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## AN OVERVIEW OF THE AMERICAN CRIMINAL JURY

KIMBERLY A. MOTTLEY, DAVID ABRAMI,  
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### I. JURISDICTION OF THE JURY

#### A. *Jurisdiction of the Jury*

The right to a jury trial is guaranteed in the United States Constitution and reflects an early commitment to the jury as a tool to limit government oppression. The Sixth Amendment to the United States Constitution states in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.<sup>1</sup>

While this jury right originally applied only to federal courts, the Supreme Court in recent decades has held that “trial by jury in criminal cases is fundamental to the American system of justice” and, therefore, the right extends to state criminal courts as well.<sup>2</sup> While some cases describe the right as an absolute one, a strict reading of the Constitutional text may indicate an absolute right to trial by jury in all cases,<sup>3</sup> the Supreme Court has read the clause to guarantee a jury trial only for defendants accused of sufficiently serious offenses. For reasons of cost and time-efficiency, “so-called ‘petty’ offenses may be tried without a jury.”<sup>4</sup> Courts have struggled with where to place the dividing line between offenses warranting a jury trial and those dubbed “petty” offenses. Initially, determinations were made through a focus

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1. U.S. CONST. amend. VI.

2. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1980) (extending Sixth Amendment jury trial right to state courts through the Due Process Clause of the Fourteenth Amendment).

3. *United States v. Titsworth*, 422 F. Supp. 587, 589 (D. Neb. 1976) (“every person charged with a crime has an absolute and fundamental right to a fair and impartial trial, and it is the duty of the courts, and also the government, to insure that this right is safeguarded and preserved at all times”).

4. *Frank v. United States*, 395 U.S. 147, 148 (1969).

on the common law treatment of the offense and its inherent nature.<sup>5</sup> Recent decisions have instead used more objective indications of seriousness of the crime, as judged by the legislature. The criterion most closely aligned with this indication is the maximum authorized penalty one might receive upon conviction of the crime.<sup>6</sup> “Penalty” in this context is not limited to the maximum prison term listed in the criminal sanction, but may include other penalties that the legislature may attach to the offense, such as registration requirements for convicts.

Although other factors may contribute to the penalty of the crime, “primary emphasis . . . must be placed on the maximum authorized period of incarceration,”<sup>7</sup> and the sentence required for the constitutional guarantee of a jury trial is more than six months.<sup>8</sup> Aggregation of crimes tried within a single trial, with a possible consolidation producing a maximum sentence of over six months, does not authorize the right to a jury trial.<sup>9</sup> Despite this time-based standard, a defendant may overcome the presumption that a sentence less than six months indicates the petty nature of the crime by demonstration that “additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a ‘serious’ one.”<sup>10</sup>

#### B. *Control of the Right to Jury*

The text of the Constitution seems to denote a right to a jury trial vested solely in the defendant. However, case law has shown that this right may be vested in the court or prosecutor as well. This issue derives from discussion of the ability of a defendant to waive the right of a jury trial in the U.S. criminal courts. In all practicality, defendants’ waivers are almost always accepted by courts. In principle, however, a prosecutor or court may insist on a jury trial. Courts have taken the position that “there is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can . . . in some instances waive his right to a trial by jury.”<sup>11</sup> Just what this waiver is conditional upon varies from state to state, with some making waiver contingent upon approval of the prosecutor, some making the court’s approval a prerequisite for waiver, while still others leave the decision completely to the

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5. *Blanton v. North Las Vegas*, 489 U.S. 538, 541 (1989).

6. *Id.*

7. *Id.* at 542.

8. *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974).

9. *Id.* at 515.

10. *Blanton*, 489 U.S. at 543.

11. *Singer v. United States*, 380 U.S. 24, 34 (1965); *see also State v. Dunne*, 590 A.2d 1144 (N.J. 1991) (applying *Singer* rule to New Jersey state courts).

informed discretion of the defendant.<sup>12</sup> Although the ability of a court or prosecutor to claim a right to a jury trial differs by state, these contingencies have been held constitutional and are reflected in the Federal Rules of Criminal Procedure. Federal Rule of Criminal Procedure 23(a) permits prosecutors to exercise discretion in protesting the waiver of a jury trial without justification of their reasoning.<sup>13</sup>

### C. *Manipulation of Jurisdiction*

The jurisdiction of a jury trial may not be manipulated by prosecutors' charging policies in the U.S. courts. The sole influence of a prosecutor's charging policies that may affect the right to a jury trial would be in charging defendants with lesser crimes, so as to avoid the attachment of the right. Case law has also protected the right to a jury trial from potential manipulations on the part of judges. A judge may not, for example, "strip a defendant of the right to a jury trial for a serious crime by promising a sentence of six months or less" because "opprobrium attaches to conviction of those crimes regardless of the length of the actual sentence imposed."<sup>14</sup> Hence, charging policy or judicial sentencing choices have little effect on the right to a jury trial in the United States.

## II. COMPOSITION OF THE JURY

Although the traditional notion of a jury trial in the United States criminal justice system is a twelve-member panel of citizens, twelve members are not always essential. In a 1970 landmark decision, the Supreme Court upheld the use of a six-person jury for criminal jury trials in state courts.<sup>15</sup> The Court subsequently designated six as the minimum number of jurors necessary to safeguard the guarantee of impartiality in the Sixth Amendment right to criminal jury trials.<sup>16</sup> State law typically imposes a similar limitation.<sup>17</sup> Inspiring these decisions were social science studies which found that a jury of less than six people hinders group deliberation, is detrimental to the defense, and decreases the likelihood of accurate minority representation from the community.<sup>18</sup>

Just what number of jurors states choose between six and twelve varies greatly, sometimes depending on the seriousness of the offense charged. Most

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12. *Singer*, 380 U.S. at 36, 37.

13. *Id.* at 37.

14. *Lewis v. United States*, 518 U.S. 322, 341 (1996) (Stevens, J., dissenting).

15. *Williams v. Florida*, 399 U.S. 78 (1970).

16. *Ballew v. Georgia*, 435 U.S. 223 (1978).

17. *See, e.g., People ex rel. Hunter v. District Court*, 634 P.2d 44 (Colo. 1981).

18. *Ballew*, 435 U.S. at 232.

states require twelve-members for felony trials, despite the Supreme Court's invitation to lower the number. A few states allow juries of six (e.g., Connecticut, Florida) or eight (e.g., Arizona) to sit on a felony case, while still others allow six-member juries for felony trials in courts of limited jurisdiction, requiring twelve-members only in general jurisdiction courts (e.g., Indiana, Kentucky, and Massachusetts).<sup>19</sup> Over half of the states use six-member juries for misdemeanors, while others specify some number between six and twelve (e.g., Ohio specifies eight, Virginia requires seven). Where states allow for twelve-member juries, a defendant may also waive this right in favor of a smaller jury.

A related issue to jury size is whether a jury must be in complete agreement in order to render a verdict. Jury unanimity is required in all federal criminal trials under the Sixth Amendment.<sup>20</sup> Yet the Supreme Court has held that the Federal Constitution does not require unanimous jury verdicts in state courts,<sup>21</sup> although only two states currently allow non-unanimous convictions (Louisiana and Oregon).<sup>22</sup> The possibility of non-unanimous jury verdicts call into question the relationship between jury size and the unanimity requirement. The Supreme Court decided that six-member juries are permitted in state criminal cases only if their verdicts are unanimous.<sup>23</sup>

### III. ROLE OF THE LAY JUDGES IN THE TAKING OF EVIDENCE

#### A. *Trial Procedure*

The criminal justice system in the United States is adversarial in nature. Both the government's counsel and defense counsel may present witnesses and evidence for consideration by the finders of fact. A professional judge determines admissibility of the evidence based on statutory evidence rules. The evidence is then used by the jury for consideration of fact issues as the trial progresses. In a criminal jury trial, there are two true finders of fact—the professional judge and the jury. The judge plays an initial, very limited fact-finding role by determining which facts are relevant and thus will be presented to the jury. The judge is further able to reverse a jury determination of guilt if she deems it against the weight of the evidence.<sup>24</sup> The judge also decides

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19. MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS*, 1395-96 (1998).

20. JUDGE NANCY GERTNER & JUDITH H. MIZNER, *THE LAW OF JURIES*, 8-8 (1997); *see also* FED. R. CRIM. P. 31(a).

21. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972).

22. MILLER & WRIGHT, *supra* note 19, at 1466.

23. *Burch v. Louisiana*, 441 U.S. 130 (1979).

24. JOHN GUINThER, *THE JURY IN AMERICA* 70 (1988).

which type of verdict the jury will be allowed to render. This verdict can take one of two forms—that of a general verdict consisting of guilt or acquittal, or a specific or “special” verdict, consisting of a series of specific factual questions which the judge then applies to the law.<sup>25</sup> Traditionally, the jury is presumed to decide factual disputes based on evidence presented by the parties, then apply those facts to law provided by the judge in her instructions.<sup>26</sup> Four states, Georgia, Oregon, Maryland, and Indiana, formally give their jurors authority to decide questions of both fact and law in their state constitutions, though apparently only the latter two will give juries instructions on their power to nullify, or to choose not to apply law.<sup>27</sup>

The adversary model leaves duties of fact investigation, witness and expert interviews, and case presentation to the two adversarial parties.<sup>28</sup> The judge and jury then impartially adjudicate the issues raised by the conflicting presentations of evidence by the parties. The system in the United States is termed a “modified” adversary system, as the judge is not completely silent concerning what the jury may consider.<sup>29</sup> The policy underlying the use of the adversary system in the United States is protection of individual autonomy and appropriate portrayal of the relationship between the individual and the state.<sup>30</sup>

The role of the jury members in the trial is one of observance and deliberation, not of active participation and questioning. When jurors are permitted to question witnesses, their questions are filtered through the judge by procedural protections usually consisting of jury submission of questions to the judge, followed by notification to counsel of the contents of the questions and an opportunity for them to comment or object to the questions.<sup>31</sup>

Victim participation is also relatively limited in this adversary system. A victim may not bring a civil suit within the criminal trial, although he or she may use evidence gleaned from the criminal investigation to support a contemporaneous or subsequent civil action. Victims have no representation in the criminal trial and, likewise, take no part in jury selection, questioning of witnesses, presentation of evidence, or oration of arguments. Recent years, however, have seen a movement toward a system more generous to victims’ rights. Currently, victims have some rights to participate at the sentencing and plea bargaining stages of the trial process. Some critics strive for inclusion of victim input into the charging decision, as this would increase victims’ feelings

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25. *Id.*

26. MILLER & WRIGHT, *supra* note 19, at 1469.

27. *Id.* at 1470.

28. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 35 (2d ed. 1992).

29. *Id.*

30. *Id.* at 36.

31. GERTNER & MIZNER, *supra* note 20, at 9-3, 9-4.

of vindication.<sup>32</sup> However, in the interests of protection of prosecutorial discretion, even these critics limit their promotion to a victims' right to be heard but not a right to determine the substance of the charging decision itself.<sup>33</sup>

The 1980s witnessed an unsuccessful movement, headed by President Ronald Reagan and his Task Force on Victims of Crime, to change the Sixth Amendment to the Constitution, adding a victim's right to be present and heard at all critical stages of judicial proceedings in every criminal prosecution.<sup>34</sup> Though nationally the movement gained little ground, at the state level victims now enjoy more participation by way of notification of dates and decisions, participation via "victim impact statements" at the sentencing stage, which tell objectively and subjectively the impact of the crime on the victim and those close to them, and greater opportunities for victim restitution.<sup>35</sup> The most controversial of these protective mechanisms is the use of "victim impact statements," which were not well received by the courts until the Supreme Court approved their use in 1991.<sup>36</sup> State provisions like these are greatly varied and enforcement of them is extremely problematic.<sup>37</sup>

#### B. *Questions of Law and Sentencing*

As discussed above, jurors in the United States criminal justice system have the power to decide issues of fact, leaving questions of law for the judge. Controversy surrounds this idea when discussed in relation to the possibility of "jury nullification." This authority has been described as the "power of a jury to soften the harsh commands of the law and return a verdict that corresponds to the community's sense of moral justice."<sup>38</sup> Because juries' acquittal verdicts are unreviewable by the trial or appellate courts, and because criminal juries return general verdicts of guilt or innocence rather than specific findings of fact, juries have the power to decline to apply law to facts that the law clearly governs. Most courts deal with the supposed illegitimacy of this action by refusing to instruct jurors of this power and preventing attorneys from doing

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32. Sarah N. Welling, *Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision*, 30 ARIZ. L. REV. 85-86 (1988).

33. *Id.* at 116.

34. Valerie Finn-DeLuca, *Victim Participation at Sentencing*, 30 CRIM. L. BULL. 403, 406 (1994).

35. *Id.* at 407.

36. *Payne v. Tennessee*, 501 U.S. 808 (1991).

37. Finn-DeLuca, *supra* note 34, at 408.

38. Alan W. Schefflin & Jon M. VanDyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 165 (1991).

so as well, and there is little evidence of regular or widespread patterns of nullification.<sup>39</sup>

Proponents of jury nullification instructions state that such instructions will “reinforce our nation’s commitment to a government where the people are sovereign, and it would serve to bring the people and their laws together in closer harmony.”<sup>40</sup> The Supreme Court, however, has rejected such reasoning and has forbidden nullification instructions in federal trials:

We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be.<sup>41</sup>

The jury’s role in sentencing is likewise limited. American criminal courts sentence through use of a bifurcated system, in which one decision process determines guilt, followed by a separate proceeding to determine punishment. Juries generally have no authority to sentence in most American jurisdictions.<sup>42</sup> One exception to this rule is capital cases. In these trials, jurors typically provide at least a recommendation as to whether the defendant will receive life imprisonment or the death penalty.

#### IV. FACTUAL AND LEGAL QUESTIONS JURORS DECIDE

In the United States, jurors determine facts and apply the law to the facts, rendering a general verdict of guilty or not guilty. “Special verdicts,” comprised of lists of factual questions to be answered by jurors and subsequently applied to law, are not favored in criminal cases.<sup>43</sup> This preference for the simple decision of guilt or innocence is primarily based upon the idea that a series of questions may pressure jurors to decide purely based on logic, rather than allowing the verdict to reflect the conscience of the community that they purport to represent.<sup>44</sup> The jury is generally not allowed, at least in practice as discussed previously in discussion of jury nullification, to decide which laws to apply to the facts. The judge provides the law on which jurors are to base their decisions through jury instructions, consisting of a

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39. MILLER & WRIGHT, *supra* note 19, at 1474.

40. Schefflin & VanDyke, *supra* note 38, at 183.

41. *Sparf & Hansen v. United States*, 156 U.S. 51, 102 (1895).

42. In a few states, such as Virginia and Kentucky, the jury is given a limited power to set the sentence after a conviction, see MILLER & WRIGHT, *supra* note 19, at 1620.

43. 26 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 631.03[1] (3d ed. 2001).

44. LAFAVE & ISRAEL, *supra* note 28, at 1050.



combination of standard jury instructions and a few customized instructions that parties may suggest.<sup>45</sup>

Jury instructions may be given prior to trial, during trial, or at the close of evidence presentation, either before or after closing arguments. The timing of instructions is normally left to the discretion of the judge, as is illustrated by Federal Rule of Criminal Procedure 30, although instructions are nearly always given at end of the trial, after the close of the evidence. Instructions in theory are to be simple, impartial, clear, and concise representations of the governing law of the jurisdiction concerning the legal issues raised by sufficient evidence in the cases of both the prosecution and defense, although there has been extensive criticism that instructions are too long, confusing or unclear.<sup>46</sup> Counsel for either party may submit proposed instructions in the “charge conference” of the trial, and the trial judge makes the final decisions on what instructions to give the jury.<sup>47</sup> Parties may object to proposed instructions outside of the hearing of the jury.

Federal courts, as well as most state courts, use pattern jury instructions from their jurisdiction that they may modify for particular trials. Whether juries receive instructions orally or in writing varies, depending upon the jurisdiction and, sometimes, the judge’s discretion.<sup>48</sup> Some states require written copies of instructions only in felony cases (e.g., Virginia).<sup>49</sup> Much is left to the discretion of judges in criminal jury instruction, such as the choice to clarify confusing instructions, the basic instructions the jurors will receive, and the wording of those instructions.<sup>50</sup>

The burden of proof in criminal cases is on the prosecution to prove all elements of the crime charged “beyond a reasonable doubt.”<sup>51</sup> Though the jury must be informed of this standard, the meaning of this phrase need not necessarily be explained.<sup>52</sup> State courts and federal circuit courts have adopted a wide range of positions on defining this standard of proof. Similarly, though the phrase “presumption of innocence” need not be used, the idea that a

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45. MILLER & WRIGHT, *supra* note 19, at 1457.

46. *See, e.g.*, AMIRAM ELWORK, ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982).

47. *See* FED. R. CRIM. P. 30 (“any party may file written requests that the court instruct the jury on the law as set forth in the requests”).

48. *See* United States v. Johnson, 466 F.2d 537, 538 (8th Cir. 1972); 22 MOORE ET AL., *supra* note 43, at ¶ 51.10.

49. EMANUEL EMROCH, VIRGINIA JURY INSTRUCTIONS § 1.03 (2d ed. 1990).

50. 26 MOORE ET AL., *supra* note 43, at ¶ 630.10.

51. *In re Winship*, 397 U.S. 358 (1970).

52. MILLER & WRIGHT, *supra* note 19, at 1507.

defendant is innocent until proven guilty is a required jury instruction in most cases, unless other instructions make the concept clear by implication.<sup>53</sup>

A related issue is the burden of proof as to affirmative defenses raised by defense counsel during trial. Should sufficient evidence be presented at trial, the judge will inform jurors of the proper standards of proof regarding these defenses. In general, there are two burdens to consider—the burden of production and the burden of persuasion. The burden of production is on the defendant to present some evidence in support of the defense, bringing the issue before the court.<sup>54</sup> In federal courts, the subsequent burden of persuasion has been held to rest on the defendant as well, if the defense does not negate any element of the crime.<sup>55</sup> States vary in their treatment of this issue, with a few modern codes placing the burden of persuasion on the prosecution as to all issues, whereas others leave the issue for the courts to decide on a defense-by-defense basis.<sup>56</sup>

Courts frequently leave to the discretion of the judge whether to advise jurors not to consider sentencing when deciding guilt.<sup>57</sup> Examination of pattern jury instructions reveals vast variation within substance of instructions. In most non-capital cases, the jury's job is complete once it renders a verdict on guilt. In a minority of jurisdictions, jurors may be retained for the sentencing stage of the trial.

#### V. DELIBERATION AND DECIDING QUESTIONS OF FACT, LAW AND GUILT

Professional judges may not participate in the deliberations in the jury room, even to instruct jurors on the law. Nor may jurors request, during deliberation, that the evidentiary portion of trial be reopened. When jurors request that documents or physical evidence be brought to the jury room, judges are sometimes hesitant to allow this within their discretion due to the possibility that allowances may add weight to this evidence when compared with the other evidence presented at trial.<sup>58</sup> Around one-third of the states have statutes or court rules which require the judge to honor such a request, but these policies vary between mandatory and discretionary allowance.<sup>59</sup> Jurors are rarely able to bring taped or written accounts of the trial into the

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53. 26 MOORE ET AL., *supra* note 43, at ¶ 630.21. Compare *Kentucky v. Whorton*, 441 U.S. 786 (1979) (presumption-of-innocence instruction not constitutionally required in every case), with *Taylor v. Kentucky*, 436 U.S. 478 (1978) (constitutional violation for failing to instruct on presumption-of-innocence with other instructions were minimal).

54. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 52 (2d ed. 1986).

55. *Id.* at 54.

56. *Id.* at 55.

57. FEDERAL JUDICIAL CENTER, *PATTERN CRIMINAL JURY INSTRUCTIONS* 4 (1987).

58. GERTNER & MIZNER, *supra* note 20, at 9-4.

59. LAFAVE & ISRAEL, *supra* note 28, at 1043.

deliberation room, perhaps due to a concern that deliberations would be lengthened considerably and that the cost of immediate transcription would be high.<sup>60</sup> There is no minimum or maximum jury deliberation time, although after lengthy deliberations, juries may decide that they are unable to reach a unanimous decision; the judge may at that point declare the jury hung and order a mistrial. In these cases, a new jury can be empaneled and the state may retry the defendant.

## VI. THE JUDGMENT

Professional judges may occasionally set aside a jury's guilty verdict if the judge finds the verdict clearly against the weight of the evidence.<sup>61</sup> The judge may set a new trial, but may not substitute a different guilty verdict or qualify the jury's verdict.

As noted above, American courts sentence defendants in a separate proceeding after the guilt determination. Defendants have no constitutional right to a jury in sentence determination, and few states allow the juries a role except in capital cases.<sup>62</sup> Florida, for example, allows jurors to recommend sentences in non-capital cases.<sup>63</sup> A substantial number of jurisdictions also make limited use of jury sentencing in non-capital cases, such as for "special offender" sentencing or for special sanctions. A few states make more general use of jury sentencing, such as providing for jury sentencing in all felony cases. A fairly recent law review article noted eight states that allow juries to determine sentences in non-capital cases, primarily in the South (e.g., Arkansas, Kentucky, Mississippi, Virginia).<sup>64</sup> Proponents of jury sentencing rely on justifications similar to those for jury nullification, such as the ideals of juries reflecting the common sense and community attitudes towards crime and punishment; whereas, opponents favor the arguments of greater education and recurrent experience used in judicial sentencing.<sup>65</sup>

In capital cases, where most states allow jury participation in sentencing (although there is no constitutional right to capital sentencing by a jury),<sup>66</sup> the jury must weigh mitigating circumstances and aggravating circumstances in coming to its decision between life imprisonment and a death sentence.<sup>67</sup>

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60. *Id.*

61. *Jackson v. Virginia*, 443 U.S. 307, 319-24 (1979).

62. 26 MOORE ET AL., *supra* note 43, at ¶ 632.21[5][a].

63. MILLER & WRIGHT, *supra* note 19, at 1620.

64. Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U. J. URB. & CONTEMP. L. 3, 4 (1994).

65. *Id.* at 18-19.

66. *Spaziano v. Florida*, 468 U.S. 447, 464 (1984).

67. 26 MOORE ET AL., *supra* note 43, at ¶ 632.21[6][b]; LAFAVE & ISRAEL, *supra* note 28, at 1093.

When juries are involved in non-capital sentencing, they are generally allowed to set the maximum term of an indeterminate sentence of incarceration, staying within the upper-limit for the offense set by the legislature. Minimum sentences are set by law. Although bifurcated systems of trial are predominant in capital cases, the Supreme Court has upheld the constitutionality of unitary trials as well.<sup>68</sup> Although a judge may have the authority in some cases to impose a sentence of death notwithstanding a jury recommendation of a life sentence, there may be special limitations on this procedure.<sup>69</sup>

Four states have statutes allowing a judge to override the jury's recommendation of life imprisonment and impose the death penalty (Florida, Alabama, Delaware, and Indiana).<sup>70</sup>

## VII. APPEALS

Except when the state has not had one clear and fair chance to convict, as in cases where juries were bribed, the prosecution can never appeal a not-guilty verdict. “[W]e necessarily afford absolute finality to a jury’s verdict of acquittal—no matter how erroneous the decision . . .”<sup>71</sup> “A verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting a [defendant] twice in jeopardy, and thereby violating the Constitution.”<sup>72</sup> A key reason the state might be denied its fair chance to convict would be if another party bribed or otherwise tampered with the jury, a crime under state and federal law.<sup>73</sup>

Although the state cannot appeal an acquittal, the defendant can appeal a conviction on several grounds. He can request either the trial judge or an appellate court to set aside the verdict as against the weight of evidence.<sup>74</sup> In granting this motion, the judge is essentially saying that no reasonable jury could have convicted the defendant. The trial judge’s decision on this motion is appealable by both sides. Additionally, the judge’s instructions to the jury can be attacked as an erroneous statement of the law that improperly led the jury to convict; this provides a routine basis for defendants to challenge convictions.<sup>75</sup>

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68. *Spencer v. Texas*, 385 U.S. 554, 568-69 (1967).

69. LAFAVE & ISRAEL, *supra* note 28, at 1088.

70. LaTour Rey Lafferty, *Florida’s Capital Sentencing Jury Override: Whom Should We Trust to Make the Ultimate Ethical Judgment?*, 23 FL. ST. U. L. REV. 463, 463-64 (1995).

71. *Burks v. United States*, 437 U.S. 1, 16 (1978).

72. *United States v. Martin Linen Supply*, 430 U.S. 564 (1977) (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)).

73. 28 U.S.C. § 1503 (Supp. IV 1992).

74. FED. R. CRIM. P. 29(a).

75. *See, e.g., United States v. Sun-Diamond Growers*, 526 U.S. 398, 412-14 (1999).

In addition, defendants can collaterally attack the jury's finding of fact through a writ of habeas corpus.<sup>76</sup> Defendants can also challenge convictions based on other decisions the judge made during the trial, such as improper exclusion or admission of evidence, or permitting the prosecutor to make improper arguments to the jury. Finally, convictions can be challenged under other constitutional rules not directly connected to the prosecution's or judge's actions at trial, such as the incompetence of defendant's trial counsel,<sup>77</sup> or because defendant's indictment was issued by an improperly constituted grand jury.<sup>78</sup>

In limited circumstances, verdicts can be overturned based solely on discovery of new evidence. "The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice . . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgement, but if an appeal is pending the court may grant the motion only on remand of the case."<sup>79</sup> In many state court systems, new trial motions based on newly discovered evidence is limited to a short post-verdict period. In Virginia, for example, the motion for a new trial must be made within three weeks of judgment.<sup>80</sup> In Virginia, absent such a motion, the only available remedy is a petition for habeas corpus in either state or federal court.<sup>81</sup> In the federal courts, after two years have passed, the defendant may make a collateral attack on the judgment, but is required to show that the facts upon which the appeal rests "could not have been discovered previously through the exercise of due diligence."<sup>82</sup>

Also, the common law writ of coram nobis is used to grant relief to a convict who seeks review of his case based on new evidence. An essential requirement for the use of this writ is that the evidence was unknown and could not have been known to the defendant before or during his trial.<sup>83</sup> Because of the protection against double jeopardy, a judge has no power to order a new trial on his own motion; she can do so only in response to a motion by the defendant.<sup>84</sup>

Appellate judges evaluate the minimal sufficiency of the evidence, but they do not otherwise re-evaluate the evidence itself. Appeals based on

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76. 28 U.S.C. § 2254(d)(2) (Supp. III 1997).

77. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

78. FED. R. CRIM. P. 6(b)(2).

79. FED. R. CRIM. P. 33.

80. VA. SUP. CT. R. 3a:15(b).

81. *Woodfin v. Commonwealth*, No. 1043-88-3, 1991 WL 832013, at \*1 (Va. Ct. App. April 2, 1991).

82. 28 U.S.C. § 2254(e)(2)(A)(ii) (2001).

83. 18 AM. JUR. 2d *Coram Nobis* § 2 (1985).

84. *United States v. Smith*, 331 U.S. 469, 473-74 (1947).

insufficiency of the evidence are not *de novo* reviews of that evidence. Either the trial judge, or an appellate court reviewing the conviction on direct appeal, may set aside a jury's guilty verdict as against the weight of the evidence.<sup>85</sup> (Because the prosecution cannot appeal acquittals, appellate courts do not face analogous issues with respect to acquittals.) Collateral appeals—review of the constitutionality of the conviction after direct appeals have been exhausted—presume that the trial court fact-finding is correct, although the defendant can rebut this presumption by clear and convincing evidence.<sup>86</sup> Federal courts can review state court convictions through this mechanism, and states are also required to have an equivalent post conviction procedure within state court systems that is sufficient to review deprivations of constitutional rights under the Federal Constitution. A writ of *coram nobis* is a traditional and adequate form of this post-conviction remedy.<sup>87</sup>

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85. *Jackson v. Virginia*, 443 U.S. 307, 319-24 (1979); FED. R. CRIM. P. 29.

86. 28 U.S.C. § 2254(d) (2001).

87. *See* AM. JUR.2D, *supra* note 83, at § 1.

## VIII. CIRCUMVENTING THE JURISDICTION OF THE JURY

In the vast majority of U.S. jurisdictions including the federal courts, more than ninety percent of all criminal charges are resolved through plea bargaining, without a trial. Yet the rate of jury trials is typically much higher for serious offenses. About forty percent of murder charges go to trial, and twenty-five percent of rape charges. Despite the relatively low percentages, U.S. state courts still conduct nearly 100,000 jury trials a year.<sup>88</sup> Moreover, the possibility of a jury trial affects many of the cases that are resolved through plea bargaining. Attorneys and parties often negotiate terms in light of how they expect a jury would decide a case, and some prosecution offices explicitly evaluate charging decisions in light of predicted jury behavior.<sup>89</sup> The practice of a “plea discount”—an offer of a lesser sentence for pleading guilty than a defendant would receive if he insisted on a jury trial and was convicted—is widespread in American jurisdictions. Because it is not a formal, explicit practice, however, it is difficult to measure. Some estimates put the discount in federal courts at thirty to forty percent. Constitutional law supports such efforts to discourage jury trials with strong presumptions that prosecutors offer bargains only for proper reasons and with rules that allow prosecutors to increase charges if defendants reject plea bargain offers.<sup>90</sup>

IX. WHO ARE JURORS AND HOW ARE THEY SELECTED?<sup>91</sup>

The Sixth Amendment to the U.S. Constitution guarantees that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” The United States Supreme Court has interpreted “impartial jury” to mean that the jury pool, or venire, must be drawn by procedures

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88. MILLER & WRIGHT, *supra* note 19, at 1379-80 (reporting that in 1994, state courts conducted 98,883 jury trials).

89. See JEFFREY ABRAMSON, WE, THE JURY 5-7 (1994); MILLER & WRIGHT, *supra* note 19, at 967 (statement of Philip Heymann, Attorney, to U.S. Congress, April 23, 1980) (describing charging policy of federal prosecutors that decisions not to prosecute may be made in part after assessing the prospect of jury nullification).

90. See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (approving, under constitutional due process clause, prosecutor’s decision to increase charges after defendant rejected a plea bargain offer); U.S. SENTENCING COMM’N, SUPPLEMENTAL REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 48 (1987); David Brereton & Jonathan Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC’Y REV. 45 (1981-82) (discussing plea discount practices).

91. The first portion of this section is based on, and borrows heavily from, Darryl K. Brown, *The Means and Ends of Representative Juries*, 1 VA. J. SOC. POL’Y & L. 445, 448, 451-58 (1994) (reviewing HIROSHI FUKARAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 18, 45 (1993)).

designed to yield a fair cross-section of adult citizens in the community.<sup>92</sup> This requirement covers all state as well as federal courts, and Congress adopted this as federal statutory policy.<sup>93</sup> Thus, jurors need not meet any requirement for legal expertise or other education.

United States courts have traditionally turned to two sources of citizen names to compose jury pool lists: voter registration rolls and, less often, driver registration records.<sup>94</sup> Both are typically the most comprehensive single-source lists available in most jurisdictions, but each has significant deficiencies with regard to inclusiveness and representativeness. Neither is necessarily co-extensive with a list of qualified jurors; one may be eligible for jury service and yet not be registered to vote, much less a licensed driver. As a result, voter lists rarely meet the two goals of jury lists—inclusion of every eligible citizen and representation of all segments of the community. For a variety of historical and social reasons, and because voter registration in the United States depends on voluntary efforts by the citizen, voter rolls typically under-represent poor citizens and people of color.<sup>95</sup> Voter rolls are estimated to exclude up to one-third of the adult population, skewing the jury pool to over-represent the elderly and relatively affluent and to under-represent racial minorities.

A minority of jurisdictions has made efforts to improve the representativeness of the jury wheel by supplementing voter rolls with other sources of citizen names, typically driver registration records.<sup>96</sup> Yet driver lists also somewhat under-represent low-income citizens and racial minorities, as well as the elderly and women. A few other source lists, such as public benefits records, property tax records, and annual local census data, are available but are not in widespread use and are likely to have comparable problems of under-inclusiveness.<sup>97</sup>

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92. The traditional view of jury selection rests on the older, pre-cross-section vision of juries, which assumed that the best jurors are active, upstanding citizens of good moral character, and in that respect are an elite subgroup of the community. This pre-cross-section vision does not accord with the contemporary notion of impartiality that depends upon a representative cross-section of citizens.

93. 28 U.S.C. § 1861 (1994).

94. HIROSHI FUKARAI ET AL., *supra* note 91, at 18, 45.

95. Congress made its first significant effort to correct that under-representation with the Voting Rights Act of 1965, 42 U.S.C. § 1971 (1994), which eased restrictions on voter registration in a variety of ways. Two decades after those reforms, however, Congress still recognized a need for the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg (1994), to improve registration rates.

96. FUKARAI ET AL., *supra* note 91, at 46-47.

97. The problem of combining two or more source lists creates problems of name duplication that are surprisingly difficult to remedy; some jurisdictions have conceded their computer programs cannot eliminate all duplicate names.



Further, studies reveal extreme variations in representation of various neighborhoods, or census tracts, within a given judicial district; jurors are not summoned equally from all neighborhoods within the district. For example, “a three-month study of jury representation in Los Angeles in 1985 revealed that . . . areas [within a defined judicial district] with high concentrations of racial and ethnic minority residents were systematically excluded from jury service.”<sup>98</sup> Over the period of study of another locality near Los Angeles, half the jurors called lived in just thirty-five of the jurisdiction’s 538 census tracts—or 6.5% of the district. On the other hand, 60.6% of the census tracts in the district (i.e., 326 tracts) had not one juror called from them; another 117 census tracts (21.7% of the district) had no more than four jurors called.<sup>99</sup>

Virtually all American jurisdictions exclude certain groups of citizens from jury service. Convicted felons are typically barred from juries, and many states exclude members of certain occupations, such as law enforcement officials, judges, lawyers or physicians. Additionally, any citizen who asserts that she cannot be unbiased in a given case, either because of her knowledge of the parties, the circumstances of the case, or strong disagreement with the applicable law, will be excluded from service in a particular case (though not from jury service generally).<sup>100</sup>

Once court officials summon a group of citizens for jury service, the parties are entitled to at least a minimal opportunity to obtain information from the jurors. Practices regarding this questioning of jurors (known as “voir dire”) varies widely among jurisdictions. Some courts allow the parties’ attorneys to question jurors extensively and individually; in others, the judge will conduct all questioning (or sometimes give jurors a written questionnaire for which the parties can submit questions) and keep the questions very limited. Beyond this formal questioning in court and supervised by the judge, parties often may obtain jurors’ names before trial and typically are not forbidden to conduct their own investigations into jurors’ backgrounds. State prosecutors frequently will check jurors’ criminal records (information which they sometimes are required to share with the defense).<sup>101</sup> Private investigation by the defense occurs only in rare trials with wealthy parties. In rare cases in which the court finds a risk of jury tampering or excessive publicity, federal rules, as well as those in many states, permit jurors to serve anonymously so that their identities

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98. FUKARAI ET AL., *supra* note 91, at 30.

99. *Id.*

100. *See, e.g.*, TEX. CRIM. PROC. CODE ANN. § 35.16 (1989).

101. *See* Lance Salyers, *Invaluable Tool v. Unfair Use of Private Information: Examining the Use of Jurors’ Criminal History Records by Prosecutors in Voir Dire*, 56 WASH. & LEE L. REV. 1079 (1999) (surveying state laws).

are concealed from the parties.<sup>102</sup> Even without jurors' names, an industry of jury consultants serves wealthy parties who do demographic research on citizens in a given locality to aid parties in determining the type of jurors they may want to seek or avoid.

After jurors have been questioned in court and immediately before they are impaneled for the start of the trial, parties may request that the court remove any jurors who are by law disqualified from serving on a particular case (because of an admitted bias or a close relation to the parties, witnesses or attorneys). Finally, after the court has certified a group of potential jurors as qualified, the parties in all jurisdictions are granted a number of "peremptory strikes" (the number they are granted varies widely among states)<sup>103</sup> which they may use to remove any qualified jurors whom they do not want on the jury. The only limitation on use of peremptory strikes is that parties may not remove jurors based on racial or ethnic discriminatory intent.<sup>104</sup> As one example of the effect of peremptory strikes, in 1993, about twenty percent of all federal jurors were excluded by peremptory strikes.

Jurors are typically paid a small amount per day or week of service; fees vary widely by locality and seem to range from \$5 to \$50 per day. Rules also vary widely as to how long a juror must serve beyond a single trial. Some jurisdictions adopt a "one week or one trial" rule, meaning jurors are excused from service after either a single trial<sup>105</sup> or a week of being in the jury pool called to the courthouse but not selected for a trial. Other jurisdictions summon jurors to the courthouse periodically over several weeks, meaning that some jurors may serve on more than one trial in that period. After that service, their names are returned to the jury list. In theory citizens are unlikely to be summoned again soon for service, but in most jurisdictions their next period of service is a matter of chance and may occur in the same year or several years later.

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102. See, e.g., Benjamin Weiser & Joseph Berger, *Jury Anonymity Is Seen as Pivotal Factor in Gotti's Plea Talks*, N.Y. TIMES, April 7, 1999, at B1 (federal court judge kept jurors' names secret from the parties).

103. MILLER & WRIGHT, *supra* note 19, at 1447 (surveying state laws and noting that in federal courts, defendants get ten strikes but the government only gets six).

104. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (extending *Batson* to bar racially discriminatory peremptory strikes by defendants); *Powers v. Ohio*, 499 U.S. 400, 415-16 (1991) (extending *Batson* so that any person, regardless of race, can raise a claim of racially discriminatory peremptory strikes); *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (easing the evidentiary burden need to prove a claim of racially discriminatory peremptory strikes by a prosecutor, in violation of the equal protection clause of the U.S. Constitution).

105. Most jury trials are short, lasting one to three days. In 1995 in federal courts, 42.8 percent of the 7,421 jury trials conducted lasted a day or less; 16.8 percent took two days; another 12.7 percent were completed in three days. Only 1.5 percent took longer than 20 days. See MILLER & WRIGHT, *supra* note 19, at 1379-80.

## X. HISTORY OF THE AMERICAN JURY

American jurisdictions, beginning in the colonial period, adopted the English common law tradition of juries for criminal trials. The U.S. Constitution confirmed this tradition with the Sixth Amendment's guarantee of a jury trial, with jurors from the locality in which the crime was committed. Although that right initially applied only to federal courts, all colonies (and later, all states) similarly guaranteed state court jury trials in their respective state constitutions. Juries initially had broad authority to decide questions of law as well as fact, and sometimes received conflicting instructions—or no instructions—from judges.<sup>106</sup> As noted above, although several state constitutions still say that juries “shall be the judges of the law and the facts,” the overwhelming U.S. practice is now that jurors apply law given to them by judges and otherwise make only fact decisions.

XI. EMPIRICAL STUDY OF JURY DECISION-MAKING<sup>107</sup>

A large body of social science literature addresses a wide range of issues related to jury decisionmaking.<sup>108</sup> A leading cognitive psychological model of jury decisionmaking—Pennington and Hastie's “story” model—concludes that jurors selectively evaluate evidence and create intuitively coherent narrative structures, or stories, that allow them to make sense of evidence. Once given the law and verdict categories by the judge, jurors seek the best match between the story representations of the evidence and their memories of verdict categories. If it finds a “subjectively satisfactory” match, the jury renders a verdict.<sup>109</sup> The story model suggests that jurors impose on the trial information—both relevant evidence and other available facts and social data—a narrative story organization. That story is shaped by their knowledge of similar events—for example, knowledge of similar crimes, or similar patterns of human behavior—and by generic expectations about necessary story elements—for example, human motivations.<sup>110</sup>

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106. ABRAMSON, *supra* note 89, at 22-45; Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994).

107. This section of the paper borrows heavily from Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1216-38 (1998).

108. See REID HASTIE ET AL., *INSIDE THE JURY* (1983). Much of this research relates to issues such as how credible jurors find eyewitness identifications, or how race, class, and gender differences affect assessments of credibility and other factfinding tasks.

109. Reid Hastie, *Introduction* to *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 26 (Reid Hastie ed., 1993).

110. Other researchers have reached similar conclusions using different research methods. Bennett and Feldman, drawing from their ethnographic studies of real jury trials, emphasize that jurors necessarily situate evidence-based stories within a preexisting social context that includes

There has been considerable empirical study of “extralegal” influences on jury decision-making, ranging from demographic factors—race, gender, age, economic status—to social attitudes and political ideology. Many such factors affect, to varying degrees, which facts jurors remember or emphasize and which final judgments seem more plausible or preferable. While such considerations are the stock-in-trade of trial lawyers’ jury-selection strategies, many correlate so weakly with verdict choices that they are ineffective predictors of juror behavior.<sup>111</sup>

Case-relevant attitudes or ideological commitments probably affect decisions most strongly. Ellsworth found in one study, for example, that attitudes toward capital punishment, which correlate with a collection of views about crime and the criminal justice system generally, subtly affect a range of small decisions that go into criminal-verdict choices.<sup>112</sup> Such attitudes affect perceptions of the plausibility of witnesses, the availability of alternative cognitive “scripts” or stories for making sense of the evidence, the possibility of mistaken conviction, and the individual sense of how much doubt constitutes reasonable doubt.<sup>113</sup> Such information and ideology seemed to affect verdicts by indirectly influencing the construction of a knowledge structure to interpret and summarize evidence of the case.<sup>114</sup>

Two points about these findings are important here. First, attitudes, though apparently stronger than demographic distinctions, have proven generally ineffective as predictors of final decisions because other factors—including evidence and trial procedures—suppress their controlling effects.<sup>115</sup> Several studies confirm that when evidence is relatively strong, the influence on juries of legally irrelevant facts as well as moderate disagreements with substantive rules is minimal.<sup>116</sup> The effect of such factors increases in close cases, but the variation in outcomes does not substantially differ from those the justice

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criteria for a coherent, plausible story of human conduct. Their findings describe a contextual approach to reasoning that situates factfinding within preexisting assumptions about human conduct. They find as well that jurors have a fairly consistent goal of reaching decisions consonant with notions of justice.

111. See Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUM. BEHAV. 1, 3 (1987) (summarizing research literature).

112. See Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING, *supra* note 109, at 42.

113. See *id.* at 58.

114. See Jonathan D. Casper & Kennette M. Benedict, *The Influence of Outcome Information and Attitudes on Juror Decision Making in Search and Seizure Cases*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING, 65-82 (1993).

115. See GUNTHER, *supra* note 24, at 57-58 (citing sources).

116. See, e.g., Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 L. & SOC’Y REV. 781, 795-95 (1979).

system produces without the jury.<sup>117</sup> More important, attitudinal and ideological biases are hardly limited to jurors, which diminishes their relevance for a specifically jury-focused theory of interpretation. An extensive and growing body of political-science literature examines attitudinal influences on judicial decision-making, particularly in Supreme Court opinions.<sup>118</sup> Like attitudinal studies of juries, research on judicial ideology suggests that judges' political and social attitudes substantially affect decisionmaking. Together, the research simply suggests that any human decisionmaker is significantly affected by ideological predispositions that legal training cannot suppress.

Several studies have examined a topic closely related to ideological influences—the effects of jurors' notions of justice related to specific, factual scenarios. Finkel tested whether popular attitudes regarding the felony-murder rule<sup>119</sup> and accessory liability affected verdicts when jurors had to apply those two rules in a death-penalty prosecution.<sup>120</sup> Two points are especially interesting. First, Finkel identifies a widely held value—proportionality—through which jurors apparently mediate the application of law.<sup>121</sup> Second, he

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117. *See, e.g.*, DONALD BLACK, *THE BEHAVIOR OF LAW* (1976) (arguing from empirical evidence that legal outcomes consistently vary across forums and legal institutions with such legally irrelevant, social factors as the wealth or social status of parties); DONALD BLACK, *SOCIOLOGICAL JUSTICE* (1989).

118. *See, e.g.*, ROBERT A. CARP & C.K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* (1983) (arguing from empirical data that judicial attitudes—personal values and backgrounds as well as regional customs—affect decisions, particularly in close cases); SHELDON GOLDMAN & THOMAS P. JAHNIGE, *THE FEDERAL COURTS AS A POLITICAL SYSTEM* 134-84 (2d ed. 1985); GLENDON SCHUBERT, *THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY* (1974) (describing an attitudinal theory of Supreme Court decision making); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); Harold J. Spaeth, *The Attitudinal Model*, in *CONTEMPLATING COURTS* 296 (Lee Epstein ed., 1995); *see also* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 88-91 (1991) (recounting blatant judicial bias in legal interpretation on civil rights issues); *id.* at 332-35 (describing lower courts' resistance to criminal procedure mandates that conflict with local practices).

119. The felony-murder rule holds a defendant guilty of murder if an unlawful killing occurs during the course of a felony, whether or not the killing was intentional. *See* JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 31.06, at 479 (1995).

120. NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW* 159-71 (1995); Norman J. Finkel & Kevin B. Duff, *Felony-Murder and Community Sentiment: Testing the Supreme Court's Assertions*, 15 *LAW & HUM. BEHAV.* 405 (1991); Norman J. Finkel & Stefanie F. Smith, *Principals and Accessories in Capital Felony-Murder: The Proportionality Principle Reigns Supreme*, 27 *LAW & SOC'Y REV.* 129 (1993).

121. Discussing findings of proportionality sentiment, jurors apparently felt strongly that just outcomes required treating accomplices less severely than principal perpetrators in felony-murder scenarios, although criminal law dictates equal liability for them. *See* FINKEL, *supra* note 120, at 169-71.

identifies instruction language that changes many verdicts but does not fully control them in the sense of producing outcomes we would expect from uniform, literal application of legal rules.<sup>122</sup> Thus, the study identifies jurors struggling between strong, widely held norms and conflicting criminal law rules, a struggle mediated by interpretation of instructions. It seems some jurors resolve that tension by applying statutes literally and against personal or community preferences; others resolve it against literal application, by either ignoring the instruction or creatively interpreting it.

Relatedly, Robinson and Darley recently have documented several contexts in which popular notions about what legal rules are or should be depart from common law rules or contemporary criminal codes.<sup>123</sup> They found, for example, that most of their survey respondents—like Finkel’s mock jurors—would assign less liability to accomplices than principal perpetrators, in contrast to most criminal codes.<sup>124</sup> Across a range of criminal law issues, including the role of harm and renunciation in attempts and failures to rescue,<sup>125</sup> they found that subjects—just as Kalven and Zeisel detected among real jurors—make “more nuanced distinctions between similar but not identical cases” than criminal codes do.<sup>126</sup> The findings show that individualized assessments of moral culpability, sensitive to circumstances and background norms, are not only a theoretical goal of criminal law, they are also part of the popular understanding of criminal law’s purpose. Yet, the results of Robinson and Darley’s study do not mean people vote for personal outcome preferences

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122. Jurors given a “conclusive presumption” instruction convicted defendants of felony-murder more frequently than those who received a “nullification” instruction, which informed them they had the “final authority to decide whether or not to apply a given law,” to which they need only give “respectful attention.” See Finkel & Smith, *supra* note 120, at 148 (reprinting instructions); *id.* at 153-154 (discussing experiment results).

123. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 13-51 (1995).

124. See *id.* at 41-42. (for a similar finding in a mock-juror studies); FINKEL, *supra* note 120, at 154-71.

125. Robinson and Darley’s subjects gave weight to whether harm occurred, thus punishing criminal attempts less severely than completed offenses and allowing a renunciation defense for attempts that were nearly complete and for which most codes allow no such defense. They also detected clear community sentiment for a rule requiring a higher threshold for attempt liability than the prevailing rule—that is, the actor must be in “dangerous proximity” of completing the crime rather than merely taking a “substantial step” toward completion. Additionally, subjects supported liability for failing to rescue others in distress, though most codes impose no such liability. See ROBINSON & DARLEY, *supra* note 123, at 13-51.

126. See *id.* at 50. As part of that inclination toward fine-tuned judgments, respondents also supported grading of offenses on a long continuum that distinguishes between offenses even more finely than the eight or nine grades of offenses now typical in most codes. See *id.* at 198.

when they become jurors.<sup>127</sup> Assigned the role of juror, one may feel a stronger obligation to ignore personal sentiments and apply the legal rules conveyed through instructions fairly literally.

Social science research has demonstrated that jurors do not consistently apply jury instructions literally. One explanation for these findings is that jurors simply do not understand the instructions.<sup>128</sup> They may not remember rules or statutory elements they are given through instructions, and they may misunderstand rules of which they have some memory, particularly if they have strong preconceptions about the alleged crime.<sup>129</sup> Yet two qualifications are important. First, the methodology used in some studies likely exaggerates the amount of miscomprehension. Some of the studies that identify juror misunderstanding of statutes survey jurors individually at some point after they have been instructed and find significant errors in retention and comprehension by individuals.<sup>130</sup> Yet, as Hastie has argued and supported with data, juries as a group likely understand instructions better than any single member does. Hastie's study of a large set of mock juries found jury memory averaged slightly over eighty percent for information from judge's instructions, if one credits a jury with recall of information that any one juror remembers.<sup>131</sup> He also documented significant correction of jurors' legal errors by other jurors during deliberations, a factor other studies did not explore.<sup>132</sup>

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127. The purpose of Robinson and Darley's study primarily was to identify popular consensus about the appropriate content of legal rules, which rule drafters could use to inform their revision of rules. *See id.* at 215.

128. *See* AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 3-24 (1982); VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY, 121-24 (1986); Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 S. CAL. L. REV. 159, 170-75 (1994); Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153 (1982).

129. *See* David A. Schum & Anne W. Martin, *Formal and Empirical Research on Cascaded Inference in Jurisprudence*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING, *supra* note 109, at 168-72; Severance & Loftus, *supra* note 128, at 157-61, 194; Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 LAW & HUM. BEHAV. 507, 509-11 (1993).

130. *See* Casper & Benedict, *supra* note 114, at 80; Reid Hastie, *Algebraic Models of Juror Decision Process*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING, *supra* note 109, at 88-89; Schum & Martin, *supra* note 129, at 168-170; *see also* ELWORK ET AL., *supra* note 128, at 3-24 (discussing problems with jury instructions in general).

131. *See* Casper & Benedict, *supra* note 114, at 81.

132. *See id.* at 80-81 (noting that individual jurors answered questions on instructions with thirty percent accuracy, but a "more meaningful examination of memory" found the jury's collective memory of instructions was over eighty percent accurate); *see also* FINKEL, *supra* note 120, at 283 (discussing empirical studies "show[ing] that jurors do not ignore or willfully disregard instructions but that they remember and comprehend them").

More importantly, the blame for jurors' lack of understanding lies to a significant extent with courts rather than juries. Courts could substantially improve jury comprehension of instructions with two sorts of changes: rewriting them to reduce complexity and legal terminology, and improving the manner in which instructions are presented. Traditionally, jurors receive instructions orally from the judge at the end of trial and often cannot take written notes.<sup>133</sup> Studies indicate comprehension could substantially improve if jurors received written copies of instructions to take to the jury room, if they received key instructions at the start as well as the end of the trial, and if instructions were written in shorter sentences using fewer arcane terms.<sup>134</sup> (Even Hastie's findings are based on juries that received instructions in a manner now known to limit comprehension: jurors received instructions only once, and only orally from the judge.)<sup>135</sup>

More generally, considerable evidence suggests that jurors are conscientious about and committed to following instructions and correctly applying rules, and they believe they understand most instructions.<sup>136</sup> More

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133. See, e.g., ARTHUR D. AUSTIN, COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY 55-65 (1984) (discussing juror comprehension of instructions in a case that was tried to two juries because the first jury hung, with only the second jury receiving written copies of the instructions and pretrial, verbal instructions); see also ABRAMSON, *supra* note 89, at 91 (describing "judges' furious, quick-paced, jargon-laced set of instructions" to juries).

134. See AUSTIN, *supra* note 133, at 60-65 (noting that the instructions in the case under study averaged 102 words per sentence, while modern American prose averages twenty-one words and were written at a "sixteenth grade level" requiring graduate education to comprehend fully); ELWORK ET AL., *supra* note 128, at 3-24, 35-56; Joseph B. Kadane, *Sausages and the Law: Juror Decisions in the Much Larger Justice System*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING, *supra* note 109; Raymond W. Buchanan et al., *Legal Communication: An Investigation into Juror Comprehension of Pattern Instructions*, COMM. Q., 31, 32-35 (1978) (finding that jurors given pattern instructions show better comprehension of law than uninstructed subjects); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) (finding improved comprehension when instructions are rewritten); Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 LAW & HUM. BEHAV. 159 (1985) (finding that mock jurors' decisions are affected by changes in burden-of-proof instructions); Vicki L. Smith, *Impact of Pretrial Instructions on Jurors' Information Processing and Decision Making*, 76 J. APPLIED PSYCHOL. 220 (1991) (finding that instructing jurors before as well as after trial improves juror comprehension).

135. See Hastie, *supra* note 109, at 17; Ellsworth, *supra* note 112, at 49-50; Schum & Martin, *supra* note 129, at 169; see also Smith, *supra* note 134, at 231 (recommending that jurors be given written copies of instructions and instructed more than once on key rules).

136. See GUINTEHER, *supra* note 24, at 59 (concluding, based on new studies and a review of research, that "jurors generally attempt to follow all . . . instructions the judge gives them"); *id.* at 73 (finding that most jurors surveyed "believed they understood 'most' of what the judge told them about the law, and they might not be wrong"); *id.* at 89 (reporting that forty-six percent of jurors said the law given by the judge was the most important factor in their decisions); *id.* at 100



important, the largest studies of real and mock jury trials find that jurors reach the result that lawyers and judges consider correct an overwhelming majority of the time.<sup>137</sup> Thus, despite evidence of miscomprehension, jurors' attempts to follow instructions are often generally successful.<sup>138</sup> They appear to understand, as a group, enough of the law usually to render acceptable verdicts.<sup>139</sup>

Several studies employing mock jurors have demonstrated that jury instructions have significant effects on verdicts, leading jurors to decisions different from ones they would reach with different instructions or none at all. Sanders and Colasanto tested the effects of general intent versus specific intent instructions on a set of mock juries deciding a case in which the defendant was accused of stealing from vacant property old bricks that he claimed to believe were abandoned.<sup>140</sup> As they should, juries more frequently convicted the defendant under the general-intent instruction, which required only intent to do the act — admitted by the defendant — rather than intent to violate the law.<sup>141</sup> Sanders and Colasanto concluded that “juries do use judicial instructions in deciding cases” and do feel constrained by the most restrictive instructions to convict despite personal sentiments.<sup>142</sup> “[J]ury decision making appears to be more principled than when the effect of instructions is left unexamined” and generally “can be rational and principled.”<sup>143</sup>

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(reporting a survey of civil trial attorneys that found more than ninety percent agreed that jurors had grasped legal issues well).

137. See GUNTHER, *supra* note 24, at 73; Ellsworth, *supra* note 112, at 59-60 (finding most mock juries in a homicide trial reached a verdict of second-degree murder—the correct verdict, in the lawyers' opinions—with manslaughter, the next most plausibly correct choice, occurring as the second most common verdict); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 429-30 (1966) (finding nine percent of jury verdicts clearly incorrect).

138. See, e.g., HANS & VIDMAR, *supra* note 128; Diane L. Bridgeman and David Marlowe, *Jury Decision Making: An Empirical Study Based on Actual Felony Trials*, *J. APPLIED PSYCHOL.* 91, 97-98 (1979) (concluding that “the jury by and large does understand the case and get it straight and . . . the evidence itself is a major determinant”) (quoting KALVEN & ZEISEL, *supra* note 14, at 162).

139. See GUNTHER, *supra* note 24, at 102.

140. The fact pattern in this experiment was based on *Morissette v. United States*, 342 U.S. 246 (1952). The general-intent instruction required the jury to find only that the defendant intended the act of taking the bricks, “and it is not necessary to establish that the defendant knew that his act was a violation of the law.” The specific-intent instruction required the jury to find that the defendant “knowingly did an act that the law forbids, purposely intending to violate the law.” See Joseph Sanders & Diane Colasanto, *The Use of Judicial Instructions in Jury Decision Making* 7-10 (n.d.) (unpublished manuscript, on file with author).

141. See Sanders & Colasanto, *supra* note 140, at 12-13.

142. See *id.* at 13, 17.

143. *Id.* at 13, 17-18.

The seminal American study examining the effect of instructions on juries—the Chicago Jury Project’s experiments on the insanity defense—found that instructions had a significant effect.<sup>144</sup> Tested with sixty-eight mock juries, the study found that juries given an insanity defense instruction based on the *M’Naghten*<sup>145</sup> case returned guilty verdicts significantly more often than juries given a *Durham*<sup>146</sup> instruction or an instruction with no legal standard, which presumably allowed community sentiment to provide the rule.<sup>147</sup> Jurors given the *Durham* instruction also deliberated longer.<sup>148</sup>

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144. See RITA JAMES SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 70-77, 184-85, 199 (1967).

145. *M’Naghten’s Case*, 10 C. & F. 200, 8 Eng. Rep. 718 (H.L. 1843), discussed in SIMON, *supra* note 144, at 8 (noting that “under the *M’Naghten* rule the defendant is excused only if he did not know what he was doing or did not know that what he was doing was wrong”). For the instruction given to mock jurors see SIMON, *supra* note 144, at 45.

146. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), discussed in SIMON, *supra* note 144, at 8 (noting the *Durham* rule “states that a defendant is excused if his act was the product of a mental disease or defect”). For the instruction given to mock jurors, see SIMON, *supra* note 144, at 45-46; see also *id.* at 72-73 (noting that the *Durham* instruction “produces a powerful difference in jurors’ verdicts” compared to the *M’Naghten* instruction).

147. The “standardless” instruction stated only: “[I]f you believe the defendant was insane at the time he committed the act of which he is accused, then you must find the defendant not guilty by reason of insanity.” SIMON, *supra* note 144, at 46; see also *id.* at 72-73 (summarizing jury verdict data for different instructions).

148. See SIMON, *supra* note 144, at 75.