

# REAL JURIES

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■ **Abstract** The elaborate efforts of the legal system to control and channel jury behavior reveal a mistrust of an institution that also attracts extravagant praise. We look at the jury by examining research on real juries drawn from archival studies and post-trial surveys and interviews, as well as from the deliberations of real juries. We show how the methods used by courts to gather and select jurors affect the representativeness and legitimacy of the jury. We also examine the evidence underlying skepticism about jury verdicts and decision making, focusing on cases that pose special challenges to jurors, particularly those involving complex evidence, legal complexity, and the death penalty. We then consider how optimal jury trials can be achieved.

Even twelve experienced judges, deliberating together, would probably not function well under the conditions we impose on the twelve inexperienced laymen [Judge Jerome Frank, *Courts on Trial* (1949), p. 120].

Juror #4 (discussing the testimony of an expert physician in a medical malpractice case): What I would like to have is 40 [specialists] and show them the [test results] and okay, get a survey and is this significant or is this not significant and would they have [done what the defendant did]? [Deliberating juror from the Arizona Filming Project (Diamond et al. 2003)]

## INTRODUCTION

The jury, with its constitutional pedigree, is a fixture in the American legal system and a symbol of American democracy that has impressed outside observers since Tocqueville. The subject of both extravagant praise and vitriolic criticism, juries decide not only cases involving multimillion dollar claims and severe permanent injury, but also whether a defendant will spend years in prison or be sentenced to death. Yet public debate about the trust we place in the jury raises questions not only about the nature of jury verdicts but also about their legitimacy in light of jury composition. Implicated here are the strains that arise when the legal system subjects conscripted citizens to extensive scrutiny and vetting before permitting them to serve as jurors. Once the trial begins, ambivalence about entrusting the resolution of serious disputes to laypersons who lack specialized technical or legal

expertise has led to elaborate efforts to control and channel jury behavior. The result is a generally polite but palpable tug of war with the jury.

To assess the product of this sensitive balancing act, we examine the research on real juries, point to some shortcomings, and discuss prospects for improvement. We focus on those areas in which issues of trust frequently arise: the selection of the citizens who serve as jurors; the verdicts of juries, particularly civil juries; comparisons between jury decisions and those of judges; and cases that pose special challenges to jurors because of evidentiary or legal complexity or the high-stakes instance of death penalty decisions. Real juries provide the most appropriate source in considering these issues because the ubiquitous research on jury simulations cannot fully enact important variables or environmental features (e.g., methods of jury selection or lengthy cases). Moreover, lurking in the background of all jury simulation research is the question of how well the findings, even those obtained from the more elaborate efforts using jury pool members, videotaped trials, and courtroom settings, mirror the behavior of real juries. Thus, although our primary focus is on research on real juries, we occasionally compare the results from studies of simulated and real juries.

## JURY COMPOSITION AND THE SIGNIFICANCE OF WHO SERVES

The composition of juries conveys a powerful political message about legitimacy. People regard trials as less trustworthy and fair—especially trials resulting in unpopular verdicts—when verdicts come from more homogenous juries (see Ellis & Diamond 2003). A belief that the racial composition of the jury determines outcomes has even affected support for the jury in nefarious ways. For example, in 1957 U.S. senators from the South responded to President Eisenhower's proposed civil rights legislation by including a provision requiring juries to decide whether an individual's voting rights had been violated (Caro 2002). At that time, minorities were rarely selected as jurors, and the segregationists of 1957 believed that all-white juries in their states would not follow the law by punishing those who violated the voting rights of African Americans.

The literature examining both experimental simulations and real jury data on the relationship between race and jury decision making reveals a more complicated picture (see, e.g., Conley et al. 2000, Garvey et al. 2004, Pfeifer & Ogloff 1991, Sommers & Ellsworth 2003). Although jury representativeness has increased in the past few decades, conviction rates in criminal cases have remained remarkably stable (Vidmar et al. 1997). The impact of demographic characteristics, including race, on jury decision making is often dramatically overestimated, especially given the far stronger effect that the weight of the evidence has in determining verdict outcomes. For example, Garvey et al. (2004) analyzed the reported first votes and jury verdicts of 3000 jurors in four major metropolitan areas. Strength of the evidence was a consistent and strong predictor of jurors' first votes. Race had

some predictive value, but only in some jurisdictions for some offenses for some defendants. Thus, African American jurors in the District of Columbia sitting in drug cases were more likely to favor an acquittal of an African American defendant on their first votes than were white jurors in those cases. Even in those cases, however, race had no detectable influence on jury verdicts. In contrast, there are at least some types of cases in which racial composition of the jury as a whole correlates with outcomes (e.g., Baldus et al. 2001). The effects on perceived fairness suggest that attention to representativeness would be warranted, even if it did not influence outcomes.

Two distinct phases in jury selection contribute to ensuring or undermining the representativeness of the jury: (a) summoning and qualifying jurors (pre-courthouse) and (b) selecting a jury after questioning at the courthouse (voir dire). As we note below, the meaning of a fair jury and challenges to achieving it are distinct at each stage.

## From the Community to the Courthouse

Jury composition has changed substantially over the past 40 years. At the federal court level, Congress worked to improve the representativeness of juries through the 1968 Jury Selection and Service Act, which required—following the landmark 1965 Voting Rights Act—use of voter registration rolls as juror source lists, as well as a plan for summonses to be sent randomly. This legislation overturned prior regimes in which local officials selected citizens for jury service based on their community ties and status (Van Dyke 1977, p. 86). The 1970 Uniform Jury Selection and Service Act, which provides a model statute for states to adopt, also endorses random selection, as well as supplementation of voter rolls with other lists (Van Dyke 1977, p. 99). According to a Bureau of Justice Report (Rottman et al. 2000), only a handful of states now mandate voter registration as their exclusive source list. Most states now use the voter rolls and supplement them with other source lists (e.g., drivers license and tax lists). A majority of the states have eliminated all occupational exemptions, broadening the range of citizens potentially available to serve as jurors (Rottman et al. 2000).

Despite these improvements, the persistent reality is that the prospective jurors assembled in courthouses and the empanelled juries that decide cases are systematically different from the communities from which they were drawn (Curriden 2001, Fukurai et al. 1993, Johnson & Haney 1994, Levin 2005, Walters et al. 2005). They are typically more likely to be white, better educated, wealthier, and older. A critical empirical question is what processes lead to this result.

Research has pointed to several institutional practices that can limit representation. Fukurai and colleagues (1993) note that less frequent updating of address lists will underrepresent the poor and the young, both of whom move frequently and are less likely to own their homes. In addition, biases in source lists affect who will be called. For example, according to the Current Population Survey, eligible (i.e., citizens over age 18) Hispanics/Latinos and Asian Americans are far less likely

to register to vote than are African Americans and non-Hispanic whites (Lopez 2003). More than one study has shown that eligible Hispanics are underrepresented in large counties (Fukurai et al. 1993, Walters et al. 2005), even in counties where African American representation is comparable to the adult population (Hays & Cambron 1999).<sup>1</sup> Some courts have begun to use the Internet to qualify and schedule jury service (Marder 2001). This innovation can be remarkably efficient and convenient for users, but it may inadvertently undermine representativeness by reducing non-response rates only among wealthier and better educated prospective jurors who have regular access to and proficiency with the Internet.

Finally, resource constraints pose a profound barrier to representation. The paltry compensation provided to jurors contributes to the underrepresentation of low-income people of any racial/ethnic group. In Dallas County, Texas, for example, which currently compensates jurors at a rate of \$6–\$10 a day (Curriden 2001), just 13% of the jury pool earned less than \$35,000 a year, whereas more than 39% of the county's citizens fell into this group (M. Curriden, personal communication). (Beginning in 2006, jurors in Texas will receive up to \$40 a day.) Low rates of compensation affect citizen participation through two routes. First, the prospect of low compensation or the hardship of time away from work deters citizens from responding to a jury summons (Boatright 1999). In addition, financial hardship may lead the court to excuse jurors who simply cannot afford the “luxury” of jury service (Fukurai & Butler 1991).

Although the jury receives strong support from the citizenry in the abstract (Harris Interactive 2004, MacCoun & Tyler 1988), citizens are often reluctant to respond to a summons because of unrealistic expectations about what their service will likely entail. News accounts of high-profile cases lasting many months present a stark contrast with the reality that the average juror is likely to serve only a day or two given the growing number of “one day or one trial” systems and the fact that the typical trial lasts a few days (Boatright 1999). Some prospective jurors express a lack of confidence in their ability to serve (Boatright 1999), even though such concerns are likely unwarranted, especially because no juror decides a case alone. Although no study shows that additional educational campaigns would alter misperceptions, actual service does appear to promote largely positive perceptions of the jury system, and a majority of those who have served report that they were well treated (Consolini 1992, Diamond 1993b, Rose 2005).

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<sup>1</sup>Apart from voter registration rates, the requirement that jurors be fluent in English can affect the participation rates of groups like Hispanic/Latinos and Asian Americans (Fukurai et al. 1993, p. 54). The remedy for this issue, however, is not fully clear, given the cost of providing translators to citizens who are not fluent in English—an accommodation generally available only to those with a language disability like deafness (see Kisor 2001). A 2000 state supreme court ruling in New Mexico (*State ex rel. Martinez v. Third Judicial District Court*) required the state to supply translators for non-English speaking jurors who require their services; other states, even those with substantial non-English-speaking populations, have not yet followed.

Researchers have studied some methods that courts might use to meet the challenge of ensuring a representative jury pool (Ellis & Diamond 2003, Fukurai et al. 1991, Munsterman & Hall 2003). Selection practices may not be based on race [e.g., by explicitly oversampling minority residents (*U.S. v. Ovalle* 1998)], but other approaches are available that may increase representativeness more generally. For example, courts could sample from census tracts or zip codes on the basis of the historical yield of eligible jurors from those locations, adjusting the proportion of summonses simply on the basis of previous yield rates, and further adjusting the proportions over time to reflect changes. Such proposals assume that prospective jurors within sampling units are homogeneous on factors that influence response rates. If true, this stratified, random-sampling approach would automatically correct for differential representativeness by race, income level, or any other characteristic that is correlated with the factors that lead to a reduced rate of yield from jury summonses, such as high mobility or hardship.

## Jury Selection in the Courtroom

**VOIR DIRE AND THE JUDGE** Once a sample of citizens appears in the courthouse, selection issues change, and a different struggle emerges in identifying the jurors who will decide a particular case. Questions about a fair cross-section of prospective jurors give way to questions about a given juror's ability and willingness to be fair, that is, to decide the case on the basis of the evidence and the law. An unbiased jury excludes those with explicit conflicts of interest with the case (e.g., blood relatives of one of the parties, their representatives, or a witness); those with specific prejudices (e.g., jurors who have made up their minds that the defendant is guilty or innocent; Vidmar 1997); and those with generic prejudice (e.g., jurors who assume that anyone charged with a particular type of offense, such as child molestation, must be guilty; Vidmar 1997).

The tug of war in the courtroom occurs because judges, in particular, must manage multiple issues and interests while assessing the level of juror bias. First, jurors value protection of their privacy (Rose 2005), even while voir dire is presumptively open to the public, and decision makers, especially attorneys, seek to learn as much as possible about life experiences and attitudes that might affect how jurors see the case. Such experiences could include issues that are difficult to discuss in open court, for example previous criminal history or other legal dealings. One study found that as many as 25% of jurors selected for criminal cases had not volunteered information during voir dire about their own or relatives' prior criminal victimizations (Seltzer et al. 1991). Some courts offer prospective jurors the opportunity to discuss sensitive areas at the bench or in chambers or to respond to voir dire questions on a preliminary questionnaire that is made available to the parties. The use of juror questionnaires may facilitate more efficient collection of individualized information from prospective jurors, but no research to this point has tested the effects of juror questionnaires on juror disclosure or on the exercise of challenges.

Second, both judges and jurors have interests in keeping the time spent on voir dire to the minimum necessary to make intelligent and accurate decisions about juror impartiality. This may explain why, despite risks of privacy threats, social influence, and jurors' self-presentation concerns, most judges initially—and often exclusively—question jurors as a group and ask people to volunteer publicly when a question is applicable to them (Bermant 1977, Hannaford-Agor & Waters 2004). Although potentially less time consuming, this procedure is comparatively less effective at gathering information about bias. After observing a number of people remain silent during questioning, one trial judge instituted a practice of privately, explicitly asking jurors who remained silent whether they had any information to add (Mize 1999). Of those who had been silent, 20% responded to the judge's individual follow-up questions with case-relevant information, some revealing severe difficulties or conflicts (e.g., a juror who was unable to understand the proceedings or, in one case, was the fiancé of the defendant). Nietzel & Dillehay (1982; see also Nietzel et al. 1987) found higher rates of sustained "challenges for cause"<sup>2</sup> when judges in capital cases allowed for individual, sequestered questioning rather than group questioning.

Finally, while encouraging jurors to be honest about their reservations or concerns about their fairness, judges also take steps to prevent jurors from too easily talking their way out of service by emphasizing (rather than minimizing or hiding) potential conflicts or superficially held opinions. Observations of actual jury selections indicate that judges spend significant time impressing upon jurors the court's need for their services (Balch et al. 1976, Johnson & Haney 1994, Rose 2005) and that judges attempt to rehabilitate those jurors who express reluctance about their abilities to serve, for example, by reducing the issue to whether the juror can or cannot follow the law (Diamond et al. 1997). This practice of emphasizing jurors' sense of duty and of extracting promises from jurors to set aside strong feelings or early intuitions about the case has implications for representativeness. Although such juror promises may not be reliable indicators of fairness, if a system of excuses for cause relied on category-based presumptions about bias—e.g., that a juror who was once a victim of a crime cannot be fair in a criminal case—there would be other negative consequences for the composition of the remaining jury pool. For example, in 2003 African Americans were 30% more likely than whites to have been a victim of a violent crime (Bur. Justice Stat. 2005).

To date, no comprehensive study has mapped out precisely how the management of these multiple interests and issues affect the representation of different groups of prospective jurors. Nor is there evidence that members of various demographic groups react differently to the structure of voir dire questioning (e.g., to private versus public questioning). Research has tended to focus almost exclusively on attorneys' evaluations of jurors' attitudes and subsequent use of peremptory challenges

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<sup>2</sup>A challenge for cause is attempted when a prospective juror, through word or life circumstance, indicates an inability to be fair; a challenge is sustained if the judge agrees that the juror cannot be fair and excuses the juror from serving on that trial.

to excuse a subset of prospective jurors, and, indeed, this adversarial input into juries reflects serious tensions in the management of jury selection.

**THE ROLE OF ADVERSARIES AND THE PEREMPTORY CHALLENGE** In exercising peremptory challenges, the parties can excuse a limited number of prospective jurors from serving on a particular case. The peremptory challenge, unlike the challenge for cause, traditionally required no explanation, but that changed in *Batson v. Kentucky* (1986). The U.S. Supreme Court held that it is unconstitutional to excuse potential jurors on the basis of their race. Despite this and other rulings,<sup>3</sup> African Americans are disproportionately likely to be dismissed by the prosecution, whereas whites are disproportionately likely to be struck by the defense (Baldus et al. 2001, Rose 1999). Although in the aggregate African Americans and whites may serve on juries at rates roughly comparable to their representation in the jury pool (Rose 1999), such representativeness may break down when the jury pool includes a small proportion of minorities or when subgroup representation is examined. Baldus and colleagues (2001) analyzed a large data set (over 317 capital cases) from Philadelphia and controlled for multiple variables (e.g., occupational category, answers to categories of voir dire questions). Although both sides' peremptories were patterned on race, prosecution challenges tended to eliminate the small group of young, African American men, particularly in trials involving an African American defendant and a white victim.

A number of commentators have called for eliminating peremptory challenges in order to improve jury representativeness (Amar 1995; *Batson v. Kentucky* 1986, Marshall, J., concurring; Hoffman 1997). Others have suggested that representativeness can be increased without a sacrifice in impartiality by reducing the number of peremptory challenges (Baldus et al. 2001, Finkelstein & Levin 1997, Hannaford-Agor & Waters 2004). Although the correct number is unclear and probably varies with the nature of the case, given the complicated mix of competing goals (e.g., privacy protection versus thoroughness, efficiency versus encouraging honest answers), some level of adversarial input in choosing jurors may act as a

<sup>3</sup>Attorneys must explain their challenges if the opposing party establishes a prima facie case that a challenge was based on race (*Batson v. Kentucky* 1986; *Georgia v. McCollum* 1992; *Powers v. Ohio* 1991) or gender (*J.E.B v Alabama, ex rel T.B.* 1994)—an allegation of a so-called *Batson* violation. To defend against the allegation, the attorney must provide the judge with a race-neutral explanation for the peremptory strike being challenged. The objecting party must prove that even trivial-sounding reasons are pretexts for intentional discrimination, a substantial hurdle, particularly because U.S. Supreme Court rulings in this area give a great deal of deference to trial judges' impressions of the attorneys' explanations for their peremptory strikes (*Purkett v. Elem* 1995). Melilli (1996) catalogued explanations offered in published opinions dealing with *Batson* violations. When challenges were disputed, attorneys failed to convince the judge that their motivations were race neutral only about 18% of the time, most often because the lawyer expressed concerns about a juror of one race but had not challenged a similarly situated juror of another race (Melilli 1996, p. 479).

safety valve for ensuring that people suspected of minimizing or failing to admit bias can be eliminated (Hannaford-Agor & Waters 2004, Rose 2003). Rose (2003) found that excused jurors who attributed their peremptory dismissal to prior experiences with the courts or to how they responded to voir dire questions (e.g., by hesitating in their response to an inquiry) had significantly greater concerns about their abilities to be fair than jurors who suspected they were removed for more tangential reasons. Thus, although attorneys are limited in their ability to predict juror verdict preferences (e.g., Zeisel & Diamond 1978), peremptory challenges do appear to eliminate some potentially unsuitable jurors who would not be subject to a challenge for cause. In sum, the central meaning of a fair jury at the voir dire stage is a group whose members are not biased against one party or another. This requires a vetting of their attitudes that can be made difficult by concerns about privacy and efficiency as well as about the need to ensure that people are not either shirking their responsibility to serve or failing to admit to or even recognize socially undesirable biases that would prevent them from being fair. The representativeness of jury panels can be diminished at this stage through attorneys' strategic uses of their peremptory challenges; however, peremptories are used as part of the complicated system for managing the various tensions and interests in selecting a fair jury. Thus, it is not clear that eliminating attorney input into selection would, in practice, result in more impartial juries or in panels that the public finds more legitimate or trustworthy.

## JURY VERDICTS

The most basic source of public mistrust of the jury is with the results of its cases. This has been especially true of the civil jury, although acquittals or convictions in some high-profile cases produce suspicions aimed also at the criminal jury. In this section, we review studies of jury verdicts and consider how these results look in light of available external standards, especially how judges might rule.

### Public Perception and Civil Jury Data

Critics often charge, and a majority of the public believes, that jurors are biased in favor of plaintiffs, awarding damages for frivolous claims and giving excessive and erratic awards (for reviews, see Kritzer 2001, Saks 1998). These suspicions, focused primarily on the tort system, have fueled an active reform agenda (e.g., legislative caps on jury awards for pain and suffering). Yet empirical studies of the tort system offer little support for this picture of extravagant and unwarranted juror generosity. According to data from the nation's 75 largest counties, plaintiffs prevail on liability on average about half the time (Cohen & Smith 2004), a success rate that is itself inflated because liability is either uncontested or only partially contested in some percentage of the cases counted as plaintiff wins (Diamond et al. 2003). Of course, it is not clear what the win rate ought to be, but plaintiffs clearly



cannot anticipate that jurors will automatically be receptive to their claims. This conclusion holds even when cases involve corporate defendants (Hans 2000). The deliberations of real jurors (Diamond et al. 2003) show substantial juror skepticism about plaintiff claims and a reluctance to make unwarranted damage awards.

A recent study of malpractice claims, based on evidence from the Texas Department of Insurance, directly contradicts contentions that the sharp increases in insurance rates for medical malpractice in the past decade are the result of jury behavior or a tort crisis (Black et al. 2005). The study revealed no increase in the number of claims, no increase in the median or mean pay outs, and no change in the percentage of claims with payments of more than \$1 million. Seabury and colleagues (2004) analyzed 40 years of jury awards and found evidence that increases in nonautomobile tort awards (e.g., medical malpractice, products liability) stem from increases in claimed costs of injuries rather than from changes in jury behavior.

The clearest indication that jury verdicts do not reflect popular perceptions comes from the few studies in which external measures of strength of evidence exist. These studies find that jury verdicts on liability are consistent with other assessments of the evidence. Taragin and colleagues (1992) examined independent physician assessments, routinely sought by malpractice insurers, of the defensibility of a given physician's care. This rating strongly predicted a plaintiff win: 42% of cases deemed indefensible resulted in payment, whereas only 21% of those labeled defensible did so. These authors note potential error in this latter rating and suggest that payments in truly defensible cases are even less frequent. In other research that considered both settlements and jury trials, injuries that independent physicians rated as avoidable were more likely to result in payment to a plaintiff (Sloan & Hsieh 1990; see also Sloan et al. 1993). Finally, Hannaford et al. (2000) asked judges who heard the exact same case that the jury heard to rate the strength of evidence; strength of evidence was the strongest predictor of a plaintiff's verdict on liability.

One area needing further research concerns the amount of variability in jury awards when two cases involve the same injury or cause of action. Simulation research suggests that even when case characteristics are held constant, jury liability verdicts and damage awards vary, sometimes in legally inappropriate ways (e.g., Saks et al. 1997). Experimenters can manipulate the amount of loss sustained in simulations, but the available measures of severity of injury in real jury data are generally limited and represent crude proxies for the real variables of interest. For example, many studies of damage awards have used a nine-point scale to assess the severity of injury, consistently showing a significant positive correlation between the scale value and damage awards (Daniels & Martin 1995). Such archival studies of damages find substantial variance unaccounted for by the severity scale, however, particularly with respect to the so-called pain and suffering component (e.g., Bovjberg et al. 1989, Vidmar et al. 1998). It is unclear how much of this unexplained variance is due to the myriad of relevant differences across plaintiffs that are not captured by this single measure. Even precisely the same injury can have vastly different implications for the compensation of different plaintiffs that a jury might reasonably consider. A classic example is the difference between the loss of

a finger for a professional violinist versus a professor or a factory worker. There is also substantial variability in punitive damage awards, which we discuss next.

## The Special Case of Punitive Damages

In a small percentage of civil cases, the jury is permitted to award punitive damages to punish the defendant in a civil case and to deter both the wrongdoer and others. The jury does so only upon finding that the behavior in question was particularly egregious (e.g., involved wanton, willful, malicious, or reckless conduct that showed an indifference to the rights of others). Jurors are typically given no further guidance in setting punitive damage amounts. Such awards are rare (occurring in 6% of tort and contract cases in which a plaintiff won damages; Cohen & Smith 2004) but have attracted enormous attention from scholars, the press, and the courts (for reviews, see Greene & Bornstein 2003, Sunstein et al. 2002) owing to a small number of unusually high awards.

Studies of real jury verdicts on punitive damages again show a disconnect between the typical assumption about jury behavior and actual results. Although juries make some multimillion dollar “mega awards” (Hersch & Viscusi 2004), the median punitive damage award in 2001 was \$50,000 (Cohen & Smith 2004). Punitive damage awards are more likely to be awarded in some types of cases—such as intentional misconduct cases—than they are in the types of cases that capture press attention, such as medical malpractice or products liability cases. Attempts to compare the punitive damage awards of judges and juries have yielded mixed results (Eisenberg et al. 2001–2002, Hersch & Viscusi 2004), but as Eisenberg and his colleagues acknowledge, and we discuss in more detail below, there is no evidence that judges and juries see the same stream of cases. As a result, the comparisons of judge and jury punitive damage verdicts are difficult to interpret.

Finally, as with compensatory awards, punitive damage amounts can be highly variable. Again, equating two cases, in this instance on the severity of conduct, is no simple matter. Research typically uses the compensatory amount as a gauge of the conduct’s harmfulness. Eisenberg and colleagues (1997, 2001–2002) find that approximately half of these awards can be explained by just a few variables, including the compensatory amount. Others (e.g., Karpoff & Lott 1999) find similar results, but note that this level of predictability occurs only when the cases examined are those that resulted in punitive damage assessments. The level of explained variance drops to approximately 2% when one attempts to predict both whether punitive damages will be assessed and what the amount will be. The principle of optimal deterrence requires accurate predictions of whether damages are likely to be awarded and the size of the likely damages for behavior that can be a cost of doing business. In this way, businesses can predict the risks associated with, for example, developing a new product. However, punitive damages also aim at punishing conduct that is highly egregious and not part of acceptable business practice (e.g., dumping toxic waste into a garbage can that neighborhood children could access; Vidmar & Rose 2001; see also Rustad & Koenig 1995). The Supreme Court has

recognized both retribution and deterrence as goals for punitive damages in its recent rulings (e.g., *Cooper Industries v. Leatherman Tool Group* 2001), while making clear that the amount of punitive damages should bear some relationship to compensatory awards. In light of the low frequency of punitive damages and the strong relationship between compensatory damages and the level of punitive damages, the availability of reductions in unusually large punitive damages on appeal may offer a reasonable way of containing punitive awards that exceed either their deterrent or their retributive value.

## How Do Judge and Jury Decisions Differ?

Another approach to assessing whether jury verdicts merit concern or trust is to compare them with the verdict that the judge, the other primary trier of fact, would reach. In jury-eligible civil cases, both parties must waive the right to a jury trial. In criminal cases, the prosecutor in many states can insist on a jury despite the defendant's waiver, although in practice prosecutors rarely do. In criminal cases, therefore, it is generally the defendant's decision as to whether a jury or a judge will decide the case. Thus, party preferences in both civil and criminal cases eligible for jury trial determine who the decision maker will be.<sup>4</sup> This nonrandom allocation of cases between judge and jury poses a large obstacle for researchers interested in comparing the decisions of judges and juries. Modeling that selection process is a complex matter. If, for example, juries were generally more pro-plaintiff than judges, bench trials in civil cases would disappear because the plaintiff would always insist on a jury. In fact, a recent study of trials in 75 of the nation's largest counties showed that bench trials accounted for nearly one in four trials (Cohen & Smith 2004). In addition, because so few civil cases result in trials rather than in settlement or other dispositions, a second layer of selection may affect which jury versus bench cases actually go to trial. A strong version of Priest & Klein's (1984) selection theory assumes that the cases going to trial should be those in which the parties substantially differ in their perceptions of what will happen at trial, taking into consideration who the trier of fact will be. By that account, overall win rates before judges and juries should not differ. Yet, Clermont & Eisenberg (1992) found that differential win rates in federal trials varied across categories of cases, with plaintiffs winning significantly more often before judges in three major tort categories and winning significantly more often before juries in two others. That finding leaves three possibilities: (a) that the cases differed, despite selection theory's assumption that they should be equivalently strong, in large part because one or both litigants miscalculated their probability of prevailing; (b) that the judges and juries differed in their response to equivalent sets of cases; or (c) some combination of the two.

<sup>4</sup>Because parties generally must wait longer for a jury trial, they may agree to a bench trial if both are anxious to proceed to trial, even if one or both might prefer a jury if delay was not an issue.

In an effort to avoid the potential case allocation selection effects, researchers comparing the outcomes of judge and jury trials have attempted to control for the influence of other variables. For example, Clermont & Eisenberg (1992) showed that the patterns they observed persisted when they controlled for locale. Nonetheless, as Clermont and Eisenberg acknowledge, a host of other differences between judge and jury trials may account for any differences (or similarities) they observed (see also Eisenberg et al. 2001–2002). The problem persists within categories of cases. Moore (2000) examined patent cases decided by juries and judges. Her data reveal that 58% of the decisions on the issue of willful infringement were jury rather than judge decisions, whereas 39% of the decisions on enforceability were decided by juries rather than judges (Moore 2000, values computed from table 4), indicating a systematic difference in the allocation of cases to jury and judge trials and undermining the interpretability of differences (or similarities) in liability verdicts and awards. Moreover, Moore (2002) finds that the judge and jury verdicts in patent cases are equally likely to be reversed on appeal, even when the appealed issues are broken down by subject matter, a pattern inconsistent with the claim that a jury is less competent than a judge to decide a complex patent case. Nonetheless, even this result is ambiguous. Although a judicial opinion by the trial judge in a bench trial may reveal judicial error, no comparable record is available from a jury trial, so equal reversal rates may not reflect similar qualities of the decisions reviewed on appeal.

A few researchers have compared judge and jury verdicts in criminal trials. Levine (1983) compared conviction rates in jury and bench trials in the 1970s, reporting higher conviction rates in jury trials in seven of nine jurisdictions and attributing the difference to “a conservative reaction of a people racked by excessive crime” (p. 86). Yet the strategic choice involved when a criminal defendant waives a jury is even more likely to affect the outcome in a criminal case than in a civil case where both parties must waive the jury. If, for example, the defendant waives a jury only when the applicable law favors an acquittal on the assumption that the judge will be more likely to recognize that strong legal advantage, then cases decided by judges will be more likely to result in acquittals because of the cases they receive owing to this selection process.

To address the selection problems that arise in comparing judge and jury verdicts, Kalven & Zeisel (1966) developed an ingenious approach that other researchers have emulated. In their classic study of jury trials, Kalven and Zeisel asked trial judges to fill out questionnaires in over 3500 criminal and 4000 civil jury trials, indicating the characteristics of the case, the jury’s verdict, and how the judge would have decided the same case in a bench trial. Because the judges were indicating their preferred verdicts on precisely the same trials that the juries decided, there could be no question about whether the cases were comparable (although the method says nothing about how juries would decide the cases that result in bench trials). The judge and jury agreed in 78% of the cases on whether or not to convict. When they disagreed in the criminal cases, the judge would have convicted when the jury acquitted in 19% of the cases and the jury convicted when

the judge would have acquitted in 3% of the cases, a net leniency rate of 16%. Disagreement rates were higher in cases that the judge characterized as close, but did not increase when the judge characterized the evidence as difficult rather than easy to understand.

The agreement on liability in civil cases was also 78%, but disagreement was almost equally divided: in 12% of the cases the jury found for the plaintiff while the judge favored the defense, and in 10% of the cases the jury found for the defense while the judge would have made an award. Jury awards were about 20% higher than those the judge would have given. Unfortunately, Kalven and Zeisel concentrated almost exclusively on the criminal jury data in their volume *The American Jury*, so little more is known from their classic study about the results for the real civil juries. Moreover, the data were collected in the 1950s, and jury trials have undergone substantial changes in the past 50 years. Both the jury and the judiciary have become more representative of the community, although the jury has undergone greater change. For example, it was not until 1975 that the U.S. Supreme Court ruled in *Taylor v. Louisiana* (1975) that the Sixth Amendment forbade the exemption of women from jury duty. The law, too, has changed significantly in a number of areas. Plaintiffs in tort cases, for example, were traditionally barred from recovery by any contributory fault for their injury. Today, most jurisdictions apply a comparative fault standard. The plaintiff who bears some responsibility for her injury can receive partial recovery, generally reduced in proportion to the plaintiff's fault, from a defendant who is also at fault.

Several smaller, more recent studies using the Kalven-Zeisel method have shown remarkably similar patterns in criminal cases. Heuer & Penrod (1994) found a 74% agreement and a net leniency of 20%. In a study designed to investigate hung jury rates in four jurisdictions, with two jurisdictions selected for their higher-than-average hung jury rates, Eisenberg and colleagues (2005) found 75% agreement, with a net leniency of 13%. The agreement rates varied by jurisdiction (between 64% and 89%), with three of the four jurisdictions showing the same pattern of greater leniency by juries that Kalven and Zeisel found.

More recent studies in civil cases have shown a pattern of results less consistent with that observed by Kalven and Zeisel. Heuer & Penrod (1994) found an agreement rate on liability of 63%, with the jury finding for the plaintiff in 18% and for the defendant in 19% of disagreement cases. Diamond et al. (2003) found an agreement rate of 77%. Hans (1998) obtained judicial ratings on the strength of the evidence favoring the plaintiff or defendant on a 7-point scale. When the judge rated the case as favoring one side or the other (1–3 or 5–7), the jury's verdict agreed with that position 74% of the time, but in the disagreement cases, the jury favored the plaintiff 19% of the time and the defendant 7% of the time.

Most of these smaller, more recent studies were carried out in one or just a few jurisdictions. The Eisenberg et al. (2005) analysis included 318 trials across 4 jurisdictions, and the remaining studies each described results based on 125 or fewer cases from a single jurisdiction. To evaluate adequately whether and how jury

verdicts have changed over time and how similar patterns are across jurisdictions calls for a large-scale, national replication of the Kalven-Zeisel study. Moreover, the Kalven-Zeisel research had some weaknesses that a modern replication could remedy. In explaining the disagreements between judge and jury, Kalven and Zeisel focused on the disagreement cases, had to rely exclusively on the judge for information about the case, and generally tested for relationships using univariate analyses. In contrast, the National Center for State Court's hung jury study analyzed by Eisenberg et al. (2005), albeit involving a substantially smaller sample, incorporated juror surveys and information on jury composition. Using multivariate analyses, Eisenberg et al. obtained results that support the overall Kalven-Zeisel findings of a higher threshold for conviction by juries. The pattern of disagreement associated with juror characteristics introduced some additional complexities. Juries with more well-educated members were more likely to acquit when the judge would have convicted than were juries with less well-educated members. Neither race nor gender was consistently related to judge-jury disagreement across sites (Eisenberg et al. 2005, Garvey et al. 2004).

No comparable study of civil cases exists. Indeed, in their original volume, Kalven & Zeisel (1966) provided only the barest description of the overall agreement-disagreement rates from the civil jury data. In view of the insights that such a study of the civil jury could provide, the case for a modern Kalven-Zeisel replication is even stronger for the civil jury than for the criminal jury. At this point, the available judge-jury comparison data do not support fears that juries tend to reach unjustified decisions or that they are substantially at odds with the views that judges would take. A closer look at the process of jury decision making is generally consistent with that pattern, but it also identifies some areas that provide particular challenges for the jury.

## JURY DECISION MAKING

Jurors are charged with two tasks in arriving at their verdicts: to find the facts and to apply the law from the judge's instructions to those facts. Questions about the jury arise from both sources. Here, we consider the evidence on jury reactions to the evidence and the law, as well as juror response to the difficult task of deciding on death in capital cases.

### Deciding Ordinary Cases

In an ordinary criminal or civil trial, the trier of fact must work out differences that the opposing sides were unable to resolve by themselves or with the assistance of their attorneys. The jury or judge must not only evaluate and compare the credibility of conflicting accounts of past events and mental states, but may also have to determine whether injuries or other damages occurred and what caused those injuries. In the typical tort case, the jury must decide whether the defendant's

behavior was negligent by determining not only what the defendant actually did, but also what it would have been reasonable to do in the circumstances.

Faced with these tasks, the jurors sensibly engage in an active evaluation of the competing claims to arrive at a plausible interpretation of the evidence presented at trial. Although jurors often differ in the narratives they consider most plausible as they reconstruct prior events from these conflicting sources, the jurors' recall and comprehension of the evidence in the ordinary trial are generally high. This pattern is revealed both on post-deliberation tests of comprehension in simulation research (e.g., Diamond & Casper 1992, Hastie et al. 1983) and in the discussions of the Arizona civil juries (Diamond et al. 2003). Jurors regularly scrutinize the claims of plaintiffs with a skeptical eye and apply common sense norms of behavior to judge whether a party's behavior was negligent and to sort out the competing and inconsistent claims. Jurors evaluate not only the credentials and experience of the experts, but also the content of their testimony. And, in general, jurors rely on as well as test each other's impressions, correcting errors in recall and inference.

Consistent with the widely accepted story model (Pennington & Hastie 1991) developed to explain individual juror judgments in criminal cases, jurors attempt to reconstruct a plausible account of what led to the plaintiff's suit. The jury's account, however, includes more than the story model would suggest. For example, jurors try to understand not only what led to the injury that eventuated in the plaintiff's complaint, but also why the case did not settle (e.g., was the plaintiff too greedy?). In the process, they draw on their own experiences with issues like insurance and prior accidents and injuries (Diamond & Vidmar 2001). In addition, their search for explanations builds on basic normative value judgments in assessing when behavior is reasonable. For example, when should a plaintiff be entitled to recover for injuries that occurred when he or she slipped and fell on a crack? How big must the crack be to constitute negligence on the part of the owner of the property? Jurors use these value judgments in integrating evidence and applying it to reach a verdict.

No evidence from close studies of jury decision making inside or outside the laboratory indicates that juries are extravagant dupes of frivolous claims in ordinary cases, although some of the rhetoric of tort reform suggests that they are (Diamond 2003). More serious concerns about the trustworthiness of the jury focus not on ordinary cases but on cases that involve unusually complex testimony.

## Complex Evidence

Modern litigation includes a growing number of trials with complex scientific or technical evidence from expert witnesses on topics unfamiliar to most jurors (and judges). Jurors (and judges) are asked to evaluate and compare the testimony of credentialed professionals addressing arcane issues, sometimes the object of vigorous dispute among respected experts on opposing sides. Although questions about how the jury handles complexity are raised most often about the civil jury, DNA evidence and white collar crimes involving complex financial transactions mean that complexity is not exclusively the preserve of civil litigation.

Most jury cases, both criminal and civil, last only a few days, but a small percentage extend for weeks or even months and may involve numerous witnesses, including multiple experts. The many hours and days of testimony place unusual demands on the attention and memory of the decision maker in a lengthy trial. The 13 cases that Lempert (1993) analyzed in evaluating jury performance in complex cases had a median length of two months. Not surprisingly, when researchers asked jurors, attorneys, and judges to rate the complexity of the criminal trial in which they had participated, duration was a consistent and strong predictor of trial complexity for all three groups (Heise 2004). But trials can also be complex, holding length constant, with increases in the technical challenge of the evidence, including expert testimony and the difficulty of the legal standards that the jury is called upon to apply.

Complex expert testimony tests both judges and juries (*Daubert v. Merrell-Dow Pharm., Inc.* 1995). Faced with expert testimony, jurors could avoid the challenge by ignoring the expert testimony or by deferring to an expert based strictly on the expert's credentials and not on an evaluation of the content of the testimony. Yet evidence obtained from observing the behavior of jurors during trials and deliberations, as well as from post-trial interviews with real jurors, indicates that jurors spend considerable time discussing the content of expert testimony (Vidmar & Diamond 2001). This effort is consistent with central processing (Eagly & Chaiken 1993), which occurs when an individual attends to the quality of an argument, rather than relying on peripheral processing, a mental shortcut to an evaluation. Jurors would be engaged in peripheral processing if they merely compared the credentials of two opposing experts and accepted the opinions of the more prestigious source.

Jury instructions explicitly tell jurors to evaluate the expert's testimony "considering the witness's qualifications and experience" along with the reasons given for the opinions and all the other evidence in the case. As instructed, jurors do consider the expert's education and experience, but they also focus on the content of the testimony (Vidmar & Diamond 2001).

Moreover, jurors recognize that the experts are appointed by the parties, which encourages jurors to be skeptical about what they hear (Shuman et al. 1996). The adversary setting, however, does not disclose to the jurors how distorted the balance in testimony may actually be. If each side has an expert, the jurors may not be told that one side's expert is among thousands holding the same view, whereas the other side's expert is the only person willing to testify to the opposing position (Gross 1991). Thus, the challenge of evaluating the testimony of equally credentialed and articulate experts is substantial. Jurors' frustrations can be palpable, as indicated in the excerpt at the beginning of this review from the juror who questioned the representativeness of the expert opinion she was receiving from the witness stand.

Other juror behaviors also reveal central processing of expert testimony. When jurors are permitted to submit questions during trial, a disproportionate number of their questions are for the expert witnesses (Diamond et al. 2004, Mott 2003). The juror questions for the experts focus primarily on efforts to clarify their testimony or to understand the bases for their opinions. In general, increases in case complexity



are associated with increases in juror scrutiny of the evidence. For example, in the Arizona Filming Project, the longer the trial, the longer jurors discussed the evidence before taking an initial vote ( $r = .54$ ) (Diamond et al. 2003). Jurors in Arizona are permitted to take notes, and the jurors referred to their notes more frequently during deliberations when the trial was complex, even after controlling for the length of the deliberation.

Studies comparing judge and jury verdicts in the same cases have found no evidence that disagreement rates rise with the complexity of the evidence (Eisenberg et al. 2005, Heuer & Penrod 1994, Kalven & Zeisel 1966). Both juries and judges may perform less than optimally when faced with complex evidence. In particular, there is evidence that judges as well as laypersons have difficulty with probabilistic and quantitative testimony (e.g., Wells 1992). Although the modern jury may include one or more members with some quantitative background who can assist with the technical evidence, and several studies show that juries do make such use of their most competent members, the trial court judge without quantitative training must turn elsewhere for help. A general challenge remains for litigants and the legal system: to educate the trier of fact.

Several researchers who have interviewed jurors following complex cases have found substantial levels of comprehension on the main issues of the case, including the expert testimony (Am. Bar Assoc. 1989, Vidmar 1995). Others have found significant sources of misunderstanding about complex expert testimony (Sanders 1998, Selvin & Picus 1987; in both instances there was a failure to understand epidemiological evidence). In a detailed review of 13 complex cases, Lempert (1993, p. 234) concluded that juries were not “befuddled by complexity” and that they usually reached defensible decisions. He noted that mistakes were often attributable to deficiencies in the presentation of the evidence or jury instructions, raising issues that are not unique to complex cases.

## Understanding and Applying the Law

The jury’s role in interpreting the law has changed substantially over time, triggering an uneasy struggle over the position and impact of the law in jury trials. Early juries were regarded as equal to the judge in their ability to interpret the common law (Perlman 1986). The rationale was that juries shared the values and knew the rules of ordinary transactions on which the common law was built. The ability of the jury to intuit legal norms and contingencies declined with the increased complexity of the modern legal environment. The development of the adversary system, a professional judiciary, and the rules of evidence led to efforts to impose legal constraints on the jury. Judges now charge the jurors that they must apply the law as the judge describes it to the facts as the jury finds them (*Sparf & Hansen v. United States* 1895). Yet the vehicle for informing the jury about the law has changed very little over time. Although literacy has grown and jurors generally must be able to read and write English, the oral tradition for conveying legal instructions persists, and jurors in many courts do not

receive a written copy of the jury instructions to refer to either while the judge reads the instructions to the jury or during jury deliberations (Rottman et al. 2000).

The jury's decision can accurately reflect the relevant legal framework either if the jury correctly anticipates and accepts the applicable law or if the jury is informed by and follows the judge's instructions. Yet legal standards are not always obvious, and jurors do not always succeed in applying the legal instructions they are given, not because they actively resist but because the legal education provided at trial is remarkably awkward, frequently incomplete, and in some respects almost obstinately opaque.

Many legal concepts are abstract and difficult, presenting a serious challenge to clear communication. Standardized "pattern jury instructions" approved by committees of judges and attorneys in most jurisdictions are designed to avoid legal error, with little effort invested in ensuring clear communication. Not surprisingly, studies testing the ability of laypersons to understand legal concepts as presented in jury instructions have repeatedly revealed poor performance (for a review, see Lieberman & Sales 1997).

Researchers conducting most of the research on comprehension of jury instructions have relied on simulations, leading critics to raise the possibility that jurors instructed in the context of a real trial may be more motivated to grasp legal concepts and may be aided by the trial context in understanding their meaning (*Free v. Peters* 1993). Moreover, most of the simulations have tested individuals who did not deliberate and thus did not have the benefit of any information they might have gleaned from group discussion. The few researchers who have addressed these concerns by administering post-trial questionnaires to real jurors (Kramer & Koenig 1990, Reifman et al. 1992, Saxton 1998) have replicated the findings of simulations demonstrating weaknesses in juror understanding of legal instructions. By comparing the accuracy of responses from jurors who served on certain types of trials with those of jurors who sat on different types of trials, Reifman and colleagues (1992) tested not only how accurate jurors exposed to those particular instructions in cases were, but also whether they were more accurate than those who had not been exposed to those particular instructions. They found that instructions improved understanding of procedural issues but produced no improvements in substantive legal understanding. The jurors were tested at the end of their two-month service, suggesting that the poor showing might be due to faulty recall as opposed to miscomprehension, but a similar effort that focused on potentially difficult legal concepts tested jurors immediately after they completed a criminal trial, and it also showed substantial misunderstanding (Kramer & Koenig 1990). Although instructed jurors performed better than uninstructed jurors, even instructed jurors displayed areas of substantial miscomprehension. Moreover, the difficulty in understanding jury instructions could not be attributed to low educational levels: More educated as well as less educated jurors showed comprehension problems for some concepts. Saxton (1998) examined post-trial juror comprehension on a range of legal issues in both criminal and civil cases. Although

instructed jurors showed better comprehension overall, jurors still revealed some substantial holes in their understanding.

In all these questionnaire studies, some of the questions used to gauge juror comprehension were themselves difficult to understand. For example, one question asked whether it is true or false that “a reasonable doubt must be based only on the evidence that was presented in the courtroom, not on any conclusion that you draw from the evidence.” This statement is false, because the juror can draw inferences from the evidence on reasonable doubt or any other matter, but a doubt based on the evidence is a conclusion drawn from the evidence. Nonetheless, many of the test questions were drawn directly from the language in the jury instructions themselves, so a failure to understand the questions likely tracked a failure to understand the instructions as well.

The persistent evidence that jury instructions frequently miscommunicate reveals several explanations for this unnecessary struggle between jurors and the law. An obvious first obstacle to jury comprehension is that unfamiliar terms and unnecessarily convoluted sentences are common in jury instructions. Researchers have shown that rewriting instructions in “plain English” can dramatically improve juror comprehension (e.g., Elwork et al. 1982, Wiener et al. 2004). Some states have made an effort to rewrite pattern instructions, and recently California included linguist Peter Tiersma on the pattern instruction committee to assist in clarifying the language used in the instructions (Judic. Coun. Calif. Advis. Comm. 2004). To provide optimum instructions on the law, the attempt to clarify the language of legal instructions needs to be accompanied by a regular testing program that evaluates whether changes in the instructions will successfully improve laypersons’ understanding of the law. When Diamond & Levi (1996) rewrote jury instructions in death penalty cases, their experiment showed that the rewritten instructions improved comprehension by laypersons, but some changes in the language were more influential than others. Other studies have revealed that recommended changes in the language of instructions may either produce only minimal improvements in comprehension (Severance & Loftus 1982) or may actually introduce new sources of error (Charrow & Charrow 1979).

Writing comprehensible jury instructions is not merely a matter of using simpler language and improving grammatical structure and organization. Instructions often contain words that appear familiar but have specific technical meanings that may be quite different from their most common definition. For example, an aggravating circumstance is a reason to impose the death penalty, whereas in common use it means merely an annoyance or irritation (Diamond 1993a, Haney & Lynch 1997).

Another obstacle to communication is the failure to acknowledge jurors’ beliefs and expectations. Courts generally avoid any reference to a topic that jurors should not be discussing during deliberations, on the assumption that jurors will not discuss an issue if the court does not mention it. As a result, jurors regularly discuss topics, such as the plaintiff’s and defendant’s insurance and attorney’s fees (Diamond & Vidmar 2001) without court guidance, making assumptions that may or may not be either factually accurate or legally correct. Blindfolding the jury

to a legally irrelevant question, that is, simply avoiding any mention of it, can be an effective method of jury control. It can function effectively, however, only when the question is unlikely to occur to the jurors (e.g., whether the defendant subsequently repaired the steps after the plaintiff tripped and fell) or, if it does occur to the jury, when the jurors are not likely to assume that they can figure out the answer if the trial does not supply one (e.g., the contents of settlement negotiations) (Diamond & Vidmar 2001).

In principle, jurors can clarify their legal misunderstandings by interrupting their deliberations and submitting a written question to the judge. Jury surveys indicate, however, that jurors may be inappropriately sanguine about their ability to make sense of jury instructions (Diamond 1993b, Reifman et al. 1992, Saxton 1998). As a result, the legal system cannot depend on the jurors to submit questions when the instructions are not illuminating. Moreover, the procedures used to submit questions during deliberations may discourage jurors from using the opportunity to clarify ambiguities in the law. Jurors submitting a question during deliberations must summon the bailiff who then informs the judge. Once the jury begins deliberations, the parties and the judge turn to other matters and convene again only if the jury has a question or announces its verdict. If the jury submits a question, the judge in turn must consult with the parties and determine whether or how to answer the question, either in a note sent back with the bailiff or by bringing the jury back to the courtroom. Either way, the jurors swiftly learn that it can take a long time to get an answer if they have a question. When the jury does submit a question during deliberations, judges are often hesitant to supply a direct response that goes beyond the language of the original legally approved instructions. Instead the judge may direct the jury to a particular section of the jury instructions (*Weeks v. Angelone* 2000; Diamond & Vidmar 2001, p. 1901) or simply tell the jury to consult the instructions (Severance & Loftus 1982) or to rely on the jury members' collective memory. These limited responses miss an opportunity to prevent an error by a conscientious jury attempting to follow the judge's instructions (Diamond & Vidmar 2001, p. 1902).

Thus far we have assumed that legal instructions fail primarily when they do not effectively convey the relevant legal standard. A more insidious miscommunication can arise if the jurors do not trust what they are being told. The task in determining the sentence in a capital case appears straightforward, even if difficult: to determine whether the defendant deserves death. Yet phrasing the question in those terms, as legal instructions generally do, ignores the real decision that the jurors must make, namely, which of two penalties is more appropriate for the defendant. Until *Simmons v. South Carolina* (1994), jurors were never informed what sentence the defendant would receive if not sentenced to death, even when they specifically asked. Since *Simmons*, if the prosecutor chooses to present arguments about the defendant's future dangerousness, and if life in prison without the possibility of parole is the only alternative sentence, jurors must be told that the defendant will receive such a sentence if he or she is not sentenced to death. Yet some jurors interviewed in the Capital Jury Project expressed the view that a defendant not sentenced to death would in fact ultimately be released, even when they were told

there would be no parole from a life sentence (Bowers & Steiner 1999). Thus, owing to a mistrust of the system, a juror who would prefer a sentence of life without the possibility of parole might vote for a death sentence as the only way to ensure that the defendant will never be released. If this concern about future dangerousness remains unaddressed, the jurors are effectively reaching life and death decisions uninformed about the nature of the choice they are being asked to make.

The failures in jury instructions do not leave the jury without resources. Un-schooled in the relevant law, the jury applies a rough and ready sense of justice that may not deviate substantially from the decision that it would reach if it were guided by clear communication of the relevant legal standards. But in light of the evidence that important deviations do occur between the jury's common sense legal standards and understandings and the legal guidance that the jury purportedly receives, better communication with the jury about the law represents a crucial and underappreciated way to optimize jury performance.

## Juries in Death Penalty Cases

In ordinary felony cases in most jurisdictions (King & Noble 2004), jurors decide only whether or not the defendant is guilty of one or more charges. The dramatic exception to this pattern occurs in capital cases. Death penalty sentences are now the exclusive preserve of the jury, both in the federal system and in the 38 states that permit capital punishment.<sup>5</sup> Perhaps no jury issue demands more from the citizens who serve as jurors. In addition to the stress associated with the death penalty decision itself and the frequently disturbing circumstances of the alleged offense, capital sentencing calls upon jurors not simply to reconstruct what happened, but also to evaluate the severity of the defendant's behavior in light of circumstances and match it with a penalty that will either spare the defendant or take his or her life. Capital sentencing has stimulated significant scholarship and criticism of the jury, encompassing critiques concerning the composition of the death-qualified jury, racial bias in the imposition of the death penalty, death-prone tendencies of jurors stimulated by unrealistic estimates of dangerousness and expectations of early release, and lack of comprehension of legal instructions. The U.S. Supreme Court responded to earlier social science scholarship on death-qualification by rejecting evidence from jury simulations (*Lockhart v. McCree* 1986) and dismissing findings pointing to racial bias based on archival research (*McCleskey v. Kemp* 1987).

The Supreme Court's negative reactions to other methods of research in part stimulated the Capital Jury Project, a national research program in which

<sup>5</sup>In *Ring v. Arizona* (2002), the U.S. Supreme Court ruled that juries, rather than judges, must decide the aggravating and mitigating facts that go into determining whether a defendant should be put to death, declaring unconstitutional the systems then in place in five states that left death penalty determinations to judges. Although the courts have yet to speak on the constitutionality of systems in four other states in which advisory juries recommend life or death, but a judge makes the final determination, many observers believe that *Ring* effectively overturned those systems as well.

interviewers conducted 3- to 4-hour post-trial interviews with jurors who had served in 20 to 30 capital cases in each of 14 states (Bowers 1995, Bowers & Foglia 2003). The 354 capital cases were chosen to provide equal numbers of life and death verdicts. By interviewing several jurors from each case, the researchers were able to check for the reliability of jurors' retrospective reports about deliberations. Some of their results, however, focus on individual juror's self-reports on their own earlier perceptions and reactions, precisely those most susceptible to distortions of memory and reporting and less subject to cross-checking. For example, the researchers questioned jurors on what they thought the punishment should be after deciding on the defendant's guilt but before hearing any evidence from the sentencing stage of the trial. Half (50.8%) reported being undecided at that point, the legally appropriate position, but the remaining jurors recalled having a view, with 30.3% favoring death and 18.9% opposing death. A majority of those who said they initially favored death (59.5%) also said that they never changed from that early position. If those recollections are correct, they signal a premature inclination toward death and a lack of openness to mitigation evidence. There is another way to view these data, however. Deciding to sentence someone to death is by all accounts perceived by jurors as a heavy burden, and the only way to lighten that burden is to be convinced that it was the only option, the right thing to do. Cognitively rewriting the unavoidability of the decision (there never was any other choice) would be an understandable post-verdict mechanism distorting recall of a juror's earlier position. The Capital Jury Project, of course, had no choice in how it conducted the research: It could not interview jurors on their positions during the trial or sentencing proceedings, so it could only obtain retrospective reports from jurors about their earlier positions. Nonetheless, the post-trial data by themselves are weak for inferring premature decision making. Similar problems occur in all post-trial interview studies of jurors, but they are particularly problematic when the juror is asked to recall a belief at an earlier time, rather than a specific action taken (e.g., the vote a juror cast on a first ballot; Garvey et al. 2004).

Other data persuasively point to premature decision making by some jurors in capital cases. Death penalty jurisprudence requires that jurors be willing and able to follow the judge's instructions to consider both aggravating and mitigating evidence in deciding whether to sentence a defendant to death. The judge must excuse prospective jurors for cause if the jurors indicate during jury selection that they would automatically impose a death sentence if the defendant is convicted or if they say they would never be willing to impose a death sentence.<sup>6</sup> Yet nearly 3 in 10 jurors from the Capital Jury Project, despite surviving jury selection, reported in their post-trial interviews that they viewed death as the only acceptable punishment for five of six different kinds of murder (Bowers & Foglia 2003, p. 62). Seventeen percent of the jurors reported that only death was acceptable as a punishment for

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<sup>6</sup>Actually, the requirement is more stringent: A juror must be excluded if his or her feelings about the death penalty would prevent or "substantially impair" the juror's performance of his or her duties in accordance with the judge's instructions on the law (*Wainwright v. Witt* 1985).

all six kinds of murder, including a killing in the course of another crime (felony murder). Unless service as a juror on a capital trial caused these jurors to become unwilling to consider mitigating factors, these “automatic death penalty” jurors should have been disqualified from serving in a capital cases.

The Capital Jury Project also provides a chilling picture of the relationship between the racial composition of the jury, as described by the converging reports on racial and gender composition from multiple jury members, and the verdicts for black defendants on trial for killing white victims (Bowers et al. 2001, pp. 190–91). When there was at least one black male on the jury, 40% of those defendants in the sample were sentenced to death. The figure jumped to 72% when not a single black male was a juror (figures computed from Bowers et al. 2001, table 1). Although, as Bowers and his colleagues acknowledge, the cases may have differed on other dimensions, this startling contrast raises a serious and plausible suggestion that the presence of a black male juror carried some significance in these interracial capital cases either in opposing death or in changing the reaction of the other jurors to this interracial offense. That suspicion is reinforced by the absence of any relationship between the number of black male jurors and death sentences for white-on-white offenses and a somewhat inconsistent pattern for black-on-black offenses. This pattern has an eerie resonance with the early finding by Baldus and colleagues (1990) that black defendants in Georgia who were convicted of killing white victims were more likely to receive the death penalty than were black defendants convicted of killing black victims, and it takes on particular significance in view of the more recent evidence that *Batson v. Kentucky* (1986) has failed to prevent disproportionate exclusion of black jurors from capital juries (Baldus et al. 2001).

## THE OPTIMAL JURY TRIAL

Research on jury decision making generally reveals that a jury is a motivated problem solver that uses reasonable strategies to understand and evaluate incomplete and conflicting evidence. Nonetheless, standard trial procedures designed to control and channel jury decision making unnecessarily undermine the jury’s efforts to deal with complex evidence and law. Some courts have recently implemented a variety of innovations that attempt to overcome some of these constraints and to assist jurors in understanding what they are hearing in court and to arrive at verdicts that reflect the evidence and the jury instructions. These innovations include permitting jurors to take notes, allowing them to submit questions for witnesses during the trial, and instructing them that they can discuss the evidence among themselves during breaks in the trial as long as they reserve judgment until they have heard all the evidence. Research evaluating these innovations suggests that their effects are modest but that they do, in some cases, facilitate comprehension, particularly in complex trials (Diamond et al. 2003, Heuer & Penrod 1988). A few courts have also attempted to improve jury instructions, providing preliminary instructions at the beginning of the trial, rewriting instructions in plain English, and providing written copies of the instructions for jurors to consult during deliberations (Heuer & Penrod 1989). Some simulation research suggests directions

for further improvements in jury trial procedures. For example, FosterLee and colleagues (2000) found that jurors who received written reports summarizing an expert's testimony before the expert testified showed enhanced understanding of the testimony. Similarly, to combat spillover effects between judgments about liability and damages, Sanders (1998) suggests greater use of bifurcated trials. The effects of other proposed innovations, such as back-to-back experts (to facilitate direct comparison of opposing testimony), periodic summaries by the attorneys, and the delivery of jury instructions before rather than after closing arguments, have not yet been assessed, but each proposal offers the promise of better communication with the modern jury. An even more radical change in procedure would invite jurors to ask questions about the law before beginning deliberations, providing an opportunity to check more directly for, and to address, both misunderstandings and areas of skepticism (e.g., how long a life sentence actually is). Informed by substantial research revealing jurors as active decision makers, these innovations reject the passive "potted plant" image of the traditional jury (Damaska 1997) and attempt to treat the courtroom as an educational setting in which informed decision makers are assisted rather than controlled (Dann 1993). Yet the rules of evidence impose some barriers that currently may stand in the way of such efforts and prevent juries from achieving optimal performance. For example, if concerns about horizontal inequity (similar cases resulting in differing awards) are warranted, they could be addressed with assistance from a procedure that permitted attorneys to share with the jury a set of awards previously given in comparable cases (the judge would act as gatekeeper to ensure that the cases selected were not aberrant). Judges have turned to such sources in assessing whether an award was excessive or inadequate (Diamond et al. 1998, p. 321), but in a jury trial, other jury awards would be excluded from the jury's consideration as irrelevant or prejudicial.

## CONCLUSION

The picture of real juries that emerges from this review provides little evidence that the jury fails to live up to the trust placed in it. Juries make mistakes and they display evidence of bias, but there is no convincing evidence that another decision maker would do better. Nonetheless, those interested in optimizing modern jury trials would do well to reconsider Judge Jerome Frank's lament (1949, p. 120) that "even twelve experienced judges, deliberating together, would probably not function well under the conditions we impose on the twelve inexperienced laymen." That juries perform as well as they do does not mean that they could not do better with some appropriate assistance.

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