⁹ *See* Tiersma, *supra* note 1, at 112.

¹⁰ *See* Nancy S. Marder, *Juries, Drug Laws & Sentencing*, 6 J. GENDER RACE & JUST. 337, 341-52, 372 (2002) (describing juries' responses to three-strikes cases in California and suggesting that courts need to inform jurors about three-strikes cases rather than leaving jurors to learn by happenstance).

Tiersma is ambivalent about nullification and does not take a stand on whether juries should be instructed on this power.¹¹ My recommendation is that courts should not tell jurors that they must follow the law, when in fact they have the power in their capacity as a jury not to follow the law.¹² Rather, courts should tell jurors that they have the power to nullify. Of course, courts can draft the instruction carefully so that jurors know that this power must be exercised only in rare circumstances.¹³ This information needs to come from the court; otherwise, some jurors will have heard of nullification, but others will not and those who are unfamiliar with the concept will feel at a disadvantage and will be uncertain whether or not this power really belongs to the jury.¹⁴

Chief Judge Bazelon, writing in dissent in *United States v. Dougherty*,¹⁵ urged courts to instruct jurors on their power to nullify. In his view, courts had to trust jurors: "Trust in the jury is, after all, one of the

¹¹ See Tiersma, *supra* note 1, at 130.

¹² See Marder, *supra* note 8, at 957 ("[N]ot only are jurors not told of that power [of nullification], but they are told the exact opposite: They only have the power the judge has described.").

¹³ *Id.* ("Admittedly, courts must proceed carefully so as not to foment nullification. Nullification should be reserved for compelling cases."). One model for an instruction on nullification could borrow from the language of John Adams, who would instruct juries, in part, as follows: "It is not only [a juror's] right, but his [or her] duty . . . to find the verdict according to his [or her] own best understanding, judgment and conscience . . ." Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 605 (1939) (quoting 2 LIFE AND WORKS OF JOHN ADAMS 253-55 (C.F. Adams ed., 1856)).

¹⁴ For an example of a case in which some members of the Fully Informed Jury Association ("FIJA") informed several jurors of the jury's power to nullify, resulting in a deadlocked jury, a mistrial, and a subsequent indictment for jury tampering and criminal trespass, see *Turney v. Alaska*, 936 P.2d 533 (Alaska 1997).

¹⁵ 473 F.2d 1113 (D.C. Cir. 1972) (describing the case of the "D.C. Nine," who broke into the Dow Chemical Company offices and vandalized them in protest of Dow's manufacture of napalm).

cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just the nullification doctrine.”¹⁶ After all, jurors are entrusted with life or death decisions. If jurors are informed of the jury’s power to nullify, they would not only have knowledge but also guidance about when to use it.¹⁷ His dissent did not persuade his fellow judges on his panel, who suggested that if jurors were told of this power they would use it excessively.¹⁸ The majority, in an opinion written by Judge Leventhal, reasoned that it was better to let jurors discover this power on their own in the few cases that seemed to call out for nullification.¹⁹

One difficulty if the court does not instruct jurors that they have the power to nullify is that when jurors find out afterward, they will feel deceived by the court. The court should not be in the business of deceiving jurors. Jurors try to perform their job responsibly and ably. They also try to follow the court’s instructions. When they are told one thing and not told another, only to find out the truth later on, then they will feel that they have been misled by the court. It is important that jurors not feel this way and that they return to their community feeling satisfied with how they have been treated by the court and how they have carried out their tasks as jurors. If the jury functions

¹⁶ *Id.* at 1142.

¹⁷ *Id.* at 1143 (“The instruction would speak in terms of acquittal, not conviction, and it would provide no comfort to a juror determined to convict a defendant in defiance of the law or the facts of the case.”).

¹⁸ *Id.* at 1134 (“[T]he advocates of jury ‘nullification’ apparently assume that the articulation of the jury’s power will not extend its use or extent, or will not do so significantly or obnoxiously. Can this assumption fairly be made?”).

¹⁹ *Id.* at 1136-37 (“[I]t is pragmatically useful to structure instructions in such ways that the jury must feel strongly about the values involved in the case, so strongly that it must itself identify the case as establishing a call of high conscience, and must independently initiate and undertake an act in contravention of the established instructions.”).

as a “free school,”²⁰ as Alexis de Tocqueville presciently observed, then it is important that jurors learn positive lessons from this experience.

One former judge, B. Michael Dann, who served as a superior court judge in Maricopa County, Arizona and who was a catalyst for jury reform in Arizona both in his own courtroom and in his role as head of the Arizona Supreme Court Committee on More Effective Use of Juries,²¹ has written about the need to inform jurors of the jury’s power to nullify.²² Courts routinely instruct jurors that they “must” convict if they find that all of the elements of a crime have been proven beyond a reasonable doubt.²³ Judge Dann argues that this mandatory instruction “invade[s] the province of the jury and violate[s] the constitutional guarantee of an ‘impartial jury.’”²⁴ Instead, he offers an instruction that judges could use that would inform jurors about the jury’s power to nullify while teaching jurors that this power should be exercised sparingly.²⁵ The language is straightforward and explains to jurors that the jury can act consistent with its conscience

²⁰ 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 252 (Jacob Peter Mayer & Max Lerner eds., 1966) (13th ed. 1850).

²¹ This committee summarized its recommendations in a report entitled *The Ariz. Supreme Court Comm. On More Effective Use of Juries, Jurors: The Power of 12* (1994), available at www.supreme.state.az.us/jury/Jury/jury1gl.htm. Arizona adopted eighteen of the committee’s fifty-five recommendations. See William H. Carlile, *Arizona Jury Reforms Buck Legal Traditions*, CHRISTIAN SCI. MONITOR, Feb. 22, 1996, at 1.

²² B. Michael Dann, “*Must Find the Defendant Guilty*” *Jury Instructions Violate the Sixth Amendment*, 91 JUDICATURE 12 (2007).

²³ *Id.* at 14 (“[A] substantial number of state and federal trial judges use the strongest term ‘must,’ or its equivalent, when instructing the jury on its duty to convict if all the jurors agree that the law’s definition of the crime has been met by proof beyond a reasonable doubt.”) (citation omitted).

²⁴ *Id.* at 12.

²⁵ See *id.* at 18-19 (providing instruction).

and can acquit a defendant whose guilt has been proven beyond a reasonable doubt, but that this power must be exercised with great care and only out of good motives.²⁶ He urges judges to adopt his version, or to construct their own, as long as the instruction tells jurors that the jury can return a verdict of not guilty, even if the defendant's guilt has been proven beyond a reasonable doubt, but that this should only be done in the exceptional case. Judge Dann, though now retired from the bench, is still in the forefront of jury reform; as of now, no federal circuit supports an instruction on jury nullification, nor do any state courts.²⁷

B. Informing Juries about “Three-Strikes” Cases

Although Judge Dann recommends instructing jurors on nullification, no judge has taken a public stance in favor of instructing jurors on three-strikes cases. Courts in California, where three-strikes cases are prevalent,²⁸ do not

²⁶ *Id.* at 19 (“You should exercise your judgment and examine your conscience without passion or prejudice, but with honesty and understanding. You should exercise with great caution your power to find a defendant not guilty whose guilt has been proven beyond a reasonable doubt.”).

²⁷ See Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 285, 310 n.116 (1999) (providing a list of federal circuits that do not permit an instruction on nullification and noting that the two states, Indiana and Maryland, which permit judges to instruct jurors that they have the right to determine the law as well as the facts, have since limited this opportunity through case law).

²⁸ California is not the only state with a three-strikes law. See David Schultz, *No Joy in Mudville Tonight: The Impact of “Three Strike” Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL’Y 557, 572 (2000) (noting that twenty-two states and the federal government have a three-strikes law). However, California, unlike other states, invokes its law frequently. See *id.* at 573 (“In the vast majority of the twenty-two states and the federal government that have adopted three-strikes, the law’s effect on

tell a jury whether or not the case before it is a three-strikes case.²⁹ Instead, the task has fallen to lawyers to provide hints to the jury that the case before it is a three-strikes case³⁰ or the task has fallen to jurors to surmise that the case is a three-strikes case.³¹ The task has also fallen to prosecutors to be circumspect about which cases they choose to bring as three-strikes cases, particularly in Northern California where juries are less likely to convict if they sense that a case is a three-strikes case and the "third strike" is not for a serious crime.³² The problem is that juries should not have to "guess" whether a case is a three-strikes case because if they guess wrong they are likely to feel bad about their

crime is arguably minimal since it is rarely used. The one exception is California where 4,468 offenders have been sentenced under the third strike provision and over 36,043 for a second strike offense.").

²⁹ The three-strikes law in California requires that any person who is convicted of a serious felony and has two prior felony convictions defined as "violent" or "serious" is to receive a sentence of twenty-five years to life imprisonment. See CAL. PENAL CODE § 667 (West 1999).

³⁰ Some of the more creative efforts by defense attorneys include the defense attorney who carried a folder marked "three strikes" across the top, another who used baseball analogies throughout the trial, and yet another who asked the jury: "In 25 years from now will you have an abiding conviction that justice was served?" Harriet Chiang, *Some Jurors Revolt Over 3 Strikes/Penalty Prospects Sway Their Verdicts*, S.F. CHRON., Sept. 24, 1996, at A1.

³¹ For example, in the case of a man convicted of robbing a security guard and trying to steal his car, a juror "became agitated and started to cry when she realized it was a 'three-strikes' case." Tony Perry & Maura Dolan, *Two Counties at Opposite Poles of '3 Strikes' Debate Crime: San Francisco is Restrictive in Applying Law, San Diego Takes Hard Line, Approaches Reflect Will of Electorate*, L.A. TIMES, June 24, 1996, at A1. As one judge remarked, sometimes juries just "smell" that a case is a three-strikes case. *Id.* (quoting Judge Alex Saldamando).

³² See *id.* ("San Francisco Dist. Atty. Arlo Smith, aware that liberal San Francisco juries would not convict, frequently declined to prosecute nonviolent crimes as 'three-strikes' cases. His more liberal successor, Terence Hallinan . . . has been even more restrictive.").

verdict afterward.³³ Although courts do not usually tell jurors anything about sentencing because sentencing is undertaken by the judge (and to some extent by the prosecutor in a sentencing guidelines case because the prosecutor can decide how to charge the case), the sentence can be so draconian in a three-strikes case that it becomes an instance when the commonsense judgment of a jury is sorely needed. However, if the court does not tell the jury that it is hearing a three-strikes case, then the jury cannot give its commonsense judgment about whether this is an appropriate case for a mandatory prison term of twenty-five years to life. As Tiersma points out, with violent crimes, the jury is likely to convict even if it is a three-strikes case.³⁴ However, with minor offenses,³⁵ such as the theft of “a slice of pizza,”³⁶ the jury can introduce commonsense into the process and not have the defendant be imprisoned for the rest of his life. With three-strikes cases, the court should not leave the jury to guess, but should inform the jury so that it can provide its “commonsense judgment.”³⁷ Courts have an opportunity to provide juries with

³³ For example, one juror who had served on a jury that had convicted a woman for taking a five-dollar cut in a cocaine deal “felt deceived by the court” after learning that the defendant would go to prison for life under the three-strikes law. Rene Lynch & Anna Cekola, ‘3 Strikes= Law Causes Juror Unease in O.C.’, L.A. TIMES, Feb. 20, 1995, available at 1995 WL 2017381.

³⁴ See Tiersma, *supra* note 1, at 112.

³⁵ See *id.*

³⁶ See Frank J. Murray, *Is a Pizza Worth 25 Years to Life?*, WASH. TIMES, Apr. 29, 1995, at A6 (“Opponents of California’s ‘three strikes and you’re out’ law . . . said it was excessive and absurd to invoke it against Jerry Dwayne Williams for taking a slice of pepperoni pizza from a group of children.”); Eric Slater, *Pizza Thief Gets 25 Years to Life*, L.A. TIMES, Mar. 3, 1995, at B3 (“Jerry Dwayne Williams was sentenced to prison for 25 years to life Thursday under the state’s ‘three strikes’ law for stealing a slice of pepperoni pizza.”).

³⁷ Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (describing the jury as a safeguard against the exercise of arbitrary power by making “available the commonsense judgment of the community”).

information that would allow them to fulfill this function more effectively. The court's silence is a lost opportunity.

Jurors should be told when a case is a three-strikes case so that they know that if there is a conviction there will be a mandatory, lengthy prison sentence. Courts should be honest with juries about this and should not leave juries with the burden of having to guess and later on having regrets about their verdict. Jurors have to live with these regrets for the rest of their lives. Rendering judgment is difficult enough—for judge or jury.³⁸ Courts should not make judging more difficult than it already is for jurors.

C. Acknowledging the Impossibility of Some Jury Tasks

Tiersma urges courts to be honest with jurors and to explain when the task they are being asked to perform is difficult, if not impossible. He suggests that jurors would be helped if the court acknowledged the impossibility of the task and simply asked jurors to do the best they can. Tiersma identifies several ways in which courts ask jurors to do the impossible. For example, judges tell jurors to determine the truth of what happened, even when jurors are not given all of the information they would like to have.³⁹ Similarly, when jurors are asked to award damages and to predict how an injury will affect a person's future job prospects, earning power, and life span, Tiersma suggests that courts should tell jurors that no one can predict the future, but that they should just do this job as best they can.⁴⁰ Additionally, when jurors are told in a criminal case

³⁸ Robert Cover described the task of judging as "deal[ing in] pain and death." Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986). Although Cover focused on judges, his description also applies to juries.

³⁹ See Tiersma, *supra* note 1, at 116-17, 130-38.

⁴⁰ See *id.* at 108-09.

about the presumption of innocence, Tiersma suggests that judges should provide further explanation because this concept is difficult for laypersons to understand. After all, have not the police and prosecutor done their jobs and arrested and charged the right person? Tiersma proposes that judges explain to jurors that this is a bedrock principle and a necessary one because prosecutors, police, and other law enforcement can and do make mistakes.⁴¹ If judges follow these suggestions and are honest with jurors, then jurors are more likely to try to do what they have been instructed to do and will not be as overwhelmed by their task as they may now feel.

III. Courts Should Give Jurors the Tools To Be Engaged Jurors

Tiersma identifies a number of reforms that courts could undertake that would assist jurors to perform their difficult roles. His recommendations are helpful insofar as they encourage jurors to be engaged, but if they went just a step further, they would enable jurors to have tools that would lead them to be engaged participants during the trial and the deliberations.

A. Giving Jurors Written Copies of Instructions and Permitting Jurors To Ask Questions about the Instructions

Tiersma points out that judges instruct jurors by reading their instructions aloud to jurors from a written text and that jurors would benefit from having a copy of the written text.⁴² I quite agree, but would add that jurors should have *individual* copies of the written instructions that they can follow while the judge reads the instructions

⁴¹ See *id.* at 111.

⁴² See *id.* at 122-24.

aloud.⁴³ Jurors should be able to make notes on their individual written copies of the instructions and should then be able to take their copies with them when they enter the jury room to deliberate. Each juror would then have his or her own annotated copy of the written instructions to consult during jury deliberations. One judge who gives jurors their own written copy of the instructions reported that deliberating juries no longer send notes to her with legal questions.⁴⁴ She described this practice, which she has adhered to for over a decade, as “wildly successful” and as “an inexpensive, effective way to virtually guarantee juror understanding of the law.”⁴⁵

In some courtrooms, jurors listen to the judge’s instructions, but do not receive a written copy of the instructions.⁴⁶ It is difficult, if not impossible, to remember several hours of instructions, given in abstruse legal language, without being able to see the words or refer back to them later. These jurors face an uphill battle in their effort to understand the instructions. Without a written text, they might ignore the instructions altogether either because they do not remember them or because they did not understand them and have no way to clarify what they did not understand. If, during their deliberations, they send a note to the judge seeking further clarification, they are

⁴³ See Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 499-500 (2006) (describing how individual written copies of the jury instructions aid jurors’ comprehension of the instructions).

⁴⁴ Jacqueline Connor, *Jurors Need To Have Their Own Copies of Instructions*, L.A. DAILY J., Feb. 25, 2004, at 7.

⁴⁵ *Id.*

⁴⁶ For example, in New York, courts do not provide the jury with even a single, written copy of the jury instructions. See Terry Carter, *The Verdict on Juries*, A.B.A. J., Apr. 2005, at 41, 42 (reporting on New York’s pilot studies, including giving jurors copies of the written instructions, and noting that these practices have been tried on an experimental basis but have not yet been adopted as accepted practices).

likely to find that the judge will simply reread relevant portions of the instructions to them without actually answering their question,⁴⁷ or the judge could simply ignore their requests.⁴⁸

In other courtrooms, such as those in Illinois, the entire jury is given one written copy of the instructions to share among all of the jurors during deliberations.⁴⁹ Although the Illinois jurors with their one copy are slightly better off than the jurors without any written copy at all, the Illinois jurors are limited because only one juror can see the written instructions at a time during the deliberations. Thus, whoever holds the instructions becomes more of an expert than the other jurors. The Illinois jurors, like the jurors who do not receive a written copy, were also at a disadvantage when the instructions were read aloud by the judge because they did not have a written text that they could follow as they listened to the instructions. People absorb information in different ways.⁵⁰ Some people learn

⁴⁷ See, e.g., Connor, *supra* note 44, at 7 (“When jurors would send out questions asking about the meaning of a concept or term, the custom was always to reread the instruction, as if the jurors would understand a second recital with the renewed dulcet tones of the judicial officer.”); Mike Kataoka, *Eschewing Obfuscation: The Judicial Council Strives for Plain English with Its New Jury Instructions*, CAL. LAW., Dec. 2000, at 52, 53 (“[Judges] sit up there and read the instructions and watch people really trying hard to understand. And often the judges respond to questions simply by reading the same instructions louder.”) (quoting Justice Carol A. Corrigan, Chairwoman of the Judicial Council Task Force on Jury Instructions and Chairwoman of the Criminal Subcommittee in California)).

⁴⁸ See, e.g., SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 167 (2005) (“Adding insult to injury from the jurors’ perspective, judges sometimes would appear to turn a cold shoulder when the jury asked them to clarify instructions or define terms such as ‘mitigating.’”).

⁴⁹ See ILL. SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL 7 (2005 ed.).

⁵⁰ See, e.g., Mark Hansen, *Learn How They Learn: Knowing Modes of Adult Education Helps Lawyers Create Successful Presentations*,

by listening, while others learn by reading. Some prefer to take notes, while others do not. If instructions are delivered in two different ways (lecture and written text) rather than just one (lecture), and if note taking is permitted,⁵¹ the court is more likely to reach a greater number of jurors and to have them understand and remember the instructions.⁵²

Tiersma also suggests that jurors should be permitted to ask the judge questions about the instructions.⁵³ I wholeheartedly agree, and have made this suggestion before.⁵⁴ As Tiersma notes, most teachers take it for granted that questions are an important part of the learning process. This is true in the classroom, and is likely to be true in the courtroom too. Most judges would probably shy away from this proposal because they worry that they might say something that would be the basis for reversal on appeal.⁵⁵ One empirical study's findings

A.B.A. J., Aug. 2003, at 26, 26 ("People learn in different ways. . . . A good teacher will try to incorporate as many different learning preferences into his or her instruction as possible.").

⁵¹ The trend is toward allowing jurors to take notes, see JURY TRIAL INNOVATIONS 141-43 (G. Thomas Munsterman et al. eds., 1997), but not all courts have adopted this practice. See G. Thomas Munsterman & Paula L. Hannaford-Agor, *Building on Bedrock: The Continued Evolution of Jury Reform*, JUDGES' J., Fall 2004, at 10, 15 ("Only a small handful of states continue to restrict juror note taking.").

⁵² See, e.g., JURY TRIAL INNOVATIONS, *supra* note 51, at 19 ("[M]aterial is better remembered when it is presented in several different forms than in a single form. Having the jurors both listen to and read the instructions should capitalize on this effect.").

⁵³ See Tiersma, *supra* note 1, at 146-47.

⁵⁴ Marder, *supra* note 43, at 501 ("After the judge reads the instructions to the jury, but before he or she sends the jury off to deliberate, the judge should allow jurors to ask questions about the instructions.").

⁵⁵ See, e.g., James D. Wascher, *The Long March Toward Plain English Jury Instructions*, CBA REC., Feb.-Mar. 2005, at 50, 54 (describing the response of Cook County Circuit Court Judge Stuart A. Nudelman, a past president of the Illinois Judges Association, to a jury's question on the instructions: "[H]e declined to answer the jury's question both

suggest that jurors' comprehension of the instructions would improve if they were given the opportunity to ask any questions they have about the instructions.⁵⁶

Judge Dann is likely to agree with this recommendation because he is a believer in judge-jury "dialogue."⁵⁷ Because of Judge Dann's jury reform efforts, Arizona state court judges now instruct juries that have reached an impasse that they can turn to the judge for further assistance.⁵⁸ Rather than delivering the typical "Allen charge,"⁵⁹ in which jurors are pressured to go back to the jury room and to try to reach a verdict, Arizona judges can meet with the jury and see what the basis of the impasse is and whether further argument by the lawyers or dialogue with the judge would help the jury to overcome its impasse.⁶⁰ The judge is permitted to play a more constructive role, as is the jury.

If jurors are able to ask the judge questions about the instructions, then they will not have to make up answers during their deliberations. In most courtrooms, jurors are not permitted to ask the judge any questions about the

because he was not entirely sure how to answer and because any answer might well have been 'a guarantee of the appellate court saying that, as the trial judge, I went too far and that it's the jury's job to interpret instructions.'").

⁵⁶ See Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 551 (1992) ("A new finding of this study is that jurors who requested help from the judge performed substantially better than those subjects who did not. When the judge responded by providing supplemental information, either in the form of written instructions or by explaining the instructions in their own words, the jurors' understanding of the instructions reached fairly high levels (up to 67%).").

⁵⁷ B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 283 (1996).

⁵⁸ ARIZ. R. CIV. P. 39(h); ARIZ. R. CRIM. P. 22.4.

⁵⁹ *Allen v. United States*, 164 U.S. 492, 501 (1896) (holding that there was no error when the jury returned for further instructions and the trial court judge instructed the jurors to reexamine their views).

⁶⁰ See Dann & Logan, *supra* note 57, at 283.

instructions immediately after they have been instructed. If jurors have questions, then they can try to answer the questions during their deliberations. Sometimes they arrive at correct answers, other times they do not. Alternatively, once the jury is deliberating it can send a note to the judge, asking the judge the jury's question about the instructions. Typically, the judge will respond, not by answering the jury's question, but simply by gathering everyone in the courtroom and rereading the relevant portion of the instructions. The jurors become frustrated when the court's only response is to reread a portion of the instructions, which they did not understand the first time. After this happens a few times, the jury realizes that it is not going to obtain any answers from the judge so it stops turning to the judge for assistance. In one case, a college professor who served as the foreperson of a criminal jury in New York reported that his jury simply stopped turning to the judge when they discovered that the judge was unhelpful, as well as cantankerous.⁶¹ One law professor who conducted interviews with jurors in several capital cases reported that jurors stopped asking the judge questions about parts of the instructions that they did not understand when the judge simply reread portions of the instructions to them.⁶² Instead, they tried to provide their own explanations.⁶³

⁶¹ See D. GRAHAM BURNETT, A TRIAL BY JURY 81 (2001).

⁶² See SUNDBY, *supra* note 48, at 49-50 (describing jurors who felt intimidated by the process of having to return to the courtroom to hear the judge reread portions of the instructions anytime the jury submitted a question to the judge).

⁶³ *Id.* at 50 (“[W]e just tried to resolve any further disputes on our own.”) (quoting a juror).

B. Permitting Jurors to Question Witnesses

Tiersma recommends that jurors be permitted to ask the judge questions about the instructions, but he does not suggest that jurors should be able to submit written questions to the witnesses. This practice is explicitly permitted in several states,⁶⁴ and explicitly prohibited in other states.⁶⁵ In most states and federal circuits, however, the decision is left to the discretion of the trial judge.⁶⁶ Allowing jurors to submit written questions to witnesses is a reform that would benefit jurors enormously. They would not have to remain confused or uncertain during the trial; instead, they could get answers to their questions.

In states where juror questions to witnesses are permitted, the jurors are typically given an opportunity at the close of a witness' testimony to submit a written question to the judge who then consults with the lawyers and decides whether the question should be asked of the witness. The questions are submitted anonymously and the judge, after consultation with the lawyers, decides whether

⁶⁴ See Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not To Ask, That Is the Question,"* 78 CHI.- KENT L. REV. 1099, 1100 (2003) (noting that Arizona, Florida, and Indiana permit jurors to submit written questions to witnesses, and that Colorado intends to adopt the practice in civil and criminal cases).

⁶⁵ See *id.* (reporting that Mississippi prohibits juror questions to witnesses in all cases, whereas Texas, Georgia, and Minnesota bar the practice in criminal cases).

⁶⁶ See Eugene A. Lucci, *The Case for Allowing Jurors To Submit Written Questions*, 89 JUDICATURE 16 (2005) ("Every federal circuit that has addressed the issue of juror questioning of witnesses agrees that it is a practice that should be left entirely within the court's discretion."); Bruce R. Pfaff, John M. Stalmack & Nancy S. Marder, *Jurors in Illinois Should Have the Right To Submit Questions To Be Answered by Witnesses*, CBA REC. (forthcoming May 2009) (providing a survey of state court and federal circuit cases on juror questions to witnesses, with most cases leaving the decision to the discretion of the trial judge) (manuscript at 7-13, on file with authors).

they are appropriate questions. If they are, then the judge will ask them. If they are not, then the judge will explain to the jury that this is not a question that can be asked. Because the questions are submitted in written form at the end of a witness' testimony, they do not interrupt the flow of the trial.

This practice allows jurors to have their questions answered as they arise, and jurors appreciate this opportunity.⁶⁷ Otherwise, they are left confused throughout the trial and can only speculate as to answers during their deliberations. Moreover, in the states that permit this practice, judges, lawyers, and jurors have been satisfied with it. In states where juror questions have been permitted as part of a pilot program, the participants usually find that they like the practice even if they resisted it initially.⁶⁸ Jurors' questions tend to be few in number and

⁶⁷ See Lucci, *supra* note 66, at 17 (polling jurors and finding that "jurors universally approve of and appreciate the ability to clear up confusion by asking questions, and, combined with the ability to take notes and having written jury instructions on the law, when jurors are allowed to ask questions they feel very satisfied that they reached the correct verdict").

⁶⁸ See, e.g., Mott, *supra* note 64, at 1104-05 (reporting on a pilot study in New Jersey state courts in which jurors and a majority of lawyers responded favorably to the practice of permitting jurors to submit written questions to witnesses, as did judges, including those who "were initially skeptical, but after experience with questions in their courtrooms, they were pleased with the results and expressed their desire to continue after the pilot period ceased"); Patrick S. Pemberton, *Out of the Mouths of Jurors: In Los Angeles They're Letting the Jurors Quiz Witnesses*, CAL. LAW., Nov. 2000, at 18 ("[T]he judges who participated in the pilot program [in L.A.] were generally pleased with the results. And so were a large majority of the participating jurors, according to a poll that was done."); Seventh Circuit American Jury Project Final Report 60-62 (Sept. 2008) (surveying participants in the Seventh Circuit's pilot program in which judges and jurors in particular reported that the practice of permitting juror questions to witnesses contributed to the fairness of the trial process and the jurors' understanding of the case).

reasonable.⁶⁹ Often, jurors seek clarification of a fact⁷⁰ or greater explanation about a practice.⁷¹ One pilot program permitting juror questions to witnesses found that juror questions do not add significantly to the length of a trial.⁷² One theory is that juror questions to witnesses might even reduce the time required for deliberations.⁷³ Another theory is that such questions might reduce the number of hung juries, though no study has tested this theory yet.

Permitting jurors to submit written questions to witnesses, just as permitting jurors to ask the judge questions about the instructions, are practices designed to give jurors the information they believe they need to decide

⁶⁹ See Mott, *supra* note 64, at 1109 (“A study asking judges in Arizona to rate the reasonableness of juror questions found that judges’ ratings were extremely high.”); *id.* at 1112 (working from data collected for other purposes from initiatives in Arizona, D.C., and Pennsylvania, Mott found that “[o]f the 130 state-level cases, the average number of questions jurors submitted per case was 16”); Lucci, *supra* note 66, at 17 (“I am currently in my fifth year of allowing jurors to propose written questions, and have done so in well over 100 trials. Over that period . . . the vast majority (over 90 percent) of juror questions are good questions and many are excellent . . .”).

⁷⁰ See Mott, *supra* note 64 at 1117 (“Approximately one-fifth of the juror questions asked witnesses to clarify factual evidence such as exactly what events witnesses saw or more detailed facts about a person or place.”); Lucci, *supra* note 66, at 17 (observing that in his own experience with juror questions in over 100 trials, “most questions seek clarification of testimony regarding topics that have already been touched upon by the witness, including testimony not heard or which was vague or ambiguous”).

⁷¹ See Mott, *supra* note 64, at 1115 (“Jurors inquired about typical practices within a profession, whether the expert believed an event was plausible, or what procedures an individual should have taken in a given situation.”).

⁷² See *id.* at 1109 (describing a study of the pilot program in New Jersey that “found that the estimated median time added to trials allowing questions was only thirty minutes”).

⁷³ See Lucci, *supra* note 66, at 18 (“Questioning is likely to save time with improved understanding by the jurors, reduced questioning of other witnesses, and shorter jury deliberations.”).

the case. Jurors typically exercise restraint in asking questions,⁷⁴ but both practices would allow jurors to get answers to the questions that they have rather than remaining confused throughout the trial or after the instructions and then speculating during deliberations. Both of these reforms give jurors the opportunity to seek answers to their questions when they arise so that when they enter the jury room, they are prepared to deliberate.⁷⁵

C. Instructing Jurors on Deliberations

Courts typically do not give jurors any instructions on deliberations. Tiersma described judges as being “quite coy about how jurors should approach deliberations.”⁷⁶ Judges are reticent to provide instructions about deliberations because it is up to jurors to decide how to conduct their deliberations. Judges are reluctant to intrude into the province of the jury. However, some guidance would be useful, and of course, jurors can still decide how closely to follow the judge’s instructions. Tiersma notes that even the new California jury instructions do not give jurors any advice on how to proceed with their deliberations, other than some general admonitions.⁷⁷ Although Tiersma does not recommend that judges should provide such guidance, I think it would be useful.⁷⁸

⁷⁴ See Mott, *supra* note 64, at 1109, 1112 (noting the reasonableness and limited number of questions asked by jurors to witnesses); see also Connor, *supra* note 44, at 7 (noting that jurors who received individual written copies of the instructions did not send notes to the judge with legal questions during their deliberations).

⁷⁵ See Lucci, *supra* note 66, at 18 (“When a witness answers an individual juror’s questions, it helps to lay the proper foundation for effective deliberations by the jury as a group.”).

⁷⁶ Tiersma, *supra* note 1, at 125.

⁷⁷ See *id.*

⁷⁸ See Marder, *supra* note 43, at 503 (recommending that judges instruct juries on deliberations).

Instructions on deliberations can give jurors an idea of what is expected of them and how to proceed. The jurors still decide how to conduct their deliberations. When all the jurors have an overview of deliberations, then when they enter the jury room they can proceed without some jurors feeling at a loss. Instead, all of the jurors will feel prepared to participate in the deliberations.

One approach that judges can take to inform jurors about the deliberation process without interfering in how jurors actually decide to structure their deliberations is to give each juror a copy of the American Judicature Society's (AJS) pamphlet entitled *Behind Closed Doors: A Guide for Jury Deliberations*.⁷⁹ The AJS is a non-profit organization committed to an independent judiciary. The pamphlet gives jurors background information useful for deliberations, such as the role of the foreperson, different ways to conduct deliberations, the need to be respectful of each juror's views, and what to do when the jury has a question or cannot agree on a verdict.⁸⁰ Although the information is general, it is nevertheless helpful. Thus, the pamphlet can be viewed as a tool that aids jurors in performing their tasks during deliberations. Rather than being baffled or confused by what they are supposed to do in the jury room, jurors receive some general guidance from the court in the form of a pamphlet. Of course, jurors can choose to depart from the suggestions, but at least they enter the jury room with an overview of the process and some understanding of possible ways to proceed.⁸¹ It is up

⁷⁹ See generally AM. JUDICATURE SOC'Y, *BEHIND CLOSED DOORS: A GUIDE FOR JURY DELIBERATIONS* (1999) (providing general information about deliberations).

⁸⁰ See *id.* at 3-8.

⁸¹ Without such guidance on deliberations, some juries struggle with how to proceed. See, e.g., Erin Emery, *The Jury That Couldn't: Scenes from a Mistrial in Teller County*, DENV. POST, July 3, 2002, at 1A (quoting a juror in a first-degree murder trial who said: "'It was really frustrating because we were not getting any help on how do you go

to the jurors to decide when they want to follow the suggestions and when they want to depart from them.

Another approach is that judges can instruct jurors on the deliberation process. Any instructions, like the AJS pamphlet, can be general so that jurors have basic background information. The instructions also can present jurors with an array of approaches as to how to organize their deliberations, and they can choose which one makes sense to them. Judge Kane, a Federal District Court Judge, decided to draft instructions that would inform jurors about deliberations after he read Graham Burnett's account of his jury duty in *A Trial By Jury*, in which Burnett expressed his frustration with the court for failing to provide any guidance as to deliberations.⁸² Judge Kane then published his instructions in *The Judges' Journal*,⁸³ a journal whose audience consists largely of fellow judges. His instructions, like the AJS pamphlet, are informative without being intrusive. Other judges can adopt them or use them as a model for developing their own instructions. Indeed, he tells jurors: "I am not directing you how to proceed, but I offer the following suggestions that other juries have found helpful so that you can proceed in an orderly fashion"⁸⁴ Another advantage of Judge Kane's instruction is that he includes guidance on the dynamics of deliberation, including suggestions that jurors participate fully, listen to each other carefully, avoid interrupting each other, deliberate before taking a vote, express respect for each other, and proceed with patience.⁸⁵ Some states, such as Michigan, are beginning to provide such instructions,

about this, how do you approach the situation. You're supposed to decide the outcome of a man's life—blind—and that's not acceptable.'").

⁸² BURNETT, *supra* note 61, at 79-85.

⁸³ John L. Kane, *Giving Trials a Second Look*, JUDGES' J., Fall 2004, at 28, 30-31 (providing instruction).

⁸⁴ *Id.* at 30.

⁸⁵ *Id.* at 30-31.

though Michigan's instruction does not provide as much guidance as Judge Kane's instruction.⁸⁶ Judges can work from either Judge Kane's instruction or Michigan's instruction so that they do not have to reinvent the wheel.

The key point is that judges can provide jurors with information on deliberations so that they are fully informed and understand their tasks. The instruction or pamphlet serves as a tool that enables jurors to be active participants in their deliberations. The traditional reason for not giving such an instruction—wariness about intruding into the province of the jury—though respectful of the jury's independence, often leaves jurors mystified or confused. There is a middle ground, whereby judges can provide background information and set forth possible ways the jury might proceed, but the court also can instruct jurors that they decide how to organize their deliberations.

D. Instructing Jurors on the Unreliability of Eyewitness Testimony

Another area in which judges are reluctant to intrude is how jurors should assess the credibility of eyewitness testimony. Typically, courts do not offer any instructions on eyewitness reliability or allow expert witnesses to testify on the unreliability of eyewitness testimony because assessing the credibility of eyewitness testimony is supposed to be solely within the province of the jury. Judges also tend to believe that this assessment is based on commonsense. Thus, there is no need for expert testimony. The difficulty is that there have been myriad empirical studies showing that eyewitness recollections can

⁸⁶ See M. CIV. J.I. 60.01 (Jury Deliberations), *available at* <http://www.courts.michigan.gov/mcji/jury-deliberations/printCh60.htm>.

be very unreliable.⁸⁷ Our commonsense tells us that we can believe what we see, and therefore, we can believe what eyewitnesses claim to have seen. However, empirical studies show that there are many factors that contribute to the unreliability of eyewitness testimony and unless jurors are made aware of these factors, they will tend to think that eyewitness testimony is more reliable than it really is.⁸⁸ The factors that can affect the reliability of eyewitness testimony include: how far the eyewitness was from the person being observed; the conditions, such as whether there was bad weather or poor lighting; how much time there was for observation; the health of the eyewitness; whether the eyewitness and the person being observed were of the same race because cross-racial identifications are harder to make; and how much stress the eyewitness was under because contrary to common belief, the more stress a person is under, the less reliable the identification is.⁸⁹

In California, as Tiersma explains, judges now instruct jurors on the factors that can affect the reliability of eyewitness testimony.⁹⁰ California judges, by instructing in this way, provide more information on this subject than judges in most other jurisdictions. However, as Tiersma notes, California judges do not go far enough. They instruct jurors to consider whether the eyewitness and the person being observed are of different races, but they do not say why this is important. They do not explain to jurors that cross-racial identifications are more difficult to make

⁸⁷ See, e.g., Robert Buckhout, *Eyewitness Testimony*, SCI. AM., Dec. 1974, at 23 (discussing studies).

⁸⁸ See, e.g., ELIZABETH LOFTUS & JAMES DOYLE, EYEWITNESS TESTIMONY 26 (1987) ("Another reason that jurors place so much faith on eyewitness testimony is that they are often unaware of how many different factors influence its accuracy.").

⁸⁹ See, e.g., Buckhout, *supra* note 87, at 23, 24-27 (identifying factors that make eyewitness identification unreliable).

⁹⁰ See Tiersma, *supra* note 1, at 126.

than identifications between people of the same race.⁹¹ Tiersma rightly criticizes the instruction for this omission because it leaves jurors to “guess” or “to read the judge’s mind.”⁹² His point is well taken; the instruction should provide this additional piece of information.

However, there is even more information, in addition to the challenges posed by cross-racial identifications, which would be useful for jurors to have. For example, researchers in this area have found that eyewitness testimony is more likely to be believed than any other form of evidence.⁹³ Even when other forms of evidence undermine the eyewitness identification, jurors will continue to believe the eyewitness testimony.⁹⁴ So, perhaps something stronger than even an instruction in which the judge describes the factors that contribute to the unreliability of eyewitness testimony is needed.

There is much disagreement as to how to counter the strongly held belief that we can believe what we see,

⁹¹ See, e.g., SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 82 (1988) (identifying several factors that are not commonly known and that make eyewitness identification unreliable including the difficulty people have in identifying people of other races); Buckhout, *supra* note 87, at 26 (describing a study in which stereotypes limit what viewers see and recall).

⁹² Tiersma, *supra* note 1, at 126.

⁹³ See, e.g., ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 9 (1979) (“Jurors have been known to accept eyewitness testimony pointing to guilt even when it is *far* outweighed by evidence of innocence.”); LOFTUS & DOYLE, *supra* note 88, at 24 (describing studies of mock jurors that show that they tend to believe eyewitness testimony particularly when it was given with confidence); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 *LAW & HUM. BEHAV.* 19, 27 (1983) (noting that jurors find eyewitness evidence extremely persuasive).

⁹⁴ See KASSIN & WRIGHTSMAN, *supra* note 91, at 79-82 (providing examples of erroneous eyewitness identification that persuaded juries in spite of strong alibi defenses by the defendants).

and therefore, we can believe what an eyewitness says he or she has seen. An instruction is a good starting-point.⁹⁵ California is ahead of the curve in this respect, even with the shortcoming identified by Tiersma on cross-racial identifications. Other recommendations include allowing the testimony of experts who can explain more fully the factors that the judge mentioned in the instruction⁹⁶ or providing jurors with some of the findings gained from the empirical studies as a way of showing them that eyewitness testimony should be open to question. Suggestions that are more controversial include the exclusion of any evidence that is based only on eyewitness testimony.⁹⁷ Some courts, like those in California, instruct juries on the factors that can affect the reliability of eyewitness testimony. Other courts have allowed the testimony of experts.⁹⁸ There is a need for greater experimentation by courts so that a “best practice” emerges. The one point that is clear is that courts’ predilection to take no action and to avoid the problem is not a useful approach. It does not give juries the

⁹⁵ See *id.* at 84 (noting that some courts, if requested by one of the parties, give a cautionary instruction in which they “inform the jury that identification evidence can be wrong and encourage them to scrutinize it carefully”).

⁹⁶ See *id.* (noting that a “more controversial, more prevalent, and potentially more effective” approach than a cautionary instruction is to allow parties to call experts “to testify about perception, memory, and eyewitness testimony”).

⁹⁷ Compare *id.* at 83-84 (“One [way to assist jurors with eyewitness testimony] is to exclude it altogether in cases where it stands alone, without corroboration. This alternative is plainly unacceptable. It would needlessly paralyze too many legitimate criminal prosecutions.”), with Michael J. Gorman, *Eyewitnesses Make Serious Mistakes*, NAT’L L.J., Sept. 30, 2002, at A21 (describing the misidentification of Bryant Gumbel’s son as a suspected purse-snatcher and recommending that eyewitness “identification alone should never lead to a criminal conviction”).

⁹⁸ See, e.g., KASSIN & WRIGHTSMAN, *supra* note 91, at 85 (describing Judges Bazelon and Weinstein as “particularly strong advocates of using eyewitness experts”).

information they need to perform their task in a responsible manner. The consequence of relying too heavily on eyewitness testimony can be quite serious; it can lead to an erroneous conviction.⁹⁹

IV. Courts Should Seek Jurors Drawn Broadly from the Community

A. Rejecting Expert Juries

Tiersma observes that courts require jurors to be experts in several different areas and he suggests that juries of experts might be useful where expertise is needed. Tiersma proposes that an expert jury could be used to decide technical cases, such as tax fraud cases.¹⁰⁰ He proposes that in “highly technical areas” it would “make sense on occasion” to have a jury of experts.¹⁰¹ For example, in a tax fraud case, he suggests that a jury of accountants “might not be a bad idea.”¹⁰²

Tiersma is not the first to suggest a jury of experts in technical areas, but this idea has been rejected in the past and should continue to be rejected. Expert juries have a number of drawbacks compared to juries of ordinary citizens drawn broadly from the community. This recommendation, rather than broadening the base of citizens who could serve as jurors, would limit the base. It would lead to limited viewpoints being made available to the jury, limited opportunities for ordinary citizens to serve, and would cast doubt on the integrity of a process by which ordinary citizens were bypassed in favor of experts.

⁹⁹ See, e.g., *DNA Clears Man in Rape, Judge Rules*, N.Y. TIMES, Nov. 1, 2006, at A21 (describing the case of Larry Fuller, who was convicted of rape based on the eyewitness identification of the victim; however, he was eventually exonerated based on DNA evidence).

¹⁰⁰ Tiersma, *supra* note 1, at 139.

¹⁰¹ *Id.*

¹⁰² *Id.*

One drawback to a jury of experts, who serve in trial after trial, is that they are unable to bring a fresh look to a case that a jury drawn from ordinary citizens who serve in only one trial could bring. Justice White recognized this limitation when he described the protections that a jury affords a defendant in a criminal case. He suggested that a criminal defendant might prefer the commonsense judgment of a jury of ordinary citizens, even though they are unschooled in the law,¹⁰³ to the expertise of a judge because the judge might become hardened over time.¹⁰⁴ Expert jurors, who would be expected to serve in trial after trial, run this risk just as readily as do judges who hear criminal cases time after time.

Another drawback to the expert jury is that it is necessarily drawn from a limited pool of people who meet certain professional or technical requirements so that they qualify as experts. Thus, the expert jury would not be drawn from a broad swath of the population and would not have available to it the full range of perspectives, life experiences, and commonsense judgment that a jury of ordinary citizens could offer. A jury consisting of experts, many of whom might have gone to the same schools, received the same professional training, and share the same attitudes or views that are prevalent in that profession, might be bereft of any jurors who can offer an outsider's perspective or critique. In addition, a jury of experts raises questions about how representative that jury is of the population at large and whether the expert jury is being

¹⁰³ See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.").

¹⁰⁴ See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("The purpose of a jury is . . . to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge.").

used as a screen to justify the exclusion of other members of society from serving as jurors. Justice White observed that “[r]estricting jury service to only special groups . . . cannot be squared with the constitutional concept of jury trial. . . . Trial by jury presupposes a jury drawn from a pool broadly representative of the community”¹⁰⁵

Another limitation is that it is difficult to decide which areas are technical and would require expert juries and which areas are general and could be heard by juries of ordinary citizens. The technical categories for which expert juries are needed are likely to grow until they overtake the general category for which ordinary juries are needed.

Finally, as Alexis de Tocqueville reminds us, the jury is above all “a political institution.”¹⁰⁶ One way in which it functions as a political institution is that it serves as a “free school” and teaches ordinary citizens about the importance of fulfilling their civic duty and serving as jurors.¹⁰⁷ Casting a vote and serving on a jury are the two ways in which citizens participate in their democracy. Jurors who lack the background to serve as expert jurors are denied an opportunity to participate in the judicial system and to acquire that education. Although they might eventually have the chance to serve on a jury, their chances are reduced with the creation of expert juries, particularly when expert juries burgeon as all cases begin to take on a technical sheen.

Tiersma’s fallback position is that there could be one or two experts on any jury that is asked to decide a technical issue.¹⁰⁸ He notes that lawyers tend to use their peremptory challenges to remove from the jury anyone who

¹⁰⁵ *Id.* at 530.

¹⁰⁶ TOCQUEVILLE, *supra* note 20, at 250.

¹⁰⁷ *Id.* at 252.

¹⁰⁸ *See* Tiersma, *supra* note 1, at 139.

has relevant expertise.¹⁰⁹ He realizes that lawyers are likely to object to any proposal that an expert or two should be seated on the jury in a technical case. Although there is no guarantee of having an expert on one's jury, it seems that peremptory challenges should not be used simply to remove all prospective jurors who might have some expertise.¹¹⁰ To the extent that a jury drawn broadly from the populace will have a range of views available to it, including jurors with expertise, eliminating peremptory challenges¹¹¹ or at least reducing the number of peremptory challenges would avoid or limit the skewing effect of lawyers who exercise their challenges to exclude prospective jurors with expertise. If lawyers had fewer peremptory challenges, then they would use their challenges with greater care and try to remove those prospective jurors whose impartiality they doubted but who did not meet the standard for a for cause challenge. Although Tiersma does not go this far in his recommendations, this seems to be a better approach than expert juries, which pose a threat to juries of ordinary citizens and do not have the advantages of juries drawn broadly from the community.

¹⁰⁹ *See id.*

¹¹⁰ According to one prospective juror's observation, "we potential jurors discovered that anyone who knew anything about costs or the medical profession had been screened out—an economist, an accountant, and two nurses." Robert J. Barro, *Pleading the Case for a Paid-Jury System*, BUS. WK., July 22, 2002, at 20.

¹¹¹ My view has long been that peremptory challenges should be eliminated rather than simply reduced in number. *See* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995). For a recommendation made by Professor David Baldus that peremptory challenges should be eliminated or limited to three per lawyer, see Debra Cassens Weiss, *Law Prof Who Studied Peremptories Suggests Three-Strike Limit*, A.B.A. J., Mar. 5, 2009, http://www.abajournal.com/news/law_prof_who_studied_peremptories_suggests_three-strike_limit.

Moreover, before taking the dramatic leap to expert juries, ordinary citizens should be given the basic tools necessary to perform their tasks, particularly when expertise is required. For example, when juries have to decide damage awards, they should be permitted to use calculators and Excel spreadsheets, which are basic tools that any expert would employ.¹¹² These tools are common in the workplace, and should be common in the jury room. These tools are not particularly expensive and would aid jurors in making the calculations that they need to make. Not too long ago, jurors were asked to make calculations about damages but were not even permitted to have paper and pencil in the jury room. Most courtrooms now allow such basic tools as paper and pencil.¹¹³ Courts need to take the next step and provide calculators and Excel spreadsheets to jurors. Before Tiersma criticizes ordinary jurors for their lack of expertise, he should insist that courts provide them with the basic tools that would enable them to perform the tasks they have been asked to perform.

B. Reaching Out To Prospective Jurors

Tiersma does not mention the myriad ways in which courts have reached out to prospective jurors and have tried to summon them from a broader swath of the population than ever before. Courts are moving in the right direction, though more remains to be done. For example, courts used to summon jurors from voter registration lists only,¹¹⁴ but

¹¹² For a detailed discussion of the high-tech and low-tech tools, including spread-sheets and calculators, that jurors should be given to help them perform their tasks, see Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1286 (2001).

¹¹³ See JURY TRIAL INNOVATIONS, *supra* note 51, at 141 (describing juror note-taking as “a widespread technique”).

¹¹⁴ See, e.g., David Kairys, Joseph B. Kadane & John P. Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL.

now many courts use multiple lists, such as tax rolls, drivers' licenses, unemployment lists, or utilities, in addition to voter registration lists.¹¹⁵ The idea is to reach as many people as possible and not to rely on just one source. Many more people are qualified to serve as jurors than people who register to vote. In addition, courts have done a better job of updating the addresses that they use when mailing questionnaires and summonses. This is important given how often people move.

Several trial courts have been innovative in trying to increase minority representation among those who are summoned to serve; however, appellate courts have not viewed these efforts with favor. When a district court in Michigan "subtracted" potential jurors from the master wheel because they were not African Americans in order to create a more diverse venire,¹¹⁶ the Sixth Circuit struck down the practice,¹¹⁷ holding that it violated a federal statute that prohibited selection based on race¹¹⁸ and that it also violated the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution.¹¹⁹ When a district

L. REV. 776, 825-26 (1977) ("The most widely used primary list is the voter registration list . . ."); *id.* at 778 (noting that in 1977, "only two federal district courts and several state courts utilize[d] multiple lists") (footnotes omitted).

¹¹⁵ See JURY TRIAL INNOVATIONS, *supra* note 51, at 36 ("As of August 1996, 12 states use only voter registration lists, six states use only lists of licensed drivers, two states use state-unique lists, and 25 use a combined voters and drivers list. Five states add some additional lists to the voters and drivers lists.").

¹¹⁶ See Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273 (1996) (describing the use of stratified juror selection by the Eastern District of Michigan).

¹¹⁷ *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998).

¹¹⁸ See Jury Selection and Service Act, 28 U.S.C. § 1862 ("[N]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status.").

¹¹⁹ U.S. CONST. amend. V.

court judge in Massachusetts tried to create a more diverse venire by ordering new jury summonses to be mailed to residents who lived in the same zip code as jury summonses returned to the court as “undeliverable,” the First Circuit granted the government’s petition for a writ of mandamus and directed the district court judge not to implement that part of her order calling for new jury summonses.¹²⁰ The First Circuit concluded that an individual judge could not enlarge the jury array; rather, it had to be done on a district-wide level.¹²¹ Appellate courts must become more supportive of innovative efforts by district court judges; otherwise, venires are unlikely to reflect the larger communities from which they are drawn.

Meanwhile, academics have studied why people do not always respond to their jury questionnaire or summons. One study discovered that while some never received their questionnaire or summons, and others are deterred by practicalities, such as the absence of childcare, the unavailability of parking, or the meager compensation, the most important factor was whether people felt that they had some control over when they performed their jury duty.¹²² As long as they felt that they had some control, especially in terms of timing, the potential jurors were more likely to respond to their questionnaire and their summons and feel enthusiastic about jury duty.¹²³ If courts focused on offering prospective jurors some control over when they performed their jury duty, such as an automatic extension when they are first called, then less time would be spent

¹²⁰ United States v. Green, 426 F.3d 1 (1st Cir. 2005).

¹²¹ See Judge Nancy Gertner, 12 Angry Men (*and Women*) in Federal Court, 82 CHI. KENT L. REV. 613, 623 (2007) (providing background to *Green*).

¹²² See Susan Carol Losh et al., “Reluctant Jurors”: What Summons Responses Reveal about Jury Duty Attitudes, 83 JUDICATURE 304, 310 (2000).

¹²³ See *id.*

imposing fines¹²⁴ or having marshals search for additional prospective jurors.¹²⁵

Courts' efforts to send jury questionnaires and summonses to as broad a swath of the population as possible have proceeded slowly, but at least they are moving in the right direction. The challenge of summoning a diverse venire depends upon the efforts of many participants, including innovative efforts by trial courts, support for these efforts by appellate courts, and greater understanding by researchers of why prospective jurors do not always respond to their summonses. The goal is to reach as diverse a group of citizens as possible for the venire, and then not to lose them during the exercise of peremptory challenges. Ideally, the petit jury that is actually seated is drawn broadly from the community, can offer a range of views and experiences, and can render a verdict that will be accepted by the community, even if the community disagrees with the verdict.

V. Conclusion

Most of Tiersma's recommendations encourage courts to be honest with jurors and to give them the tools they need to perform their jobs ably. His recommendations could go further, as I have suggested above, but they are

¹²⁴ See, e.g., Colin F. Campbell & Bob James, *Innovations in Jury Management from a Trial Court's Perspective*, JUDGES' J., Fall 2004, at 22, 25 (describing Arizona's enforcement efforts for those summoned for jury duty, including orders to show cause and up to \$500 penalties for those held in contempt); Greg Moran, *When Jury Duty Calls: Counties Wrestle with High Evasion Rates*, CAL. LAW., May 2001, at 22 (describing that in California failure to appear for jury duty is an act of contempt punishable by a fine up to \$1000 and five days in jail).

¹²⁵ Moran, *supra* note 124, at 22 (explaining that in Stanislaus County, California, a "failure to appear" postcard follows an ignored jury summons, and if that fails to elicit a response within ten days, then a uniformed marshal with an order to show cause can appear at the door).

consistent with the basic principles by which courts should approach jury reform. The only recommendation for which this is not the case is the creation of expert juries. This recommendation runs counter to the principle that juries should be drawn broadly from the community. This principle is important for several reasons. First, by drawing on ordinary citizens from all walks of life, a jury will potentially have available to it a wide range of viewpoints, perspectives, and life experiences. Second, a deliberation among jurors from diverse backgrounds will allow for questions, challenges, and the avoidance of what Irving Janis called “groupthink,” in which jurors simply go along with the prevailing point of view.¹²⁶ Third, such juries of ordinary citizens, working together and participating actively in a thorough deliberation, can reach a just verdict and one that the community is willing to accept. Surprisingly, such a jury is also more likely to reach an accurate verdict. James Surowiecki described this phenomenon in *The Wisdom of Crowds*.¹²⁷ He suggested that when a group engages in a deliberative process in which the participants have different viewpoints and skills and feel free to offer them, they will reach a more accurate result than a homogeneous group, even one with expertise,¹²⁸ or than one or two people, “no matter how smart they are.”¹²⁹ Thus, when jurors are treated with honesty by courts and given the information and tools to be active participants, they are more likely to render accurate verdicts. If Surowiecki is right, then we need to worry less about creating expert juries and more about creating conditions that will allow juries of ordinary citizens to achieve the wisdom of crowds.

¹²⁶ IRVING L. JANIS, GROUPTHINK 262, 270-71 (2d ed. 1982).

¹²⁷ JAMES SUROWIECKI, THE WISDOM OF CROWDS (2005).

¹²⁸ *Id.* at 30-31.

¹²⁹ *Id.* at 31.

