Step 12
Your Day in Court: The Trial Begins

If you are the defendant in a trial, you are probably not in the state of mind to appreciate the fact that you are about to participate in a rather remarkable courtroom proceeding that represents both the ideals and the (sometimes quite different) realities of our legal system. Although you have the choice of being tried by a judge without jurors in a bench trial, if you are like most defendants who go to trial, you have probably opted for trial by a jury of your peers. As you may recall from Step 7, only 3 percent of trials are bench trials (adapted from Boland and Sones, 1986, pp. 6, 26). As you face the prospect of trial by jury, however, you may well appreciate the differences between the modern trial you are about to experience and the trials of olden days, including trial by ordeal and trial by battle (see Step 4).

In this chapter, we will briefly continue tracing the development of modern American jury trials from pre-Revolutionary times, and then focus on the modern trial process from the perspective of the jury. Since what matters most in a jury trial is how jurors perceive the unfolding criminal justice drama and its key actors, a jury-focused perspective will help illuminate the realities of the trial process. As we go through the steps of the modern trial process (see Figure 12.1), it will help to keep in mind what we already know about the duties and dilemmas of key players, such as the judge, the prosecutor, and the defense attorney.

As we watch the process of trial unfold, it may become clearer why trials can sometimes be quite lengthy. The length of the average criminal trial varies by jurisdiction, but commonly ranges between three days and one week. Occasionally, a trial might last much longer, depending upon the number of witnesses called to testify and the amount of physical evidence presented. The longest and costliest trial in America was the McMartin preschool case, which lasted thirty months, and was then followed by two additional trials because of hung juries on some of the charges, making the total length of the case seven years.
TRIAL BY JURY IN PRE-REVOLUTIONARY AMERICA

When the colonists came to America, they imported the concept of trial by jury as part of the package of English legal concepts and procedures. Since America was still a colony of the British Crown, the colonists’ early experiences with trial by jury were often filled with difficulty. When a colonist was accused and tried, jurors were generally chosen by the King’s officials, not from the accused’s neighbors (or peers). These officials usually chose jurors partial to the Crown’s interests, so getting justice was nearly impossible in the eyes of independence-minded colonists. Yet the colonists could see the potential for the jury trial, if the jurors were impartial or consisted of even numbers of those partial to the prosecution and those partial to the defense (Abramson, 1994).

TRIAL BY JURY AFTER INDEPENDENCE

After the American Revolution, the framers of the Constitution considered trial by a jury of peers so important that the Constitution provides the right to trial by jury for
all crimes except impeachment; the Sixth Amendment (1791) provides the right to be tried by an impartial jury, meaning a fair and unbiased one; the Seventh Amendment (1791) grants this right in civil cases involving twenty dollars or more.

The Supreme Court originally interpreted these constitutional provisions as applicable only in federal trials, reasoning that trial by jury was not a “fundamental” right, and thus was not applicable to the states through the Fourteenth Amendment’s due process clause (Palko v. Connecticut, 1937). This meant that states were not required to provide jury trials, but could choose to do so. In Duncan v. Louisiana (1968), the Court reversed its position, ruling that trial by jury in criminal cases is a fundamental right applicable to the states. The justices’ reasoning in the Duncan case emphasized the importance of jury trials as part of due process and as a significant aspect of a participatory democracy.

In subsequent cases, the Supreme Court clarified the scope of the right to trial by jury, finding it applicable in any case involving a minimum possible sentence of six months’ incarceration, and even in some cases with a shorter penalty. In Lewis v. United States (1996), however, the Supreme Court ruled that defendants who are convicted of multiple petty offenses for which the combined total length of incarceration would be greater than six months are not entitled to a jury trial. For civil matters, however, the Court has not extended the Seventh Amendment requirement of trial by jury to the states, instead leaving state governments to decide whether they wish to require juries in civil trials.

MODERN-DAY TRIALS

We’ve seen the reasons why the right to trial by jury is a fundamental part of due process in our court system. Now let’s take a closer look at the trial itself, beginning with a fundamental question: What is the purpose of a jury trial? Many people might answer “To find the truth, of course.” That is indeed the purpose, yet this presumes that there is a single true version of events, and that the adversarial format of a criminal trial is the best way to discover the truth.

However, a trial can also be conceptualized as a forum where differing interpretations of events are offered by each side, and jurors sift and sort and select the version of events that seems most plausible. The jurors then begin the complicated process of reconciling the facts of the case as they perceive them with the provisions of the law, the dictates of their consciences, and the compromises hammered out during jury deliberations. The resulting verdict, therefore, reflects a particular subjective construction of “the truth” as much as—perhaps more than—it represents a discovery of an “objective” truth. In this sense, the purpose of a jury trial may be to provide a forum for presenting competing versions of the truth, and provide a means both practical and symbolic of pronouncing that justice has been served. This illustrates the role that trials play as social dramas where larger societal issues can be examined and addressed in the context of specific cases.
THE TRIAL PROCESS: PRE-TRIAL ACTIVITIES

Discovery

This is the process whereby the prosecution and the defense exchange information in order to prepare for trial. As part of discovery, each side may interview and take depositions from witnesses. A deposition is an “out-of-court statement given under oath by any person involved in the case” (American Bar Association, 2001). Although the goal of discovery is to enable each side to anticipate the evidence the other side will present, in order to avoid unpleasant surprises (American Bar Association, 2001), sometimes surprises occur nonetheless. For example, it may be revealed later that information that should have been disclosed to the defense was not, either inadvertently or deliberately. Sometimes, a subpoena requesting all relevant papers is answered with a slew of unsorted papers crammed into cardboard boxes. This tactic may cut into the opposition’s preparation time, by requiring them to spend time wading through a paper flood to identify relevant documents.

Ongoing Negotiations Between Defense and Prosecution

As we saw in the last chapter, most criminal charges are settled through plea bargaining. When the defense opts to go to trial, however, that does not necessarily mean the end of negotiations. Even as the defense and prosecution prepare to go to trial, ongoing attempts to reach a settlement occur, and negotiations can continue even as the trial begins and after it is well underway. In one case, for example, a man pleaded guilty to stealing Malcolm X’s diary three days into his trial for the theft (Finkelstein, 2000). In some rare cases, plea bargains are finalized while the jury is out deliberating.

Pre-Trial Motions

Before the trial actually begins, the defense and prosecution will submit relevant pre-trial motions to the court for the judge to decide upon. Motions are requests to the court for a ruling on a legal matter. For example, the defense may file a motion asking the judge to dismiss the case on the basis of insufficient evidence. The prosecution will then file a rebuttal requesting the court not grant the motion, and explaining why the case should proceed. Attorneys for either side may file a motion requesting that the trial date be postponed in order to give them more time to study the issues in a case or locate a key witness. Another common petition is a motion to discover, which is used to seek information held by opposing counsel. See Box 12.1 for an example of a pre-trial motion that is relatively uncommon, except in cases attracting intense publicity.
The bombing of the federal building in Oklahoma City, in which 168 people died, received extensive and in-depth media coverage before and after the trial of suspects Timothy McVeigh and Terry Nichols. News media around the world described the wreckage of the building, possible motives for the bombing, the search for survivors, and the horror and grief of victims and their families. The horrific and unique nature of the crime made the smallest details of the event the subject of widespread coverage, which was often emotionally laden and intensely detailed. Not surprisingly, local media in Oklahoma, especially in Oklahoma City itself, provided saturation coverage of the bombing and its aftermath, including the capture and identification of Timothy McVeigh.

As McVeigh’s defense team prepared for trial, people around the world saw images of the death and destruction caused by the bombing. Given such intense and emotionally evocative coverage, the defense team questioned whether defendants McVeigh and Nichols could receive a fair trial in the Oklahoma City venue. Could a truly impartial jury be drawn from citizens of the local community, given the widespread impact of the bombing and the extensive media coverage?

The defense attorneys hired social scientists to investigate this question through empirical research on the newspaper coverage in four potential trial venues: Oklahoma City, Tulsa, and Lawton (all in Oklahoma), and Denver, Colorado. Researchers at the University of Nebraska, Lincoln, conducted a content analysis of newspaper media coverage of the bombing. They assessed the nature and emotional content of the coverage, as well as the sheer volume of coverage in each locale, by reading a random sampling of 939 articles about the bombing published in the newspapers of each city between April 20, 1995, and January 8, 1996. Each newspaper article was systematically coded along a number of dimensions, including whether McVeigh and Nichols were portrayed as the embodiment of evil or in other demonic imagery, clearly negative characterizations of the defendants.

The results of the study showed that the nature of the media coverage in the Oklahoma cities was substantially more emotionally laden and prejudiced than that which appeared in the Denver paper. The scientists concluded that the nature and extent of the pre-trial publicity in the venue where the trial was to be held was such that it would be substantially impossible to seat an impartial jury.

The defense attorneys decided to file a motion for change of venue—that is, a request to change the location of the trial. For both legal and practical reasons, a request for change of venue often requires the defense to provide solid evidence supporting the argument that the trial should be conducted at another location. The research demonstrated that there was more intense media coverage of the issues in Oklahoma, and that not surprisingly Oklahomans were more familiar with and had stronger attitudes about the bombing, the guilt of the suspects, the nature of the evidence that had been amassed, and other associated issues. The defense motion for change of venue, using this evidence in support of the motion, was granted. Thus, the trial was ultimately held in Denver, and both defendants were found guilty (Studebaker, Robbennolt, Pathak-Sharma, & Penrod, 2000).
Jury Selection: The Legal Foundations

The right to trial by an “impartial” jury raises many questions concerning jury selection and composition. A common method of jury selection before 1968 was the “key man” system, relying on prominent citizens in the community to serve. This meant many citizens were excluded from jury duty, despite being legally eligible. Most notably, in *Strauder v. West Virginia* (1880), the Supreme Court struck a state law excluding African American men from jury duty as a violation of equal protection. Thus, by law, the importance of fair jury selection was explicitly established. However, in fact, the practice of excluding minorities from jury service continued unacknowledged by the Court, as illustrated by its decision in *Swain v. Alabama* (1965) allowing exclusion of potential jurors on the basis of race.

Similarly, although women became jury eligible between 1870 and 1940 (depending on locale), most states continued to exclude women from jury pools (from which jurors are drawn) (Abramson, 1994). The Supreme Court addressed this in *Taylor v. Louisiana* (1975), striking the practice of including women in jury pools only if they had contacted the court and asked to have their names included on jury lists.

One of the first Vermont juries to include women as well as men was convened in Barre Municipal Court. Women were not allowed to serve as jurors in Vermont until 1943. The issue of whether women could or should serve as jurors was debated until well into the twentieth century. Some people argued that women should be protected from the unpleasantness of courtroom trials, while others argued that women were intellectually or morally unfit to serve as jurors. The debate over women’s jury service clearly illustrates the central role that gender stereotyping has played in shaping women’s participation in the criminal justice system, whether as jurors, judges, attorneys, or police and correctional officers.  

*Source: Courtesy of the Aldrich Public Library, Barre, Vermont.*
In 1968, Congress enacted the Jury Selection and Service Act, requiring that federal jury pools be comprised of citizens drawn at random “from a representative cross section of the community.” In *Taylor v. Louisiana* (1975), the Supreme Court extended this requirement to states. The random selection requirement substantially changed the methods used to create jury pools, but did not address how individual jurors are selected during **voir dire** (jury questioning).

In *Holland v. Illinois* (1990), the Supreme Court clarified that it is the process of selecting the jury pool that must be representative, rather than juries themselves. This is a crucial distinction to keep in mind. Many people mistakenly think that a “jury of one’s peers” refers to a jury made up of people who share the defendant’s ethnic and gender background. This is *not* the case! If the definition of “peers” referred to similarities between defendant and jurors, then a defendant with a prior criminal conviction could surely make the case to have some ex-felons on his or her jury. Instead, a **jury of one’s peers** refers to the idea that defendants should be tried by fellow citizens from the same community. Therefore, if the process of jury selection has been carried out in accordance with legal requirements, the resulting jury is considered a jury of one’s peers, even if the defendant is an Asian American woman in her twenties and the jury consists of mostly white middle-aged men.

**THE GOAL OF REPRESENTATIVENESS**

Why do we care about the representativeness of the jury selection process? What are the legal assumptions underlying the requirement of a representative jury selection process?

One of the major assumptions is that the selection process, if drawing from a representative cross section of the community, will lead to a more diverse jury (though the jury itself will not be representative). Another assumption is that jurors from different demographic groups may have significantly different perspectives on the case: Women may see the issues differently than men, for example, and people from different ethnic groups sometimes bring differing perspectives.

Yet research shows that jurors’ demographic characteristics, although significant influences on the verdict in some cases, are less important than the evidence in many cases. The key question is **how** (to what degree) such characteristics are important in any particular case. The assumption that jurors’ verdicts can almost always be accurately predicted based on demographic characteristics is *not* supported by research: Not only do jurors not necessarily vote according to their demographic characteristics, but demographic groups are themselves not uniform in their beliefs. In addition, every juror simultaneously represents a variety of different demographic groups defined by age, ethnic background, gender, education level, sexual orientation, political and religious attitudes, social class, and others.

However, the assumption that demographics have nothing to do with verdict choices is inaccurate as well; since we are a product of our experiences, diversity
Who will fill these seats? The process of jury selection illustrates the complexities involved in drawing jurors from a “representative cross-section of the community,” as required by law. Consider the importance of the jury in both criminal and civil cases. Who would you want to fill these seats in your trial? SOURCE: Courtesy of Jon’a Meyer.

matters. For example, if a juror shares the same ethnicity as the defendant, it may increase the likelihood that the juror will acquit or, on the other hand, convict. Although often assumed, “group loyalties” may not exist in reality. For example, women jurors are not necessarily the “ideal juror choice” for the prosecution in a rape case. While some women may indeed be more likely to sympathize with a female victim, under some circumstances women may actually be less sympathetic toward the victim. For example, some women may imagine themselves in the situation and feel that they would have acted differently, thus increasing the likelihood that they may blame the victim.

The fact that juror demographics are not necessarily tightly linked to their verdict choices is in fact quite appropriate, given that verdicts are not supposed to reflect the influence of extra-legal factors. We can recognize that personal experiences influence jurors’ perspectives but do not necessarily determine jurors’ behavior. Whether experiences are such a powerful influence that they essentially determine a juror’s verdict choice depends upon a complex constellation of factors, including the political and social atmosphere at that time and place, and the issues in the case. Certainly, all-white juries in the American South during the first half of the twentieth century illustrated all too well how racism in the jury box—which was a reflection of the racism in the larger community—sometimes left little chance for African American defendants to receive a fair trial.
However, it is also critically important to avoid assuming that all members of a given demographic group share the same perspective, attitudes, or experiences. Certainly, they may share some common experiences, but individual differences also exist. Just as all teenagers and young people do not think alike, all women or all men or all members of a given ethnic group do not have the same attitudes or identical experiences.

Public controversy surrounding high-profile criminal cases, in particular cases raising questions about the relationship between race, ethnicity, and the fairness of the legal process, suggests another reason for caring about representativeness. While verdicts from relatively homogenous juries may be greeted with skepticism by significant segments of the public, verdicts from more diverse juries could potentially—although not necessarily—be perceived as having more legitimacy.

Steps in the Process of Jury Selection

So, just how is a jury selected? To begin with, using lists from voter registration and the Department of Motor Vehicles, each county’s jury management personnel create a master list of county residents. From this list, the names of people who will receive a summons for jury service are randomly drawn. Folks whose names are not on these lists have no chance of being called for jury duty, so people who are homeless or who move frequently, such as students or seasonal employees, are often underrepresented on the lists. In an attempt to capture a larger cross-section of residents, some jurisdictions use additional sources, such as lists of people receiving social security, general assistance (welfare), or unemployment benefits.

After the jury summonses are sent out, more prospective jurors are in effect “weeded out” of the jury selection process in the following ways:

- The person does not respond to a summons for jury service.
- The person is not eligible for jury duty (e.g., he or she moved to another county).
- The person is exempt (e.g., a peace officer, in some jurisdictions).
- The person is excused (e.g., for medical reasons).

The folks who remain after this stage comprise the venire (the jury panel). This is where the process of voir dire begins—where the judge and/or the attorneys question prospective jurors to determine whether they should be seated on the jury. “Voir dire” means “to speak the truth” in French, and therefore implies the process of identifying any biases or prejudices on the part of the jury panel.

“Traditional” Jury Selection

How are jurors typically selected? “Traditional” jury selection is based on lawyers’ experiences, intuitions, hunches, and implicit personality theories—that is, their
beliefs that juror characteristics, such as ethnicity, gender, age, certain experiences, and even nonverbal demeanor indicate potential attitudes and behavior that may or may not favor their side. Box 12.3 shows how Clarence Darrow, the famous defense lawyer, chose jurors in his cases.

**Scientific Jury Selection**

This refers to the use of social science techniques to assist attorneys in selecting jurors and/or developing persuasive trial strategies to present the case. The goal is to systematize jury selection, in order to help maximize the chances of avoiding jurors unfavorable to one’s side while identifying jurors who are favorable.

Common techniques of scientific jury selection (SJS) include surveying community members and holding focus groups (discussion groups) to gauge their attitudes and reactions on issues crucial to the trial. For example, both sides in the criminal trial of O.J. Simpson were interested in potential jurors’ attitudes and experiences with domestic violence, their beliefs about scientific evidence (such as DNA samples), their perceptions of police officers and police credibility, their feelings about celebrities, and their potential race or gender sympathies. Research with residents of the community in which the trial will be held should help identify the types of citizens who would make the most favorable jurors. The research is conducted with residents in the community from which the actual jurors will later be drawn; research is not done with actual jurors themselves, for legal and ethical reasons. However, the use of scientific jury selection techniques with potential jurors
Clarence Darrow was a famous defense attorney who represented controversial defendants such as Socialist presidential candidate Eugene Debs, Tennessee school teacher John Scopes, and teenaged murderers Leopold and Loeb. Darrow, an ardent opponent of capital punishment, was known for his fiery oratory in the courtroom and his skill as a litigator. As you read this excerpt from Darrow’s writings, think about what kinds of stereotypes appear to be illustrated by his assertions.

Choosing jurors is always a delicate task. The more a lawyer knows of life, human nature, psychology, and the reactions of the human emotions, the better he is equipped for the subtle selection of his so-called “twelve men, good and true.” In this undertaking, everything pertaining to the prospective juror needs to be questioned and weighed: his nationality, his business, religion, politics, social standing, family ties, friends, habits of life and thought; the books and newspapers he likes and reads, and many more matters that combine to make a man; all of these qualities and experiences have left their effect on ideas, beliefs and fancies that inhabit his mind. . . . Involved in it all is the juror’s method of speech, the kind of clothes he wears, the style of haircut, and, above all, his business associates, residence and origin. If a criminal case, it is practically always the poor who are on trial. The most important point to learn is whether the prospective juror is humane. This must be discovered in more or less devious ways. As soon as “the court” sees what you want, he almost always blocks the game.

Let us assume that we represent one of “the underdogs” because of injuries received, or because of an indictment brought by what the prosecutors name themselves, “the state.” Then what sort of men will we seek? An Irishman is called into the box for examination. There is no reason for asking about his religion; he is Irish; that is enough. We may not agree with his religion, but it matters not, his feelings go deeper than any religion. You should be aware that he is emotional, kindly and sympathetic. If he is chosen as a juror, his imagination will place him in the dock; really, he is trying himself. You would be guilty of malpractice if you got rid of him, except for the strongest reasons.

If a Presbyterian enters the jury box and carefully rolls up his umbrella, and calmly and critically sits down, let him go. He is cold as the grave; he knows right from wrong, although he seldom finds anything right. He believes in John Calvin and eternal punishment. Get rid of him with the fewest possible words before he contaminates the others; unless you and your clients are Presbyterians you probably are a bad lot, and even though you may be a Presbyterian, your client most likely is guilty.

If possible, the Baptists are more hopeless than the Presbyterians . . . you do not want them on the jury, and the sooner they leave the better. The Methodists are worth considering; they are nearer the soil. Their religious emotions can be transmuted into love and charity. They are not half bad; even though they will not take a drink, they really do not need it so much as some of their competitors for the seat next to the throne. If chance sets you down between a Methodist and a Baptist, you will move toward the Methodist to keep warm.

Beware of the Lutherans, especially the Scandinavians; they are almost always sure to convict. Either a Lutheran or Scandinavian is unsafe, but if both in one, plead your client guilty...
during voir dire is illustrated by the use of detailed jury questionnaires and probing questions from attorneys. Such detailed information gathering has led to charges that such practices may intrude on the privacy of potential jurors.¹

Scientific jury selection rests upon several critical assumptions, including the following:

- Jurors’ behavior reflects or is at least consistent with their attitudes.
- Links between individual characteristics and attitudes on case issues in community members will be similar for actual jurors.
- Use of questionnaires, surveys, and questioning during voir dire can accurately measure attitudes and uncover biases.
- Juror attitudes significantly influence the verdict.

In most of the criminal cases where SJS techniques have been used by the defense, defendants have been acquitted, convicted on lesser charges, or the jury deadlocked. For example, in the McMartin preschool case, the defense used scientific jury selection techniques to help identify the most promising types of jurors in an attempt to combat the potentially prejudicial effects of extensive pre-trial publicity. Based on this research, the defense attempted to get jurors from certain ethnic groups (African American, white, or Asian) rather than others (Hispanic, Native American). The defense also focused on male jurors, and jurors with a relatively high education level. The McMartin defense also attempted to choose jurors with particular attitudes on issues relevant to the case; for example, jurors who believed that it was possible for children to be taught to testify about things that never happened (Fukurai, Butler, and Krooth, 1993). In the end, the McMartin defendants were acquitted on most charges. The jury deadlocked on fourteen other charges against one of the defendants.

Scientific jury selection is a controversial practice for several reasons, and it is employed relatively rarely in criminal trials compared to its use in civil trials. Some proponents of SJS believe it is very effective, but the results of the limited amount of research experimentally comparing traditional and scientific selection strategies suggests it’s a toss-up (Horowitz, 1980; Nietzel and Dillehay, 1986). However, in some circumstances, SJS might be significantly more effective than traditional jury selection techniques: in cases where the evidence is equivocal; for certain types of civil litigation or political cases; where community sentiment
about the case has been shaped by extensive media coverage. The use of SJS techniques together with traditional methods, so that jurors selected only if both methods indicate they would be acceptable, can boost chances of making good juror selection. Perhaps the most effective role for SJS is in helping attorneys develop the best case presentation. For example, SJS can provide invaluable data to help attorneys decide the best, clearest, and most accessible way to present complex or technical legal and scientific information, or the most understandable way to arrange the sequence of arguments and evidence presentation.

The debate over the effectiveness of SJS raises complex ethical questions that are not resolvable through empirical research. To the extent that scientific jury selection is an effective tool in some circumstances, does this provide some defendants with an unfair advantage over those without the resources to employ “scientific” techniques? The response most often heard is that defendants already vary in the resources available to them to marshal tools for their defense, such as the most competent counsel, the services of defense investigators, and the services of expert witnesses. To the extent that defendants with greater resources enjoy an advantage over other defendants, the issue of inequality is an old and persistent one, and access to SJS research is merely another example of an already entrenched problem.

**Voir Dire: “To Speak the Truth”**

The purpose of voir dire is to question prospective jurors in order to weed out people who would not be impartial. In reality, voir dire also provides the attorneys the opportunity to try to identify jurors who will be sympathetic to their side, and those who may favor the opposition. The process of questioning prospective jurors can also provide each side with a better idea of the “game plan” the opposition will use at trial. For example, during jury selection in a case where a woman stands accused of killing her husband, the prosecution team may learn that the defense is planning to present information that the accused was a victim of domestic violence as part of its trial strategy.

Depending upon the jurisdiction, the judge may do most of the juror questioning, or the attorneys may be the primary questioners (see Box 12.6). In some
cases, prospective jurors are asked to fill out questionnaires indicating their attitudes and experiences with issues in the case. Jury questionnaires can run from a few pages to dozens of pages, depending upon the complexity of issues in the case. For example, in the trial of John DeLorean, the forty-two-page jury questionnaire contained ninety-nine questions (Brill, 1989, p. 232).

The voir dire phase of jury selection provides an interesting contrast to earlier steps in the process of jury selection, where the focus on the representativeness of the selection process requires random selection of prospective jurors. In contrast, jury selection during voir dire is anything but random, as attorneys for each side attempt to choose jurors they favor and exclude those they believe could be biased against their case. So how does the juror selection process become so selective?

Attorneys have two ways they can “strike” a prospective juror off the panel. First, an attorney can “challenge” a juror “for cause.” Attorneys have an unlimited number of challenges for cause. This means that the attorney asks the court to excuse the juror from service because the attorney believes that the juror would be biased for a particular reason. For example, voir dire may reveal that a potential

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**BOX 12.5**

**The Unwanted Juror**

Some years ago in a Massachusetts prosecution for assault with intent to murder, one seat remained to be filled on the jury after the defense had expended its final challenge. The man called to occupy it was, as his informational questionnaire disclosed, a police lieutenant. In the “Remarks” section he had written: “I once investigated and prosecuted a case of assault with intent to murder.”

Before the lieutenant could enter the jury box, defense counsel was, understandably, asking the judge to excuse the juror “for cause.” However, because the juror had sworn to his impartiality during the usual pre-empanelment routine the judge denied the request.

As the trial went on, the evidence seemed to the judge to be exceptionally strong, and he silently anticipated a conviction. At the end he did not pick the foreperson for the jury (as many judges do) but instead left that choice to the jurors. They selected the lieutenant and returned after only an hour’s deliberation.

“What say you, Mr. Foreman?” the clerk intoned in language unchanged since John Adams’s day. “Is the defendant guilty or not guilty?”

Promptly and loudly the lieutenant replied, “Not guilty.” After the defendant’s discharge several jurors, including the lieutenant, asked to speak to the judge. “We were wondering,” said a woman, “why the government brought this case; it seemed pretty weak to us.” “I’ll second that,” said the lieutenant. “It’s the worst, sloppiest investigation I’ve seen in seventeen years as a police officer. They should be ashamed at having wasted everyone’s time.”

“Well,” said the judge, “cases aren’t always predictable.” And, he might have added, neither are juries—or jurors. (Zobel, 1995)

The courtroom was full, with about sixty people sitting on the plain wooden benches. Some were looking around with interest, obviously curious about the jury selection process that was about to begin. Others had already opened their paperbacks and resumed the reading they had begun that morning in the jury assembly room. As prospective jurors, we knew only that we had been assigned to go to a courtroom where a criminal case was to be tried; we knew no other details. After the bailiff led us to the courtroom and we were seated, the judge introduced himself and explained that some of us would be randomly selected to come up and be seated in the jury box, so that the attorneys in the case could begin the process of questioning the jury. The jury selection process would continue until there were twelve jurors and two alternates selected for the case.

I was one of the people called during the first round of jury questioning, and I could feel my fellow citizens’ eyes on me and the other prospective jurors as we took our seats in the jury box. The palpable but unspoken question was “will I be next?”

The prosecutor and defense attorneys introduced themselves, and we got our first look at the defendant. The judge explained a little bit about the process, and asked if there was any reason that we could not serve, if selected. One man quickly raised his hand and asked to be excused, stating that he had a lower back condition that prevented him from sitting in the same position for long periods of time. The judge asked him a few questions about this but quickly granted his request to be excused. A few other people wanted to be excused, and the judge granted most of these requests.

The judge and attorneys then began systematically questioning each person in the jury box, one individual at a time. During questioning, all eyes in the courtroom—the attorneys, the judge, the defendant, the other potential jurors in the courtroom—were focused on the individual responding from the jury box. “What’s your name? What is your occupation?” the judge would ask, and then the attorneys would take turns asking questions that could give them a sense of who we were, what our attitudes toward the key issues in the case would be. “Do you have children?” asked the defense. Both sides asked questions about gun ownership and attitudes. As the questioning continued, the questions provided an interesting glimpse of the case. It appeared the defendant was an ex-felon who was being charged with possession of a firearm, which had been left unattended and could have endangered a child who came upon it. However, no one had actually been injured.

At some point in the questioning, an attorney for one side or the other might stop and confer with someone else, and after that the attorney might ask the judge to excuse the potential juror who had just been questioned; alternatively, the attorneys for both sides would state that “This juror is acceptable to us,” and the questioning would begin with a new prospect. Now it was my turn, and I was surprised at the hint of nervousness I felt. I had long been accustomed to public speaking, usually in front of far larger groups than this; yet the solemnity of the circumstances felt quite different than anything I’d experienced before.

“What is your occupation?” “Criminal justice professor? How interesting . . .” “What kind of courses do you teach?” “Oh, you say you teach a course on jury selection and decision-
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making?” “And your dissertation topic was jury decision making in criminal cases?” (Audible
titters from members of the courtroom audience).

To my surprise, I was not challenged for cause, and I happily settled in to watch as my fel-
low prospective jurors were questioned. However, as the nature of the case became clearer, I
started to have misgivings. The case appeared to present issues that were startlingly similar to
the issues I had researched for my dissertation.

At this point, the judge ended the questioning of this batch of potential jurors by asking all
of us if we knew anyone else in the courtroom. A young man seated two rows in front of me in
the jury box raised his hand. “I know Dr. Grant. She was one of my instructors . . .”

I peered from the back row of the jury box. I had thought the fellow looked vaguely famil-
iar, but only vaguely. One of the attorneys apparently found this connection interesting. “So tell
us,” he asked the young man “what course did you take with Dr. Grant?” “When was that—a
couple of years back?”

I still had little memory of this particular former student, but I felt for him as his academic
life was being probed in front of a whole bunch of interested and evidently amused strangers. I
was not prepared for the next question the attorney asked of my former student: “What grade
did you get in Dr. Grant’s class?” “You got a ‘C,’ you say?” At this, I could hear suppressed giggles
from some members of the audience. Oh dear, I thought. And anyway, how was that relevant to
the person’s potential to be a good juror?

After that, it appeared that both the student and I were going to be on the same jury,
because neither attorney objected to our university connection. But I knew what I had to say
when the judge asked a final question of all of us. “Is there any reason you feel you could not
serve on this jury? If so, please speak up.”

I raised my hand. I briefly explained my increasing misgivings about serving as a juror in
this particular case, because while I believed that I could be a fair and impartial juror, I knew
that my fascination with the particular issues presented in this case from a research perspective
could distract me if I were to serve. Not only would I be thinking about the issues of the case
from the perspective of a citizen serving as a juror, I would also be examining the issues from
the perspective of a jury researcher who had spent much time studying cases that presented very
similar issues to this one: “Looking in from the outside,” as it were. Regretfully, I asked to be
excused, and I was. As I left the jury box, I wondered how the case would turn out and what the
experience of serving in the case would be like for the other people selected as jurors. I silently
wished them good luck as I walked out of the courtroom, feeling rather wistful.

juror had been a crime victim, or knows one of the participants in the case. During
voir dire in a civil case observed by one of the authors, one man was dismissed
after he told the judge that he himself had a lawsuit pending against the defendant,
and a woman was excused when she announced that she knew the plaintiff’s attor-
ney from church. It is easy to see how these individuals may be less than fully
impartial because of such connections.

Much more controversial is the use of peremptory challenges to “strike”
prospective jurors. Attorneys for each side have a limited number of “perempto-
ries” that they can exercise, depending on the jurisdiction and the complexity of the
case. Peremptory challenges are “ace in the hole cards” because they allow attorneys to exclude a prospective juror who could not be removed from the panel using a challenge for cause. Traditionally, attorneys can exercise peremptory challenges without giving any reason for wanting to remove a particular person. Historically, the attorney’s reasoning was legally irrelevant; perhaps the attorney had a “gut hunch” that the person would favor the opposing side, or the attorney wished to select jurors in keeping with his or her personal stereotypes of the “ideal” juror.

However, in recent years the issue of the purposes for which peremptory challenges are employed, especially by the prosecution, has become very controversial. Research suggested that prosecutors used peremptory challenges to systematically strike prospective jurors who were African American, especially in death penalty cases where the accused was African American. In Philadelphia, a prosecutor conducting a videotaped training session urged new district attorneys to use peremptory challenges to strike poor African Americans as jurors (Johnson, 1998).

Questions about the role of peremptory challenges in jury selection have come into sharp focus recently, given the new emphasis on inclusiveness in jury selection that took hold after Duncan v. Louisiana. Controversy focused on the “race-based” use of peremptories, because such challenges directly conflict with the goal of representativeness in jury selection.

A major change in the Supreme Court’s perspective on the use of peremptory challenges became evident in 1986. In Batson v. Kentucky (1986), the Court reversed its earlier position in Swain v. Alabama (1965), holding that using race to strike a prospective juror violated the defendant’s equal protection rights. Thus, peremptory challenges cannot be used to exclude potential jurors solely on the basis of race. In the Court’s written opinion, the justices discussed the potential harm to the ideal of representativeness posed by the use of peremptories to strike people of a cognizable group (a group of people recognizable as having a high likelihood of sharing common experiences and attitudes). In Batson, the Court decreed that when it appears that the prosecution may be engaging in a “race-based” use of peremptory challenges, the court can require the prosecutor to provide a “nondiscriminatory” explanation for the pattern. Critics charge, however, that this has not ended the race-based use of peremptory challenges (Morehead, 1994; Swift, 1993). Following Batson, the Supreme Court decided a series of cases representing a consistent perspective on the purposes for which peremptory challenges can be used. The Court forbade the use of race-based peremptories in civil cases in 1991 (Edmonson v. Leesville Concrete Company) and ruled that the use of race-based peremptories by defense counsel in criminal cases is unconstitutional in 1992 (Georgia v. McCollum). In 1994, the Court extended its reasoning on peremptory challenges in a case arising out of a child custody dispute (J.E.B. v. Alabama ex rel. T.B.), forbidding the use of peremptories to strike prospective jurors solely on the basis of gender.

Although the U.S. Supreme Court has thus far not extended its ban on the use of peremptory challenges solely on the basis of race or gender to other potential
“cognizable groups,” it may be only a matter of time. In 2000, the California Supreme Court ruled that sexual orientation is another indicator of a cognizable group, and thus peremptory challenges cannot be used to remove prospective jurors solely on the basis of their sexual orientation (Chiang, 2000). This ruling applies only in California, of course.2

What is the future of peremptory challenges? This jury selection technique may have a limited lifespan, because of the increasing realization that there is an inherent conflict between the ideal of representation and the use of peremptory challenges. Another factor in the potential future demise of peremptory challenges is that it seems quite likely the U.S. Supreme Court may recognize additional cognizable groups in the future. For example, religious beliefs or occupational status could arguably represent group distinctions meriting designation as a cognizable group. It might even be argued that students could be considered a cognizable group. Would you agree?

We Have a Jury!

During the voir dire phase of jury selection, prospective jurors have been “weeded out” for a variety of reasons. The attorneys for both sides have challenged some for cause, and have used peremptory challenges to unseat others. A notable number of citizens may have asked the judge to be excused from serving in this case, citing a variety of reasons: health problems or a change of circumstance that the requester was not aware of when summoned. Depending on the judge’s discretion, hopeful citizens may or may not have their request granted. At the conclusion of this process, the folks who survived this long winnowing process comprise the jury, along with a couple of alternate jurors who can step in if a juror has to leave (commonly for health reasons, or possibly due to actual or alleged juror misconduct).

So is the jury drawn from a “representative” cross-section of the community? Consider all of the mechanisms by which folks are “weeded out” of the jury selection process (see Figure 12.2). These are all threats to the representativeness of the selection process, leading some jury scholars to decry the process as the “myth of representativeness” (Abramson, 1994).

THE TRIAL BEGINS

“All rise!” the bailiff commands, and everyone in the courtroom stands. As the defendant, the attorneys, the court staff, the jurors, and the courtroom spectators watch, the judge enters the courtroom and sits, and thus the trial begins. “Court is in session!” says the bailiff. Thus begins the next phase of the trial after jury selection.

The judge has lists of the items that each side wishes to have admitted as evidence in the case. Evidence includes “any type of proof that is legally presented at
“Master Wheel” (list of county residents). Names are randomly selected to receive jury summons.

No response to summons
- Ineligible (do you know what the eligibility requirements for jurors are?)
- Exempt (Peace Officers, usually)
- Excused/postponed

At the courthouse:
Citizens who responded to their jury summonses, and who are not ineligible, excused, or exempt, form the venire (jury pool).

In the courtroom: Voir dire (jury questioning)
- Potential jurors may ask the judge if they can be excused. The judge decides.
- Potential jurors may be challenged for cause and dismissed.
- Potential jurors may be dismissed via peremptory challenges.

The jury box. (Why are there 14 people?)

**Figure 12.2 The jury selection process in criminal trials**
trial through witnesses, records, and/or exhibits” (Courtinfo, online). Some of these items will meet the legal requirements for admissibility as evidence without much difficulty. Other items may be far more problematic. Is the evidence relevant and probative, that is, tending to prove or disprove the legal issues at hand?

Some of the material offered as evidence may be inadmissible because of questions about the legality of methods used to obtain it. For example, should the confession of a defendant who was interrogated by police without an attorney present be admitted? The defense wants the confession thrown out on grounds that it was not given voluntarily; the prosecution argues that the confession was given freely by the defendant. The judge considers legal precedent on the admissibility of confessions and information on the circumstances under which this confession was obtained in deciding whether it is admissible or not.

What about information that is so relative that it could prejudice the jurors against the defense? Assume, for example, that a judge must decide whether to allow the prosecution to introduce evidence of the defendant’s prior arrest for a crime similar to the one in the current trial. The prosecution cannot present this information as proof that the defendant is a “bad person,” and therefore likely guilty of the current charge. This is prohibited by the rules of evidence (Federal Rule of Evidence 407). But the prosecutor states that he is asking that evidence of the defendant’s prior arrest or conviction be admitted to help jurors assess the credibility of the defendant’s testimony (if he or she takes the witness stand) because he wants the jurors to consider whether someone with an arrest or conviction is a believable witness.

The defense has filed a motion opposing the introduction of evidence of the prior arrest or conviction, arguing that it will unnecessarily prejudice the defendant’s case. The defense attorney currently plans to call the defendant to the stand to testify on his or her own behalf, but may change that plan depending upon how the trial proceeds. The defense faces a dilemma: if the defendant testifies and the prosecutor is allowed to tell the jury about his or her prior arrest, jurors may perceive the defendant as having little credibility, or worse, as having a propensity for criminal behavior (Grant, 1996). Yet, (if the defendant does not take the stand) and testify about events during the night in question, the jurors may wonder about this and might interpret the defendant’s silence as an indication of guilt, despite the judge’s admonition to jurors not to make such an inference.

The judge scans the courtroom, looking at the faces of the participants and spectators. After opening remarks to the audience, the judge turns to look at the expectant faces in the jury box. From this point on, almost everything that is said and done in the courtroom by the participants in the case is done with an eye to how it will influence the jurors. How will the jurors perceive the evidence that is presented? How will they be influenced by the witnesses whose testimony they hear? Will the defendant’s demeanor and facial expression have a favorable or unfavorable impact? Will the jurors’ impressions of the attorneys and the judge
color their attitudes about the facts in the case? What impression will the victim—or the family and friends of the victim—make on jurors as they sit in the spectator section of the courtroom or testify on the witness stand?

OPENING STATEMENTS

The purpose of opening arguments is to provide a framework for jurors to consider the evidence to come. The opening arguments are not part of the evidence, yet they are considered critical factors (along with closing arguments) in the jury’s decision. The prosecution begins the presentation of the evidence at trial by outlining the government’s “case in chief” (the government’s theory and evidence in the case) for the court. The prosecution bears the burden of proving its case beyond a reasonable doubt. The defense then presents its opening arguments; it may be more difficult for the defense to construct a persuasive opening argument because much of the defense case will consist of attacking the credibility of the prosecution’s version of events rather than providing a distinct alternative explanation for events (Faculty, 2000).

As the excerpt from the prosecution’s opening statements in the McVeigh case illustrates, opening statements can be emotionally compelling presentations, consistent with the dramatic nature of a criminal trial (see Box 12.7). As the famous

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**BOX 12.7**

**Excerpts from the Prosecution’s Opening Statements in the Oklahoma City Bombing Trial**

Ladies and gentlemen of the jury, April 19th, 1995, was a beautiful day in Oklahoma City—at least it started out as a beautiful day. The sun was shining. Flowers were blooming. It was springtime in Oklahoma City. Sometime after 6 o’clock that morning, Tevin Garrett’s mother woke him up to get him ready for the day. He was only 16 months old . . . and as some of you know that have experience with toddlers, he had a keen eye for mischief . . .

That morning, Mrs. Garrett got Tevin and her daughter ready for school and they left the house at about 7:15 to go downtown to Oklahoma City. She had to be at work at 8 o’clock. Tevin’s sister went to kindergarten, and they dropped the little girl off at kindergarten first; and Helena Garrett and Tevin proceeded to downtown Oklahoma City. . . . Tevin attended the day-care center on the second floor of the federal building.

When she went in, she saw that Chase and Colton Smith were already there, two years old and three years old. Dominique London was there already. He was just shy of his third birthday. So was Zack Chavez. He had already turned three. When she turned to leave to go to her work,
Opening Statements

Tevin, as so often, often happens with small children, cried and clung to her; and then, as you see with children so frequently, they try to help each other . . . one of the little Coverdale boys—there were two of them, Elijah and Aaron. The youngest one was two and a half. Elijah came up to Tevin and patted him on the back and comforted him as his mother left.

As Helena Garrett left the Murrah Federal Building to go to work across the street, she could look back up at the building; and there was a wall of plate glass windows on the second floor. You can look through those windows and see into the day-care center; and the children would run up to those windows and press their hands and faces to those windows to say goodbye to their parents. And standing on the sidewalk, it was almost as though you can reach up and touch the children there on the second floor. But none of the parents of any of the children that I just mentioned ever touched those children again while they were still alive.

At nine o’clock that morning, two things happened almost simultaneously. In the Water Resources Building—that’s another building to the west of the Murrah Building—an ordinary legal proceeding began in one of the hearing rooms; and at the same time, in front of the Murrah Building, a large Ryder truck pulled up into a vacant parking space in front of the building and parked right beneath those plate glass windows from the day-care center.

What these two separate but almost simultaneous events have in common is that they both involved grievances of some sort. The legal proceeding had to do with water rights. . . . It was a tape-recorded proceeding, and you will hear the tape recording of that proceeding. It was an ordinary, everyday-across-America, typical legal proceeding in which one party has a grievance and brings it into court or into a hearing to resolve it, to resolve it not by violence and terror, but to resolve it in the same way we are resolving matters here, by constitutional due process.

And across the street, the Ryder truck was there also to resolve a grievance; but the truck wasn’t there to resolve the grievance by means of due process or by any other democratic means. The truck was there to impose the will of Timothy McVeigh on the rest of America and to do so by premeditated violence and terror, by murdering innocent men, women and children, in hopes of seeing blood flow in the streets of America.

At 9:02 that morning . . . a catastrophic explosion ripped the air in downtown Oklahoma City. It instantaneously demolished the entire front of the Murrah Building, brought down tons and tons of concrete and metal, dismembered people inside, and it destroyed, forever, scores and scores and scores of lives—lives of innocent Americans: clerks, secretaries, law enforcement officers, credit union employees, citizens applying for Social Security, and little kids.

All the children I mentioned earlier, all of them died, and more; dozens and dozens of other men, women, children, cousins, loved ones, grandparents, grandchildren, ordinary Americans going about their business. And the only reason they died, the only reason that they are no longer with us, no longer with their loved ones, is that they were in a building owned by a government that Timothy McVeigh so hated that with premeditated intent and a well-designed plan that he had developed over months and months before the bombing, he chose to take their innocent lives to serve his twisted purpose.

In plain, simple language, it was an act of terror, violence, intended to serve selfish political purpose.

The man who committed this act is sitting in this courtroom behind me, and he’s the one that committed those murders.

jurist Judge Learned Hand once wrote: “It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion. Courts make no such demand; they recognize that a jury inevitably catches this mood . . .” (*United States v. Wexler*, 1935). For this and other reasons, opening arguments can have a powerful influence on jurors, and in some cases jurors may decide their opinion of the case simply on the basis of hearing the “opener,” before the evidence is presented (Perrin, 1999). For both sides, the opening statements provide the opportunity to develop the framework of the case, focus on relevant themes, and present a theory of what occurred. These three elements—frame, themes, and theory—define the contours of the case (see Box 12.8 for an example of this). As one article on trial advocacy advises:

Opening statement is especially demanding because it requires counsel to present facts in a compelling manner. Counsel must emphasize from the beginning that they are “telling a story” to the panel. “Telling a story” is the best way to structure an opening statement, that is, to present the opening statement with a compelling recitation of the facts, using inflection and language to highlight some facts and minimize others, and to create empathy with the panel for counsel’s theory of the case. Counsel can also use devices to add emphasis and to suggest disbelief. Such devices include repetition, vivid imagery, and oratorical techniques such as dramatic pauses and pacing. (Faculty, 2000, p. 35)

**BOX 12.8**

**Key Elements of the Case**

*Steven Lubet describes why it is critically important to set up the framework of a case in order to set the context within which the triers of fact will evaluate all subsequent pieces of evidence:*

That act of imagination or vision constitutes a story frame, the context in which the factfinder determines what must have happened in the incident described by the evidence. To use a contemporary example, recall that the prosecution in the O.J. Simpson case labored long and hard to create what might be called a “domestic violence” frame. At the very outset of the trial, prosecutors introduced evidence of Mr. Simpson’s ill treatment of his wife, his past threats, and her fear of him. The purpose of this evidence was to support the conclusion that, given his jealousy, anger, and violent nature, he must have been the murderer. In contrast, the defense developed a counter-story, the “police prejudice” frame, intended to advance the theory that the officers must have contrived or mishandled the DNA and other evidence against Mr. Simpson.

Neither side had the benefit of direct evidence, which increased the importance of the competing frames. . . . Instead, the jurors were asked to reach a conclusion based upon an accumulation of circumstances, in light of their own judgment and past experiences. (Lubet, 2001)

*Source: Reprinted with permission of the University of Colorado Law Review.*
There are limits to what attorneys can say as part of opening (and closing) statements, however. According to the rules of trial procedure and professional ethical guidelines, for example, attorneys should not make factual claims that will not be supported by the evidence, make prejudicial remarks about any of the parties in the case, attack opposition witnesses or counsel, or refer to jurors by their names (Sinclair, 1990). While examples of violations of such rules by both defense counsel and prosecutors are obviously troubling, instances of inappropriate claims by prosecutors during opening statements raise special concerns because of the fact that prosecutors may have greater credibility in the eyes of jurors.

THE EVIDENCE IS PRESENTED

After opening statements by the prosecution and defense, the trial then proceeds with the prosecution’s presentation of evidence. There are two types of evidence:

1. Direct evidence usually is that which speaks for itself: eyewitness accounts, a confession, or a weapon.

Many prosecutors and defense attorneys present evidence to a jury or judge through the use of courtroom exhibits. This exhibit illustrates the injuries received by a shooting victim in a comprehensive and informative graphic, to help a juror or judge see the negative effects of the crime. By looking at this graphic, created by Medical Legal Art, one can easily imagine the harm to the victim. Technology has greatly changed the nature of courtroom exhibits by providing graphics such as computer-generated animations to demonstrate shootings, car accidents, and other incidents. **Source:** Courtesy of Medical Legal Art, Atlanta, Georgia.
2. **Circumstantial evidence** usually is that which suggests a fact by implication or inference: the appearance of the scene of a crime, testimony that suggests a connection or link with a crime, physical evidence that suggests criminal activity. (American Bar Association, 2001)

After the prosecution has presented the government’s case, the defense then presents its case, and the prosecution has a brief opportunity for rebuttal. As you will recall from Step 8, there are a variety of key players at trial, and this is the

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**BOX 12.9**

**The Confrontation Clause: Confronting Controversies**

The Sixth Amendment provides a person accused of a crime many key due process rights, some of which we discussed in Step 4. A key provision of the Sixth Amendment is the **confrontation clause**, which specifies a defendant’s right “to be confronted with the witnesses against him.” This provision was intended to ensure that the trial process was conducted in an open and fair manner so that the accused would be able to respond to the charges alleged. For this reason, the defendant has the right to be present at his or her trial during all phases of the proceeding, and to confront the witnesses against him or her. In most trials, no special issues relating to the confrontation clause arise, but in some trials very difficult legal and ethical issues do occur in connection with these rights.

Suppose, for example, that a defendant is repeatedly disruptive at trial. Perhaps the defendant tries to attack others, or constantly interrupts the judge or other parties in the case. Perhaps the court’s admonitions to the defendant and defense counsel are insufficient to stop the disruptions, which are so problematic that the trial cannot proceed unless the defendant behaves. Yet, the defendant continually defies the judge. The constitutional question is whether or not the trial can continue if the defendant has been removed from the courtroom in order to prevent disruption of the legitimate legal proceeding taking place. Can you think of some of the arguments for and against allowing the trial to proceed in the absence of a disruptive defendant?

Cases involving child witnesses have also posed constitutional challenges to the confrontation clause. In cases involving child witnesses who testify in court about their experiences as victims of sexual abuse, courts have grappled with the question of whether it is constitutionally permissible for child witnesses to avoid direct visual contact with the defendant through testifying from behind a screen or via closed-circuit television. This difficult issue implicates the rights of the defendant, concerns for victims, and the interests of the government in ensuring that key prosecution witnesses are able to testify. Are such “screening” mechanisms acceptable? If so, why? If not, why not? What are the implications of allowing such screening mechanisms? What might the jury miss if such mechanisms are allowed?

Should witnesses who fear retribution be allowed to testify anonymously? Prosecutors argued (in *California v. Alvarado*, 2001) that the witnesses would face danger from violent gang members if they testified in a murder trial while using their real names. Prosecutors argued that the witnesses should be allowed to testify anonymously despite the fact that the weight of precedent on the issue did not favor their position.
point at which many take the stage, so to speak. All the major parties to the case should be present, although in a small percentage of trials the defendant may not be present (see Box 12.9 on the confrontation clause). During the course of the trial, a wide variety of witnesses may be called to testify, including the victim, the defendant, police officers, government investigators (such as Drug Enforcement Administration agents), expert witnesses, character witnesses, and other witnesses attesting to key facts in the case (for example, that the defendant was at work with them at the time of the crime). A **witness** is a person who can give a firsthand account of something they saw, heard, or experienced. Each time a person takes the witness stand to testify, the bailiff swears the person in by administering the oath to be truthful. The witness then testifies on **direct examination**; that is, in response to questions from the attorney representing the party that called the witness. A pattern quickly becomes apparent: After each side presents a witness, opposing counsel then steps in and questions the witness, asking probing questions designed to challenge the witness’ testimony. This is the process of **cross-examination**, a basic and powerful tool in the adversarial process because it can help reveal inconsistencies, contradictions, and gaps in testimony. During cross-examination, attorneys may ask leading questions, but the scope of their questioning should be restricted to the matters the witness testified to on direct examination. Sometimes a witness’ testimony appears to surprise the attorney who called the witness, and the value of the old legal saying that one should “never ask a question unless you know the answer” becomes evident (see Box 12.10 for a humorous example).

Cross-examination has been called “the heart and soul of a criminal trial” (Swerling, 1999, p. 753). The power of cross-examination lies in its use as a tool

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**BOX 12.10**

**Never Ask a Question Unless You Know the Answer**

An attorney questioning a doctor on the witness stand asked the following questions (Sevilla and Lorenz, 1993, online):

*Question:* Doctor, before you performed the autopsy, did you check for a pulse?

*Answer:* No.

Q: Did you check for blood pressure?
A: No.

Q: Did you check for breathing?
A: No.

Q: So, then it is possible that the patient was alive when you began the autopsy?
A: No.

Q: How can you be so sure, Doctor?
A: Because his brain was sitting on my desk in a jar.

Q: But could the patient have still been alive nevertheless?
A: Yes, it is possible that he could have been alive and practicing law somewhere.
for developing evidence that supports the cross-examining attorney’s case and illuminates contradictions in the opposition’s case:

The possible purposes of cross-examination include discrediting the witness, impeaching the witness, undermining the damaging testimony of a witness or another adverse witness by cross-reference, eliciting favorable testimony to your position, drawing or creating favorable inferences with other testimony, corroborating favorable testimony for your position, damaging your adversary’s case, advancing your case, injecting or enhancing your theme, and tying down an important issue or unanswered question (Swerling, 1999, p. 764).

For example, cross-examination allows the jury to assess the credibility of a witness when it is used to impeach the witness. As one court Web site states in its information for prospective jurors:

As you listen to the testimony, there are a few questions you might keep in mind: Does this witness have an interest in how the case comes out? Does he or she “forget” when its convenient to do so, and only remember what is favorable? Are the statements of the witness reasonable—or improbable? Could the witness simply be mistaken about what he or she saw, heard, smelled, or felt?

Remember that witnesses often remember different details, especially when an event happened quickly, and involved emotions. Cross-examination of witnesses will also help you in considering evidence. Cross-examination often points up weaknesses, uncertainties, and improbabilities in testimony that might have sounded convincing at first. You should keep an open mind to the end of the trial, when you have heard all the evidence (Santa Clara County, 2001).

Cross-examination is sometimes referred to as a “double-edged sword.” On one hand, an effective cross-examination can be the key to winning a case, whereas a less skillful cross-exam carries the potential to weaken a case if it reveals information that wasn’t anticipated by the cross-examining attorney. On the other hand, cross-examination is not without potential costs of several types. For example, although the legal rationale for cross-examination of a defense character witness is to help the jury assess the credibility of the character witness’ testimony, it can weaken the defendant’s case by painting an unflattering portrait of the defendant’s criminal history. “So what?” you may well ask. The problem is that it is legally impermissible for jurors to draw an inference that the defendant has a propensity for criminal behavior on the basis of information about prior criminal history of the defendant. Yet research suggests that jurors are quite likely to make such an inference, and that it may significantly influence their verdicts (Grant, 1996). Thus, cross-examination in such instances may carry an unintended “legal cost” to the defendant.

Cross-examination of victims in sex crimes cases provides a different example of the potential costs of the “double-edged sword.” Research and observation of cross-examination of victims in rape cases illustrates that searching questions posed by defense counsel can contribute to rape victims’ feelings that they have been “revictimized” by their courtroom experiences.
When counsel for one side believes that the other side is making statements that are irrelevant, prejudicial, or misleading, the attorney will interject with an objection. If the judge sustains the objection, the offending attorney will be instructed in accordance with the judge’s ruling, such as requiring the attorney to rephrase a question or discontinue an offensive behavior, such as harassing a witness. If the judge decides the objection lacks merit, the objection will be overruled, sometimes after the action in question has been explained by the errant attorney. At various times, the attorneys and the judge will call a sidebar if there is a legal question that needs to be briefly discussed at the judge’s bench, out of earshot of the jury. If the issue requires more extensive discussion, the judge may call a recess and hear from both attorneys in chambers.

During the presentation of evidence, counsel for both sides must focus on how the proceedings appear to jurors (see Box 12.11). An interesting example of jurors’ perspectives on the legal process illustrates this point: Louisiana Judge W. Ross Foote interviewed more than 400 jurors to ask them their opinions on the judicial process. Following are the jurors’ “top ten pieces of advice” to lawyers (Foote, 1995, quoted in Anderson, 1999, p. 621):

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#### BOX 12.11

**Some Tips, Tricks, and Techniques of Trial Presentation**

During a trial, attorneys must consider the most persuasive way to present the evidence, the witnesses, and the arguments they present. The literature on trial tactics is replete with examples of appeals to jurors’ emotions. The attorney might appeal to jurors’ sense of right and wrong, or ask them to think about how their verdict will affect their community. Prosecutors and defense attorneys alike may remind jurors of the victim’s character; how the death of such a person of sterling qualities represents a loss to society; or how the victim’s abusive, violent characteristics contributed to his or her own demise. Attorneys may ask jurors to put themselves in the shoes of the victim or the defendant, and to imagine how they would respond in similar circumstances.

If the families and friends of the victim and the defendant can appear in court to show support, so much the better. The silent message that this is a person whom others judge worth supporting, or a person who is much loved and much missed, is worth more than a thousand words.

During cross-examination, one of the attorneys may “accidentally” mention information that is not admissible, such as the fact that the defendant or the witness has a prior criminal record. Despite the objection from opposing counsel and an admonition from the judge to jurors to ignore the forbidden fact, the cat is already out of the bag.

Another technique used to reduce the impact of damaging information about the credibility of your witness is to beat the opposition to the scoop by acknowledging the issue at the outset of the witness’ testimony. This tactic of “stealing thunder” deprives opposing counsel of the opportunity to claim that your side tried to conceal the witness’ credibility flaws from the jury.
1. Be brief, succinct and accurate. Get to the point.
2. Don’t repeat evidence, questions and other points so often.
3. Don’t confuse the jury. Establish as many facts as possible, leaving no questions or doubts. Give more background on some points. Cover all bases of a case sufficiently.
4. Be more organized and prepared and familiar with the information required. Make sure your client also is prepared with factual information at hand.
5. Keep in mind a lay person’s lack of knowledge of legal and . . . medical terminology. Speak in simple terms and have witnesses do so, also.
6. Do not underestimate the intelligence and ability of the jury.
7. Be factual, fair and courteous. Don’t make the other attorney’s questions look stupid and ridiculous. Don’t show hostile attitudes, at least not to the jury.
8. Don’t object so often.
9. Try to settle out of court.
10. Use fewer theatrics. Don’t be a big fake. Be nice but don’t take it to extremes. (Louisiana Bar Association; reprinted with permission)

CLOSING STATEMENTS

After the presentation of evidence by both sides is finished, including direct examination, cross-examination (and, sometimes, more questions during redirect and re-cross-examination), the trial concludes with the prosecution and defense closing statements. These carefully crafted presentations to the jury are designed to persuade the triers of fact to draw particular inferences from the facts that support a specific conclusion favoring the speaker’s side. As with presentation of the evidence, the prosecution usually presents its closing argument first, followed by the defense. After the defense’s closing argument, the prosecution is allowed a brief period of rebuttal and the defense can make a surrebuttal.

There is much debate and some study on the question of the relative advantage to the government of being allowed the first chance to frame the issues during closing arguments, in contrast to the defense’s position of following the prosecution and yet being subject to the prosecution’s opportunity for rebuttal (Mitchell, 2000). During the closing, counsel will summarize the case, in the process reminding the jury of the strength of their arguments and the weaknesses in the opponent’s case. Closing arguments cannot be used to present new evidence, but they provide an opportunity for counsel to present the jury with a new “twist” on the conclusions they are asked to draw from the evidence presented. In this context, the effective trial counsel, whether defense or prosecution, may want to consider the Story Model’s paradigm (Pennington and Hastie, 1993) of juror decision-making while
constructing a persuasive narrative during closing statements (Meyer, 1999). The effectiveness of closing arguments thus depends upon the rhetorical skills of the attorneys in presenting their arguments persuasively. Therefore, closing arguments are an opportunity for counsel to demonstrate their efforts at zealous advocacy in the adversarial arena. Yet for this very reason, critics charge that closing arguments often illustrate “adversarial excesses” when attorneys overstep the boundaries of appropriate advocacy (Nidiry, 1996). For just as we saw in the section on opening statements, attorneys are prohibited from doing certain things—such as referring to facts not admitted as evidence, introducing new evidence, or invoking racial, ethnic, or gender stereotypes about the defendant, the victim, or witnesses during “closers”—but in practice, attorneys may flout such rules with relative impunity (Nidiry, 1996). For example, defense attorneys in most jurisdictions are not permitted to ask jurors to nullify the law, but in other jurisdictions this is permissible, and in practice this may occur in any jurisdiction.

Given the prosecutor’s role as a “minister of justice” and the possibility that prosecutors’ assertions may have greater credibility than the claims of defense counsel in the eyes of some jurors, the problem of prosecutorial misconduct during closing statements raises special concern. Prosecutors who use inflammatory language—for example, calling defense witnesses “liars,” making prejudicial references to the defendant’s ethnic background or sexual orientation, or arguing that the jury must help the government “win the war on drugs” by convicting the defendant—may be shifting the emphasis of the argument from evidence to emotion. Such a shift would signal a potential “legal impropriety” on the part of counsel (Nidiry, 1996). The issue of what kinds of statements may be allowed as part of closing arguments has been particularly controversial in death penalty cases in which prosecutors have made religious arguments in favor of the death penalty. For example, one prosecutor’s closing arguments to the jury during the penalty phase of a capital trial included the following statements:

You are not playing God. You are doing what God says. This might be the only opportunity to wake [the defendant] up. God will destroy the body to save the soul. Make him get himself right. . . . Let him have the opportunity to get his soul right. (People v. Sandoval, 1992, p. 193)

Although courts have consistently held that such arguments are improper for a variety of reasons, the courts have rarely offered any remedy to defendants (Duffy, 1997). Actual and proposed remedies for attorney misconduct during closing have proven insufficient to address the problem, and in some cases appear merely to perpetuate the problem. For example, in some cases the improper assertions of defense counsel during closing arguments have been “remedied” by the court allowing the prosecution to make similar arguments in rebuttal (Nidiry, 1996).

However, while defense counsel misconduct during closing is much less often subject to appellate review (given that the government cannot appeal acquittals), prosecutorial misconduct during closing argument can be the basis for an
appellate court overturning a conviction. For example, in People v. Hill (1998), the defendant’s convictions for murder and attempted murder in a death penalty case were overturned after prosecutorial misconduct was held by the appellate court to represent a denial of the defendant’s right to a fair trial. In this unusual case, the prosecutor had previously been rebuked (although not formally disciplined) by the same appellate court for using a variety of inappropriate tactics during closing arguments in other cases, including one in which the defendant’s conviction for child molestation was overturned as a result of an appellate finding that the prosecutor’s misconduct included misstating the law and making “unjustified inferences” (Spiegelman, 1999). In the Hill case, the court found that the prosecutor had misstated the evidence, referred to inadmissible evidence during closing, mischaracterized the testimony of an eyewitness, misstated the law, intimidated defense witnesses, and displayed contempt for opposing counsel both verbally and nonverbally (Spiegelman, 1999) (see Box 12.12).

**BOX 12.12**

**Prosecutorial Misconduct in People v. Hill**

The Hill prosecutor’s misconduct is illustrated by a couple of examples discussed in Spiegelman (1999). In one instance, the prosecutor misstated the evidence when she directed the victim of attempted murder to show the jury a ten-inch scar on his chest, which the prosecutor later referred to in her closing argument to the court:

> You saw the scar. Take a look at it, and you will remember how far across the chest it went. If you stick it in him two times and rip his chest open, you are planning to kill him. (*People v. Hill*, 1998, p. 686)

The defense counsel objected, providing hospital records showing that the scar that the jury had seen was not the result of the attack, but instead was a scar resulting from surgery the defendant had undergone earlier. Nonetheless, the prosecutor refused to acknowledge this (Spiegelman, 1999).

The prosecutor also smeared the defendant’s character by claiming that:

> Everything [the defendant] ever did one way or another, he got away with. He has killed. He has stabbed. He has robbed. He has gone to prison for it. He has not been rehabilitated under any guise or thought. (*People v. Hill*, 1998, p. 693).

However, this was not in fact the case, because the defendant did not have any prior convictions for homicide, attacks involving stabbing, or robbery. The prosecutor was reported to the state Bar Association for disciplinary proceedings. (Spiegelman, 1999, reprinted with permission)
JURY INSTRUCTIONS

“Ladies and Gentlemen of the jury...” It’s time for the judge to issue instructions to jurors about their duties before the jury retires to the deliberation room. The nature and length of jury instructions varies with the type of case; in some cases, they may take several hours (or even longer). The judge’s charge to the jury in a criminal case will outline the elements of the crime that must be proven, and remind jurors that the prosecution carries the burden of proving the defendant’s guilt beyond a reasonable doubt. The judge will tell the jurors what their verdict choices are: For example, in a particular case, jurors may have a choice between verdicts of first-degree murder, second-degree murder, manslaughter, or acquittal. The instructions will remind jurors that they must base their verdict on evidence presented in court, and apply the law as instructed by the judge. In addition to the standard jury instructions given, jurors may also be given additional instructions on specific issues that the defense or the prosecution has requested. For example, jurors may be reminded that information they learned about the defendant’s prior convictions should only be used to assess his or her credibility, not to infer a general propensity for criminal behavior.

It seems obvious that it is important for jurors to be able to understand the instructions the judge reads to them concerning the case. After all, how can the jurors apply the law to the facts of the case if they don’t understand what they are supposed to be doing? Yet, research demonstrates that jurors may not comprehend jury instructions accurately, and often fail to follow them (Severance and Loftus, 1982; Tanford, 1990; Diamond, 1994). Some jurors may believe that the defendant must prove innocence, despite direct instructions to the contrary. In addition, jurors sometimes have trouble with instructions about the burden of proof. The fact that jurors are instructed on the law only after hearing the case, rather than being given such instructions at the outset, may lessen the impact of the instructions. Some jury researchers have suggested that instructions should be given at both the beginning and end of a case in order to maximize their usefulness to jurors.

The consequences of a failure of understanding are not trivial matters. Researchers interviewing jurors who had served in death penalty cases discovered that some of the former jurors were confused about the difference between “aggravating” and “mitigating” factors (Eisenberg and Wells, 1993; Garvey, 1998). Other researchers have found similar results (Luginbuhl, 1992; Blankenship et al., 1997). The distinction is a critical one, for jurors are instructed in capital cases to decide whether the defendant receives life or death on the basis of such factors. Aggravators include factors that weigh in favor of a death sentence, such as whether the victim was tortured before death or the victim was a child. Mitigators include factors that weigh in favor of giving a life sentence, such as the defendant’s past history of abuse or mental incapacity.

Despite the significance of jurors’ lack of comprehension, appellate courts have not been receptive to appeals based on this argument. Although an appeal
based on the fact that the jury was not given the appropriate legal instructions may well result in a conviction being overturned and a new trial ordered, it is a different matter if the jury simply did not understand an instruction that was properly given. In one case, the appellate court noted that: “It has never been held error in California to instruct in terms of [a jury instruction] due to lack of intelligibility” (John B. Gunn Law Corp. v. Maynard, 1987). See what you think of the jury instructions in Box 12.13. How understandable are they? Do you think these instructions would raise any questions in the minds of jurors?

BOX 12.13
Deciphering Jury Instructions: Would It Help to Be Psychic?

In the state of New York, if you are a juror in the trial of a defendant accused of misdemeanor fortune-telling, these are some of the instructions the judge will read to you:

The count is Fortune Telling.

Under our law, a person is guilty of Fortune Telling when, for a fee or compensation which he or she directly or indirectly solicits or receives, that person claims or pretends to tell fortunes [or holds himself or herself out as being able, by claimed or pretended use of occult powers, to answer questions (or give advice on personal matters) (or exorcise, influence or affect evil spirits or curses)].

[This charge does not apply to a person who engages in such conduct as part of a show or exhibition solely for the purpose of entertainment or amusement.] In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both [each] of the following two [three] elements:

1. That on or about (date), in the county of (county), the defendant, (defendant’s name), claimed or pretended to tell fortunes [or held himself/herself out as being able, by claimed or pretended use of occult powers, to answer questions (or give advice on personal matters) (or exorcise, influence or affect evil spirits or curses)]; and
2. That the defendant directly or indirectly solicited or received a fee or compensation for such conduct; and
3. [That the defendant did not engage in such conduct as part of a show or exhibition solely for the purpose of entertainment or amusement].

Therefore, if you find that the People have proven beyond a reasonable doubt both [each] of those elements, you must find the defendant guilty of Fortune Telling as charged in the count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt either one or both [any one or more] of those elements, you must find the defendant not guilty of Fortune Telling as charged in the count.
How do jurors decide on a verdict? Although the verdict should reflect only the evidence in the case, research has revealed that many factors other than the evidence can significantly influence jurors’ thoughts and emotions, and thus potentially their verdicts. Jurors’ attitudes and beliefs about human nature, the law, and legal processes are potentially significant (but not necessarily inevitable) influences on their verdicts (Levine, 1992). Jurors’ perceptions of the character, motives, and behavior of key players in the legal drama—the defendant, the victim, the judge, the attorneys—represent one category of extra-legal factors that can significantly influence the verdict. Jurors’ beliefs about the defendant’s future dangerousness, the proportionality of the defendant’s potential sentence to the crime, and other legally irrelevant factors can also influence the verdict (Levine, 1992). In one survey of potential jurors, “A significant minority of respondents said that they could not be impartial if a party were gay or lesbian (31 percent); Hispanic (25 percent); black (24 percent); Asian (24 percent); or Caucasian (23 percent)” (Van Voris, 2000, p. 1). Although this finding does not guarantee that such biases would significantly influence such jurors’ verdicts, it seems quite plausible that it would. A recent examination of white jurors’ bias against black defendants, for example, found evidence of racial bias, and the authors conclude that the evidence suggested that racial bias was particularly apparent in cases where race was not an explicit issue in the trial (Sommers and Ellsworth, 2001).

At a broader level, the political climate and the tide of public opinion on crime are also significant influences in some cases (Levine, 1992). Because of the fact that by law, jury verdicts should reflect only the evidence in the case, factors such as these are referred to as “extra-legal” or sometimes “extra-evidential” influences on the jury in order to emphasize that they are legally irrelevant. Let’s look more closely at an example of this.

What if public opinion about a particular case is so volatile that it threatens the defendant’s right to a fair trial? Can justice truly be served when courtroom proceedings occur in an atmosphere of palpable tension? Can jurors freely deliberate without consideration of how their decision will be received? If jurors are to serve as “the conscience of the community,” what happens when the community wants blood, not justice?

In 1913, during the trial of Leo Frank, a northerner of Jewish heritage accused of murdering a young girl, newspaper accounts described the uproar that existed in the southern community of Atlanta, Georgia, over the case. At the conclusion of Frank’s trial in an emotionally charged courtroom, the jurors found Frank guilty and sentenced him to death. The defense appealed the sentence, but it was affirmed by a majority of judges of the Georgia Supreme Court. However, two judges dissented: Judge Oliver Wendell Holmes (who later became a member of
the U.S. Supreme Court) and judge Charles Evans Hughes. Judge Holmes’
description of Leo Frank’s trial make the reasons for the dissent clear:

The trial began on July 28, 1913, at Atlanta, and was carried on in a court packed with
spectators and surrounded by a crowd outside, all strongly hostile to [Frank]. On Saturday,
August 23, this hostility was sufficient to lead the judge to confer in the presence of the jury
with the Chief of Police in Atlanta and the Colonel of the Fifth Georgia Regiment stationed
in that city, both of whom were known to the jury. . . . The judge before beginning his charge
had a private conversation with [Frank’s] counsel in which he expressed the opinion that
there would be ‘probable danger of violence’ if there should be an acquittal or disagreement
[i.e., a hung jury], and that it would be safer for not only [Frank] but his counsel to be absent
from Court when the verdict was brought in.

At the judge’s request they agreed that [Frank] and they should be absent, and they kept
their word. When the verdict was rendered, and before more than one of the jurymen had
been polled there was such a roar of applause that the polling could not go on till order was
restored. The noise outside was such that it was difficult for the judge to hear the answers of
the jurors although he was only ten feet from them . . . .

Mob law does not become due process of law by securing the assent of a terrorized jury.
We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where
the processes of justice are actually subverted. . . . Any judge who has sat with juries knows
that . . . they are extremely likely to be impregnated by the environing atmosphere. (Zobel,

Despite the Georgia appellate court’s affirmation of Leo Frank’s death sentence,
the governor exercised his legal option to commute the sentence to life imprison-
ment. But a few weeks later, an angry mob stormed the local jail where Leo Frank
was being held, kidnapping and then lynching him (Zobel, 1995).

BOX 12.14

Legal Assumptions about Jury Decision-Making

What are the law’s assumptions about jury decision-making, and are these assumptions realistic
in light of research on how jurors and juries actually function? Imagine that you are a juror in a
felony trial involving a defendant charged with a serious crime. In the courtroom, you watch
and listen as lawyers present the opening arguments, refer to pieces of important evidence, and
cross-examine witnesses. You may listen to testimony from the victim, expert witnesses for one
or both sides, and possibly the defendant as well. Throughout all this, you are forbidden to take
any notes. Fortunately, the court reporter records the proceedings while making a transcript of
the trial. While the trial is proceeding, you are not allowed to talk to anyone—including your
fellow jurors—about any aspect of the case. You are not supposed to come to a conclusion about
the defendant’s guilt or innocence until you gather with the other jurors to deliberate, yet your
mind keeps coming back to the guilt question every night as you go to sleep. You know that you
should not let sympathy or prejudice influence your assessment of the evidence; but you some-
times find it hard to ignore your feelings as you think about the case.
What do you think is the purpose of these restrictions on your behavior as a juror? Wrightsman, Nietzel, and Fortune (1994) assert that the law expects jurors to act in a certain way, and that these expectations are embodied in such regulations and restrictions on juror conduct. Wrightsman and his colleagues identify five assumptions and assess their viability in light of research on human behavior. They discuss how such research casts serious doubt on the accuracy of these assumptions.

1. **Jurors are accurate and complete information processors.** This assumption is reflected in the fact that typically jurors are not allowed to take any notes on the trial. Instead, they are expected to rely on their collective memories. Imagine if you were required to remember all the things you’ve learned in your courses without the benefit of taking any notes or audiocassettes. The judge has discretion to allow jurors to take notes, and an increasing number of courts are allowing this.

   Research on human cognitive biases, memory, and decision-making processes suggests this assumption is questionable at best. Research on judgmental heuristics (decision-making) demonstrates that human decision-making is typically distorted by cognitive biases (Nisbett and Ross, 1980). Jurors’ accuracy as information processors is subject to question according to research showing that jurors give too much weight to certain types of evidence (such as eyewitnesses) but give too little weight to statistical and probabilistic evidence. In addition, jurors often have difficulty understanding and/or adhering to jury instructions.

2. **Jurors can suspend judgment until they hear all the evidence.** This assumption is clearly reflected in the court’s charge to jurors to avoid coming to a conclusion on the defendant’s culpability until jury deliberations.

   However, research on human decision-making suggests that people typically evaluate information as it is received, and that it may be difficult for people to separate the acquisition and evaluation of information because the two processes are so intertwined. Recall that jurors sometimes make initial judgments simply based on the opening statements, despite the fact that “openers” are not part of the evidence.

3. **Jurors are “blank slates” with no or few preconceptions.** The law’s emphasis on impartial, unbiased jurors appears to reflect the assumption that it is possible, given appropriate jury selection procedures, to impanel a jury whose members have few preconceptions about the participants and events in the trial.

   Yet this assumption is belied by the very techniques used during voir dire to select jurors, where attorneys actively seek jurors whose biases will favor their side. An attorney might also try to use voir dire to try to begin to sway members of the panel toward his or her side, by asking questions in such a way that prospective jurors get a slanted portrayal of the case.

   The assumption that jurors bring few preconceptions with them to the jury box is further eroded if you consider that the process of voir dire may not identify and weed out biased jurors for a number of reasons. Jury questioning does not always uncover the biases of jurors who should have been challenged for cause, whether this is due to the fact that the questioning simply did not uncover the issue or the juror actively concealed—or was even unaware of—his or her biased preconceptions or attitudes.
The “Story Model” of jury decision-making (Pennington and Hastie, 1993) presents a detailed theory of how juror decision-making occurs. In this model, jurors are portrayed as active manipulators of evidence and information who construct an account of events related to the crime, not merely passive recipients of information presented at trial. According to the story model, each juror constructs a story or stories in three steps, and this ultimately determines which verdict is chosen.

First, jurors use trial evidence and real-world knowledge to construct one or more stories that link the events described during the trial in some causal way. Jurors actively imagine themselves in the position of participants in the crime (“How would I have behaved in this situation?”) as they seek to understand what happened. While constructing a story (or possibly more than one story) that links events in some causal way, the jurors rely on their own experiences to make inferences, such as the inference that the sight of a knife would cause fear (Pennington and Hastie, 1993). For example, mock jurors in the case of a defendant accused of a stabbing constructed different types of stories to account for the fact that a defen-
dant was in possession of a knife at the time of the crime. The jurors’ inferences varied depending upon their class backgrounds. Middle-class jurors were more likely to feel that the defendant’s possession of a knife at the time of the crime indicated that he planned the attack, whereas working-class jurors were more likely to infer that the defendant had probably simply been carrying a knife routinely for purposes of self-defense. In the second step of the story model, the juror learns a set of “verdict representations,” such as the legal distinction between first- and second-degree murder. In the final step, the juror compares the narrative story or stories he or she has constructed with the verdict choices to check for a match. The verdict that best matches the story is chosen, and if no good match is found, the juror should return a “not guilty” verdict. What determines which story is finally chosen? Pennington and Hastie’s model describes four “certainty principles” governing the choice:

1. Coverage (How well does the story explain the evidence?)
2. Coherence (Are the parts of the story internally consistent? Is the story plausible; does it fit with the juror’s knowledge of what happens in the real world? Is the story complete; does it cover all the main issues, without leaving too many gaps or requiring too many inferences?)
3. Uniqueness (Is this story the best explanation of events? Or are there other accounts that explain the evidence just as well?)
4. Goodness of fit (how well do the elements of the story match elements of the verdict choices? For example, if one of the verdict choices is self-defense, do the elements of the story fit with this?)

The Story Model suggests some implications for attorneys’ trial strategies. Presenting evidence in the form most amenable to story construction appears more likely to lead to a verdict consistent with the potential story, compared to other methods of presentation, such as presenting evidence out of temporal sequence, organized around the order in which witnesses appear, or thematically organized around legal issues. Jurors have more confidence in a given story when they have heard both defense and prosecution evidence presented in story order versus hearing only one side, or neither side, present in story order. One attorney put it thus:

The best trial lawyers are storytellers. They take the raw and disjointed observations of witnesses and transform them into coherent and persuasive narratives. They develop compelling theories and artful themes, all the better to advance a client’s cause. . . . But trial lawyers are not only storytellers. In addition, they are legal technicians, taking the raw observations of witnesses and organizing them into coherent, legally meaningful narratives. You can tell a terrific story and nonetheless lose your case—especially if you have failed to shape it in a way that will be convincing to the trier of fact. (Lubet, 2001, p. 2)
In California, the Judicial Council Web site has this advice for potential jurors:

Quite often in the jury room the jurors may argue and have a difference of opinion. When this occurs, each juror should try to express his or her opinion and the reasoning supporting it. It would be wrong for a juror to refuse to listen to the arguments and opinions of the others or to deny another juror the right to express an opinion. Remember that jurors are not advocates, but impartial judges of the facts. By carefully considering each juror’s opinion and the reasons behind it, it is usually possible for the jurors to reach a verdict. A juror should not hesitate to change his or her mind when there is a good reason. But each juror should maintain his or her position unless conscientiously persuaded to change that opinion by the other jurors.

Following a full and free discussion with fellow jurors, each juror should vote only according to his or her own honest convictions. (Judicial Council of California, 2000)

When jurors begin the process of deliberation, their first task is to choose a foreperson, unless the judge has already done so. The jurors can make this choice however they wish: They can take a vote, ask for a volunteer, or draw lots. The foreperson’s task is to help organize the deliberation process, to ensure that the group considers all the issues, and that the opinions of all are heard. Research finds that men are more likely than women to become jury forepersons, but it is not clear whether this is because they are chosen or volunteer more often.

The next task jurors have is deciding how to begin deliberating. In some cases, jurors will take an initial ballot at the beginning or early on in deliberations, revealing where the group stands. Research on both jury simulations and the results of actual trials finds that the verdict typically, but not always, reflects the initial ballot results (Kalven and Zeisel, 1966).

As the jurors consider the evidence, they may go back and re-enact details of the crime that were presented in trial or reread important items of written evidence. Through the bailiff, the jurors may ask the judge for clarification on some of the evidence, testimony, or jury instructions. The judge’s response may be limited to simply restating the confusing testimony or instructions again, without adding further clarification. By adhering strictly to procedure, the judge may avoid providing information that could serve as possible grounds for appeal.

Jurors may also attempt to get information that they believe is relevant to their decision, but which is not a legally permitted factor for consideration. A classic example of this is the length of the sentence. Jurors are not supposed to consider the potential sentence the defendant may face if convicted, yet many jurors are very interested in this. This is perhaps not surprising, reflecting a natural concern with the proportionality of the punishment in relation to the offense.

Their desire to know may be particularly acute in capital cases, where many jurors faced with the task of choosing life or death for a convicted defendant want to know “Is life really life, or is there the possibility the defendant could get out on parole?” In some cases, jurors in capital cases would have preferred to give a life
sentence, but chose the death sentence because they could not be sure that a life sentence would keep the defendant off the streets for good (Bowers and Steiner, 1998). Requests to the judge for this information were answered with the instruction that they could not be told and should not consider the issue of how long a life sentence in their particular jurisdiction would actually be.

GROUP DYNAMICS

Juries provide good examples of group dynamics in action. Juries are an example of groups that are convened for a specific purpose rather than formed naturally. Thus, juries illustrate groups of people who are brought together for a common purpose—the task of “doing justice.” Jurors know little about each other before they begin deliberating, except for whatever information they gleaned about their fellow panelists during voir dire and perhaps from idle small talk during breaks in the trial. They cannot be entirely certain how long they will have to spend working together on their common task, but they know that once their task is done, they may never see each other again. Therefore, the jurors may not behave in the same way that they would if they anticipated future interactions with each other.

As the jurors begin deliberating, they may learn that some of them are first-time jurors, while others may have served before. Regardless, most group members will be acutely aware of the stakes involved for the parties in the case, especially in a felony case.

So how do these factors influence the group dynamics of jury decision-making during deliberations? Recall that according to Wrightsman and colleagues (1994), the law assumes that jury decisions will be “unaffected by group pressures or personal wishes.” However, much research on jury decision-making demonstrates that too often this is not so; in fact, juries provide classic illustrations of the power of group pressures toward conformity.

Idealized portrayals of jurors, such as the classic Henry Fonda movie Twelve Angry Men, show jurors arguing passionately to persuade each other on their views on the basis of the evidence. The arguments use appeals to logic and reason, with the goal of genuinely convincing the audience of the inherent superiority of the speaker’s view of the case.

In reality, research shows that the line between persuasion and coercive pressure can be very thin. Jurors in the minority faction face intense pressures to conform, varying with the individual makeup of the people on that jury. Jurors do not want to deadlock because they cannot reach consensus; they want to finish the task. A lone juror faces especially strong pressures, but having even one other ally is quite effective in helping a nonconformist resist pressures from jurors in the majority faction. Research cannot tell us how often undue pressure to conform is placed on jurors in actual cases. But anecdotal information from interviews with actual
jurors demonstrates that not infrequently, jurors may be subjected to expressions of
disgust, angry comments, taunts, and pleas to change their verdict decision. In one
case, several women jurors reported that the jury foreman and other male jurors
called them “stupid females” and told them that because they were women, they
“didn’t have minds” (Duffy, 1996). In the most extreme examples, a few jurors
have reported that they voted to convict a criminal defendant when they really
wished to acquit (State v. Kaiser [1996]; M.S. v. Stansfield [1996]).

While majority jurors are prevailing upon those in the minority to join them,
they may provide psychological rationales to holdouts that help them to retain dig-
nity while joining the majority. Levine (1992) describes this phenomenon occur-
ing among the jurors in the trial of serial murderer Juan Corona:

Respect is sometimes a two-way street, with the dominant group helping the holdout to relent
by acknowledging the right to dissent and the legitimacy of alternative viewpoints. This
“stroking” process can ease the way to capitulation by enabling the dissenter to maintain self-
estee at the same time he or she is crumbling. This was the tactic of what had become an
11-person majority for conviction in the Juan Corona mass murder case. Rather than steamroll
the remaining resister into compliance with them, the jury took a day off from voting after six
full days of deliberation and told her to go with her convictions. On the 8th day she switched,
remarking: “I think I’ve changed my mind. Yesterday you gave me a day’s rest and I relaxed
and I saw things differently . . . basically, I now think you people are right and I do think
Corona guilty.” (Levine, 1992, p. 155. Reprinted by permission of James Levine

However, Wrightsman, Nietzel, and Fortune (1994) question the true rationale for
this juror’s change of heart, noting that earlier during the Corona jury’s deliber-
ations, this same juror had exclaimed “Please, I’ll change my vote. Just don’t hate
me. I’ll change my vote so you can go home to your wife” (Wrightsman, Nietzel,
& Fortune, 1994, p. 334). Regardless of the reasons for this juror’s decision to join
her fellow jurors in convicting Corona, the phenomenon of holdout jurors illus-
trates classic conformity pressures. As with any divided group, once someone from
the minority makes the decision to join the majority viewpoint, this “legitimates
the idea of capitulation so that others with similar views almost always follow suit”
(Levine, 1992, p. 154). Despite the deliberative ideal embodied in the law, such
conformity pressures do not necessarily invalidate the jury’s verdict under the rules
of evidence. In one case where a juror who voted to convict reported that she did so
after being pressured during deliberations, the defendant’s conviction was upheld
by an appellate court, which noted that such pressure “ . . . is an inherent and intrin-
sic part of the deliberative process” (Nadvorney and Cantu, 1987, p. 32).

BARGAINING BETWEEN JURY FACTIONS

Because juries often have several verdict choices, there is often room for compro-
mise between different factions on the jury. For example, jurors may have to
choose between convicting the defendant of second-degree murder, manslaughter,
or acquitting. Given such verdict choices, there is room for negotiation. Similar opportunities for negotiation and compromise exist in cases involving multiple counts of the same crime, or multiple charges varying in seriousness. The group dynamics of jury-room bargaining play an important role in preventing hung juries, as the case of Joel Steinberg illustrates (see Box 12.15).

“Logrolling” is a particular form of jury group compromise: when there are multiple defendants accused in the same incident, juries may convict one defendant but not the others, even though the evidence is the same in the joint trial of all defendants. For example, in one case several police officers were tried on charges of brutality stemming from an interrogation of a suspected killer of a fellow officer.

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**BOX 12.15**

**Bargaining in the Jury Room**

*James Levine describes the negotiations that occurred during the infamous trial of a lawyer on charges of killing his daughter.*

Steinberg, a disbarred lawyer and routine cocaine user, was accused not only of striking a severe blow to the back of the girl’s head but of failing to get help for 12 hours while she was still alive. Complicating the trial was the situation of Hedda Nussbaum, Steinberg’s live-in lover, who allegedly had been viciously brutalized by Steinberg for years. She, too, waited to call medical authorities until it was too late. At first Nussbaum was also charged with murder, but later the charges were dropped and she became a witness against Steinberg.

From the beginning of deliberations, the jury was deeply divided . . . the allocation of moral responsibility between the two principals was a source of dispute. The jury initially split evenly into 3 factions: those who thought Steinberg guilty of murder (the “hard liners”), those who favored first-degree manslaughter (the “middle of the roaders”), and those who opted for second-degree manslaughter because they thought Nussbaum had struck the fatal blow (the “softies”) . . . in the foreman’s words, ‘we were almost hopelessly divided.’ After eight days . . . the jury arrived at a verdict. They opted for first degree manslaughter, the in-between outcome.

Although at one point the pro-murder contingent reached ten . . . the hardliners eventually realized that they would never get all 12 jurors to agree on a murder conviction. They then willfully deviated from the judge’s instructions that they first dispense with the murder charge before going to the lesser ones, and they concentrated on getting the “softies” to accept the first-degree manslaughter charge—no mean feat considering that some continued to feel that Hedda Nussbaum might have been the more culpable. Having accomplished that, the hardliners themselves relented on the murder charge, even though in their hearts they believed it was warranted. The alternative was a hung jury, and it was thought preferable to establish some culpability and assure punishment rather than give Steinberg another opportunity to get exonerated. (Levine, 1992, p. 158)

*Postscript: One of the “hardliner” jurors in the case would later say that she regretted not being able to bring in a murder conviction.*

*Source:* Reprinted by permission of James Levine.
The jury acquitted four of the officers, but returned verdicts of guilty against three other officers, although all the officers were tried together, and the evidence was the same for each defendant (Levine, 1992). How can this seemingly inconsistent result have occurred? “The verdict seems baffling unless we bring in a plausible political explanation: defendants were traded off so that neither the pro-police nor the pro–civil rights forces would come away empty-handed. Defendants are treated differently to secure a resolution that gives something to both sides in a split jury” (Levine, 1992, p. 160).

The group dynamics of jury deliberations reflect the influence of psychological and political pressures, strategies, and solutions. Jurors bring their own experiences, attitudes, and beliefs with them to the deliberations, and work together as a group to fashion a verdict that reflects the facts as they perceive them. This means that even when jurors agree on a verdict, they may vary in their reasons for agreement. For example, interviews with jurors in one case revealed that some jurors voted to acquit the defendant because they believed he was not guilty of any crime; others felt he may have been guilty but felt that the government had not met its burden of proving guilt beyond a reasonable doubt (Brill, 1989).

When the jurors are ready to announce their decision, it’s time to call the bailiff and prepare to re-enter the courtroom, all eyes upon them as they take their seats in the jury box one last time.

### BOX 12.16

**How Do Jurors Perceive Each Other?**

In one study, jurors in felony cases generally reported being favorably impressed with the seriousness and sense of purpose shown by their fellow jurors. Many were quite pleased and even proud of how their jury had come together as a group to tackle the task at hand. However, some jurors were distressed at what they knew or suspected was misconduct on the part of a member of the panel, such as when a juror attempted to discuss the case during trial breaks. In another case, a juror announced upon entering the deliberation room for the first time that he had made up his mind about the verdict. One juror described how another juror on the panel had refused to participate in deliberations and instead spent three days reading her book while the others deliberated. (Grant, 2000)

### THE JURY DECIDES: THE VERDICT

Historically, jury service could sometimes be hazardous to the health, as we saw in Step 4’s discussion of the treatment of jurors who refused to find William Penn and William Mead guilty. As we saw, the Penn and Mead trial was a turning point in the history of juror independence, and today, jurors are free to return the verdict as
they see fit. They do not need to discuss their reasons for their verdict with anyone. However, in cases where the jury returns a guilty verdict, the defense may request that individual jurors be “polled” (questioned) as they sit in the jury box, in order to affirm that the decision was indeed unanimous. If the jury returns an acquittal, the decision is final. If the jury convicts, a judge has the power to overturn the verdict if it appears the evidence would not support a conviction. In practice, however, judges rarely exercise this power.

In approximately five percent of cases, the jury is unable to agree on a verdict. If the jury informs the bailiff that they are “hung,” the judge may order the jurors to deliberate further and try their best to reach an agreement. If they are still unable to reach a verdict, the judge declares a **mistrial**. Mistrials can occur for other reasons as well, such as the death of a key party (e.g., an attorney), juror misconduct, or a fatal procedural error that would prejudice the outcome. For example, in one case a mistrial was declared after it was disclosed that jurors examining some documents during deliberations had learned about the defendant’s prior convictions, which was information that they were not supposed to have. This happened because jurors had noticed that certain sections of testimony in the document had been covered with correction fluid, and they held the papers up to the light to decipher what had been concealed (Gotthelf, 1994).

What does this mean for the defendant? Because the defendant’s trial was not completed, the prosecutor has the right to decide whether to retry the case, which

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**BOX 12.17**

**The Impact of Jury Service on Jurors**

Interviews with a small group of jurors who served in felony cases provide a glimpse into the jurors’ experiences (Grant, 2000). The jurors in this study almost uniformly reported a sense of pride and satisfaction in performing their civic duty, often describing the experience as a “fascinating” opportunity to get an inside look at the workings of the legal system.

In contrast, the jurors’ perceptions of negative aspects of jury service varied greatly. Pragmatic aspects of jury service, such as lack of parking and poor juror pay, were mentioned often. Major substantive concerns reported by these jurors included experiencing doubts about the jury’s decision. For example, some former jurors reported that over a year after their service, they remained “haunted” by doubts and questions. One former juror reported thinking about the trial every day and wondering whether he had made the right decision in a complex murder trial. Another person said it took weeks to “readjust” after serving as a juror in a murder case, and another described worrying about whether she was being followed by gang associates of the defendant. One man described how he and his fellow jurors had convicted a teenaged defendant of attempted murder. Later, said this former juror, he discovered that the young defendant had received a very long sentence. Upon learning this, said the juror, “I felt like I had killed a child,” because he believed strongly that such a long sentence was not merited. (Grant, 2000)
would not violate double jeopardy. The prosecutor’s decision will depend upon a number of things, including the seriousness of the crime, the resources that would be required for a retrial, and the prosecutor’s assessment of why the current jury could not reach agreement. For example, in an unusual case in California, defendant Taufui Piutau was tried on misdemeanor charges of driving under the influence of kava (a type of tea with relaxing properties, typically sold in health food stores). The jury could not reach agreement, and a mistrial was declared when jurors reported they were hung ten to two in favor of acquittal. The district attorney, asked whether he would retry the case, commented that “with a split like that in a misdemeanor case, I can’t remember the last time a case was retried” (Stannard, 2000, p. A17).

**JURY NULLIFICATION**

In the 1735 trial of John Peter Zenger, a publisher who was accused of printing seditious material, jurors refused to convict even though it was clear that Zenger had violated the law. This is often cited as a classic example of *jury nullification*. Jury nullification, broadly defined, refers to juries returning a verdict that is inconsistent with the evidence; in essence nullifying the law by taking it into their own hands. For example, a jury that acquits a defendant accused of sexual assault not because of lack of evidence, but due to juror perceptions of the victim, is practicing jury nullification.

A narrower conception of jury nullification would refer only to jurors’ ability to decide not to apply the law in certain cases, thus acquitting the defendant or returning a verdict of guilty on a lesser charge than the facts of the case would support (Abramson, 1994). One possible example here might be the failure of four different Michigan juries to convict Dr. Jack Kevorkian of assisting suicide on four separate occasions. He was later convicted of murder by a jury after he videotaped his role in a patient’s death and gave the tape to the *60 Minutes* newsmagazine for broadcast (Silverglate, 1999).

As we saw earlier, juries historically held the power to decide both the law and the facts in a case. In *Sparf and Hansen v. United States* (1896), the Supreme Court confined the power of the jury to deciding the facts in the case, leaving the judge to decide the law. This meant that juries no longer possessed the legal right to nullify the law; however, to this day juries retain the *power* of nullification.

Controversy exists over the question of whether juries should be informed of their power to nullify. Proponents argue that jury instructions should explicitly inform jurors that they have the right to nullify, but there is disagreement over how nullification should be defined. If nullification were narrowly defined, jurors could be informed that they possess the power to refuse to apply the law. In essence, juries would have the power to bestow leniency on a defendant, but not to convict a defendant where the evidence does not support a conviction. Proponents of informing juries of their nullification powers argue that juries should be able to decide the law for themselves, because the laws might be unjust, out of date, or not applicable.
in certain cases. Another argument favoring nullification is the idea that because laws are made to express general principles, the task of jurors is to apply the law to the specific circumstances of the case. In turn, this requires that they sometimes interpret the law anew, or ignore it.

Opponents, however, argue that informing juries about nullification defeats the very purpose of having a system of laws. Allowing juries to practice nullification would amount to condoning injustice, as juries might be more likely to return verdicts based on personal or political biases rather than the evidence. This perspective is evident in a California appellate decision upholding a defendant’s conviction for statutory rape. At trial, the judge had replaced a juror who didn’t believe in the law with an alternate. The defendant appealed, but the appellate court’s decision illustrated judicial concerns about jury nullification: “A nullifying jury is essentially a lawless jury, . . . Jury nullification is contrary to our ideal of equal justice for all and permits both the prosecution’s case and the defendant’s case to depend upon the whims of a particular jury” (Chiang, 2001, p. A3).

However, research on the potential consequences of giving jurors instructions that inform them of their power of nullification suggests juries do not appear to take law into their own hands very frequently, or for no reason. Informing jurors of their power to nullify does not appear to result in the “jury anarchy” which concerns many critics of nullification (Jacobsohn, 1976; Horowitz, 1985; Niedermeier, Horowitz, and Kerr, 1999).

Ironically, the practice of jury nullification may be enhanced by the trend toward mandatory sentences. For example, reports have surfaced of cases where jurors learned that the defendant, on trial for a relatively minor, nonviolent crime, was actually facing a third-strike sentence of twenty-five years to life if convicted. In response, the jurors apparently decided to acquit instead (Chiang, 1996). This has raised the prospect of a scenario where the defense attorney whose client is being tried for a crime such as check kiting, may seek ways to subtly “cue” the jury, hoping they will realize that this is a “three-strikes” case and that they will choose to acquit the defendant despite having sufficient evidence to convict.

There are indications that jury nullification may be growing, with some cases suggesting individual jurors and sometimes juries use their decision-making power to send messages about their perceptions of the criminal justice system in general or specific laws (Biskupic, 1999). This raises a very interesting question: When a jury refuses to apply the law, is this a worrisome deviation from the ideals underlying trial by jury—or is it the very embodiment of the jury’s role as the conscience of the community?

**CONCLUSION**

The announcement of the verdict in a criminal trial is frequently simply a culmination of one phase of the criminal courts process. If the defendant is found “not
guilty,” then the prosecution cannot appeal the verdict. In the aftermath of an acquittal, the former defendant returns to society, the defense attorney may contemplate the lessons learned from a successful defense, and the prosecutor may try to ask the jurors why they voted for acquittal. Victims, or their families, will undoubtedly replay the trial in their minds as they contemplate the verdict. The jurors must now return to their everyday lives, where they can reflect on their experiences and the impact that serving as a juror has made on them.

However, most felony criminal trials result in a verdict of “guilty” (Hart and Reaves, 1999). In these cases, the verdict is actually a signal for the next critical steps in the process to begin: the task of determining the appropriate sentence, and for the defense, the question of whether there are grounds for an appeal. Let us turn our attention now to the next phase: the question of sentencing.

**DISCUSSION QUESTIONS**

1. What did you think of Clarence Darrow’s jury selection strategies (presented in Box 12.3)? Do you think that group members generally share the same attitudes, or not? What does the research on the relationship between juror characteristics, attitudes, and behavior suggest? Given the research on the relationship between juror characteristics, attitudes, and behaviors, why do you think Darrow believed his strategies for juror selection were successful? Is it possible that Darrow’s skill as an advocate for his client, rather than his jury-picking techniques, accounted for his success as a defender?

2. What do you think of the use of peremptory challenges? Take a position:
   a. Do you think the use of peremptory challenges increases the likelihood of an impartial jury?
   b. Do you think the use of peremptory challenges decreases the likelihood of the impartial jury?


4. Should students be considered a “cognizable group”? Why or why not?

5. Is the jury’s power, if not their right, to nullify a necessary part of flexibility in the jury system, an illustration of jury discretion that gives the system its value in tailoring justice? Or is it an opportunity for citizens to do an “end run” around the law by disregarding the law and the facts?

6. Amar, discussing jury decision rules, comments: “Preserving unanimity might also be undemocratic, for it would create an extreme minority veto unknown to the Founders” (1995, p. 1190). What do you think he means? Do you think this statement has merit? Why or why not?

7. Consider the issue of religious appeals by prosecutors during closing arguments. Why might such arguments be considered improper by courts? Think about how such arguments could influence the jury and then discuss reasons. Would religious appeals to mercy on the part of defense counsel pose similar problems? Why or why not?

**NOTES**

1. Note that the use of jury questionnaires does not in and of itself mean that scientific jury selection strategies are being used. Depending upon how such questionnaires are constructed and interpreted, they may simply represent attempts to gather information about prospective jurors, rather than being part of a concerted strategy based on social science techniques. The use of jury
questionnaires illustrates the fact that there is no hard and fast distinction between “scientific” and “nonscientific” jury selection techniques; rather, the distinction is a matter of degree reflecting not only how information is gathered but how it is analyzed and applied.

2. The reason that gender orientation can be considered a cognizable group in California, when it has not been designated as such by a U.S. Supreme Court decision, is straightforward: While states may not provide fewer constitutional protections than those provided by the U.S. Constitution, U.S. Supreme Court decisions, or federal statutes that are nationally applicable, states can choose to provide greater constitutional protections.

3. There are a few very narrow exceptions where the government may be able to appeal an acquittal, such as when the acquittal was obtained through judicial corruption.

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