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The Jury as a “Free School” for Democracy
At one time, the juror investigated crime. At another, the juror decided both the facts and the law. You’ll learn how and why the role of the juror has evolved over time from Nancy S. Marder.

Juries Around the Globe
Have you ever wondered if juries are used in Ghana, Sri Lanka, or the Kingdom of Tonga? As Neil Vidmar points out, juries have developed in distinct ways around the globe, and, in fact, they are not “entrenched as a symbol of democracy” in many countries.

The Modern American Juror: A Changing Landscape
When jurors question witnesses during trials, can they interrogate witnesses directly or ask any questions they wish? Christopher John Connelly explains this and other proposals for jury reforms.

Perspectives: Is Bias a Problem in the American Jury System?
Some commentators argue that juror bias is a serious issue in both civil and criminal trials. Three experts—Valerie P. Hans, Vikram David Amar, and Randolph N. Jonakait—offer their perspectives on whether jurors bring biases into the courtroom.

Viewpoint: What Do Americans Believe About Jury Service?
John Paul Ryan shares the results of a recent Harris survey of Americans’ attitudes toward jury service.

Students in Action
What happens if you’re under nineteen and you’re caught shoplifting? Katie Fraser explains one innovative option: youth court—a diversion program in which young people sentence other young people for minor offenses and violations.

Learning Gateways: Libel Cases and the Jury System
In this lesson from Timothy H. Little, students rule as a jury on a real-life libel cases. They also participate in a mock trial of former president Theodore Roosevelt, accused of libel in another real-life case from 1913.

Law Review
David L. Hudson, Jr., outlines the growing inclusiveness of the jury system over the past century, thanks to U.S. Supreme Court decisions that struck down state laws and attorney practices designed to keep African Americans, Hispanic Americans, and women out of the jury box.

Teaching with the News: ‘CSI Effect’ Has Juries Wanting More Evidence
This article by Richard Willing, originally appearing in USA Today, highlights how the highly popular CSI television shows have influenced juries and their expectations for the amount and quality of forensic evidence in trials.

Insights on Law & Society Online
Learn about our features available online at www.insightsmagazine.org
Letter from the Director

Today, when people hear the word “jury,” their images and impressions are colored by media coverage of jury verdicts in high-profile cases. But the jury as an institution is more than the sum total of contemporary decisions in a handful of well-known cases. The trial jury exemplifies the way power, political authority, and responsibility are shared under American Constitutional principles. With its power to make legal decisions, the jury embodies the idea of government by the people and a commitment to peaceful resolution of conflict. The jury is a core feature of American civic life, and it is the only American governing body through which governing generally occurs by consensus.

The three feature essays in this issue of Insights explore the many goals and functions of the jury, both historically and today, alternatives to the American jury system presented by world jury systems, and visions for the American jury of the future.

As with all social institutions, views differ about the jury system’s strengths and weaknesses. Some commentators believe the modern jury system has many shortcomings. Others believe the jury system works. In Perspectives, read about one question that has long evoked different opinions: Does our system of justice ensure trial before an “impartial” jury? Valerie P. Hans, Vikram David Amar, and Randolph N. Jonakait share their ideas and thoughts.

Law Review describes the Supreme Court’s efforts to remedy the historic practice of excluding certain groups of people from the jury selection pool. The results of a recent national public opinion poll about Americans’ beliefs and experiences with jury service are featured in Viewpoint.

Finally, classroom ideas and learning activities about the jury may be found in Students in Action, which profiles youth court, an innovative juvenile diversion program that gives students experience deliberating and reaching verdicts about the conduct of their peers, Learning Gateways, which engages students in deciding two actual libel cases, and Teaching with the News, which offers more classroom ideas on the “CSI effect” on juries.

Every day, people in America gather in courthouses across the country to fulfill one of the responsibilities of citizenship by serving on juries. We believe the essays and lessons in this issue of Insights will help you to move students beyond a limited view of the American jury to examine the full scope and complexities of this enduring institution.

Mabel C. McKinney-Browning
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Over 170 years ago, Alexis de Tocqueville wrote *Democracy in America*, in which he shared his observations of important American institutions. In his book, Tocqueville described the American jury as a “free school” because it taught jurors lessons about what it means to live in a democracy and to participate in self-governance. Jury service, along with electoral voting, is one of the badges of citizenship and provides one of the few opportunities that citizens have to participate in their own government.

Tocqueville's description of the jury as a free school is even more apt today than it was in his day because jury service is now open to women and African Americans. When Tocqueville visited the United States, jury service was available only to white men who owned property. From among these men, a Jury Commissioner selected those whom he regarded as upstanding citizens. Today, jury duty is open to all citizens, regardless of race, ethnicity, gender, or class.

**Civil and Criminal Juries as Free Schools for Democracy**

In *Democracy in America*, Tocqueville described both civil and criminal juries. He concluded that the civil jury was important because it taught jurors to think like judges in civil matters, such as business disputes. When jurors completed their jury service, they would return to their private lives and use what they had learned as jurors in their ordinary, everyday decisions.

Tocqueville recognized that criminal juries afforded the defendant an important protection. Juries, consisting of ordinary citizens, protected the criminal defendant from a prosecutor who had brought charges that were unwarranted or

Nancy S. Marder (nmarder@kentlaw.edu) is a professor of law at Chicago-Kent College of Law. She is the author of a book on the jury entitled *The Jury Process* and teaches a law school course on the jury called “Juries, Judges & Trials.”
How Do Criminal and Civil Juries Differ?

Today, juries continue to be available in both criminal and civil cases. A criminal defendant who has been charged with a serious crime has a right to a jury trial. In criminal cases, the jury typically consists of twelve jurors. The judge instructs jurors that the defendant is presumed to be innocent unless the prosecutor has established the defendant’s guilt “beyond a reasonable doubt.” All twelve jurors have to agree before the defendant can be convicted of the crime. If even one juror disagrees and the jury cannot reach a unanimous verdict, then the judge will declare that jury to be a “hung jury.” The prosecutor must then decide whether to retry the defendant.

In civil cases, juries typically consist of six to eight jurors, though they can consist of as many as twelve jurors. In some civil cases, like in criminal cases, the verdict must be unanimous; however, in other cases, the jury can decide by only a majority. The plaintiff, the individual who has initiated the lawsuit, has an easier burden than the prosecutor because life or liberty is not at stake in a civil case as it is in a criminal case.

The Role of the Juror

In both civil and criminal cases today, the juror is expected to be impartial and to decide the facts based on the evidence presented at trial. A person can serve on a jury only if he or she has no fixed view of the case; in other words, that person has to be able to decide the case either way depending on the evidence presented at trial. This has not always been the case. The role of the juror has evolved over time.

The Investigative Juror in Medieval Times

The role of the juror has changed significantly since medieval times. Although in many ways the medieval English jury is the precursor to the American jury, the medieval juror was chosen precisely because he knew the facts of the case. The medieval juror was chosen because he knew the parties, their reputations in the community, and the nature of their dispute. If there were any facts unknown to the medieval juror, he was expected to discover them. The medieval juror was supposed to investigate, and his investigations necessarily occurred outside of the courtroom.

There were at least two reasons that the British Crown relied upon the medieval juror to conduct independent investigations. First, such investigations would be costly for the government to undertake. With an investigative jury, the government saved itself the cost of labor-intensive investigations. Second, the resolution of the dispute inevitably resulted in a winner and a loser. If the dispute was resolved by a jury of neighbors, rather than by a judge selected by the government, the government could avoid displeasing one party or the other.

One advantage to the jurors of conducting their own investigations outside the courtroom was that they were able to find facts that could not be reviewed by a judge because the judge was not privy to their investigations. This meant that in their fact-finding role jurors could ignore certain facts that would establish a defendant’s guilt. This was important in medieval times when the only punishment available for many crimes was death. Thus, medieval juries could avoid this harsh penalty by claiming that the facts required for conviction had not been met, even in cases when they clearly had been. In these important ways, the medieval juror differed significantly from today’s juror, who is expected to have no connection to the parties involved in a dispute and is prohibited from conducting his own investigations.

The Colonial American Juror Finds Facts and Law

Today’s juror is also different from the early colonial American juror in significant ways. Although the colonial juror, unlike the medieval juror, did not conduct independent investigations outside of the courtroom, the colonial juror in some respects had greater responsibility than the modern juror. He was instructed that he could decide both the law and the facts. In contrast, the judge tells today’s juror that the jury’s role is to decide the facts, and the judge’s role is to decide the law.

One reason colonial jurors had these dual responsibilities was that judges did not receive legal training; they were laypersons, just like jurors. Thus, in the absence of special training for judges, there was little reason for jurors to follow judges’ view of the law.

By the mid-1800s, most courts no longer instructed juries that they could determine the law. Instead, juries were told that their job was to find the facts and to apply the law, as the judge instructed them on it, to the facts as they found them.

There are several explanations for this mid-nineteenth century movement...
to limit the finding of law by juries. First, lawyers and judges had become more professional and therefore assumed more prominent roles in the courtroom. Lawyers began to present evidence in accordance with rules that had developed over time, and judges began to oversee the proceedings and ensure that lawyers’ presentations were consistent with the rules. Second, people were less suspicious of judges than they had been during the colonial period when the Crown in England had appointed judges. By the mid-1800s, judges were elected or appointed by fellow citizens.

Today’s juror is not supposed to assess the law, but are simply supposed to take the law as the judge gives it to them and apply the law to the facts as they find them. For example, California has a “three strikes” law that results in a mandatory sentence of twenty-five years to life imprisonment after conviction for a third serious crime. Juries in California are not supposed to decide a case based on whether they agree with the law; rather, they are simply supposed to decide whether the defendant is guilty of the crime with which he has been charged.

Although this ostensibly diminishes some of the power of today’s juror, there are still vestiges of the earlier dual colonial functions. The distinction between facts and law is not always clear. Some fact-finding also calls for interpretation of the law. For example, although a juror should only vote to convict in a criminal case if the prosecutor has established the defendant’s guilt “beyond a reasonable doubt,” the juror has to decide what is meant by beyond a reasonable doubt. He has to interpret this legal standard as well as find facts that support it or not.

Today’s Impartial Juror

Today’s juror, unlike the medieval juror, is supposed to be impartial. He is supposed to be open-minded and have no fixed view of the case or the parties. Juries are supposed to rely only on the evidence presented at trial, and they are not supposed to undertake any independent investigations. “Impartial” does not mean that a person has to be a blank slate with no views on any subject. Jurors can be considered impartial even if they have heard about the case or know something about the issue.

The modern jury selection process tries to eliminate prospective jurors who cannot be impartial. If a citizen satisfies the qualifications for jury service (being at least 18 years old and able to read, write, and speak in English), he or she is included in a venire or panel of prospective jurors who will be questioned by the judge and/or the lawyers during voir dire. After the voir dire, or questioning, the judge will remove those prospective jurors who cannot be impartial because they have some connection to the case or because they have said that they cannot be impartial, and the lawyers will remove those prospective jurors with whom they have reservations.

For Further Reading


Twelve remaining jurors will serve on the jury, which is known as the petit jury.

The voir dire is intended to reassure the parties that the jurors who have been selected can be impartial. In addition, it is intended to teach the jurors that their role is to be impartial.

This is one way in which the modern jury continues to serve, in Tocqueville’s words, as a “free school,” teaching citizens how to be impartial jurors so that the jury remains a respected and vital institution in our democracy.

For Discussion

Why did Alexis de Tocqueville believe that civil juries were important? What important function did he think criminal juries served? Do you agree with Tocqueville? Why or why not? Why else are juries important? What other functions do juries serve in society and the justice system?

What responsibilities did the medieval juror have? What are the advantages and disadvantages of the role played by the medieval juror during trials?

What responsibilities did the colonial juror have? What are the advantages and disadvantages of the role played by the colonial juror during trials?

In what ways do the responsibilities of the modern juror differ from those of the medieval and colonial juror? Do you think that the modern juror should have any of the responsibilities assigned to medieval or colonial juror? Why or why not?
Juries Around the Globe

Jury systems around the globe exemplify different legal values.

by Neil Vidmar

Juries around the world have developed in interesting and surprising ways. This article describes some well-known and less well-known jury systems, examining differences in jury features and practices around the globe.

Criminal and civil juries play an important role in the United States legal system, and most Americans know that we inherited our jury system from England. Other well-known jury systems are found in Australia, Canada, Ireland, Northern Ireland, New Zealand, and Scotland. However, juries are used in at least 40 other countries. They include Ghana, Malawi, and St. Helena in Africa, Sri Lanka and Hong Kong in Asia, the Marshall Islands and the Kingdom of Tonga in the South Pacific, and most Caribbean nations, including Jamaica, Barbados, Bermuda, Montserrat, Anguilla, and Trinidad and Tobago. In Central and South America, Belize and Guyana maintain jury systems. All of these countries were once part of the English empire, have legal systems derived from English common law and belong to the Commonwealth of Nations. But juries are used elsewhere and in surprising places.

Russia and Spain, which had jury systems in the eighteenth century, have reintroduced them. Kazakhstan and Argentina are currently attempting to develop jury systems. Despite its militaristic government, Japan had a jury system between 1929 and 1943 and is currently implementing a mixed tribunal system composed of judges and laypersons. Korea is implementing a similar system. In 2005, China will begin holding a limited version of jury trials as part of legal reforms intended to focus public attention on financial fraud and corruption. Panama, Nicaragua, and Brazil have forms of juries. On the European continent, Austria, Belgium, Denmark, and Norway utilize versions of the jury for serious criminal cases.

Other countries in Europe, such as Germany, Croatia, and Norway have mixed tribunals composed of laypersons and judges. France also has a “jury” system, but in practice it closely resembles the mixed tribunal systems. Still other countries, such as Botswana, The Gambia, Mauritius, Namibia, Tanzania, Tuvalu, Vanuatu, and Samoa, use between two and six “assessors,” laypersons who assist the judge and provide information about local cultural values and customs. The judge, how-

“Many European countries with strong democratic governments see many disadvantages to a true jury system …”

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ever, can overrule the assessors in determining the verdict.

Development of Jury Systems
Jury systems developed in two distinct ways. After losing its American colonies after the American Revolution, England began to expand its empire around the globe. The colonists who settled the various territories in Malta, and in the British African territories, such as Sierra Leone, Nigeria, Kenya, and Zanzibar (now Tanzania), Natal and the Orange Free State (now parts of South Africa), insisted on juries. The laws of the East India Company provided for jury trial in India. Colonists in the Caribbean, Australia, New Zealand, and the far Pacific islands insisted on having the same system of justice that they were entitled to in England.

Other countries developed jury systems by a less direct route. In France, philosophers such as Voltaire and Diderot had great admiration for English notions of justice, including the jury system. Juries were discussed during the French Revolution, but were not implemented until the development of the Napoleonic Code in 1804. As Napoleon conquered Europe, he imposed his Code, including jury systems, on defeated countries. Russia, Sweden, Portugal, and Spain also copied English justice and introduced jury systems. Likewise, Portugal, and Spain transported the concept to their South American colonies.

Characteristics of World Jury Systems
The definition of a jury, as opposed to a mixed tribunal, is that a jury is composed entirely of laypersons who are gathered and sworn to decide certain disputed facts under legal instructions provided by a judge. The laypersons have sole responsibility for deciding the verdict. But it is a mistake to assume that all juries are just like American juries. First of all, only the United States and two provinces of Canada, Ontario and British Columbia, still utilize juries for civil disputes. All of the other countries, including England itself, have either totally abandoned civil juries or placed such hurdles for their use that it is impractical to ask for trial by civil jury.

One of the greatest differences between American juries and those in other countries is that the right to a jury trial is more restricted in other parts of the world. In the United States, defendants in cases involving all but minor crimes have a right to a jury trial. In England, Scotland, Canada, New Zealand, and Australia crimes are classified into indictable, nonindictable and “either way” offenses. Thus, in Canada, indictable offenses, such as murder and treason, must be tried by a jury. Nonindictable offenses are summary conviction offenses involving less than two years in jail and are tried only by a judge. “Either way” offenses include assaults of all kinds, serious fraud, conspiracy, and drug offenses. If the Crown Prosecutor decides that the crime is not too serious, he or she may elect to try it as a nonindictable crime, but if it is judged more serious, the Crown will proceed by indictment. However, the defendant then has the option of choosing a jury trial or a trial by judge alone. England is unique among other Commonwealth countries in that a three-person panel of magistrates, all of whom are laypersons, tries nonindictable offenses.

Another striking contrast between the U.S. system and that of other countries is evident in the “voir dire” process. Here in the United States, jurors are questioned by the judge and lawyers, sometimes at great length. England abolished juror pretrial questions almost 40 years ago and then abolished peremptory challenges for cause. The English jury is seated from the first twelve persons randomly called from the jury pool. In Australia, Canada, and New Zealand, jurors are also not questioned in most cases, but the prosecutor and the defendant may each exercise a limited number of peremptory challenges and challenges for cause. The English jury is seated from the first twelve persons randomly called from the jury pool. In Australia, Canada, and New Zealand, jurors are also not questioned in most cases, but the prosecutor and the defendant may each exercise a limited number of peremptory challenges. Of course, since the juror has not been questioned, the peremptory is based only on hunches about who might be a biased juror. Jury
consultants, incidentally, are almost unknown in these countries.

In Canada, exceptions are made for rare instances if there has been a great deal of pretrial publicity. In these cases, the judge may allow the defense lawyer or prosecutor to ask three or four general questions about whether the potential juror has heard the publicity and whether he or she can be fair. But, in contrast to the American system, in Canada, the judge has no authority to remove the juror. Rather, two jurors who have already been seated in the jury box serve as a minijury, and they alone decide whether the juror is “impartial between the Queen and the Accused.” If their verdict is “not impartial,” that juror is excused, and another is called and questioned. The process continues until twelve impartial jurors are seated.

Another important way that world jury systems differ involves the practice of “summing up.” American judges present only instructions on the law to the jury. Typically, American judges will not elaborate on those instructions even if the jury asks for additional guidance. In contrast, judges in the other countries are required to review and comment on the evidence, as well as give instructions on the law. The judge in these other countries is required to be fair in the “summing up” and must instruct the jury that they are the final decider of the facts, but jurors receive considerably more guidance about important issues, and judges have more freedom to elaborate on the law.

The Role of Values
Jury systems around the globe exemplify different legal values. Differing legal values account for some differences among systems. For instance, one of the reasons that some countries feel no need for “American-style” voir dire is that a fair trial is valued over a free press. Consider Australia. In 1999, the Sydney Morning Herald published a series of articles about the “drug bosses” allegedly in charge of importing heroin and other illegal drugs from Asia. One of the men, Duong Van Ia, was currently facing trial on drug charges, and the jury trial was about six months away. The Attorney General of New South Wales filed contempt charges against the publishers of the Morning Herald for creating publicity that could prejudice jurors and interfere with the defendant’s right to a fair trial.

Next, consider Canada. The first article of the Canadian Constitution provides for a free press, but, nevertheless, the Criminal Code provides a defendant the right to ask that any information produced in a pretrial hearing be banned from publication until the actual trial is completed. Failure to comply is punishable by up to six months in jail and a $5,000 fine. English, New Zealand, and Scottish prosecutors are equally zealous in suppressing pretrial publicity. They reacted with shock to the publicity in the O.J. Simpson trial and in more recent cases such as that of Scott Peterson, who was convicted of killing his wife and her unborn baby.

Jury Size, Composition, Deliberations, and Verdicts
There are many other differences from country to country, including differences involving jury size, composition, and the number of votes required for a verdict. The Scottish jury, which developed somewhat independently from the English jury, is composed of fifteen rather than twelve persons, and a simple majority of eight votes is sufficient for conviction. However, in addition to “guilty” or “not guilty,” the Scottish jury also has a third verdict option of “not proven.” A “not proven” verdict results in the same outcome as a “not guilty” verdict—a person is freed—but it allows the jurors to say that while there wasn’t enough evidence to convict, they wish there had been more.

Many other jury systems do not require that a jury be composed of twelve persons or even require unanimity for a verdict. In Gibraltar, the jury is composed of nine persons. In Hong Kong, the jury has seven members, and five votes are needed for a conviction. In Anguilla, Tortola, Dominica, Montserrat, Antigua and Barbuda, Grenada, and the Grenadines, the jury has nine members. In Trinidad, twelve-person juries are used for murder cases, and the verdict has to be unanimous. For lesser crimes, the jury has nine members, and seven votes are sufficient for a conviction.

Brazil’s jury system dates back to 1822, but is used only in cases of homicide, infanticide, abortion, and aiding suicide. Uniquely, its seven members never deliberate with one another. They listen to the trial evidence and receive legal instruction from the judge. They then vote by secret ballot, and four guilty votes are sufficient for a conviction. An appeals court can overturn a guilty verdict and send it back to be tried by a second jury. In Denmark, the twelve-person jury sits with a panel of three judges. The jurors deliberate without the judges on the question of guilt. Eight votes are necessary to convict. If the verdict is guilty, the jurors sit with the three judges to decide punishment. But while each juror has only one vote on the punishment, each judge has three votes.

In Norway, jurors are elected to serve for four years. The initial jury list must consist of seven men and seven women to ensure gender parity. The ten-person jury is selected from this list by the prosecution and the defendant. A majority of seven is needed for conviction. After a guilty verdict, the jury
foreperson and three jury members sit with the three trial judges to decide the punishment. If the verdict is not guilty, the judges have the power to decide that the evidence of guilt was strong enough that a new trial should be ordered.

**Juries Evolve**

Although there appears to be a modest revival in interest in jury systems around the world, some countries that had jury systems at one time have abandoned them. In South Africa during apartheid, all-white juries often showed extreme prejudice against black Africans in a manner similar to the ways that juries in the American South treated blacks before the civil rights era. In developing its new legal system, South Africans rejected what they saw as an institution of repression. Similar attitudes existed about juries in other former English colonies. Indeed, while Ireland retains a jury system, it is not deeply entrenched in the American South treated blacks before the civil rights era. In developing its new legal system, South Africans rejected what they saw as an institution of repression. Similar attitudes existed about juries in other former English colonies. Indeed, while Ireland retains a jury system, it is not deeply entrenched.

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From its beginnings in the thirteenth century, jury systems have been modified and continue to evolve. For example, England has made a number of changes to its jury system in relatively recent years. Parliament made revisions to the criminal code so that crimes formerly classified as indictable are now classified as “either way” offenses, allowing prosecutors to opt for trial by magistrates rather than juries. Jurors are still initially instructed that they should try to reach a unanimous verdict, but after a couple of hours of deliberation the judge may call them back to the courtroom and instruct them that ten of twelve votes are sufficient for a conviction. In contrast to the United States, jurors in England may be instructed that the failure of the defendant to talk to police at the time of arrest or the failure to testify at trial may be considered as an adverse fact bearing on possible guilt. Furthermore, the long-standing rule that a defendant’s prior criminal record is not admissible at trial because it might create an unfair assumption of guilt on the present charge has also been altered. Beginning in December 2004, the rule changed. Jurors may now be told that a defendant has prior convictions that are similar to the one at issue in the current trial. In child sex abuse cases even dissimilar convictions may be admitted into evidence. Many English lawyers concerned about civil rights are upset with these changes because the changes affect the burden of proof and the presumption that a person is innocent until proven guilty.

The jury is an institution that grew out of ideas associated with legal justice and is often seen in the United States and other common-law countries as synonymous with democracy. Indeed, today, countries like Russia, Spain, Japan, and Korea are implementing jury systems or mixed tribunals in attempts to provide greater public participation in their criminal justice systems. Yet, in the past, including in parts of the United States, the jury has also been a symbol of oppression. Many European countries with strong democratic governments see many disadvantages to a true jury system, while permitting some public participation through mixed tribunals. Thus, jury systems must be viewed in their legal and cultural context and as continually evolving institutions.

**FOR DISCUSSION**

- What are some of the major differences between the American jury system and jury systems of other countries?
- What is a mixed tribunal? How is a jury different from a mixed tribunal? What are the advantages and disadvantages of a mixed tribunal when compared with a jury?
- What role do legal values play in jury practices around the world? Can you think of some examples?
- Some countries once had juries but no longer want anything to do with them. Why?

**For Further Reading**


Contentious debates surround many of the proposed jury reforms that most directly affect the experience of the American juror. This article describes some of these proposed reforms and debates.

The Modern American Jury

Thomas Jefferson once stated, “I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constitution.” Jefferson’s sentiment, ingrained in the Sixth and Seventh Amendments, echoes a long-standing respect for civil and criminal jury trials. Perhaps as a result of this respect, the United States has been relatively slow to update and adapt its jury systems to accommodate social change or to take advantage of technological advances. Although changes have been instituted to stimulate greater minority and gender equity in jury pools, and some other administrative alterations have dealt with jury size and sentencing, very few changes have been implemented to improve the process for one essential participant: the juror.

Change can be unsettling, especially when it is related to one of the most fundamental rights Americans possess as citizens. Consequently, many innovative procedures geared towards helping jurors have become the subject of debate among court personnel and observers. To best understand some of the key issues, such as juror note taking, allowing jurors to question witnesses, and procedures to protect juror privacy, we need to examine both sides of each issue and its possible future impact.

Juror Note Taking

Imagine the following scenario: in an average high school classroom, a teacher explains to the students that they will face an extensive and often complicated lecture on a specific topic. At the conclusion of this lecture, all students will face a grade-defining examination. But there is a catch: the students are prohibited from taking written notes on any of the material presented to them.
As anybody familiar with a classroom environment can imagine, such a prohibition would certainly raise objections. Note taking is such a familiar method of facilitating learning that to formally remove it from a classroom would be highly unusual. Consequently, note taking seems like a natural tool for a courtroom, where jurors are, in a sense, students of the facts as presented to them. During a trial, jurors are expected to learn about a rather complicated case and reach a judgment based upon what they have learned. However, allowing jurors to take notes remains a controversial issue in many courts across the country.

The benefits of allowing jurors to take notes are very simple, as they echo the educational benefits of note taking for students in a classroom. Studies show that jurors who are allowed to take notes are more informed about the evidence and the application of law during deliberations. In more complex trials, note taking allows jurors to sort out the evidence as they take it in and helps them remember details that might otherwise be lost. Some contend that the ability to take notes keeps jurors “tuned in” to testimony, instructions, and presentations by counsel, as it gives them a way to actively keep track of the proceedings. Additionally, studies have shown that note taking increases juror satisfaction with their service.

However, opponents of juror note taking see things differently. Jurors who take notes, some argue, will be distracted from important parts of testimony in the course of their note taking, such as body language or inflection. Objections to note taking also extend to using notes in the jury room during deliberations. Those jurors that take notes, critics contend, may have inappropriate sway over jurors that do not. There is a fear that if a juror takes notes that inaccurately represent testimony, other jurors will believe the noted information over their individual recollection. Consequently, note taking may result in judgment based on inaccuracy.

Despite these concerns, opinion has been advancing greatly toward allowing jurors to take notes, as the benefits seem to outweigh the possible disadvantages. Most states, such as Virginia, have left the decision to judicial discretion. In Virginia, this has meant a veritable prohibition on note taking in all but the rarest of cases. Some states, such as Louisiana, have made distinctions between civil and criminal cases, allowing note taking in civil cases in recognition of often technically complicated evidence, but prohibiting it in criminal cases. Others, such as the District of Columbia and Maryland, not only allow note taking, but also provide jurors with pens and paper in order to make it easier to take notes.

**Allowing Jurors to Ask Questions of Witnesses**

People who are particularly attentive to current events may have noticed an interesting aspect of publicity surrounding the now-defunct criminal trial of basketball superstar, Kobe Bryant. The national news media accurately noted that had the case proceeded, jurors would have been allowed to ask questions of witnesses. This high-profile trial marked the first time many citizens had heard of such a practice. Coupled with Colorado’s Rules of Criminal Procedure, which were among the first to allow jurors to question witnesses in criminal cases, this publicity sparked a fair amount of national discussion and debate over whether to allow juror questioning of witnesses.

Although the Bryant trial brought national attention to the issue, the practice of allowing jurors to question witnesses had previously been in effect and debated for quite some time in courts across the country. As with note taking, more states allow jurors to ask questions of witnesses in civil than criminal cases, in recognition of the greater potential for confusing testimony during civil trials. Others, following Colorado’s lead, have extended this privilege to criminal juries as well.

Before we can evaluate its pros and cons, we must understand exactly what is involved in “allowing jurors to ask ques-tions of witnesses.” It is not, as the phrase might imply, a license for jurors to raise their hands and interrogate witnesses for the purpose of gathering evidence. Rather, in the vast majority of courtrooms permitting the practice, jurors are allowed to ask questions for the sake of clarifying evidence and testimony. They may not ask questions to discover new information. Furthermore, questions are submitted by jurors in writing to the judge, who reviews them in conjunction with counsel. The court, at the judge’s discretion, determines whether a question can be asked. If approved, the judge will read the question aloud to the witness.

Most obviously, the benefit of allowing jurors to ask questions of witnesses is
that it clarifies evidence and testimony, ensuring that the jury is fully informed upon entering deliberations. In addition, the questions asked by jurors confirm for the judge and counsel that some issues may not have been fully understood by jurors, offering the judge and counsel a second chance to clarify important points. In this way, allowing jurors to ask questions of witnesses can rectify mistakes or miscommunications by officers of the court. And, as with note taking, the ability to ask questions keeps jurors actively involved in and attentive to the trial. Jurors are more apt to pay close attention and feel more satisfied with their experience at the close of the trial if they have been permitted to pose questions to witnesses.

Opponents of juror questioning of witnesses, however, are plentiful and outspoken, more so than those opposing juror note taking. Most opponents object to the practice on principle alone. The traditional role of the jury is to serve as a neutral judge of fact as applicable to guilt or innocence. Opponents of juror questions contend that allowing jurors to interrogate witnesses makes the juror more of an advocate than a fact-finder. This is a role that the jury was never meant to assume. Additionally, if the judge decides not to ask a question of a witness submitted by a juror, this could pose potential problems. Jurors may interpret such a decision as insulting, or they may erroneously believe that the subject of their question was irrelevant. These concerns guarantee that the discussion about jurors asking questions will continue in the future.

**Protection of Juror Privacy**

Regardless of their stand on many particular jury innovations, most people agree that it is vital to protect juror privacy. With the rise of the information age and the increasing demand from the national media for a more transparent court system, jurors are being placed in the spotlight more frequently, especially during high-profile cases. Most courts will not release personal information about any juror in the aftermath of a trial unless presented with a formal court order by the party seeking the information, and virtually all courts inform jurors of their rights to ignore the media. In addition, the courts retain the right to block cameras from the courtroom with media gag orders, and when allowed, cameras are prohibited from showing jurors’ faces. However, opponents are becoming more vocal, and they are strongly advocating for more camera access in the courtroom.

In addition to invasions of personal privacy from the media, the courtroom itself can also infringe on juror privacy. The jury selection process often raises sensitive personal issues that jurors may find invasive. Disagreement exists, however, over how to deal with sensitive personal issues during jury selection. Some courts have started to question jurors individually during selection so that they do not have to reveal embarrassing or personal information to the rest of the jury pool. Generally speaking, such questioning is done at sidebar or in the judge’s chambers. Other judges, however, oppose questioning jurors at sidebar or in their chambers because...
The Sixth Amendment guarantees the right to a public trial before an impartial jury. Empanelling twelve jurors who are free of bias in the particular case is one of the most important elements of a fair trial. In this section, three jury experts take different points of view on how serious a problem jury bias may be, the challenges faced in high-profile cases, and whether the use of peremptory challenges by prosecutors and defense attorneys helps to ensure a fair and representative jury.

Struggles over the selection of unbiased jurors are not new. Consider historian Kevin Boyle’s description of jury selection by Clarence Darrow in the murder trial of Dr. Ossian Sweet, his wife, and nine other African-American friends and relatives, who were charged with firing guns into an angry white mob that was attacking the Sweet house in an all-white neighborhood of Detroit in 1925:

All of Friday afternoon and Saturday morning ... Clarence Darrow interrogated the jurors that the prosecution had passed. Slowly, the faces in the jury box changed. A second juror was dismissed because he held membership in the Ku Klux Klan, two others because they made their living as real estate agents. When a colored man was called, Darrow sent him off without a single question, saying that the prosecutor was sure to discharge him. A white woman was asked to step down when she revealed that she had recently served on a jury that had convicted a defendant of manslaughter. A second woman said that if Negroes moved into her neighborhood she would fear for her property values; she, too, was dismissed .... Since Darrow had not one but eleven clients, he went into jury selection with an extraordinary three hundred and thirty peremptory challenges [in addition to challenges for cause], enough to reject three entire jury pools single-handedly.... Now the defense had the power to shape the perfect jury.*

The all-white jury in the Sweet murder trial could not reach agreement, and the judge declared a mistrial; a second trial resulted in acquittal.

*From the Book ARC OF JUSTICE by Kevin Boyle. Copyright © 2004 by Kevin Boyle. Reprinted by arrangement with Henry Holt and Company, LLC.
Juror Bias is a Special Problem in High-Profile Trials
by Valerie P. Hans

On Christmas Eve, 2003, 27-year-old Laci Peterson, eight months pregnant with her first child, disappeared from her home in Modesto, California. After returning from a solitary fishing trip to find her gone, her husband Scott Peterson called the police and reported her missing. Thus began one of the most widely reported and discussed trials in contemporary times. Initially, media coverage focused on the fruitless search for the missing woman. But soon, public attention turned to the suspicious behavior of her husband. A media frenzy erupted when information was revealed about a relationship he had recently begun with another woman. The torso of an adult woman and the body of a baby boy washed ashore close to where Scott Peterson had claimed to be fishing. The bodies were identified as the missing Laci Peterson and her baby. Scott Peterson was arrested and charged with capital murder. But, after hearing a steady diet of police reports identifying Scott Peterson as a suspect, widely televised rumors about his life and affairs, and nonstop coverage of his arrest and the evidence against him, what citizen could possibly be an impartial juror in his case?

Research studies testing the impact of pretrial publicity confirm that it can bias jurors. These studies show that those who read or watch a lot of pretrial publicity about a case tend to prejudge the defendant’s guilt, compared to those who have not heard or read such media stories. Once in the courtroom, people who’ve been exposed to negative pretrial publicity are more likely to see the evidence against the defendant as stronger, are more apt to make negative character judgments about the defendant, and are more persuaded by antidefendant arguments during the jury deliberation.

None of the available methods are perfect remedies for the problems of jury bias. In high-profile trials, judges increasingly use gag rules to prohibit the trial participants from discussing the case until the trial finishes. But damage from pretrial publicity has often already been done, and the First Amendment protects the media’s right to publish information about the ongoing trial. Changing the trial’s location is rarely employed, but it is sometimes necessary when many members of the local community have prejudged the case or know the parties. Today’s broad national media coverage of crime and the courts means that pretrial publicity is not as localized, so a venue change may make little difference. Questioning prospective jurors during jury selection is an important technique for identifying bias, but to be effective, it must be thorough. Many judges are reluctant to employ questionnaires, to allow attorneys to ask questions directly, to pose extensive questions about prospective jurors’ views and attitudes, and to let jurors answer open-ended questions in their own words. Yet all of these approaches tend to improve the ability of the judges and attorneys to identify juror bias. Sequestering the jury during the entire trial has fallen out of favor because it causes extraordinary disruption and stress, according to reports from sequestered jurors. It also dramatically reduces the representativeness of the jury, since most people have family and work obligations that don’t permit them to be isolated for any length of time. Finally, the judge can instruct the jury to avoid media coverage of the trial, to disregard anything they’ve heard outside the courtroom, and to decide the case solely on the evidence presented during the trial. Psychologists point out that jurors may be unaware of their biases or unable to disentangle media sources and trial evidence.

To his credit, the judge in the Scott Peterson trial used virtually all of these methods in a vigorous effort to select an impartial jury and to encourage unbiased decision making. The trial was moved continued on page 18
Bias, like beauty, is often in the eye of the beholder. Are rich persons on juries “biased” in favor of corporations? Do black jurors favor criminal defendants more often than whites because whites are “biased” against the accused? Do men and women have different instincts in rape cases because both groups are “biased” in opposing directions?

There is an important but often overlooked distinction between bias and perspective. Different people, because of their experiences and their demographic identities, process evidence in different ways. A government frame-up theory argued by a criminal defense lawyer may seem unconvincing to the suburban middle-aged white businessman who has never been hassled by a cop, but it might seem plausible to the urban black 18-year-old who has seen police abuse up close.

Traditionally, we have sought to control jury bias by giving lawyers and judges a lot of leeway to removal potentially objectionable persons from the jury pool. This approach has backfired, resulting in the elimination not of bias but of many necessary perspectives. Given the demographic makeup of most juries we observe, the selection process seems stacked against the educated, the perceptive, and the well-informed in favor of persons more easily influenced by the arguments and comments offered by lawyers and judges. Attorneys exercising their clients’ rights to “strike” juror candidates slyly and cynically exclude persons on the basis of race, gender, class, and age. And jurors are treated so shabbily—low pay, no child care, lack of courtesy—that most citizens struggle mightily (and successfully) to avoid jury service altogether.

The upshot today is that juries often are not representative—they don’t really look or act like America. And when they reach results that Americans as a whole would not reach, those outcomes seem to be—and sometimes are in fact—the product of bias and emotion rather than deliberation.

The problem of skew stemming from unjustified exclusion of people from juries is not new. Earlier in the nation’s history, jurors were empanelled under the elitist principle that only the property and the highly educated possessed the habits of citizenship needed to serve well. We know better now, of course. But in some ways we have overcorrected, so that professional and literate citizens are exempted or systematically struck from the jury pools.

Among the biggest culprits is the peremptory challenge—a device used in most courtrooms that allows lawyers on each side to remove a specified number of jurors from the panel without having to show any particular “cause” or reason. Peremptory challenges should be eliminated; such challenges allow lawyers for plaintiffs and defendants to manipulate demographics and chisel an unrepresentative jury out of a representative pool.

The biggest argument in support of peremptories is the idea of legitimacy: the parties will respect a decision reached by a body they helped to select. But what about the legitimacy of verdicts for the rest of society—“We the People”—whom the jury system is supposed to serve? After all, the parties regard the trial judge, the appellate court, the legislature, and the grand jury as legitimate, even though the parties did not personally select any of them.

In practice, peremptories are often based on pernicious racial and gender stereotypes, and lawyers have often exploited peremptory challenges to get rid of jurors in a way that deprives them of their right to participate as democratic equals. For instance, an African-American defendant may be forced—because of peremptory challenges—to face an all-white jury, as one by one every potential African-American juror is struck, for no reason but prosecutorial racial stereotyping. The Supreme Court has responded to this problem, saying in cases such as Batson v. Kentucky (1986) that race-driven peremptories will not be allowed. But the very nature of peremptory challenges makes the problem difficult to solve. Lawyers can explain their strikes on the basis of idiosyncratic hunches, even if these hunches are not the real reason for the strikes. In the end, the only real way to eliminate improper discrimination in peremptories is to eliminate peremptories themselves. Any juror who is truly biased—on account of his race or for any other reason—can be removed through “for cause” challenges.

Eliminating peremptory challenges isn’t a panacea. We still need to find ways to prevent persons from shirking their jury duty, but it is a good start. By and large, the first 12 persons drawn randomly by lot from a list of qualified citizens in the community should form the jury. The actual jury—not just the jury pool summoned for each case—should be as representative of the entire community as possible.

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Juries Decide on the Evidence, Not on Biases
by Randolph N. Jonakait

No one is free of bias. Jurors, being human, are biased. Irrational perspectives can distort how we see, recall, and interpret information, including courtroom evidence and the law.

The jury system primarily attempts to lessen bias through jury selection. Potential jurors are questioned in **voir dire** to find out whether they can be impartial in the particular case being tried. If it appears that a potential juror cannot be impartial, that person is challenged for cause and will not sit as a juror in the case. Some grounds for excusing a juror for cause are clear—the potential juror is related to one of the parties or other participants in the trial, or will be a witness, or has already served as a juror in a related matter. Other potential jurors, however, can be challenged for cause more generally, because it is established that they cannot decide the matter solely on the evidence and the legal instructions presented in that case. There are many reasons why a person might not have the necessary impartiality. A potential juror may be a stockholder in a company being sued or work for one of its stores. Or she may have such a high or low opinion of the police that she cannot fairly evaluate a testifying officer’s credibility. Or he may feel that a law is wrong and cannot follow the judge’s instructions.

When an attorney challenges for cause, the trial judge must determine whether the potential juror should be excused. Many have concluded, however, that this system is not particularly good at flushing out those who are biased. First, few of us wish to admit publicly that we are biased. Second, biases may often act subconsciously, and the potential juror may not recognize them. For example, a survey of jury-eligible citizens questioned about two controversial cases found that people who had more information about the cases tended to find the prosecution’s case compelling, but these same people did not perceive themselves as being biased against the defendants. The researchers concluded that these prospective jurors may not have been able to respond objectively to questions concerning their own impartiality [see Randolph N. Jonakait, *The American Jury System.* New Haven: Yale University Press, 2003, 112].

Peremptory challenges can also be used to excuse potential jurors who may be biased. Each attorney has a limited number of peremptory challenges. He cannot use them to excuse potential jurors on the basis of race or gender, but he can for any other reason. The voir dire questioning may not have given grounds to sustain a for-cause challenge, but the attorney still believes that the potential juror will not be impartial. The attorney can use a peremptory challenge to excuse that person. For example, in a drug case I defended, a potential juror was the editor of what some would regard as a pornographic magazine whose scant copy often seemed to praise drugs and denigrate the police. He, however, steadfastly maintained that he could be impartial in any kind of criminal trial, including a drug case, and fairly evaluate a police officer’s testimony. The court had no reason to excuse him for cause, but to the surprise of no one, the prosecutor excused him peremptorily.

In addition to this selection process, the jury system also attempts to lessen the effects of bias by trying to assure that the case will be decided solely on the presented evidence. Jurors are told not to read or listen to news about the case and to discuss the case with no one before the trial concludes. These procedures surely do help to reduce the effect bias has on verdicts, but another more important factor lessens the impact of juror bias.

A jury verdict is a group decision made after deliberations. Jurors have to be selected from a pool of people drawn from a fair cross section of the community. The result generally is a jury of individuals with diverse characteristics, backgrounds, and experiences. In this situation, the prejudiced misconceptions of a juror are often confronted and corrected by others who do not share the bias. Furthermore, a juror expects to have to defend her position in deliberations and perhaps persuade others. In what is really a small assemblage of strangers, most jurors realize that to be effective persuaders, they have to try to overcome their own biases. Mere prejudices will not sway those who do not share them, and jurors have to attempt to go beyond their own biases to be effective. Melvyn Zerman’s experience as one of twelve white jurors on a murder trial is frequently repeated. He listed the qualities he found in the jurors and concluded that prejudice was the biggest problem. He, however, then concluded, “Ironically, I think now that where the jury is most to be commended was in the painfully conscious effort nearly all of us made to look beyond our prejudices...” [Melvyn Bernard Zerman, *Call the Final Witness: The People v. Darrell Mathes as Seen by the Eleventh Juror.* New York: Harper & Row, 1977, 159].

In thinking about bias in trials, it is important to remember that the alternative to a jury in our legal system is a...
Perspectives—High-Profile Trials

from Modesto to another city. Prospective jurors completed questionnaires and answered extensive questions during jury selection. The parties were under a gag rule early on. After a dismissed juror caused a media sensation by revealing his views of the evidence, the remaining jurors who were dismissed were put under a gag rule for the duration of the trial as well. Although the jury was sequestered only during its deliberations, the judge continually reminded jurors to avoid media coverage and to focus only on the trial evidence.

Scott Peterson’s jury convicted him and sentenced him to death. Whether he had a fair jury is a question that the appellate courts will confront as they review Peterson’s appeal of his conviction and sentence. Would the jury have reached the same decisions if the case had not been so extensively covered in the media? Or was Scott Peterson condemned by media publicity? Whatever your verdict, the Peterson trial provides yet another example of the hurdles to fair trials in high-profile cases.

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In fact, juries are quite good at overcoming bias. Studies of jurors consistently show that the personal characteristics of the jurors—their race, age, education, socio economic characteristics, attitudes, etc.—have only a minor effect on verdicts. Instead, studies uniformly show that the prime determinant of jury decisions is the information that is presented during the trial. Just as it should be in a good legal system, the evidence and the law overwhelmingly produce trial outcomes. Evidence, not bias, determines verdicts.

A more serious problem for the jury system than biased outcomes is that many people incorrectly believe that verdicts usually result from bias instead of the evidence. For example, many believe that civil jurors are prejudiced against corporations, doctors, and others with “deep pockets.” In fact, verdicts in civil cases are evenly split between plaintiffs and defendants. Corporations win half the time, and doctors win more malpractice suits than they lose. What seems to be the case is that the less an observer knows about the evidence presented at trial, the more he will ascribe the verdict to extraneous factors. It is a lot easier to believe an easily accessible explanation, such as bias, than to master the evidence that was presented. But it is that evidence, not bias, which is the most important factor in a trial’s verdict.

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Jury Consultants

Jury consultants are social science and legal experts who advise attorneys in the selection of jurors. They may research the community from which the jury is drawn, develop written questionnaires for potential jurors, draft questions to ask during voir dire, and recommend when to use peremptory challenges. Jury consultants have been used at least as far back as the 1960s, notably in famous trials of Vietnam-era antiwar protesters. They continue to be used today in high-profile cases or where a defendant has substantial resources. Increasingly, jury experts provide advice to attorneys on other trial elements such as case strategy, witness preparation, and mock trials. For more information, go to: www.cbsnews.com/stories/2004/06/02/48hours/main620794.shtml.
What Do Americans Believe About Jury Service?

by John Paul Ryan

American Bar Association president Robert J. Grey recently announced a new initiative on the jury. The American Jury Project is working to produce a single set of modern jury standards, while a blue-ribbon Commission on the American Jury will be working on outreach to the public, the legal profession, and the courts.

To gain background information for this initiative, the ABA commissioned Harris Market Research to conduct a national public opinion poll on Americans’ beliefs about, and experiences with, jury service. Approximately 1,000 Americans, aged 18 and older, were surveyed in July 2004. Here are a few of the survey’s highlights.

Americans view jury service as an important civic duty. Fully 84% of those surveyed agree that they should meet the civic duty of jury service “even if it is inconvenient.” Similar percentages reject the idea that jury duty is “a burden to be avoided.” Likewise, most Americans express support for the institution of the jury trial. Fully three-quarters (75%) agree with the statement, “If I were a participant in a trial, I would want a jury to decide my case, rather than a judge.”

Americans express very few concerns about jury duty. Most Americans feel confident about their ability to serve as effective jurors. Fully 71% disagree with the statement, “I don’t know enough about the law or the legal system to be a good juror.” Likewise, 61% disagree with the statement, “I don’t want to stand in judgment of others as a juror.” They also reject the notion that jury service would be an economical hardship. A substantial majority (63%) disagree with the statement, “Serving on a jury would hurt my income.” Likewise, few worry about publicity stemming from a jury trial; only 12% agree with the statement, “I’m worried about the publicity I might receive if I served on a jury.”

Americans report positive experiences in their jury service. The majority of Americans (62%) have been called for jury service. Almost half (47%) of these have served as part of a jury (typically, on two or three juries). As the table indicates, a majority of those called for jury service (58%) agree that “jurors are treated well by the court system,” a figure slightly higher than for those who haven’t been called. In general, those who have served as a juror feel their experience was what they expected; indeed, more people are likely to say their jury experience was better than expected (22%) than worse (10%). Particularly important, nearly two-thirds (63%) of those who have served on a jury say they would like to serve again.

Conclusion. This survey shows that Americans express a solid base of support for the jury, in theory and practice. But there is still much work to do and improvements to be made. As ABA President Grey says, “If we are to sustain Americans’ respect for the jury system, the legal profession must take steps to move the jury experience into the 21st century.” The ABA’s American Jury Project and Commission on the American Jury will be seeking to do just that.

Table “Jurors are treated well by the court system.”

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N= 1,029

John Paul Ryan is a consulting editor for Insights. An educational and social studies consultant, he previously served as director of school programs for the ABA Division for Public Education.
Imagine you’re under nineteen and you’ve been caught shoplifting. You are arrested, charged by the police, and given a choice: you can either appear before a judge in a regular juvenile court, or you can go to youth court.

The first question you would probably ask is: what is a “youth court”? Most simply, youth courts are programs in which young people sentence other young people who have committed crimes. Despite the name, youth courts are not formal courts. Sure, they may sometimes look a lot like courts, and the judge on a youth court (who might be a young person or an adult) might wear a robe. But there are several crucial differences. Obviously, in a regular court the judge, prosecutor, defense and jury are all adults. In a youth court all of these positions may be filled by young people. In a regular court, if you plead not guilty, then a prosecutor may produce evidence to try and prove your guilt. To be eligible for most youth courts, on the other hand, young people must admit their wrongdoing. In addition, both the parent and young person must give informed consent to participate in youth court. And most youth courts will only accept first-time offenders who have committed relatively minor crimes—for example, minor theft, alcohol and drug offenses, and vandalism. The good news is that if you complete a sentence you are given by a youth court, then in most circumstances you will not be given a criminal record. Sentences in youth courts are generally called dispositions. And most youth courts use the term respondent instead of “offender” for the young person who is being sentenced.

Now imagine for a moment that you’re sitting on the other side of the judge’s bench: you’re a teenage volunteer on a youth court. What does this mean? This is a slightly more complex question because there are so many different kinds of youth courts across the country, with different structures, operations, case-loads, and characteristics. Depending upon which of the approaches is followed at your local youth court, you may be able to take on the role of judge, prosecutor, defense attorney, juror, or other positions (such as community advocate, defense advocate, bailiff, or clerk). What do these jobs involve? Read on.

**Judge**

In some youth courts, a young person serves as a judge and may have responsibility for ruling on courtroom procedure, clarifying terminology, and making a decision on sentencing. In other youth courts, an adult lawyer serves as judge for the youth court.

**Prosecutor and Defense Attorney**

In some youth courts, a youth prosecutor and defense attorney make arguments before a youth jury on the issue of whether the accused person is innocent or guilty. As noted above, in most youth courts, a person must admit their guilt to be eligible for youth court. In many youth courts, a prosecutor and defense attorney make arguments to the jury about what is an appropriate disposition.

**Juror**

Jurors in youth courts have an important role: to listen to the arguments of the attorneys and the person brought before the youth court and make a decision on an appropriate disposition. Ideally, jurors need to have the opportunity to learn something about the person appearing...
before the court so that they can tailor the disposition to that person.

**Dispositions**

Common dispositions include a combination of community service hours, educational classes, mediation, restitution, apology, essays, counseling, curfew, drug testing, and peer discussion groups. In many youth courts, dispositions include a period of jury duty, which means that offenders have the chance to return to youth court as jury members and have a role in sentencing other young people who have broken the law. This can help the young person understand more fully the thinking that goes into sentencing and what has happened to them. Additionally, it helps to ensure a diverse youth jury that reflects the range of members of the community. Failure to complete a disposition imposed by a youth court will generally result in the person being referred back to juvenile court or probation.

**How Are Youth Courts Unique?**

We’ve seen that youth courts can impose some creative sentences on young people, including jury duty. Youth courts also have an important role in diverting certain kinds of cases away from regular juvenile courts. Some juvenile courts are so busy that they don’t spend a lot of time on minor offenses like shoplifting and vandalism, and offenders get nothing more than a quick hearing and “a slap on the wrist.” In the youth courts system, youth volunteers have the chance to tell young people who have committed a crime that their behavior is wrong. Youth courts can help young offenders understand that their behavior has harmed others and the community. Finally, youth courts provide an important way for young people to learn more about and participate in legal processes in the real world, where their decisions have real consequences for people. If you’re fifteen, then working as a juror making a decision about how to sentence a sixteen-year-old boy will probably mean that you pay a lot more attention to court procedures and sentencing instructions than if you were learning about these issues in class.

There is a special website dedicated to youth courts created by the National Youth Court Center, and you can access it at www.youth-court.net/. The site includes access to a chat room and web boards where you can talk to youth court volunteers across the country.

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In 2001, the ABA Division for Public Education developed an all-in-one curriculum-in-a-box to help the young people who volunteer in youth courts learn the skills they need to be effective volunteers. The $45 boxed set includes a Guide for Trainers of Student Volunteers, a video, Changing Lives: America’s Youth Courts, and handbooks for student volunteers. The Guide has both content and skills-based lessons that court coordinators can use to help young people become effective jurors, attorneys, and judges. The set includes one sample student handbook for each of the most common youth court models used across the country—the adult judge, youth judge, youth tribunal, peer jury models (additional copies of particular youth handbooks can be purchased at bulk discount rates). The video profiles three thriving youth court programs from different areas of the country. In addition, when ordering the curriculum, you receive a CD-ROM, which has all written training materials, that allows you to create tailor-made handbooks and lessons for your court’s needs.

For more information about how to order this package, visit the ABA’s Online Store (www.abanet.org/publiced/catalog.html), and select “LRE Development Materials.” Or visit the Insights Web site (www.insightsmagazine.org).

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**Youth Court Newsletter**

“Twelve students re-enter a courtroom. ‘Has the jury agreed on a sentence?’ A judge questions the group. A member of the jury steps up to the microphone. ‘Yes, your honor, we have. We, the jury suggest a sentence of 30 hours of community service and mandatory enrollment in a substance abuse workshop.’ Murmurs and quiet sighs of disappointment and victory echo throughout the courtroom. ‘Court adjourned.’”

The above extract was written by Aletta Cooke, a 17-year-old youth court volunteer, in a newsletter produced by youth court volunteers from across the nation for other volunteers. To sign up for newsletters or find out how you can contribute, send an email to kblackwell@csg.org.

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**Teaching Skills for Youth Court**
Introduction

“Gentlemen, a court is no better than each man of you sitting before me on this jury. A court is only as sound as its jury, and a jury is only as sound as the men who make it up.” These words, spoken in Harper Lee’s famed 1960 novel, *To Kill a Mockingbird*, remain true today for the more diverse juries of men and women. Jury duty in America tends to be viewed by the citizenry as a lottery, serious duty, and sometimes as a curse. Nevertheless, most citizens, male and female, at one time or another will be called to serve, and their service is vital to the functioning of our judicial system.

Jury duty also can be one of the most complex tasks a citizen is asked to perform. Often, graduates of our public schools who have been versed in the abstract and theoretical underpinnings of our judicial system have been given little or no classroom preparation to serve as a juror. Yet, jurors are often charged with determining the future life or fortunes of fellow citizens who face them in the dock.

For the past 30-plus years, the Michigan State University Summer Law Seminar has trained teachers to make “law” an integral part of a social studies education. Significant attention within the seminar has been given to preparing teachers to utilize realistic classroom activities, ranging from simulating the voir dire process to conducting mock trials. What follows is a sample of the classroom student activities presented in the MSU seminars, which we hope will represent one step toward better preparing our school-age jurors-to-be for jury service.

The legal concept that will serve as the knowledge target for our activities will be “libel.”

Two cases follow, designed to encourage students to:

- pre-test their knowledge of everyone’s concept of libel by constructing a verdict in an early case (*Cherry v. Des Moines Leader*, 1901), and

The Case of Cherry v. Des Moines Leader, 1901

America in 1896 was a nation of no TV, radio, or movies. Amusement-starved citizens looked to live vaudeville in local theaters for entertainment. Enter the act known as the Cherry Sisters. Five farm girls from Marion, Iowa, the Cherry sisters were determined to enter show business and barnstorm the country. Despite a lack of professional training, the women generated a series of short moralistic playlets and original songs. These episodes were strung together to form an evening’s “entertainment,” which the Cherrys presented in small town theaters across Iowa. In the tradition of TV’s “Gong Show” and “American Idol,” audience reaction to the act was loud and demonstrative. Mistaking volume for endorsement, the women seemed to believe that their “act” was being very well received. Not even the cabbages, tomatoes, or eggs hurled at the stage by howling audience members seemed to curb the sisters’ enthusiasm.

A theatrical review penned by Billy Hamilton and reprinted in the *Des Moines Leader* newspaper was highly critical of the act, despite the women’s obvious success. **Timothy H. Little** (Timlittl@msu.edu) is a professor of education at Michigan State University, East Lansing, MI 48824 (tel: 517.337.1517). He specializes in history/social studies education and law-related citizenship education programs. Special thanks to Professor Charles Palmer of the Cooley Law School, Ms. Mary deWolf of Holt High School and Michigan State University, and to the State Bar of Michigan Public Outreach Committee.
critical. Of the Cherrys’ performance, Hamilton wrote in part:

“Effie is an old jade of 50 summers, Jessie a frisky filly of 40, and Addie, the flower of the family, a capering monstrosity of 35. Their long, skinny arms, equipped with talons at the extremities, swung mechanically, and soon were waved frantically at the suffering audience. The mouths of their rancid features opened like caverns and sounds like the wailings of damned souls issued therefrom. They pranced around the stage—strange creatures with painted faces and hideous mien. Effie is spavined, Addie is stringhalt, and Jessie, the only one who showed her stockings, has legs without calves, as classic in their outlines as the curves of a broom handle.”

A short definition of libel. “A method of defamation expressed by print, writing, pictures, or signs. In its most general sense, any publication that is injurious to the reputation of another. A false … publication in writing of defamatory material.”

The elements of a successful libel suit as defined above include the following: (1) publication of print, writing, pictures, or signs, (2) about the person filing suit, (3) which are false, and (4) which caused injury to the filer.

Discussion Questions

■ Did the Cherry sisters’ lawsuit meet each of the criteria for a successful libel suit?

■ Taken collectively, did the remarks in the theatrical review published in the Des Moines Leader constitute libel against the Cherry Sisters? How would your class rule as a jury, or as separate mini-juries? What amount of money damages, if any, should be awarded?

Case Outcome. The trial judge directed a verdict for the newspaper, thereby not allowing the case to be decided by the jury. After an appeal by the Cherry Sisters, the Iowa Supreme Court in 1901 ruled:

“The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; …for which no action will lie without proof of actual malice…”

Cherry v. Des Moines Leader, 114 Iowa, 298, 86 N.W. 323 (1901) (emphasis added).4

The Case of Theodore Roosevelt v. George A. Newett, 1913

On May 26, 1913, in rural Marquette, Michigan, former president Theodore Roosevelt strode up the local courthouse steps to do battle in civil court against an area newspaper editor, George Newett. The charge was libel against Mr. Roosevelt by the defendant. Specifically, Newett was charged with publishing the following libelous statement about the former president in his newspaper, The Iron Ore:

“Roosevelt lies, and curses in a most disgusting way, he gets drunk, too, and that not infrequently, and all his intimates know about it.”

A jury of citizens from the community was impaneled, and the trial began the next day. What follows is an outline for a compressed version of a mock trial treating the Roosevelt/Newett case. In addition to learning more about the legal concept of libel, students will have the opportunity to practice the weighing of evidence in the case. The bibliographic citations available online [go to: www.insightsmagazine.org] should provide teachers with sufficient original testimony to present either a condensed mock trial (one day) or an extended (3–5 day) version.

A Condensed Mock Trial Format for Roosevelt v. Newett

Prior to the day of the mock trial, discuss the order of the trial with the class. Ask each student with an assigned part to pay close attention, so that he or she knows what to do. The order of the civil trial is as follows:

1. Opening of court by the clerk;
2. Seating and swearing in of the jury by the clerk;
3. Opening statements to the jury (first, the plaintiff’s attorney, then the defense attorney; each speech has a five-minute limit);
4. Direct examination and cross-examination of plaintiff’s witnesses (Roosevelt’s lawyers summoned noted social reformer Jacob Riis; the former president of the American Medical Association, General Leonard Wood; Admiral Dewey; and James Garfield, the son of the assassinated president. Some 37 depositions/witnesses were gathered in support of Roosevelt’s case.);
5. Direct examination and cross-examination of defense witnesses (while more than 35 depositions were collected by Newett’s attorneys, none of his supporters could/would testify that they had seen Roosevelt “drink to excess”);
6. Closing arguments to the jury (plaintiff’s attorney first, then defense attorney; each speech has a five-minute time limit);
7. Instructions by the judge to the jury;
8. Deliberations of the jury; and
9. Verdict, given by the foreperson of the jury.

Discussion Questions

■ Did the Roosevelt lawsuit meet each of the criteria for a successful libel suit?

■ Taken as a whole, did Newett’s remarks in The Iron Ore constitute libel against Theodore Roosevelt? How would your
class rule as a jury, or as separate mini-
juries? What amount of money damages,
if any, should be awarded?

Case Outcome. In the closing stages of
the case, Theodore Roosevelt addressed
the court:

“I ask the Court to instruct the jury
that I desire only nominal damages. I
did not go into this suit for money or ...
for any vindictive purpose. I went
into it ... because I wished ... during
my lifetime, thoroughly and comprehen-
sively to deal with these slanders, so
that never again will it be possible for
any man, in good faith, to repeat them.
I have achieved my purpose, and I am
content.”

The jury eventually awarded Roo-
sevelt five (5) cents in damages.

Conclusion
In the years since the Cherry sisters and
Theodore Roosevelt cases, the legal
concept of libel in the United States
has continued to evolve and has been
further refined. Teachers who wish to
provide their students with another
stellar and significant case upon which
to hone their jury deliberation skills
should examine New York Times Co. v.
Sullivan, a 1964 decision of the U.S.
Supreme Court. In that case, the bar
was raised significantly for persons who
wished to succeed in pressing a libel
suit: the Supreme Court held that pub-
lic officials must now prove “actual
malice” in the publication of false state-
ments about them. In 1974, the
Supreme Court relaxed the libel stan-
ard by allowing private persons to show
negligence rather than malice on the
part of the publisher (Gertz v. Welch).

On the other hand, in some courts
the judge has complete control over the
jury selection process. In these cases,
the judge handles all of the questioning
directly, with limited attorney involve-
ment. Many of these courts have limited
the information about jurors that is given
to attorneys prior to trial, contending
that it is not necessary for counsel to have
personal information such as address or
employer. Balancing the rights of the
accused against those of the jury to their
privacy is a difficult task, and one that
continues to pose a challenge to the
court system.

A Changing Landscape
Ultimately, the most important point
about the modern American jury is that
the system is becoming more efficient,
accommodating, and effective after nearly
two centuries without much alteration.
The system is beginning to think inside
the box: the jury box, that is. The debates
described in this article are important
not only for the issues they represent,
but also for the virtue of the debates
themselves: the simple fact that these
innovations are being discussed at length
marks a significant step forward. The
dialogue about reforms to assist jurors
is relatively new, and, as such, marks
the onset of an exciting time for the
American jury. The future is likely to
bring the resolution of many of our
contemporary debates and has the
potential to permanently change the
landscape of the American judiciary for
its most important participant: the juror.

Endnotes
1 Most generous long-term financial
support for these efforts has been
provided by the Irwin I. Cohn
Memorial Scholarship Fund and by
the Michigan State Bar Foundation.
Logistical assistance has also been
supplied by the Michigan Center for
Civic Education.
2 The Odebolt History Pages,
Supreme Court of Iowa, May 28,
1901 (transcribed by B. Ekse, 2002) at:
www.rootsweb.com/~iaohms/cherry_
lawsuit.html.
3 Black’s Law Dictionary
(St. Paul,
4 The Odebolt History Pages.
5 Palmer, Charles, “Teddy Roosevelt
Was Not a Drunk and He Proved It
in Marquette, Michigan,” private
6 Ibid.
The Sixth Amendment of the United States Constitution guarantees to criminal defendants the right to an impartial jury. The Fourteenth Amendment guarantees individuals equal protection under the law. Both of these amendments come into play when a jury selection process excludes certain groups based on race or ethnicity.

The problems of race, ethnicity, and jury selection occur at different levels of the criminal justice process. Sometimes they occur when the grand jury is impaneled. Because the grand jury decides whether or not a person will enter the criminal justice system, it is obviously important for it to include a balanced, representative body of people.

The problems of race, ethnicity, and jury selection occur at different levels of the criminal justice process. Sometimes they occur when the grand jury is impaneled. Because the grand jury decides whether or not a person will enter the criminal justice system, it is obviously important for it to include a balanced, representative body of people.

More often, the problems occur during the impaneling of a petit or trial jury, the body that actually determines the fate of the defendant. The trial jury is the group of people who hear the case and render a guilty or not guilty verdict. If they don’t represent a cross-section of the community, the defendant can be deprived of his or her right to a fair trial.

The Jury Pool

Certain groups were once disproportionately excluded in the overall jury selection pool. The most basic method of discrimination occurred when a state passed a law prohibiting certain people from serving as jurors. In Strauder v. West Virginia, the Court ruled that a West Virginia law allowing only white males 21 years of age and older to serve on juries violated the Fourteenth Amendment’s Equal Protection Clause. The Court reasoned that prohibiting jurors from serving based on race “is practically a brand upon them, affixed by law, an assertion of their inferiority, and a stimulant to race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”

However, even after the West Virginia law was struck down, African Americans often were not given the opportunity to serve on juries. Because the Strauder case prohibited the outright exclusion of jurors based on race, many jurisdictions found less direct but equally effective ways to exclude minorities, such as calling jurors only from the list of eligible voters in localities in which threats, hostility, and unfair literacy tests kept the vast majority of blacks from voting. To counteract this, the Supreme Court determined in later cases that the substantial underrepresentation of a race during the jury selection process could also be unconstitutional if it resulted from purposeful discrimination. For example, in Norris v. Alabama (1935), the Supreme Court invalidated the conviction of two of the Scottsboro Boys, because the jury selection process intentionally excluded African Americans.

Jury selection systems must not be arbitrary or result in the systemic exclusion of any racial or ethnic group. Criminal defendants are entitled to a grand jury and a trial jury selected from a reasonable cross section of the community. This does not mean that a Latino defendant, for example, must have several Latino grand jurors or several Latino jurors in the actual trial jury. Rather, it means that the government must employ a fair procedure designed to produce an impartial and random jury. In Castenada v. Partida (1977), the Supreme Court ruled that a Mexican-American defendant was entitled to a new trial because the evidence showed that over an eleven-year period in a Texas county having 79 percent Hispanics, only 39 percent of people summoned for grand jury duty were Hispanic.

Peremptory Challenges

In the cases discussed so far, courts found problems with how the pool of potential jurors was selected. There can be problems, however, even when the pool represents a reasonable cross section of
the public. In fact, the most contentious area of jury selection and race/ethnicity concerns jurors excluded during the voir dire process.

During voir dire, attorneys can use two types of challenges to remove jurors: for-cause challenges and peremptory challenges. Lawyers on both sides have an unlimited number of for-cause challenges. For-cause challenges can be used to exclude jurors who clearly show a bias that calls into question their ability to judge the case impartially. For example, a potential juror who says that she doesn’t like police officers and couldn’t trust their testimony would likely be removed for cause.

Peremptory challenges are different. A staple of the English legal system, peremptory challenges allow lawyers to dismiss jurors peremptorily without cause or without supplying a reason. The theory behind peremptory challenges is that the attorneys will remove jurors who are extremely partisan on either side, leaving jurors who will more likely decide cases based on the evidence rather than other factors. In reality, each side uses peremptory challenges to get rid of jurors whom they do not think will be best for their client. Historically, prosecutors dismissed minority jurors, believing, rightly or wrongly, that such minorities might sympathize with a criminal defendant of the same race.

In 1965, in *Swain v. Alabama* the Supreme Court ruled that striking jurors on the basis of race could constitute a violation of the Equal Protection Clause of the Fourteenth Amendment, but only if the criminal defendant was able to show a clear pattern of discriminatory jury strikes. This proved a nearly insurmountable hurdle for most defendants because it was hard to gather the statistics necessary to make such a case.

**Batson v. Kentucky.** Twenty-one years later, the U.S. Supreme Court revolutionized this area of the law in *Batson v. Kentucky* (1986). The Court held that striking jurors on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment. The Court broke new ground by ruling that a criminal defendant could establish unlawful discrimination if a prosecutor struck jurors on the basis of race in the particular case at issue. This meant that defendants did not have to show a pattern of strikes over hundreds of cases.

The case involved the criminal trial of James Batson, an African-American man charged with burglary. During jury selection for Batson’s burglary trial, the prosecutor used four of his peremptory challenges to strike all four black persons in the jury pool.

Batson’s attorneys argued during his trial that the prosecutor’s selective use of peremptory challenges to strike four African Americans violated Batson’s constitutional rights under the Sixth and Fourteenth Amendments. Batson was convicted, a decision upheld by the Kentucky Supreme Court.

Batson then appealed to the U.S. Supreme Court, which reversed the state court decision. The Supreme Court found that the trial judge should have required the prosecutor to come forward with race-neutral explanations for why he dismissed the four African-American prospective jurors. The Supreme Court established a three-step, burden-shifting process when a defendant challenges a prosecutor's use of peremptories. First, the defendant must make sufficient allegations to establish an inference of discrimination. Second, the prosecutor must offer a race-neutral explanation for his or her use of the peremptory challenges. Third, the defendant must try to counter the prosecutor’s argument and show that the prosecutor’s stated race-neutral reasons were false or a pretext for discrimination.

**After Batson.** In later cases, the Supreme Court ruled that *Batson* prohibited a prosecutor’s race-based use of peremptory challenges against Latino jurors (see *Hernandez v. New York*, 1991). Even though *Batson* involved an African American defendant, the *Hernandez* decision held that the principles established by *Batson* applied to all races and ethnicities. Federal courts have examined *Batson* challenges in cases involving defendants of nearly all races.

The principle of racially neutral peremptory challenges applies even when the defendant and the dismissed jurors do not share the same race or ethnicity. The Supreme Court has reasoned that it’s not that a white defendant has the right to an African-American person on a jury, but that the individual has the right to sit on the jury. In *Powers v. Ohio* (1991), the Supreme Court ruled that a white criminal defendant could object to the dismissal of African-American jurors from the jury pool. In *Powers*, the state of Ohio argued that a *Batson* claim required the criminal defendant and the dismissed jurors to share the same race. The state argued that because the allegation concerned African-American jurors, the Caucasian criminal defendant had no legal standing to object to the practice. The Supreme Court rejected this argument, holding that “race is irrelevant to a defendant’s standing to object to the discriminatory use of peremptory challenges.” The Court explained that both criminal defendants and jury members alike have an interest in ensuring that criminal trials are free of racial and ethnic discrimination. Criminal defendants, no matter their race, have an interest in the “integrity
of the judicial process” and fairness of criminal proceedings. In 1998, the Court further extended the *Batson* line of cases by ruling that the Equal Protection Clause is violated when African Americans have been systematically excluded in the formation of grand juries when a criminal defendant is white (*Campbell v. Louisiana*).

The *Batson* line of cases decided by the U.S. Supreme Court all involved the race-based use of peremptory challenges by prosecutors, not defense attorneys. Did *Batson* prohibit criminal defense attorneys from dismissing prospective jurors solely on account of their race? In the 1992 case of *McCollum v. Georgia*, the Supreme Court was confronted with a case in which two white defendants were accused of assaulting an African-American couple. The defense argued that it was reasonable for them to exclude many African-American jurors because of the racially charged nature of the case. The Court disagreed, ruling that a criminal defendant cannot engage in purposeful racial discrimination when using peremptory challenges.

### Women and Jury Service

In 1957, the most famous movie about the American jury—“Twelve Angry Men”—hit the screens. When we watch this old movie today, we might ask ourselves: “What's wrong with this picture?” Of course, the fictional jury, led by foreman Henry Fonda, is all-white (this accompanying article traces the inclusion of people of color on juries). The jury is also all-male—where are the women?

Historically, serving on juries was closely tied to the right to vote. Not until 1920, with the passage of the 19th Amendment, were women formally accorded the right to vote. Serving on juries was a parallel concern for the suffragists who believed (incorrectly) that jury service would automatically follow the right to vote. (In fact, women both voted and served on juries in a few states before 1920.) Nevertheless, many states—including Florida in 1949—subsequently passed “voluntary” jury service laws for women, typically based upon paternalistic views of the capabilities and interests of women. As a result, often times few women registered for jury duty and even fewer were actually called.

In 1961, the U.S. Supreme Court upheld Florida’s voluntary service law in *Hoyt v. Florida*, a case arising from an all-male jury’s conviction of a female defendant who had beaten her unfaithful husband to death with a baseball bat. But by 1975, the U.S. Supreme Court reversed itself in *Taylor v. Louisiana*, finding that “it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male…” (Justice Byron White). Now, women serve on juries routinely in every state, leaving the all-male jury a relic of our nation’s past.

### Sources:


### Cases

- **Castenada v. Partida**, 430 U.S. 482 (1977)
- **Strauder v. West Virginia**, 100 U.S. 303 (1879)
- **Swain v. Alabama**, 380 U.S. 202 (1965)

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**Conclusion**

The Constitution requires the government to provide criminal defendants with an impartial trial free from racial discrimination. Historically, minorities, particularly African Americans, faced discrimination in the jury selection process. Over time, the courts have required that defendants must be tried before juries that represent a reasonable cross section of their communities. Nevertheless, despite undeniable progress, much debate continues over the use of peremptory challenges. Some contend that attorneys on each side (prosecution and the defense) continue to employ peremptory challenges in a race-based way. Some commentators have advocated that juries must contain jurors of the same race as the defendant. Others, such as the late Justice Thurgood Marshall, have called for the abolition of peremptory challenges as a way to combat racial discrimination. What is clear is that many people believe that the role of race still plays a large role in the jury selection process.
Like viewers across the nation, folks in Galveston, Texas watch a lot of TV shows about crime-scene investigators. Jury consultant Robert Hirschhorn couldn’t be happier about that.

Hirschhorn was hired last year to help defense attorneys pick jurors for the trial of Robert Durst, a millionaire real estate heir who was accused of murdering and dismembering a neighbor, Morris Black. It was a case in which investigators never found Black’s head. The defense claimed that wounds to the head might have supported Durst’s story that he had killed Black in self-defense.

Hirschhorn wanted jurors who were familiar with shows such as CSI: Crime Scene Investigation to spot the importance of such a gap in the evidence. That wasn’t difficult: In a survey of the 500 people in the jury pool, the defense found that about 70% were viewers of CBS’ CSI or similar shows such as Court TV’s Forensic Files or NBC’s Law & Order.

Durst was acquitted in November. To legal analysts, his case seemed an example of how shows such as CSI are affecting action in courthouses across the USA by, among other things, raising jurors’ expectations of what prosecutors should produce at trial.

Prosecutors, defense lawyers and judges call it “the CSI effect,” after the crime-scene shows that are among the hottest attractions on television. The shows—CSI and CSI: Miami, in particular—feature high-tech labs and glib and gorgeous techies. By shining a glamorous light on a gory profession, the programs also have helped to draw more students into forensic studies.

But the programs also foster what analysts say is the mistaken notion that criminal science is fast and infallible and always gets its man. That’s affecting the way lawyers prepare their cases, as well as the expectations that police and the public place on real crime labs. Real crime-scene investigators say that because of the programs, people often have unrealistic ideas of what criminal science can deliver.

Like Hirschhorn, many lawyers, judges, and legal consultants say they appreciate how CSI-type shows have increased interest in forensic evidence. “Talking about science in the courtroom used to be like talking about geometry—a real jury turnoff,” says Hirschhorn, of Lewisville, Texas. “Now that there’s this almost obsession with the [TV] shows, you can talk to jurors about [scientific evidence] and just see from the looks on their faces that they find it fascinating.”

But some defense lawyers say CSI and similar shows make jurors rely too heavily on scientific findings and unwilling to accept that those findings can be compromised by human or technical errors.

Prosecutors also have complaints: They say the shows can make it more difficult for them to win convictions in the large majority of cases in which scientific evidence is irrelevant or absent.

“The lesson that both sides can agree on is, what’s on TV does seep into the minds of jurors,” says Paul Walsh, chief prosecutor in New Bedford, Mass., and president of the National District Attorneys Association. “Jurors are going to have information, or what they think is information, in mind. That’s the new state of affairs.”

Lawyers and judges say the CSI effect has become a phenomenon in courthouses across the nation:

- In Phoenix last month, jurors in a murder trial noticed that a bloody coat introduced as evidence had not been tested for DNA. They alerted the judge. The tests hadn’t been needed because the defendant had acknowledged being at the murder scene. The judge decided that TV had taught jurors about DNA tests, but not enough about when to use them.

- Three years ago in Richmond, Va., jurors in a murder trial asked the judge whether a cigarette butt found during the investigation could be tested for links to the defendant. Defense attorneys had ordered DNA tests but had not yet introduced them into evidence. The jury’s hunch was correct
— the tests exonerated the defendant, and the jury acquitted him.

- In Arizona, Illinois and California, prosecutors now use “negative evidence witnesses” to try to assure jurors that it is not unusual for real crime-scene investigators to fail to find DNA, fingerprints and other evidence at crime scenes.

- In Massachusetts, prosecutors have begun to ask judges for permission to question prospective jurors about their TV-watching habits. Several states already allow that.

- Last year in Wilmington, Del., federal researchers studying how juries evaluate scientific evidence staged dozens of simulated trials. At one point, a juror struggling with especially complicated DNA evidence lamented that such problems never come up “on CSI.”

The CSI effect also is being felt beyond the courtroom. At West Virginia University, forensic science is the most popular undergraduate major for the second year in a row, attracting 13% of incoming freshmen this fall. In June, supporters of an Ohio library drew an overflow crowd of 200-plus to a luncheon speech on DNA by titling it “CSI: Dayton.”

The Los Angeles County Sheriff’s Department crime lab has seen another version of the CSI effect. Four technicians have left the lab for lucrative jobs as technical advisers to crime-scene programs. “They found a way to make science pay,” lab director Barry Fisher says.

**Shows’ Popularity Soars**

CSI, which begins its fifth season next month, was America’s second-most-popular TV program during the season that began last fall, after the Tuesday edition of American Idol. CSI and a spin-off, CSI: Miami (which is about to begin its third season), have drawn an average of more than 40 million viewers a week during the past TV season. Law & Order, whose plots sometimes focus on forensic evidence, has been the 13th-most-watched show during the 2003-04 season, averaging about 15 million viewers. On cable, the Discovery Channel, A&E and Court TV have programs that highlight DNA testing or the analysis of fingerprints, hair and blood-spatter patterns. CSI: NY, set in New York City, is slated to premiere next month.

The shows’ popularity, TV historians say, is partly a result of their constant presence. Counting network and cable, at least one hour of crime-forensics programming airs in prime time six nights a week.

The stars of the shows often are the equipment—DNA sequencers, mass spectrometers, photometric fingerprint illuminators, scanning electron microscopes. But the technicians run a close second.

“It’s ‘geek chic,’ the idea that kids who excel in science and math can grow up to be cool,” says Robert Thompson, who teaches the history of TV programming at Syracuse University. “This is long overdue ... cops and cowboys and doctors and lawyers have been done to death.”

**Departing from Reality**

Some of the science on CSI is state-of-the-art. Real lab technicians can, for example, lift DNA profiles from cigarette butts, candy wrappers and gobs of spit, just as their Hollywood counterparts do.

But some of what’s on TV is far-fetched. Real technicians don’t pour caulk into knife wounds to make a cast of the weapon. That wouldn’t work in soft tissue. Machines that can identify cologne from scents on clothing are still in the experimental phase. A criminal charge based on “neuro-linguistic programming”—detecting lies by the way a person’s eyes shift—likely would be dismissed by a judge.

But real scientists say CSI’s main fault is this: The science is always above reproach. “You never see a case where the sample is degraded or the lab work is faulty or the test results don’t solve the crime,” says Dan Krane, president and DNA specialist at Forensic Bioinformatics in Fairborn, Ohio. “These things happen all the time in the real world.”

Defense lawyers say the misconception that crime-scene evidence and testing are always accurate helps prosecutors. “Jurors expect the criminal justice system to work better than it does,” says Betty Layne DesPortes, a criminal defense lawyer in Richmond, Va., who has a master’s degree in forensic science. She notes that during the past 15 years, human errors and corruption have skewed test results in crime labs in West Virginia, Pennsylvania, California, Texas and Washington state.

But prosecutors say the shows help defense lawyers. Jurors who are regular viewers, they say, expect testable evidence to be present at all crime scenes. In fact, they say, evidence such as DNA and fingerprints—the staple of CSI plots—is available in only a small minority of cases and can yield inconclusive results.

“Defense attorneys will get up there and bang the rail and say ‘Where were the DNA tests?’ to take advantage of the idea that’s in the juror’s mind,” says Joshua Marquis, a prosecutor in Astoria, Ore. “You’ve got to do a lot of jury preparation to defeat that.”

Some prosecutors have gone to great lengths to lower jurors’ expectations about such evidence. In Belleville, Ill., last spring, prosecutor Gary Duncan called on seven nationally recognized
experts to testify about scientific evidence against a man accused of raping and murdering a 10-year-old girl. The witnesses included specialists in human and animal DNA, shoe-print evidence, population statistics and human mitochondrial DNA, genetic material that is inherited only from one's mother and that seldom is used in criminal cases. Duncan won a conviction.

“I wanted to be certain the jury was clear on the evidence and its meaning,” he says. “These days, juries demand that.”

CSI producers acknowledge that they take some liberties with facts and the capabilities of science, but they say it’s necessary to keep their story lines moving. Elizabeth Devine, a former crime lab technician who writes and produces episodes of CSI: Miami, spoke at a training seminar for prosecutors last year in Columbia, S.C. She said that if the shows did not cut the time needed to perform DNA tests from weeks to minutes, a villain might not be caught before “episode five.”

For all of CSI’s faults, some lab technicians say they have a soft spot for the TV version of their world. “It’s great for getting people interested (in) careers” in forensic science, says Barbara Llewellyn, director of DNA analysis for the Illinois State Police.

Terry Melton, president of Mitotyping Technologies in State College, Pa., says the programs have made “jury duty something people now look forward to.”

And Fisher says the shows have given “science types” like himself some unexpected cachet. “When I tell someone what I do, I never have to explain it now,” he says. “They know what a crime-scene [technician] does. At least, they think they do.”

Use these discussion questions, research activities, Web resources, and books to help students extend their understanding of the article and spur classroom discussion.

**Discussion Questions**

1. Do you watch the CSI shows? What have you learned about forensic evidence, trials, and the criminal justice system from these shows?

2. Do television shows like CSI help jurors to better understand and evaluate forensic evidence? Why (not)?

3. In your opinion, how important is forensic evidence to jurors, compared with other types of evidence (such as eyewitness testimony, statements to the police, etc.)?

4. What obligation, if any, do television shows have to accurately portray the workings of the criminal justice system, including the gathering and interpretation of forensic evidence?

5. What other television shows might influence jurors’ perspectives about law, the police, and the criminal justice system? How?

**Research Activities**

1. Organize the class into small groups of 3 to 4 students each. Ask each group to research a particular type of forensic evidence used in court—e.g., DNA testing, fingerprints, ballistics, etc. Have the groups report in the classroom on the uses, reliability, and problems of various types of forensic evidence. Which types of forensic evidence would seem especially complex to the average juror? Why?

2. Ask the students to identify and do research on a recent trial that involved the presentation of one or more types of forensic evidence (use national or local newspapers as sources). How important was the forensic evidence to the trial? Did the reports of the trial include any interviews with prosecutors, defense attorneys, or jurors regarding the use of forensic evidence?

**Web Resources**

“Scientific Testimony: An Online Journal” [www.scientific.org], a project of the Department of Criminology, Law & Society at the University of California, Irvine, publishes articles, news reports, and commentary about the use of scientific evidence in legal proceedings.

“Forensic Files” [www.forensicfiles.com] is the web site for this Court TV program. In addition to program information, the site also has a “Resources” section that contains a wealth of information about types of forensic experts, terms of the field, and links to major forensic science organizations.

**For Further Reading**


Insights Online

Here are some of the features you will find at the Web site for Insights on Law & Society at www.insightsmagazine.org.

Read about the experiences of people who have served on juries in famous cases, including Jack Ruby’s trial for the murder of Lee Harvey Oswald.

Review the U.S. Supreme Court opinions broadening access to jury service for women, African Americans, and other groups.

Learn about jury nullification, from colonial days when a jury acquitted John Peter Zenger of seditious libel to recent controversies.

Find some of the best lessons online that complement this issue’s key themes and topics.

Take an online quiz about the jury and have the answers scored and explained then and there.

Watch a video debate about opening jury deliberations to cameras from the NewsHour with Jim Lehrer, then take stand in the debate.

Learn about the short story, “A Jury of Her Peers,” and listen to an audio dramatization of it. Complete a word search about the jury.

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—Spring 2005

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