How Does Law Matter? (1998)

THE JURY: HOW DOES LAW MATTER?

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In the most fundamental sense, the jury *is* a legal matter. The legal system creates the jury and, in the absence of that legal mandate, criminal charges and civil disputes in the United States would be handled as they generally are elsewhere: without the assistance of a jury.[1] Yet although the jury is a product and instrument of the law, it is the most nonlegal of legal creations. The legal system gives a group of ordinary citizens the extraordinary power to make consequential legal decisions—to determine guilt or innocence in criminal cases and to decide whether a defendant should be sentenced to death, as well as to determine liability and set damages in civil cases. Although most jury verdicts can be appealed or altered,[2] the jury as a rule is not required to explain its decisions,[3] and jury verdicts are accorded substantial deference by both trial court judges and appellate courts.

Despite or perhaps because of the formidable powers it grants to a group of laypersons, the legal system reveals considerable ambivalence toward the jury. For example, legal doctrine assumes that the jury will base its verdict solely on the facts and law presented in court, and that jurors will not be influenced by prejudice or legally irrelevant information. Yet concern about the jury's ability to sift and to evaluate information fairly has produced a myriad of legal rules that orchestrate and restrict the presentation of facts and

law that jurors receive in the course of a trial—all aimed at controlling and channeling jury decision making. Nor is there consistent agreement on how the jury should exercise its discretion in applying legal doctrine to the facts it finds. Although the jury is told that it is obligated to follow the court's instructions on the law, one of the jury system's acknowledged strengths is its occasional deviation from the law a judge would be expected to apply. Thus, after a jury acquitted a young bartender with no criminal record who was prosecuted for possession of a single stolen television set, choosing to believe that the defendant did not know it was stolen, a federal judge expressed relief in the acquittal. As the judge explained, he would have had to convict on the evidence in a bench trial, although he believed that the jury's verdict was the better outcome. An appreciation for the jury's power to stretch the law—or to impose a legal standard codified only in the community's sense of justice—has a long tradition (Green 1985; see also Constable 1994). Moreover, it is not confined to so-called nullification cases involving criminal defendants; the jury's tempering of the strict rule of contributory negligence barring a plaintiff's recovery for injuries unless the defendant was totally responsible preceded the modern comparative negligence statutes that permit partial recovery by a negligent plaintiff.

The rules of evidence and instructions on the law that the judge delivers to the jury are the most conspicuous legal efforts to control jury decision making, but they are not the only ones. In addition, legal standards specify the size of the jury, influence how the jury is selected, and determine the structure of an acceptable verdict (e.g., unanimous or based on a majority vote, a special or general verdict). Each of these decisions too reflects the tension between conflicting values in controlling and relying on the jury: attempting to achieve both representativeness and impartiality, to provide for full debate while reducing costs and minimizing hung juries, and to structure decision making while leaving the jury free to soften some of the inflexibilities of the statutory and judge-made law.

If the legal system is ambivalent about the jury, it is perhaps no surprise that jurors sometimes express ambivalence in their reactions to the law. Thus, in asking how law matters for the jury, we must ask not only how the jury exercises the powers that the legal system grants to it, but also how the jury interprets and reacts to and sometimes resists the legal controls used to structure and constrain its actions and to channel its influence. Research on the jury indicates that it exercises its powers and handles its constraints actively, functioning not as the passive recipient of information and compliant decision maker that the law sometimes appears to expect, but as an active collaborator in the production of verdicts (see, e.g., Diamond and Casper 1992; Diamond, Casper, and Ostergren 1989). This picture of the active jury will be helpful as we examine the thicket of inconsistent and often ineffective approaches used by the legal system ostensibly to guide and channel jury behavior.

We begin by considering how law explicitly and implicitly influences which cases go to juries rather than to judges, what kind of verdicts juries can

reach, and which citizens become jury members. We then examine how the law organizes the content of a jury trial, including legal arrangements invisible or only partially visible to the jury as well as legal directives explicitly communicated to the jury. We also discuss some obstacles to legal control of the jury. Finally, we consider the sources and consequences of the ambiguous legal efforts exerted in the name of jury control.

1. HOW LAW MATTERS IN PRODUCING A JURY TRIAL

A. When Jury Trials Occur

Most criminal offenses carry a constitutional right to trial by jury, but even this right has important limits. The United States Supreme Court has interpreted the Sixth Amendment's right to trial by jury in all criminal prosecutions to apply only if the verdict can carry the potential of at least six months imprisonment (*Baldwin v. New York* 1970).[4] Juveniles, however, even when charged with the same crimes as adults, are not entitled to a jury trial (*McKeiver v. Pennsylvania* 1971). Moreover, convicted defendants have no constitutional right to a jury decision on penalty and in most states the jury does not participate in felony sentencing decisions.[5] Even in capital cases, the Constitution does not guarantee the right to a jury in determining whether the defendant will be sentenced to death (e.g., *Walton v. Arizona* 1990). Although the federal government and thirty-four of the thirty-eight states with death penalty statutes do use juries in some form,[6] four of the thirty-four use the jury only in an advisory capacity, leaving the final decision to the judge.[7] The U.S. Supreme Court has explicitly endorsed advisory juries on the ground that this reduced role must be permissible if it is constitutional to eliminate the jury entirely from the capital punishment decision. Some recent work in Indiana by Hoffman (1995) suggests that the jury's advisory role may affect jury decisions by reducing juror concerns about the consequences of their decision. If judges in turn use the jury's recommendation for guidance, the legal framework putting the jury in an advisory role may have the significant and presumably unintended consequence of reducing the deliberation associated with decisions on death—an example of the way in which attempts to control the jury can undermine the jury's performance.

The right to a jury trial in the civil arena also takes its pedigree from the U.S. Constitution, but there is considerable controversy about when that heritage entitles litigants to a jury. In federal courts the Seventh Amendment preserves the right to jury trial in suits at common law, but the U.S. Supreme Court has not made the right to trial by jury in civil cases binding on the states by incorporating the Seventh Amendment into the Fourteenth Amendment. Nonetheless, all state constitutions currently contain provisions protecting

the right to a jury trial in civil suits. The primary legal limitation on the right to a civil jury trial turns on the definition of "suits at common law,"[8] and many pages of court opinions and law review analysis have been spent in the attempt to delineate what this phrase encompasses (e.g., If a statute provides for civil penalties and not merely damages, does a party have the right to a civil jury trial on the issue of liability?[9] If Congress uses the magic word "equitable" to describe the relief provided under the employment discrimination provisions of Title VII of the Civil Rights Act, but not under the fair housing provisions of Title VIII, is the right to a jury trial to be denied in the former but not in the latter?).[10] Although some scholars believe that recent court decisions have expanded the reach of the civil jury (e.g., Cecil, Hans, and Wiggins 1991), efforts have also been made, albeit unsuccessfully, to carve out a "complexity" exception to the right to trial by jury in civil cases (*In re Japanese Electronic Products Antitrust Litigation* 1980). The boundaries of the right to a civil jury trial are likely to continue to be contested ground as new causes of action are identified and as the legal system continues to struggle with its ambivalence about the power and competence of the lay jury.

There is thus noticeable ambiguity in and dispute about the formal rules of the legal system that control the characteristics of the cases that are or should be eligible for jury trial. In contrast, there is substantial agreement about the quantity of cases that juries actually decide. Both civil and criminal jury trials are rare events. Most criminal indictments are disposed of without any trial.[11] The majority of convictions are obtained as a result of guilty pleas.[12] On the civil side, most claims are dismissed or settled before trial.[13] Even when trials do occur, the decision maker may be a judge rather than a jury. This rate of jury trial activity suggests that we should look elsewhere for the sources that shape court outcomes. But the small number of jury trials is a misleading measure of the jury's influence on participants in the legal system. The jury, through what Galanter (1990) calls its threat-and-signal function, shapes the pretrial, and even the prelitigation decisions of prospective trial participants. Predictions about what a jury would be likely to do affect the probability of a guilty plea, the sentence a defendant is willing to accept in order to avoid trial, the settlement offer a defendant is willing to make, and the amount a plaintiff is willing to accept. This image of what the jury would do does not of course assume that predictions are always accurate. Indeed there is ample evidence to suggest that some pictures of the jury's likely behavior are systematically distorted. For example, Daniels (1989) and Saks (1992) have demonstrated that media coverage of jury decisions and, in particular, strategic publicity by the insurance industry create a false picture of pro-plaintiff juries and runaway jury awards that purport to inflate insurance rates and threaten business health.[14] Nonetheless, false or correct, different expectations about what the jury is likely to do are the stuff that jury trials are made of. After all, if the parties agreed in advance on what the jury's verdict would be, they generally would settle, agree to drop the charges, or plead, avoiding the anguish and work of trial.

B. What Verdict a Jury Can Return

The general verdict is the standard form of jury verdict. The jury delivering a general verdict indicates only whether it finds the defendant guilty or not guilty, liable in the amount of X dollars or not liable. One critic of the jury has called the general verdict "the great procedural opiate" (Frank 1949) because it provides no information about whether the jury's verdict was based on error or bias. Others have praised the general verdict for the scope it leaves the jury to do what the law officially forbids: to compromise (Casper 1993). Unease with the general verdict is thus one more area that reveals the law's ambiguous relationship to the jury. The inscrutable nature of the general verdict is acceptable only if the jury is a trustworthy decision maker. If it is deemed necessary to monitor the structure of the jury's decision making, the form of the verdict can be adjusted to reveal that structure. One approach used in some civil cases gives the jury a list of questions to answer that together determine whether and how much a plaintiff will recover (e.g., Do you find that the defendant behaved recklessly? Do you find that the defendant's behavior was a cause of the plaintiff's injury?). A verdict that consists entirely of the answers to such questions is called a special verdict. Alternatively, the jury may be asked to provide a general verdict as well as to answer a set of questions called interrogatories. The notion is that these more specific verdict forms will both help the jury to organize its consideration of the evidence and will permit closer supervision of the jury's behavior by the trial and appellate courts. Inconsistencies can be detected and, where necessary, a retrial can occur on only the unresolved issues.

The debate about the effects of special verdicts and interrogatories has thus far been minimally informed by data. Some scholars have identified plausible systematic biases that could accompany a shift to special verdicts (Casper 1993). For example, Lempert (1981) has suggested that plaintiffs would be disadvantaged because jurors would be required to reach a series of favorable decisions and failure on any one would preclude a finding of liability. More recently, Lombardero (1996) has pointed to the logical advantage a plaintiff may have with a special verdict: if the jury answers all of the special verdict questions in favor of the plaintiff, the judge will enter a judgment for the plaintiff. Yet suppose that the answers were independent[15] and in each instance the jury thought it was only 75 percent likely that the answer favored the plaintiff (and 25 percent likely it favored the defendant). If there were four questions, the probability that the verdict would favor the plaintiff should be $(.75)^4$ or .32, logically supporting a verdict for the defendant. Of course, jurors may not answer each question without considering the answer to the remaining questions, and thus this model may not reflect the way jurors actually behave.

Little is known about whether or how special versus general verdicts actually affect jury behavior. In the single study that compared juror performance using general versus special verdict structures, Wiggins and Breckler

(1990) examined how jurors responded to a simulated defamation trial. They found that verdict structure did not affect the frequency of liability verdicts. Jurors who delivered special verdicts did give significantly higher compensatory damages awards than jurors who reached general verdicts, but there were no differences in the size of punitive awards. In addition, special verdict jurors did not show better comprehension of the evidence, although they did understand the legal standard on the burden of proof better than jurors who reached a general verdict, possibly because they were exposed to it twice, once during instructions and again on the verdict form. The mixture of findings from this lone study leaves us with fundamental questions about how the special verdict affects jury behavior, whether it achieves the shaping function it was designed to serve, and how it affects other values more easily expressed through the jury discretion implicitly conferred by the general verdict.

C. How the Jury Trial Is Structured

1. The Role and Consequences of Law in the Composition of the Jury

Jury service has evolved since colonial days when jurors were selected for their personal knowledge of the events at issue in the trial (Thayer 1898; Dawson 1960) and only men of property were eligible to sit as jurors.[16] This limited pool of prospective jurors expanded gradually as U.S. courts determined, based on constitutional mandate, that jurors must be drawn from a fair cross-section of the community.[17] In 1880 the U.S. Supreme Court ruled that black male citizens could not be excluded from jury service[18] but women were regularly excluded from serving in some jurisdictions even after 1946.[19] Some recent state decisions have been sensitive to more subtle forms of systematic underrepresentation. In 1984, the California Supreme Court found that voter lists used to select prospective jurors were not, as a general rule, sufficiently representative of the jurisdiction.[20] California state courts now merge voter and driver lists in selecting prospective jurors (Munsterman and Munsterman 1986).[21] Yet there is no doubt that the selection process that begins with the population at large and ends with the empaneling of a jury produces substantial differences in demographic and other characteristics between the jury and the population at large (Fukurai, Butler, and Krooth 1993; Van Dyke 1977). This path leading to the selection of the jury highlights the conflict between the legal rhetoric that endorses jury representativeness and the selection processes deemed necessary to obtain a competent and impartial jury.

The legal system thus provides numerous opportunities for the most representative prospective cross-section of citizens to be transformed by the

time that the jury is seated. First, most jurisdictions have until very recently permitted statutory exemptions from jury service. It was only in 1975 that the U.S. Supreme Court declared Louisiana's method of selecting women as jurors unconstitutional. At that point, Louisiana summoned men to the courthouse for jury service, but called women only if they went to the courthouse and filed notice of their desire to serve.[22] More subtle forms of exclusion occurred and occur in the granting of excuses for individuals in certain occupations. Recently, with the advent of one-day/one-trial procedures in many jurisdictions, states have reduced statutory exemptions (even attorneys are called to serve) and become less generous in granting excuses. The apparent result is that lists of prospective jurors are more heterogeneous and representative than they have ever been. Nonetheless, the process of qualifying jurors itself affects the shape of the jury venire. For example, citizens who move frequently are less likely to appear on the juror roles, and mobility is associated with socioeconomic status (Fukurai, Butler, and Krooth 1993). Moreover, potential jurors with family and other pressing responsibilities, burdens not distributed randomly in the population, are regularly excused from jury service.

Even if the qualified sample of citizens summoned for jury duty formed a random subset of citizens, the empaneled jury would not. The yield for a jury summons reflects substantial loss—as much as 50 percent in some large cities, and courts rarely engage in the vigorous follow-up that would be required to ensure that the majority of these qualified no-shows eventually appeared as prospective jurors. One explanation for this failure to pursue recalcitrant prospective jurors, in addition to the costs involved, is the suspicion that citizens reluctant to serve will be less motivated to serve well. In fact, the limited evidence we have suggests that jurors tend to come away with more favorable attitudes toward jury duty than they had before serving, including those jurors who report that they had attempted to avoid jury service (Diamond 1993). Thus, by failing to press all eligible citizens to serve as jurors, the legal system may unnecessarily reduce the representativeness and threaten the legitimacy of the juries it empanels.

Before they are seated, prospective trial jurors are subjected to further screening, which often involves detailed questioning about their backgrounds and their attitudes on issues related to the case they may be asked to decide. If they explicitly display or admit an inability to be fair to any party, they will be excused for cause.[23] In addition, however, all parties are allotted a number of peremptory challenges that they can exercise to remove a juror for any or no reason.[24] Because these challenges are not exercised randomly,[25] the jury selected is not a random sample of six or twelve drawn from among those awaiting assignment.[26] From both within and outside the legal system, some of the most vociferous criticism of the way jurors are selected has focused on this final stage of the selection process (e.g., *Batson v. Kentucky* 1984; Alschuler 1995).

The attempt to ensure participation of jurors drawn from a cross-section of the community can be justified on constitutional grounds or because of the greater legitimacy that is likely to flow from democratically selected juries, but we can also ask about its effect on the decisions juries reach. Does systematic exclusion of particular citizens affect jury decision making itself in predictable ways? Do the decisions of juries drawn from a representative jury pool differ from those that would be reached by more homogeneous sets of jurors? The competing values served by the jury system are squarely implicated in this final stage of jury selection because the peremptory challenge, while not constitutionally mandated, is a well-entrenched tradition in American legal procedure. Peremptory challenges permit the parties in a case to have a voice in the composition of the jury that will be exerting its power over them, a recognized component of procedural justice (Lind and Tyler 1988). At the same time, the interests of the community at large in the appearance of fairness to all trial participants, including jurors as well as parties, argue for limits on the form taken by this exercise of voice—thus, the U.S. Supreme Court has ruled in a series of recent cases that a party cannot base a peremptory challenge on the race or gender of the prospective juror.[27]

In principle, the race or gender of any trial participant, witness, party, or juror can influence juror verdict preferences. Although some color-blind and gender-neutral models of legal decision making view any relationship between race or gender and jury decisions as unacceptable bias in a purportedly neutral system (and indeed some of the U.S. Supreme Court's language in *Batson* and its progeny and in *J. E. B.* have this flavor—e.g., "we hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality" [p. 1421]), the color-blind gender-neutral perspective ignores the social context that jurors may legitimately reflect in their decision making. Race and gender may be indicators of differences in life experiences that can lead jurors to evaluate the same testimony differently—indeed the pooling of those different perspectives is arguably one of the major strengths of the jury system. To the extent that the experience of jurors who differ in their racial backgrounds or gender leads those jurors to see evidence in different ways (e.g., if the experience of some black jurors with police officers leads them to view the police with greater suspicion, if some women find a claim of self-defense more plausible because of their own experience with the threat of violence), they sometimes may evaluate witness credibility differently and consequently favor different verdicts. To the extent that race and gender affect jury decisions by reflecting the multiple perspectives of jurors with different experiences, ensuring widespread participation on juries across race and gender may expand the pool of experience that the jury has at its disposal. Thus, while legal institutions are charged with ensuring that litigants do not receive different outcomes based on their race or gender, there are ways in which race and gender can affect the legal process legitimately. In evaluating evidence for the effects of race and gender, we attempt to distinguish between these different forms of race and gender effects.

a. The Effects of Race on Jury Decision Making

The evidence for racial effects on verdict preferences is surprisingly mixed. Although several researchers have shown higher conviction rates for black defendants than for white defendants by white respondents (e.g., McGlynn, Megas, and Benson 1976; Poulson 1990; for reviews, see Johnson 1985 and King 1993), a recent meta-analysis of twenty-nine juror simulation studies revealed no consistent effect of race of defendant on conviction rates across studies (Mazzella and Feingold 1994). This mixed pattern of racial results may reflect a complex web of interactions, but a few regularities emerge. First, there is some evidence that white jurors are *less* likely to convict when the victim and defendant are both minority members. At least some juries, according to the judges surveyed by Kalven and Zeisel (1966), showed an unusual willingness to acquit when both the defendant and the victim were black, exhibiting a form of racism that benefited the black defendant—but only at the expense of a black victim. This finding has been replicated by Myers (1980) and by Foley and Chamblin (1982).

Second, both white and black jurors show some evidence of an own-race bonus. Although most researchers have focused on the behavior of white jurors, a few studies have examined the verdicts of both black and white jurors. For example, a comparison of conviction rates for defendants tried by biracial or all-white juries in Florida (Freedberg 1984) showed a conviction rate for black defendants to be higher before all-white juries than before biracial juries (79 versus 51 percent), but higher for white defendants before biracial juries than all-white juries (73 versus 56 percent). Although the study was based on a small number of cases (37 cases before all-white juries and 144 before biracial juries) and there were no controls for the weight of the evidence and make-up of the jury on nonracial characteristics, the pattern is consistent with results from two simulation studies in which the case facts were held constant. Both Ugwuegbu (1979) and Bernard (1979) asked black and white college students to judge a simulated case and found that white respondents were more likely to convict a black defendant than a white defendant, while black respondents were more likely to convict a white defendant than a black defendant.[28] If both black and white jurors favor same-race defendants, that pattern provides an additional justification (apart from juror rights and concerns about jury legitimacy) for court judicial and administrative efforts to avoid procedures that reduce minority representation on juries.

Only a few of the many researchers who have used simulations to investigate racial effects on the verdicts of jurors have given the jurors judicial instructions on the law or have obtained their verdicts after allowing them to deliberate as a group. In a study by Pfeiffer and Ogloff (1991), white jurors who received no judicial instructions showed an increased conviction rate for black defendants on trial for a crime involving a white victim, but the race of the victim and the defendant had no effect on jurors who had received instructions. Similarly, uninstructed jurors showed an increased conviction

rate for black defendants that did not occur for instructed jurors in a study by Rector, Bagby, and Nicholson (1993). A parallel attenuation of ethnic effects occurred with deliberations in a study by Lipton (1983) comparing the verdicts of Hispanic and Anglo student jurors. It is of course unclear whether such procedures would eliminate or reduce race effects outside the laboratory.

Thus, despite an inconsistent pattern of results, there is evidence that societal issues of race do not stop at the jury room door, although they may be muted. There are also some data suggesting that judges too may be influenced by racial stereotypes that affect their decisions. Uhlman (1979) found that both white and black judges were more likely to convict black defendants than white defendants, even after controlling for crime severity, but the difference was smaller for black judges.

Several scholars (e.g., Alschuler 1995) have suggested racial quotas to ensure minority representation on juries in every trial. This proposal puts in sharp focus the ambiguous status of the juror as a representative of the community at large as opposed to a particular subcommunity, as a presumptively impartial blank slate or as a repository of particular experiences. It also raises serious questions about the effect of labeling jurors as racial representatives in an effort to reflect the community in the jury room.

b. The Effects of Gender on Jury Decision Making

Like race, a juror's or other trial participant's gender is a potential source of influence on the outcome of a jury trial. In *J. E. B. v. Alabama* (1994) the Supreme Court noted that even if the judgments of men and women were found to differ from each other in some statistically significant way, gender could not be used as a proxy for bias to justify a gender-based peremptory challenge. In fact, research has produced little evidence that systematic differences in verdicts are associated with gender for most offenses (e.g., Bray and Noble 1978; Eisen and McArthur 1979; Gray and Ashmore 1976; Hastie, Penrod, and Pennington 1983). The two exceptions arise in studies of sexual assault (e.g., Bottoms and Goodman 1994; Scaly and Cornish 1973; for a recent meta-analysis of mock juror reactions to sexual assault cases finding a higher conviction rate by women, see Schutte and Hosch 1996) and wife-battering (e.g., Pierce and Harris 1993). In cases involving these offenses, women appear to be more willing to convict. Note, however, that such cases typically involve a male defendant and a female victim, so that it is impossible to distinguish among potential explanations for the gender pattern that emerges in these cases. Are women simply more likely to show sympathy and empathy for the victim who is similar to them? Do they find the victim's story more credible because their life experiences or increased knowledge about crimes of sexual assault lead them to find it more plausible?

As in the case of racial effects, there is some evidence that judicial instructions and deliberations may attenuate gender effects. Studies of gender in real

cases as opposed to simulations have revealed few differences (e.g., Bridgeman and Marlowe 1979; LaFree, Reskin, and Visher 1985; Visher 1987). Moreover, the addition of deliberations to jury simulations also appears to mute gender differences in verdict preferences (Crowley, O'Callaghan, and Ball 1994; Davis et al. 1975; Kerr et al. 1976) or cause them to disappear (Davis et al. 1977; Epstein and Bottoms 1996; Swim, Borgida, and McCoy 1993).

Although the Supreme Court specified in *J. E. B.* that gender could not be used as a proxy for bias when making peremptory challenges, the court explicitly noted that other characteristics were still permissible reasons for peremptorily striking jurors, even if one gender was disproportionately represented in, for example, a particular employment status. Thus, under *J. E. B.* it would presumably be appropriate to challenge an unemployed spouse because of his/her lack of paid employment. Researchers have identified some juror characteristics strongly correlated with gender that are associated with verdict (e.g., housewives were significantly less likely to acquit a defendant by reason of insanity in an incest case than were both women who worked outside the home and men [Simon 1967]; sex role stereotypes and rape empathy were associated with both gender and verdict preferences (Weir and Wrightsman 1990; Willis 1992). Under the reasoning expressed in *J. E. B.* it would be legitimate to peremptorily strike jurors based on attitudes or occupational characteristics even when they are closely related to gender.

c. The Effects of Juror Heterogeneity on Jury Decision Making

Thus far we have considered the effect of specific juror characteristics on individual verdict preferences, but we can also take a more multidimensional approach to the effect of juror composition on the behavior of the jury, asking how heterogeneity on the jury affects the process of decision making. Several pieces of evidence suggest that juror heterogeneity improves the deliberative process by encouraging a more thorough evaluation of possible alternative interpretations of evidence. For example, Pennington and Hastie (1990) report that jurors in their research responded differently to the fact that the defendant was carrying a knife. Jurors from wealthier suburbs found the defendant's possession of a knife remarkable, leading them to infer that the defendant had culpable intent, while jurors from poorer neighborhoods were more willing to believe the defendant was carrying the knife as a habit or for protection.

A more detailed exploration of the effects of heterogeneity was conducted by Cowan, Thompson, and Ellsworth (1984), who varied the homogeneity of juries according to jurors' willingness to consider giving the death penalty. They found that jurors who served on heterogeneous juries were more critical after deliberations in their evaluations of all witnesses than jurors who served on more homogeneous juries. The jurors on heterogeneous juries were also more accurate in their recall of the testimony, providing evidence that heterogeneity promoted more critical analysis of all issues. Thus, they suggest, "[H]omogeneity may hush the voice of a dissenting minority, whose criticisms of the majority viewpoint would have fostered the careful scrutiny

of all relevant issues" (Cowan, Thompson, and Ellsworth 1984: 60). More recently, Diamond et al. (1996) found that in close cases (in which members of the jury pool were substantially divided on the appropriate verdict), juries that reflected that heterogeneity in their individual predeliberation verdict preferences covered more different facts in their deliberations than did juries that were less representative (and more homogeneous) in their initial preferences. Heterogeneous juries thus engaged in deliberations that more thoroughly reflected the evidence at trial.

At various times, the legal system has limited heterogeneity on the jury by using special so-called blue-ribbon juries composed of jurors who meet special educational or training qualifications. The assumption is that such jurors bring special skills to and as a result increase the competence level of the jury. Under current federal law, such special juries are specifically prohibited[29] but it is unclear that any constitutional obstacle exists. In 1947 the U.S. Supreme Court upheld a New York statute authorizing special juries selected from the general jury lists in cases involving "important, intricate, or widely-publicized" issues. It survived several constitutional challenges before being repealed in 1965. In recent years, a number of commentators have suggested that blue-ribbon juries be used in at least some complex cases (e.g., Drazan 1989; Luneburg and Nordenberg 1981).

Proposals for special juries generally do not consider the potential costs of blue-ribbon juries for the jury's political and legitimizing role. In suggesting them for complex civil cases, advocates would effectively create a two-tiered jury system in which large corporate defendants draw blue-ribbon juries and individual tort defendants go before traditional juries. The proponents of blue-ribbon juries also fail to provide any empirical foundation to support this dramatic curtailment of juror eligibility (Casper 1993). There is some intuitive plausibility to the notion that individual jurors with higher education levels or particularly relevant experience might show better comprehension for complex or technical evidence, but some recent work indicates that heterogeneous juries can draw on the special expertise of their members without sacrificing the advantages of heterogeneity (Diamond et al. 1996).

In sum, there may be more rhetorical heat than substance to the assumed trade-off between jury representativeness and jury competence that fuels much of the legal struggle to define the boundaries of jury composition. Reducing exclusions and removing obstacles to wide jury participation may stimulate a more complete representation of diverse views and more thorough debate about the evidence during jury deliberations and at the same time produce greater legitimacy for the resulting jury decisions.

2. How Big Will the Jury Be? Must the Verdict Be Unanimous?

The traditional jury is a group of twelve citizens instructed that its verdict must be unanimous. What then was the source of the movement to reduce

the size of the jury and to permit non-unanimous verdicts? One explanation is that those arguing for the change genuinely believed that it would be possible to reduce costs with no effect on the quality of jury deliberative processes. An alternative explanation is that the movement expressed an image of the jury as a decision producer, whose particular verdict is less important than the fact that a verdict is produced.

In a series of cases during the 1970s, the U.S. Supreme Court ruled that juries with as few as six members were permissible and that unanimity was not required for jury verdicts in civil and criminal cases.[30] Many of the early court opinions cited substantially flawed research which purported to show no effect of jury size or a unanimity requirement on jury decisions or deliberations (Zeisel and Diamond 1974). Since those rulings, smaller and non-unanimous juries have become more common. Courts adopted these changed procedures primarily in the name of cost savings and with the expectation that the rate of hung juries would drop.

More carefully designed studies of the effects of the smaller and non-unanimous juries have found evidence that the cost savings produced by these changes are minimal (Guinther 1988), and that the changes have additional consequences: smaller juries are significantly less representative (Zeisel 1971) and are less accurate in their recall of the evidence (Padawer-Singer 1977); non-unanimous jury members are less likely than those on unanimous juries to correct factual errors, are less satisfied with deliberations, and report that deliberation has been less thorough (Hastie, Penrod, and Pennington 1983).

As Paul Carrington (1990) has pointed out, at the same time that legal shifts have produced more representative jury pools, the reduction in jury size has reduced opportunities for obtaining representative juries. The loss associated with the reduction in jury size has been compounded by a failure to reduce the number of peremptory challenges, so that the attorneys can exert more substantial control over the ultimate membership on the jury. Thus, these apparently value-free cost-saving measures have altered the distribution of control over jury membership and reduced the ability of juries to reflect the sense of the community.

2. HOW LAW MATTERS IN SHAPING THE CONTENT OF THE JURY TRIAL AND THE VERDICT OF THE JURY

So far we have considered aspects of the trial that the jurors can influence only in limited ways. They can fail to cooperate in becoming jurors or they can fabricate responses during jury selection, but in general the judge and the parties and their attorneys control who will be seated on the jury. The potential for control shifts dramatically once the jury is chosen and faces the content of the trial itself. Here the jury in reaching its verdict can, if it chooses, ignore evidence or disregard the judge's admonitions and

instructions on the law. If it decides to acquit a defendant in a criminal trial, the decision will be final. As we shall see, although the jury possesses these powers, its rule departures occur relatively infrequently. When they do, they are often the result of inadequacies in legal instruction and fundamental human information processing and attributional processes, rather than overt rebellion against the applicable legal standard. Even in those instances when the jury intentionally deviates from what it understands the law to be, the legal standard provides a yardstick which the jury considers in exercising its power.

There are a number of reasons to expect rule departures by juries. Much legal doctrine proceeds on the assumption that the jury is a passive and docile receptacle for evidence and instructions on the law. The rules of evidence create a selective picture of what the jurors are told about the events that led to the trial. Curious omissions, objections, and admonitions to disregard information dot the presentation of evidence. Jurors are told not to discuss the case and generally cannot ask questions during the trial. They are instructed not to form impressions or make judgments about their ultimate verdict until all the testimony is completed and the judicial instructions have been issued. Although most judges and attorneys would probably not claim that jurors actually achieve this model of passivity, the legal system proceeds as if it assumes they do.

Evidence from behavioral science paints a very different picture. Like other human decision makers, jurors bring expectations and preconceptions with them to the jury box, actively search for causal explanations to make sense of the events about which they are told, and consciously or unconsciously process information, filling in blanks or interpreting ambiguities in testimony in ways that may strongly influence their decisions (Casper, Benedict, and Perry 1989; Diamond and Casper 1992; Hastie, Penrod, and Pennington 1983). Like all human information processors, jurors do not absorb everything they are exposed to (Fiske and Taylor 1991), instead drawing selectively from the factual and legal information that the trial presents. As a result, the jury's verdict may be guided less by the intended legal lessons of the jury instructions and more by the jury's own construction of the case evidence in light of the jury's own sense of justice.

A. The Rules of Evidence

The rules of evidence determine what evidence the jury will be permitted to hear. Not only is irrelevant[31] information excluded from the trial, but also some relevant information is excluded if the legal system determines that it will cause prejudice or confusion, or mislead the jury.[32]

Jurors know that the story they hear in the courtroom is incomplete (Diamond 1993). Sidebars during the trials, objections, and instances in which the jurors are excused from the courtroom all convey to jurors that they are not being permitted to learn all that there is to know. Although

jurors are instructed to base their decisions only on the evidence presented in court, it can be difficult for them to avoid speculating about matters they view as omissions or limitations. For example, in a survey of jurors who served in thirty-eight federal and state civil cases in Pennsylvania, 51 percent of the jurors said they wondered why certain people who were mentioned during the trial didn't testify (Guinther 1988). One-fourth (27 percent) said they "held it against the side that did not call certain people to testify who might have added important information." Thus, by limiting the jurors' access to some forms of evidence, legal controls only partially succeed in focusing the jurors solely on the events that transpire in the courtroom.

B. Partially Visible Controls: Admonitions to Disregard, Limiting Instructions, and Blindfolding

In the course of a trial, a witness may say something that is precluded by the rules of evidence (e.g., the witness may refer to the defendant's liability insurance in a jurisdiction that forbids the mention of insurance). Or a judge will instruct jurors to consider the defendant's criminal record only for the limited purpose of judging credibility and not as evidence that the defendant committed the offense. Or jurors who are deciding whether the defendant should be sentenced to death send a note to the judge asking what will happen if the defendant is not sentenced to death. Although the statute requires the judge to sentence the defendant to life in prison without the possibility of parole, the jurors are blindfolded to the consequences of their decision. They are told that their only responsibility is to determine whether the defendant should be sentenced to death.

In each instance, the legal system asks the jurors to ignore a case attribute that may fundamentally affect their perceptions of the parties and the case. Research indicates that on some of these occasions jurors are unable to comply fully with the legal demand. The most studied instance involves the defendant with a criminal record who takes the stand. As Wissler and Saks (1985) demonstrated, jurors told about the defendant's prior record tend to convict at a higher rate than those not told of the defendant's record, particularly if the defendant has a prior conviction for a crime identical to the current charge. Moreover, there is persuasive evidence that this effect is not a product simply of discounting the defendant's exculpatory testimony, but rather is produced by the existence of the criminal record itself.

When legal policies attempt to control jury behavior by simply forbidding juries access to available information or demanding that they use the information in limited ways, the policies are ignoring the role of the juror as an active collaborator in the production of the trial verdict. Although it may not always be possible to meet the jury's cognitive needs and gain the jury's cooperation, one strategy is to do what Judge Schwarzer of the Federal Judicial Center calls "level" with the jury. Jonathan Casper and one

of us (S. D.) tested juror responses to several versions of an antitrust jury instruction (Diamond and Casper 1992). Some of the jurors were informed that their verdict would be automatically trebled by statute and the jurors gave significantly lower awards as a result of that information, presumably to avoid a plaintiff windfall. Other jurors were told about the trebling provision and were simply admonished not to lower their awards. That admonition did not prevent them from giving reduced awards. In contrast, a third condition treated the jurors as collaborators and explained why Congress had passed the automatic trebling provision—for purposes of punishment and deterrence—and how they would be undermining Congress's purpose if they reduced their award below the amount necessary to compensate the plaintiff. In this third condition, the jurors did not give reduced awards. Although the strategy of blindfolding may occasionally be preferred (if jurors are unlikely to think of a particular topic or fact unless it is introduced in the courtroom), leveling with jurors may in many cases facilitate rather than impair legal control. Again, a system ambivalent in its willingness to trust lay decision makers may fail to gauge when the cost of withholding information is greater than the danger of providing it.

C. Explicit Legal Directives: Jury Instructions

In every American jury trial today, the jurors begin their deliberations only after receiving instructions from the judge on the law they are to apply in reaching a verdict. These judicial instructions are a relatively recent development in the history of the American jury. Early juries in the United States 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. It was not until the end of the nineteenth century, as part of the increasing efforts at jury control, that state legislatures and courts began to require the trial judge to instruct the jury and empowered the judge to grant a new trial when the jury's verdict was deemed inconsistent with the law. In 1895, the U.S. Supreme Court held in *Sparf and Hansen v. United States*[33] that jurors did not have the right to decide questions of law, even in criminal cases. If jurors did not have that right, the trial judge had to give the jury instructions so that the jury could base its verdict on the applicable law.

Appellate courts began to review the instructions that the judges gave to juries, reversing jury decisions or ordering a new trial when judges failed to state the applicable law accurately. To increase the likelihood that their instructions would be accurate and to decrease their chance of being reversed, judges formed committees, usually with representatives from the practicing bar, to draft pattern jury instructions that could be endorsed for use in all applicable cases. Almost all jurisdictions have developed some form of pattern jury instructions (Nieland 1978) and in some states judges are required to

give the pattern jury instruction whenever one is available that is applicable to the case.[34]

This history reveals the dominant force that motivated the way in which jury instructions were written: a determination to present the applicable law accurately. It also provides a clue like the one that came from the silent dog in the Sherlock Holmes tale:[35] nowhere in this history was any concern expressed about whether the judicial instructions were being written in a way that would effectively instruct the jury on the applicable law. The audience of concern was and continues to be the appellate court, not the jury.

Jurors encounter a series of difficulties in attempting to follow the judicial instructions they typically receive. These include problems of comprehension, memory failure, and problems in applying the legal standards.[36] Researchers have conducted a number of empirical studies that reveal the breadth and depth of these obstacles and which raise serious questions about the ability of standard jury instructions to control or even to affect jury decision making.

1. Rewriting Jury Instructions

In the late 1970s and early 1980s several teams of psychologists and legal scholars presented citizens with selections from judicial instructions and tested juror comprehension of the instructions. For example, Charrow and Charrow (1979) read a set of instructions drawn from the official set of California pattern jury instructions, one at a time,[37] to a panel of prospective jurors in California and asked each juror to paraphrase the instruction after listening to it. Across the fourteen pattern jury instructions they tested, the Charrows found that jurors averaged approximately 45 percent correct.[38] By altering the grammatical structure of the instructions without changing their meaning, the Charrows were able to improve significantly the overall juror performance to approximately 59 percent correct. Performance on several individual instructions improved by more than 20 percent. This result provided evidence that lack of clarity in judicial instructions was not solely the result of inherent complexity in legal concepts, but rather was at least in part due to unnecessary lack of clarity in presentation.

Later researchers have described in detail how rewriting can improve the clarity and comprehensibility of judicial instructions. Elwork, Sales, and Alfini (1982), in the most extensive attempt to address problems of opaque instructions and describe ways to overcome them, presented jurors with trial evidence from a simple burglary case or a complex criminal case involving a defense of insanity. They then gave the jurors a set of judicial instructions. To some jurors they gave the original instructions. To other jurors they gave rewritten instructions which were simplified and clarified using standard psycholinguistic techniques (e.g., exchanging unfamiliar words like "conjecture" for more familiar ones like "guess," substituting active for passive voice, reorganizing sentences to avoid complicated embedded clauses, etc.). By rewriting the instructions, Elwork and his colleagues were able to increase

juror performance on a multiple choice test from 51 percent in the complex criminal case and 65 percent in the simple burglary case to 80 percent in both cases.

If the goal is to guide juror decision making with a set of legal standards, communicating the content of the rules is an obvious first step. But good performance on a comprehension task does not ensure that the jurors will be able to apply the instructions accurately. Severance and Loftus (1982) tested their respondents' comprehension.[39] They then gave the respondents a series of fact patterns and assessed the rate of agreement and disagreement by the respondents with correct and incorrect applications of the law. On the critical concepts they studied, jurors began with low comprehension levels (between 24 and 47 percent on a multiple-choice test). By rewriting jury instructions on those concepts (like reasonable doubt and the meaning of intent) that appeared to cause jurors difficulty,[40] Severance and Loftus were able to produce some significant increases in both comprehension and correct application. The increases, however, were small, and even with the revised instructions the mean percentage correct on the application measures averaged 68 percent.

The efforts to rewrite jury instructions generally have shown significant improvements in comprehension, but the level of jury miscomprehension researchers have found with standard jury instructions and the size of the effects produced by rewriting the instructions have varied considerably. In part, the differences may be due to the variations in the procedures used. Some researchers studying comprehension of jury instructions have had jurors paraphrase the instructions (e.g., Charrow and Charrow 1979), some have asked questions that required short answers (e.g., Elwork, Sales, and Alfini 1977), some have asked true/false questions (e.g., Ellsworth 1989; Reifman, Gusick, and Ellsworth 1992), and others have used multiple-choice measures (e.g., Strawn and Buchanan 1976). Some have permitted jurors to refer to written copies of the instructions (e.g., Severance, Greene, and Loftus 1984), while others have read the instructions to the jurors so that the jurors were left to rely on their memories (Ellsworth 1989).[41] Some have used student respondents (e.g., Severance and Loftus 1982) and others have tested jurors (e.g., Elwork, Sales, and Alfini 1982). Some have allowed jurors to deliberate (e.g., Severance, Greene, and Loftus 1984) and some have not (e.g., Strawn and Buchanan 1976). In all cases, however, researchers have been able to produce some improvements in comprehension by clarifying the instructions.

2. Deliberations

Two recent investigations have conducted thorough examinations of the role played by instructions during deliberations (Ellsworth 1989; Hastie, Penrod, and Pennington 1983). Both showed jurors the same videotaped criminal murder trial[42] in which jurors were asked to reach one of four possible verdict categories.[43] Hastie, Penrod, and Pennington report that approximately 25

percent of the remarks jurors made during deliberations referred to the instructions. Similarly, Ellsworth found that jurors spent an average of 21 percent of their time discussing the judge's instructions. This substantial attention to instructions might suggest that low comprehension levels are cured in the course of normal trial procedures. Further analysis, however, indicates that any optimism would be misplaced.

Hastie, Penrod, and Pennington (1983) found that jurors averaged less than 30 percent correct on questions that concerned the instructions although they showed an average performance of 60 percent on factual issues in the testimony. Ellsworth (1989) coded the accuracy of juror discussion of both instructions and factual issues during deliberations as well as postdeliberation comprehension levels. Using what she characterized as generous coding, Ellsworth (1989) found that only half of the references to the law were correct. Moreover, although inaccurate statements of fact tended to be corrected during deliberations, incorrect references to the law were not corrected. Because she had a sample of jurors who were not asked to deliberate, she was also able to test directly the impact of deliberations on juror comprehension. Although deliberating jurors performed quite well on the test of factual issues and significantly better than jurors who did not deliberate, both deliberators and nondeliberators performed equally poorly, at no better than chance levels, on the test assessing comprehension of the judge's instructions.

The dismal overall performance of the jurors in dealing with judicial instructions in these two studies might have been partially cured if the instructions had been rewritten following the model proposed by Elwork, Sales, and Alfini (1982). In a recent study, Diamond and Levi (1996) tested the effects of deliberation on juror comprehension of a set of death penalty instructions that had been revised to improve clarity. Although revising the instructions improved performance on all three of the issues they were designed to address, deliberation affected only the one issue on which a substantial portion of jurors individually demonstrated comprehension: that is, deliberation helped only when the deliberating jurors were more likely to share correct rather than incorrect information.

3. Written Instructions

Numerous commentators have advocated providing jurors with written instructions to increase comprehension (e.g., Cunningham 1958; Elwork, Sales, and Alfini 1982; Sand and Reiss 1985). Moreover, cognitive psychology has repeatedly demonstrated the comprehension benefits of multiple exposure (e.g., Nelson 1977), and educational psychology has shown that the opportunity to go over material several times—not possible when listening but possible when reading—generally makes reading comprehension superior to listening comprehension (Young 1973). Nonetheless, many jurisdictions currently do not allow and most do not require that jurors be provided with a written copy of the judge's instructions on the law.

Neither of the two studies that have directly assessed the impact of written instructions provide evidence that written instructions can be relied on to ensure juror comprehension. Hastie (1983) randomly assigned simulated juries to a written or an oral instruction condition. The jurors then watched a videotape of an armed robbery trial and deliberated to a verdict. The jurors who received written instructions performed *less* well on a recall measure than those who received oral instructions. Hastie suggests that jurors who can refer to the instructions do not process them as deeply as those who must rely on their memories, but he was not able directly to test that explanation because he did not have comprehension measures or measures that tested how jurors applied the instructions to fact situations.

Heuer and Penrod (1989) tested the effect of written instructions by randomly assigning real criminal and civil trials to written or oral instruction conditions.[44] Jurors filled out questionnaires at the end of each trial, including a set of multiple-choice questions that assessed juror memory for the judge's instructions. Jurors who received written instructions did not differ in their performance from those who received them orally. Because even the jurors who received written instructions filled out the questionnaire and returned it through the mail after the trial, the measure assessed memory rather than simply comprehension. Moreover, the test was not able to evaluate the effect of written instructions on many issues of substantive law because all of the questions were designed to apply to every trial.[45] Nonetheless, these two studies suggest that the problems associated with judicial instructions may not be solved merely by supplying written copies.

4. Preinstruction

Preinstruction is another procedure designed to improve juror comprehension. Jurors traditionally are instructed on the law only after they have heard the evidence. By failing to provide a framework of relevant legal considerations at the outset, the system assumes that jurors will attend to and recall all relevant evidence for later use in reaching a verdict, an expectation that strains credulity. In a larceny trial, for example, testimony about whether the defendant intended to permanently deprive the victim of his property is relevant to the definition of the crime. If jurors begin the trial thinking that larceny consists simply of taking property, they may not attend closely to testimony that relates to the defendant's plans for the property's return. Although some evidence suggests better recall for instructions delivered both before and at the end of the trial (Smith 1991), as with written instructions, preinstruction does not appear to eliminate the comprehension deficit.

In general, then, if jury instructions are intended to control jury decision making, there is substantial evidence that they are not achieving that goal. Why have efforts to improve communication been so limited (Tanford 1991)? In some areas of the law, the reluctance may be understandable, if not justified, because there is considerable disagreement about the meaning of a particular

legal standard or principle. The best example of this may be the phrase "beyond a reasonable doubt," a phrase that jurors regularly raise questions about (Severance and Loftus 1982) and apparently have some difficulty applying in a consistent fashion (e.g., Kagehiro and Stanton 1985). Courts have been ambivalent about how and even whether to define the phrase (e.g., Newman 1996; *Victor v. Nebraska* 1994). In most areas, however, communication can be improved although the effort entails two costs. First, the task requires some effort both in writing and in testing proposed alternatives. Second, the committees generally responsible for drafting pattern instructions must deal with the not insignificant challenge of pleasing diverse constituencies with competing interests (e.g., prosecutors and plaintiffs' attorneys as well as defense counsel).

Does a failure to communicate applicable legal standards to the jury matter? One possibility is that jurors faced with opaque instructions apply their own sense of justice (Saks 1993). Thus, in such cases, the legal system may by default (or by benign neglect or design?) encourage jurors to turn to custom and practice rather than doctrine in reaching their decisions.

5. Resistance and Jury Nullification

There is no clear standard for gauging the correctness of a jury verdict or even its consistency with the law. Judicial behavior was the standard used by Kalven and Zeisel (1966) in their survey of American judges. They asked judges across the country to report on the jury trials they presided over. After each of the more than seven thousand criminal and civil trials in the study, the judge filled out a questionnaire indicating the characteristics of the trial, the nature of the evidence presented, what the jury decided, and how the judge would have decided the case. The rate of agreement between judge and jury was 78 percent for criminal cases (Kalven and Zeisel 1966) and 79 percent for civil cases (Kalven 1964). If we assume that the judges reached decisions consistent with the law, the room for the jury's resistance would be confined to the remaining 20 percent of cases.[46] Kalven and Zeisel, based on their analysis of the case characteristics that produced disagreements between judge and jury, concluded that even among the 22 percent of criminal cases involving judge-jury verdict differences, few reflected a war with the law.[47] Jurors were less likely to convict when the offense involved an unpopular law (e.g., gaming), or the defendant appeared to be acting in self-defense but used more force than was permissible under the law, and jurors seemed to recognize contributory fault in the victim that the law would find irrelevant. In general, however, Kalven and Zeisel (1966) attribute most of the disagreements to evidentiary disputes, reporting that the jury is engaged in only a modest rewriting of the law in cases that are close on the evidence.

In one important respect, the Kalven and Zeisel data provide only a limited correlational view of how much the law influences the jury's behavior.

We cannot tell whether or how much of the agreement they report is the result of the law's influence on the jury and how much is due simply to a convergence of the jury's perspective and the law's guidance. The data on juror comprehension of judicial instructions indicate that many attempts to instruct the jury on the law are more ritual than communication. To the extent that communication about legal standards is fuzzy or unclear, it may be that a large portion of the high agreement is the spurious result of legal standards that are consistent with jurors' doctrinally unfettered sense of justice.

This assessment is consistent with our evidence from those limited occasions when the jury does refuse to apply the law, the jury nullification cases. These cases reveal the limited nature of the jury's overt disagreement with legal standards or their application. Some of these instances have a political tinge, like those involving juries who refused to convict young men who failed to register for the draft during the Vietnam era. Others express what may be the beginning of a move to change the law, as in some acquittals or manslaughter convictions of battered women charged with the murder of the men who brutalized them and the occasional acquittals in cases of euthanasia.

In a third category is a more diverse collection of cases in which the jury's mercy simply exceeds that of the law. The young bartender we described at the beginning of this chapter is one of this group, and the background of the case is telling. The stolen television he bought for such an unexpectedly low price had been part of a large shipment that the prosecutor said had been sitting in a truck in the adjacent parking lot. Behind the scenes, it emerged that the prosecutor had brought the case to trial because he believed that the young man knew and refused to disclose the name of the person responsible for the shipment. The judge, who applauded the jury's acquittal saying that based on the evidence he would have been forced to convict if it had been a bench trial, was annoyed with the prosecutor for bringing the case to trial. Some of the jurors said they believed that the defendant must have known that the television set was stolen.[48]

In a second case, the defendant was a longtime mail handler on disability leave from a job-related injury. He was accused of stealing a test sack of mail with a lock on it that indicated the sack contained money. Using periscope-like equipment to watch the employees from the ceiling of the building, postal security was able to document that he had moved the sack from its proper place to an out-of-the-way location. Some jurors felt that the postal authorities should have waited until he removed or opened the bag, but they did not seem to doubt that he had intentionally moved the bag so that he could obtain its contents. Some of the jurors said that they suspected that the post office was trying to get rid of a disabled employee. All of the jurors objected to what they called the "spy-in-the-sky" surveillance system. The judge told one of us (S. D.) he would have convicted, albeit reluctantly. The jury acquitted.

A final example comes from the film of an actual deliberating jury in the case of *Wisconsin v. Leroy Reed* (Herzberg 1990).[49] After an agonizing deliberation, the jurors acquitted the mentally deficient defendant on a weapons charge although the evidence clearly indicated that he possessed a gun, in direct violation of the terms of his parole. Although recognizing the extenuating circumstances, the last juror agreed to acquit with the greatest of difficulty. His struggle reflected discomfort with the conflict between an acquittal and the apparent demands of the law.

Throughout the history of the jury, the appropriate role of jury nullification has been a source of extensive and continuing debate. In particular, courts and commentators have argued about whether the jury should be told about its power to nullify. In *United States v. Dougherty* (1972), which grew out of protests against the Vietnam War, the majority opinion found that although juries have the power to nullify, they do not have the right to be told explicitly that they have that power. Judge Leventhal contended that to make the power explicit would loosen appropriate restraint. In his dissent Judge Bazelon argued for candor. In the federal courts and in all but two states,[50] jurors are not told that they are entitled to nullify.[51] Although they occasionally do, the power is used sparingly. Some limited empirical evidence suggests that Judge Leventhal may have been correct in assuming that nullification would be more common if jurors received an explicit instruction. In a series of jury simulations Horowitz and his colleagues (Horowitz and Willging 1991) have shown that jurors are more willing to acquit in certain circumstances when they hear an explicit instruction on nullification. Horowitz found that increased acquittals occurred only when the offense and defendant were admirable (e.g., a devoted nurse in a case of euthanasia), and that an unexpected increase in guilty verdicts occurred for unsympathetic defendants (e.g., a drunk driving case). Thus, the release of restraint caused by the explicit instruction may have unanticipated and objectionable consequences. In the absence of instruction, nullification currently operates as a limited restraint on the inflexibility of the legal context in which the jury operates.

3. COMPARING JURIES AND JUDGES

One assumption in our discussion of the jury—and indeed in all of the legal efforts aimed at jury control—has been that the jury, without special efforts at channeling and guiding, will be less likely to follow legal standards than would a professionally trained judge. Recent critics of the jury have claimed that jurors cannot be trusted to apply legal standards. Thus, an important question is: How do lay judges compare with their professional counterparts in their ability to follow the law and arrive at reasonable verdicts?

One way to answer this question is to find out whether judges and jurors make the same verdict choices given an identical set of case facts. Kalven

and Zeisel (1966), based on their comparison of judge and jury verdicts, concluded that disagreements between the judge and jury were rarely the product of disagreement over legal standards. Furthermore, when they did disagree it was not likely due to the jury simply misunderstanding the evidence or law involved in the more complex cases, as the level of disagreement was the same whether the case was rated by judges as "easy to understand" or "difficult to understand."[52]

The few other studies that have examined decision making by judges and jurors have shown a surprising correspondence, even in response to case characteristics that might be expected to influence laypersons more than professionals. Wells (1992) asked both judges and jury-eligible undergraduates to evaluate naked statistical evidence in a series of mock civil cases. Both sets of decision makers were reluctant to find for the plaintiff when presented with this kind of evidence, even though both assessed the meaning of the probability information similarly. Furthermore, a substantial proportion of judges who chose not to apply statistical evidence gave weak or flawed reasons for discounting it.

More recently, Vidmar and Rice (1993) compared the medical malpractice awards of professional judges (experienced arbitrators) and jurors (who volunteered to participate while waiting to be called to the courtroom) in a simulated case. Decision makers were informed that liability and economic damages had already been agreed on, but that noneconomic damages for disfigurement and pain and suffering were still in dispute. The authors found no significant differences in the total amount of money that the arbitrators and jurors awarded the plaintiff. More importantly, no differences between arbitrator and juror awards emerged when the total awards were disaggregated into their component parts (economic damages, pain and suffering, and disfigurement). Based on these findings the authors argued that the reasoning of jurors does not differ substantially from that of their professional counterparts.

Based on some of the above data (and other data by Diamond and Stalans 1989; Howe 1991; Howe and Loftus 1992), Landsman and Rakos (1994) questioned whether judges consistently reach verdicts that are more legally justifiable than the verdicts of jurors. They tested the legal system's assumption that judges can "compartmentalize" and discount legally inadmissible information when they are exposed to it. In a mock civil products liability case they found that judges and jurors who were exposed to information that had been ruled inadmissible were influenced by that information to a similar extent. This finding calls into question the traditional assumption that judges (though not juries) can ignore prejudicial information they may be exposed to during pretrial hearings and outside the presence of a jury. Moreover, it suggests that under some circumstances law can matter more in a jury trial than in a bench trial, precisely because the structure of the jury trial avoids burdening the decision maker with much potentially biasing information which the judge must confront in any trial.

4. THE LAW'S AMBIVALENT REACTIONS TO THE JURY: SOURCES AND CONSEQUENCES

The jury has changed in substantial ways since its early days when it consisted of knowledgeable citizens who were familiar with the events that formed the foundation for the conflict they were to judge. These early jurors knew more than the judge did about the facts and were expected to determine the applicable legal standards based on custom and practice. They were drawn from a relatively narrow population of eligible citizens (white male property-owners) and only limited efforts were mounted to control them. Over the years, both the demands and the constraints on the jury have grown, interacting in unanticipated ways.

Our examination of legal controls on the jury reveals a mixed picture of attempts to direct the jury along the pathways of formal legal doctrine. While granting substantial decision making power to the jury, the legal system imposes formidable blindfolds and barriers that limit the jury's base of information. While engaging in increasing efforts to maximize heterogeneity in the pool of potential jurors, the legal system permits a selection process that limits the diversity of jurors who actually are seated on the jury. Despite substantial ritual in the design and policing of jury instructions, there is evidence of a persistent failure to communicate and little serious effort to facilitate juror comprehension of legal standards. What explains these inconsistent efforts to regulate the jury?

The answer may lie in the multiple roles that the jury is called on to play and in the fact that the roles themselves are often inconsistent. When one demand on the jury seems paramount, we bolster the structures that promise to fill that demand. Thus, in addressing concerns about the jury's ability to resolve complex fact-laden disputes, we focus on ways to maximize the jury's rational information-processing skills. A natural response is the expansion of methods aimed at channeling the jury's attention and limiting its access to potentially distracting but persuasive evidence. When concerns are raised about the jury's ability to perform its symbolic and political role in reflecting community values, attention shifts to procedures that control heterogeneity and structures that limit the jury's ability to express a distinctive voice. Not surprisingly, conflicting demands produce conflicting responses.

The jury is an instrument of the formal legal structure—law does matter—and jury decisions generally mirror those of its judicial counterpart. But much of the value and vitality of the jury, embedded in the legal rules and structures that only partially restrain it, lies in the jury's power to, and indeed in the expectation that it will on occasion, deviate from formal doctrinal paths or from what a judge would do. In that role, the jury acts as a safety valve, able to respond to the particulars of an individual case without disturbing or creating legal precedents.

The jury, however, is not simply a safety valve. Nor does it merely soften

the law's hard edges. Jury verdicts may also reflect community legal standards more accurately than do the decisions of professional judges even when they are attempting to represent those community standards. When the jury is called upon to define community norms, it is *the* voice of the law, and that voice, permitted to carry weight, can act as a constraint on judicial deviation from those uncodified standards. For example, does the jury or the judge better represent the law when the decision is whether or not to sentence a defendant to death? In thirty of thirty-eight states with capital sentencing, the jury is the ultimate barrier to a death sentence: no judge can impose death after a jury determination that death is not appropriate. In Alabama and three other states, juries provide advisory verdicts in capital cases and the judge retains final authority to decide on the sentence. In a recent survey in Alabama, judges overrode the nondeath recommendation of the jury in forty-seven cases and spared five defendants for whom the jury had recommended death.[53] Justice Stevens (*Harris v. Alabama* 1995) argues that this disproportionate rate of judicial override in favor of death can be explained by prejudicial extralegal pressure on the judges: "The 'higher authority' to whom present-day judges may be 'too responsive' is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty. . . . Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III" (p. 1039). Although the polls show that a majority of citizens support the death penalty, they do not show how a majority of citizens would vote in a particular trial. Thus, if a judge attempts to reflect community norms by applying a generalized community sentiment, that reflection will provide an imperfect guide to relevant community standards applied to the facts of that case.

The legal system's ambivalence about the jury is thus both understandable and unavoidable. The jury plays an important, if not always predictable, role not just in applying legal doctrine, but also in interpreting it, defining and redefining it. As a result, those responsible for granting power and discretion to the jury will always be ambivalent about sharing power with a group of amateurs. That ambivalence will continue to express itself in periodic efforts to control and constrain the jury. The form taken by these efforts, and the response of the jury to them, will continue to shape how law matters to the jury.

NOTES

1. The jury is primarily an Anglo-American phenomenon. In Great Britain, juries decide cases involving serious criminal offenses, but juries in civil cases were abolished in most circumstances by the Administration of Justice Act of 1920.

2. Decisions to acquit in criminal cases cannot be overturned due to constitutional protection from double jeopardy.

3. The standard jury decision is a general verdict unaccompanied by any explanation or delineation of the steps that led the jury to its finding on guilt or liability. In civil cases, however, the general verdict occasionally is either replaced with a special verdict which requires the jury to answer a series of specific questions on the factual issues involved in the case or is supplemented with a set of special interrogatories. Unlike the extensive findings of fact that characterize a judicial opinion, special verdicts and interrogatories are limited to conclusions about the crucial legal elements that would be required to produce liability or determine the amount of damages that would be awarded (e.g., Did the defendant exercise ordinary care? Did the defendant have a duty to warn the plaintiff? What percentage of fault was attributable to the plaintiff?).

4. In *Blanton v. North Las Vegas* (1989), the court extended this coverage, suggesting that there may be a right to a jury trial even when the possible penalty is less than a six-month sentence if there are other penalties that are so severe that they indicate the legislature viewed the crime as serious rather than petty.

5. States that do have jury sentencing in some noncapital felony cases include Georgia, Indiana, Kentucky, Texas, and Virginia.

6. The judge is responsible for capital sentencing in Arizona, Idaho, Montana, and Nebraska.

7. The jury plays an advisory role in Alabama, Delaware, Florida, and Indiana (Russell 1994).

8. This phrase entails two distinctions: (1) between law and equity jurisdiction; and (2) causes of action that existed or are according to some analysis comparable to causes of action that existed at the time the Bill of Rights was passed.

9. The party does, according to *Tull v. United States*, pp. 417–27 (1987).

10. Carrington (1990: 83) describes this distinction as a "Solomonic result . . . that cannot be persuasively explained to the practical political observer," but that provides a way for a motivated Congress to deny the right to a civil jury trial in private actions.

11. National Center for State Courts (1983), p. 37.

12. U.S. Department of Justice (1983).

13. Galanter (1990) reports that jury trials take place in less than one percent of cases terminated in state courts and in just over two percent of terminations in federal courts.

14. This coverage not only presents unrepresentative damages awards, it also portrays the jury as eager to believe plaintiff claims, an image that sharply conflicts with evidence from studies of actual jurors (e.g., Hans and Lofquist 1992).

15. For some special verdicts, the answers are not independent because the answer to some questions may be contingent on the answer to an earlier question. For example, in a products liability suit, the jury may be asked first whether the product at issue caused the plaintiff's injury and then whether that product was manufactured by the defendant (versus some other manufacturer).

16. The property requirement provided an easy way to discipline jurors who delivered unacceptable verdicts. Jurors could be punished by having their property seized.

17. Case law has interpreted the constitutional mandate for an impartial jury to require "a body truly representative of the community and not an organ of any special group or class" (*Glasser v. U.S.*, 1942). This requirement has generally been interpreted to preclude

systematic exclusion or underrepresentation of distinctive groups in the jury selection process (e.g., *Duren v. Missouri*, 1979).

18. *Strauder v. W. Virginia* (1880).

19. The decision was *Ballard v. United States* (1946), which reversed a federal conviction by an all-male jury because in limiting jury service to males, the federal court had not followed practice in state court. *Ballard* was subsequently seen as simply interpreting the statute that required federal courts to follow state practice and not as establishing a constitutional standard for all courts (Van Dyke 1977: 66).

20. *People v. Harris* (1984).

21. Federal courts have been willing to accept the sole use of voter lists as the source for jurors.

22. *Taylor v. Louisiana* (1975).

23. For example, when a criminal case involves substantial pretrial publicity, jurors will be excused for cause if they admit to having preconceived notions about the guilt or innocence of the defendant that they say they would be unable to set aside. Other kinds of cases, too, may generate excuses based on cause. For example, in a federal case involving the sale of heroin, the judge excused jurors who said that the nature of the case would prevent them from being fair. The elimination of biased jurors through the challenge for cause depends largely on the willingness of jurors to recognize and admit an inability to be fair. An interesting empirical question is whether jurors who admit to such bias would in fact be less objective in response to evidence presented at trial than jurors who do not see themselves as biased (i.e., "Yes, although my father and brother are police officers, I can be fair to the accused who allegedly shot a police officer").

24. Race and gender are currently the only attributes whose use is forbidden in the exercise of peremptory challenge. In *Batson v. Kentucky* (1984), the U.S. Supreme Court applied to peremptory challenge the concerns about the systematic exclusion of jurors on the basis of race that it formerly applied only to the jury venire. In *Batson*, the court concluded that the government's use of peremptory challenges to exclude blacks during voir dire violated the black defendant's rights under the Equal Protection Clause. In later cases, the court shifted its focus and extended relief from racial discrimination to all litigants, granting them the standing to raise the equal protection rights of the prospective jurors. Thus, in *Powers v. Ohio* (1991), the court reversed the conviction of a white defendant based on systematic exclusion of black jurors by the government. *Edmonson v. Leesville Concrete* (1991) prohibited a civil litigant from basing challenges on race. Finally, *Georgia v. McCollum* (1992) held that a criminal defendant may not exercise peremptory challenges on the basis of race.

    In *J. E. B. v. Alabama ex rel. T. B.* (1994), the court extended the prohibition on the systematic use of peremptory challenges to gender in a paternity and child support suit in which the government used nine of its ten peremptory challenges to remove male jurors and thereby obtain an all female jury.

25. Attorneys show some ability systematically to exclude jurors likely to be unfriendly to their side (see, e.g., Zeisel and Diamond 1978).

26. A lucrative industry in jury-consulting supplies attorneys with advice in jury selection techniques. Evidence on the ability of social scientists to predict juror behavior based on the information typically available during jury selection suggests that the promise of scientific jury selection in most cases is overrated (see Diamond 1990).

27. See n. 24.

28. Of course even if the bias were evenhanded and always expressed toward the outgroup

it would disadvantage the minority group members, particularly when they are disproportionately represented among defendants. Note, however, that the impact would be quite different for men and women, at least in jurisdictions where they are equally represented in the jury venire.

29. 28 U.S.C. sec. 1865(a) (1970).

30. The cases included *Williams v. Florida* (1970), *Johnson v. Louisiana* (1972), *Apodaca v. Oregon* (1972), *Colgrove v. Battin* (1973), and *Ballew v. Georgia* (1978).

31. Relevance is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determinations of the action more probable or less probable than it would be without the evidence." Federal Rule of Evidence 401.

32. Federal Rule of Evidence 403.

33. *Sparf* applied only to federal trials, but most states followed its ruling.

34. See, e.g., Illinois Revised Stat., ch. 110A, sections 239 (civil) and 451 (criminal).

35. The story was "Silver Blaze," in which the dog's silence told Holmes that the dog knew the thief.

36. This discussion assumes that the juror is motivated to apply the law as it has been described by the judge. Below we will discuss the case of jury nullification when the jury chooses to depart from the legally endorsed standard.

37. Each instruction was read twice.

38. See table 14 (Charrow 1979).

39. The respondents were college students rather than jurors.

40. Severance and Loftus (1982) studied the questions that jurors ask during deliberations and they rewrote the instructions involving concepts that appeared to cause jurors trouble.

41. Ellsworth (1989) was following the standard practice in California courts.

42. Ellsworth (1989) modified the tape slightly, deleting one defense witness whose testimony added little and replacing the original judge's instructions which were based on Massachusetts law with the applicable California instructions.

43. The possible verdicts were murder in the first degree, murder in the second degree, manslaughter, and not guilty (by reason of self-defense).

44. Because litigants in Wisconsin are entitled to written instructions, the random assignment did not entirely determine the instruction condition that the trial actually received. An objection from one of the attorneys in twelve of the forty-four cases assigned to the nonwritten instruction condition resulted in that case being dropped from the study.

45. That is, the same six test items were used on all civil trials and the same nine test items were used on all criminal trials. Performance was generally better on the test given in the criminal cases (mean = 75 percent) than on the one given in the civil cases (mean = 53 percent).

46. Note, however, that if both judge and jury determined their verdicts by flipping a coin, they would agree in roughly half of the cases.

47. Although a full report was produced on the criminal jury data, the civil jury analysis was never completed.

48. Myers (1979) found that the few instances of rule departures she detected occurred in cases like this one involving young sympathetic defendants.

49. This filming was legally possible under Wisconsin law with the permission of both parties.

50. In Indiana and Maryland, judges tell jurors that they are the judges of the law as well as the facts.

51. Herzberg (1986) interviewed the juror in the *Wisconsin v. Leroy Reed* case who held out until the last and asked him if he thought jurors should be informed about their power to nullify. Although such an instruction clearly would have made his life easier, the juror said that he didn't think jurors should receive such an instruction because he thought it *should* be a difficult decision.

52. For civil trials, Kalven (1964) reports that judges and jurors agreed on the issue of liability 79 percent of the time. Unfortunately he did not present any data on whether the level of agreement differed by case difficulty.

53. These figures are grossly disproportional to the rate of death sentences recommended by juries in Alabama. According to figures for 1994 and 1995 obtained from Eva Ansley of the Equal Justice Institute, juries sentence capital defendants to death roughly half the time they find the defendant guilty of capital murder. If judges were equally likely to override death and nondeath sentences, the number of death and nondeath overrides should also be similar. Instead, the ratio of nondeath overrides to death overrides is more than 8:1.

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STATUTES AND JURY INSTRUCTIONS

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