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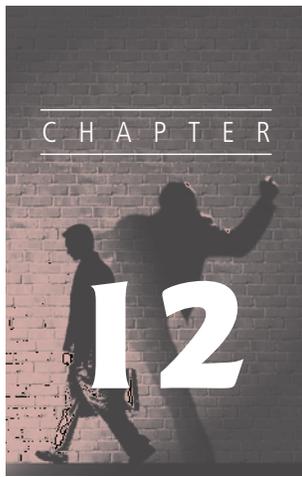
CRIMINAL COURTS

A CONTEMPORARY PERSPECTIVE



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The Criminal Trial



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Introduction

Opening Statements

The Presentation of Evidence

Calling Witnesses

Privileged Communications

Privilege Against Self-Incrimination

Evidence and Rules of Evidence

Types of Evidence

Rules of Evidence

Box: Current Controversy

Objecting to Introduction of
Evidence or Questions Asked

Closing Arguments

Instructing the Jury

Jury Deliberations and Verdict

The Verdict: Guilty or Not Guilty?

Box: Current Research
 Requirement of Unanimity
 Jury Nullification
Box: Current Controversy
 Hung Juries
Box: Comparative Courts
 Announcing the Verdict

*Box: Movies and the
 Courts*

Summary
Discussion Questions
Key Terms
Internet Sites
Student Study Site

Introduction

In August 2006, Samuel Dieteman and Dale Hausner were charged with a series of random shootings in the Phoenix metropolitan area. Authorities alleged that the two roommates killed eight people, wounded 17 more, and killed several animals in a 16-month crime spree that terrorized Phoenix and surrounding communities. In April 2008, Dieteman pled guilty to two of the murders and agreed to testify against Hausner at his trial. Hausner, who was facing eight counts of first-degree murder as well as dozens of other charges, pled not guilty and went on trial in September 2008. Hausner's jury trial, which lasted nearly 6 months, featured testimony by dozens of victims who survived the shootings, stabbings, and arsons that Hausner was charged with committing. It also featured the testimony of a jailhouse informant who claimed that Hausner had confessed to one of the shootings while they were in jail together and evidence of Hausner's involvement in the crimes that was provided by Samuel Dieteman. Dale Hausner himself spent several days on the stand; he denied that he had any role in the attacks and claimed that he had alibis for some of the dates when the crimes occurred.

The case went to the jury in late February 2009. After deliberating for more than 2 weeks, the jury found Hausner guilty of 80 crimes, including six counts of first-degree murder. During the penalty phase of the trial, the jury found 22 aggravating circumstances that justified sentencing Hausner to death. Hausner then waived his right to present mitigating evidence in support of a sentence of life in prison and indicated to the judge that he did not intend to fight for a life sentence. On March 28, 2009, Dale Hausner was sentenced to death.

The trial of Dale Hausner, which attracted the attention of the national media, was in many ways not your typical criminal trial. For example:

- Hausner was arrested in August 2006, but his trial did not conclude until March 2009, thirty-one months later. In contrast, the typical felony case is disposed of within 85 days. Even for violent crimes, the average time from arrest to adjudication is only 130 days (Bureau of Justice Statistics [BJS], 2010).

- Hausner pled not guilty, and his case was tried by a jury. In 2009, 98% of all convictions of felony defendants in large urban counties were the result of guilty pleas (BJS, 2012). Jury trials are the exception, not the rule.
- Hausner testified in his own defense, despite the fact that the Fifth Amendment to the U.S. Constitution provides that a defendant cannot “be compelled in any criminal case to be a witness against himself.” Many defendants exercise their right to remain silent at trial.
- The jury deliberated for more than 2 weeks before finding Hausner guilty. This no doubt reflects the complexity of the charges the jurors had to consider; they had to decide whether Hausner was guilty of 87 crimes, and they had to vote on each charge separately. Although there are no national data on the length of time that juries deliberate, one study of criminal trials in Oregon found that no jury deliberated for more than 8 hours and 20 minutes (Brunell, Chetan, & Morgan, 2007). The jury that found Dzhokhar Tsarnaev, the so-called Boston Marathon Bomber, guilty of all 30 counts against him deliberated for only 11-1/2 hours.
- Hausner was sentenced to death, which is a punishment that is rarely applied. In 2013, more than 10,000 persons were arrested for murder and nonnegligent manslaughter (Federal Bureau of Investigation, 2014), but only 83 persons were sentenced to death (Death Penalty Information Center, 2014).

Although the highly publicized trials of defendants such as Dale Hausner are not typical, they nonetheless are the trials that capture the public’s attention and, in many ways, define what people believe about the process of trial and adjudication in the United States. They also are the trials that are most likely to involve clashes between the prosecution and the defense over the selection of the jury, the admissibility of evidence, and the testimony and examination of witnesses. In short, they are the trials that best symbolize the adversarial nature of the criminal court system.

The purpose of this chapter is to describe the criminal trial, from the opening statements by the prosecutor and the defense attorney to the verdict by the judge or jury.

Opening Statements

After the judge has ruled on pretrial motions and the jury has been selected and sworn in, the trial begins with opening statements by the prosecutor and the defense attorney. Although neither side is required to make an opening statement and the statements themselves are not considered evidence, the prosecutor will almost always make at least a brief statement that explains the charges that have been filed and the evidence that is likely to be produced as the trial progresses. In his or her statement, the prosecutor might describe the crime, the defendant’s motivation for committing the crime, and the impact that the crime has had on the victim or the victim’s family. The prosecutor also might

walk the jury through the evidence, explaining the relevance of the evidence and demonstrating how the evidence will prove the defendant's guilt. For example, Joseph Hartzler was the attorney who prosecuted Timothy McVeigh for the bombing of the Murrah Federal Building in Oklahoma City that left 168 people dead, including 19 children from a day care center in the building. He concluded his opening statement by promising to meet the burden of proving Timothy McVeigh guilty beyond a reasonable doubt:

It's our burden to prove each of the elements for each of the counts. We will meet that burden. We will make your job easy. We will present ample evidence to convince you beyond any reasonable doubt that Timothy McVeigh is responsible for this terrible crime. You will hear evidence in this case that McVeigh liked to consider himself a patriot, someone who could start the second American Revolution. The literature that was in his car when he was arrested included some that quoted statements from the founding fathers and other people who played a part in the American Revolution, people like Patrick Henry and Samuel Adams. McVeigh isolated and took these statements out of context, and he did that to justify his antigovernment violence. Well, ladies and gentlemen, the statements of our forefathers can never be televised to justify warfare against innocent children. Our forefathers didn't fight British women and children. They fought other soldiers. They fought them face to face, hand to hand. They didn't plant bombs and run away wearing earplugs. (Entire opening statement available online at <http://www.law.umkc.edu/faculty/projects/ftrials/mcveigh/prosecutionopen.html>)

The defense attorney also has the opportunity to make an opening statement at the beginning of the trial. Often, the defense will remind the jurors that the defendant is presumed innocent until proven guilty and that the prosecution bears the burden of proving the defendant's guilt beyond a reasonable doubt. The defense may also remind the jurors that their duty is to ensure that justice is done and ask them to keep an open mind until they have heard all the evidence in the case. In the Timothy McVeigh case, defense attorney Steven Jones began his opening statement by stating that the evidence would prove not McVeigh's guilt but his innocence:

I have waited two years for this moment to outline the evidence to you that the Government will produce, that I will produce, both by direct and cross-examination, by exhibits, photographs, transcripts of telephone conversations, transcripts of conversations inside houses, videotapes, that will establish not a reasonable doubt but that my client is innocent of the crime that Mr. Hartzler has outlined to you. (Entire opening statement available online at <http://law2.umkc.edu/faculty/projects/Ftrials/mcveigh/defenseopen.html>)

In many jurisdictions, the defense attorney has the option of reserving the opening statement until the state has concluded its case and the defense case is about to begin. The advantage of this is that it allows the defense to size up the state's case, point out evidence that the state promised in its opening statement but failed to deliver, and generally respond more effectively to the evidence (or lack thereof) presented by the prosecution. On the other hand, deferring the opening statement means that the defense attorney does not get the opportunity early on in the trial to present his or her version of the case or to persuade the jury to view the evidence from the defense perspective.

The Presentation of Evidence

The introduction of evidence in the case begins with the prosecutor presenting the case for the state. This is because the prosecutor has the burden of proving the defendant's guilt beyond a reasonable doubt; the defendant is presumed to be innocent and therefore is not required to prove his or her innocence. It is important to point out that the presumption of innocence is not a prediction of the outcome of the case: Presuming the defendant's innocence does not equate to an expectation that the defendant will be found not guilty. Rather, as Herbert Packer (1968) pointed out, the presumption of innocence means that until there has been an adjudication of guilt by someone with the authority to make such a determination (that is, the judge or jury), the suspect is to be treated as if his or her guilt is an open question.

In making a case against the defendant, the prosecutor must prove the defendant's guilt "beyond a reasonable doubt." Although the U.S. Constitution does not explicitly address this issue, the due process clause has been interpreted to mean that every element of the offense in a criminal prosecution must be proved beyond a reasonable doubt. But what does this—beyond a reasonable doubt—mean? Jurors are typically informed that "reasonable doubt is a doubt based on reason, a doubt for which you can give a reason. It is not a fanciful doubt, or a whimsical doubt, nor a doubt based on conjecture" (Tanford, 1990, p. 78). In other words, the state is not required to prove its case with absolute certainty by eliminating all doubt—no matter how unreasonable—regarding the defendant's guilt from the jurors' minds.

To prove its case, the prosecution calls witnesses and introduces various types of evidence (see below for a discussion of the types of evidence and the rules for presenting evidence). After the prosecution has presented its direct case against the defendant—that is, the evidence designed to prove beyond a reasonable doubt that the defendant committed the crime—the defense presents its case. Often, the defense attorney will first move for a directed verdict of not guilty, which in some states is referred to as a judgment of acquittal. Essentially the defense attorney is asking the judge to rule that the

prosecution has not proven the defendant's guilt beyond a reasonable doubt. If the judge grants the motion, the defendant is discharged and the case is over. If, as is more likely, the judge rejects the motion, the case continues with the presentation of evidence, if any, by the defense.

THE IMPORTANCE OF THE PROOF BEYOND A REASONABLE DOUBT REQUIREMENT

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

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. . . . Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.

A DIRECTED VERDICT IN A MURDER CASE

South Carolina v. Arnold, Opinion No. 25892 (2004)

In 2004, the South Carolina Supreme Court upheld a lower court decision overturning the conviction of Eddie Lee Arnold for the murder of a Savannah child psychologist. The lower appellate court ruled that the judge should have granted the defense attorney's motion for a directed verdict of acquittal at the conclusion of the state's case. The South Carolina Supreme Court agreed, noting that the circumstantial evidence against Arnold was not sufficient to prove his guilt. The court was particularly critical of the fact that there was no evidence at all that put the defendant at the scene of the crime.

Like the state, the defense may call witnesses and introduce evidence. However, the defense is not required to do so; as noted earlier, the defense attorney does not have to prove the defendant's innocence. If the defendant does not have a valid defense and is not going to testify in his own defense, the defense attorney's strategy will be to create doubt in the minds of the jurors through cross-examination of the witnesses called by the prosecution.

Each witness who is called to testify in the case is questioned first by the side that called the witness. This is referred to as the direct examination of the witness. The lawyer for the opposing side then has an opportunity to cross-examine the witness. The attorney doing the cross-examination may try to discredit the testimony of the witness by getting the witness to contradict what he or she said on direct examination, by pointing out inconsistencies with statements made by other witnesses, by raising questions about the witness's motivation in testifying, or by getting the witness to admit to a criminal record or other facts that raise questions about the witness's credibility. Alternatively, the attorney simply may attempt to get the witness to say things that are consistent with the attorney's version of the facts. The cross-examination of the witness may be followed by a redirect examination, in which the side that originally called the witness is allowed to question the witness again so as to clarify or explain issues that were raised during the cross-examination. If an issue not raised before comes out during the redirect examination, the judge may allow a re-cross-examination.

To illustrate how this might work, assume that the prosecutor has called a witness in a criminal case involving the sexual assault of a woman by a man she met at a local bar. The witness is the victim, who testifies on direct examination that she met the suspect at the bar and, after a couple of drinks, agreed to accompany him to his apartment, where he sexually assaulted her. She describes the sexual assault and testifies that she asked the suspect to stop. She also testifies that the suspect drove her home after the attack. On cross-examination, the defense attorney asks her how much she had to drink at the bar and whether she was impaired when she arrived at the suspect's apartment; he also asks her a series of questions designed to elicit what she did to rebuff the defendant's advances and to establish doubt in the jurors' minds that the sexual contact was nonconsensual. He focuses on the fact that the victim willingly went to the suspect's apartment and allowed the suspect to drive her home after allegedly being sexually assaulted. During the redirect examination, the prosecutor asks the victim questions designed to establish that she was not impaired by alcohol or drugs at the time and asks her to clarify why she went to the suspect's apartment and allowed the defendant to drive her home.

It is important to point out that the defendant in a criminal case has a *right* to cross-examine witnesses against him or her. This right is found in the Sixth Amendment to the Constitution, which states that a defendant has the right "to be confronted with the witnesses against him." This has been interpreted to mean, among other things, that the

defendant must have an opportunity to question all witnesses called by the prosecution so as to test the accuracy and credibility of the witness's testimony. As the U.S. Supreme Court stated in *California v. Green* (1970), the purpose of the confrontation clause is to ensure that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."

THE LAWYER WHO ASKED ONE QUESTION TOO MANY

Inexperienced lawyers often commit the common error of cross-examining every witness, even interrogating witnesses whose direct testimony has done no damage to their case. Eventually most lawyers learn to leave witnesses alone if there is nothing to be gained from them. Knowing when to stop asking questions is sometimes learned from painful lessons of having gone on too long. [President Abraham] Lincoln was fond of telling the story of the young lawyer who asked one question too many: "If you now admit not having seen the defendant bite the young man's ear, how can you tell this jury that he really did bite that ear off?" "Because," the witness answered, "I saw him spit it out."

SOURCE: Wishman (1986, pp. 179–180).

Generally, the right to confront witnesses has been interpreted to mean that the witnesses who testify against the defendant must appear at trial and confront the defendant face-to-face. In fact, in 1988, the U.S. Supreme Court ruled that an Iowa statute that allowed children who were victims of child abuse to testify from behind a screen violated the defendant's constitutional right to a face-to-face confrontation with accusing witnesses (*Coy v. Iowa*, 1988). The Court returned to this issue 2 years later (*Maryland v. Craig*, 1990). In this case, the issue was whether a child victim of sexual assault could testify by closed-circuit television. The justices, who noted that the confrontation clause does not guarantee criminal defendants an absolute right to a face-to-face confrontation with witnesses against them at trial, also stated that face-to-face confrontation can be dispensed with "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." The Court found that the Maryland procedure, unlike the one struck down in Iowa, did ensure the reliability of the testimony; the defendant was able to cross-examine the witness, and the judge and jurors were able to observe the demeanor and body language of the witness as he or she testified. The Court concluded that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her

accusers in court.” Although a number of state courts have held that these types of procedures violate their state constitutions, they are not necessarily *precluded* by the Sixth Amendment of the U.S. Constitution.

Calling Witnesses

The Sixth Amendment gives the defendant in a criminal case the right to cross-examine witnesses against him or her and also “to have compulsory process for obtaining witnesses in his favor.” This means that the defendant can compel witnesses to come to court and testify in the case. This is done by subpoena, which is a court order requiring the individual to come to court and testify as a witness. The subpoena form used by the U.S. District Court for the Northern District of California, for example, states,

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

The subpoena can be used to compel witnesses to give pretrial depositions to explain what they know about the crime and the defendant’s role in the crime, to testify at the trial itself, and/or to bring specified evidence or documents to court. If the individual subpoenaed does not appear on the date specified, the judge has the power to find the person in contempt of court, which may result in a jail sentence or fine.

Privileged Communications

Certain categories of individuals generally cannot be compelled to testify in criminal cases. For instance, husbands and wives cannot be forced to testify against each other, priests cannot be compelled to testify about things told to them in confidence by parishioners, doctors cannot be forced to testify about their patients, and lawyers cannot be forced to reveal information provided by their clients. Each of these types of communication—which are referred to as **privileged communications**—are exceptions to the general rule that all relevant evidence is admissible at trial. The rationale behind these privileges, none of which is absolute, is that each of these relationships involves an expectation of privacy and confidentiality. Husbands and wives assume that things told to one another in confidence will not be revealed. Similarly, those who confess to a priest or confide in a doctor or lawyer have an expectation of confidentiality.

Regarding the spousal or marital privilege, the Supreme Court in 1934 held that “the basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails” (*Wolfe v. United States*, 1934). However, the marital privilege does not apply if the victim of the crime was the spouse or a child of the defendant or if the statements were made in the presence of a third party. The privilege can be waived if the spouse is willing to testify in the case. If the spouse claims the privilege and refuses to testify against his or her partner, the prosecution cannot comment on the spouse’s failure to testify.

A highly publicized case involving the spousal privilege was the trial of Michael Derderian, who, along with his brother, was charged with involuntary manslaughter after 100 people died in a 2003 fire at a Rhode Island nightclub, which the brothers owned. Kristina Link, who was the office manager for the nightclub at the time of the fire, initially testified before the grand jury that indicted the brothers. She later married Michael Derderian and, when subpoenaed to testify at his trial, indicated that she would invoke the marital privilege and would refuse to testify. Both of the brothers eventually pleaded no contest to involuntary manslaughter.

Privilege Against Self-Incrimination

The other person who cannot be called to the stand to testify in a criminal case is the defendant. The Fifth Amendment states that “no person . . . shall be compelled in any criminal case to be a witness against himself.” This **privilege against self-incrimination** means that the prosecutor cannot call the defendant as a witness and question this person about his or her involvement in the crime with which he or she is charged. Although critics charge that the privilege helps guilty people avoid conviction for their crimes, Supreme Court Justice Arthur Goldberg saw it as a protection of individual rights. In *Murphy v. Waterfront Commission of New York* (1964), Goldberg wrote, “The privilege [of avoiding self-incrimination] while sometimes a shelter to the guilty, is often a protection to the innocent.”

The defendant’s failure to take the stand and tell his or her side of the story obviously will raise questions in the minds of the judge and, especially, the jurors. The jurors will wonder why, if the defendant is innocent, he or she is unwilling to testify under oath that he or she played no role in the crime with which he or she is charged. However, the defendant does not have to explain the decision to remain silent, and the prosecutor cannot comment on the defendant’s refusal to testify. The prosecutor cannot say—in his or her closing argument, for example—“if the defendant is innocent, as he claims, why doesn’t he take the stand and tell us what he knows? What is he hiding?” In fact, the defendant can request that the judge instruct the jurors not to infer

anything from the defendant's failure to testify. As the Supreme Court stated in the case of *Carter v. Kentucky* (1981),

A trial judge has a powerful tool at his disposal to protect the constitutional privilege—the jury instruction—and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.

If the defendant waives the privilege against self-incrimination and takes the stand in his or her own defense, the defendant, like all other witnesses, is subject to cross-examination by the prosecutor. This means that the prosecutor can attempt to impeach the defendant's credibility by asking, for example, if the defendant has ever been convicted of a crime. Moreover, the defendant cannot pick and choose the questions to answer and must testify truthfully or face the prospect of prosecution for perjury.

A related issue is whether defendants have a right to testify in their own defense and whether the scope of their testimony can be limited. The Supreme Court has ruled that the Fourteenth Amendment's guarantee that no one should be "deprived of life, liberty, or property without due process of law" includes defendants' right to offer testimony in their own defense (*Faretta v. California*, 1975). This right is also found in the Sixth Amendment provision giving defendants the right to call witnesses and in the defendant's right to serve as his or her own lawyer. As the Court stated in a 1987 case, "A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness" (*Rock v. Arkansas*, 1987). However, the introduction of the defendant's testimony is governed by the same rules of evidence that apply to the testimony of other witnesses.

Evidence and Rules of Evidence

During the trial of Dale Hausner, the Phoenix serial shooter convicted and sentenced to death in 2009 for six murders and more than 70 other crimes, prosecutors trying the case introduced the testimony of dozens of victims who allegedly were targeted by Hausner as well as the testimony of the police and paramedics who responded to the crimes. They used this testimony to lay out the facts of every shooting, stabbing, and arson that Hausner was accused of committing. They also introduced transcripts of secret wiretap conversations between Hausner and Samuel Dieteman (who was charged along with Hausner and who testified against him) and several hours of the videotaped interrogation of Hausner by Phoenix police detectives. A police fingerprint analyst testified that Hausner's fingerprints were not found on either of the

shotguns seized from Hausner's property the night of his arrest, but a police DNA analyst testified that his DNA was found on a pair of latex gloves that also had gunshot residue on them. Hausner's ex-wife also testified for the prosecution; she claimed that Hausner had violent tendencies and that he attacked her on two occasions. Hausner testified in his own defense, arguing that he had alibis for many of the times when the crimes occurred.

As this case illustrates, a criminal trial may involve the introduction of various types of evidence. To prove the defendant's guilt, the prosecution introduces evidence designed to prove the elements of the crime and to convince the judge or jury that the defendant is the person who committed the crime. Likewise, the defendant may introduce evidence that challenges the prosecution's version of the crime and raises questions about the evidence presented by the prosecution.

Types of Evidence

The evidence introduced at trial may be either real evidence or testimonial evidence (Scheb & Scheb, 1999). **Real evidence** consists of fingerprints or DNA linking the suspect to the crime, stolen property, clothing worn by the victim, documents, photographs of the victim or the crime scene, guns or knives used in the crime, and other tangible items. **Testimonial evidence** is the sworn statements of witnesses, including the victim, eyewitnesses to the crime, and the police officers who investigated the crime. It also includes the testimony of experts who are called to testify about things such as the defendant's sanity; the scientific tests that were conducted on fingerprints, DNA, or a recovered weapon; or the cause of the victim's death. Although there are some exceptions, lay witnesses generally are not allowed to express their opinions or draw conclusions. They are required to state what they saw, heard, felt, tasted, or smelled. In contrast, expert witnesses may express their opinions about things that are within the area of their expertise: A psychiatrist might testify that, in his opinion, the defendant suffers from paranoid schizophrenia; a handwriting expert might testify that the defendant forged the victim's signature on a check; and a forensic scientist might testify about the "match" between the defendant's DNA and the DNA found in a semen sample taken from the victim of a sexual assault. To testify as an expert, the witness must be accepted by the trial court as an expert on the topic about which the witness is to testify.

Evidence can be either direct or indirect. **Direct evidence** includes eyewitness testimony, the confession of the defendant, or testimony by the victim of the crime; it is evidence that, by itself, proves (or disproves) a fact that is at issue in the case. **Indirect evidence**, or circumstantial evidence, is evidence that requires the judge or jury to make inferences about what happened at the scene of the crime or judgments about the

defendant's role in the crime. An eyewitness who testifies that she saw the defendant force the victim out of a car at gunpoint is giving direct evidence. In contrast, evidence that the defendant's fingerprints were found on the steering wheel of the car is circumstantial evidence; the existence of the fingerprints establishes that the defendant was in the car but does not establish that the defendant is the person who committed the crime. Evidence can be both direct and circumstantial. For example, a credit card receipt for the purchase of the gun that was used in the crime is direct evidence that the defendant owned the gun but only circumstantial evidence that the defendant is the person who used the gun during the commission of the crime.

Rules of Evidence

The introduction of witness testimony and other types of evidence is governed by the rules of evidence. The two most important of these rules concern the relevance and the competence of the evidence. According to Rule 401 of the Federal Rules of Evidence, "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence that does not meet this standard is irrelevant and is therefore inadmissible. For example, assume that a defendant is charged with burglary of a residence. It would be relevant to show that the defendant's fingerprints were found in the house, that a laptop computer and jewelry stolen during the burglary were sold to a pawnshop, and that the owner of the pawnshop paid the defendant, whom he can identify, for the items. Evidence that the defendant had once been arrested for driving while intoxicated or that the defendant had a child out of wedlock would be irrelevant; this evidence would not help the judge or jury decide whether the defendant is the person who burglarized the home. (See the "Current Controversy" box on p. 357 for a discussion of rape shield laws that prevent the introduction of evidence of a rape victim's prior sexual behavior.)

Evidence must also be competent. The competence of real evidence is established by showing that the evidence really is what it is purported to be; that is, that the gun is, in fact, the gun that was found at the scene of the crime, that the bullets are the actual bullets that were recovered from the body of the victim, and the letter from the defendant to the victim is the original letter and not a photocopy. The police officer who found the gun would testify that the gun was found in a particular place and would explain what he did with the gun after finding it and where it has been since it was recovered. The medical examiner who removed the bullets from the victim's body similarly would present testimony designed to establish that the bullets being entered as evidence in the case are the actual bullets recovered during the postmortem examination of the victim.

NATIONAL ACADEMY OF SCIENCES REPORT ON FORENSIC EVIDENCE

In 2009, the National Academy of Sciences issued a highly critical report on the forensic evidence that police and prosecutors often rely on in criminal trials, including fingerprints, firearms identification, and analysis of bite marks, blood spatter, hair, and handwriting (National Research Council, 2009). The report noted that, with the possible exception of DNA evidence, there was little scientific basis for the claims made about the reliability or infallibility of forensic evidence. For example, the report stated that claims that fingerprint analyses have a zero error rate are “not scientifically plausible” and that the scientific basis for bite mark evidence is “insufficient to conclude that bite mark comparisons can result in a conclusive match.” The authors of the report also charged that many of the nation’s crime labs, which they characterized as “a system in disarray,” were underfunded, beholden to law enforcement agencies, and lacked oversight and consistent standards. The report called for a number of reforms, including the creation of a new federal agency, the National Institute for Forensic Science, which would fund scientific research, disseminate standards for use and interpretation of forensic evidence, and certify expert witnesses and forensic analysts. U.S. Court of Appeals Judge Harry Edwards, who cochaired the panel, said, “There are a lot of people who are concerned, and they should be concerned. Forensic science is the handmaiden of the legal system. . . . If you claim to be science, you ought to put yourself to the test.”

Testimonial evidence also must be competent. The witness who is testifying must be competent to testify. This standard requires that the witness testify under oath and swear (or affirm) that the testimony the witness is about to give is “the truth, the whole truth, and nothing but the truth.” This, in turn, requires that the witness understand what it means to tell the truth. The witness also must have personal knowledge about the subject of his or her testimony (i.e., he or she saw, heard, felt, tasted, or smelled something relevant to the case) and must be able to recollect and describe what happened. Under this standard, a very young child might not be competent to testify; a child of age 3 or 4 might not understand the meaning of telling the truth and might not have the language skills to be able to accurately describe what he or she saw or heard. Similarly, a person with a mental illness or an eyewitness to a crime who was under the influence of alcohol or drugs at the time of the crime might be ruled incompetent to testify. If there are questions about the competence of a potential witness, the judge hearing the case must determine whether the witness is competent.



CURRENT CONTROVERSY

Rape Shield Laws

The past several decades have witnessed significant changes in rape laws (Spohn & Horney, 1992). These changes came after feminists, social scientists, and legal scholars charged that the laws and the rules of evidence unique to rape encouraged criminal justice officials and jurors to base their decisions on legally irrelevant evaluations of the victim's character, reputation, and relationship with the accused.

Reformers were particularly critical of evidentiary rules that allowed the defense attorney to introduce evidence of the victim's past sexual conduct or reputation for promiscuity. Under common law, evidence of the victim's sexual history was admissible to prove that she had consented to intercourse and to impeach her credibility as a witness. The notion that the victim's prior sexual conduct was pertinent to whether she consented was based on the assumption that chastity was a character trait and that, therefore, an unchaste woman would be more likely to agree to intercourse than a woman without premarital or extramarital experiences. Some courts also admitted evidence of the victim's lack of chastity on the issue of credibility, which they justified on the grounds that unchaste women are apt to lie (see, generally, Estrich, 1987; Spohn & Horney, 1992).

Those who championed rape law reform insisted that this two-pronged evidentiary rule be eliminated or modified. Some pointed to the law's inherent double standard; nonmarital sexual activity could not be used to impeach the defendant's credibility if he took the stand but could be used to call the victim's truthfulness into question. Many critics argued that the rule was archaic in light of changes in attitudes toward sexual relationships and toward the role of women in society. This type of evidence, according to critics of the evidentiary rule, was simply irrelevant to either the issue of nonconsent or the credibility of the victim as a witness.

Confronted with arguments such as these, state legislatures enacted rape shield statutes designed to limit the admissibility of evidence of the victim's past sexual conduct. The laws range from the less restrictive, which permit evidence of sexual conduct to be admitted if it is shown to be relevant, to the most restrictive, which prohibit such evidence unless it involves a prior sexual relationship between the victim and the defendant. Between these two extremes are statutes that attempt to balance the interests of the victim against the rights of the defendant by delineating a number of exceptions to the general presumption against admission of evidence of sexual conduct. Among the more common exceptions are (1) evidence of the complainant's prior sexual activity with third persons to show that a third person was the source of semen, pregnancy, or disease and (2) evidence to rebut sexual conduct evidence introduced by the prosecutor.

Rape shield laws are controversial. The main point of contention between advocates and opponents of the laws is whether evidence of the victim's past sexual behavior is, in fact, relevant

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evidence. Reformers argue that what a woman has done in the past with other people or in other situations is not relevant to her behavior with the defendant in the situation being contested. Some civil libertarians and legal scholars, on the other hand, argue that the evidence is relevant if it reveals a pattern of behavior or a propensity to engage willingly in a particular type of behavior. If this is the case, according to critics of the laws, the evidence is relevant to whether the victim consented to the behavior in question and should be admitted.

Consider a case in which the victim has accused the defendant of sexual assault. She testifies that she met the defendant at a singles' bar, danced and drank with him, and accepted his offer to drive her home. She also testifies that he walked her to the front door of her apartment and, when she opened the door, forced his way in and raped her. The defendant admits that he and the victim had sexual relations but claims that it was consensual. He wants to introduce evidence that the victim previously had consented to intercourse with casual acquaintances that she met at singles' bars.

What do you think? Is the evidence of the victim's prior sexual conduct relevant? Can the defendant get a fair trial if the evidence is excluded?

Objecting to Introduction of Evidence or Questions Asked

The admissibility of evidence can be established either before trial—through the judge's rulings on motions to suppress evidence—or during the trial—through the judge's ruling on objections to evidence raised by either the prosecutor or the defense. The attorney making the objection will say, "Your honor, I object," and will then state the reason for the objection. Either side can object to the introduction of evidence on the grounds that the evidence is not relevant, that the witness is not competent to testify or is being asked to give an opinion that the witness is not qualified to give, or on some other grounds. The judge either will rule immediately on the objection—either sustaining it or overruling it—or will ask the opposing attorney to respond to the objection. The judge also may send the jury out of the courtroom before hearing arguments from the two sides.

A common reason for objecting to the admission of evidence is that the evidence is hearsay. **Hearsay evidence** is evidence given by a witness that is based on information provided to the witness by someone else. This type of evidence generally is not admissible. For example, a witness who states in court, "I know that the defendant owned a gun like that because my brother told me that he saw the gun in the defendant's car," would be giving hearsay testimony. The witness has no direct knowledge that the defendant owned a gun. If the prosecutor wants to prove that the defendant owned such a gun, the prosecutor must call the witness's brother to the stand to testify.

There are a number of important exceptions to the hearsay rule. In fact, the Federal Rules of Evidence list more than 20 situations in which hearsay evidence can be

admitted. This includes the so-called dying declaration exception, which allows, for example, a third party to testify about statements made by a homicide victim as the victim was dying. If the victim identified or described the perpetrator of the crime before dying and if a nurse attending the victim heard what the victim said, the nurse would be allowed to testify about what she or he heard. Related to this is the excited utterance exception, which allows third parties to testify about emergency 911 telephone calls or about statements made to a police officer arriving at the scene of the crime. The assumption is that statements made by a person who has just been the victim of a crime or who has just witnessed a crime will be spontaneous and trustworthy. As one court put it, “The test is whether the utterance was made before there has been time to contrive and misrepresent—that is, while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance” (*People v. Brown*, 1987).

Closing Arguments

After all the evidence in the case has been presented, each side is allowed to make a closing argument. As is the case with the opening statements, what the attorneys say during closing arguments is not considered evidence. The prosecutor usually goes first, followed by the defense attorney, with the prosecutor having an opportunity to make a concluding argument. The purpose of the closing argument is to summarize the case for the jury and to persuade the jury to either convict or acquit the defendant. The attorneys can only discuss issues that were raised during the trial and cannot comment on evidence that was not presented. The prosecutor cannot comment on the fact that the defendant failed to testify in his or her own defense or make inflammatory remarks to the jury. Although defense attorneys may be given wider latitude in making closing arguments to the jury, they too are prohibited from crossing the line by, for example, challenging the integrity of the prosecutor or referring to the state’s witnesses in derogatory terms. (For a discussion, see “Playing the ‘Race Card’ in a Criminal Trial.”)

SOWING SEEDS OF REASONABLE DOUBT IN THE MINDS OF THE JURORS

During a closing argument, a defense attorney is said to have told the jury, “In the next few seconds, you will see the alleged murder victim walking into the courtroom.” After every juror had turned to look in the direction of the door, the lawyer continued, “Although the victim has not appeared, I have proved that you must have a reasonable doubt in your minds that the victim is even dead, much less murdered. Otherwise you would not all have looked at the door of the courtroom.”

SOURCE: Wishman (1986, pp. 223–224).

Both the prosecutor and the defense attorney generally will begin the closing argument by thanking the members of the jury for their attention and their patience. Each side then will recollect and evaluate the evidence that was presented and attempt to connect the evidence to the theory of the case that was developed during the trial. The prosecutor will discuss the elements of the crime and will argue that the evidence proves the defendant's guilt beyond a reasonable doubt; the defense will argue just the opposite. Although each side may urge the jury to "do its duty" by either convicting or acquitting the defendant, it is inappropriate for either side to express a personal belief in the defendant's guilt or innocence.

PLAYING THE "RACE CARD" IN A CRIMINAL TRIAL

In 1994, O. J. Simpson, a Black actor and former All-American football star, was accused of murdering his ex-wife, Nicole Brown Simpson, and Ronald Goldman, a friend of hers. On October 4, 1995, a jury composed of seven Black women, two White women, one Hispanic man, and one Black man acquitted Simpson of all charges. Many commentators attributed Simpson's acquittal at least in part to the fact that his attorney, Johnnie L. Cochran Jr., had "played the race card" during the trial. In fact, another of Simpson's attorneys, Robert Shapiro, charged that Cochran not only played the race card but "dealt it from the bottom of the deck" (Kennedy, 1997, p. 287).

Cochran was criticized for attempting to show that Mark Fuhrman, a Los Angeles police officer who found the bloody glove that linked Simpson to the crime, was a racist who planted the evidence in an attempt to frame Simpson. He also was harshly criticized for suggesting during his closing argument that the jurors would be justified in nullifying the law by acquitting Simpson. Cochran encouraged the jurors to take Fuhrman's racist beliefs into account during their deliberations. He urged them to "send a message" to society that "we are not going to take that anymore" (Kennedy, 1997, pp. 286–290).

Although appeals to racial sentiment—that is, "playing the race card"—are not unusual in U.S. courts, they are rarely used by defense attorneys representing Blacks accused of victimizing Whites. Much more typical are *prosecutorial* appeals to bias. Consider the following examples:

- An Alabama prosecutor who declared, "Unless you hang this Negro, our White people living out in the country won't be safe" (*Moulton v. State*, 1917)
- A prosecutor in North Carolina who dismissed as implausible the claim of three Black men that the White woman they were accused of raping had consented to sex with them. The prosecutor stated that "the average white woman abhors anything of this type in nature that had to do with a black man" (*Miller v. North Carolina*, 1978)

- A prosecutor in a rape case involving a Black man and a White woman who asked the jurors, "Gentlemen, do you believe that she would have had intercourse with this black brute?" (*State v. Washington*, 1915)
- A prosecutor in a case involving the alleged kidnapping of a White man by two Black men who said in his closing argument that "not one *white* witness has been produced" to rebut the victim's testimony (*Withers v. United States*, 1976, emphasis added)
- A prosecutor who stated, during the penalty phase of a capital case involving Walter J. Blair, a Black man charged with murdering a White woman, "Can you imagine [the victim's] state of mind when she woke up at 6 o'clock that morning, staring into the muzzle of a gun held by this black man?" (*Blair v. Armontrout*, 1990)

All these appeals to racial sentiment, with the exception of the last, resulted in reversal of the defendants' convictions. A federal court of appeals, for example, ruled in 1978 that the North Carolina prosecutor's contention that a White woman would never consent to sex with a Black man was a "blatant appeal to racial prejudice." The court added that when such an appeal involves an issue as "sensitive as consent to sexual intercourse in a prosecution for rape . . . the prejudice engendered is so great that automatic reversal is required" (*Miller v. North Carolina*, 1978, p. 708).

A federal court of appeals, on the other hand, refused to reverse Walter Blair's conviction and death sentence. Its refusal was based on the fact that Blair's attorney failed to object at trial to the prosecutor's statement. The sole dissenter in the case suggested that the court should have considered whether the defense attorney's failure to object meant that Blair had been denied effective assistance of counsel. He also vehemently condemned the prosecutor's statement, which he asserted "played upon white fear of crime and the tendency of white people to associate crime with blacks" (*Blair v. Armontrout*, 1990, p. 1351).

According to Harvard law professor Randall Kennedy, playing the race card in a criminal trial is "virtually always morally and legally wrong." He asserted that doing so encourages juries to base their verdicts on irrelevant considerations and loosens the requirement that the state prove the case beyond a reasonable doubt. As he noted, "Racial appeals are not only a distraction but a menace that can distort interpretations of evidence or even seduce jurors into believing that they should vote in a certain way irrespective of the evidence" (Kennedy, 1997, pp. 256–257).



Instructing the Jury

Before the jurors begin their deliberations, the judge instructs them about the law and how they are to apply the law. This is because the jurors determine the facts in the case, but the judge determines the law that is to be applied. As the Supreme Court stated in 1895, "It is the duty of juries . . . to take the law from the court and apply that law to the facts as they find them to be from the evidence" (*Sparf v. United States*, 1895).

In the instructions to the jury, the judge reminds the jurors that the defendant is presumed innocent and that the prosecutor bears the burden of proving the defendant's guilt beyond a reasonable doubt. The judge defines each of the elements of the crime(s) with which the defendant is charged and, if the defendant has raised a defense such as insanity or self-defense, explains the meaning of the defense based on the law in that jurisdiction. The judge may also instruct the jurors regarding the procedures they are to follow as they deliberate. The judge might say, for example,

Each juror should listen, with a disposition to be convinced, to the opinions and arguments of the other jurors. It is not intended under the law that a juror should go into the jury room with a fixed determination that the verdict shall represent his opinion of the case at that particular moment. Nor is it intended that he should close his ears to the discussions and arguments of his fellow jurors who are assumed to be equally honest and intelligent. (Wishman, 1986, p. 222)

If a unanimous verdict is required, the judge will explain what this means and will instruct the jury on the procedures to be followed if they cannot reach unanimity.

One of the criticisms of jury instructions is that, because they are crafted by lawyers, they are full of legal jargon and therefore are difficult for laypeople to understand. As Jerome Frank, who served as a U.S. court of appeals judge from 1941 to 1957, wrote in 1930,

Time and money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that those words might as well be spoken in a foreign language. (p. 181)

A lawyer who served on a jury was similarly critical of the instructions he and his fellow jurors received, noting that “those instructions did not, in the ordinary or familiar use of that plain English word, instruct us in any way to do anything that could have been digestible to an adult without a legal training” (Kraft, 1982, p. 593).

This issue—the degree to which jurors are able to comprehend the instructions on the law given by the judge—has been the subject of a considerable amount of research. Most of this research concluded that jurors do not understand the judge's instructions (Steele & Thornburg, 1988). For example, one early study of persons summoned for jury service in Florida found that only half of the jurors understood that the judge's instruction on presumption of innocence meant that the defendant did not have to present any evidence of his or her innocence (Strawn & Buchanan, 1976). There also has been research designed to determine if juror comprehension is affected by the language used in the jury instruction. One **mock jury study** found higher comprehension rates for instructions that were written in clear, nontechnical language (Elwork, Alfini, & Sales, 1987).

The results of this research prompted many jurisdictions to adopt patterned jury instructions—that is, standard instructions that apply in most criminal cases (see “Examples of Standard Jury Instructions: State of Florida” for examples of Florida’s standard jury instructions). Typically, the judge consults the prosecutor and the defense attorney about the instructions that will be given and allows each side to suggest supplemental instructions. This is usually done during a charging conference. If the judge rejects one of the defense attorney’s proffered instructions, the attorney will object to the judge’s decision, which preserves the issue for appeal.

EXAMPLES OF STANDARD JURY INSTRUCTIONS: STATE OF FLORIDA

Plea of Not Guilty: Reasonable Doubt and Presumption of Innocence

The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the defendant’s presumption of innocence, the State has the burden of proving the crime with which the defendant is charged was committed and the defendant is the person who committed the crime.

The defendant is not required to present evidence or prove anything.

Whenever the words “reasonable doubt” are used you must consider the following:

A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

It is to the evidence introduced in this trial, and to it alone, that you are to look for that proof.

A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence, or the lack of evidence.

If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

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Lesser Included Crimes

In considering the evidence, you should consider the possibility that although the evidence may not convince you that the defendant committed the main crime[s] of which [he] [she] is accused, there may be evidence that [he] [she] committed other acts that would constitute a lesser included crime [or crimes]. Therefore, if you decide that the main accusation has not been proved beyond a reasonable doubt, you will next need to decide if the defendant is guilty of any lesser included crime.

SOURCE: Florida Supreme Court, Standard Jury Instructions. Available online at http://www.floridasupremecourt.org/jury_instructions/instructions.shtml.

Jury Deliberations and Verdict

What goes on in the privacy of the jury room? Stated another way, what makes juries tick? This is a topic that has long fascinated legal scholars, social scientists, and others interested in criminal trials. The mystery surrounding the jury deliberation process stems from the fact that jurors deliberate in secret and are neither required nor allowed to explain why they arrived at the verdict they did. It also stems from the fact that jurors are more or less on their own in terms of the procedures they will follow in arriving at a verdict: Do they take an initial vote prior to deliberating? Should the votes be by secret ballot or by a show of hands? Should the judge's instructions be read and discussed before deliberations begin? Should they review the evidence and, if so, who should lead the discussion? All these issues are left to the jurors' discretion.

After receiving the judge's instructions, the jurors retire to the jury room. In many states, they are allowed to take a copy of the instructions with them and usually are provided with written forms for all possible verdicts in the case. Typically, the first step is to select one of the jurors as the foreperson or presiding juror, whose job it is to preside over the deliberations and votes and deliver the jury's verdict to the judge. If the jurors have questions about the evidence or need clarification of legal issues, they can send a note to the judge. Although the judge can refuse to answer the question, it is more likely that the judge will either respond immediately or call the jury (and the defendant and the lawyers for both sides) back into the courtroom for additional instructions or to read back the part of the transcript about which the jurors have questions.

The Verdict: Guilty or Not Guilty?

An important assumption underlying the jury trial is that the jurors will be able to accurately determine the facts in the case; that is, that the jurors, both individually and

collectively, will arrive at a just decision (but see “Wrongful Conviction and Exoneration of the Innocent” for a discussion of wrongful convictions, many of which resulted from jury verdicts). This assumption, in turn, rests on the jurors’ ability to assess the credibility of witnesses, to disregard testimony or evidence that the judge ruled inadmissible, to ignore their sympathies and/or biases toward the defendant or other witnesses, and to interpret and apply the law to the facts in the case.

As numerous commentators have pointed out (Levine, 1991), the adversarial process—which in theory should illuminate the truth—is more likely to produce juror uncertainty than certainty about the facts in the case. This is because jurors usually hear two versions of the facts, one told by the prosecutor and the other told by the defense attorney. The same set of facts, in other words, may be given two completely different interpretations by the adversaries in the case. For example, the fact that the defendant ran when confronted by the police, which the prosecutor might interpret as evidence of guilt, might be explained away by the defense attorney as evidence of fear of the police in poor neighborhoods. This is compounded by the fact that the law itself is ambiguous and vague. For instance, a key element of the crime of sexual assault is nonconsent by the victim. But what does this mean? The judge’s instruction that “consent means a freely given agreement to the act of sexual penetration” notwithstanding, how will the jurors know whether the victim did or did not consent?

WRONGFUL CONVICTION AND EXONERATION OF THE INNOCENT

In 1997, Orange County (California) Superior Court Judge Everett Dickey reversed Geronimo Pratt’s 1972 conviction for first-degree murder, assault with intent to commit murder, and robbery (Olsen, 2000). Pratt, a decorated Vietnam War veteran and a leader in the Black Panther Party, was accused of killing Caroline Olsen and shooting her ex-husband Kenneth Olsen on the Lincoln Park tennis court in Santa Monica. Pratt, who claimed he had been in Oakland on Panther business at the time of the crime, was convicted based in large part on the testimony of another member of the Black Panther Party, Julius Butler. It was later revealed that Butler had been a paid police informant and that police and prosecutors in Los Angeles conspired to keep this information from the jury hearing Pratt’s case.

Over the next 25 years, Pratt’s lawyers filed a series of appeals, arguing that Pratt’s conviction “was based on false testimony knowingly presented by the prosecution” (Olsen, 2000, p. 367). Their requests for a rehearing were repeatedly denied by California courts, and the Los Angeles District Attorney’s Office refused to reopen the case. Then, in May 1997, Judge Dickey granted Pratt’s petition for a writ of habeas corpus and reversed his conviction. Citing errors by the district attorney who tried the case, Judge Dickey stated, “The evidence which

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was withheld about Julius Butler and his activities could have put the whole case in a different light, and failure to timely disclose it undermines confidence in the verdict" (Olsen, 2000, p. 465). Geronimo Pratt, who spent 25 years in prison—including 8 years in solitary confinement—was released on June 10, 1997. In April 2000, Pratt's lawsuit for false imprisonment and violation of his civil rights was settled out of court: The city of Los Angeles agreed to pay Pratt \$2.75 million, and the federal government agreed to pay him \$1.75 million. Pratt's attorney, Johnnie Cochran Jr., described the settlement as "unprecedented" and praised Pratt for "the relentless pursuit of justice." Cochran also stated that the settlement puts "to rest a matter that has dragged on for more than three decades."

During the past two decades, the issue of wrongful convictions has appeared on the national political and public agendas. Highly publicized exonerations of individuals—such as Geronimo Pratt—convicted of murder, sexual assault, and other serious crimes have led to questions about the accuracy and fairness of the procedures used to investigate and adjudicate criminal cases. These concerns are based in part on the fact that a large number of the exonerees, many of whom were facing sentences of death or life in prison, were freed as a result of DNA tests that either were unavailable or were deemed unnecessary when their cases were being investigated and tried; this, in turn, has led some critics to suggest that the documented cases of wrongful conviction (according to the National Registry of Exonerations, there were 1,535 exonerations from 1989 through 2014) are only "the tip of the iceberg" (Gross, Jacoby, Matheson, Montgomery, & Patil, 2005, p. 531). Concerns about false convictions also are based on research showing that a disproportionate number of those exonerated have been racial minorities and that the disparity is particularly stark in cases of interracial sexual assault (Gross et al., 2005). Together, these concerns have raised questions about the legitimacy and integrity of the criminal justice process.

There is compelling evidence that conviction of the factually innocent occurs in court systems throughout the United States (Garrett, 2008), but the rate of wrongful convictions is difficult to estimate. Although some scholars have placed the number at around 7,500 annually (Huff, 2004), practitioners generally provide lower estimates. Two separate studies found that practitioners assume about a 0.5% to 1% rate of wrongful conviction in their own jurisdictions versus a more liberal estimate of 1% to 3% nationwide (Ramsey & Frank, 2007; Zalman, Smith, & Kiger, 2008). Even a conservative estimate of 0.5% nationally extrapolates to approximately 5,000 wrongful convictions and 2,000 innocent persons incarcerated annually (Zalman et al., 2008). When only considering capital murder-rape cases during the 1980s (a crime for which DNA evidence can be expected), Risinger (2007) estimated, based on cases of factual innocence established through DNA evidence, a minimum base rate of erroneous convictions of 3.3%.

Several studies have attempted to investigate the reasons for erroneous convictions. Huff (2004) cites the following as leading predictors of wrongful conviction: false or mistaken eyewitness identification; unethical or overzealous practices among criminal justice actors, including prosecutors and the police; illegally obtained and/or false confessions; use of unreliable informants, especially "jailhouse snitches"; inadequate assistance of counsel; forensic

errors and/or malfeasance (see National Research Council, 2009); and an über-focus on legal versus factual guilt. Liebman (2002) suggests that the high rate of invoking capital punishment throughout the United States (relative to other industrialized countries) raises the probability of executing factually innocent persons. Furthermore, he argues that political exigencies for elected judges maintain a high rate of death sentences (see also Bright & Keenan, 1995), which in turn enhances the probability of executing the innocent.

Rape, Race, and Misidentification

A recent analysis of 340 exonerations in the United States from 1989 to 1990 revealed that DNA exonerations were especially prevalent in rape cases (Gross et al., 2005). These cases also were characterized by eyewitness misidentification. In fact, in 107 of the 121 exonerations for rape, the defendant was the victim of eyewitness misidentification, and in 105 of these cases, the defendant was eventually cleared by DNA evidence. About half (102 of 205) of the exonerations in murder cases also involved eyewitness misidentification, but only 39 of the 205 defendants were cleared as a result of DNA evidence.

Although the percentages of Blacks, Hispanics, and Whites who were exonerated for all crimes were similar to the percentages of each group incarcerated in state prisons, this was not the case for rape. In 2002, 58% of all persons incarcerated for rape were White, 29% were Black, and 13% were Hispanic. Among defendants who were convicted of rape but later exonerated, the percentages were reversed: 64% were Black, 28% were White, and 7% were Hispanic. Blacks, in other words, comprised only 29% of all persons incarcerated for rape but 64% of all defendants exonerated for rape (Gross et al., 2005, p. 547).

The authors of this study suggested that the key to the explanation for the overrepresentation of Blacks among defendants falsely convicted for rape "is probably the race of the victim" (p. 547). As they pointed out, the race of the victim was known in 52 of the 69 exonerations of Blacks for rape. In 78% of these cases, the victim was White. As they noted, "Interracial rape is uncommon, and rapes of white women by black men in particular account for well under 10% of all rapes. But among rape exonerations for which we know the race of both parties, almost exactly half (39 of 80) involve a black man who was falsely convicted of raping a white woman" (Gross et al., 2005, p. 548).

The authors, who admitted that there were many possible explanations for this finding, stated that the "most obvious explanation for this racial disparity is probably also the most powerful: the perils of cross-racial identification" (p. 548). Almost all the exonerations in the interracial rape cases included in their study were based at least in part on eyewitness misidentification.

There is substantial evidence that cross-racial eyewitness identifications, particularly eyewitness identifications of Blacks by Whites, are unreliable (Meissner & Brigham, 2001; Rutledge, 2001). What seems to happen, then, is that a White victim of a rape case mistakenly identifies a Black man as the perpetrator of the crime, the defendant is found guilty at trial based at least in part on the eyewitness identification, and the defendant is exonerated when DNA evidence reveals that he was not the man who committed the crime. This line of research (see also Walker, Spohn, & DeLone, 2011) suggests that racial disparity in the criminal justice system remains an unresolved issue.

Because jury deliberations are conducted behind closed doors, researchers are unable to observe the actual deliberation process. Instead, they use mock juries or mock trials that involve hypothetical scenarios. These may be actual mock trials, such as in a university classroom, or simple written scenarios wherein people (often college students) are asked to decide a hypothetical defendant's fate. Then the researchers compare people's demographic characteristics to the decisions they hand down. One problem with this approach is that the hypothetical situations presented are not real, and therefore no one's liberty is at stake. In addition, the vignettes are typically short and provide very limited information about the crime, the defendant, and the victim. The decisions that "jurors" make in these situations may or may not be the same as decisions they would make in actual trials.

Research on jury decision making generally has focused on the effects of procedural characteristics, juror characteristics, case characteristics, and deliberation characteristics (Devine, Clayton, Dunford, Seying, & Pryce, 2001). Procedural characteristics refer to such factors as jury size, juror involvement during the trial, and jury instructions. Juror characteristics refer to demographic factors, such as age, race, gender, employment status, and other individual variables. Case characteristics refer to variables associated with specific trials, such as the charges involved or the strength of the evidence. Finally, deliberation characteristics refer to such factors as polling procedures or participation in deliberation.

In an extensive review of the literature, Devine and his colleagues (2001, pp. 700–701) drew several conclusions regarding juror decision making. Not surprisingly, the studies revealed that juror decisions are affected by the quality and the quantity of the evidence; jurors are more likely to convict when the evidence is strong and conclusive. The personal characteristics of the participants (i.e., the mock juror, the victim, the defendant), on the other hand, do not reliably predict juror verdicts. These factors come into play primarily in cases where the evidence is ambiguous and the outcome is therefore less predictable. This has been explained using the **liberation hypothesis** (Kalven & Zeisel, 1966), which suggests that when the evidence is uncertain, jurors are "liberated" from the constraints imposed by the law and therefore feel free to take legally irrelevant factors into consideration. Research also reveals that the deliberation process produces a reversal of the verdict preference initially favored by the majority in 1 of every 10 trials. Finally, the studies conducted to date indicate that jurors' decisions reflect their past experiences, their stereotypes about crime and criminals, and their beliefs about what is right, wrong, and fair.

Two studies of jury verdicts in actual cases addressed the issue of the factors that influence verdicts, reaching somewhat contradictory conclusions (see also the "Current Research" box on p. 369, which summarizes the results of a study of jury decision making in federal death penalty cases). Myers (1979) analyzed jury verdicts in 201 felony

trials in Marion County, Indiana. Her objective was to determine the extent to which the jury's verdict was affected by various types of evidence, indicators of witness credibility, and legally irrelevant characteristics of the victim and defendant. She found that juries were more likely to convict if a weapon was recovered, if there were several witnesses, if the defendant had a lengthy prior record or was unemployed, if the defendant or an accomplice testified, and if the victim was young; the likelihood of conviction, on the other hand, was not affected by eyewitness identification of the defendant, expert testimony, the relationship between the victim and the defendant, or the race of either the victim or the defendant. In these cases, then, the jury's decision to convict or acquit the defendant was predicted primarily by legally relevant indicators of the strength of evidence in the case, the victim's vulnerability, and the defendant's credibility.

A study of jury verdicts in 38 sexual assault trials in Indianapolis similarly found that the likelihood of a guilty verdict was affected by the strength of evidence in the case: whether a weapon was recovered, whether there was evidence that the victim suffered collateral injuries, other physical evidence, and eyewitness testimony (Reskin & Visher, 1986). However, the jurors' perceptions of the victim also played a role. Jurors were less likely to convict the defendant if they believed that the victim had not exercised sufficient caution at the time of the alleged assault or if they had questions about the victim's moral character. Consistent with Kalven and Zeisel's (1966) liberation hypothesis, the study also revealed that these legally irrelevant victim characteristics came into play only in weak cases—that is, in cases with no more than one of the four types of hard evidence. This led the authors to conclude that “the influence of extralegal factors [was] largely confined to weak cases in which the defendant's guilt was ambiguous because the prosecution did not present enough hard evidence” (p. 436).



CURRENT RESEARCH

SOURCE: “Capital Jury Decision Making: The Limitations of Predictions of Future Violence.” Mark D. Cunningham, Jon R. Sorensen, and Thomas J. Reidy. *Psychology, Public Policy and Law*, 14, 223–256, 2009.

In 1976, the U.S. Supreme Court upheld the new death penalty statute enacted in Texas following the Court's ruling in *Furman v. Georgia* that the death penalty as it was then being administered violated the constitutional prohibition against cruel and unusual punishment. The new statute required jurors to determine “Whether there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” In *Jurek v. Texas*, the Court expressed confidence in the ability of jurors

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to make such judgments, noting that "It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. . . . The task that a Texas jury must perform in answering the statutory question in issue is basically no different from the task performed countless times each day throughout the American system of criminal justice."

The authors of this paper argue that confidence in jurors' ability to predict future dangerousness "may not be well placed" (p. 226). Noting that rates of prison violence are low, the authors point out that "it is much more difficult to predict which offender will exhibit a low base rate behavior" (p. 227). That is, it is unlikely that jurors in capital cases will be able to identify with any degree of accuracy the relatively rare offender who will engage in serious violence while incarcerated.

To test this, the authors use data on 72 male federal capital defendants for whom juries made a determination of the defendants' likelihood of committing future acts of violence; 37 of the defendants were sentenced to life in prison with no possibility of parole (LWOP) and 35 received a sentence of death. They used data from the Federal Bureau of Prisons to determine whether each offender had committed any serious violent disciplinary violations, including homicide, attempted homicide, serious assault (which was defined as assault with the potential to result in serious injury), attempted serious assault, participating in a riot, or taking a hostage.

When they examined the characteristics of offenders in the two groups—that is, the offenders for whom the jury found that future violence was likely and the offenders for whom the jury found that future violence was not likely—the authors found that offenders did not differ by race/ethnicity, mean age at conviction, or the elements involved in the capital offense. In fact, the only statistically significant difference was the sentence that was imposed; not surprisingly, cases in which the jury determined that the offender did have a probability of future violence were substantially more likely to result in a death sentence.

When they examined the in-prison behavior of the offenders in their study, the authors found that the frequency and prevalence rates of serious violence were low and that, "even among infractions defined as serious assaults . . . the actual level of harm resulted in only minor injuries in each case" (p. 238). More importantly, they also found that there was little correspondence between jury predictions of future violence and actual violence. As they noted, "for both the LWOP-sentenced group and the death-sentenced group, predictions of future violence were wrong far more often than right" (p. 239). In fact, jury predictions of future dangerousness were incorrect 9 out of 10 times and "their performance was no better than random guesses" (p. 240).

These findings led the authors of this study to conclude that the jurors in these cases were engaging in arbitrary decision making and that the outcomes of the decision making process are not reliable. According to their analysis, "Whatever its salience to capital jurors and intuitive attractiveness to legislatures, there is a chasm between the predictions of capital jurors that serious violence is likely in the future and the science demonstrating that capital jurors cannot reliably make this prediction" (pp. 231–232).

Requirement of Unanimity

In most jurisdictions, the jury verdict must be unanimous. This reflects the fact that the jury's role is to determine the truth, and there can be but one "true" version of the facts. It also reflects an assumption that a verdict rendered by a jury that speaks with a single voice will be more likely to be accepted as authoritative and final (Jonakait, 2006). These arguments notwithstanding, in 1972, the U.S. Supreme Court ruled that the Sixth Amendment to the Constitution did not require unanimous verdicts in criminal cases. In doing so, the court upheld an Oregon law that permitted criminal defendants to be convicted by a 10–2 vote (*Apodaca v. Oregon*, 1972) and a Louisiana law that allows conviction by a 9–3 vote (*Johnson v. Louisiana*, 1972). The Court stated that unanimity was not required for the jury to exercise its "commonsense judgment."

Seven years later, the Court returned to this issue, ruling in *Burch v. Louisiana* (1979) that a Louisiana law permitting conviction by a vote of 5–1 in felony cases tried with 6-person juries did violate the Sixth Amendment. In his opinion for the Court, Justice Rehnquist stated that "lines must be drawn somewhere if the substance of the jury trial right is to be preserved," adding that "conviction for a nonpetty offense by only five members of a 6-person jury presents a threat to preservation of the substance of the jury trial guarantee and justifies requiring verdicts rendered by such juries to be unanimous."

The Court's decisions allowing nonunanimous verdicts notwithstanding, today only two states—Oregon and Louisiana—allow a defendant to be convicted of a felony by a nonunanimous verdict. Unanimity also is required in all federal criminal cases. In 2014, defense attorneys for Ortiz V. Jackson, who was found guilty of second degree murder by a 10–2 vote of a Louisiana jury, asked the U.S. Supreme Court to review his case and overrule their decision allowing nonunanimous verdicts. The Supreme Court refused to hear the appeal.

Jury Nullification

Most jury trials result in convictions. A jury's decision to acquit the defendant usually means that the state has failed to prove its case beyond a reasonable doubt. Sometimes, however, the jury votes to acquit despite overwhelming evidence that the defendant is guilty. In this case, the jury ignores, or nullifies, the law.

Jury nullification, which has its roots in English common law, occurs when a juror believes that the evidence presented at trial establishes the defendant's guilt, but nonetheless the juror votes to acquit. The juror's decision may be motivated either by a belief that the law under which the defendant is being prosecuted is unfair or by an objection to the application of the law in a particular case. In the first instance, a juror might refuse to convict a defendant charged in a U.S. district court with possession of more than 5 grams of crack cocaine, based on a belief that the long prison sentence

mandated by the law is unfair. In the second instance, a juror might vote to acquit a defendant charged with petty theft but also charged as a habitual criminal and facing a mandatory life sentence, not because the juror believes the law is unfair but because he or she believes that this particular defendant does not deserve life in prison (Dodge & Harris, 2000).

Although nullification allows the jury to be merciful when it believes that either the punishment or a criminal conviction is undeserved, it also allows the jury to make arbitrary or discriminatory decisions. For example, there is evidence that southern juries have—and some would say, still do—refused to convict White defendants charged with offenses against Black victims, even in the face of convincing evidence of their guilt (Hodes, 1996). Nullification can also be used to make a political statement, such as to express dissatisfaction with a policy. Some have alleged that O. J. Simpson's acquittal reflected in part the jurors' beliefs that the Los Angeles Police Department was racist (Rosen, 1996). An even darker form of jury nullification has been called jury vilification (Horowitz, Kerr, & Niedermeier, 2001). According to Horowitz and colleagues (2001, p. 1210), "Juries may return verdicts that reflect prejudiced or bigoted community standards and convict when the evidence does not warrant a conviction."

Jurors clearly have the power to nullify the law and vote their conscience (for a discussion of this, see "Current Controversy: Race-Conscious Jury Nullification"). If the jury votes to acquit, the double jeopardy clause of the Fifth Amendment prohibits reversal of the jury's decision. The jury's decision to acquit, even in the face of overwhelming evidence of guilt, is final and cannot be reversed by the trial judge or an appellate court. In most jurisdictions, however, jurors do not have to be told that they have the right to nullify the law (see, e.g., *United States v. Dougherty*, 1972).

There is no way to know with any certainty how often jury nullification occurs. However, researchers have sought to identify the circumstances under which jurors will disregard the law. Some experimental evidence shows that as penalties become more severe, jurors are less likely to convict and in fact apply higher standards of proof (Kerr, 1978). Niedermeier, Horowitz, and Kerr (1999), for example, reported on an experiment they conducted wherein a physician was accused of knowingly transfusing a patient with blood he knew hadn't been screened for HIV. Holding everything else constant (e.g., the evidence), the authors found that mock jurors were less likely to declare the physician guilty when the penalty was severe (25 years in prison relative to a \$100 fine). The findings from these studies show that jurors are influenced by something other than the facts of the case as laid out by the prosecution and defense.

CURRENT CONTROVERSY

Race-Conscious Jury Nullification

In a provocative essay published in the *Yale Law Journal* (Butler, 1995) shortly after O.J. Simpson's acquittal, Paul Butler, an African American professor of law at George Washington University Law School, argued for "racially based jury nullification." That is, he urged African American jurors to refuse to convict African American defendants accused of nonviolent crimes, regardless of the strength of the evidence mounted against them. According to Butler, "it is the moral responsibility of black jurors to emancipate some guilty black outlaws" (p. 679).

Butler's position on jury nullification is that the "black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison" (p. 679). Arguing that there are far too many African American men in prison, Butler suggested that there should be "a presumption in favor of nullification" (p. 715) in cases involving African American defendants charged with nonviolent, victimless crimes such as possession of drugs. Butler claimed that enforcement of these laws has a disparate effect on the African American community and does not "advance the interest of black people" (p. 714). He also suggested that White racism, which "creates and sustains the criminal breeding ground which produces the black criminal" (p. 694), is the underlying cause of much of the crime committed by African Americans. He thus urged African American jurors to "nullify without hesitation in these cases" (p. 719).

Butler did not argue for nullification in all types of cases. In fact, he asserted that defendants charged with violent crimes such as murder, rape, and armed robbery should be convicted if there is proof beyond a reasonable doubt of guilt. He contended that nullification is not morally justifiable in these types of cases because "people who are violent should be separated from the community for the sake of the nonviolent" (p. 716). Violent African American offenders, in other words, should be convicted and incarcerated to protect potential innocent victims. Butler was willing to "write off" these offenders based on his belief that the "black community cannot afford the risks of leaving this person in its midst" (p. 719).

The more difficult cases, according to Butler, involve defendants charged with nonviolent property offenses or with more serious drug-trafficking offenses. He discussed two hypothetical cases, one involving a ghetto drug dealer and the other involving a thief who burglarizes the home of a rich family. His answer to the question "Is nullification morally justifiable here?" is "It depends" (p. 719). Although he admitted that "encouraging people to engage in self-destructive behavior is evil" and that therefore most drug dealers should be convicted, he argued that a juror's decision in this type of case might rest on the particular facts in the case. Similarly, although he is troubled by the case of the burglar who steals from a rich family because the behavior is "so clearly wrong," he argued that the facts in the case—for example, a person who steals to support a drug habit—might justify a vote to acquit. Nullification, in other words, may be a morally justifiable option in both types of cases.

RANDALL KENNEDY'S CRITIQUE

Randall Kennedy (1997) raised a number of objections to Butler's proposal (see the "Current Controversy" box on the previous page), which he characterized as "profoundly misleading as a guide to action" (p. 299). Although he acknowledged that Butler's assertion that there is racial injustice in the administration of the criminal law is correct, Kennedy nonetheless objected to Butler's portrayal of the criminal justice system as a "one-dimensional system that is totally at odds with what black Americans need and want, a system that unequivocally represents and unrelentingly imposes 'the white man's law'" (p. 299). Kennedy faulted Butler for his failure to acknowledge either the legal reforms implemented as a result of struggles against racism or the significant presence of African American officials in policymaking positions and the criminal justice system. The problems inherent in the criminal justice system, according to Kennedy, "require judicious attention, not a campaign of defiant sabotage" (p. 301).

Kennedy objected to the fact that Butler expressed more sympathy for nonviolent African American offenders than for "the law-abiding people compelled by circumstances to live in close proximity to the criminals for whom he is willing to urge subversion of the legal system" (p. 305). He asserted that law-abiding African Americans "desire more rather than less prosecution and punishment for all types of criminals" (pp. 305–306), and suggested that, in any case, jury nullification "is an exceedingly poor means for advancing the goal of a racially fair administration of criminal law" (p. 301). He claimed that a highly publicized campaign of jury nullification carried on by African Americans will not produce the social reforms that Butler demands. Moreover, such a campaign might backfire. Kennedy suggested that it might lead to increased support for proposals to eliminate the requirement that the jury be unanimous in order to convict, restrictions on the right of African Americans to serve on juries, or widespread use of jury nullification by White jurors in cases involving White-on-Black crime.

According to Kennedy, the most compelling reason to oppose Butler's call for racially based jury nullification is that it is based on "an ultimately destructive sentiment of racial kinship that prompts individuals of a given race to care more about 'their own' than people of another race" (p. 310). He objected to the implication that it is proper for African American jurors to be more concerned about the fate of African American defendants than White defendants, more disturbed about the plight of African American communities than White communities, and more interested in protecting the lives and property of African American than White citizens. "Along that road," according to Kennedy, "lies moral and political disaster." Implementation of Butler's proposal, Kennedy insisted, would not only increase but legitimize "the tendency of people to privilege in racial terms 'their own'" (p. 310).

Hung Juries

If the jury cannot reach a unanimous verdict (or a 9–3 verdict in Louisiana or a 10–2 verdict in Oregon), the jury is said to be deadlocked, or hung. This ends the trial, and the prosecutor has to decide whether to dismiss the charges, offer the defendant a plea bargain, or try the defendant again before a new jury.

There are limited data on the frequency of hung juries. One study of jury trials in the 10 largest counties in California in the early 1970s found that 12.2% of the trials resulted in hung juries (Planning and Management Consulting Corporation, 1975). This study also found that 26% of the cases involving deadlocked juries were dismissed, 41% were resolved with a plea agreement, and 33% resulted in a new trial. A more recent study by the National Center for State Courts (2002) found that many states did not compile data on interim dispositions such as hung juries. The rate in the 30 jurisdictions that did compile such data was 6.2%. Like the earlier research in California, this study also found that only a third of the cases that resulted in a deadlocked jury were retried to a new jury.

According to the research conducted by the National Center for State Courts (2002), three factors were significant predictors of the likelihood of a hung jury: (1) the complexity of the case and the ambiguity of the evidence; (2) the group dynamics of the jury deliberation process, including the level of conflict among the jurors, the extent to which the deliberations were dominated by one or two individuals, whether the jury took an early vote, and whether the members of the jury had previously served on a jury (jurors with previous experience were more likely to deadlock); and (3) juror concerns about the fairness of the process that brought the defendant to court to face criminal charges. In contrast, the study found no relationship between the likelihood of a deadlock and the racial, ethnic, gender, or socioeconomic composition of the jury. Although the authors of this report stated that eliminating the unanimity requirement would reduce the number of hung juries, doing so

would address the symptoms of disagreement among jurors without necessarily addressing the actual causes—namely, weak evidence, poor interpersonal dynamics during deliberations, and jurors' concerns about the appropriateness of legal enforcement in particular cases. (p. 86)



COMPARATIVE COURTS

Prior to 1984, there were no female judges on the Magistrates' Courts in Victoria, Australia. A series of controversial decisions in rape cases, however, led to public protests and calls for the appointment of women to the bench. From 1984 to 1992, 30% of the new appointees were women. By the mid-1990s, women comprised 15% of all judges on the Victoria Magistrates' Court. The chief magistrate was also a woman.

A recent study examined the impact of this "sudden and dramatic change" in the gender composition of the Victoria Magistrates' Court, which handles about 90% of all criminal cases. Laster and Douglas (1995) interviewed six female judges and 24 male judges regarding their perceptions of the changes that had taken place on the court.

Laster and Douglas (1995) state that the "most striking" finding of their study "is the ready acceptance of women as appropriate appointees to the bench." A number of the male judges reported that "there had been some initial shock when the first women were appointed to the bench." Generally, however, the men believed that the women had made positive contributions to the work environment and had proven themselves to be competent, professional, and hardworking. The male judges, for example, reported that the female judges were "good fun," that they had "livened things up," and that female judges were a "boon" to the working environment. Some of them indicated that the women were more sensitive, more understanding, and more empathic in their decision making. The male judges also believed that their female colleagues had been accepted and integrated into the organizational culture. According to Laster and Douglas, "Within a relatively short period, the female members of the bench had managed to impress their male colleagues. They seem to have proved to them that if there is any 'difference' between male and female magistrates, the qualities that women bring to the job make them eminently suitable for the career."

The women magistrates maintained that "gender in the courtroom was irrelevant." Although some noted that witnesses seemed uncomfortable when they had to repeat indecent language and that their gender might be commented on by those who were unhappy with the outcome, most of the women magistrates believed that "no one seems to be conscious that you're a man or a woman." Moreover, the attitudes of the men and women toward standards of proof, sentencing standards, and other aspects of the magistrate's job "were marked more by congruence than by divergence." The women magistrates also stated that the overall style of the court reflected feminine values and that both the men and the women on the bench "have female ways of doing things."

Laster and Douglas (1995) conclude that the "feminization of the bench" was part of a more general change in perceptions about the administration of justice. "Women did not change practice; rather, politicians allowed women into the all-male preserve because the political imagination suddenly could conceive of them as exercising power under a new ideological regime."

Announcing the Verdict

After the jury has reached a verdict, the jurors return to the courtroom to deliver their verdict. All the other key players—the judge, the prosecutor, the defense attorney, and the defendant—also reassemble in the courtroom. The judge will ask the foreperson of the jury if they have reached a verdict; the foreperson will reply that they have and will hand the verdict to the bailiff, who will hand it to the judge. The defendant will be asked to stand and face the jury, and the judge (or, sometimes, the foreperson of the jury) will read the verdict.

A defendant who is found not guilty is released. The judge cannot overrule the jury's decision, and the state cannot appeal it. The jury's decision is final. If the jury finds the defendant guilty, the defendant has the right to appeal the decision. In addition, the defense attorney may ask the judge for a directed verdict of acquittal; in essence, the defense attorney is asking the judge to set aside the jury's guilty verdict. If the judge decides to do so, the prosecutor can appeal the judge's decision. If the guilty verdict stands, the judge either will sentence the defendant immediately or, more likely, will schedule a date for a sentencing hearing.



MOVIES AND THE COURTS

Anatomy of a Murder (1959)

The criminal trial has been the subject of countless films. One of the greatest courtroom dramas is *Anatomy of a Murder*, a film about a murder trial set in rural Michigan. While many of the cultural references are now dated (the film is over 50 years old), its depiction of the battle between prosecutor and defense attorney, overseen by the trial judge acting as a sort of referee, remains compelling.

The defense attorney, Paul Biegler, represents a United States Army Lieutenant, Fred Manion, who is accused of killing a bartender, Barney Quill, because he believes Quill raped Manion's wife, Laura. There is a lot of courtroom jousting about the insanity defense, evidence (or the lack thereof) of rape, and justifiable homicide. It is unclear if Laura Manion was in fact raped or if she consented to sexual intercourse, and it is also unclear what Fred Manion's state of mind was at the time he shot Barney Quill. The attorneys argue back and forth and the judge is forced to mediate their many disputes. While the movie is a melodrama of the highest order, the courtroom scenes depict well the different roles of the prosecutor, defense attorney, and judge.

SUMMARY

The criminal trials that capture the attention of the national media clearly influence public perceptions of what goes on in criminal court. However, these highly publicized trials are distortions of reality. Most of them involve defendants charged with very serious crimes—often multiple murders or sexual assaults—and teams of lawyers for the prosecution and the defense. Jury selection takes days, if not weeks, the presentation of each side's case is a long, drawn-out process in which the attorneys constantly raise objections to the admission of testimony or evidence, and the jury deliberates for days, not hours. The *typical* criminal trial bears little resemblance to this “idealized” view. The charges that the defendant is facing are less serious, the proceedings are much shorter, the defense may or may not present a case, and the jury is unlikely to spend days deliberating on a verdict.

The purpose of this chapter is to describe the typical criminal trial, from the opening statement by the prosecutor to the announcement of the verdict by the jury. The process begins when the prosecution gives an opening statement, which generally outlines the facts in the case and the evidence that will be presented to prove beyond a reasonable doubt the state's case against the defendant. After the prosecutor delivers the opening statement, the defense attorney is allowed but not required to present his or her side of the case from the perspective of the defendant.

Following opening statements, evidence is presented by the prosecutor in the form of witness testimony and real evidence. Once the prosecutor has finished presenting the state's case, the defense has an opportunity to present evidence designed to raise doubts in the minds of the jurors. It is possible that the defense attorney will not present any evidence; this might be the strategy if the defense attorney believes that the prosecutor has failed to establish guilt beyond a reasonable doubt or if the defendant has no alibi or other defense to the charges. Typically, however, the defense calls its own witnesses to the stand and admits its own evidence in hopes of establishing reasonable doubt in the minds of the judge or jury.

Closing statements come at the end of the trial, and they provide both the prosecutor and the defense attorney an opportunity to summarize their arguments to the judge and jury a final time. Next, the judge provides the jury with instructions on how to interpret and apply the relevant law of the case, and the jury is dismissed to deliberate. On completion of deliberations, the jury reports its verdict to the judge. If the defendant is found not guilty, she or he is free to leave. If the verdict is guilty, the judge then sentences the defendant or schedules a sentencing hearing for a later date.

While rare, criminal trials in the United States symbolize the rule of law for the American form of criminal justice. On completion of the trial, the case may not end because there are opportunities to appeal, which is the topic of a subsequent chapter.

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DISCUSSION QUESTIONS

1. Do you believe that individuals such as the defendant's spouse, priest, doctor, or lawyer should or should not be compelled to testify against the defendant? What are the arguments in favor of designating these "privileged communications"? What are the arguments in favor of forcing these individuals to testify?
2. Consider the information discussed in the box "Controversy: Is the Victim's Prior Sexual Conduct Relevant in a Rape Case?" Do you believe that a victim's prior sexual conduct is relevant in a rape trial? Should all prior sexual conduct be inadmissible, or are there certain types of evidence that should be allowed? What are the consequences of including or excluding such information?
3. Take into consideration the cases cited in the discussion of "playing the race card" and pay close attention to the years in which the cases occurred. Are you surprised that such discrimination emerges in contemporary courtrooms? How do you feel about attorneys "playing the race card" during trial? What could judges do to prevent it?
4. What are the consequences of jury instructions being given in technical legal terms to jurors? What are the pros and cons to making the jury instruction process more comprehensible to laypeople?
5. Should jurors be allowed to base a decision to sentence an offender to death rather than to life in prison on predictions of future dangerousness? Why or why not?
6. What problems could arise from requiring all juries to return a unanimous verdict in order to convict an individual of a crime? Allowing nonunanimous verdicts?
7. Should juries be notified by the judge that they are allowed to nullify the law? Are there situations when jury nullification can be justified? Where it produces injustice rather than justice?
8. Do you agree or disagree with Paul Butler's call for "race-conscious jury nullification"? What are the dangers inherent in allowing jurors to nullify the law based on the race of the defendant?
9. Why do you believe criminal trials in the United States follow such an orderly sequence of events such as that described in this chapter?

KEY TERMS

Direct evidence	Liberation hypothesis	Privileged communication
Hearsay evidence	Mock jury study	Real evidence
Indirect evidence	Privilege against self-incrimination	Testimonial evidence

INTERNET SITES

Bureau of Justice Statistics: <http://www.ojp.usdoj.gov/bjs/>

Fully Informed Jury Association (American Jury Institute): <http://www.fija.org/>

National Academy of Sciences Committee on Law and Justice: <http://www7.nationalacademies.org/claj/>

National Center for State Courts: <http://www.ncsc.org/>

University of Missouri–Kansas City School of Law: <http://www.law.umkc.edu>

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