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THE AMERICAN CRIMINAL JURY

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I

INTRODUCTION

The criminal jury, after its importation to North America by English settlers, evolved into a unique institution in the United States. Across the centuries, prominent features of American law and culture have left their mark on the criminal jury: Americans' distrust of the judiciary, their passion for open procedures and unfettered public discourse about those procedures, their struggle to overcome racial and ethnic injustice, their commitment to adversarial adjudication, and the dual state-federal justice system. This brief exposition will describe the American criminal jury generally, focusing on those aspects of that institution that distinguish it from juries in other parts of the world.

II

THE CRIMINAL JURY IN THE NEW NATION

It was a highly publicized case from the colonial era, the trial of John Peter Zenger, that is credited with "impress[ing] thousands of Americans with the importance of the right to a jury as a bulwark against official oppression."¹ In 1734, Zenger, an American newspaperman, was charged by the British Crown with the crime of seditious libel for mocking the Royal Governor, a widely detested man named Cosby, in the *New York Weekly Journal*.² Court officials took pains to assure that the jury pool included supporters of Cosby,³ but some of the veniremen were of Dutch ancestry and maintained anti-British sentiments.⁴ The jury chosen included a mariner, a brewer, a vintner, an artisan, a baker, a merchant, a blacksmith, a carpenter, a currier, a tradesman, and a clerk.⁵ An aging but renowned lawyer, Andrew Hamilton of Philadelphia, de-

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1. JOHN GUINThER, *THE JURY IN AMERICA* 30 (1988).

2. See LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 39-40 (1985).

3. See *id.* at 41 (noting that the original panel, ultimately challenged by lawyers for Zenger, was made up of Cosby appointees and friends).

4. See LIVINGSTON RUTHERFURD, *JOHN PETER ZENGER, HIS PRESS, HIS TRIAL AND A BIBLIOGRAPHY OF ZENGER IMPRINTS* 62 (1904).

5. See JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* 210 n.56 (1963).

fended Zenger.⁶ Barred by the judge from presenting witnesses who could testify as to the truth of what Zenger had published, Hamilton exhorted the jury, "it is not the cause of a poor printer, nor of New York alone, which you are now trying. No! It may in its consequence affect every freeman that lives under a British government on the main of America. It is the best cause. It is the cause of liberty."⁷ The jury acquitted Zenger, he was released, and news of the trial spread throughout the colonies and to England.⁸

Thirty years later, the British prosecuted American colonists for revenue violations in admiralty courts without juries, rather than in common pleas courts where juries could have acquitted and thus freed protesters. Trials for treason were to be conducted in England, removing them entirely from the scrutiny or participation of colonists.⁹ These practices helped to precipitate the American Revolution;¹⁰ Thomas Jefferson stated in the *Declaration of Independence* that one of the reasons requiring separation from England was Britain's conduct "depriving us, in many cases, of the benefits of Trial by Jury."¹¹ Even before the *Declaration*, each of the twelve states that had adopted a written constitution had included the right of the accused to a jury trial—"the only right that these twelve constitutions declared unanimously."¹²

Not surprisingly, Article III of the Constitution of the United States, the document establishing and limiting the power of the federal government, also guarantees the right to a jury trial. It provides that "[t]he Trial of all Crimes, except in the Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed."¹³ But this assurance was not specific enough for some who feared federal tyranny. Patrick Henry, for example, argued that by selecting jurors "from any part of the state," the federal authorities "can hang anyone they please, by having a jury to suit their purposes."¹⁴ Others argued that the Constitution should include more particular protections concerning the selection of jurors and the procedures governing their deliberations. Ultimately, however, agreement upon the "accustomed requisites" of the jury could not be reached because the jury prac-

6. See LEVY, *supra* note 2, at 41.

7. *Id.* at 42-43.

8. See *id.* at 44; Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 874 (1994) ("In the half-century between Zenger's trial and the ratification of the Sixth Amendment [a pamphlet account of the trial] was reprinted fourteen times. More than any formal law book, it became the American primer on the role and duties of jurors.")

9. See Alschuler & Deiss, *supra* note 8, at 875 (citing Edmund Burke, *Letter to the Sheriffs of Brison*, in 2 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 189, 192 (9th ed. 1889)).

10. See CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 209 (1960).

11. THE DECLARATION OF INDEPENDENCE para. 20.

12. Alschuler & Deiss, *supra* note 8, at 870; see also WILLIAM EDWARD NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 96 (1975).

13. U.S. CONST. art. III, § 2, cl. 3.

14. FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 25-26 (1951).

tices among the states were too diverse.¹⁵ The Sixth Amendment provided simply that a person accused of violating federal criminal law receive “a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.”¹⁶

III

A PATCHWORK OF JURY LAWS: THE LAWS OF THE FEDERAL GOVERNMENT AND OF THE SEVERAL STATES

For nearly two centuries, judges interpreted the jury provisions in Article III and the Sixth Amendment to govern only prosecutions in the courts of the United States for violations of federal criminal law. However, the number and breadth of state crimes dwarfed the meager collection of federal crimes, and only a tiny fraction of all criminal prosecutions took place in federal court. As a result, the United States Constitution did not protect the majority of criminal defendants—those who faced state criminal charges in the courts of the several states. In state court the right to a jury trial depended upon not federal law, but the statutes, constitutional provisions, and common law of that state. Even though every state guaranteed the right to a jury trial for at least some criminal charges, state law differed as to what that right entailed. This patchwork system of justice, with the state and federal courts following separate laws, sometimes resulted in striking differences in jury procedures. It was not until 1968 that the United States Supreme Court declared that the right to jury trial guaranteed by the Sixth Amendment was an element of the “due process” safeguarded for all state citizens by the Fourteenth Amendment.¹⁷ Thus, every court, state or federal, was bound to provide defendants with at least those fundamental aspects of the jury trial embodied in the Sixth Amendment. The Court explained in *Duncan v. Louisiana*:

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. . . . The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.¹⁸

Since *Duncan*, the Supreme Court has construed the Sixth Amendment to dictate many aspects of the jury trial, such as juror selection procedures and

15. *Id.* at 26-33; see also Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 817-44 (1976) (providing a historical account of the debate over vicinage and the Sixth Amendment).

16. U.S. CONST. amend. VI.

17. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

18. *Id.* at 155-56.

jury size.¹⁹ Yet the Sixth Amendment does not regulate every detail of the criminal jury trial in the United States. Individual state courts and legislatures have considerable room to experiment with different jury procedures consistent with the minimum protections of the Sixth Amendment, and have sometimes expanded upon its guarantees, providing more protection than the United States Constitution requires. The thousands of juries convened each day (over ninety percent of them in state courts)²⁰ are governed by hundreds of state constitutional provisions, statutes, and court rules of varying complexity and content. Congress, too, has supplied a multitude of statutes and rules governing jury trials in the federal courts, also supplementing the constitutional commands of the Bill of Rights. The federal constitutional declarations of the U.S. Supreme Court, in other words, are only the common core of a much larger body of jury law in the United States which varies significantly from jurisdiction to jurisdiction. A jury trial in California, for example, may be conducted quite differently than a jury trial in Colorado. This state autonomy, particularly in matters of criminal justice, continues to be fiercely defended against federal control. State autonomy has made it possible for states to try out different jury procedures over the years, supplying a rich source of empirical information about jury reforms and techniques for other jurisdictions to adopt or decline. The discussion of the American criminal jury in this article is therefore necessarily imprecise, sometimes providing a rough generalization of a common practice instead of a detailed breakdown of variations in practice among the fifty states and the federal courts.²¹ The following section outlines the core requirements of the Sixth Amendment and several of the most common procedural variations from the traditional common law jury.

IV

THE RIGHT TO A JURY TRIAL UNDER THE SIXTH AMENDMENT AND LOCAL VARIATIONS

History has served as the Court's guide in interpreting many aspects of the jury right guaranteed by the Constitution. For example, although the Sixth Amendment promises a jury "in all criminal prosecutions," the Supreme Court has not required courts to provide juries for "petty" offenses. Using the legislature's chosen punishment as a proxy for seriousness, the Court has refused to recognize a right to jury trial when the charge that the defendant faces carries a penalty of six months or less, even when a defendant faces conviction on sev-

19. See *infra* Part IV.

20. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1997, at tbl. 5.16 (1998) (noting that in 1995, there were approximately 3,150 felony jury trials in federal court); *id.* tbl. 5.47 (noting that in 1994, there were over 51,000 felony convictions after jury trials in state court).

21. This article also does not address the law governing jury trials in courts of military justice, juvenile courts, or Native American tribal courts.

eral such charges in one trial.²² For a fine alone to trigger the right to a jury trial, the amount must be quite substantial.²³ In its decisions exempting petty offenses from the jury trial right, the Court has repeatedly relied upon the historical practice of trying petty offenses before judges without juries.²⁴

Tradition, however, was abandoned in other decisions interpreting the right to a jury trial. One of the most fundamental changes in the scope of the jury guarantee was brought about by the Court's 1930 decision holding that the jury trial was optional rather than mandatory in federal felony cases. *Patton v. United States*²⁵ gave defendants the option of dispensing with the jury and proceeding to trial before a judge alone.²⁶ As a result, bench trials in felony cases, rare at common law, are now commonplace.²⁷

The challenge of reconciling the variations and innovations in state practice with the Sixth Amendment prompted the Court to authorize several other modifications of the common law jury. The Court upheld Massachusetts's two-tier trial system in which a defendant received a jury only if he was first convicted by a judge.²⁸ The Court also held that the Constitution does not require that a jury rather than a judge make the decision to impose the death penalty or to spare a capital defendant's life.²⁹ However, only a few states have chosen to exclude the jury from the capital sentencing process and turn it over to judges completely.³⁰ In a handful of states, defendants retain the option even in a non-

22. See *Lewis v. United States*, 518 U.S. 332 (1996) (no right to a jury when charged with two separate counts, each carrying up to sixth months' imprisonment).

23. Compare *Muniz v. Hoffman*, 422 U.S. 454 (1975) (labor union fined \$10,000 for a violation of criminal contempt not entitled to jury trial), with *International Union, UMW v. Bagwell*, 512 U.S. 821 (1994) (fines of over \$64 million imposed for contempt required jury trial).

24. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373, 379 (1966); *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937); *Schick v. United States*, 195 U.S. 65, 69-71 (1904).

25. 281 U.S. 276 (1930).

26. See also *Singer v. United States*, 380 U.S. 24 (1965) (upholding a rule conditioning the defendant's ability to waive a jury upon the consent of prosecutor and judge).

27. See Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 1-10 (1995) (reporting data from thirteen states on the percentage of felony trials tried to the bench: three states reported less than 10%, one reported over 77%, and nine ranged between 14% and 69%); Susan C. Towne, *The Historical Origins of Bench Trial for Serious Crime*, 26 AM. J. LEGAL HIST. 123, 152 (1982).

28. See *Ludwig v. Massachusetts*, 427 U.S. 618 (1976). In 1978, Massachusetts changed its law so that the first trial before a judge was optional, not mandatory. This modified law was upheld against a double jeopardy challenge in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984).

29. See, e.g., *Spaziano v. Florida*, 468 U.S. 447 (1984) (upholding judge's decision to impose death penalty after jury's recommendation of a life sentence).

30. See ARIZ. REV. STAT. § 13-703(B) (1997); IDAHO CODE § 19-2515 (1997); MONT. CODE ANN. § 46-18-301 (1997); NEB. REV. STAT. § 29-2520 (1997). Four others leave the final determination of whether to impose the death penalty to the judge rather than the jury, but require the jury to make a recommendation to the judge based upon its evaluation of aggravating and mitigating factors. See ALA. CODE § 13A-5-47(c) (1997); DEL. CODE ANN. tit. 11, § 4209 (1997); FLA. STAT. ANN. § 921.141 (West 1997); IND. CODE ANN. § 35-50-2-9 (West 1997); see also NEV. REV. STAT. §§ 175.554, 175.556 (1997) (three-judge panel may decide sentence if jury cannot agree).

capital case to have the jury pronounce the sentence, but elsewhere sentencing by the judge is the norm.³¹

To comply with the Sixth Amendment, a state felony jury may have as few as six jurors,³² and it need not decide the issue of guilt or innocence with a unanimous vote.³³ Few jurisdictions have taken advantage of these streamlined procedures, however. All but four states require that twelve jurors be seated initially in noncapital felony cases (some allow for juror attrition during the trial), and only Louisiana and Oregon allow nonunanimous verdicts in felony cases.³⁴ Recent proposals to allow for nonunanimous juries have surfaced again in some localities, however, prompted by concern with the frequency of hung juries.³⁵

While the Court has allowed for some narrowing of the safeguards provided by the common law jury to criminal defendants, it has also erected jury trial procedures for the benefit of the accused that did not exist at common law. Like the constitutional requirements adopted in the mid-1900s for other phases of criminal investigation and prosecution, these changes began as responses to injustices suffered by African-Americans prosecuted in state courts.³⁶ Particularly significant are the rules governing the selection of jurors. Elsewhere in this issue, Professor Stephan Landsman examines in some detail the restrictions on the exercise of peremptory challenges under the Equal Protection Clause, restrictions that originated in *Batson v. Kentucky*,³⁷ a criminal case.³⁸ The Court has also held that the Constitution regulates the process by which potential ju-

31. Seven states permit some jury sentencing in noncapital cases. For a collection of citations to state statutes, see WAYNE LAFAYE ET AL., *CRIMINAL PROCEDURE* § 26.2(b) (2d ed. forthcoming).

32. See *Ballew v. Georgia*, 435 U.S. 223 (1978) (five-member panel deprived defendants of his right to trial by jury); *Williams v. Florida*, 399 U.S. 78 (1970) (six-member panel met due process requirements).

33. See *Burch v. Louisiana*, 441 U.S. 130 (1979); *Apodaca v. Oregon*, 406 U.S. 404 (1972); see also *Schad v. Arizona*, 501 U.S. 624 (1991) (discussing when unanimity is required regarding alternative means of committing a single offense).

34. See DAVID B. ROTTMAN ET AL., *STATE COURT ORGANIZATION* 1993, at 274-79 (1995) (state-by-state listing of jury size and verdict rules).

35. See, for example, the discussion of unanimity in the REPORT OF THE CALIFORNIA BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT 70-79 (1996) (recommending a modified unanimity procedure in which a nonunanimous verdict of 11-1 would be permitted after the jury had deliberated for at least six hours, except where the punishment may be death or life imprisonment). See also sources cited *infra* notes 145-146 (collecting hung-jury rates).

36. See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 21 (1997) ("Several of the most basic protections enjoyed by all Americans, for example, the right to an attorney when charged with a serious offense, the right to be free of torture, and the right to a trial absent mob intimidation, are protections that arose in response to the racially motivated mistreatment of black defendants."); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 838 (1994) ("The efforts of twentieth-century judges to forge new connections in the Fourth Amendment between 'reasonableness' and warrants and to create a Fourth Amendment remedy of evidentiary exclusion have been linked, both chronologically and ideologically, to attempts to address the larger problem of racial injustice.").

37. 476 U.S. 79 (1986).

38. See Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285, 293-95 (Spring 1999).

rors are selected and summoned to the courthouse, a topic addressed separately below.³⁹

Beyond these departures from the common law jury expressly addressed by the Supreme Court, a host of other innovations have become well established. In many states, jurors receive instructions about the case before the presentation of evidence.⁴⁰ Jurors in many jurisdictions may take notes during trial and review them during deliberations, although some courts continue to prohibit note-taking.⁴¹ Some courts will allow jurors to submit questions to the judge to be asked of witnesses, but this is not nearly as popular as the practice of juror note-taking.⁴² Pattern jury instructions have for the most part replaced the idiosyncratic jury charges of yesteryear.⁴³ Most courts today issue the jurors written copies of the jury instructions to take into the jury room.⁴⁴ Unlike the jurors of 1800 who were typically subject to sequestration—locked in the jury room together, even overnight, until they reached a verdict⁴⁵—today’s jurors are rarely sequestered.⁴⁶ When a juror becomes unable to continue serving due to illness or misconduct, the trial need not be aborted; many jurisdictions allow the jury to continue deliberating with depleted numbers, and several jurisdictions allow the substitution of juror alternates even during deliberations.⁴⁷

Another change from the traditional common law jury trial is the rule in most states barring the trial judge from sharing his opinion of the evidence with the jurors.⁴⁸ Unlike the rule in many other countries requiring judicial com-

39. See *infra* Part VI.

40. See JURY TRIAL INNOVATIONS 151-53 (G. Thomas Munsterman et al. eds., 1997) (discussing preinstruction).

41. See Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256 (1996); Larry Heuer & Steven Penrod, *Juror Note Taking and Question Asking During Trials*, 18 LAW & HUM. BEHAV. 121 (1994); see also JURY TRIAL INNOVATIONS, *supra* note 40, at 141-47. Louisiana still prohibits the use of juror notes in the jury room. See LA. STAT. ANN. art. 1794 (West 1997).

42. See Larry Heuer & Steven Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 NW. U. L. REV. 226, 229 (1990) (reporting survey of judges that revealed note-taking occurred in about one-third of trials, while permission to ask questions was reported in only one percent of trials); see also Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441 (1997) (discussing advantages, disadvantages, and empirical information concerning juror questioning). Juror questioning apparently has “honorable antecedents in older English and American trials, but has fallen out of use in American jurisdictions.” Michael E. Tigar, *Foreword: The Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 27 (1970).

43. See LAFAVE ET AL., *supra* note 31, § 24.8(c) (discussing use of pattern instructions).

44. See Howard H. Lehman, *A Critical Survey of Certain Phases of Trial Procedure in Criminal Cases*, 63 U. PA. L. REV. 754, 771 (1915); Annotation, 91 A.L.R.3d 382 (1979 & Supp. 1997).

45. See Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673, 2679-81 (1996).

46. See Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 68 n.22 (1996) (noting that G. Thomas Munsterman, Director, Center for Jury Studies for the National Center for State Courts, estimates that no more than 100 juries per year are sequestered during the trial period).

47. See, e.g., *Miller v. Stagner*, 757 F.2d 988, 995 (9th Cir. 1985) (upholding substitution); see also King, *supra* note 45, at 2749.

48. See, e.g., *People v. Kelly*, 179 N.E. 898, 905 (Ill. 1931) (DeYoung, J., dissenting) (“A jury trial in which the judge is deprived of the right to comment on the evidence and to express his opinion on the facts . . . is not the jury trial which we inherited.”).

ment on the evidence (known as “summing up”), this prohibition in the United States is unique.⁴⁹ Most states outlawed such comment in the 1800s by constitutional provision, statute, or judicial decision, although it is still an option in federal courts and in the courts in a minority of states.⁵⁰ The ban is based on the principle that the jury is the sole judge of the facts, combined with the traditional American distrust of the judiciary. In essence, most state legislatures and courts have decided that the judge’s opinion of the evidence is at best irrelevant and meddlesome, and at worst, partisan advocacy.⁵¹ Even in jurisdictions where judges are permitted to comment on the evidence, they must be careful not to give a “one-sided rendition” of the case.⁵² Indeed, at least one recent study showed that American jurors may be deeply suspicious of judicial comment on the evidence.⁵³ In some ways, this rigid exclusion of judges from factfinding complements the equally uncompromising exclusion of juries from interpreting the law in all but a few states.⁵⁴ Nevertheless, the no-comment rule continues to be criticized by some as further “isolating” the jury laymen from “learned guidance,” thus exacerbating the problem of juror misunderstanding.⁵⁵

Judicial influence over factfinding remains considerable despite no-comment rules. American jury trials involve complex and pervasive judicial control of juries through the rules of evidence.⁵⁶ A judge may not be allowed to tell jurors what to deduce from the evidence they hear, but he can prevent them from hearing it at all. Certain kinds of proof offered by the prosecution, for example, must be excluded in order to comply with constitutional commands. Hearsay is inadmissible against a criminal defendant absent adequate indicia of reliability, due to the Sixth Amendment’s guarantee that the accused be allowed to “confront the witnesses against him.”⁵⁷ Evidence seized in an unlawful search must be excluded in order to ensure that government agents live up

49. Cf. generally Symposium, *The Common Law Jury*, 62 LAW & CONTEMP. PROBS. 1 (Spring 1999).

50. See LAFAVE ET AL., *supra* note 31, § 24.6(e) (collecting current state statutes, constitutional provisions, and decisions); Kenneth A. Krasity, *The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913*, 62 U. DET. L. REV. 595, 622-27 (1985) (listing state-by-state the law first barring judicial evaluation).

51. See *The Right of a Judge to Comment on the Evidence in His Charge to the Jury*, 6 F.R.D. 317, 330 (1947); see also Krasity, *supra* note 50, at 611-12 (hypothesizing that the shift to elected judges may have diminished the respect for judicial expertise regarding factual matters); Hon. Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161 (1988).

52. *State v. Hernandez*, 590 A.2d 112 (Conn. 1991).

53. See Dennis Turner & Solomon Fulero, *Can Civility Return to the Courtroom? Will American Jurors Like It?*, 58 OHIO ST. L.J. 131, 153-54 (1997) (finding, in mock trial study involving variations on judicial comment, that judicial comment “did not find favor with the American jurors,” and that the jurors had a “strong preference” that the judge not sum up the evidence).

54. See Krasity, *supra* note 50, at 620-21. On the role of juries in deciding law as well as fact, see the discussion of nullification at *infra* Part V.

55. John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195, 202; Smith, *supra* note 42, at 538-47.

56. See generally John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168 (1996).

57. U.S. CONST. amend. VI; see, e.g., *Idaho v. Wright*, 497 U.S. 805 (1990).

to the Fourth Amendment's command that "the right of the people . . . against unreasonable searches and seizures, shall not be violated."⁵⁸ Statements of the defendant are inadmissible when obtained in violation of his Fifth Amendment right not to "be compelled in any criminal case to be a witness against himself."⁵⁹

Other incriminating evidence may be barred by statute or court rule for fear that the jury would be unable to assess its proper weight and relevance, such as evidence of other bad deeds by the accused.⁶⁰ Still other exclusions are meant to encourage the litigants to engage in remedial activities or settlements, such as the rule barring the admission of statements made during plea negotiations.⁶¹ Evidence offered by the defense, too, may also be excluded on the grounds that it is unreliable or irrelevant.⁶² Juries judging guilt or innocence are not allowed to hear evidence of a rape victim's prior sexual history, for example, or to learn about the punishment a defendant faces upon conviction.⁶³ Intoxication, insanity, duress, and other defenses are carefully regulated by the judge and often by statute.⁶⁴ As in civil trials, a judge in a criminal case may in some circumstances exclude a witness's testimony or other evidence as a sanction for a party's failure to comply with rules of pretrial discovery.⁶⁵ The Supreme Court has held that even a defendant may be precluded from presenting the testimony of a witness whose name defense counsel deliberately failed to list prior to trial.⁶⁶ For example, readers who followed the trial of O.J. Simpson may recall both sides arguing over the sanction of exclusion for alleged failures to disclose witnesses and other evidence prior to trial.

In addition, the judge serves as the gatekeeper for technical, scientific, and other expert testimony, allowing the jury to hear such evidence only after determining that the testimony will assist the jury in finding the facts.⁶⁷ In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁶⁸ the Supreme Court established a framework within which federal judges must evaluate expert evidence. This formula has been adopted by several state courts as well.⁶⁹ One recent study of

58. U.S. CONST. amend. IV. See generally WAYNE LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (3d ed. 1996).

59. U.S. CONST. amend. V. See generally LAFAYE ET AL., *supra* note 31, ch. 6.

60. See, e.g., FED. R. EVID. 404.

61. See, e.g., *id.* 410.

62. See, e.g., *Taylor v. Illinois*, 484 U.S. 400, 410 (1988) (noting that "the accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence").

63. See, e.g., FED. R. EVID. 412 (limiting evidence of victim's past sexual behavior); *Rogers v. United States*, 422 U.S. 35, 40 (1975) (noting that "the jury had no sentencing function and should reach its verdict without regard to what sentence might be imposed"); *United States v. Davidson*, 367 F.2d 60 (6th Cir. 1966) (discussing ban on juror consideration of punishment).

64. See generally PAUL H. ROBINSON, CRIMINAL LAW DEFENSES (1984).

65. See LAFAYE ET AL., *supra* note 31, § 20.6.

66. See *Taylor*, 484 U.S. at 415-16.

67. See FED. R. EVID. 702; *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993).

68. 509 U.S. 579 (1993).

69. See, e.g., Joseph R. Meaney, Note, *From Frye to Daubert: Is a Pattern Unfolding?*, 35 JURIMETRICS J. 191 (1995) (listing states following *Daubert*).

three cities found that about six of every ten criminal trials includes expert testimony.⁷⁰ Occasionally, a defendant will raise as a defense a claim that he was suffering from insanity or some other mental impairment, a claim that usually will necessitate testimony by mental health professionals. The insanity defense, however, is raised infrequently and is rarely successful.⁷¹ Acquittals due to insanity probably make up no more than about 0.26% of terminated felony prosecutions.⁷² Expert testimony may also be presented by a defendant who claims that her actions were the reasonable response of a person suffering from battered woman syndrome or any of a variety of other mental or emotional conditions. Prosecutors in sex offense cases sometimes present expert testimony concerning child sex abuse syndrome or rape trauma syndrome in order to help the jury understand the behavior of alleged victims. Experts on eyewitness identification have testified in a number of cases as well, although many courts continue to exclude such testimony as unhelpful.⁷³

V

JURY NULLIFICATION

As illustrated by the Zenger trial,⁷⁴ jurors in criminal cases do not always follow the instructions given to them by judges. When their failure to follow the law results in conviction, a defendant may appeal the conviction, and in turn may receive a new trial. However, when jurors depart from the law to acquit, the Double Jeopardy Clause of the Fifth Amendment protects the defendant from being retried for that crime.⁷⁵ This power of the jury to disregard the law and to acquit a defendant accused of a crime, even when the proof at trial demonstrates guilt beyond a reasonable doubt, is known as "jury nullification." As noted above, nullification provided a shield against British oppression before the Revolution. American juries have, since colonial times, exercised leniency by acquitting against the evidence and law in cases in which a conviction would be followed by a mandatory death sentence.⁷⁶ Before the Civil War, antislavery juries nullified in cases in which defendants were charged with treason for resisting the enforcement of the 1850 Fugitive Slave Law, a draconian statute enacted to assist slave owners in recovering runaway slaves.⁷⁷ Following the

70. See Daniel W. Shuman et al., *An Empirical Examination of the Use of Expert Witnesses in the Courts—Part III: A Three City Study*, 34 JURIMETRICS J. 193, 204 (1994).

71. See Hugh McGinley & Richard A. Pasework, *National Survey of the Frequency and Success of the Insanity Plea and Alternate Pleas*, 17 J. PSYCHIATRY & L. 205, 208-14 (1989).

72. See Andrew Blum, *Debunking Myths of the Insanity Plea*, NAT'L L.J., Apr. 20, 1992, at 9.

73. See Steven D. Penrod et al., *Expert Psychological Testimony on Eyewitness Reliability Before and After Daubert: The State of the Law and the Science*, 13 BEHAV. SCI. & L. 229 (1995).

74. See *supra* notes 1-8 and accompanying text.

75. See U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .").

76. See *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976).

77. See STANLEY W. CAMPBELL, *THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860*, at 148-69 (1968); ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY*

war, Southern juries refused to convict those accused of violence against African-Americans, and in Utah, Mormon jurors refused to convict defendants charged with bigamy or polygamy.⁷⁸ Prohibition era juries refused to convict liquor law violators, Vietnam War era draft-dodgers escaped punishment through acquittals, and jurors today may be nullifying in cases involving police oversight or abuse, lengthy mandatory sentences, charges of assisted suicide, drug possession, or the use of firearms.⁷⁹

Ever since the ratification of the Constitution, judges and scholars have debated whether nullification is good or bad, whether it is a right or a *de facto* power, and what courts can and cannot do to control it. For some, nullification "is what the jury system is about."⁸⁰ For others, it is a necessary cost of allowing the jury unfettered freedom to find facts, and of protecting an acquitted defendant from the ordeal of a second trial.⁸¹ The Supreme Court has avoided entering this controversy directly for more than a century. Its last significant discussion of nullification appeared in an 1895 decision denying a criminal defendant's claim of entitlement to an instruction about a lesser-included charge that was unsupported by the evidence, a decision in which a majority of the Court sternly disapproved of such jury lawlessness and declared that it was the role of the judge, not the jury, to determine the law.⁸²

While the debate continues about how much leeway jurors should be given to reject judge-directed law, there is no question that the Constitution now prohibits some judicial efforts to restrict nullification. The Double Jeopardy Clause of the Fifth Amendment bars retrial after acquittal for the same offense,⁸³ and the Jury Clause of the Sixth Amendment has been interpreted to prohibit judges from entering a judgment of conviction absent a jury's verdict of guilt in cases where the defendant has not waived a jury trial.⁸⁴ A court may not bar a defendant from litigating anew a factual issue decided previously against him.⁸⁵ And most courts consider special verdicts, by which a jury is asked to find the facts so that the judge can apply the law and determine guilt or innocence, to be unconstitutional.⁸⁶

At the same time, numerous limitations on the jury's nullification power thrive in criminal courtrooms, indicating either that the power is quite narrowly

AND THE JUDICIAL PROCESS 191 (1975); JANE H. PEASE & WILLIAM H. PEASE, *THE FUGITIVE SLAVE LAW AND ANTHONY BURNS* (1975).

78. See Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 461-64 (1998).

79. See *id.* at 433-34, 466; Alschuler & Deiss, *supra* note 8, at 890-92.

80. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 95 (1995).

81. See King, *supra* note 78, at 444-58 (reviewing origins and explanations of jury nullification).

82. See *Sparf v. United States*, 156 U.S. 51 (1895).

83. See, e.g., *United States v. Ball*, 163 U.S. 662 (1896).

84. See *Connecticut v. Johnson*, 460 U.S. 73, 84 (1983); *Sparf*, 156 U.S. at 105.

85. See *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994); Richard B. Kennelly, Jr., Note, *Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases*, 80 VA. L. REV. 1379 (1994).

86. See *LAFAVE ET AL.*, *supra* note 31, § 24.9.

confined, or an ambivalent judicial commitment to that power, or both. Federal courts remain free to retry a defendant acquitted by a state jury, as may the court of a different state, on the theory that when a defendant violates the law of more than one "sovereign," each sovereign may exact its own punishment regardless of what another sovereign chooses to do.⁸⁷ For example, following the state acquittals of the police officers charged with beating African-American motorist Rodney King, the federal government successfully prosecuted the same officers under federal law.⁸⁸ Also, a defendant's sentence for a crime of which he was convicted may be based on the commission of another offense of which he was acquitted.⁸⁹ A "civil penalty" may follow a criminal acquittal as well, even when the penalty looks suspiciously like a fine for the same wrongdoing.⁹⁰

In addition, trial judges take pains to prevent nullification from occurring. Potential jurors who reveal during jury selection that they have doubts about the law are regularly excused for cause, and jurors exposed as nullification advocates during deliberations may, in some instances, be removed from the jury.⁹¹ Judges routinely prevent defendants from introducing evidence or argument to support defenses that are not authorized by law, although occasionally a sympathetic judge may permit defense counsel to hint at a forbidden reason for the jury to exercise leniency, such as the steep punishment a defendant would face if convicted. Defendants are almost without exception denied instructions that will inform jurors that they have the power to acquit even when they believe that a defendant may be guilty under the law.⁹² Instead, judges are allowed to instruct the jury that it must convict if the government proves each element of the crime charged with proof beyond a reasonable doubt.⁹³ As the Court held in 1895, defendants are not entitled to instructions informing the jury of a lesser-included offense unless the evidence supports that charge.⁹⁴ Judges may require a jury to deliberate further if it returns with an acquittal on

87. *See id.* § 25.5. A state may also prosecute a defendant for the same offense after acquittal in federal court.

88. *See Koon v. United States*, 518 U.S. 81 (1996).

89. *See United States v. Watts*, 519 U.S. 148 (1997).

90. *See Hudson v. United States*, 522 U.S. 93 (1997) (holding that double jeopardy does not bar the imposition of civil and criminal penalties for the same offense). At least one court has authorized the retrial of a defendant should the prosecutor prove that the defendant bribed his judge to acquit him. *See Aleman v. The Honorable Judges of the Circuit Court of Cook County*, 138 F.3d 302 (7th Cir. 1998). While it would be a simple matter to confine this exception to the finality of acquittals to bench trials without intruding on the sanctity of jury decisions, the Court has so far refused in its double jeopardy cases to extend less protection to acquittals by judges than to acquittals by juries. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573-75 (1977); *Kepner v. United States*, 195 U.S. 100, 133-34 (1904).

91. *See King, supra* note 78, at 484-85; *see also United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997) (reviewing case in which judge during trial dismissed juror alleged to have been misbehaving and refusing to follow instructions, noting that trial judges have the duty to dismiss jurors who intend to nullify).

92. In Indiana and Maryland, however, the state constitution permits juries to determine both the law and the facts. *See IND. CONST.* art. 1, § 19; *MD. CONST. DECL. OF RTS.* art. 23.

93. *See King, supra* note 78, at 475 n.158.

94. *See Sparf v. United States*, 156 U.S. 51, 59-64 (1895).

one count that is inconsistent with its verdict on another.⁹⁵ And sometimes judges ask jurors to answer special interrogatories along with their verdict of guilt or innocence—factual questions that may focus the jury on the legal issues as presented by the judge and away from extra-legal reasons for acquitting the defendant such as conscience or prejudice.⁹⁶

Judges and legislators refuse to give the criminal jury any more discretion than this because they are concerned that greater leeway would free jurors to misuse their power. A juror may vote to acquit a defendant because she believes that the conduct proscribed by the charge is not a crime, that the defendant does not deserve punishment, that the police acted in bad faith, that God would not punish the defendant, that the victim needs no protection from the law, that she will earn a personal benefit if she acquits, that the defendant or those who support his innocence will harm her if she votes to convict, that the Constitution requires fingerprint evidence to prove identity beyond a reasonable doubt, or for any other reason at all. It is not so long ago that jurors refused to punish those responsible for torturing and terrorizing African-Americans throughout the South.⁹⁷ Those wary of nullification recognize that criminal jury trials today may still involve victims who are unpopular yet deserve protection, or laws that, while opposed in some communities, reflect the will of the state or the nation. It is in these types of cases that the jury's decision to refuse to enforce the law can be most disturbing. In any event, as Professors Harry Kalven and Hans Zeisel's classic study of American juries demonstrated, judge/jury disagreement is the exception, not the rule.⁹⁸ Most acquittals are probably due to genuine doubts about the facts, rather than overt disregard for the law.⁹⁹

VI

JURY COMPOSITION

Given the ability of jurors to block the enforcement of criminal law, it was inevitable that the identity of those who sit in the jury box would be a subject of intense controversy. The Sixth Amendment gave little guidance, insisting only that the jury be "impartial" and drawn from a "previously ascertained" "district," leaving plenty of room for courts and legislatures to define further the qualifications for service as a juror.¹⁰⁰ Until the Civil War, federal courts followed the juror selection procedures of the state in which the court was located, and all but one of the states effectively limited jury service to white men

95. For a full discussion of inconsistent verdicts and their treatment by courts, see Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771 (1998).

96. See LAFAVE ET AL., *supra* note 31, § 24.9.

97. See *supra* note 78 and accompanying text.

98. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 56 (1966) (noting that in sample of 3,576 trials, judges agreed with jurors in over 75% of cases).

99. See *id.* at 116.

100. See Kershen, *supra* note 15, at 843.

who were property owners or taxpayers.¹⁰¹ Often local statutes would require that jurors be of "intelligence" or "of fair character," requirements judged exclusively by those men charged with the job of creating jury lists. These men, called sheriffs, trustees, or selectmen, would choose the initial names to be summoned, with virtually no check on their discretion.¹⁰² When not enough of those enlisted for jury service responded to their summonses, or showed up drunk or sick, bystanders were chosen to make up the remainder.¹⁰³ By manipulating the initial list, local officials could attempt to stack a jury with sympathizers, while a defendant could do the same by trying to control who showed up and who was standing around to take the place of no-shows.¹⁰⁴

Following the Civil War, Congress prohibited states from disqualifying citizens from jury service on account of race, and for a short time during Reconstruction, African-Americans served on juries in some communities.¹⁰⁵ But the right of African-Americans to serve on juries in most Southern communities remained unrealized: Their names were rarely on jury lists, and when they were, they were never selected.¹⁰⁶ The Court's efforts to remedy this persistent practice began in 1880. Striking down an express statutory exclusion of African-Americans from juries, the Court in *Strauder v. West Virginia*¹⁰⁷ concluded that the statute denied equal protection of the law to the African-American defendant who must submit to a trial by a jury from which all members of his race had been excluded. But the Court's decision served only to shift discrimination from the text of statutes to the actions of those who enforced them. Keeping juries all-white remained business as usual well into the twentieth century. The names of African-Americans were essentially "nailed to the bottom" of the boxes, if they appeared there at all.¹⁰⁸ Courts occasionally ordered relief after finding that nothing else but race discrimination could explain the total absence of African-Americans on juries over several years, rejecting claims that no qualified African-Americans existed or that those in charge did not know any. Yet, as Professor Randall Kennedy has pointed out, bringing such a challenge was not a realistic option for most defendants: Even for those defendants able to afford an attorney, attorneys remained "dependent on the good will of whites," and were "unwilling to jeopardize their careers" by challenging dis-

101. Although only three states explicitly limited service to whites, other limitations effectively ensured all-white juries. See Alschuler & Deiss, *supra* note 8, at 877; see also KENNEDY, *supra* note 36, at 169 ("Prior to the Civil War, only one state, Massachusetts, permitted blacks to serve on juries.").

102. See Alschuler & Deiss, *supra* note 8, at 879-80; see also JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 86-88 (1977) (cataloguing continued use of "key-man" jury selection systems in several states in the mid-1970s).

103. See King, *supra* note 45, at 2682.

104. See Alschuler & Deiss, *supra* note 8, at 879-80; King, *supra* note 45, at 2682-85.

105. See Alschuler & Deiss, *supra* note 8, at 886. For further discussion, see Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 EMORY L.J. 921 (1984).

106. See Alschuler & Deiss, *supra* note 8, at 877.

107. 100 U.S. 303 (1879); see also *Neal v. Delaware*, 103 U.S. 370 (1880).

108. Alschuler & Deiss, *supra* note 8, at 895.

criminatory practices.¹⁰⁹ In addition, state judges rarely recognized the practices in their own courts as unlawful.¹¹⁰ Eventually, after the United States Supreme Court overturned the convictions of several defendants convicted by all-white juries during the 1930s, 1940s, and 1950s due to intentional race discrimination, state courts began to attempt to include African-Americans in jury pools. Even then, officials in some communities made sure to summon only as many as were necessary to avoid a successful legal challenge.¹¹¹

A system for selecting jurors randomly from voter lists was adopted by Congress in 1970, freeing federal courts from the more discretionary state jury selection schemes and eliminating the exemptions for certain professions which had skewed jury pools in the past.¹¹² But in interpreting the commands of the Constitution, which bind the states, the Court stopped short of mandating random selection. The Court refused to hold unconstitutional the key-man jury selection system that allowed state jury commissioners to select those potential jurors they felt were most qualified. Instead, the Court held in 1975 that the Sixth Amendment guarantees only that juries be drawn from a "cross-section" of the community.¹¹³ If a defendant could show that a cognizable group in the population was underrepresented on the venire, he deserved a new trial unless the state could show that the underrepresentation was due to a selection procedure that advanced a significant state interest.¹¹⁴ Although the cases that established this doctrine involved the exclusion of women from juries, the cross-section concept was immediately employed to combat racially discriminatory selection practices.¹¹⁵ Subsequent cross-section and equal protection challenges,¹¹⁶ together with the court systems' acquisition of computer technology, led states to adopt random selection procedures and remove from commissioners the discretion to pick and choose among qualified potential jurors.¹¹⁷ Today, in nearly every American jurisdiction, the names of citizens who are mailed summonses for jury service are selected randomly, by computer, from lists of registered voters or licensed drivers.¹¹⁸

109. See KENNEDY, *supra* note 36, at 174.

110. See *id.*

111. As late as the 1970s for example, attorneys and jury commissioners in Putnam County, Georgia, had conspired to minimize the number of African-Americans and women on the county's jury lists. See *id.* at 180 (describing *Amadeo v. Zant*, 486 U.S. 214 (1988)).

112. See generally Carl H. Imlay, *Federal Jury Reformation: Saving a Democratic Invention*, 6 LOY. L.A. L. REV. 247 (1973).

113. See *Taylor v. Louisiana*, 419 U.S. 522 (1975).

114. See *Duren v. Missouri*, 439 U.S. 357, 367-68 (1979).

115. See Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 968 n.111 (1998).

116. See *Castaneda v. Partida*, 430 U.S. 482 (1977) (finding that a statistically significant gap between the proportion of Mexican-Americans in the adult population (79.1%) and the proportion of those summoned for grand jury duty in the preceding 11 years (only 39%) was enough to establish intentional discrimination on the part of those jury commissioners responsible for summoning jurors). For more on the cross-section challenge under the Sixth Amendment, see Leipold, *supra* note 115.

117. For a discussion of state reform efforts, see G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216 (1996).

118. See *id.* at 216.

But random selection has not resolved the ongoing litigation over the composition of juries—far from it. First, random selection highlighted the discrimination that occurred later in the selection process during the *voir dire* stage. Getting a representative group of prospective jurors into the courtroom was a big step. Ensuring diversity in the jury box was something else. Through peremptory challenges, attorneys could use whatever criteria they wished to tailor the jury pool in their favor—race, sex, ethnicity, you name it. *Batson* and the cases extending the ban against race-based peremptory challenges followed.¹¹⁹ A decade of experience with the *Batson* rule has demonstrated its futility, however,¹²⁰ causing some scholars and judges to suggest the elimination of the peremptory challenge altogether.¹²¹ Unlike the challenge for cause, which is necessary to ensure the defendant the “impartial” jury guaranteed by the Constitution, the peremptory challenge is not protected by the Constitution and is not an essential element of the defendant’s right to an impartial jury.¹²² The peremptory challenge is thus subject to elimination by legislatures. Already, efforts have been made in some states to reduce the number of peremptory challenges provided to each party. Presently, eight states allow four challenges or fewer per side, five states allow twelve or more challenges, and the rest fall somewhere in between.¹²³

Critics of the peremptory challenge argue that not only does the challenge permit, and perhaps even encourage, invidious discrimination against potential jurors, it causes jurors to become “frustrated and cynical about the justice system.”¹²⁴ The challenge, claim some critics, also wastes time and promotes reliance on “jury experts,” which, in turn, exacerbates the imbalance between parties who possess unequal resources to pay for such services. Actually, trial consultants offer such a wide variety of help with trial presentation and strategy that the elimination of the peremptory challenge may not have much of an effect on the market for their services. Expert assistance on how to present evidence, clients, and witnesses to a particular jury during jury selection and the remainder of trial will continue to be useful to attorneys, even if peremptory challenges were unavailable.

119. See *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 505 U.S. 42 (1992); *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

120. See Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996).

121. See, e.g., *id.*; Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809 (1997).

122. See *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988); *Stilson v. United States*, 250 U.S. 583, 586 (1919).

123. See COUNCIL FOR COURT EXCELLENCE DISTRICT OF COLUMBIA JURY PROJECT, *JURIES FOR THE YEAR 2000 AND BEYOND* (1998) [hereinafter *YEAR 2000*].

124. *Id.* at 29 (quoting Hoffman, *supra* note 121, at 862, “Is it any wonder that these people leave our courtrooms thinking that the whole trial process is just as trivial and flawed as jury selection?”).

Jury reformers sometimes point to the successful eclipse of the peremptory challenge in other countries as evidence that the same could be accomplished here.¹²⁵ But the ability of other nations to shed the challenge does not necessarily portend an easy transition in the United States. Other countries may enjoy conditions more favorable to this change, including a history of less litigant autonomy during *voir dire*, more effective regulation of trial publicity, more homogenous jury pools, and widespread acceptance of nonunanimous verdicts. Should the peremptory challenge erode in America, it is likely that litigants would attempt to make greater use of challenges for cause. Presently, challenges for cause are employed in most trials; an estimated fifteen to twenty-five percent of potential jurors brought to court for each criminal case are excused for cause.¹²⁶ If the challenge for cause were expanded to allow for disqualification of jurors for bias that was less obvious or clear,¹²⁷ the frequency of challenges for cause would undoubtedly increase.

Two additional constitutional regulations of the *voir dire* process deserve mention. First, the Court has held that there is a right to ask potential jurors about racial bias in a very narrow class of criminal cases raising racially sensitive issues.¹²⁸ Second, in capital cases, the Court has held that the defendant's right to an impartial jury is violated when the prosecutor excludes for cause jurors who are opposed to the death penalty but nevertheless are able to impose it.¹²⁹ As a result, questioning of potential jurors in capital cases typically is quite detailed.¹³⁰ However, other than these required inquiries and the ban against the intentional use of race and gender in exercising peremptory challenges, the Court has imposed very few constitutional constraints on the *voir dire* process. It has refused to recognize a constitutional right to question potential jurors about the extent of their exposure to pretrial publicity, for example, insisting only that the judge assure himself that the jurors could "put aside what they had read or heard and render a fair verdict based on the evidence."¹³¹ Thus, the

125. See Alschuler, *supra* note 121, at 166-67.

126. Usage will vary with the individual case and the jurisdiction. See Telephone Interview with Paula L. Hannaford, Senior Research Analyst, National Center for State Courts, Williamsburg, Va. (Oct. 23, 1998).

127. See, for example, YEAR 2000, *supra* note 123, at 35, proposing that peremptory challenges be abolished, but that cause challenges be

expanded to mandate the exclusion of any juror as to whom any reasonable doubt exists about the juror's impartiality, based on either the juror's demeanor or substantive answers to questions during *voir dire*; and where a trial judge is uncertain regarding the existence of such a reasonable doubt, the judge's uncertainty should be resolved in favor of striking the challenged juror.

128. See *Morgan v. Illinois*, 504 U.S. 719 (1992) (requiring an inquiry of potential jurors in capital cases as to whether they would automatically impose a death sentence after a guilty verdict); *Turner v. Murray*, 476 U.S. 28 (1986) (requiring an inquiry about racial bias in prosecution of African-American defendant charged with murder of a white victim); *Ham v. South Carolina*, 409 U.S. 524 (1973) (requiring an inquiry about racial bias in prosecution of black civil rights activist).

129. See *Wainwright v. Witt*, 469 U.S. 412 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968); see also *infra* notes 183-184.

130. See *infra* Part IX.

131. *Mu'Min v. Virginia*, 500 U.S. 415, 432 (1991) (O'Connor, J., concurring).

trial judge still has almost complete control over the amount of information litigants will learn about jurors during *voir dire*. Some judges allow attorneys great leeway to question (and begin indoctrinating) jurors; others do not allow the attorneys to question the prospective jurors, preferring instead to pose a minimum number of quite general questions from the bench. In complex or high-profile cases, courts may allow the use of detailed written juror questionnaires as a supplement to in-court questioning. This permits the jurors somewhat more privacy, facilitates the disclosure of more information about jurors, and conserves judicial resources. Some commentators have recommended that questionnaires be used routinely due to these advantages.¹³²

With the widespread adoption of random selection systems, concern about discrimination shifted not only to later phases of jury selection, but also to an earlier stage of the selection processes: the creation of the juror lists themselves. In some courts, critics have claimed, the geographic boundaries of the community from which jurors are drawn create racially skewed jury lists due to the persistence of residential segregation. An example is the controversy recently resolved in the federal court for the Eastern District of New York, a district divided into two predominately white counties on Long Island and the three more racially diverse boroughs of Queens, Bronx, and Brooklyn. Out of concern for the difficulties faced by lower-income residents living in the city who had to find transportation to courthouses on Long Island, the five-county district had for years drawn jurors for its two Long Island courthouses exclusively from the two Long Island counties, while jurors for other courthouses were drawn from all five counties.¹³³ Recently, this system came under attack. Defendants tried in Queens, Bronx, or Brooklyn alleged that their juries were diluted with whites from Long Island, while defendants tried on Long Island alleged that they were deprived of minority jurors from the rest of the District.¹³⁴ After considering several alternative proposals to alleviate racial imbalances, the court eventually abandoned trying to carve up its racially polarized vicinage and adopted a plan which drew jurors for all courthouses from the entire District.¹³⁵

Concerns about racial representation in jury pools have also caused some litigants, judges, and lawmakers to question whether otherwise random and race-neutral procedures for summoning and qualification actually exclude a disproportionate number of minority citizens. Studies have shown that in some communities, minority citizens are statistically less likely to appear on lists of

132. See YEAR 2000, *supra* note 123, at 34; Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123 (1996).

133. See *In re Jury Plan of the Eastern District of New York*, 27 F.3d 9 (2d Cir. 1994).

134. See, e.g., *United States v. Miller*, 116 F.3d 641 (2d Cir. 1997); *United States v. Bhana*, 68 F.3d 19 (2d Cir. 1995).

135. See *In re Jury Plan of the Eastern District of New York*, 61 F.3d 119 (2d Cir. 1995); Nancy J. King, *Jurymandering Is Asking for Trouble*, NEWSDAY, Sept. 22, 1994, at 36; Susanne H. Vikoren, *Justice or Jurymander? Confronting the Under Representation of Racial Groups in the Jury Pool of New York's Eastern District*, 27 COLUM. HUM. RTS. L. REV. 605 (1996); see also *United States v. King*, 134 F.3d 1173 (2d Cir. 1998).

voters or licensed drivers, to remain at one address long enough to receive a jury summons, or to be able to obtain transportation to the courthouse or time off from work to serve as jurors.¹³⁶ To compensate, many jurisdictions are considering adding to their juror source list the names of those who may not be licensed to drive but who pay income tax, receive public assistance, or have recently become American citizens.¹³⁷ A few courts have experimented with “oversampling” minority neighborhoods or other efforts to achieve racial balance in the jury pool.¹³⁸ The federal court in Detroit, Michigan, for example, replicated on the list of qualified jurors the racial demographics of the population from which the list was drawn by striking the appropriate number of non-African-Americans. However, the Court of Appeals recently found that such racial “balancing” was unconstitutional,¹³⁹ and the District has discarded the system.¹⁴⁰

VII

THE CRIMINAL JURY TRIAL: AN EMPIRICAL SNAPSHOT

No discussion of the American criminal jury would be complete without some mention of how seldom those charged with crime in the United States actually face a jury, yet how influential the jury remains. For most defendants, the jury, if not irrelevant, is at least inaccessible. A remarkably small percentage of felony cases go to trial, only three to ten percent.¹⁴¹ Plea bargaining or “settlement” is the norm, due to powerful incentives to avoid the risk and expense of trial, incentives that influence both prosecution and defense. In more than a third of the small percentage of felony cases that are tried, the defendant opts for trial by a judge without a jury.¹⁴² As Professor Albert Alschuler states, “American criminal procedure has become an administrative process rather than the adjudicative process it once was.”¹⁴³

But even though only a tiny proportion of defendants are willing or able to submit their fate to juries, the jury retains importance in other ways. Attorneys settling cases often try to predict whether a jury would convict or acquit, bargaining in the shadow of the jury. While juries actually convict in two-thirds to three-quarters of all felony cases submitted to them, the conviction rate varies

136. See Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 712-14 (1993).

137. See, e.g., YEAR 2000, *supra* note 123, at 8.

138. See King, *supra* note 136, at 723-24.

139. See *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998).

140. See Tim Doran, *Ruling Puts a Roadblock into Federal Jury Selection*, DETROIT FREE PRESS, Mar. 17, 1998, at 3B (reporting that “[t]he U.S. District Court in eastern Michigan agreed to stop removing non-blacks from jury pools”).

141. See BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1993: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 48 (1995).

142. See *id.* (noting figures for state courts).

143. Alschuler & Deiss, *supra* note 8, at 925.

considerably depending on the type of crime.¹⁴⁴ Only about three percent of federal criminal cases tried to a jury end in hung juries;¹⁴⁵ in some localities, that percentage is higher.¹⁴⁶

The justice system continues to devote a hefty portion of its resources to maintaining the criminal jury. Trial judges spend a significant amount of time trying criminal cases, and appellate judges expend considerable time reviewing them. In the federal courts, for example, although criminal case filings represented only thirteen percent of all cases filed in 1994, forty-two percent of all trials were criminal trials, and most of those were jury trials.¹⁴⁷ Jury administration costs to each court system include the expense of preparing and updating juror lists and pattern jury instructions, juror fees (up to fifty dollars per day in some jurisdictions, but in many states, much less),¹⁴⁸ jury administrators' salaries, jury summoning and qualification mailings, proceedings to enforce jury summonses, jury education programs,¹⁴⁹ juror meals, and, for some cases, the cost of sequestering the jury during deliberations.¹⁵⁰

Although criminal trials are much longer and more complex than the several-a-day trials of centuries past, they are still quite short. Nationwide, each felony jury trial takes about two to four days to complete, not weeks or even months as recent (and unusually lengthy) murder trials such as that of O.J. Simpson or Louise Woodward might suggest.¹⁵¹ Complex, multi-defendant, or capital cases take longer to try than most felonies. The jury selection phase of a felony case can last less than an hour or can drag on for several days, but on average seems to take up about twenty to thirty-five percent of total trial time.¹⁵² Often parties will not use all of their allotted peremptory challenges. *Batson* objections to these challenges are quite common in some courtrooms, rare in many others. During the government's case-in-chief, the prosecution typically presents several witnesses, often including a police officer or the crime victim,

144. See BUREAU OF JUSTICE STATISTICS, *supra* note 20, tbl. 5.28 (1997); OSTROM & KAUDER, *supra* note 141, at 50. For a thorough statistical profile of trials, and other steps in the criminal justice process, see LAFAVE ET AL., *supra* note 31, § 1.3.

145. See Michael J. Saks, *What Do Jury Experiments Tell Us About Jury Decisions?*, 6 S.C. INTERDISC. L.J. 1, 40 (1997) (collecting hung jury statistics in federal criminal jury trials from 1980-1993).

146. See Roger Parloff, *Race and Juries: If It Ain't Broke . . .*, AMERICAN LAWYER, June 1997, at 5 (collecting statistics on acquittal rates and hung jury rates, finding that acquittal rates vary greatly, and that hung jury rates in Los Angeles have remained between 12% and 16% for over a decade).

147. See David L. Cook et al., *Criminal Caseload in U.S. District Courts: More Than Meets the Eye*, 44 AM. U. L. REV. 1578, 1591 (1995).

148. See Munsterman, *supra* note 117, at 217.

149. See, e.g., YEAR 2000, *supra* note 123, at 5-6 (describing use of juror orientation video and recommending program to improve public attitudes toward jury service).

150. Until it abandoned mandatory felony jury sequestration in 1996, the State of New York was spending more than \$4 million annually just to house and supervise sequestered jurors in criminal cases. See THE JURY PROJECT, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 13 (1994).

151. See *Commonwealth v. Woodward*, 694 N.E.2d 1277 (Mass. 1998) (noting trial lasted three weeks).

152. See DALE ANNE SIPES ET AL., ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 40 tbl. 18 (1988).

and in many cases will call an expert to the stand to assist the jury in evaluating evidence concerning illegal substances, firearms, wounds, injuries, physical conditions, or fingerprint, DNA, or other forensic analysis. The defendant may choose not to present any witnesses at all, opting instead to impeach the credibility of the government's witnesses. When the defense does present testimony, it usually takes up less time than the prosecution's case.¹⁵³

The criminal jury trial plays a prominent role in the nation's psyche as well as its budget. Many believe, or at least believed at one time, that one of the jury's primary functions is to educate citizens in democracy through their participation as jurors.¹⁵⁴ Yet most Americans will never have the experience of deliberating as a juror. Each year, about one-quarter to one-half of the estimated twenty million individuals who receive jury qualification questionnaires in the mail will be exempted, disqualified, or excused from serving.¹⁵⁵ Others will be summoned but will not show up.¹⁵⁶ Less than half of those who do appear for jury service will become sworn jurors in any case, criminal or civil.¹⁵⁷ Some citizens experience juries as defendants, witnesses, attorneys, or court officers. A far greater number of Americans learn about criminal juries second-hand, schooled about the criminal jury through media accounts of jury trials.¹⁵⁸ Criminal jury trials continue to be front-page, box-office, best-seller material year after year, and now are even available on their own cable channel, Court

153. For information on the length of trials, see *id.* Criminal jury trials in federal court average in length about four and one half days. See Cook et al., *supra* note 147, at 1592-93. On the types of evidence submitted in felony trials in several urban courts, see SIPES ET AL., *supra* note 152; Dale Ann Sipes & Barry Mahoney, *Toward Better Management of Criminal Litigation*, 72 JUDICATURE 29, 34 (1988) (reporting that while a typical prosecution in Oakland and Marin Counties in California involved at least one expert witness and three officials (police officers, etc.), prosecutors in other urban areas studied used only two officials and rarely used experts); see also OSTROM & KAUDER, *supra* note 141, at 50 (reporting that actual trial time for a typical felony jury trial in the cities they studied averaged 11 hours and that the prosecution consumed about twice as much time as the defense).

154. See, e.g., Vikram Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 239 (1995).

155. See G. THOMAS MUNSTERMAN, JURY SYSTEM MANAGEMENT 47 (National Center for State Courts 1996).

156. See *id.*

157. These figures vary greatly from jurisdiction to jurisdiction. For example, in Washington, D.C., of those summoned for jury service, 19% purposely ignored their summonses, and 43% never received it through the mail. See YEAR 2000, *supra* note 123, at 1. Other jurisdictions report near-perfect compliance. See King, *supra* note 45, at 2697 n.89 (collecting response rates ranging from over 93% to less than half of those summoned). The National Center for State Courts recommends that courts design their jury systems so that no more than half of the jurors reporting go home without being sworn in as jurors. See Munsterman, *supra* note 155, at 86 tbl. 7-1.

158. See SUSANNA BARBER, NEWS CAMERAS IN THE COURTROOM: A FREE PRESS-FAIR TRIAL DEBATE xiv (1987):

Though television is only one source of citizens' knowledge about courts and law, it may well be the single most common and pervasive source of *shared* information and imagery. . . . [T]ypical viewers of prime time dramatic network programs will see 43 law enforcers, 6 lawyers, and 3 judges every week—all fictional but realistically portrayed. They nearly all work on criminal cases. . . . The legal process is practically invisible. . . . Viewers rarely see arraignments, indictments, pre-trial hearings, plea-bargaining, jury selection, or jury deliberations.

TV.¹⁵⁹ This endless supply of dramatic highlights of real and imaginary prosecutions is, for much of America, the only source of information about the criminal jury.¹⁶⁰

VIII

PUBLICITY AND THE JURY

The American public has always been fascinated by crime and criminals, eagerly consuming news of crime before, during, and even after a prosecution. In the United States, as in other countries where the jury is employed, the jurors' views of a case may be influenced by media accounts of the crime, the victims, or the alleged perpetrator, including information that would not be admissible at trial. As elsewhere, this kind of influence can threaten the impartiality of the jury and the legitimacy of its decision. But in America, the fear of the influence of publicity on verdicts is more pronounced than in other countries. For example, whatever prejudices English jurors may bring with them to the jury room are assumed in that country to cancel each other out in the decisionmaking process.¹⁶¹ Not so in the United States.

Jurors' exposure to publicity can be fatal to a verdict. Judges and attorneys often take great care to empanel jurors who have not heard much about the case and to protect those jurors from publicity during the course of the trial.¹⁶² The intensified concern about media taint in the United States may be due to the greater potential for such influence. Unlike the law of other countries, American law does not control the effects of publicity on jurors by barring the press from disseminating information about a criminal case before and during a trial.¹⁶³ Such restrictions, even if they could be effective in the age of the Internet, are contrary to the First Amendment protection of freedom of speech.¹⁶⁴ A defendant's inadmissible confession or prior record, the details of the victim's loss, legal pundits' speculation about the trial and sentence, reports of rulings made outside the hearing of the jury, and other inadmissible information may be freely broadcast into the homes and delivered to the doorstep of every juror and potential juror prior to and during the trial. The Constitution guarantees the press access to trials as well as the freedom to report whatever it learns, forbidding exclusion of the press except when "necessitated by a compelling

159. See PAUL THALER, *THE WATCHFUL EYE: AMERICAN JUSTICE IN THE AGE OF THE TELEVISION TRIAL* 3-6 (1994).

160. See *id.* at 6-10.

161. See Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62 *LAW & CONTEMP. PROBS.* 7, 25 (Spring 1999) (noting that "[t]he defence has practically no information on which to base . . . a challenge and no right to ask potential members of the jury exploratory questions").

162. See King, *supra* note 45, at 2729; Strauss *supra* note 46, at 83-88.

163. See Lloyd-Bostock & Thomas, *supra* note 161, at 28-31.

164. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

governmental interest,” and by means “narrowly tailored to serve that interest.”¹⁶⁵

Instead of the media, then, it is the jurors, together with the judge, who carry the burden of keeping the trial process free from information untested in the crucible of trial procedure. Jury selection is expected to screen adequately those potential jurors whose exposure to publicity has left them irreparably influenced,¹⁶⁶ even though the result may be a jury stripped of people who stay informed about the greater world around them.¹⁶⁷ At times, an entire community may be saturated with outrage, suspicion, or rumor, so that jurors who lack strong views about a case are hard to find. In such cases, a judge may order a change of venue to a different location.¹⁶⁸ Jurors who are chosen are expected to follow the court’s instructions not to pay attention to media accounts or other discussions of the case during the trial, subject to dismissal from the jury should they disobey. In some cases, a court may keep the names and addresses of jurors from the press and even from the parties, to relieve juror anxiety about being approached by parties, witnesses, sympathizers for one side or the other, or by reporters.¹⁶⁹

After the trial, free speech principles continue to influence a judge’s ability to regulate jurors. For example, judges cannot issue gag orders preventing jurors from seeking out members of the press and telling all about their deliberations.¹⁷⁰ At most, a court might be able to prohibit the press and others from approaching hesitant jurors and pressing them for information about their secret deliberations after the trial.¹⁷¹

Despite all of these protections for the press, and the impression one might get by watching the television news, the vast majority of criminal trials in the United States go forward quietly, without attorneys giving press conferences on the courthouse steps, without debriefings on nightly television talk shows, and without cameras broadcasting live courtroom events. Most criminal trials are covered only by local press, if at all. Many courtrooms in the United States still lack video recording equipment. Although several states have installed such equipment and also allow for television coverage, other courts continue to ban cameras or audio recording equipment in the courtroom, allowing access only

165. *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986); *Globe Newspaper v. Superior Court*, 457 U.S. 596, 606-07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 55 (1980).

166. *See Press Enterprise Co.*, 478 U.S. at 14.

167. Barring news consumers from juries is, in Jeffrey Abramson’s view, “rabidly antidemocratic.” ABRAMSON, *supra* note 80, at 248.

168. For an in-depth look at a change of venue controversy, see Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533 (1993) (discussing the state prosecution of the officers charges with beating motorist Rodney King).

169. *See King*, *supra* note 132, at 130-32.

170. *See Marcy Strauss, Juror Journalism*, 12 YALE L. & POL’Y REV. 389 (1994).

171. *See United States v. Cleveland*, 128 F.3d 267 (5th Cir. 1997) (upholding, against First Amendment challenge by press, trial judge’s mandate that, “absent a special order by” the judge, “no juror may be interviewed by anyone concerning the deliberations of the jury”).

to representatives of the print media.¹⁷² Attorneys, too, are barred in many states by rules of professional conduct from commenting in any detail about their trials, a restriction that has been upheld by the Supreme Court as consistent with the First Amendment.¹⁷³

IX

THE CAPITAL JURY: THE AMERICAN DEATH PENALTY

One of the most unique tasks of the criminal jury in the United States is deciding whether a convicted criminal will be put to death for his crime.¹⁷⁴ Presently, the federal government and about three-quarters of the states have authorized the death penalty, and in most of these states the jury, not the judge, decides whether the defendant should be sentenced to death.¹⁷⁵ The Court has interpreted the prohibition against "cruel and unusual punishment" in the Eighth Amendment to bar the imposition of the death penalty except for the most serious crimes, so that today essentially only murderers are sentenced to death. Hence, capital jury trials are relatively uncommon. Of the 2,000 to 4,000 defendants a year charged with a crime that makes them eligible for the death penalty, only about six to fifteen percent receive a death sentence, an average of about 250 death sentences per year.¹⁷⁶

For much of American history, jurors were given little, if any, guidance as to how they should decide who would live or die, and judges had little power to review a jury's sentencing decision. As Professor Randall Kennedy has vividly portrayed in his book *Race, Crime, and the Law*, capital trials in the United States have been plagued by racial injustice.¹⁷⁷ The death penalty was employed frequently in cases in which African-American men were convicted of raping white women, for example.¹⁷⁸ In 1972, in *Furman v. Georgia*,¹⁷⁹ the Supreme Court attempted to put a stop to arbitrary death sentencing. The decision struck down dozens of state sentencing schemes as violative of the Eighth Amendment's prohibition of cruel and unusual punishment.¹⁸⁰ Within five years, however, the Court upheld revised state sentencing statutes that were designed by state legislatures to ensure that the death penalty would be imposed in a more consistent, yet more individualized manner.¹⁸¹ In dozens of

172. See, e.g., *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986); *Westmoreland v. CBS, Inc.*, 752 F.2d 16 (2d Cir. 1984).

173. See *Gentile v. State Bar*, 501 U.S. 1030 (1991).

174. For a complete listing of which nations authorize the sentence of death, see THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 78-83 (Hugo A. Bedau ed., 1997).

175. See LAFAVE ET AL., *supra* note 31, §§ 26.1(b), 26.3(b).

176. See ABRAMSON, *supra* note 80, at 213-14; THE DEATH PENALTY IN AMERICA, *supra* note 174, at 31-32.

177. See KENNEDY, *supra* note 36.

178. Eventually, the Supreme Court in 1977 held that the death penalty was an unconstitutionally severe punishment for the crime of rape. See *Coker v. Georgia*, 433 U.S. 584 (1977).

179. 408 U.S. 238 (1972).

180. See *id.* at 239.

181. See *Jurek v. Texas*, 428 U.S. 262 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

subsequent decisions, the Court has continued to map out the complex procedures required by the Constitution in order to impose the penalty of death.¹⁸² A brief summary of those procedures follows.

The trial of a person charged with a capital crime has two separate stages: the determination of guilt or innocence, and the selection of a sentence. Only after the guilt-or-innocence phase ends with a verdict of guilt does the jury hear evidence concerning the appropriate sentence. Yet because the same jurors who decide the sentence also decide guilt, the questions during *voir dire* often focus on the sentencing decision. Potential jurors are carefully interrogated about their attitudes about the death penalty. While many of these potential jurors will have never thought seriously about capital punishment before, others will voice strong, sometimes religiously based views for or against capital punishment. For nearly two centuries, those potential jurors who revealed conscientious scruples about sentencing someone to death, or who were otherwise opposed to capital punishment, were struck from the juries in capital cases “for cause.” In 1968, the Court found that this practice violated the defendant’s rights to due process and to an impartial jury under the Sixth Amendment.¹⁸³ Today, potential jurors who cannot impose a sentence of death and thus lack the capacity to apply the law are subject to disqualification for cause, but those who might be able to sentence someone to death (and are simply reluctant to do so) are qualified to serve.¹⁸⁴ Government attorneys nevertheless strike such moderate opponents of the death penalty from capital juries when they can with peremptory challenges. Indeed, both parties in capital cases are usually allotted more peremptory challenges than in noncapital cases, ostensibly to provide greater assurance that the jurors who remain on the panel are fair.

The sentencing phase of a capital case is a trial-like, adversarial hearing during which the parties present evidence of certain aggravating or mitigating factors. The government and the defense may present information about the character of the convicted defendant and, in many states, the jurors are exposed to victim-impact evidence. Jurors are instructed that they must unanimously agree that specified aggravating factors have been established beyond a reasonable doubt before they can impose a death sentence. For these jurors, the process of deciding whether to sentence a defendant to death is always a trying, and often a confusing, ordeal. A mammoth study involving lengthy interviews with hundreds of people who have served as jurors in death penalty proceedings¹⁸⁵ has revealed that jurors often misunderstand what will happen to the defendant if they decide not to impose the death penalty, believe that their decision is merely advisory, or misunderstand which factors can and cannot be

182. For useful discussions of the death penalty and the jury, see ABRAMSON, *supra* note 80, at 207-39, and Jordan Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590 (1996).

183. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

184. See *id.*

185. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1077-85 (1995) (describing study).

considered, what level of proof is required, and what degree of concurrence is required for aggravating and mitigating factors.¹⁸⁶

The dozens of decisions fine-tuning the death sentencing process have failed to dispel the belief, still held by a significant percentage of Americans, that the death penalty is imposed in a racially discriminatory manner.¹⁸⁷ In 1987, lawyers seeking to overturn the death sentence of Warren McCleskey, an African-American man convicted of murdering Frank Schlatt, a white police officer, presented studies that many believed demonstrated that the race of the victim consistently influenced capital sentencing decisions in Georgia.¹⁸⁸ In particular, defendants convicted of killing whites were much more likely to receive the death penalty than those who murdered African-Americans. The Court assumed the studies were valid, but refused to overturn McCleskey's sentence absent proof that the decisionmaker in McCleskey's case discriminated on the basis of race.¹⁸⁹ The Court's decision in *McCleskey* prompted the House of Representatives to endorse a federal statutory remedy for capital defendants whose statistical evidence of discrimination could not be rebutted by the state, but the bill failed to pass the Senate.¹⁹⁰ Studies continue to suggest that prosecutors are more likely to seek, and jurors more likely to impose, the sentence of death if the victim of the crime was white.¹⁹¹ The problem of how to remedy discrimination in capital cases continues to confound courts and critics, dividing them into those who favor removing discretion entirely through either mandatory death sentences or the abolition of the death penalty, and those who seek to maintain, but somehow limit, sentencing discretion.¹⁹²

X

CONCLUSION

The jury system in America took root in the midst of political conflict between those who served as jurors and those who served as judges. Today, judges in the United States are either elected by the people or appointed by elected officials; they are no longer agents of a foreign nation. Still, jurors and judges continue to disagree, coming from different backgrounds, with different attitudes about crime, about police, and about those who file in and out of witness boxes. Juries regularly surprise the system's insiders, sometimes through

186. See William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220 (1996).

187. See, e.g., Dan Smith, *Death Penalty Supported in State*, SACRAMENTO BEE, Mar. 14, 1997, at A3 (stating that 40% of respondents polled in California believe racial discrimination is a "big factor in the application of the death penalty").

188. See *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987).

189. See *id.* at 312-13.

190. See KENNEDY, *supra* note 36, at 345-48.

191. See David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 385, 397-403 (James R. Acker et al. eds., 1998).

192. See *id.*

dramatic verdicts, sometimes in other, less momentous ways, such as the juror who one day, presumably out of frustration with the repetitive nature of the evidence, brought a sign with him to court that read, “[w]e got it the first time,”¹⁹³ the juror who holds out for acquittal against the rest, or the juror who wants a question asked of the witness. Clearly, an independent spirit lives within some American jurors.

As juries become both less common and more expensive, some have questioned the wisdom of preserving the criminal jury in its present form.¹⁹⁴ The benefits of the jury are difficult to quantify, but jury verdicts continue to earn widespread acceptance by the public and trial by jury remains a cherished right of most Americans. In any event, many basic features of the criminal jury in the United States cannot be modified without either constitutional amendment or radical reinterpretations of the Bill of Rights. Judges and legislators continue to tinker within constitutional confines, some hoping to improve the jury trial by helping jurors deliberate more carefully, others hoping to improve the speed and flexibility of jury trials, still others hoping to promote greater juror participation. Ultimately, the success or failure of any jury reform will depend on its ability to accommodate those values unique to American criminal justice: a fierce attachment to adversarial advocacy, respect for state autonomy, an improving sensitivity to racial equality, the expectation of jury independence from judicial control, and a deep commitment to freedom of speech.

193. See *Malpractice Suit Jury Impatient*, DETROIT FREE PRESS, Nov. 21, 1997, at 4B (reporting that a juror brought two signs into court, one said, “We got it the first time” and the other said, “Stop the Insanity”).

194. See, e.g., Parloff, *supra* note 146 (noting efforts to scrap unanimity requirement).

