

# JURY TRIALS: PSYCHOLOGY AND LAW<sup>1</sup>

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## I. Introduction

In this article, we will be concentrating on trial by jury, an institution that has a long and cherished history but that is undergoing rapid changes; there are even calls for its abolition. This review of the difficult interface between psychology and law will cover the numerous empirical studies related to individual differences in conviction proneness and/or punitiveness, extra-evidentiary factors in individual decision making, and the dynamics of juror interaction that culminate in the verdict. We will also necessarily review evidence related to recent changes in the operation of juries, for example, in the size of jury and the requirements of unanimity, as well as various proposed reforms.

However, we would like to encourage researchers to go beyond these matters and apply their intellects and efforts to the broader issues, to conceptions of justice and to the processes by which these can best be achieved. Social psychological research is of considerable aid to an attorney whose purpose is to win his or her case. We have tools and knowledge pertinent to the selection of jurors, to the development of case strategy, and to the art of persuasion. We have also contributed to appellate issues such as the size and decision rules of juries. Yet, our research is often directed at a compilation of factors that "make a significant difference" or to the consequences of a decision once the court has already made its ruling. To aid the courts in their decisions of the future and, perhaps more ambitiously, to outline procedures that better ensure "due process" and "equal protection under the laws," we need to address the conceptual and value-laden issues involved in the notion of *justice* as well as study and devise procedures by which to ensure the attainment of this objective.

At present, our system of trial by jury is an adversarial process where evidence for both sides is presented to a (theoretically) impartial body of representatives of the community, usually 12 in number and typically required to deliberate to unanimity. Their decision is the final verdict.

Questions, of course, arise as to whether this is the best system to achieve justice and whether it best reflects the values intended by the framers of the Constitution in their provisions for due process, equal protection under the law, and trial by one's peers. For example, both critics and advocates have asked whether representation of the community is the best way to achieve justice. Are laymen sufficiently capable to render complicated judgments? Is representativeness the best way to achieve impartiality or lack of bias? Then there are questions on the specific forms representation should take. Is 12 the best number of jurors? Is justice curtailed if the size of the jury is reduced? Is unanimity necessary and for what reasons? Even if we decide representativeness is our desired goal, does our system select jurors so as to insure representativeness? By what means do we determine bias and by what mechanisms do we detect and remove it?

In attempting to investigate and hopefully to shed light on these issues, we

should bear in mind that our present system is not the result of a carefully outlined set of theoretical and philosophical principles. Rather, it is the product of centuries of accumulated changes and adaptations which have given content and meaning to the term *trial by jury*. Thus, the jury trial must be understood in its historical context—how it began, what functions it has served, and the timing of its arrival and acceptance by the states. It must also be understood in the context of its relationship to the political and social structure. Many of the proponents of trial by jury see it as a ‘bulwark of liberty,’ a safeguard against political tyranny, or as a community lever against unpopular laws. They point to the controversial political trials of the 1960s as well as the frequent unwillingness of juries to convict violators of prohibition or drug laws. Even the debate over the role of the jury, that is, as fact finder versus interpreter of the law, can be viewed as a power struggle between judge and jury. Thus, as we attempt to understand the psychology and the law in the institution of trial by jury, we will start by exploring the origins of this deeply embedded tradition.

## II. Antecedents and Historical Developments in Trial by Jury

The origin of trial by jury is difficult to trace, since it occurred in numerous forms over the centuries. While our particular conception of a jury trial bears most resemblance to that practiced during the reign of Henry II in England (1154–1189), there is evidence of widespread usage of jury trials in one form or another as early as 1200 B.C., during the Trojan period, when tribal democratic justice was observed. Both Greek and Roman law had versions of trial by jury. Socrates was condemned to death by a Greek jury of 501 members (of which apparently 30 could have swung the vote to acquittal). The Romans appealed to the *populus romanus* as a check on the magistrates. Ancient Germanic tribes practiced a form of democratic justice and are credited with the spread of the custom. This practice was developed further under the Carolingian kings in the latter part of the eighth century. The Danes used a form of group accusation of crime in the tenth century.

Though in existence and reasonably widespread for centuries, the important historical periods for the form of jury trials as we have come to know them were the Norman Invasion of Britain in 1066 and the reign of Henry II (see Cornish, 1968, pp. 9–18; Holdsworth, 1938; Howe, 1939, pp. 582–616; Pope, 1961, pp. 426–448; Thayer, 1892, pp. 295–319).

When the Normans invaded England, William the Conqueror introduced the notion of the Frankish inquest by sending inquisitors to investigate and record the property and claims of the populace, this becoming the famous Domesday Book. Henry II expanded the usage of local participation in adjudicating disputes and made it available for private disputes as well. In addition to charging a fee which

added to his coffers, he submitted delicate disputes between the Crown and the Church to a jury and, in the process, won the approval of a populace who disliked trials by ordeal or battle and did not trust the fairness of the lords.

Although the practice became more widespread during Henry's reign, the importance of trial by jury as a right, as a guarantee of individual freedom and liberty, was marked by the signing of the Magna Carta on June 12, 1215, during the reign of King John. John, confronted by the barons at Runnymede, signed a document that made even the king subject to the law. Most important was clause 39, which stated that "No freeman shall be arrested and imprisoned, or dispossessed, or outlawed, or banished, or in any way molested; nor will we set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land."

Thus arose the importance of trial by jury as a basic democratic right, one that came to be described as a "bulwark of liberty," an institution which "ever will be looked upon as the glory of the English law" (Blackstone Commentaries, 1791, p. 379). It also came to be viewed as a protection of individual liberty against potential political tyranny. As late as 1956, Lord Devlin echoed the sentiments of Blackstone in the following quotation:

The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives. (as quoted in Cornish, 1968, p. 126)

Blackstone was hard pressed to document the independence of the jury against political tyranny prior to his statements. However, there is more corroboration for the independence of juries during the period of the French and American Revolutions (Cornish, 1968, p. 130).

### III. The Jury in America

Though there was a century-long battle on the meaning of a jury trial in England, the trial by jury took on a special meaning as a safeguard against political oppression in the United States. It was used as a protection against unpopular laws and capricious English judges. It was part of our revolution. In the famous case of John Peters Zenger, an American jury refused to convict Zenger of libel and, in so doing, made it clear that the power of the British Crown could not be enforced without a conviction from an American jury.

Recognizing this show of independence, England wanted to get around the jury and attempted to enforce its hated Stamp Act of 1765 by placing the act under the jurisdiction of the admiralty courts. The outcry was great. The Ameri-

cans saw the removal of a trial by jury as a mechanism for subjecting them to political repression. So deeply entrenched was this belief that all states used juries of various forms prior to the Declaration of Independence. The Articles of Confederation insisted on the right to trial by jury and the United States Constitution made it a fundamental right guaranteed to all citizens.

The Trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such place or places as the Congress may by law have directed. (U.S. Constitution, Article 3, Paragraph 2)

In addition, three amendments to the Constitution were added to specify more clearly the constitutional right to trial by jury. The Fifth Amendment requires indictment by a grand jury; the Sixth Amendment guarantees citizens the right to a speedy and public trial before an impartial jury in the jurisdiction where the crime was committed; and the Seventh Amendment allows for jury trials in civil matters where more than \$20 is at stake. Thus, a country with deeply held suspicions of political tyranny and with fears of unchecked power developed a system of checks and balances and, with it, a belief in the protection afforded by community representation in the administration of justice (see generally Pope, 1961).

#### A. DETERMINERS OF FACT VERSUS INTERPRETERS OF THE LAW

Although the principle of trial by jury is deeply embedded in the roots of American history and has at times protected the populace against political repression or unpopular laws, there have been many attempts to curtail its usage or abolish it altogether. One form of curtailment can be best understood in the context of a struggle for power between judges and jurors, a struggle that has been waged for centuries.

Prior to 1670, judges had the power to control verdicts since, according to the practice of attain, they could punish jurors for "error." This power was rendered obsolete by the famous Bushell case of 1670 involving William Penn, who attempted to conduct a Quaker meeting and was charged with unlawful assembly. When the jury returned a verdict of acquittal, "contrary to evidence," the judge (who was bent on conviction) confined the jury without food or water for three days. In a landmark decision, Chief Justice Vaughan ordered the jury freed and argued that the jury cannot be controlled by the judge. Thus ended the power to punish the jury. An important corollary to this decision was that the jury had the power to interpret the law as well as find for the facts since its general verdict could not be punished or controlled by the judge. Now came a new battle for power. Although the jury had the *power* to decide facts and interpret law, many argued that they had not the *right* to interpret the law. Thus, in the late

seventeenth century when judges could no longer control verdicts by punishing jurors, they often sought to define the jury's role very narrowly, insisting that the jury should only determine the facts, not interpret the law. As one example, jurors in cases of sedition were asked only to determine whether an individual had published a given work, not whether the words were seditious. Whether or not the words were seditious was a question of law, not of fact, the judges argued. Juries resented this incursion into what they considered their role and eventually had the right to render a verdict on the entire question restored to them. This was effected by Fox's Libel Act of 1792 (Cornish, 1968, p. 131).

From the historical accounts, it seems clear that the jury was accorded the right as well as the power to interpret the law in the early days of this country. John Adams was quoted in 1771 as saying that it was not only the right of the juror but "his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court" (as quoted in Van Dyke, 1970, p. 22). However, this right was soon contested and the issue was directly addressed in *United States v. Battiste* (1835) and *Sparf and Hansen v. United States* (1895). In *United States v. Battiste*, Mr. Justice Story argued that "it is the duty of the court to instruct the jury as to the law and it is the duty of the jury to follow the law as it is laid down by the court" (as quoted in Van Dyke, 1970, p. 18). It is this case that is credited "more effectively than any other decision to have deflected the current of American judicial opinion away from the recognition of the jury's right" (Howe, 1939, p. 590).

In *Sparf and Hansen v. United States*, two sailors were accused of throwing a third overboard from an American vessel near Tahiti and were charged with murder. Although the defendants asked that the jury be allowed to return a verdict of manslaughter, the judge refused to give such instructions, saying that the evidence did not warrant such a verdict. The Supreme Court upheld the judge's decision. In a majority opinion written by Mr. Justice Harlan, the Court held that the jury was obliged to follow the judge's instructions in matters of law even though, as the Court acknowledged, judges had instructed juries that they were judges both of law and of fact in criminal cases prior to 1835. The dissenting justices argued that it was preferable, for both historical and political reasons, to recognize that the jury had the right to disregard the court's instructions (Howe, 1939, pp. 588-590; Van Dyke, 1970, pp. 19-20).

The history of this struggle is lengthy and elaborate. It continues to this day and is poignantly illustrated in the contrast between instructions given to jurors in California and Maryland, where jurors are told, respectively

Ladies and Gentlemen of the Jury: It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you. (as quoted in Van Dyke, 1970, p. 17)



Members of the jury, this is a criminal case and under the Constitution and the laws of the State of Maryland in a criminal case the jury are the judges of the law as well as of the facts in the case. So that whatever I tell you about the law, while it is intended to be helpful to you in reaching a just and proper verdict in the case, it is not binding upon you as members of the jury and you may accept the law as you apprehend it to be in the case. (as quoted in Van Dyke, 1970, p. 20)

Although the above instructions show that the issue is still very much alive, it appears that the judges are winning since only Maryland and Indiana instruct jurors that they are interpreters of the law as well as finders of fact. The rest of the states make it clear that the jurors have the duty to follow the law as the judge gives it to them.

Most of the concern about the diminishing power of the jury in this regard is raised in the context of political trials. It should be remembered that these are the same issues that marked the importance of the jury as a protection of individual liberty against political tyranny in the early days of this country. Thus, critics of the present judicial instructions (e.g., Van Dyke, 1970; Lefcourt, 1970) argue that the jury should be told that they have the right as well as the power to interpret the law, particularly in political trials involving crimes of conscience.

It is when judges presume to ask specific questions rather than allow the jury to simply return a general verdict (e.g., the Benjamin Spock case) or when there is evidence that the radical leaders of a movement for change are being selected for prosecution (e.g., the Black Panther 21 trial) that the jury must act on the totality of the evidence (Van Dyke, 1970, p. 24; Lefcourt, 1970, p. 63). It is here that we need the voice of the community, a lever against overzealous prosecutors and case-hardened judges. It is here that we need protection against possible political oppression, and it is in these types of cases that officials of the government lose their objectivity.

On the other side of the issue, critics of discretion on the part of juries point to the possibility of a "system in which the ultimate test of socially permissible conduct is, to a significant degree, the random reaction of a group of twelve people selected at random" (Fortas, 1970, p. 61). If a jury is prejudiced, discretion allows for unequal protection of the law. Some have argued that prejudice is manifested by findings that a black defendant is more likely to be convicted, to be convicted of a higher degree of crime, and, if convicted, to be more severely punished than whites (see Greenberg, 1959; Kalven & Zeisel, 1966; Kuhn, 1968 for related research), though other research does not corroborate these findings (Gleason & Harris, 1975; Nemeth & Sosis, 1973; Boone, 1973). However, it should also be mentioned that many authors concerned with racism have questioned whether manifestations of prejudice would be appreciably altered if a judge rather than a jury were rendering the verdict. (See discussions by McDougall, 1970; Rhine, 1969.)

## B. COMPETENCE, REPRESENTATIVENESS, AND QUALIFICATIONS

Perhaps the most frequently voiced concern about the jury system has to do with competence of laymen to render just decisions in regard to complex problems. Writers from both sides of the Atlantic have voiced doubts about the quality and competence of juries. Some argue that verdicts should be left to judges and lawyers because of their presumed expertise in these matters. However, it is interesting that most of the criticism is not based on the supposed superiority of judges over laymen in rendering such decisions. Rather, the argument usually is that juries are not truly representative of their communities. Critics have especially emphasized the fact that professionals and the highly educated are underrepresented on juries. Given that clergymen, doctors, lawyers, dentists, chemists, etc. were exempt from jury service in England, Granville Williams expressed concern in 1955 as follows:

The subtraction of relatively intelligent classes means that it is an understatement to describe a jury, with Herbert Spencer, as a group of twelve people of average ignorance. There is no guaranty that members of a particular jury may not be quite unusually ignorant, credulous, slow-witted, narrow-minded, biased, or temperamental. (quoted in Van Dyke, 1970, p. 21)

Thus, Williams fears nonrepresentation of the intelligent and educated on juries rather than the fact that it is laymen who serve. Interestingly, proponents of the jury system would agree with the critics on this issue of representation, although for less elitist reasons. They too argue forcefully for community representation. Juries "restricted to certain classes within the community are more likely to have some common prejudice" (Cornish, 1968, p. 141). Further, one needs representativeness in order to have the voice of a community conscience.

This issue of competence versus community representation has always been present in one form or another. Most of the arguments revolve around the definition of each of these terms and the links between them. One aspect of the dispute involves the premise that the most competent jurors are not random representatives of the community but, rather, the more educated, intelligent, and socially prominent. Thus, we have always had qualifications for jury service, many of which barred specific groups such as women and blacks. This is the first issue that we will explore. We will investigate the historical development and current status of qualifications for jury service and, with it, how the struggle for minimum qualifications has served to compromise representation of the community. A second issue that we will confront is the definition of competence. Granville Williams, and others as well, assumed that competence is linked to education and intelligence. He decried underrepresentation of the highly educated, not because of his belief in representation per se, but because of an assumption that these individuals would be better able to understand and comprehend complex issues and therefore render better and more just decisions.



Others have argued that competence is linked to representation rather than to education or intelligence. Competence to render justice is not an issue of scientific analysis, they contend, but of human insight, and this is not the sole province of the educated. One uses general knowledge and "familiarity with similar situations" to find the facts (McDougall, 1970, p. 532).

A third issue involves still another aspect of competence, that is, the jury's broader political and social role as protector against political oppression, as conscience of the community, and as a legitimating and symbolic institution for society. Thus, its competence must be viewed in terms of this broad mandate rather than a narrow definition related only to its fact-finding role.

### *1. Qualifications*

Historically, the elitist answer to the question of how best to ensure just decision making has been to establish qualifications for jury service on the assumption that not all citizens are capable of the "onerous" duties. Athenian justice involved only male citizens and property holders and the Frankish kings summoned "important men" for their inquests. Pope (1961) argues that "every historical experiment which foreshadowed the modern jury required jurors to possess certain minimum qualifications . . . [and from] the beginning, jurors had to be freemen, had to own property and had to come from the vicinity of the dispute" (p. 437). Thus, the wealthy and socially prominent were favored for jury service.

In addition to selection procedures which barred particular groups, there is also a long history of the special jury, that is people chosen specifically for their qualifications to judge a particular issue at hand. Cooks and fishmongers may be called on to decide issues involving the selling of bad food. Merchants may be jurors in cases involving business practices. In England, both the special and the common petty juries existed until 1949. Special juries were used in civil cases where the issues were "of too great a nicety for the discussion of ordinary free-holders" (Blackstone Commentaries, III, p. 357). The assumption behind the special jury was that these individuals would most likely understand the issue and render a just verdict. The related assumption is that "like should be tried by like." However, as we will learn, the courts in both England and the United States have proven hesitant to favor this as a principle, particularly in the sensitive areas of sex and race.

Both England and the United States have a long history of discrimination in jury service. Originally, juries were composed of barons; women and indentured servants were specifically barred. When the institution of juries came to the United States, blacks were initially excluded as well, but as early as 1875 Congress made it a crime to exclude potential jurors on the basis of race. This act was upheld in a Supreme Court decision (*Strauder v. West Virginia*) in 1880 that specifically invoked the "equal protection under the law" clause of the Four-

teenth Amendment. Kuhn (1968) reports that "express statutory exclusion of Negroes from jury duty disappeared soon after the close of the Reconstruction" (p. 251). As will be discussed in the section on race, however, this did not end racial discrimination, which has become more subtle and has raised more complex issues for legal opinions.

Women fared less well since the Supreme Court did not see fit to interpret the Fourteenth Amendment as prohibiting the exclusion of women. In this regard, it is interesting to note that, in a famous antidiscrimination case (*Hernandez v. Texas*), the Supreme Court in 1953 argued, "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated" (p. 478). The *Hernandez* case involved exclusion of Mexican-Americans, and the Court at that time was focusing on race and ethnicity. Although one might expect that the principle would apply to the sex as well as the other social categories, this was not the case. The Court specifically noted the categories of concern: "Exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment" (p. 479). Even more pointed is Lindquist's (1967) comment with regard to the *Hernandez* decision: "Under this rule, the courts looked to the selection procedure only to prevent overt discrimination with respect to race, religion, color, national origin and economic status" (p. 33). Again, we note the omission of sex. Thus, for women, the right to serve on juries had to be established on a state-by-state basis, and as recently as the mid-1960s three states barred women from jury service (Alabama, Mississippi, and South Carolina) and three others required that they specifically ask to be called in order to be eligible (Florida, Louisiana, and New Hampshire).

Today, no state that we can find specifically bars women from jury service. However, Mississippi, in its 1972 statutes, has a special section on exclusion of women saying that "exclusion of women from jury service does not constitute an invalid discrimination" and that "the Fourteenth Amendment is not applicable on the issue as to whether or not women will be required to serve as jurors in a state court." They note that the power to prescribe qualifications rests with the state legislature and that they may include or exclude women. Legally, they are right, but such a practice underscores the problem with regard to discrimination based on sex. (See Kenyon & Murray, 1966; Nemeth, Endicott, & Wachtler, 1976, for further discussion.)

In the Federal courts, prohibitions against discrimination have been more clear and uniform. Congress passed the Jury Selection and Service Act in 1968, specifically stating that citizens shall not "be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status" (28 U.S.C.S. 1862).

Thus, any person is qualified for jury service in the Federal Courts except one who

- (1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;
- (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form
- (3) is unable to speak the English language;
- (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or
- (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty. (Federal Code of Jury Qualifications, 28 U.S.C.S. 1864, 1865)

States, however, differ greatly in their qualifications for service. Most have an age qualification, usually 18 or 21; most require ordinary intelligence and the ability to read, write, and speak English; most disqualify convicted felons. However, some States require only these qualifications or slight variants thereof (e.g., California), whereas others include subjective provisions such as being "of well known good character and standing in the community" (Louisiana R.S. 13:3041), "of good character, of approved integrity, of sound judgment, and able to read and write the English language understandably" (New York juror qualifications, 1975, NY Judiciary Law, Art. 16, Para. 504), or "esteemed in the community for integrity, good character and sound judgment" [Ala Code § 12-16-60 1975 (Supp. 1979)]. Mississippi goes so far as to add that the person should not have "been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five years and who is not a common gambler or habitual drunkard" [Miss. Code Ann. Sec. 13-5-1 (1972)]. The subjectivity of the wording and the lack of clear criteria by which to assess good character, ordinary intelligence, etc. obviously allow for discrimination. The problem is exacerbated when one considers that jury commissioners who compile original jury lists tend to be white males. Kuhn (1968) reports that every district judge (65), every jury commissioner (129), and every court clerk (28) in the federal district courts in the 11 Southern states in 1966 was white.

To make the situation even more subjective, many states still use the key-man system, a mechanism by which the jury commissioners contact prominent or *key men* to compile names for the jury lists. They may also contact organizations for this purpose. Many critics of this system (e.g., Lindquist, 1967; Rhine, 1969) have pointed to the fact that selection from organizations tends to favor white, professional, or business people who are better educated and who live in urban settings. The selection of key men uses arbitrary criteria as well; Lindquist (1967) reports criteria such as (1) previous jury service, (2) reputation in the community, (3) names in local newspaper articles, and (4) personal acquaint-

tances as some of the ways in which key men are selected (pp. 37-39). These mechanisms tend to amplify uniformity and lead to overrepresentation of the white, male, middle-class population.

Such a procedure for jury selection was criticized in *Rabinowitz v. United States* (1966). In rejecting this mechanism for the Federal Courts, Title I of the Civil Rights Act established uniform juror selection procedures for district courts through the use of voter registration lists. Lindquist (1967), however, points out that this is applicable only to federal courts. While Title II provides that it is unlawful to distinguish on the basis of race, color, religion, sex, national origin, or economic status in any state, the phrasing prohibits discrimination but does not require a cross-section of the community. Nor does it establish random selection procedures for the states; state selection procedures are thus left alone and allowed to be nonrandom (note 74). Many advisory boards and court opinions have argued that these jury commissioners have a duty to find qualified jurors (*Cassell v. Texas*, 1950; U.S. Judicial Conference, 1966), but random and reviewable procedures are not mandated.

## 2. Competence

As noted earlier, the jury as an institution has long been charged with incompetence of one form or another. Many critics view it as ignorant and full of prejudice and passion (Frank, 1949). However, the little research that has been conducted does not offer so bleak a picture. Kalven and Zeisel's (1966) classic work concludes that jurors understand evidence and Simon's (1977) review of trials involving issues related to First Amendment civil liberties causes her to conclude: "During none of these periods is there any evidence, or indeed any suggestion, of the jury's lack of independence, or of the jury's failure to understand the issues or complexities of the problems involved, or of the jury's failure to do its duty" (Simon, 1977, p. 290). It should be remembered that these definitions of competence have more to do with comprehension and intellectual ability than human understanding or insight, although, even here, the jury looks quite competent. Another type of evidence offered on the issue of competence uses, interestingly, the criterion of what a judge's decision would have been. Many researchers have cited the work of Kalven and Zeisel (1966) in this regard. In that study, the jury verdicts were compared to the decisions that judges would have rendered in 3576 cases. While the juries were deliberating, the judges noted their own decisions. Subsequently, if there was a disparity between a judge's decision and the verdict rendered, the judge tried to give reasons for such a disparity. An analysis of these data shows agreement between judge and jury on 78% of the cases and, important for some critics' definition of competence, the disparity in judgments on the remaining cases can easily be understood. Kalven and Zeisel report that juries were generally more lenient than judges. Of the 22% of the cases on which there was disagreement, the jury was more lenient in 19% and

less lenient in 3%. Kalven and Zeisel conclude that, of the disagreements in criminal cases, about 54% are due to "issues of evidence," 29% are due to "sentiments of the law," 11% to "sentiments on the defendant," and 6% to other factors. Of the disagreements due to "issues of evidence," most are largely due to the fact that the judge is privy to information that is considered "unduly biasing" to the jury, for example, the past criminal record of the defendant.

The varying "sentiments" reported by Kalven and Zeisel include tendencies to reduce the charge when damage is slight, leniency when the defendant had already been punished or when collaborators had received preferential treatment, leniency when the police had used improper methods, and so on, values that fall outside the official rules (Kalven & Zeisel, 1966). Thus, if one accepts the argument that competence is defined in terms of what the judge would have concluded, juries again appear quite competent. The disagreement appears to be in the application of values outside official rules, these being the community voice and conscience which our founding fathers valued.

The old political issues regarding the role of the jury are again apparent in discussions of the competence of juries. Erlanger (1970) argues that "the most sharply drawn issue in the debate over the jury's competence is the question of whether juries: (a) understand the judge's instructions; and (b) if they do, whether they follow them and therefore truly decide only issues of fact" (p. 348). The first part of this has to do with comprehension; the second is more political and subject to debate. With regard to comprehension, some critics point out that there are studies showing that as many as 40% of jurors do not understand judges' instructions (Hervey, 1947). While the issue of comprehensibility should be taken seriously, there is, of course, a question as to whether incomprehensibility is the fault of jurors' lack of competence or judges' phrasing. Many researchers (e.g., Charrow & Charrow, 1979; Elwork, Sales, & Alfini, 1977) have documented outmoded phrasings and grammatical constructions in the law. These researchers and many concerned attorneys are attempting to substitute ordinary English for legalese.

Given adequate comprehension, the concern over whether jurors follow judges' instructions brings us back to the fact finder versus interpreter of the law issue and the general role of the jury as representative of the community and its conscience. One frequently cited example of the unwillingness or inability of juries to follow judges' instructions is in negligence cases. Jurors often substitute comparative negligence for compensatory negligence (Broeder, 1958, 1965a; Kalven, 1964). They usually consider who was more negligent (e.g., an individual vs. a company) rather than following a law that instructs them to award nothing to a plaintiff who "contributed proximally to the cause of his injuries." One may question whether or not jurors understand the distinction made in the law, but we must also consider the possibility that they choose to substitute what they consider to be a fairer or more equitable rule. (For further discussion of

equity considerations by judges and jurors, see Austin & Utne, 1980; Austin, Walster, & Utne, 1978.)

Much of the foregoing discussion is related to many people's conception of competence, that is, analytic ability, knowledge, and comprehension. Critics of this approach (e.g., McDougall, 1970) point out that decision making in a criminal case is not a scientific process, dependent on technical knowledge, but is more often choosing between competing truths. Many times, it comes down to whom one believes, questions of credibility, likelihood of events, and inference of intentions. In such situations, many people (e.g., Kuhn, 1968; McDougall, 1970; Rhine, 1969) argue that personal experiences and background have more to do with the decision reached than scientific ability. It is here that one needs diversity of background and at least the presence of persons who have a background similar to that of the defendant.

The accuracy issue is difficult to document, as we will learn, since persons from different cultural backgrounds often make different decisions. Most of the arguments for the advantages of diversity for accuracy and competence are based on example. McDougall (1970) offers the illustration of a Park Avenue juror trying to understand a ghetto plaintiff's experience with shysters and shylocks. Other examples are easy to contemplate. If a person spotted at the scene of a crime runs away, is this an indication of fear of being wrongfully accused or is it an indication of guilt? One would expect race, class, and ghetto experience to be relevant to one's assumptions. Consistent with these arguments is the research of Triandis (1976) showing the importance of cultural background in interpreting events, including intentions. Thus, one could well argue that diversity of background and viewpoint is important for the fact-finding function of a jury and acts as a check on the prejudices of a particular group.

### *3. Representation*

Although the preceding discussion argues for community representation on juries in order to render fact finding more competent or accurate, many of the issues involving representation of the community are political and social. They concern values that we wish to preserve. First, trial by jury is an important democratic principle; it provides for participation of the populace in the administration of justice. Perhaps no one understood its importance better than Jefferson: "Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making them" (Jefferson, 1789, as quoted in Howe, 1939, p. 582).

In a democracy, each citizen should participate. Jury service, participation of the people in the administration of justice, thus requires representation of the citizenry. However, the fact is that our juries are not truly representative. We might be tempted to believe that the long history of discrimination is past. After



all, the Supreme Court prohibited exclusion on the basis of race as early as 1880 in *Strauder v. West Virginia*. The Federal Jury Selections Act of 1968 required the use of voter registration lists and prohibited exclusion on the basis of race, color, sex, national origin, religion, or economic status. The struggle has been long and hard. Can we assume that representation has finally been achieved?

The available statistics do not support such optimism. Most studies still show underrepresentation of women on juries (Levine & Schweber-Koren, 1976; Simon, 1975; Mills, 1969; Alker & Barnard, 1978). Some indicate that blacks are underrepresented (Lindquist, 1967; Vanderzell, 1966), whereas others do not show significant differences (Mills, 1969; Alker & Barnard, 1978). Young people are consistently underrepresented (Simon, 1975; Mills, 1969; Alker & Barnard, 1978; Vanderzell, 1966). The less educated also tend to be underrepresented (Mills, 1969; Alker & Barnard, 1978). Thus, the picture painted by several studies is that the typical jury represents middle America and that there is underrepresentation of "blacks, women, lower and upper classes, young and old, core cities and exurbs" (Alker & Barnard, 1978, p. 221). The Prahl (1973) study confirms this picture, describing American juries as white, male, middle class, and suburban or rural. Lest we assume that this "middle" bias is an American phenomenon, Lord Devlin describes juries in England as "male, middle aged, middle minded and middle class" (Pope, 1961, footnote 10).

The reasons for this distribution are complex and the discrimination occurs at different phases in the selection process. Most states use either the key man system, previously described, or "objective" lists such as voter registration lists. The subjectivity of the key man system has been previously addressed and serves to exaggerate the presence of categories to which the jury commissioners belong. However, the objective lists have been seen as also contributing to the bias in race and age. Some states use taxpayer lists, with resulting overrepresentation of whites. Even voter registration lists (which are a great improvement over previous lists used) have a built-in bias. Lindquist (1967) points out that of the "1964 voting age population of 114 million, only about 80 million were registered to vote" (p. 47) and that available statistics suggest that this is discriminatory toward blacks, lower socioeconomic classes, and the less politically active. Young people tend to be underrepresented on these lists because many states update their master jury wheel every three or four years, meaning that persons newly eligible to vote may not appear. In addition, highly mobile students tend not to appear (Alker, Hosticka, & Mitchell, 1976, footnote 5).

The reasons for underrepresentation of women appear to be related more to the exemption or excuse processes than to the original master wheel. These processes produce an underrepresentation of the highly educated and professional classes as well. In our system of jury selection, certain groups of people are exempt from jury service (they are qualified but they are exempted). These exemptions are usually occupational in nature and cover members in active



service of the armed forces, policemen or firemen, and public officials [18 U.S.C. §1863 (b) (6)]. The rationale is that it is in the public interest to exempt such individuals. England has the same kind of system, exempting lawyers, policemen, members of Parliament, peers, county councillors, doctors, firemen, priests, nuns, members of Mersey Docks and Harbours Board, and Elder Brethren of Trinity House from jury service (Cornish, 1968, p. 39). In addition, many groups of people can be easily excused. In England, these tend to be people with a one-person business who cannot be easily replaced, those who already have their holidays arranged, those who would lose a seasonal bonus, and those who must look after children or invalid relatives. In the United States, excuses are for those over age 70, ministers of religion, persons essential to the care of young children or aged persons, registered physicians, surgeons, dentists, pharmacists, and nurses, those who have served as jurors within the previous 2 years, university and other teachers, lawyers, sole proprietors of businesses, and anyone who has to come more than 80 miles or 2 hours of travel time to the court. There is also the discretion of the judge at the time the court is in session. There are myriad variations on the "no one can replace me" theme that, the judge willing, can be the basis for excuse [28 USC 1863 (b.) (5)].

It is clear that exemptions and excuses based on occupation tend to reduce the numbers of professional and highly educated persons. Excuse based on the care of children and the aged is credited with being the main reason for the great underrepresentation of women on jury panels (Alker & Barnard, 1978). While the preceding applies to federal courts, the states can be even more "chivalrous" in not requiring the services of women on juries. Copelon, Schneider, and Stearns (1975) report that four states (Alabama, Georgia, Missouri, and Tennessee) excuse women solely on the basis of their sex; our recent search shows that Georgia and Tennessee have repealed this automatic exemption. Many states give child care exemptions for women, and some even require that women specifically register for jury service.

The issue of exemptions and excuses is an important one. Apart from the question of whether or not certain occupations are so needed elsewhere as to be exempted or excused, many excuses are based on a simple preference by the person that he or she not serve. For one thing, some people claim that jury service poses an economic hardship on them since they are not paid at work while they serve and the \$3-20 jury fee does not compensate them. Further, jury trials take a great deal of time, particularly since, according to some studies, only 21.5% of the entire service is spent in trial and deliberation and most of the time (61%) is spent in the waiting room (Simon, 1975; Pabst, 1973). Although 90% of jurors tend to be favorably impressed after service (Pabst, 1973), these are not inconsiderable hardships. Thus, there is an incentive to be excused from jury service, especially for particular categories of people.

Some would argue that a person should not serve who does not so wish.

Even Congress, in its defense of using voter lists for juries, said "Voter lists contain an important built-in screening element in that they eliminate those individuals who are either unqualified to vote or insufficiently interested in the world about them to do so" (as quoted in Alker & Barnard, 1978, p. 237). On the other hand, many have argued for a tightening of exemptions and excuses (Simon, 1975; Copelon, Schneider, & Stearns, 1975) on the basis that they contribute to the unrepresentativeness of the jury and, consequently, may harm the litigant, the community, and members of the excluded class. Nonrepresentation for any reason will probably affect the quality of jury decision making; it will certainly undermine representation of the community conscience, and it may serve to lessen public confidence in, and legitimacy of, the jury system. It should also be noted that the surveys reported in the beginning of this section probably underestimate the degree of discrimination. For one thing, most of those surveys were taken in northeastern states, and, although discrimination is not the sole province of any one section of this country, the strongest evidence of racial discrimination was found in the survey of eleven southern federal districts. The last states to allow women to serve on juries were also southern. The magnitude of this problem is perhaps better illustrated by specific cases and appellate decisions rather than surveys, since they demonstrate specific instances in which discrimination took on such a blatant form as to require reversal of the jury's decision as well as the setting of a legal precedent. We will concentrate mainly on cases involving race, since this is the category to which the courts have been most responsive.

### C. COURT DECISIONS AND DISCRIMINATION

As mentioned previously, the Supreme Court as early as 1880 ruled that the states could not statutorily require that only whites could serve on juries. While one might hope that such a ruling would end discrimination by race, the discrimination only became more subtle. While state law no longer specifically excluded persons on the basis of race, actual practices of the jury commissioners were such that blacks did not serve. In 1935, the Supreme Court held in *Norris v. Alabama* that the practice of exclusion was forbidden by the Constitution (rather than just the explicit statute barring blacks from service). Yet, consider the evidence that was mustered to show discrimination in this case: "We think that the evidence that for a generation or longer no Negro had been called for service on any jury in Jackson County . . . established the discrimination which the Constitution forbids" [*Norris v. Alabama* (1935)]. In a case involving Mexican-Americans, the Court in *Hernandez v. Texas* found that Mexican or Latin American surnames comprised 14% of the population, 11% of males over the age of 21, and 6 or 7% of the tax rolls, but "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a

jury commission, grand jury or petit jury in Jackson County'' (*Hernandez v. Texas*, 1954, pp. 480-481).

Needless to say, the forces of discrimination proved to be resilient. Token inclusion occurred, thus requiring further rulings. In *Smith v. Texas* (1940), a ruling of discrimination was based on the facts that blacks constituted 20% of the population and almost 10% of the poll tax payers but that only a fraction of 1% had served on juries during an 8-year period. One or two blacks were on the jury list each year and, with arrogant tokenism, the black juror was almost invariably numbered 16. In *Whitus v. Georgia* (1967), it was found that blacks comprised 27.1% of the taxpayers and 42% of the male population over 21, but only 3 of 33 prospective grand jurors were black, of whom 1 served on a 19-member grand jury, and only 7 of 90 were called for the petit jury, of which none was accepted (*Smith v. Texas*, 1940; *Whitus v. Georgia*, 1967).

Although the rulings were consistent when there was total exclusion, the Court stated to make distinctions when the exclusion was not total. The courts had generally established that there must be a *prima facie* case for discrimination, but they generally relied on their own intuitions as to when the disparity between the qualified population and the venire was sufficiently large. However, the courts have not sought proportional representation. In fact, they have specifically held that a defendant is not entitled to a proportional representation of groups, including his or her own, on the jury of 12 persons who try the case (*Hoyt v. Florida*, 1961; *Swain v. Alabama*, 1965; *Hernandez v. Texas*, 1954; *Akins v. Texas*, 1945). *Swain v. Alabama* made this particularly clear in their ruling that ''A defendant in a criminal case is not constitutionally entitled to a proportionate number of his race on the trial jury or the jury panel'' (*Swain v. Alabama*, 1965, p. 202).

What the Courts do want to prevent, and have fairly consistently ruled, is purposeful and systematic exclusion of recognizable groups. This, they argue, would prevent an impartial jury selected from a fair cross-section of the community (*Smith v. Texas*, 1940; *Theil v. Southern Pacific Company*, 1946). The purposeful or intentional aspect arose in *Akins v. Texas* (1945), where the Court did not find evidence of purposeful or systematic exclusion on the basis of 1 out of 16 grand jurors being black. In *Swain v. Alabama* (1965), this is again articulated clearly: ''But purposeful discrimination may not be assumed or merely asserted'' (p. 205). In *Swain*, the Court argued that purposeful discrimination based on race was not ''satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%'' (pp. 208-209). The evidence in that case was that 26% of the male population in the county were black, whereas only 10 to 15% of the members of grand and petit jury panels drawn since 1953 were black. No black had actually served on a petit jury since 1950, and none were on the jury in the defendant's trial (in 1964).

The issue of systematic exclusion basically means that the discriminatory practice must be shown to exist over a period of time. Thus, the *Norris v. Alabama* (1935) case used a generation; and the *Smith v. Texas* (1940) case used seven years. In *Akins v. Texas* (1945), "systematic exclusion" was not demonstrated since the evidence dealt with a single grand jury. The issue of a "cognizable" group is an interesting one which will be dealt with later. For present purposes, race has never been contested as a cognizable group.

Though some of these decisions, notably *Swain v. Alabama*, have been considered setbacks (e.g., McDougall, 1970), a series of recent decisions in the Fifth Circuit appear to be more progressive in this regard (Georgia Law Review, 1967). Sitting *en banc* in 1966 to review six state and federal cases pertaining to discrimination, this court ruled in *Davis v. Davis* (1966) that jury commissioners had the obligation to familiarize themselves with blacks who were qualified for service. Here, the discrepancy was 14.2%, and the court did not accept good intentions but, rather, insisted on active search by jury commissioners for qualified blacks. In *Brooks v. Beto* (1966), they upheld purposeful inclusion of blacks so long as it was a good faith effort to ensure proportional representation.

It has probably been noticed that these cases rest on the opportunity to serve and tend to concentrate on the jury pool list rather than the actual jury that hears a given case. In an extraordinary decision in a case in California (*People v. Wheeler*, 1978), the use of peremptory challenges to remove blacks on the actual jury was disallowed. Not only is this the strongest ruling against discrimination; it also deals with a specific sitting jury and, even more in contrast to previous decisions, the use of peremptory challenges. In this case two black defendants were convicted by an all-white jury of murdering a white grocery store owner in the course of a robbery. The conviction was overturned because the prosecutor used his peremptory challenges to remove blacks from the jury.

This ruling is in strong contradiction to *Swain v. Alabama*, which underscored the tradition that peremptory challenges may be made on any basis, including race. The rationale for this is in the long and cherished history of peremptory challenges. In its own wisdom, the Court has allowed for a challenge to a juror "without a reason stated, without inquiry and without being subject to the Court's control" (*Swain v. Alabama*, 1964, p. 220). The defendant should be able to remove a certain number of persons because of the belief that they will not be unbiased, even if he or she cannot articulate the reason for this belief. Although originally intended as a right and protection for the defendant, it has also become a right of the prosecution. The decision may be made on the basis of anatomy, dress, a smile, any of the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another" (4 Blackstone Commentaries, p. 353). The point of the peremptory challenge is that one should be able to remove a juror who is believed to be prejudiced against

oneself or one who will not fully consider the evidence with impartiality, even if the reasons cannot be articulated and even if no one else would agree with the assessment.

Let us take an example to illustrate the phenomenon. A juror in a death penalty case was asked whether he had such conscientious objections against the death penalty that he could not vote for conviction under any circumstance, knowing that the death penalty could be a consequence (the death qualification process). Most jurors with no conscientious objections, or even those who favor the death penalty, respond with a simple no. This juror chose to add "that's the only way we can deal with *these* kinds of people," staring directly at the defendant. The clear and unmistakable impression that this man would not be impartial toward the defendant may have been difficult to articulate, and this is precisely the reason for the peremptory challenge. Needless to say, this juror was challenged peremptorily.

The problem is that peremptory challenges often are designed not to remove people with prejudice but, rather to get a "friendly" jury. Undoubtedly with this practice in mind, the California court in *Wheeler* pitted the right to peremptory challenge against a higher constitutional right, that is, representation of the community, in ruling that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community" (p. 258). In distinguishing *group bias* from *specific bias*, the court is basically saying that one can challenge an individual but not a group. Needless to say, the distinction poses practical problems. As we will learn in the next section, most peremptories are based on assumptions of group attitudes, prejudices, etc. In one trial, you may search for a white female who is college educated. In another, you may want Catholics and Jews, preferably male. The problem that the *Wheeler* decision poses is that you cannot remove groups of people, at least not groups of blacks. As a practical matter, the court will ask for a reason (other than race) which is the basis of the challenge, thus allowing for a clever recasting of reasons.

Throughout this review of discrimination cases, it appears as though the courts have been quite responsive to issues of racial discrimination. Yet, as we have indicated previously, de facto discrimination still occurs. For other groups suffering from discrimination, for example, women and the young, even the law has not been very responsive. Though discrimination in any form violates representativeness and impartiality, the courts have set up a pecking order of minorities to be considered. In *Fay v. New York* (1947) for example, the Court ruled that if race was not the issue, the petitioner must demonstrate prejudice to his case.

From some of the cases reviewed, it appears as though the courts have close to a 10% tolerance level. If the discrepancies are very large between qualified populations and venires, the courts have ruled that discrimination has occurred.



However, the *Swain* decision allowed for a 10% discrepancy. With regard to other categories, the courts have been more tolerant of de facto discrimination. The case of *United States v. Di Tomasso* (1968) is revealing in this regard. In this case, the Court found "substantial representation" of blue collar workers when 18.6% of the jurors were from this group, though the qualified population was 29.3%. They also allowed for only 24% of jurors with less than a high school education when over 50% of the population comprised this group. As mentioned previously, less educated people are greatly underrepresented on juries. This Court also found "substantial representation" of 21- to 29-year-olds when 3.9% of the jurors drawn were from this category, even though they constituted almost 19% of the eligible population (see Jurymandering, 1973, p. 411). The Court went so far as to devise a pecking order in arguing that the achievement of substantial representation of sex, race, religion, and occupational groupings might make it necessary to sacrifice ideal representation in such categories as age and geography (*United States v. Di Tomasso*, 1968).

Although sex appeared as one of the more important categories in the *Di Tomasso* decision, the courts have, at times, been unresponsive to discrimination based on sex; as we have seen, surveys indicate that women are significantly underrepresented on juries. As Kuhn (1968) points out, "In the past, the Supreme Court has countenanced the exclusion of women from jury service" (footnote 25, p. 240; see also citations *Fay v. New York*, 1947; *Ballard v. United States*, 1946; *Glasser v. United States*, 1942). Thus, as we have noted previously, the fight for inclusion of women on juries was a state by state battle. Some states, however, have circumvented statutory exclusion by requiring specific registration by women. When this was challenged, the Court ruled that it was reasonable (*Hoyt v. Florida*, 1961). In this amazing ruling, the Court stated that "the relevant inquiry . . . is whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation" (p. 61). Previous courts found exclusion of Mexican-Americans (*Hernandez v. Texas*), blacks (*Norris v. Alabama*), and wage earners (*Thiel v. Southern Pacific*) unconstitutional, but the Court in *Hoyt v. Florida* found that requiring women to register is not unconstitutional because it is based on a reasonable classification:

Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities. (*Hoyt v. Florida*, pp. 51-62)

It is important to note, however, that more recent decisions have held that states

may not systematically exclude women from juries (*Taylor v. Louisiana*, 1975; *Duren v. Missouri*, 1979), thus effectively overruling the *Hoyt* decision.

As unresponsive as the Court rulings may have been with regard to women, the underrepresented young (and aged) have an even more difficult time, since they are not viewed as cognizable (see Jurymandering, 1973, p. 408, footnote 84, for a list of case rulings on this issue). The definition given in *United States v. Guzman* (1972) is that the group must:

- 1) have a definite composition without arbitrarily chosen members;
- 2) be cohesive in terms of a basic similarity in attitudes, idea or experience; and
- 3) have a community of interest that cannot be adequately protected by the rest of the populace. (Jurymandering, 1973, p. 408)

These criteria prove to be difficult for age groupings and, we assume by analogy, for the less educated as well.

While the courts have proven unable to give clear guidelines and consistent rulings in discrimination cases, it should also be apparent that court rulings cannot fully eliminate discrimination. The rulings require proof of an unconstitutional situation in a particular case. Thus, a more effective mechanism to contain discrimination, and a more affirmative one, involves the selection process itself. The Jury Selections Act of 1968 was one such attempt to foster representation in its insistence on the use of voter registration lists. While even these lists are less than perfect, they are an improvement over the key man system or other subjective methods of juror selection. Suggested improvements over the voter lists have included recommendations that they be supplemented by city directories, social security, tax rolls, utility bill lists, etc. (Chief Justice Earl Warren Conference, 1977; Van Dyke, 1977). Other suggestions have pointed to problems at the clerical level—that, even with fully representative lists, there may not be random selection for specific juries if the clerical process is not random. In England, the Morris Committee found that some selection practices were random. Others selected people by street, by page, or alphabetically. One person confessed that he selected the watchdog mother of a lady he was courting (Cornish, 1968). In the United States, preliminary sorting, the “desk drawer” selection process, and the lack of follow-up on returned questionnaires have been reported as contributing to the lack of randomness in the procedures (Alker & Barnard, 1978).

#### IV. Does It Matter? Demographics and Jury Verdicts

In the foregoing treatment of discrimination in jury selection, it should be underscored that underrepresentation of a given group violates participation in a democratic institution. It may create problems for legitimacy of the process, for public confidence in the administration of justice, and in the stigmatization of the



excluded class. Most court cases, however, have concentrated on fairness to the defendant due to the exclusion of a group of people to which he or she belongs. It is to this question that we now turn for empirical evidence. Are different identifiable groups likely to render different verdicts?

For those of you who like to read the ending before beginning the story, the answer is "Yes, but . . ." As you may well expect, our rearing, as females versus males, as black versus white, as rich versus poor, matter in jury selection. Whether we are in the early or later years of our lives also matters. However, there is no clear and simple relationship between such social categories and finding for the state versus the defendant or in finding for a plaintiff versus the defendant in a civil case. As with most areas of social psychology, the impact of these categories "depends." It depends on the evidence, characteristics of the defendant and the victim, rapport with the attorneys, etc. In addition, most attempts at jury selection depend on a combination of demographic characteristics. Women may differ from men, but women also differ greatly from one another. A young, urban, professional woman is different from an older woman who has spent her life raising nine children in a small town. Yet, even a single demographic quality can be of use in the selection process and provide a context which may be statistically helpful in ascertaining the sympathies and orientation of a juror.

One of the problems that we will find is that our evidence on the role of demographic characteristics in jury decisions is fragmentary. Part of the reason is that it is very difficult for researchers to obtain a sizeable sample of heterogeneous people to make judgments about the same case. Ideally, the investigator would want this sample to represent various age groupings, political orientations, national and ethnic groups, race, sex, and socioeconomic-status groups so that he or she could determine how these groups differ in the decisions they reach. Because of the enormity of such an undertaking, many researchers have opted for the most readily available population for such studies, the college undergraduate. Thus, while some sex and race differences have been studied, there is relatively less information on the effects of other categorizations. The college populations are relatively homogeneous with regard to age, socioeconomic status, and even political orientation. As a result, even the available evidence on the role of race and sex issues in jury decisions should be viewed with some caution since they may represent a relatively "emancipated" view and may well underrepresent the degree of discrimination against these groups.

#### A. SEX AND RACE OF JUROR OR DEFENDANT

The available evidence from empirical studies of how the sex of the "juror" influences decisions is mixed. Some studies have shown males more conviction prone and/or more punitive. For example, Kerr, Nerenz, and Herrick (1976)

found males more likely to convict. Simon (1967) reported males more conviction prone in a case of housebreaking, and Steffensmeier (1977) found males more punitive in cases of homosexuality and resisting arrest. A survey of six-person juries in the Northwest Territories (Morrow, 1974) showed some tendencies for males to be more conviction prone in the number of cases. However, these data are difficult to interpret in the context of other findings because of the cultural disparity, the noncomparability of the cases being considered, and the fact that these individuals were not challenged nor did they "stand aside" (the Canadian version of our peremptory challenge).

Other studies have shown females to be more conviction prone and/or punitive. Mistretta (1977), using multidimensional scaling, found females more punitive across a number of crimes. Austin, Walster, and Utne (1976) found females to be more punitive in a purse-snatching case. Griffitt and Jackson (1973) reported females to be more punitive in a negligent automobile homicide case. Simmons (1975) stated that females gave longer sentences and greater periods of incarceration prior to parole. Scroggs (1976), using rape and robbery cases, and Simon (1967), using an incest case, found females more punitive.

Still other studies obtained no sex differences. Vidmar (1972) and Nemeth, Endicott, and Wachtler (1976) found no sex differences in murder cases, and Steffensmeier (1977) found no significant sex differences in cases involving shoplifting, public drunkenness, murder, embezzlement, child beating, and seduction of a minor.

The one area where there is a consistent sex difference is in cases of rape. As might be expected, females are consistently more conviction prone (Rumsey & Rumsey, 1977; Miller & Hewitt, 1978; Davis, Kerr, Atkin, Holt, & Meek, 1975; Bray, 1974; Ugwuegbu, 1973, 1976) and more punitive (Scroggs, 1976; Howitt, 1977; Bray, 1974; Ugwuegbu, 1973) than males. Although some studies (e.g., Jones & Aronson, 1973) reported no sex differences in a case of rape, sex differences are usually obtained, and the pattern of conviction proneness and punitiveness by females in this type of case is fairly well documented. Consistent with this is the finding that males are more likely to assume that the victim played a role in the rape than are females (Calhoun, Selby, Cann, & Keller, 1978).

With regard to race, most studies have involved white subjects as "jurors" and varied the race of the defendants. Many of these studies showed no statistically significant differences between conviction rates or sentencing of blacks versus whites (Gleason & Harris, 1975; Nemeth & Sosis, 1973; Boone, 1972), whereas a study by McGlynn, Megas, and Benson (1976) reported a marginal tendency for a greater likelihood of conviction if the defendant were a black male. This, of course, is in contrast to surveys (e.g., Wolfgang & Reidel, 1973) showing that blacks in the South are 18 times more likely to be executed for raping a white woman than any other racial combination of defendant and victim, as well as studies (e.g., Thornberry, 1973) which offer evidence that blacks are

treated more harshly at the police level, the intake level, and the juvenile court level. In addition, there is the work by Broeder (1965b) and Greenberg (1959), who argued that blacks are more likely to be convicted, convicted of a higher crime, and, if convicted, given more severe sentences.

It is possible that experimental studies may underestimate the degree of bias against black versus white defendants, since their subjects usually consist of young white persons, often at fairly liberal institutions. Further, the cases are hypothetical. As indicated by the Wolfgang and Reidel survey mentioned above, the race factor may come into play when we consider characteristics of the victim and the type of crime involved. In their survey, the case was rape, usually interracial in nature. Recent evidence by Ugwuegbu (1974, 1976) indicates that prejudice does occur in these types of situations but that it goes both ways. In his studies, both races showed a bias for their own group. Whites were more severe if the victim was white, and blacks were more severe if the victim was black. Similarly, Miller and Hewitt (1978) reported that subjects were more likely to find the defendant guilty if the victim was similar in race to them.

#### B. AGE, POLITICS, AND EDUCATION OF JURORS

With regard to age and political orientation, the data are sparse but reasonably consistent. Several studies show younger jurors to be more acquittal prone (Scroggs, 1976; Stephen & Tully, 1977; Sealy & Cornish, 1973), though some studies (Reed, 1965; Simon, 1967, p. 112) show no significant differences as a function of age. The trend in the Simon study, however, is that persons under 35 years of age are more likely to vote not guilty (by reason of insanity, in this study). Politics tends to be important in terms of a liberal-conservative dimension. Nemeth and Sosis (1973) offer some limited evidence that jurors from a conservative junior college were more conviction prone than their liberal university counterparts. More direct evidence comes from Hermann's (1970) report on over 6000 jurors showing that registered Democrats tend to favor the plaintiff in a civil case both in judgment and in amount of award.

Ethnicity has mixed effects, though a north-south European dimension tends to appear in both folklore and empirical studies. Clarence Darrow (1936) indicated a preference, from the point of view of the defense, for "The Irishman and the Jew, (who) because of their national background, will put a greater burden on the prosecution and prove more sympathetic and lenient to a defendant, than an Englishman or a Scandinavian whose passion for the enforcement of the law and order is stronger" (as quoted in Simon, 1967, p. 104). Broeder (1958) found persons of German and British descent to be more likely to vote guilty and persons of Slavic or Italian descent to vote not guilty in his study with the University of Chicago jury project. Reed (1965) found Anglo-Saxon jurors of northern Louisiana to be more conviction prone than their French counterparts in

the southern part of the state. Simon (1967, p. 111), however, found no significant differences between persons of southern or eastern European descent, those of central European descent, those of Scandinavian or British descent, and third-generation Americans.

Education and social class appear to be more important than ethnic background. Reed (1965), for example, finds that as education increases the likelihood of voting guilty increases. James (1959) reports that more highly educated persons emphasize procedures and instructions, whereas those with a grade school education are more likely to use personal life experiences and opinions from the trial in making their decision. Since education and social class are not unrelated, it is not surprising that there is also evidence (e.g., Rose & Prell, 1955) that higher status jurors (who define themselves as upper-upper class, lower-upper class, or upper-middle class) are more punitive than those of lower status (who define themselves as lower-middle class, upper-lower class, or lower-lower class). Simon (1967, p. 110) finds that persons with incomes over \$450 per month are less likely to vote not guilty than those with incomes under \$450.

Occupation, except for its correlation with social class, appears less helpful as a general predictor of jury decisions. Studies that rate the prestige of occupations (e.g., Adler, 1973; Reed, 1965) find that, the higher the prestige, the more one is likely to vote guilty. Specific occupations, however, offer a confusing pattern. Hermann (1970) reports on a study involving 6266 jurors questioned about civil cases. Butchers and skilled tradesmen were likely to find for the plaintiff on a liability case but would tend to give a below average award. Professionals were above average on both finding for the plaintiff and the award given. Blue collar workers were average on both finding for the plaintiff and the amount of the award. However, there were large differences within a category. Executives, for example, had to be divided into those who do editing and/or writing versus those who work for a corporation. The former tend to find for the plaintiff but to give him or her a low award, whereas the latter are less likely to find for the plaintiff but, if they do so, give an average award. Retired persons may be low on finding for the plaintiff, but the pattern changes when one considers retired real-estate persons versus retired sales clerks. The latter are higher on both liability and award. The complexity becomes even more apparent when one considers the occupation of the plaintiff. Here, however, the finding is fairly clear: People are kind to their own (Hermann, 1970, p. 152).

### C. CHARACTERISTICS OF THE DEFENDANT

Probably the strongest effect for a defendant characteristic found in the experimental studies is the social and/or physical attractiveness of the defendant. Using descriptions that paint an individual as upstanding, middle class, having a

good job,<sup>2</sup> and so forth, as opposed to less socially attractive descriptions, the evidence is quite clear that the socially attractive defendant is less likely to be convicted and, if convicted, is treated more leniently (Gleason & Harris, 1975; Kaplan & Kemmerick, 1974; Landy & Aronson, 1969; Nemeth & Sosis, 1973; Reynolds & Sanders, 1975; Sigall & Landy, 1972; Izzett & Leginski, 1974; Dowdle, Gillen, & Miller, 1974; Kalven & Zeisel, 1966). Although this documents the advantages of social status and social desirability in criminal cases, there is some evidence that higher status may have disadvantages when it comes to fines. Rose and Prell (1955) offer evidence that higher status persons may be fined more money for given criminal offenses, although this same study shows only minimal differences with respect to the sentencing of high-status persons in the same cases. One note of caution comes from Wilson and Donnerstein (1977), who offer evidence that the advantages of social attractiveness may be more important in hypothetical situations (which is the setting for most of these studies) than in reality. When real consequences are at stake, such advantages are not found, at least with regard to conviction. However, this study did show more severe punishment for the less socially attractive defendant in both real and hypothetical situations.

Attractiveness in the social sense is clearly an advantage. It also appears to be an advantage if one is physically attractive. A number of studies have simply varied the physical attractiveness of a "defendant" (ordinarily by photos) and found the more physically attractive person to be less likely to be convicted or, if convicted, to be treated more leniently (Efran, 1974; Levanthal & Krate, 1977). Physical appearance also makes a difference in civil cases. Stephan and Tully (1977) found that the physically attractive person wins more judgments and receives higher awards. However, there is also evidence that physical attractiveness can be a disadvantage, for example, in cases where it helps to effect a crime. Sigall and Ostrove (1975) found that physical attractiveness was an advantage for a female accused of a crime unrelated to attractiveness (in this case, burglary) but was a disadvantage when the crime was related to attractiveness (swindle).

Though jurors appear to like the physically and socially attractive regardless of how they themselves stand on these dimensions, much of the literature suggests that "like likes like," that is, that similarity leads to attraction leads to sympathy, an assumption that "they didn't do it," and leniency. We have seen that similarity on the basis of race and sex appears to follow this rule. Similarity of occupation was found to lead to higher awards. There is also evidence that workers favor labor and executives favor management if asked to imagine themselves as referees (Robinson, 1950). In addition, Adler (1973) found that the more similar the socioeconomic status of the defendant to that of the juror, the more likely is that defendant to be found not guilty.

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<sup>2</sup>Note that these are the "qualifications" set by some states for eligibility for jury service.

This tendency to sympathize with those like oneself is even more apparent when we consider similarity of attitudes and beliefs. Griffitt and Jackson (1973) show that assumed similarity of attitudes leads to less likelihood of conviction and less severe punishments as well as recommendations of less time to be served prior to parole eligibility. Mitchell and Byrne (1973) find this tendency to be especially prominent when high "authoritarian personality" types are judging. Several researchers, notably Rokeach (1960), have argued that assumed similarity of belief is even more important than race.

Some research (e.g., Byrne, 1961) shows that highly prejudiced persons are likely to have negative evaluations of blacks while less prejudiced persons do not distinguish on the basis of race when responding to liking and work desirability scales. However, the Rokeach argument that similarity of belief is more important than race per se is supported by evidence showing that favorableness of evaluations is more tied to manipulations of assumed similarity of attitudes and beliefs than to race (Rokeach, Smith, & Evans, 1960). Even studies involving interaction between people show the possible supremacy of belief similarity over race for judgments (Hendrick, Stikes, Murray, & Puthoff, 1973).

Of course, comparing two such variables is a tricky research endeavor since it is hard to equalize the levels. Thus, other researchers have underscored the importance of race (e.g., Triandis, 1961) arguing that prejudice involves negative behaviors as well as the withholding of positive behaviors, and subsequent research (e.g., Stein, Hardyck, & Smith, 1965) shows that both race and assumed similarity are important for judgments. This bodes ill for the black defendant faced with an all-white jury since some studies (e.g., Byrne & Wong, 1962) show that whites tend to assume dissimilarity between themselves and blacks; highly prejudiced persons do this to an even greater degree. This would argue for the importance of having blacks and whites on juries simply in fairness to the litigant, not to mention the symbolic and community importance.

#### D. ATTITUDES AND PERSONALITIES OF JURORS

While demographics appear to have limited generality to verdicts, the one area of psychological knowledge that offers quite good predictive capabilities is the personality "type" known as the authoritarian personality. Developed by Adorno, Frenkel-Brunswick, Levinson, and Sanford (1950), this personality is characterized by rigidity, a tendency to see things in terms of black or white, punitiveness, moralism, conservatism, intolerance of deviant behavior, and hostility toward low-status persons. It is measured by the famous F Scale (fascism scale) or more recently by a related measure designed specifically for legal attitudes, the Legal Attitudes Questionnaire (Boehm, 1968). Several studies using these measures have found that persons high on authoritarianism tend to be more conviction prone (Bray & Noble, 1978; Boehm, 1968), though some

studies did not find the differences to be statistically significant (Sue, Smith, & Pedroza, 1975; Thayer, 1970). This tendency to convict is even more pronounced when high authoritarians are confronted by defendants who are dissimilar to themselves (Horstman, 1976; Mitchell & Byrne, 1972, 1973); this finding takes on additional importance when one considers the fact that high authoritarians are likely to assume dissimilarity with defendants who are lower status individuals. The one interesting anomaly is the situation where a defendant is an authority figure or has submitted to orders from an authority. Consistent with the personality "type," high authoritarians are less conviction prone and punitive when the defendant followed orders from an authority figure (Hamilton, 1976).

With regard to sentencing, the evidence is even more clear-cut. If persons high on authoritarianism convict, they tend to be more punitive (Centers, Shomer, & Rodrigues, 1970; Friend & Vinson, 1974; Bray & Noble, 1978; Mitchell & Byrne, 1973; Hamilton, 1976); Sue, Smith, and Pedroza (1975), however, find no significant differences in sentencing as a function of authoritarianism. Though some studies may show nonsignificance at the high levels of statistical confidence that are required for publication, the pattern of the evidence clearly supports the assertion that, by and large, high authoritarians are more prone to convict and, if they convict, to sentence more punitively.

#### E. JURY SELECTION: EFFICACY AND ETHICS

It is clear that some demographics characteristics may be related to jurors' decisions, but it is still difficult to compile a profile of an acquittal prone (or plaintiff prone) juror with only demographic information. After an extensive study of demographics, Simon (1967) concluded that it was "extremely difficult to predict the response or behavior of a given individual to a concrete situation on the basis of such gross characteristics as occupation, education, sex, or age" (p. 118). By and large, the preceding review shows sparse data and mixed results. Further, we have seen how often the influence of given demographic characteristics depends on the type of case, the characteristics of the defendant and the victim, issues of similarity, etc. Thus, most social scientists concerned with juror selection have used an empirically obtained profile rather than one that is theoretically based in deriving a profile for jury selection. These techniques involve sampling from the jurisdiction in which the trial is to be held. Demographic characteristics and attitudes are sampled and regression equations are used to determine which of them account for the most variance in a given criterion (i.e., a likely vote for conviction or acquittal). (See Berman & Sales, 1977; Christie, 1976; Kairys, Schulman, & Haring, 1975; Schulman, Shaver, Colman, Emrick, & Christie, 1963; for a discussion of procedures and specific cases.)

These empirically based profiles appear to have helped in a number of celebrated cases, for example, the Wounded Knee, Harrisburg, Camden, Angela



Davis, and Attica Prison trials (see Saks, 1976b). However, they appear to be of limited usefulness if one changes the jurisdiction. Women may be defense prone in Harrisburg, but men may be more defense prone in Gainesville (Schulman *et al.*, 1963). Further, Saks (1976b) points out that the profile can change not only with geography but even with the passage of time (p. 7). Certainly it changes with the case.

While not of direct theoretical use, the above techniques and empirically derived profiles have caused a surge of interest among lawyers and judges, not to mention social psychologists. The main reason is that these techniques have been used in widely publicized trials and, in general, have been on the winning side. The fact that these cases have been "won" has spurred controversy over both the efficacy of such social science help and its ethics. Let us deal with the efficacy issue first.

### *1. Efficacy of Science*

Although it would be difficult to ignore the impressive track record of social scientists using jury selection techniques in these publicized cases, it has been pointed out that the scientists were usually on the side of the defense and that the trials were mostly conspiracy trials. Some people believe that convictions are difficult to obtain in conspiracy trials. Therefore, some argue that the defense may have won without the help of social scientists. There are no control groups for these cases (Saks, 1976b, p. 13; Shapley, 1974; Zeisel, 1974).

Although there are no definitive answers about whether or not the scientific jury selection has won cases, most people who have aided lawyers in jury selection recognize the art as well as the science of this selection process. Even in developing the empirically based profiles, there is an art to selecting criteria questions and predictor variables. The design and phrasing of the questions takes judgment as well as training. However, the profiles are rarely used as the only basis on which to make the juror selections. Some (e.g., Saks, 1976b) argue that we should trust the "science" of the data that is collected rather than the "art" of our own clinical judgments. However, others would argue that one needs the combined wisdom, differential expertise, and cooperation of both attorney and psychologist (e.g., Christie, 1976). Further, the reality is that the profile is "statistical" in nature while the problem in court is to make a decision about a specific individual. As many (e.g., Saks, 1976a) have pointed out, the statistical approach means playing the odds. On the average one will win. The problem is that one wants to win the specific case. Furthermore, most statistical information is of too little predictive power to be of much help. One may find, for example, that in a given case females are likely to favor conviction 65% to 35% whereas males are likely to favor conviction 58% to 42%. If one wanted acquittal, one would pick males *on the average and if one knew nothing else*. The point, however, is to decide whether a specific male on the jury is one of the 58% or one

of the 42%. Obviously, the job would be simpler if 98% of the males on a given case were likely to convict.

It is also the case that when one considers the specific 12 jurors, any given individual is a composite of social categorizations, attitudes, traits, and life history. One cannot have information on all the things he or she is and one probably wouldn't know how to weight them even if they were available. The empirically driven profile is of help since it orders variables by importance as predictors. It also gives composites. Again, however, one must make a decision on a specific individual. That person may fit the composite, but will he or she make the predicted judgment? To help in this decision, most favor expansive voir dire, a probing of the attitudes, values, and life experiences of the actual jurors to find those that "fit" the statistical profile. Most look for verbal statements and even nonverbal cues that "go together" with the demographics and attitudes that are assumed to underly a sympathy for the defendant (or the reverse). This is more the art than the science. Asking the questions in such a way as to receive authentic and revealing answers, recognizing that other jurors are influenced by the answers that are given, detecting the important information contained in both the verbal and nonverbal responses, and assessing the weight to give to each piece of information is, in part, an art. And the lawyer has his or her own experience and insights that must be considered as well.

## *2. Efficacy of the Lawyer's Insights*

Although the judgments of an experienced trial attorney should be respected, it is difficult to document the insight and knowledge that such experience can bring. However, the articulated "rules" for jury selection promoted by some of the "greats" of the legal profession should provide some relief to social scientists obsessed by the inadequacy of their theories and findings. The advice offered by lawyers and judges in the books and manuals available to law students is different in two major respects from advice offered by social scientists. The lawyers' advice tends to be phrased definitively rather than probabilistically. It also derives from experience rather than from the systematic accumulation of data. It may also be more witty and entertaining.

Clarence Darrow (1936) recommended that a defense counsel should pick Catholics, Episcopalians, and Presbyterians over Baptists and Methodists, Irishmen and Jews rather than an Englishman or a Scandinavian. Donovan (1885) advised for the defense "better warm than cold faces; better builders than salesmen, better farmers than inventors. Avoid doctors, lawyers and pettifoggers" (p. 227). Bailey and Rothblatt (1974) tell us that persons between 28 and 55 are more alert and responsive to complex defenses and that married persons are more favorable to the defense than the unmarried. They further caution against women jurors when the defendant is a woman. While intriguing at some level, these generalizations have not been corroborated by available data,

and the distinctions tend to be imprecise. For example, the age range of 28 to 55 is very wide, and most research finds distinctions within that range to be quite significant (e.g., 28 to 35, 35 to 45, 45 to 55). Unmarried persons can be widowed, divorced, or never married, distinctions that most scientists would make and that are psychologically meaningful. Women are not necessarily unfavorable to women defendants; some studies actually show the reverse (e.g., Rose & Prell, 1955; Nagel & Weitzman, 1972). Religion, nationality, and occupation are less consistent than lawyers have assumed.

Perhaps more revealing are the data from a survey of Chicago trial specialists chosen at random from the Martindale-Hubbell directory of lawyers. Kallen (1969) sent questionnaires to 88 trial specialists and received 50 responses. In an attempt to check the "truisms" that he learned as a law student, Kallen sought to learn whether or not there was agreement among trial specialists as to the relationship between juror background and verdict. The data showed that there were "no 'truisms' concerning the effect of background upon juror sympathies" (p. 146). Attorneys showed wide disagreement as to which demographic characteristics were good predictors and even disagreed as to the directions of the biases.

In a better designed study aimed at assessing the efficacy of lawyers' use of the peremptory challenge, Zeisel and Diamond (1978) studied cases before the Federal District Court of northern Illinois. For each case, the authors studied not only actual jurors but also their controlled counterparts; that is, they studied the jurors who were challenged peremptorily as well as the remaining venire. With the cooperation of the judges, all these individuals heard the entire case, were privy to exactly the same information, and were, to the extent possible, treated exactly as were the actual jurors. Comparing the "votes" of these individuals, Zeisel and Diamond were able to calculate a performance index for the prosecutor and the defense by taking into account the vote distribution of the entire venire. The authors report that the "collective performance of the attorneys is not impressive." The prosecutors made about as many good challenges as bad ones. The defense attorneys, though on the average a little more effective, were highly erratic. Some did very well; others did very poorly. To the extent that jury selection is not just a matter of technique and training, legal practitioners, like social scientists, will differ.

### 3. *The Evidence*

Though one could well argue that scientific jury selection techniques can help a lawyer in shifting the probabilities of winning a case, no one would argue that it is all-important or even the most important factor. The strength of the evidence appears to dominate the outcome. Most would argue that jury selection is important "all other things being equal." Zeisel (as cited in Shapley, 1974), for example, credits the evidence for the verdict in the vast majority of cases.



Saks (1976b) has data suggesting that "the amount of evidence was more than three times as powerful, and strength of evidence more than seven times as powerful" as attitudes. This latter finding should be taken with a grain of salt, since, as the authors themselves understand, the ranges of the variables under study are not comparable and one cannot take the conclusions about relative strength as definitive. However, the importance of the evidence is underscored by such findings. Further, the fact of agreement by judge and jury found in 78% of cases (Kalven & Zeisel, 1966) and the fact that jurors voted in line with the evidence 62% of the time regardless of personality differences (Boehm, 1968) supports the contention that it is the evidence that matters.

#### 4. *Ethics*

It would be naive and irresponsible to equate the ethical issues in jury selection with its efficacy. In one sense, it may be true that charges of "stacking the jury" with a resulting diminution of justice may be less important if the jury selection techniques were found to be useless. Yet, the ethical issues involve more than efficacy, and most believe that social science knowledge can aid jury selection. The question then turns to the appropriateness and ethics of this aid.

Most people concerned with the shaping of a jury's composition tend to confuse the issue of cross-representation with the issue of peremptory challenge. As noted in the earlier sections, we presently do not have a cross-representation of the community with our existing qualifications for, and exemptions and excuses from, jury service. While one would be loathe to worsen the situation, the peremptory challenge originated from the idea that persons who are, or who are thought to be, biased against a defendant should be removed. It is further based on the insight that one cannot always clearly articulate the reason for presumed bias, which may be a look, a gesture. It is by its very nature a challenge "without a reason being stated" (*Swain v. Alabama*, 1964). Thus, one can challenge a given number of jurors for any reason, though the presumption is that the person is removed because of perceived bias.

The reality may well be that one attempts to create the most favorable jury. However, it is important to remember that the use of peremptories does not allow the selection of favorable jurors. It provides for the excusing of unfavorable jurors. This distinction is all too apparent to those who have done jury selection and have watched a favorite juror struck by the other side or have rethought a potential challenge when viewing the remaining venire. Given that the law provides the defendant (and the prosecution) with the right to strike unfavorable jurors, it makes sense that the effective use of this right requires information and judgment. To the extent that social scientists offer this information and judgment, they help the system to operate more effectively. Some (e.g., Mariani, 1975) argue that "the union of social scientists and attorneys serves to ensure the impartiality and fundamental fairness expected of our judicial machinery" (p.

81). One should recognize, however, that there is an implicit and very optimistic assumption in this reasoning. It is that both sides have access to this information and judgment.

Many critics of our system have been concerned that the prosecution has long had access to information not held by the defense, particularly government records and documents. Thus, some researchers (e.g., Christie, 1976) have tended to work for the defense. Others recognize the inequality of access to such information based on wealth of the defendant—some people can afford these services, others cannot. When it is provided at no cost, it is usually because of political sympathy—another nonequalizer. Thus, one should be concerned that the inequity that is evident throughout the criminal justice system, that is, that it helps to be beautiful and rich, becomes again evident in the use of social science aids in jury selection. It is also the case that this inequity has existed for some time in another form. As we saw earlier, some attorneys are better at jury selection than others. These are likely to be the attorneys that win. And the attorneys that win tend to be paid more, and, therefore, the wealthy tend to have greater access to them and to their knowledge. In this light, however, the issue becomes one of how to make the information available to the poor, not necessarily whether to ban it altogether.

#### F. ATTITUDES TOWARD CAPITAL PUNISHMENT

##### 1. *Exclusion of Those Opposed to Capital Punishment*

An area where psychological research has been particularly needed and solicited by judges and lawyers alike is in cases involving the death penalty. For over a century, jurors with conscientious objections to the death penalty have been excluded from jury service in capital cases. The rationale for this was that when the death sentence is mandatory the only way a person could express scruples against capital punishment was to vote not guilty.

As early as 1820, in *United States v. Carnell*, all Quakers were challenged for cause because they did not believe in the death penalty, a practice that was upheld by the circuit court. In 1892, the Court ruled in *Logan v. United States* that the exclusion of veniremen who had conscientious scruples against the death penalty was constitutional. While this practice remained intact, most states started to allow juries to decide between penalties of death or life in prison rather than having a mandatory death penalty. Though this discretion changed the rationale for the exclusion practices, they remained until the mid-twentieth century. Although other cases have borne on the issue (see Cucinotta, 1968; Oberer, 1961; Gordon, 1969; Enborg, 1976, for reviews), the landmark decision came in 1968 with *Witherspoon v. Illinois*. Prior to *Witherspoon*, jurors with "general objections" to capital punishment were excluded. This could be as tentative as being "inclined that way," being that way in "most instances," requiring that

the evidence be "very strong" to impose the death penalty, or even not knowing "whether he has such scruples" (Oberer, 1961, p. 547). Needless to say, many individuals were excused on this basis. Oberer (1961) reports a case involving murder in Erie, Pennsylvania in 1958 in which 142 prospective jurors were examined before 12 jurors and 2 alternates could be accepted. They exhausted the original panel of 100 and on three occasions sent out for more jurors. The reason was reported to be, in large part, that many persons had scruples against the death penalty.

After *Witherspoon*, only those jurors who would never impose the death penalty, that is, those irrevocably committed before trial to vote against the penalty of death, could be challenged for cause. The interesting legal point, however, is that this distinction was ruled necessary for the sentence phase, not the guilt determination phase, of the trial.

In the *Witherspoon* case, the defendant was convicted of first degree murder and sentenced to death by a unanimous jury. However, the venire members indicating conscientious scruples against the death penalty were challenged for cause and therefore removed. On appeal, the petitioner argued that the jury was neither representative nor impartial and therefore asked that his conviction and sentence be reversed. The Court ruled a reversal of the sentence, making it life in prison rather than death, on the argument that impartiality in the sentence required that the jury "express the conscience of the community on the ultimate question of life or death" (p. 1775). With this pronouncement, they noted that 42-47% of the people in a recent Gallup poll had expressed opposition to the death penalty; thus, a jury composed solely of persons with no scruples against the death penalty could not speak for the community. The Court also recognized the distinction between "general objections" to the death penalty and an inability to even consider that as an alternative. Some people can set aside their general scruples and consider the punishment that the state allows. Thus, the Court ruled that it is when a person would "automatically vote against the imposition of the capital punishment without regard to any evidence that might be developed at the trial of the case before them" (pp. 552-553) that is a basis for exclusion.

## 2. *Death Penalty Attitudes and Readiness to Convict*

The necessity of considering the available alternatives was underscored with respect to the sentencing of the defendant. However, the Court did not accept the argument that the removal of persons who had scruples against the death penalty would yield a conviction-prone jury. Thus, they did not reverse *Witherspoon's* conviction for they could not conclude that the "exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction" (p. 518).

In support of the petitioner's argument, three studies showing a relationship between death penalty attitudes and conviction proneness were submitted. How-

ever, they were all unpublished at the time (Wilson, 1964; Goldberg, undated; Zeisel, 1957), and the third study was a report on some preliminary analyses. The first study (Wilson, 1964) used 187 college subjects and found that those with scruples against the death penalty gave guilty verdicts significantly less often than those with no scruples. The second study (now published as Goldberg, 1969) studied 200 college students and reported that those with scruples against the death penalty found the defendants guilty in a greater percentage of cases than those without scruples, but such differences were not statistically significant. The third study reported some preliminary findings that were later published (Zeisel, 1968). This study involved actual jurors who had served in criminal cases. Zeisel asked each juror questions pertaining to capital punishment attitudes as well as the juror's first-ballot vote (and the first-ballot votes of the other jurors on that trial). In 9 out of 11 "first-ballot" jury votes, those without scruples against the death penalty voted guilty more often than those with scruples. Though not the strongest evidence in the world, the studies offered the argument (and at least were consistent with it) that jurors with no scruples against the death penalty would be more conviction prone. However, these studies were the only ones available to the Court at the time, and the Court saw fit to mention that even the amicus curiae brief filed by the NAACP on behalf of the defendant observed that "with respect to bias in favor of the prosecution on the issue of guilt, the record in this case is 'almost totally lacking in the sort of factual information that would assist the Court'" (footnote 11, p. 517). The Court found the evidence "too tentative and fragmentary" and was unable to determine "the precise meaning of the terms used in those studies, the accuracy of the techniques employed and the validity of the generalizations made" (p. 517). To reverse every conviction made by a "death qualified" jury as practiced for the past century was too great a decision given the evidence. Although the evidence was not considered conclusive, the Court agreed with the legal premise by stating that jurors could be excluded if their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Since the ruling in *Witherspoon*, more data have been collected and the pattern, while not perfect, supports the general contention in *Witherspoon* as to the relationship between death penalty attitudes and conviction proneness. (It should be pointed out that this link was made very clearly and persuasively by Oberer, 1961, prior to the *Witherspoon* case).

Some of the data both prior to and subsequent to this ruling are consistent with, but not a direct test of, the linkage between capital punishment attitudes and conviction proneness. Some (e.g., Crosson, 1968) link death penalty attitudes to conservatism. Jurow (1971) corroborates this and also relates death penalty attitudes to authoritarianism. Authoritarianism, as we saw in an earlier section, has been linked to conviction proneness and, especially, to punitiveness (Boehm, 1968; Bray and Noble, 1978, pp. 43-45). Capital punishment attitudes



have been directly linked to punitiveness in numerous studies (Jurow, 1971; Goldberg, 1969; Hamilton, 1976). Those who favor the death penalty give longer sentences and are more likely to choose the death penalty relative to those who oppose the death penalty.

The most pertinent test, of course, is that between capital punishment attitudes and conviction proneness. Bronson (1970) made this specific connection but defined conviction proneness in terms of agreement with antidefendant legal attitudes. Those who favored the death penalty were more likely to agree with attitudes against defendants. While this may be correlated with conviction, it is not a precise test of the link we wish. White's (1973) report on the 1971 Harris Poll shows that "subjects who could vote for the death penalty were more likely to convict than those who would never vote for the death penalty" (p. 1186). However, these conviction data were based on voting guilty or not guilty from the evidence of a set of cards, each containing the facts of a criminal case. Although this is consistent with the proposed link, the problem is that not voting for the death penalty is not the legal definition of exclusion under the *Witherspoon* ruling. Furthermore, the "case" methodology is quite removed from its analogue. The Zeisel interviews, now published (Zeisel, 1968), report odds of 24 to 1 that jurors without scruples against the death penalty are more likely to vote guilty than persons with scruples. The data are powerful, and Zeisel makes a legally relevant distinction in assessing death penalty attitudes by asking the jurors if they had conscientious scruples against the death penalty which would preclude them from finding the defendant guilty if the crime were punishable by death. The problem, of course, is that conviction is defined as the first-ballot vote on noncapital cases; yet, the data are quite convincing since one could easily assume that conviction proneness in noncapital cases would transfer to capital ones.

Perhaps the best early study on this issue, which directly tests the link between capital punishment attitudes and conviction proneness (plus many other things), is that conducted by Jurow (1971). Recognizing that "general objections" to the death penalty was not a sufficient basis for exclusion, Jurow made the legal distinctions by including both a general attitudes toward capital punishment measure and one specific to the situation "if you were a juror." Five-point scales were used to assess the degree of "scruples" versus "no scruples." He also used tape-recorded cases and tested the hypotheses using two different cases (a liquor store robbery and rape). His findings basically support the contention that people with scruples against capital punishment are less prone to conviction. However, the findings are clear in this regard in the robbery case, whereas the data in the rape case show the predicted trend but did not reach the conventional level of significance (i.e., the chance factor must be less than 5 times out of 100). It is interesting to note that most subjects favored conviction in the rape case, whereas they favored acquittal in the robbery case. Though not explicitly stated

by the authors, the pattern is that where the case evidence favors conviction, those who are for capital punishment are somewhat more likely to convict, but not significantly so. Where the evidence favors acquittal, those who are for capital punishment are significantly more likely to convict the defendant.

Ellsworth, Thompson, and Cowan (1980) conducted a study on this issue using a videotape of a single murder trial with subjects who were eligible for jury duty. Their findings show a significant difference between "death qualified" jurors (i.e., those who would consider imposing the death penalty) and those who would be excused under the *Witherspoon* ruling (i.e., those who would not consider it in any case).

The Supreme Court of California, *Hovey v. Superior Court* (1980), took quite seriously the whole sequence of studies pertinent to capital punishment attitudes and conviction proneness. However, California excludes not only those who would automatically vote for life imprisonment (i.e., not consider the death penalty in any case) but also those who would automatically vote for the death penalty. Thus, the studies did not make the appropriate comparisons for the *Hovey* case and the courts have yet to be convinced that the death qualification process, whether as defined by the *Witherspoon* ruling or by California law, leads to a greater probability of conviction and, thus, violates due process.

On balance, the evidence is quite strong for the link between death penalty attitudes and conviction proneness. Each study may have its flaws, and some of the results don't quite reach statistical significance, but the pattern of the results points very strongly to the contention that removal of persons with scruples against the death penalty is likely to lead to a conviction-prone jury. It certainly leads to a punitive one.

Another issue regarding exclusion of persons with scruples against capital punishment arises with regard to representation of cognizable groups, an issue we discussed earlier in this article. Though the *Witherspoon* decision concerned itself mainly with the conviction and sentence, the issue of representation of the community was also raised. In that context, it is important to note that most studies show fairly consistent demographic differences on the basis of attitudes toward the death penalty. In general, persons who favor capital punishment tend to be white rather than black, male rather than female, Republican or Independent rather than Democrat, wealthy rather than poor (Bronson, 1970; Zeisel, 1968; Harris polls cited in Vidmar & Ellsworth, 1974). These differences are strong and reliable.

Somewhat more complicated and less predictive are the demographic variables of age, occupation, religion, and education. The first two studies cited above report little differences in death penalty attitudes as a function of age, whereas the latter report, based on Harris polls, finds that older persons have a greater tendency to favor capital punishment. With regard to occupation, Bronson (1970) reports that professionals, executives, white collar workers, and

skilled workers are more favorable to the death penalty than unskilled workers or housewives. The Harris polls reviewed by Vidmar and Ellsworth (1974) find that "white collar workers, manual laborers and farmers favor capital punishment [more] than do professionals and business persons" (p. 1253). With regard to religion, Bronson's (1970) ordering of death penalty attitudes from most to least favorable is Southern Baptists, Protestants in general, agnostics, Catholics, and Jews. However, Vidmar and Ellsworth (1974) report little difference between Catholics and Protestants, though the former are slightly more favorable to capital punishment. Both these studies show little relationship between education and death penalty attitudes, though Bronson (1970) reports a tendency for the highly educated and the poorly educated to oppose capital punishment.

Thus, one pattern becomes clear. We noted in earlier sections that the categories of persons underrepresented on juries are black, female, the highly and poorly educated, etc., exactly those groups of persons who would be further underrepresented in death penalty cases because of their scruples against capital punishment.

## **V. Influence and Persuasion within the Jury**

Up to now, we have concentrated on the jurors as individuals, people with a set of attitudes, values, and experiences that predispose them to view a case in one way or another. However, the jury is a group, usually 12 in number, who usually must deliberate to unanimity. (We will discuss the "usually" of these procedures in the next sections.) As a group, they inform each other, recreate the evidence, interpret it, and search to influence each other until consensus is reached.

As is undoubtedly apparent, not all individuals are equal in the art of persuasion. Even as a tactic in jury selection, lawyers and social science consultants try to keep the persuasive people who are in sympathy with their position and to remove the persuasive people who lean to the opposition. If one cannot persuade them to one's position, the strategy is to remove the independent and persuasive.

### **A. THE FOREPERSON**

In considering the categories of persons in terms of who is most likely to be persuasive, we must first consider who is most likely to be selected as foreperson. The available literature on this issue is very consistent. The findings are that the foreperson is most likely to be white, male, and of a higher status occupation. Strodbeck, James, and Hawkins (1957), Gordon (1968), Davis *et al.* (1975), and Beckham and Aronson (1978) all find that males are significantly more likely

to be elected as foreperson than females. By occupation, proprietors are most likely to be elected foreperson, followed by clerical workers, skilled laborers, and unskilled laborers (Strodtbeck *et al.*, 1957; James, 1959; Strodtbeck & Hook, 1961). Important in terms of influence, the foreperson is found to participate more than other jurors (Strodtbeck *et al.*, 1957; James, 1959; Simon, 1967), and participation is found to relate to maintenance of position and influence (Strodtbeck *et al.*, 1957).

Part of the reason that the white, male proprietor is most likely to be elected foreperson is because he tends to act in a highly confident manner. He usually takes the head seat at a rectangular table (Strodtbeck & Hook, 1961; Nemeth *et al.*, 1976), starts the conversation, and participates the most (Strodtbeck *et al.*, 1957). People usually elect as foreperson the person who takes the head seat at the table (Strodtbeck & Hook, 1961), and they usually elect the person who starts the conversation (Strodtbeck *et al.*, Gordon, 1968). The foreperson is in a position to control the discussion, suggest procedures, and give instructions (James, 1959). As an autocrat, he can suppress discussion and lead jurors to quick decisions; as a democrat, he can foster discussion and lengthen the deliberation process (Bevan, Albert, Loiseaux, Mayfield, & Wright, 1958). In any event, he has power and influence.

The fact that choosing the head seat, opening conversation, and participating more, that is, the behavioral manifestations of confidence, correspond to certain demographic characteristics (i.e., white, male, prestigious occupations) points to the possibility that it is the behavioral style rather than the category of person that determines influence and/or selection as foreperson. A study by Nemeth and Wachtler (1974) is informative in this regard. In that study, five "jurors" deliberated a personal injury case; unknown to the four who were subjects, the fifth person was a confederate of the experimenter. The confederate maintained a deviant position in favor of a decision for very low compensation, whereas the four subjects were in close agreement for a decision of much more compensation. Upon entry into the deliberation room, this deviant individual chose either the head seat at the table or one of the side seats. In two other conditions, he was assigned either the head seat or one of the side seats. Results showed that, although his arguments were exactly the same in each group, he exerted more influence when he chose the head seat than he did in any other condition. The other individuals significantly reduced their judgments of appropriate compensation. Further, they showed substantially lower judgments on different, but related, cases. This study shows the importance of the act of taking the head seat, the show of confidence that led to influence. Simple occupation of that seat was not found to affect influence; when the confederate was assigned the head seat, he was not influential.

Thus, the circle seems complete. Certain categories of persons are likely to perform the actions that foster their selection as foreperson. However, the em-

phasis on behavioral styles of confidence rather than the category of person suggests that the best predictor of foreperson and influence is the behavioral style of the person, that is, the indications of confidence, rather than the category of person. Although these tend to be correlated, it would behoove lawyers and social scientists alike to note the stylistic differences between jurors rather than just their demographic characteristics in making predictions regarding influence.

#### B. BEING IN THE MAJORITY OR THE MINORITY

It should also be noted that influence is not totally dependent on individual differences but is, in part, related to whether the person's position is in the majority or in the minority. Kalven and Zeisel's (1966) work shows that the majority position on the first ballot is highly likely to be the final verdict (in over 90% of cases). Part of the reason for this is the powerful conformity process. Decades of studies in social psychology point to the phenomenon where a person with a minority position will adopt the majority position even when the majority is incorrect (Asch, 1956; Allen, 1965). Thus, apart from the persuasive tactics of specific individuals, the fact of being in the majority is an advantage. It is particularly advantageous if the minority position is held by a single individual since the conformity process is drastically reduced if that individual has an ally (Allen, 1965).

Though it is statistically rarer, it is the case that the minority sometimes prevails. These may be our most interesting and controversial cases. Available evidence indicates that this process is more likely if the minority takes the position of "not guilty" rather than "guilty" (Nemeth, 1977). They are particularly more likely to prevail if they maintain their position, both resisting the conformity pressure and actively arguing their own position. This behavior, while creating dislike for them, tends to be effective in swaying majority opinion. (See Nemeth, 1979a, for a review of the influence of a minority.) Thus, it would appear that independence and confidence, while useful in general for influence, is particularly necessary when the person holds a minority position. Rather than yielding to a position with which they disagree, such individuals are more likely to resist and therefore "hang" the jury or possibly influence the majority to their position (see Nemeth, 1979b).

### VI. Changes in the Form of the Jury

Court rulings have served to affect representation of the community on juries. Most notably, these have involved changes in the form of the jury—its size and its procedures for reaching a verdict. As noted earlier, the common law jury has been a body of 12 persons deliberating to unanimity ever since the reign

of Henry II. Though some states have used smaller and nonunanimous juries, it is only in the last decade that the Supreme Court has ruled on both the size and the decision rule by which verdicts are reached. These decisions, many feel, are an erosion of the jury system. At least one author has suggested that the "1970's may well be remembered as the decade in which we almost lost the jury" (Sperlich, 1980, p. 263).

#### A. SIZE

In an historic and widely criticized ruling, the Supreme Court held in *Williams v. Florida* (1970) that state criminal juries of six were constitutional. Referring specifically to the sixth Amendment requiring an "impartial jury" in criminal cases, the Court concluded that the 12-person jury was an historical accident "unrelated to the great purposes which gave rise to the jury in the first place" (pp. 89-90). They further pointed to the distinction between the Sixth Amendment, covering criminal cases, and the Seventh Amendment, covering civil cases. The Seventh Amendment refers to jury trials according to the "rules of the common law." Common law juries were historically 12 in number. The Court did not dispute this. What it did dispute was the relevance of the common law jury to the "impartial jury" phrasing of the Sixth Amendment covering criminal trials. It thus left the question open with regard to civil trials.

The evidence that the Court mustered in support of this historically important and potentially damaging ruling is cause for particular concern. The issue raised by the Court was whether or not the 6-person jury was "functionally equivalent" to the 12-person jury. They were concerned with the values embedded in the jury system both as a protection against government oppression and in terms of community participation as well as its reliability as a fact finder. For support of functional equivalence on these issues, it used the following: (1) an undocumented statement by a judge quoting a book which stated that "it could easily be argued" that 6- and 12-person juries would deliberate equally well; (2) a judge's insight that 5-person juries over which he had presided were "satisfactory"; (3) the undocumented statement of a court clerk and the testimony of three lawyers that civil court verdicts were about the same for 6-person juries (with which they were experimenting) and 12-person juries; (4) reports by lawyers and a court clerk in a Massachusetts district court that the verdicts reached by differently sized juries were not different; (5) the fact that the Monmouth County Court of New Jersey was experimenting with 6-person juries; and (6) a judge's summary of the economic advantages that are likely to be derived from 6-person juries (see Zeisel, 1971, pp. 714-715; Sperlich, 1980, p. 270, for further details and commentary).

The reaction to this "evidence" was widespread and critical (Zeisel, 1971, 1972; Walbert, 1971; Stevens, 1971). It was seen as representing a concern for



economics, that is, presumed time and money saved, over the preservation of a long and cherished democratic institution. The subjectivity and undocumented nature of the evidence especially caused concern, particularly in light of the sweeping changes that such a ruling could cause. In countering the arguments of the Court, Zeisel (1971) argued from a statistical point of view that 6-person juries would be less representative of the community and that minorities would be less likely to be represented. If represented, they would be less likely to have an ally, a situation that we know is likely to lead to conformity to the majority even if the majority is incorrect (Asch, 1956; Allen, 1965). Further, Zeisel argued that fewer hung juries would result with 6 person juries as consequence of yielding on the part of the minority.

Some of these points are consistent with the mathematical modeling approach to size of jury and decision making (e.g., Gelfand & Solomon, 1973, 1974, 1975, 1977; Nagel & Neef, 1975; Saks & Ostrom, 1975; see generally Penrod & Hastie, 1979, and Grofman, 1980, for thoughtful reviews and analyses of modeling approaches). These models, though they require interpretation because of some of their simplifying assumptions, tend to support the view that 12-person groups are more representative, more accurate, less likely to convict defendants when a case has "high apparent guilt," and will hang more often. The models tend not to assume large differences in the aggregate, much of this due to the fact that many cases are "clear," that is, most juries would make the same decision, as well as the fact that aggregate data tend to mask case by case differences (Kalven & Zeisel, 1966; Lempert, 1975).

In addition to the preceding arguments based on logic and modeling, there exists a sizeable literature on small groups pointing to differences in group performance and productivity as a function of group size. For example, a review of over 30 studies by Thomas and Fink (1963) concludes that larger groups are better, both qualitatively and quantitatively. These conclusions need to be tempered somewhat by the realization that the resources available to a group increase with size (though at a decreasing degree), but that coordination and motivation factors come into play, making the relationship between size and performance somewhat more complicated. Further, it is clear that the type of task affects this relationship, larger groups being superior when a correct answer is easily recognized as such (see generally Steiner, 1972, as well as Hoffman, 1965, for a review of these issues). Many studies show a superiority of larger groups when judgments are averaged, as might be the case with damage awards (see e.g., Lorge, Fox, Davitz, & Brenner, 1958), and the greater resources of large groups also appear to be relevant to recall of crucial facts (see generally Kelley & Thibaut, 1969). On the other hand, smaller groups tend to foster more equal participation and report more satisfaction (Hackman & Vidmar, 1970; Thomas & Fink, 1963). These, however, are not necessarily desirable in jury deliberations. Satisfaction may inhibit task performance (Hackman & Vidmar, 1970).

Although the evidence used by the *Williams* Court was subjective and undocumented and although there existed ample evidence illustrating the functional nonequivalence of 6- and 12-person groups, the message of the *Williams v. Florida* ruling was unmistakable. With the removal of the constitutional obstacles to reduction in jury size in state criminal trials, radical changes in civil litigation started. Gibbons (1972) reports that, starting on January 1, 1971 and continuing through June of 1972, more than 41 of 93 federal district courts reduced "the common law jury of twelve persons in all or specified categories of civil litigation" (p. 594). This was challenged in *Colgrove v. Battin* (1973), but the Court exacerbated the problem by upholding the reduction of jury size in civil juries.

In support of its ruling, the *Colgrove* Court not only repeated the errors of "evidence" in the *Williams* decision but found four new studies to support the contention that 6- and 12-person juries were functionally equivalent. Ignoring the criticism directed against the *Williams* Court as well as the available empirical data on the issue, the Court in *Colgrove* looked to four studies showing no statistically significant differences in verdicts as a function of 6- versus 12-member juries (the studies, however, proved to be methodologically flawed and are ably criticized by Zeisel & Diamond, 1974). These studies, which the Court found to be "convincing empirical evidence" (p. 159), were actual trial results from Washington (Bermant & Coppock, 1973), New Jersey (Institute of Judicial Administration, 1972), and Michigan (Michigan Study, 1973) as well as an experimental study (Kessler, 1973).

The first two studies collected data in systems that allowed litigants to choose between 6- or 12-person juries. Since the choice is a nonrandom event (lawyers have reasons for choosing a 6- or a 12-person jury), the groups cannot meaningfully be compared. In fact, the second study showed that the 12-person juries had bigger cases, that is, the settlements were, "on the average, three times as great as for the six-member jury cases" (Zeisel & Diamond, 1974, p. 284). The third study used a before and after design in which a 12-person system was changed to a 6-person system. The problem with this study is that, in addition to unknown corresponding events, there were two important "known" events—a mediation board was instituted and procedural rules involving insurance were established. The fourth study had the common problems of a nonrepresentative subject sample and an artificial situation. However, this study had additional problems in that only one case was used and this case overwhelmingly favored the defendant. The lack of statistically significant differences is not surprising given that practically all the subjects favored the same verdict. To make matters worse, the subjects were given instructions to deliberate until a 5/6 majority had been reached.

Since the *Colgrove* ruling, interested scientists have become even more alarmed at the increasing erosion of the jury system, particularly when the evidence does not support such a sweeping change. In fact, the change flies in the

face of both historical precedent and good empirical data. Many have assumed that the courts favor a reduction in size because of presumed economic saving, an intolerable consideration when pitted against the constitutional protections. However, the available evidence shows that even such savings are minimal, if they exist at all. Pabst (1973), for example, finds virtually no differences in voir dire times, trial times, and number of challenges. While the Chief Justice estimated that \$4 million could be saved by reducing federal civil juries to six persons (*New York Times*, 1971, as reported in Zeisel, 1971, p. 711), Zeisel (1971) points out that this represents "little more than a thousandth part of one per cent of the total federal budget." In even more concrete terms, Sperlich (1980) translates this into "two cents of savings per person per year" and compares it to the "annual outlays of \$631 million for golf equipment" (pp. 276-277). The savings, if any, will be quite small when compared to the other wastes in the judicial system, particularly when the importance of democratic participation in the administration of justice is considered.

Not all the criticisms have come from scientists and concerned citizens, however. The conferees of the Chief Justice Earl Warren Conference on Advocacy in the United States (1977) openly disagreed with the views of the Supreme Court. They backed 12-person juries and called for a resistance to the trend for 6-person juries. As part of the advantages of 12-person juries, the conferees noted that there would be better representation of the community, that there would be more resources and more likelihood of correcting errors in larger groups, and that deliberation would be more vigorous and more encouraging of dissent.

Of great service to this issue and to subsequent rulings was an article by Lempert (1975), who provided summaries of available literature as well as methodological critiques of the evidence pertinent to the issues raised by the *Williams* and *Colgrove* rulings. Given the balance of its presentation and the review it provided, this article came to be heavily cited (along with the articles by Zeisel, 1971, 1974, and Saks, 1977) in a ruling that was to follow.

In 1978, the Court stopped the erosion of the jury by calling to a halt the reduction in size. In *Ballew v. Georgia*, a case involving the distribution of obscene materials, the Court ruled that Georgia's jury of five persons was unconstitutional. The Court did not, however, correct its ruling in *Williams v. Florida*. In fact, it reaffirmed its position that 6- and 12-person juries were functionally equivalent and that 6-person juries were therefore constitutional. However, the *Ballew* ruling said that 5-person juries were not constitutional because "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members" (p. 1030). The Court recognized the importance of the available data for demonstrating functional nonequivalence based on group size. Yet, it used much of the data (which actually compared 6- and 12-person juries) to find an impairment of functioning in juries consisting of 5 members while still affirming the



functional equivalence of juries of 6 and 12 members. Though this is still of concern to many who feel that the allowance of even 6-person juries is an erosion of an important institution, the Court at least has called a halt to the diminution of the jury.

In an impressive use of available scientific data, Mr. Justice Blackmun pointed out that reduction in jury size can impair quality of performance and productivity. It lessens the likelihood of remembering each of the important pieces of evidence; it is less likely to overcome the biases of its members; the likelihood of convicting an innocent person increases (Type I error); the variability of the decisions is greater; the minority is less likely to be represented and, if represented, less likely to adhere to its position; fewer hung juries will occur; and the opportunity for meaningful and adequate representation of the community decreases (see pp. 1035-1037). For these conclusions, the Court relied on an extensive list of published studies (see footnote 10, p. 1034), many of which were included in the Thomas and Fink (1963), Lempert (1975), Saks (1977), and Zeisel (1971, 1974) articles. Not all the complexities of the relationship between group size and performance were noted, or perhaps understood, but the message of functional nonequivalence was understood and utilized. For many of us, the *Ballew* ruling was indeed welcome because it halted a process that may have caused serious underrepresentation of minority viewpoints and a reduction in the conflict of diverse viewpoints that are part of the robust process necessary to reach a verdict.

Since *Ballew*, even better evidence has accumulated. In one of the most realistic and controlled studies on the issue of 6- versus 12-member juries, Padawer-Singer, Singer, and Singer (1977) studied 828 jurors from the central jury room. The experiment was conducted in the authentic setting of a courtroom, and the trial was a 3-hr videotaped reenactment of a real trial. A judge gave the jury instructions and the jury was allowed to deliberate as long as needed. The results from this extensive and well-designed study show that, although verdicts in the aggregate are not statistically different for 6- and 12-person juries, 6-person juries are much more likely to have consensus at the start of deliberation (23.9%), which did not occur in the cases of 12-member juries. The 6-person juries were more "unstable," being highly variable, and 12-person juries "hung" more often. This, together with the experimental evidence of Valenti and Downing (1975) showing that 6-person juries are more likely to convict when apparent guilt is high, tends to underscore the functional nonequivalence of 6- and 12-person juries.

#### B. MAJORITY VERSUS UNANIMITY OF VERDICTS

Ordinarily, the robust conflict needed to reach a verdict means *the robust* conflict needed to reach consensus. Historically, the common law jury has been

defined not only as 12 people, but also as 12 who would reach a unanimous decision. That definition has changed this past decade. In another sweeping change in the early 1970s, the Court ruled in *Apodaca, Cooper and Madden v. Oregon* (1972) and in *Johnson v. Louisiana* (1972) that the allowance by some states of less than unanimous verdicts in criminal trials was not unconstitutional. In Oregon, verdicts can be reached by a vote of 10 to 2, except for capital cases. Louisiana has a three-tier system in which capital cases require 12 persons deliberating to unanimity, cases where punishment is necessarily imprisonment at hard labor can be decided by a 9 to 3 vote, and cases where punishment might be imprisonment at hard labor require 5 persons reaching a unanimous verdict.

In the Oregon case, Apodaca was convicted by a vote of 11 to 1, Cooper by 10 to 2, and Madden by 11 to 1. They argued that their constitutional rights to an impartial jury under the Sixth Amendment and equal protection under the law under the Fourteenth Amendment were violated. The Court disagreed. In the Louisiana case, Johnson made a similar plea. He also pointed out that requiring 5 persons to be unanimous was a stricter requirement than a 9 to 3 majority and that he should at least have been accorded the same protections as he would have received if charged with a less serious crime. The Court disagreed with this premise and argued that "If appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature" (*Johnson v. Louisiana*, p. 4527). The Court split 5 to 4 in these decisions. The majority opinion concluded that the constitutional rights of the defendants were not violated in either Oregon or Louisiana. In so ruling, the Court considered evidence from Kalven and Zeisel (1966) that 5.6% of juries required to deliberate to unanimity "hang," whereas, in those states requiring less than unanimity, hung juries result in only 3.1% of the trials, a difference the Court did not find particularly significant. Since almost no empirical data were available to the judges on this issue, they relied on their intuitions about conviction-acquittal rates as well as other legally pertinent issues. The Court did consider the issue of preservation of minority viewpoints. Would the minority whose votes were not needed for conviction be ignored? Would the nature of the deliberation be adversely affected? Would community confidence in the administration of justice suffer? While considering these issues, the justices had different intuitions, with the majority believing that little of consequence would be affected by the allowance of nonunanimity. The underlying premise for much of the logic seems to have been that the majority would win in any event, and, thus, majority rule will not change verdicts substantially; they will simply eliminate the occasions when one juror is stubbornly, and without reason, holding out. Given this (as we will learn, incorrect) set of premises, the Court argued that

We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments pre-

sented to them in favor of acquittal, terminate discussion, and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal could either have his arguments answered or would carry enough other jurors with him to prevent conviction. A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose—when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position. (p. 1624)

Such an optimistic view that the majority will only outvote a minority when it ceases to have persuasive reasons of its own provides a certain irony, since the majority justices, numbering five, outvoted a minority who offered persuasive reasons for an opposing position. Mr. Justice Douglas, writing a dissenting opinion, argued as follows:

Non-unanimous juries need not debate and deliberate as fully as most unanimous juries. As soon as the requisite majority is attained, further consideration is not required either by Oregon or by Louisiana even though the dissident jurors might, if given the chance, be able to convince the majority . . . the collective effort to piece together the puzzle of historical truth . . . is cut short as soon as the requisite majority is reached in Oregon and Louisiana. . . . It is said that there is no evidence that majority jurors will refuse to listen to dissenters whose votes are unneeded for conviction. Yet human experience teaches that polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity. (pp. 1647, 1648)

The available evidence tends to support the dissenting opinion. Unfortunately, most of these studies were conducted after the decisions were rendered. First, in regard to the issue of verdict and hung juries, studies on verdict distribution as a function of decision rule show mixed findings. Davis *et al.* (1975) find no statistically significant differences between experimental groups required to deliberate to a 2/3 majority or unanimity in a rape case. Nemeth (1977) finds no significant differences over a number of cases. However, she does find greater conviction rates in the majority rule situation if the minority favors a not guilty verdict. Under these circumstances, that is, when the majority favors conviction and the minority favors acquittal, the minority is more resistant and ultimately is more likely to prevail if the jury must deliberate to unanimity. Kerr, Atkin, Stasser, Meek, Holt, and Davis (1976) find majority rule more likely to lead to conviction than unanimity in a study using a rape case. Thus, the pattern, though not strong, tends to support the assumption that allowance of nonunanimity may increase conviction rates.

More clear-cut is the evidence on the frequency of hung juries as a function of unanimity versus majority rule. Numerous mathematical models (e.g., Gelfand & Solomon, 1973; Davis, 1973; Saks & Ostrom, 1975) support the contention that groups required to deliberate to unanimity hang more often. This greater likelihood of reaching a verdict in majority rule groups is accomplished by higher errors of both Type I (convicting an innocent person) and Type II (acquitting a



guilty person). Empirical evidence supports this as well, with most of the studies conducted showing greater percentage of hung juries under unanimity conditions (Davis *et al.*, 1975; Kerr *et al.*, 1976; Nemeth, 1976; Padawer-Singer *et al.*, 1977). Juries required to deliberate to unanimity also tend to deliberate for a longer time (Davis *et al.*, 1975; Kerr *et al.*, 1976; Nemeth, 1976).

The Court raised still other issues which are pertinent to due process. One major theoretical difference between the Court and the dissenting justices has to do with whether minorities whose votes are not needed for conviction will be ignored. The Kalven and Zeisel (1966) data show that unanimity requirements lead to verdicts that are nonunanimous (i.e., to hung juries) in only 5.6% of cases. In contrast, those states allowing for nonunanimity show 25% of the verdicts as not having been reached by consensus (see Saks & Hastie, 1978, p. 85). In an experimental laboratory study involving a murder case and in a study involving a series of cases presented in an actual courtroom, Nemeth (1977) found that groups required to deliberate to a 2/3 majority did not stop as soon as the requisite votes were achieved, but they did stop short of full consensus. Relative to the unanimity groups, the juries required to deliberate to a 2/3 majority stopped significantly short of consensus. As a result, jurors reported more dissatisfaction and felt that justice was less well served when the decision rule was a 2/3 majority rather than unanimity. It appears that it is the minority in these majority rule groups that reports the most dissatisfaction; this finding is corroborated by Kerr *et al.* (1976).

The Justices also disagreed on whether the nature of the deliberation would be altered by nonunanimity. Would polite and academic conversation (particularly after the requisite votes were achieved) replace robust conflict? In Nemeth's (1977) study, a technique was used to test this. Using a procedure known as *valence* (Hoffman & Maier, 1964, 1967), a running count was kept of all comments, including for each one whether it was pro-prosecution or pro-defense. When the number of comments for one position (regardless of who uttered the comment) exceeded the number of comments for the other position, Nemeth (1977) found that she could predict all but one of the verdicts (i.e., she could accurately predict the outcome of 97% of the deliberations). Since this measure so accurately predicts the outcome, it was used as a measure of "functional deliberation time." The assumption was that if the outcome of a deliberation could be predicted very quickly this was not a deliberation of robust conflict. Groups required to deliberate to unanimity required more functional deliberation time than majority rule juries. Unanimity groups were harder to predict. In addition, unanimity groups made more comments in "conflict" categories (e.g., giving information and giving opinions) than did majority rule groups. The individuals also reported that they felt significantly more conflict in the unanimity groups than in the majority rule groups.

Still another issue raised by the justices in the *Apodaca* decision was com-

munity confidence. Mr. Justice White commented as follows:

Community confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines. The requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury. (p. 1627)

Though there are very limited data, the Nemeth (1977) study finds that persons required to deliberate to unanimity tend to report that justice has been better served than those persons deliberating to a 2/3 majority.

The issue of community confidence is an important one that deserves more scientific attention. We do not know whether, on a statistical basis, individuals in Oregon and Louisiana, for example, feel that justice is less 'fair' since unanimity is not required in many of their trials. Yet, history shows us that a single case can be of paramount importance. Imagine a situation where a black man accused of a criminal charge against a white victim is faced with a jury of 9 whites and 3 blacks in Louisiana. If the vote followed racial lines, the perception of justice by the black community could be seriously jeopardized. At the time of this writing, 3 days of rioting in Miami were stimulated by the acquittal of 4 white policeman charged with shooting a black insurance man. The jury was all white.

Though there is not a great deal of evidence on the unanimity issue, the data that do exist tend to support the concerns of the dissenting justices in *Apodaca* and *Johnson*. The allowance of nonunanimity raises serious questions for preservation of minority views. Even if a minority does not convince the majority of their position, unanimity at least fosters the robust conflict and the full consideration of all views that leads to consensus. The consequence is more satisfaction and a perception that justice has been served. In a number of possibly important instances, minorities who cannot be outvoted can effect hung juries, a right that many would want to preserve. Thus, those concerned with the rulings in the early 1970s that reduced both the size of juries and the degree of consensus required to convict are relieved by the recent ruling in *Burch v. Louisiana* (1978). As the *Ballew* judgment limited the reduction in size of juries to 6, the *Burch* decision stopped the reduction in unanimity by ruling that conviction by a nonunanimous 6-person jury for a nonpetty offense was unconstitutional under the Sixth and Fourteenth Amendments. In support of this ruling, the Court relied on the reasoning in *Ballew* but offered no additional empirical evidence.

While the erosion of the jury thus seems to have been halted, many are still concerned about the losses in community representation, in preservation of minority views, in 'robust conflict' in deliberations, and in the perception that justice has been served that the allowance of less than 12-person and less than unanimous juries may have been created.

## VII. The Future

The preceding sections cover areas where social science is particularly able to aid lawyers and judges in the difficult decisions they have to face. On the one hand, a recognition of the historical values and the history of court decisions involving this treasured institution of trial by jury can serve to help us frame questions that are legally and even politically relevant. Further, it is hoped that the importance of the issues that have surrounded this institution (e.g., death qualification, reduction in size and consensus, representation of all sectors of the community) will serve to interest researchers in combining their talents and efforts into making this the instrument of justice that was originally intended. In addition to creating the relevant empirical base, social scientists need to present their studies in ways that are helpful to those making the decisions. Though pertinent evidence existed prior to the *Williams v. Florida* decision, the justices were seemingly unaware of it. With the Lempert (1975) review, this evidence came to the attention of the *Ballew* Court.

The problem, of course, is twofold. As scientists, we must make our research available in a coherent form that is critically analyzed and legally relevant. On the other hand, judges have to want to know the data and ideas pertinent to their decisions. Their passivity in this regard has been problematic since they tend to rely on lawyers' briefs to bring forth the pertinent evidence. Sperlich (1980) has some recommendations in this regard. Judges can let lawyers know they expect "complete and responsible treatments of social fact issues, which must include all relevant scientific evidence" (p. 286); they can take it upon themselves to search the scientific literature (as Mr. Justice Blackmun did in the *Williams* case); or they can delegate the task to a body of scientific experts.

The onus, of course, is on the scientists to provide well-designed and comprehensive studies that are pertinent to legal issues prior to rulings. One of the problems is that much legally relevant research has been conducted after decisions have been rendered. It is when we realize that an error has been made that we start to address an issue. Scientists cannot be expected to anticipate every decision where well-designed research will be needed. Yet, we can address questions that will always be relevant, such as the improvement of the jury trial. If we want representation, robust conflict, and preservation of minority views, we can ask questions about the best selection procedures and best mechanisms for encouraging participation and even dissent. We can ask questions pertinent to raising the quality and the creativity of decision-making groups.

Perhaps most important is the contribution we can make in regard to the citizens' views of, and participation in, this democratic institution. At one level, people's perception of whether justice has been served can affect their regard for the institution, their feelings of pride in their citizenry, even their willingness to obey the laws. The rioting in Miami over an acquittal that had strong racial

implications serves to remind us that the clauses of due process and equal protection under the laws must have meaning and be believed by the populace. At perhaps a more mundane level, we also need to consider the little issues, the encounters that most people have with the courts. Most of us will, happily, not be personally involved in a death penalty trial. Most of us will, at one time or another, be involved in traffic citations, divorces, child custody cases, eviction proceedings against "professional tenants," or the like. Though not of constitutional importance, the delays in such proceedings, the emotional trauma, and the perceptions that justice is not served will be the important determinants of confidence in our system of justice. The interface between psychology and law is an area filled with issues of intellectual and human importance, one that deserves "the best and the brightest" research we can bring to bear.

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