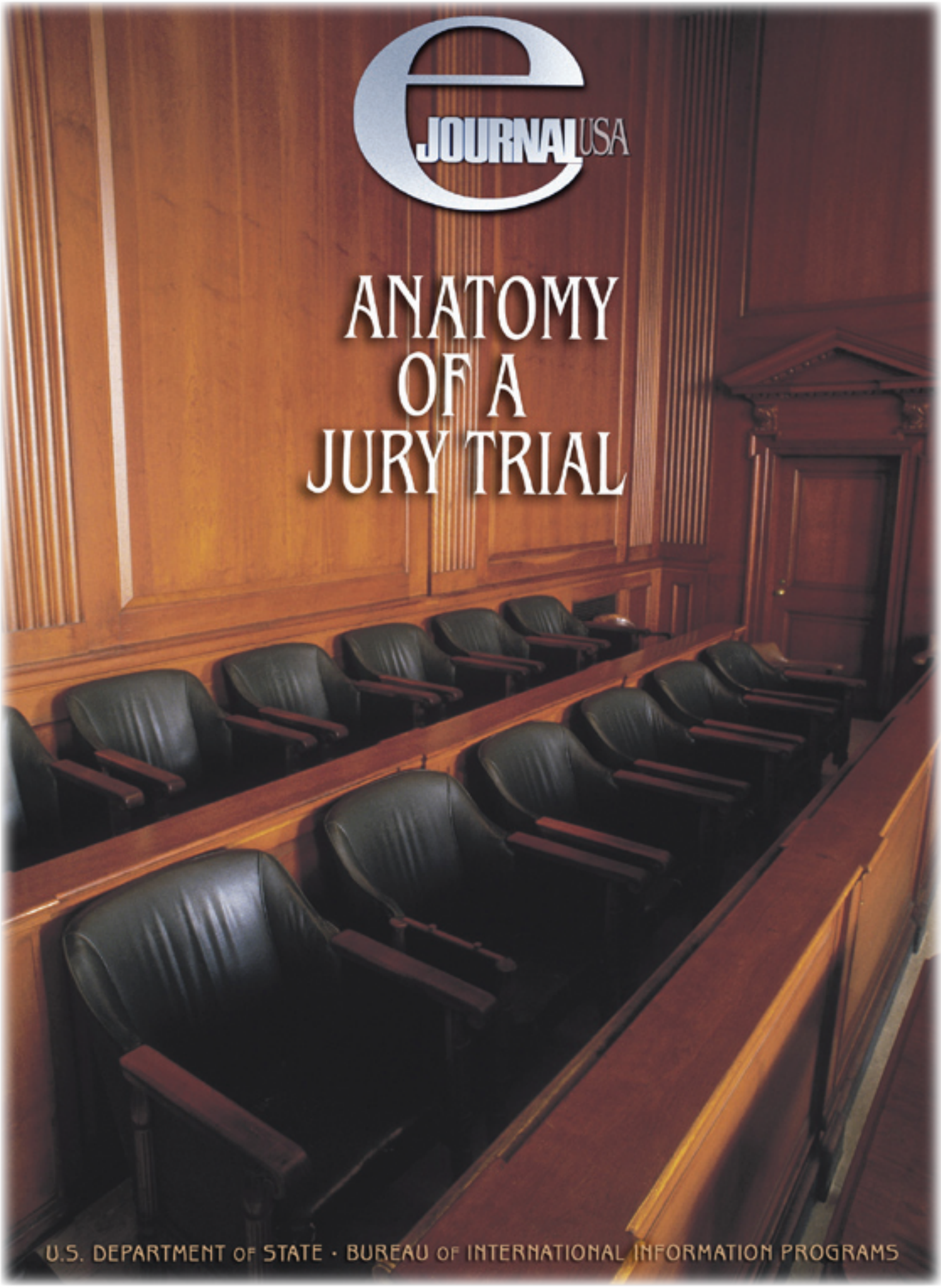
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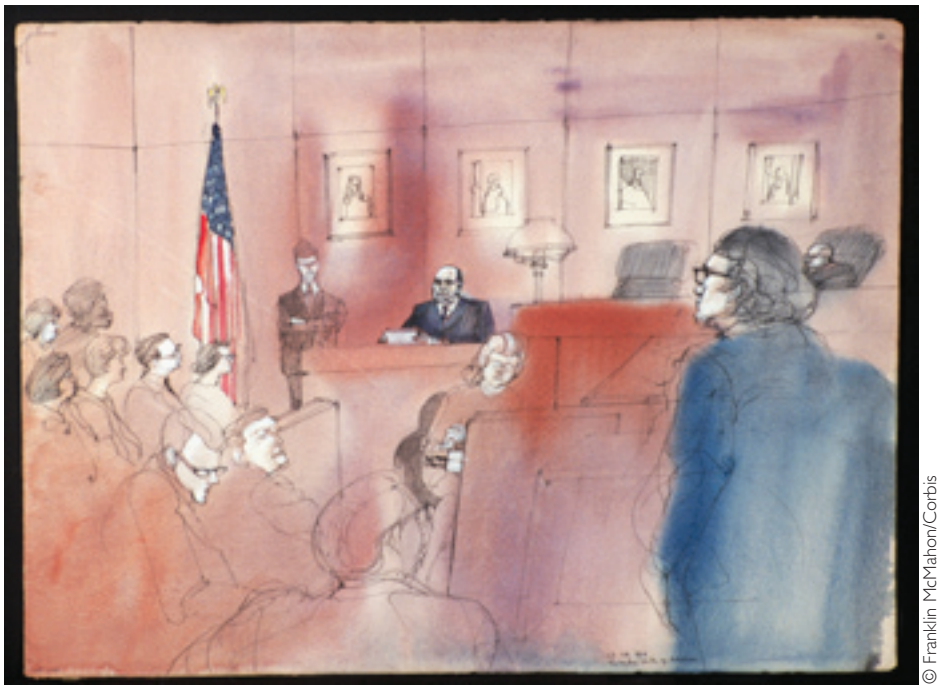

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In *12 Angry Men*, a classic Hollywood film of the 1950s, the deliberations inside a jury room take center stage. Henry Fonda, as juror number 8, holds out under pressure against conviction of a teenage Hispanic boy charged with killing his father, slowly converting the other jurors — the wise and foolish, the old and young, the compassionate and bigoted — through tense, thrilling deliberations to a verdict of not guilty.

Real-life jury trials are not usually so dramatic or inspiring, but they still have a lot of merit, by most accounts.

Juries — usually groups of 6 or 12 ordinary citizens — provide a crucial service for their fellow citizens: Just as in medieval England, where they got started, juries prevent government, even democratic government, from pursuing oppressive prosecutions.

"Jurors wield the awesome power of the state to punish, or not to punish, citizens," television journalist Fred Graham writes in this issue of *eJournal USA*. "In that sense, they stand above the sovereign — and that has made them the subject of fascination around the world."

The jury system is no more perfect than the larger justice system or even democratic government itself. In the United States, whose citizens are ever aiming to create a more perfect union, judicial leaders are directing refinements in the jury system. They are promoting composition of juries more representative of the diverse ethnic and economic backgrounds of the community.

This issue, in a sense, cross-examines the U.S. jury system, with eyewitness testimony from jurors themselves, judges, a prosecutor, a defense lawyer, a witness, and a reporter. A point-counterpoint debate between Dutch and American law professors makes explicit the question the journal poses repeatedly: Is a jury trial the best way to arrive at justice when a crime occurs? We also probe the intersection between popular culture and the drama of the jury room through photos from the American Bar Association's list of best trial movies and an interview with a producer of the popular television show *Law & Order*.

Here is a striking fact: In their lifetimes, 29 percent of adult Americans have served on a jury. And, arguably, they are better citizens for it.

— The Editors

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Anatomy of a Jury Trial

American Juries

Fred Graham

The U.S. jury system derived from a British practice that aimed to protect subjects from tyranny by the king. For hundreds of years the system has evolved with changes in society and has survived, still presenting a check on government power. Fred Graham is an anchor on truTV, formerly called Court TV, and was the primary court reporter for CBS News from 1972 to 1987.

In the winter of 2009, inmates of Roumieh prison in Lebanon were given permission to stage a play. They chose to perform an Arabic version of *12 Angry Men*, originally an American television drama and then a hit 1957 movie, about jurors who argue bitterly over a murder case and eventually find the defendant not guilty.

The version put on by the prisoners was a smash success — despite the fact that Lebanon, like most nations, has no trial by jury and all of the imprisoned viewers had been locked up without the benefit of the kind of anguished deliberations that are the essence of a jury trial. In fact, 90 percent of the world's jury trials take place in the United States, where the practice is thriving.

What makes the American jury system so fascinating to the public? Why does it flourish in the United States and barely exist elsewhere? Does the U.S. system carry the seeds of its own demise, as in other nations that once used juries widely and gradually replaced them with decisions by judges?

The answers are to be found in the historical roots of the American jury system and the remarkable capacity of the U.S. system to adjust to legal and societal changes that might otherwise seem to threaten the vitality of trial by jury.

The American jury system was inherited from medieval England, where panels of 12 "free and lawful" men in each community were summoned to help the king do justice. For centuries these panels based their decisions on what they knew of local wrongdoing. But as England became more populous, these jurors usually could not rely on neighborhood gossip and increasingly based their decisions on evidence they heard in court. By the time the American legal system absorbed the British model, U.S. jurors were admonished to ignore anything they might know about the case and decide the facts solely on the evidence presented in court.

The British had regarded jury trials as a potential bulwark against oppressive actions by the king, but there was a more pragmatic reason for retaining trial by jury. English law contained harsh penalties, including the death penalty for relatively petty crimes. British juries served to soften the impact of this by acquitting defendants or finding them guilty of lesser crimes.

Resisting Oppression

American law did not pose this problem, but the American colonists in the 18th century had their own reason for retaining trial by jury — they used it as a shield to block what they saw as oppressive prosecutions by the British. Repeatedly the British rulers indicted Americans for illegally shipping goods in non-British vessels, only to have local juries acquit the accused. When the prominent American publisher John Peter Zenger was brought to trial for criticizing a governor appointed by the British king, a New York jury found him not guilty and created an early precedent for freedom of the press. So as the Americans moved toward revolution, it was not surprising that in their Declaration of Independence they denounced the British king "for depriving us in many cases, of the benefits of trial by jury."

And when the new nation adopted its Bill of Rights in 1791, it specified that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." It also provided that the right to jury trials in civil cases should be preserved.

In the years that have passed, the U.S. Supreme Court has interpreted these guarantees in ways that have adjusted the concept of the jury to meet changing conditions. Where jury service was once limited to white men who owned property, the right to serve on a jury was gradually extended to minorities and women. The court held that the right to a jury trial did not extend to petty cases, and that any defendant may waive the right to a jury and go to trial before a judge. Originally, all juries had 12

members whose decisions had to be unanimous, but the Supreme Court introduced more flexibility into the system by holding that juries may be as small as six members and that not all verdicts must be by unanimous votes. Traditionally, poor defendants had to face the prosecutors alone before the jury, but the Supreme Court held that the government must provide defense lawyers for them free of charge.

To some extent, the right of trial by jury appears more imposing than it is in reality because in practice the vast majority of accused persons do not invoke their right to a jury trial. They realize that if they go to trial before a jury and are found guilty, their own misconduct will have been highlighted by the testimony and the judge will tend to hand down a heavy punishment. So they enter into a plea bargain with the prosecutor — they agree to plead guilty to a lesser offense in exchange for a reduced sentence. The prosecution often agrees to plea bargains because it is spared the trouble, expense, and uncertainty of going to trial. In many jurisdictions more than 9 out of 10 prosecutions are resolved in this way, without a jury trial.

This heavy reliance on plea bargaining is often criticized by observers of the American legal system. It reflects the reality that while in theory the prosecution and the defense should have the same chance of winning before a jury, in fact the prosecution usually has many advantages. The defendant has a right to legal counsel, but frequently his or her lawyer is a public defender who is inexperienced, overworked, and inclined to settle the matter by a plea bargain rather than fight it out before a jury. Moreover, the prosecution typically has far more money than the defense to spend on investigating the case, analyzing the evidence, and checking out prospective jurors. The result is a degree of cynicism among defendants toward the right to trial by jury, which sometimes seems to them to promise more than it delivers in terms of justice.

In fact, scholars, judges, and other observers of the jury system point to a series of problems posed by modern developments that could not have been imagined by the statesmen who enshrined the right to trial by jury in the Bill of Rights.

American Bar Association Picks

© Time & Life Pictures/Getty Images

Anatomy of a Murder (1959) — An unlikable army officer is charged in a small town with murdering a bartender who he alleges raped his flirtatious wife. The realistic film portrays the behavior of trial participants as far from ideal, yet allows that even highly imperfect proceedings can lead to a reasonable, if imperfect, resolution. The judge (played by famous real-life lawyer Joseph N. Welch, left) confers with the defense attorney (played by Jimmy Stewart, center) and the prosecutor (played by George C. Scott, right).

Impact of Race

One of the most troubling of these problems is the impact of race on jury selection. Traditionally, during jury selection both sides were given the right to strike a certain number of prospective jurors from the

panel without giving any reason. In recent years, some prosecutors have used their strikes (called "peremptory challenges") to remove from the jury all African Americans, who the prosecutors believe are inclined to favor defendants in criminal trials. The Supreme Court has condemned this practice and has ruled that prosecutors must have valid reasons for striking blacks from juries. But the rule has been difficult to enforce because prosecutors have become adroit in citing reasons other than race for removing potential jurors who happen to be black. The result is a festering resentment among some black defendants and their lawyers toward a system that they believe denies defendants a jury of their peers.

Another problem that the U.S. Founding Fathers could never have anticipated is the effect of celebrity defendants on the jury system. The popularity of television and movies in the United States has created a celebrity culture in which the rich and famous are looked upon by some people as more deserving than ordinary folk. This can have a bizarre result when a celebrity is on trial and celebrity admirers are on the jury.

JURY SERVICE IN THE UNITED STATES

Estimated number of U.S. jury trials per year: 154,000 (149,000 in state courts, 5,000 in federal courts)

- 66 percent criminal trials (47 percent felony crimes plus 19 percent misdemeanor crimes)
- 31 percent civil trials
- 4 percent other

Source: *State-of-the-States Survey of Jury Improvement Efforts* (April 2007), National Center for State Courts.

Note: Sum exceeds 100 due to rounding.

A classic example of this was the 2005 child molestation trial in California of the late entertainer Michael Jackson. During jury selection it became obvious that even though jury service in the long trial would be burdensome, many of the potential jurors were maneuvering to get on the jury. Spectators came from around the world to see Jackson on trial, and some of the jurors became so starstruck they behaved in bizarre ways. To make a point, one juror smuggled into the jury room a videotape of a television account of the trial. After the jury unanimously acquitted Jackson on all counts, two jurors went on television and declared that he was in fact guilty and that they planned to write a book about the case.

Book writing by jurors is a persistent problem in celebrity cases. For many jurors a book deal is the best chance in their lives to make a large sum of money, and the temptation can be irresistible. After the sensational 1995 trial of former football star and actor O.J. Simpson — he was controversially acquitted of murdering his ex-wife and her friend — the trial judge lamented that every juror participated in some form of book project. Legal observers concede that jurors have a First Amendment freedom of speech right to write about their case, but most critics believe that the practice can have an unwholesome effect on the jury system.

Urban America poses other problems for the jury system that could not have been foreseen by the Founding Fathers. Media coverage of newsworthy cases has become so pervasive that picking an untainted jury can take weeks or sometimes even months. A new profession of jury consultants has learned to use sophisticated polling techniques that can help trial lawyers select juries that are loaded in their favor. Jury trials in high-profile cases are often so complicated that defendants who can afford expensive legal teams have an advantage, feeding a public perception that the system favors the rich.

Despite the problems, the jury system is on a sound footing in the United States. Jurors wield the awesome power of the state to punish, or not to punish, citizens. In that sense, they stand above the sovereign — and that has made them the subject of fascination around the world. ■

The opinions expressed in this article do not necessarily reflect the views or policies of the U.S. government.

A Juror's Role

D. Graham Burnett

Proving guilt beyond a reasonable doubt to jurors can be a stiff test. While a chance exists that a guilty man or woman might go free after a jury trial, the jury system still beats any other system. The account of a murder trial below is true, but the author has changed people's names. D. Graham Burnett is a professor of history at Princeton University and an editor at Cabinet *magazine in Brooklyn, New York. He is the author of several books, including* A Trial By Jury *and, most recently,* Trying Leviathan.

What is it like to serve on a jury? Millions of Americans could answer this question, each in a different way. But that each of them has an answer — that each of them has stepped inside a courtroom, witnessed the unfolding of a trial, and finally sat in judgment on a fellow citizen — says a great deal about the ideals of openness and democracy to which we aspire in the United States.

The United States is not by any means a perfect nation, nor do we have anything like a perfect legal system, but our tradition of citizen juries provides a remarkable opportunity for ordinary Americans to participate in an intimate and challenging way in maintaining the rule of law and building a just society.

We must not romanticize this institution (it is important to remember that the vast majority of legal cases in the United States are resolved without going to a jury trial), and there is always a danger that excessive emphasis on the appealingly civic character of jury justice will distract us from larger structural and administrative features of American legal practice (such as

JURY SERVICE IN THE UNITED STATES

Estimated number of people summoned each year in the United States for jury service: 32 million:

- Estimated number of summonses returned by the post office marked as undeliverable: 4 million
- Estimated number of people disqualified from service (noncitizens, nonresidents, felony convicts): 3 million
- Estimated number of people exempt from service (people with recent jury service, people in certain occupations): 2 million
- Estimated number of people excused for financial or medical hardship: 3 million
- Estimated number of people "waived off" by the courts before the reporting date because the trials were cancelled or continued to another date: 8 million.
- Estimated number of people who simply fail to appear after being summoned: 3 million
- Estimated number of people reporting for jury service each year: 8 million

Estimated number of jurors impaneled each year: 1.5 million

Source: *State-of-the-States Survey of Jury Improvement Efforts* (April 2007), National Center for State Courts.

plea bargaining). Nevertheless, anyone who wants to understand the way the law works in the United States must reckon with the jury and appreciate its role in the courts and in the lives of Americans — both those accused of crimes and those called to help decide their fate.

I am a historian, and I teach in an American university. My professional work deals with the history of science and technology from the 17th to the 20th century, and I have no formal legal expertise. About 10 years ago, however, I wrote a small book about my experience serving as the foreman of the jury in a Manhattan murder trial. This book, *A Trial By Jury*, received a good deal of attention for its depiction of a jury's struggles to reach a verdict in a difficult case, and it continues to be read in law schools and by policy makers for insights into the ways juries work (and the ways they don't!). My aim in what follows is to sketch briefly the story I tell in greater detail in that book and to offer a few reflections on what I learned from my jury experience.

A GRISLY KILLING

When the police kicked in the door of a small apartment in lower Manhattan in the summer of 1998, they found Randolph Cuffee on his face, collapsed in the corner under a window. He was very dead: More than 20 stab wounds gashed his upper back, neck, and the base of his skull. These were ugly, to be sure, but the fatal cut was in fact hidden: a single knife blow to the chest that had nicked Cuffee's aorta; he would have lived for only a matter of minutes after receiving that injury.

By the time I found myself sitting in a juror's seat in a Manhattan courtroom two years later, looking at photographs of the body presented by the prosecution, the police had also found the young man who wielded the knife: Monte Milcray, who sat looking straight ahead before the bench with his lawyer. Milcray claimed that he had been walking along the street in New York City one day and met a handsome young woman who struck up a conversation and offered him her phone number, suggesting they might meet up again sometime. Taking her up on the offer, he phoned her one evening and received directions to her apartment in Greenwich Village. When he got there, she showed him into a small and dimly lit room where they sat on a couch and watched a suggestive television program.

Only when they started to undress, however, did Milcray realize that his new acquaintance wasn't a woman at all, but rather a man — a man who stood between him and the door. According to Milcray, what happened next was an attempted male-on-male rape. In the struggle, Milcray drew a small pocketknife from his trousers and stabbed his assailant, first in the chest and then, folded in an unwanted embrace, again and again in the back. When Randolph Cuffee collapsed, Milcray made a dash for the door and escaped.

This, at any rate, was one of the stories he told. There were several.

Initially, fleeing into the crowded streets of the city with blood all over his body (he had nearly severed his pinky finger while swinging the knife), Milcray had begged help from passersby and found his way to a hospital, claiming to have been attacked by a gang of white men who had beaten him up (both Milcray and Cuffee were black). Only later, when police picked him up from the hospital and confronted him as a suspect in Cuffee's murder, did he admit that he had been the killer, giving as his confession this fantastic story of seduction and mistaken identity. (Locating Milcray was good police guesswork: Detectives always canvass local hospitals for people with hand wounds after a stabbing because it is very easy to cut oneself while repeatedly whacking someone with a knife.) As it happens, when he took the stand in court to defend himself against the murder charge, Milcray modified his story yet again, alleging that he had in fact first met Cuffee in a phone-chat dating system, but sticking to the part about thinking Cuffee was a she and the part about the attempted rape.

Summoned to Duty

How did I find myself entangled with all this unpleasantness? Well, as a good citizen I had simply registered to vote. That was all it took to set the bureaucratic wheels turning. In those days my wife and I were subletting a friend's apartment, having recently finished our schooling and just embarked on our professional lives: My wife was working as a grassroots political organizer, and I was trying to turn my doctoral dissertation into a book, in the hopes of finding a teaching job.

We were both very busy, so I was plenty irritated when the notice came through the mail slot informing me that I was required to turn up for jury duty at the court building just south of where we lived. I grumbled but I went, and sat around in the vast waiting area for a day or so as names were pulled out of a big lottery roller and people were shuffled off to the different courtrooms.

When my name came up, I still thought it was unlikely I would actually end up on a jury because every potential juror was required to go through a process known as *voir dire*, in which the lawyers and judge ask a set of questions to get a "feel" for one's suitability to serve on the case. There are various ways to get bumped from the process (for instance, if you say you are a racist or too afraid, or if you already have a strong opinion about the case), and I assumed I would be deemed unsuitable in one way or another.

But no. Even though I answered many questions in an opinionated way (for instance, I said that I objected to the death penalty and that I was not sure I could in good conscience convict a defendant who might be put to death by the state), I was kept on to serve, and indeed, made the head of my jury of 12 very different Americans: four men, eight women; nine whites, two blacks, and a Hispanic; about half under age 30; about half professionals of one sort or another. We would get to know each other very well over the three weeks that followed.

It is impossible for me to rehearse all the twists and turns of the testimony we heard, or to reproduce the intensity of the four days we spent together in sequestered deliberations about our verdict. In serious cases such as ours, it is not uncommon for juries to be kept in something like state custody as they work to achieve consensus about the case — and so we were not allowed to go home and not allowed to talk with our families throughout the 66 hours of our final decision making. We were escorted to our meals by armed court officers and kept in hotels overnight, attended by guards.

All this was much more than a cheerful civics lesson; it was a disorienting encounter with the power of the state and the ugly matter at hand. In our crucible, behind the closed doors of the jury room, we struggled to understand our responsibilities and to make sense of a vast amount of conflicting and complicated evidence. There were tears and fights, soulful silences, talks about God and gays and truth and justice. It was democratic deliberation raised to the level of an extreme sport.

The Verdict

Above all, we labored to understand what it meant that the state had to prove its case "beyond a reasonable doubt." It is a very high standard. And when a defendant claims to have been acting in self-defense, the burden of proof remains on the state, which must prove beyond a reasonable doubt that the defendant was not doing so. Two men go into a room and one comes out, claiming to have been defending himself. No witnesses. No evidence of previous violent crime by either party. Who can say "beyond a reasonable doubt" that the survivor is lying?

We couldn't. And, in the end, we acquitted.

Not that we were happy about it. We didn't like the defendant. We thought it likely that he was lying about

Jury Service in the United States

Average length of jury trial: five days for criminal trials, four days for civil trials
Average length of jury deliberatons: four hours for both criminal and civil trials

Source: *State-of-the-States Survey of Jury Improvement Efforts* (April 2007), National Center for State Courts.

the whole thing. We thought it quite possible that he had simply murdered Cuffee, who may well have been his lover. But we also realized we hadn't been asked what we thought was possible or likely. We had been asked what had been proven beyond a reasonable doubt.

Was justice done in our courtroom? Frankly, I am not at all sure it was. Did we apply the law as we were instructed? I believe we did. A verdict of "not guilty" — we reminded ourselves as we left the jury room — does not mean innocent.

Why was the burden of proof so very high? We learned a great deal about that through our jury service itself since we glimpsed in our own loss of freedom for four long days of sequestration the shadow of the terrifying power of the state — against which, finally, every citizen has only other citizens for defense. That, for me, was the deepest lesson of my jury service. And it is one I will never forget.

People sometimes ask me if I think the jury system works. I have come to answer that question in a paraphrase of Winston Churchill's famous quip about democracy, which he called the worst form of government, except for all the rest. To build a society we must punish each other for crimes. Who should make that possibly fatal decision? In the United States the answer is "a jury of peers." It certainly isn't always pretty, but are the alternatives better? Are you sure?

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Glossary of Terms for Jury Trials

Appeal – (noun) A review in a higher court of a lower court's ruling or verdict.

Arraignment – (noun) A proceeding in which a criminal defendant is brought before a court to be formally charged and to enter a plea. See also **Presentment**.

Arrest – (noun) The physical taking of a person into legal custody, either on a warrant or upon probable cause. An arrestee is a person under arrest.

Bail – (noun) A surrender of cash or property to a court to obtain the temporary release of a defendant and ensure his or her appearance in court on a future date. In the United States, bail for petty offenses is sometimes set according to the maximum fine for the offense, allowing a defendant to "post and forfeit" bail in lieu of further hearings. (verb) To obtain the release of a defendant by posting cash or property ("She bailed out her brother.").

Charge – (noun) An accusation. (verb) To accuse someone of a crime.

Civil trial – (noun) A trial under civil law, which pertains to the relationship between one private citizen and another, between a private citizen and a corporation, or between one corporation and another.

Collateral attack – (noun) A challenge to the legality or constitutionality of a person's imprisonment, such as a petition for a writ of habeas corpus. The challenge may allege errors in the trial or an illegal sentence.

Complaint – (noun) A formal charge of a crime lodged with, or by, the police and presented to the court at the defendant's first appearance.

Conviction – (noun) In a criminal case, a judgment that a defendant is guilty of a crime.

Criminal trial – (noun) A trial under criminal law, which pertains to offenses against the state itself, actions that may be directed against a person but that are deemed to be offensive to society as a whole – for example, armed robbery or rape.

Defendant – (noun) A person brought before a court accused of a crime.

Defense counsel – (noun) A lawyer who represents an accused person in a local, state, or federal criminal proceeding. The Sixth Amendment to the U.S. Constitution [see below] provides, in part, "In all criminal prosecutions, the accused shall enjoy ... the assistance of counsel for his defence."

Discovery – (noun) The process by which lawyers learn about their opponent's case in preparation for a trial, including requests for documents and oral statements.

Evidence – (noun) Anything received ("admitted") in a legal proceeding that tends to prove or disprove a disputed fact. Evidence may be physical, such as a weapon or bloody clothing, or nonphysical, such as the testimony of a witness.

Grand jury – (noun) A body of citizens that sits for a period of time and hears evidence from the prosecutor in order to determine whether crimes have been committed. A grand jury may hear many cases during its term. If, after hearing witnesses and examining the prosecution's evidence, a majority of the grand jurors decide that a crime has been committed and a certain named person probably committed it, it will issue a "true bill of indictment" charging the suspect with a crime.

Habeas corpus – (noun) An ancient legal maneuver ("writ of habeas corpus") used to bring a prisoner before a court, usually to determine whether the government has any legal ground upon which to hold him. It dates to at least 1215 in England and is mentioned in the U.S. Constitution. See also **Collateral attack**.

Jury Service in the United States

To be eligible for jury service in most state and federal courts, a person must be a U.S. citizen, a resident of the geographic jurisdiction served by the court, age 18 or older, able to speak and understand English, and not under a legal disability (felony conviction or incompetent).

Source: *State Court Organization, 2004*, U.S. Department of Justice, Bureau of Justice Statistics.

Hearing – (noun) A judicial proceeding in which a court receives evidence on a specific issue or hears argument on a legal point. Hearings may be held before, during, or after a trial or appeal.

Indictment – (noun) A formal document representing a grand jury's determination charging a person or persons with committing a crime ("true bill of indictment").

Jury – (noun) A body of citizens, traditionally between 6 and 12 in number, who hear evidence during a trial and decide the verdict ("guilty" or "not guilty"). One or more alternate jurors may also be chosen in case a juror becomes incapacitated during trial and cannot discharge his duties.

Motion – (noun) A request that the court make a ruling on a specific issue — such as whether certain evidence including a confession of guilt will be admissible at trial, or whether, due to errors, a new trial is warranted. Requests for special services, such as appointment of expert witnesses or interpreters, are usually made upon a motion, oral or written, by counsel. Motions may be made before, during, or after trial, or on appeal.

Motion for judgment of acquittal – (noun) A request from a defense counsel that the judge enter a verdict of not guilty in favor of the defendant based upon the prosecutor's failure to present evidence of his guilt beyond a reasonable doubt. It is usually made at an early stage of a trial, after the prosecutor's case-in-chief, and, if denied by the court, renewed at the close of the prosecutor's rebuttal case.

Plea – (noun) In a U.S. criminal proceeding, a defendant will usually enter a plea of "not guilty" at his initial appearance before a court or judicial officer. Later, if circumstances warrant, a defendant may change his plea to "guilty" by which he admits the charges against him, or he may continue to assert his right to trial and have a court determine guilt, often in a trial by a jury. In special cases, a defendant, through his lawyer, may enter a plea of "not guilty by reason of insanity," in which the defense expects to prove that a defendant should not be found criminally responsible for his actions by reason of a severe mental defect or disability. (verb) To plead — the verbal act of entering a plea.

Plea bargain – (noun) An agreement between the defendant and the prosecutor in which the defendant agrees to plead guilty in exchange for favorable consideration such as a lesser charge or a lenient sentence.

Preliminary hearing – (noun) A criminal hearing before a judicial officer to determine whether there is sufficient evidence to prosecute an arrestee or refer the case to a grand jury for possible indictment.

Presentence investigation – (noun) A detailed examination of a convicted defendant's background, usually made by a court employee known as a probation officer, presented to aid the judge who will sentence the defendant. Ideally, the report will be an objective analysis of the defendant and his crime, highlighting any facts that would tend to aggravate or mitigate the sentence.

Presentment – (noun) The defendant's initial appearance before a judicial officer, in which charges are read and a bail determination is made. A presentment will precede a formal arraignment if a defendant is arrested prior to his indictment by a grand jury.

Probable cause – (noun) A reasonable belief that a crime has occurred, is occurring, or will occur, which is sufficient to justify an arrest of a person, a search, or a seizure of property. It is often described as more than a mere suspicion.

Prosecutor – (noun) A lawyer who represents the government (local, state, or federal) in criminal proceedings.

Prosecutor's case-in-chief – (noun) In U.S. courts, the prosecutor always presents the government's case first, and the evidence must be strong enough in every way that, if unrebutted by the defendant, it can sustain a conviction. If the evidence is weak, the defendant may be entitled to a judgment of acquittal at the close of the prosecutor's case-in-chief. See also **Motion for judgment of acquittal, Prosecutor's rebuttal case.**

Prosecutor's rebuttal case – (noun) Because the government has the heavy burden of overcoming the defendant's presumed innocence, the government is entitled to present additional evidence after the defendant presents his case. But if the defendant does not present his own evidence, the government is not entitled to present a rebuttal case, as there will be no additional evidence to rebut.

Right to counsel – (noun) The Sixth Amendment to the U.S. Constitution guarantees that every person charged with a crime has the right to have a lawyer to assist in his defense. The defendant hires a lawyer of his own choice if he can afford one, but the court appoints a lawyer from a public defender office or from the private bar to defend him if the defendant cannot afford one.

Search warrant – See Warrant.

Sentence – (noun) A punishment imposed on a defendant after conviction, such as a fine or term of imprisonment. Thirty-five U.S. states and the federal government may impose the death penalty for particularly heinous murders or treason.

Sixth Amendment – (noun) A provision of the U.S. Constitution that lists many of the rights afforded persons accused of crimes in U.S. courts to protect them and to ensure a fair trial. It states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; … and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." (Note: The U.S. Constitution was ratified by most of the original 13 states by 1789. The first 10 amendments to the U.S. Constitution, also known as the Bill of Rights, were ratified in 1791.)

Subpoena – (noun) A document (or writ) commanding a person to give testimony or submit documents before a court or grand jury.

Testimony – (noun) Evidence given by a witness under oath in court.

Trial – (noun) A formal judicial proceeding to receive evidence and render a verdict, such as a determination whether a criminal defendant is guilty or not guilty. The "fact-finder" in a trial may be a judge and a jury, or a judge alone.

Verdict – (noun) A decision by the "fact-finder" (jury or judge) at the conclusion of a trial; in a criminal trial, the verdict will be "guilty" or "not guilty." If the jury cannot reach agreement as to a verdict (a "hung jury"), a new trial may be warranted or the prosecutor may dismiss the charges at his discretion.

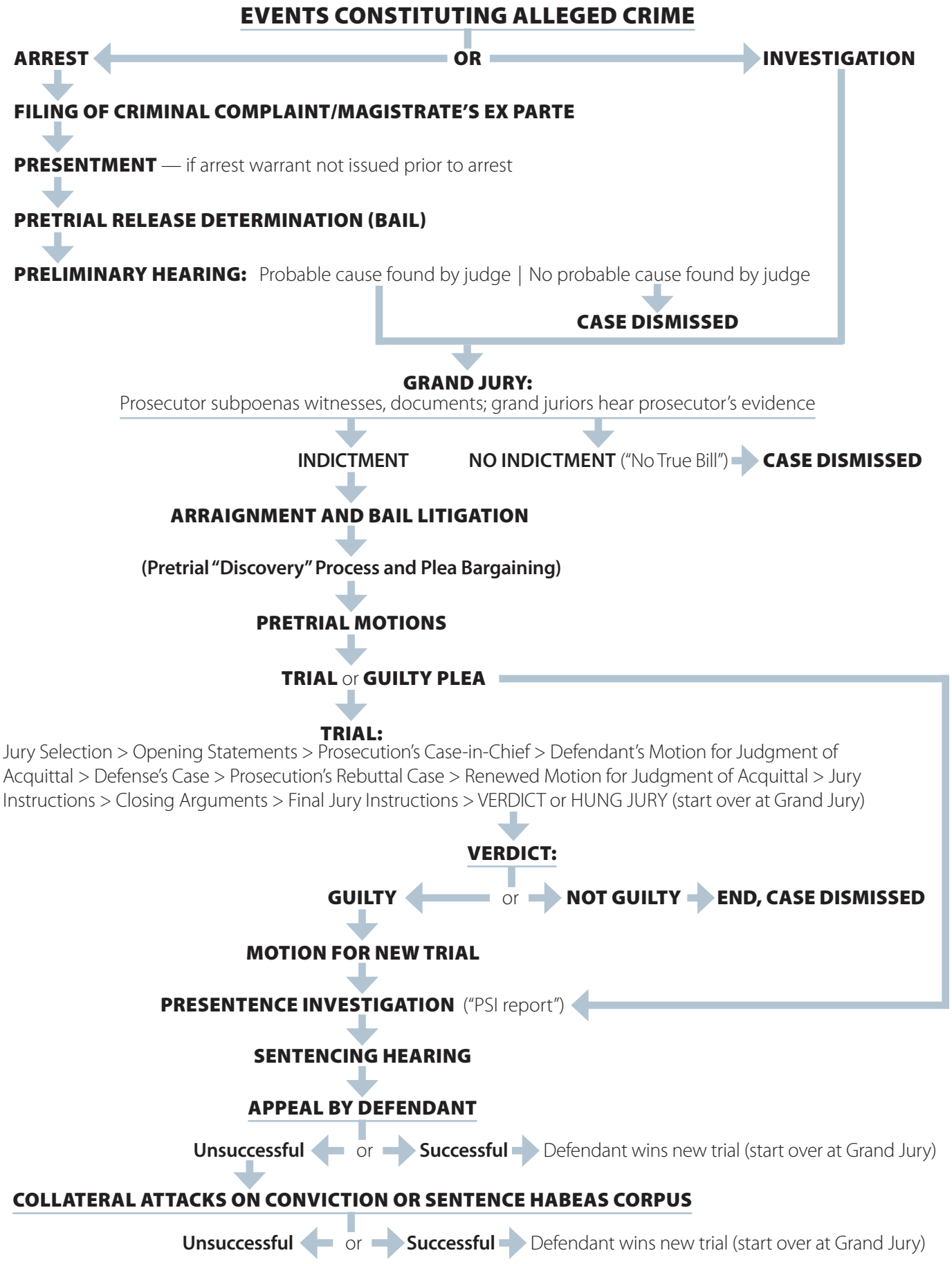
Warrant – (noun) An order (writ) issued by a court or judicial officer authorizing a search or seizure of property ("search warrant") or seizure of a person ("arrest warrant").

Witness – (noun) A person who testifies, under oath and with actual knowledge, as to a fact at issue in a case. Witnesses may be called and questioned (examined) by the prosecution or the defense, or by both. When the witness is finished giving her direct testimony, the other party will be afforded an opportunity to cross-examine the witness with questions that may elicit further facts or otherwise undermine the witness's testimony.

Writ – (noun) An order of the court commanding an act be done or not done.

Prepared by Jack King, Director of Public Affairs and Communications, National Association of Criminal Defense Lawyers, Washington, D.C.

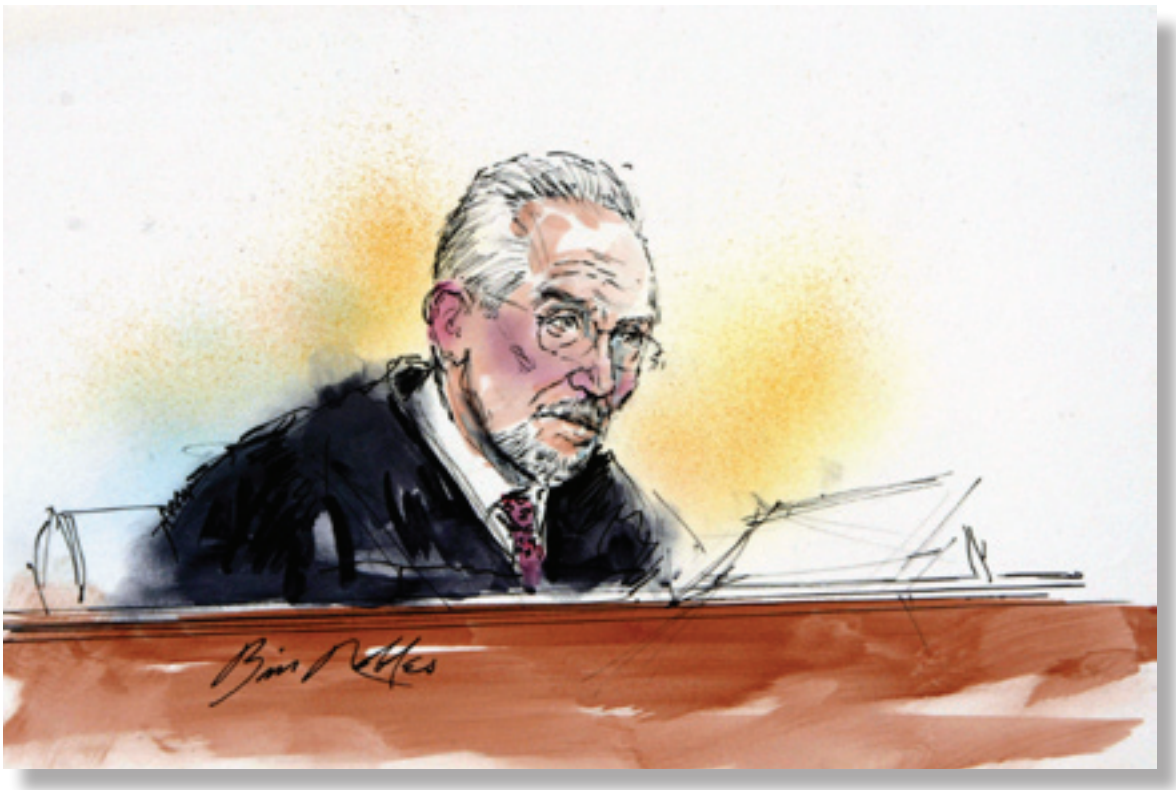
TYPICAL FEDERAL CRIMINAL PROSECUTION



Provided by Jack King, Director of Public Affairs and Communications, National Association of Criminal Defense Lawyers, Washington, D.C.

A Judge's Role

Ricardo M. Urbina



A judge needs to make jurors understand that they are like deputized judges sworn to fairness. Ricardo M. Urbina is a judge for the U.S. District Court for the District of Columbia in Washington.

When a judge convenes a case for trial before a jury, his or her mission is to organize, facilitate, and oversee a process that will render an outcome based on a fair and impartial assessment of the evidence in the case. An attorney representing each party plays an integral role in picking jurors who will function without bias or prejudice in the performance of their duty. It is the judge, however, who is responsible for ensuring the integrity of the proceedings by making sure that the attorneys perform properly within the boundaries of their function.

The judge rules on matters before and during the trial that allow or disallow the jury to consider evidence proposed by the attorneys. In that regard, the judge gives the members of the jury instructions at the beginning, during, and at the end of the trial intended to guide them in the process of fairly considering the testimony, documents, and other evidence in the case. The judge, by his or her example, motivates the jury to consider matters neutrally while they await the completion of the trial.

I tell jurors at the very beginning of a trial that the freedom we usually have to jump to conclusions in everyday life is, for the purpose of this trial, now suspended. Instead, jurors must consider themselves "deputized judges" sworn to fairness, as am I. This elevated self-image helps jurors understand the solemn importance of their task.

During my more than 28 years as a judge, I have developed great confidence in the wisdom of juries. Juries nearly always render verdicts with which I agree. I have learned that jurors, no matter how reluctant to engage in the process when they are first selected, become deeply invested and dedicated to the task of fairly assessing the evidence.

In criminal cases, for example, the jurors adhere to the principle that an accused is presumed innocent until proven guilty beyond a reasonable doubt. Moreover, as required by the law, the U.S. Constitution, and the judge's instructions, the burden of proving guilt is exclusively on the government. They understand that the defendant never has to prove his or her innocence. Former jurors have agreed to speak to lawyers who are taking an academic course I teach on the American jury. Often these jurors explain to the class that they thought the accused person committed the crime, but that they nevertheless voted for acquittal because the government's evidence failed to prove the facts beyond a reasonable doubt.

Remaining Neutral

The task of remaining neutral until the evidentiary presentation is complete is often a difficult one for the judge as well. In a case before me several years ago, the government charged a man with several counts of taking indecent liberties with numerous boys all under the age of 14. The allegations were particularly egregious because the offender was infected with the HIV virus but used no condom during his sexual encounters with these boys.

At pretrial hearings, I ruled that some of the incriminating evidence could not be used by the prosecution because the police had violated the defendant's constitutional rights during procedures leading up to the defendant's arrest. Ruling in this manner weakened the government's case, but the evidence remaining in the case still proved strong enough to result in convictions on most counts in the indictment.

Impanelling a jury required posing questions with the aim of identifying prospective jurors who would not be able to assess the evidence in a neutral and detached fashion. Several jurors stated during the *voir dire* (pretrial questioning of prospective jurors) that the subject matter of the charges alone was enough to taint their thinking about the case and the defendant's innocence. They plainly indicated that they could not presume that the defendant was innocent. Other prospective jurors declined to serve because they, family members, or friends had experienced some kind of sexual child abuse. And yet others felt that the testimony anticipated at the trial would so offend their sensibilities that they would not be able to remain objective in assessing the defendant's case.

The process of jury selection lasted several days, and the trial took two months for the presentation of evidence and another two weeks of jury deliberations before the jury reached guilty verdicts on most counts. The jury did not convict on all counts, however. When I personally reviewed the evidence on those acquitted counts, it became apparent that the jury had done its job well, for indeed those counts lacked the quality of evidence required for conviction.

The relationship that often develops between a jury and its presiding judge is one of trust. The jury trusts the judge to give it what it needs by way of the law and guidance on how to evaluate the case fairly. The judge entrusts the jury with the ultimate responsibility of administering justice. Looking back on my years on the bench, I find that in more than 95 percent of jury trial cases tried before me, the jury has returned verdicts supported by the evidence. ■

American Bar Association Picks

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12 Angry Men (1957) – As the film begins, juror number 8 (played by Henry Fonda, fifth from left) casts the lone not guilty vote in a case involving a Hispanic teenage boy charged with murdering his father. In the hot, cramped jury room, the men wrestle emotionally with their own biases and limitations as some of them contribute personal insights that start to raise doubts about the preponderance of circumstantial evidence indicating the boy's guilt.

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A Man for All Seasons (1966) – The jury, falling in line with English King Henry VIII (played by Robert Shaw, left), does not even deliberate before wrongly convicting Lord Chancellor Thomas More (played by Paul Scofield, right) of treason and sentencing him to execution. More does not seek martyrdom but cannot compromise his religious faith by approving of Henry's divorce of childless Catherine of Aragon so that he may wed Anne Boleyn.

Jury Trials: In Favor

Neil Vidmar

Jury trials not only give credibility within a community about verdicts reached in court cases, but also seem to turn jurors into better citizens. Neil Vidmar is Russell M. Robinson II professor of law at Duke University School of Law in North Carolina and coauthor with Valerie Hans of the 2007 book American Juries: The Verdict.

The jury is a unique institution. Twelve ordinary citizens, sometimes as few as six, who have no legal training, are summoned to hear evidence about an important criminal or civil dispute. While the trial judge decides what evidence they can hear and instructs them on the law, in the end these ordinary citizens deliberate alone and render verdicts about guilt or innocence; sometimes about who should be sentenced to die; or, in civil cases, who should prevail in a dispute that sometimes involves many millions of dollars. But are juries competent and responsible enough to make these decisions? Overwhelming evidence indicates that they are.

Hundreds of studies have assessed the competence of jurors. A classic 1966 study by two University of Chicago professors, Harry Kalven and Hans Zeisel, involving 3,576 criminal trials and more than 4,000 civil trials, asked the trial judges, who heard the same evidence as the jurors, to render their own verdict before they learned what the jury decided. Judges and juries agreed about 80 percent of the time.

What about the other 20 percent? The study showed that jurors understood the evidence and

Continued on page 20

Jury Trials: Opposed

Peter J. van Koppen

The jury trial system is so complicated and expensive that it forces most defendants to accept plea bargains arranged in secret. In the relatively few cases that go to trial, jurors are often considering technical issues beyond their aptitude. Peter J. van Koppen is professor of legal psychology at Maastricht University Law School and Free University Law School, both in the Netherlands.

One day you visit your general physician. You are greeted there by a panel of 12 individuals. The one person who apparently is the chairwoman cheerfully tells you that this panel is replacing your doctor for the next month. With confidence she adds: "Do not worry, dear, most of what doctors do is common sense anyway." What would you do?

In fact, the chairwoman is right: Most of what doctors do is common sense. But an important part is not. And that part is the vital part of your doctor's work. Even more vital, maybe, is that your doctor is able to distinguish the odd difficult case and the dangerous condition of a patient from the average run-of-the-mill disease.

The defendant who enters the courtroom and who has decided not to plea bargain is confronted with such a cheerful bunch of jurors. They are there to evaluate the evidence and decide whether the defendant is guilty or not. The question is whether such a jury is better than the alternative. What I mean by alternative, I shall discuss shortly.

For sure, everybody would prefer a general physician with a diploma to the general

Continued on page 23


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Jury Trials: In Favor (continued from page 18)

the law in those cases, but simply differed from the judges in the perspectives and values they applied to the issues. In short, the juries applied community standards while the judges applied technical legal standards. That study's findings have been replicated many times.

Still other research has compared jury verdicts in medical malpractice cases with independent judgments made by physicians regarding whether negligence occurred. The jury verdicts corresponded closely with the doctors' judgments. Moreover, juries often sided with defendants, even when the patients were severely injured, indicating that the jurors were not swayed by sympathy in making their decisions.

Detailed interviews with jurors after they rendered verdicts in trials involving complex expert testimony have demonstrated careful and critical analysis. The interviewed jurors clearly recognized that the experts were selected within an adversary process. They employed sensible techniques to evaluate the experts' testimony, such as assessing the completeness and consistency of the testimony, comparing it with other evidence at the trial, and evaluating it against their own knowledge and life experience. Moreover, the research shows that in deliberations jurors combine their individual perspectives on the evidence and debate its relative merits before arriving at a verdict.

Arizona Jury Project

I was involved in an extraordinary project in which I and my co-investigators videotaped the whole trial and the actual deliberations of juries in 50 Arizona civil court cases. Our findings strongly supported the conclusions of other empirical studies about the competence of jurors. For instance, in one trial the jurors submitted questions to a physician who testified on behalf of a woman injured in a collision between two autos, an Oldsmobile and a Lincoln:

- Why [are there] no medical records beyond the two years prior to the accident?
- What tests or determination besides subjective patient's say-so determined [your diagnosis of] a migraine?
- What exact symptoms did he have regarding a migraine?
- Why no other tests to rule out other neurological problems?
- Is there a measurement for the amount of serotonin in his brain?
- What causes serotonin not to work properly?
- Is surgery a last resort?
- What is indothomiacin? Can it cause problems if you have prostate problems?

Questions to the plaintiff's accident reconstruction expert in the same case included the following:

- Not knowing how she was sitting or her weight, how can you be sure she hit her knee?
- Would these factors change your estimate of 15 [feet per second] travel speed?
- If a body in motion stays in motion, and she was continuing motion from prior to the impact, how did this motion begin and what do you base this on?
- How tall is the person who sat in your exemplar car to reconstruct the accident, and how heavy was he?
- What is the error in your 10 [miles per hour] estimate?
- Is the time of 50 to 70 milliseconds based on an estimate of the size of the dent?
- Do you conclude that the Olds was slowed and pushed to the left by the Lincoln, and [if so] how would the plaintiff move to the right and forward?

Recorded deliberations of other juries in the study showed similar attention to detail.

American Bar Association Picks

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To Kill a Mockingbird (1962) – Defying his white community, lawyer Atticus Finch (played by Gregory Peck, left) defends a poor African-American man falsely accused of raping a white woman in a small Alabama town in the 1930s. The story, based on a novel by Harper Lee, is told through the viewpoint of Finch's six-year-old daughter, who begins to learn "a sense of social right and wrong, justice and injustice, the cruelty of the world, and how to be courageous in the face of it all," the ABA says.

Collective Wisdom

There are many logical reasons to believe that, under the guidance of a judge who explains the law to them, a group of 12 laypersons can do a better job sifting the factual evidence and deciding a case than a judge can alone.

Trials ordinarily involve a host of issues about human behavior. For instance, date-rape cases generally concern whether sexual intercourse was consensual, not whether it occurred. A murder trial will often have clear evidence of a killing, but turn on whether it was premeditated, committed on the spur of the moment, committed in self-defense, or committed by a mentally ill defendant.

Why should we assume that judges are better than juries at determining the credibility of a witness who claims the defendant uttered death threats, or that she was running a sophisticated scheme to inflate stock prices?

Cultural variables abound in any trial verdict, by judge or jury. Thus, in a murder case involving an African-American victim and defendant, would a jury composed of at least some African-American jurors be better able to understand the spoken insult that led the defendant to claim that his life was in danger than a white judge who grew up in a white suburb?

In one of the Arizona jury trials involving a Hispanic plaintiff injured in an auto accident, a Hispanic juror told the other jurors that Hispanic people tend to prefer chiropractors over medical doctors, thereby possibly explaining why the plaintiff did not follow a recommendation that she seek follow-up care by a physician.

In another trial, two jurors who had backgrounds familiar with car repairs were able to explain how a truck caught fire and burned down a house.

In short, the varied backgrounds jurors bring to their task can give juries an intuitively better understanding of the facts than the trial judge, who may have little actual experience with the specific setting in which the contested events occurred.

Addressing Critics

Critics of jury trials often point to some iconic cases. One is a notorious 1994 product liability lawsuit brought by a 79-year-old woman who burned herself by spilling hot coffee served at a McDonald's chain restaurant. The jury's award of $2.7 million in punitive damages to the woman created debate about what some people considered frivolous lawsuits.

Yet most people probably don't know the evidence the jurors had to consider about that case:

- McDonald's sold its coffee 20 degrees hotter than recommended by the manufacturer to satisfy customer preference.
- The woman sustained second- and third-degree burns to her genital area, requiring extensive surgery and skin grafts.
- McDonald's had had more than 700 prior complaints about its coffee but never consulted a burn specialist.
- Testimony by McDonald's executives at trial allegedly projected arrogance and expressed resistance to changing their marketing strategy (though after the verdict McDonald's did lower the coffee temperature).
- The jury punitive award of $2.7 million was equivalent to just two days of McDonald's overall coffee sales. Moreover, the judge reduced the punitive award to $480,000.

The McDonald's case also serves as a reminder that trial by jury is really "trial by judge and jury," and that the judge supervises the evidence the jury hears, instructs the jurors on the law, and scrutinizes their verdict before it is entered as a judgment of the court.

Many other criticisms of criminal and civil jury verdicts that appear in newspapers and Web sites likewise fail to withstand close scrutiny. Juries can make mistakes, as can judges or any other decision makers, but hard evidence indicates that, on the whole, juries perform exceedingly well. And surveys of American judges who preside over trials indicate their overwhelming and enthusiastic support for the jury system.

Crime, Negligence, and Community

Trials concern events that affect the community in which they occur. Having members of the community decide who is guilty or innocent, or who has been negligent or not, provides legitimacy to the verdict, especially when the case is controversial.

In the many surveys that I have conducted over the past four decades, prospective jurors consistently say that they would be inclined to accept the verdict of a jury who heard the evidence at trial, even when that verdict is inconsistent with their own views derived from newspaper and television reporting of the case.

Recent research also has demonstrated quite convincingly that after people have served on a jury, they not only have a better appreciation of the legal system but also become more engaged in civic affairs and more inclined to volunteer for community service.

In short, hard evidence indicates not only that juries are competent decision makers, but also that the jury system is an important democratic institution. ■

The opinions expressed in this article do not necessarily reflect the views or policies of the U.S. government.

American Bar Association Picks

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Paths of Glory (1958) – Kirk Douglas (left) plays Colonel Dax, a front-line French army officer during World War I who defends three of his men charged at court-martial with cowardice. The three men are scapegoats selected by generals for public execution as an example to others who retreated from a suicidal mission against a German position. "The geometrical arrangement of the courtroom shows the hierarchy of power and provides an appropriate arena for Dax's condemnation of a legal system that is itself a crime," the ABA says.

Jury Trials: Opposed (continued from page 18)

physician-jury, and that holds for almost all professionals. So a first question is: Is decision-making or fact-finding in criminal cases such that it can be done by laypersons? In order to answer that question, let me dissect the problem that faces the jury in a criminal trial. A jury must make a decision about the truth. American lawyers reply immediately that criminal trials are not about the truth, but about a certain version of the truth: Which party has the better argument about the truth?

Either way, the work to be done by a jury does not differ much from what any scientist has to do. A scientist has to make inferences about states of affairs that cannot be observed directly, inferring from evidence that can be observed. And that is precisely what a jury has to do: make a decision about the guilt of the defendant based on the evidence presented at trial. That is a scientific enterprise that surpasses the intellectual aptitude of most laypersons who are called to jury duty.

Proponents of the jury tend to use the seminal study by Harry Kalven and Hans Zeisel from 1966 here. In a large number of cases, Kalven and Zeisel, while the jury was in the jury room deliberating, asked the single judge presiding over a trial what he would decide. They found that in most cases the judges would have rendered the same verdict as the jury somewhat later returned.

Training Matters

That study warrants some comments. As with the example of the physician, the professional judge and the jury may agree most of the time, but that does not mean that they agree in the most important cases, the cases where decision making on the facts of the case is in some way difficult and where knowledge and training would matter.

Why would we turn to the judge to assess the quality of jury decisions? That assumes two things: that the judges are so good that they can be used as a criterion for the evaluation of the jury, and that law matters for the decision problem faced by the jury. The latter point is a common misconception. The jury decision is a purely factual decision that takes the form of a scientific decision. Most important, the law has nothing to do with that decision. The decision may be embedded in all kinds of legal rules — for instance about what evidence can be presented to the jury or can enter the decision — but that does not make the decision itself a legal decision. Jury proponents then would argue that the standard of decision making in criminal trials, beyond a reasonable doubt, is a legal rule. That is not so. It is the same kind of decision rule that is applied widely in science, just with a different name. In psychology, for instance, the same decision rule is called significance level.

And single judges are indeed the wrong kind of people to use as a criterion for scientific decision making. First of all, a panel of judges would be a fairer comparison. In most countries, cases without a jury are decided by panels of three or five judges. But, secondly, aren't judges as much laypersons on factual decision making as juries? Those who enter law school usually do that because they do not like scientific thinking or hate math or detest doing experiments. And surely legal thinking considerably departs from scientific thinking.

Judges, as such, thus are not better qualified than jurors for fact-finding unless they are trained. And in countries with professional judges, the judges are trained. In fact, when I serve as an expert witness in my small country, I often encounter courts in which one or more judges have been in my class where I taught them about witness statement, identification, and evaluation of evidence. How could proponents of jury trials argue that training does not matter in solving the kind of complicated problems in some criminal cases? Why do they ignore that there are more known miscarriages of justice in jury countries such as the United States and Great Britain than in continental nonjury countries?

Other Disadvantages

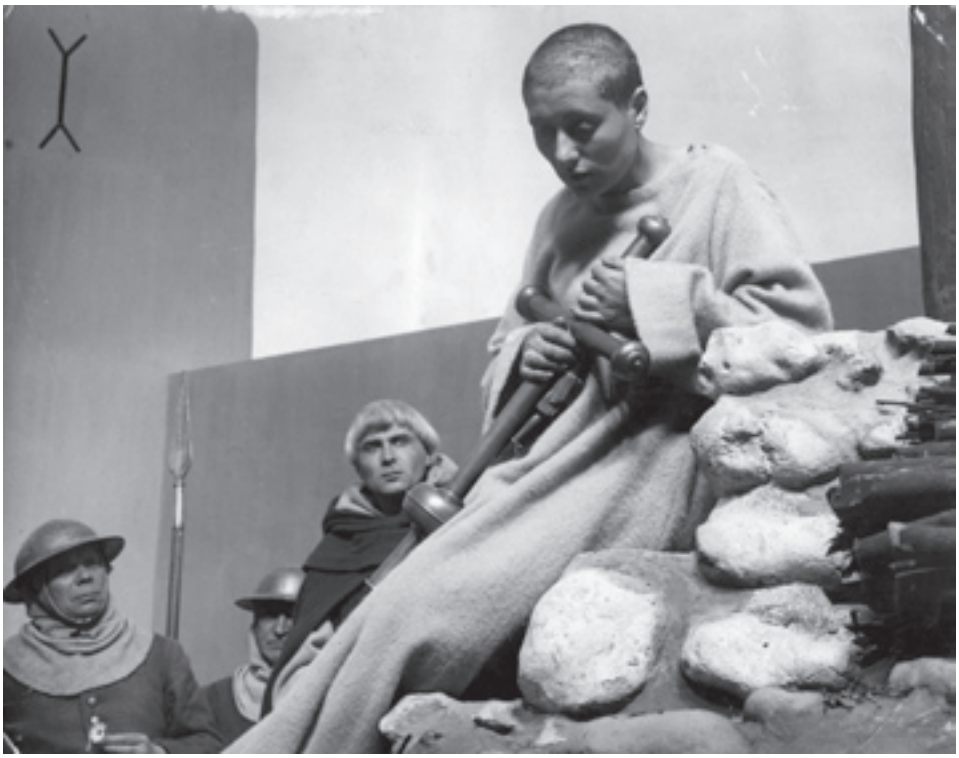
A system with jury trials has some additional disadvantages that are seldom discussed. First, a jury trial is more complicated than a bench trial (a trial where a judge or panel of judges reaches a verdict). That places higher demands on the defense attorney. Jury trials require better lawyers, but most defendants in the United States are too poor to hire a good-quality attorney. In countries with bench trials, a not-very-good attorney is a lesser disadvantage for the defendant.

The jury trial also is very time consuming and labor intensive. In fact, it is so expensive that a jury system can only be maintained if the vast majority of cases are dealt with differently. In the United States that occurs through plea bargaining, a negotiated agreement between prosecution and defense with a marginal check by a judge. In practice this is a system where most cases end in a way that nobody really has evaluated the evidence, without public scrutiny and with disproportionate power for the prosecution.

In short: In the jury system most cases are handled in secret, and a minute number of cases are decided by little groups of people who apply their common-sense ideas to complicated problems beyond their training. ■

The opinions expressed in this article do not necessarily reflect the views or policies of the U.S. government.

American Bar Association Picks



© Getty Images

The Passion of Joan of Arc (1928) – Maria Falconetti plays St. Joan in this silent film re-creating "with relentless visual power" the 15th-century trial and execution by burning after her capture by the English.

The Trial (1962) – Director Orson Welles's film version of Kafka's novel about injustice and corruption presents the nightmarish ordeal of one Joseph K., played by Anthony Perkins, who is arrested, brought to the courtroom, and condemned to death without ever learning the charge against him. "The trial by ordeal depicted here is meant not only for Joseph K. but for the viewer as well," the ABA says.

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A Prosecutor's Role

Shane Read

The prosecutor in a trial aims not only to persuade the jurors of the government's case that the defendant has committed a crime, but also to assure that no innocent person is wrongly convicted. Shane Read is assistant United States attorney in Dallas, Texas, and author of the book Winning at Trial.

The role of the prosecutor at trial is to represent the government and prove the defendant is guilty of the crime charged. This article focuses on the job a prosecutor has in the courtroom and shows some examples from one of America's most famous trials.

There are five key parts to a trial: jury selection, opening statement, direct examination, cross-examination, and closing argument. When a trial begins, the judge brings about 40 jurors into the courtroom so that 12 fair jurors can be selected. In order to find these jurors, the prosecutor is allowed to ask the jurors questions. Such questions might include: Have you ever had any bad experiences with the police, or have you or has a family member been wrongfully convicted of a crime? If a juror answers yes to these questions, then the prosecutor will ask follow-up questions to find out if the juror can still be fair given his or her experience.

After the jury is selected, the prosecutor gives an opening statement. In essence, this is a speech in which the prosecutor tells the jury about the evidence he will show them in order to prove the defendant's guilt. One of the best opening statements — because it was so persuasive and well organized — was given by prosecutor

Joseph Hartzler in the Timothy McVeigh trial. McVeigh was on trial for masterminding the bombing of a federal government building in Oklahoma City on the morning of April 19, 1995. On that morning, McVeigh parked a rental truck filled with homemade explosives in front of the building. He got out of the truck, and when it exploded 168 people were killed, including 19 children.

What made the opening statement so persuasive was that the prosecutor began by immediately capturing the jurors' attention so that they would be interested in hearing the detailed evidence that would later be presented at trial. He started by telling about the last few hours of life of a young child who was dropped off by his mother at the day care center in the federal building that was bombed. The prosecutor did this in order to focus the jury's attention on McVeigh's ruthless act of violence against the most innocent of victims — a child.

The prosecutor then told the jury how he was going to prove that McVeigh was guilty. One problem was that there were no eyewitnesses who saw McVeigh get out of the truck that exploded, but the prosecutor had physical evidence such as receipts for the rental of the truck and testimony from McVeigh's former friends who watched him acquire materials for the bomb and listened to McVeigh explain what he was going to do.

Calling Witnesses

After the prosecutor gives an opening statement, the defense attorney has a chance to do the same. Then the prosecutor begins the most critical part of the trial. He has to call witnesses who can tell the jury what they saw or heard that proves that the defendant is guilty. The prosecutor will also show the witness photographs, documents, diagrams, and objects for these witnesses to identify that prove the defendant committed the crime. In the McVeigh trial, one of the key witnesses was Lori Fortier, who had been a good friend of McVeigh. The prosecutor asked her about the time when she saw McVeigh make a diagram for her to show how he would build the bomb. Fortier also told the jury how McVeigh had tried to persuade her to help him in his plot. She said she refused.

After the prosecutor presents his case to the jury, the defendant has the right — but no requirement — to present evidence of his innocence. When the defense does this, the prosecutor has the right through cross-examination to ask the witnesses questions challenging their truthfulness. McVeigh's defense lawyer tried to present evidence that showed an unknown man was the actual killer. However, through logical questioning of the witnesses, the prosecutor was able to show that McVeigh was indeed the bomber. McVeigh was found guilty in 1997 and executed in 2001.

The prosecutor's role ends when he gives a closing argument at the completion of a trial. Like the opening statement, the closing argument is a speech to the jury. In this second speech, the prosecutor summarizes what the witnesses have told and shown the jury and then argues why the defendant should be convicted. Having said this, the prosecutor's role is not to get a conviction at all costs, but to seek justice so that no innocent person is wrongfully convicted. ■

The views expressed in this article do not necessarily represent those of the U.S. Attorney's Office or the U.S. Department of Justice.

Jury Service in the United States

Percent of adult Americans who have served as a trial juror in their lifetime: 29 percent

Source: *Jury Service: Is Fulfilling Your Civic Duty a Trial?* (July 2004), HarrisInteractive.

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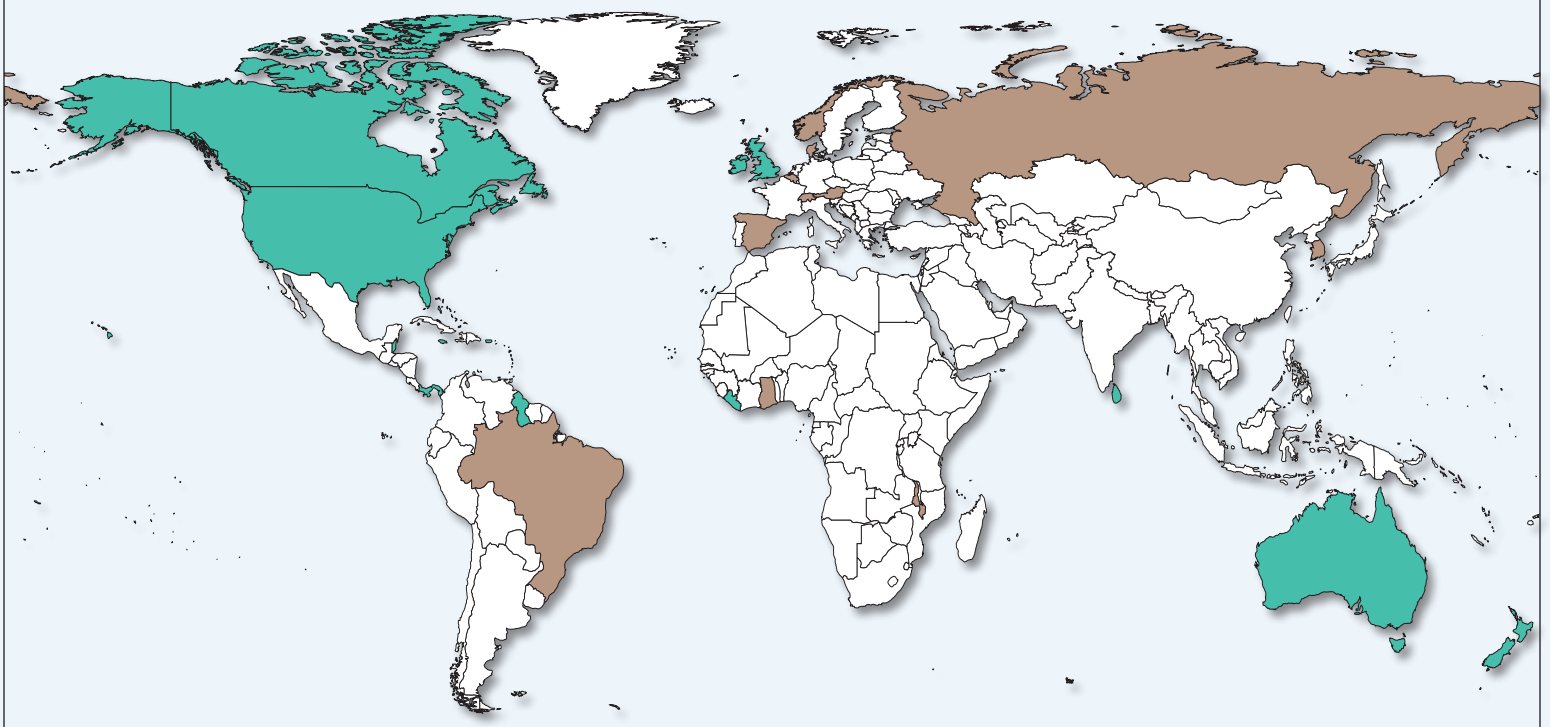
Average daily juror pay: $22 (approximately 25 percent of daily per capita income)

Source: *State-of-the-States Survey of Jury Improvement Efforts* (April 2007), National Center for State Courts.

JURY SYSTEMS AROUND THE WORLD



Countries, Territories, and Protectorates With Common Law Juries			
American Samoa	Cayman Islands	Jamaica	St. Helena
Anguilla	Cook Islands	Jersey	St. Lucia
Antigua	Dominica	Liberia	St. Vincent
Australia	Gibraltar	Malta	Sri Lanka
Bahamas	Grenada	Marshall Islands	Tonga
Barbuda	Grenadines	Montserrat	Tortola
Belize	Guam	New Zealand	Trinidad
Bermuda	Guyana	Northern Mariana Islands	Turks and Caicos Islands
British Virgin Islands	Hong Kong	Panama	United Kingdom
Canada	Ireland	Puerto Rico	United States
	Isle of Man	St. Christopher and Nevis	

Countries and Territories That Use Forms of the Jury Under Different Procedural Systems and Their Use Is Limited for Certain Types of Crimes			
Austria	Denmark	Korea	Russia
Belgium	Ghana	Malawi	Spain
Brazil	Guernsey	Norway	Switzerland

Source: Neil Vidmar, Duke University School of Law

A Defense Lawyer's Role

Barry Pollack

© William Hennessy/epa/Corbis

For those defendants willing to take the risks of going to trial, an able defense lawyer can challenge even the extraordinary powers of the government. Barry Pollack represents individuals and corporations in criminal investigations and trials as a member of the Washington, D.C., law firm Miller Chevalier.

The United States criminal justice system affords the government extraordinary powers in the prosecution of criminal offenses while simultaneously imposing substantial burdens on the government's ability to obtain a conviction. Both the power granted to the government and the limitations placed on it create a challenging role for criminal defense lawyers.

When criminal charges are brought, a defendant enjoys substantial procedural protections, including the right to the appointment of an attorney if the defendant cannot afford one. However, sentences, even for nonviolent first-time offenders, can be draconian. Prosecutors have tremendous discretion to plea bargain cases, offering lesser charges with reduced sentences in return for an admission of guilt or the defendant's assistance in the prosecution of others, or both. The combination of nearly boundless discretion to reduce charges and sentences and the lengthy prison sentences that attach to many charged offenses offers prosecutors tremendous negotiating leverage to resolve cases without testing factual allegations through the adversary system of a courtroom trial.

Two recent examples illustrate the disparity between those who accept a plea bargain and those who proceed to trial. The chief financial officer of telecommunications giant MCI/WorldCom implemented a massive accounting fraud at the company. He pled guilty and received a five-year sentence. The chief executive officer went to trial. He was convicted and sentenced to 25 years in prison. Similarly, the chief financial officer of the Houston, Texas, conglomerate Enron Corporation pled guilty to accounting fraud and received a six-year sentence. Another senior executive who proceeded to trial was convicted and was sentenced to 24 years in prison.

For those who do proceed to trial, the risks are high, but the potential reward is great. At trial, the government bears the burden of proving the defendant guilty to the unanimous satisfaction of 12 jurors. The defense has the right to compel the production of documents and physical evidence and to compel witnesses to appear. However, the defense often flies blind because witnesses need not speak to the defense in advance of trial and the government has only limited obligations to disclose evidence it has gathered. Further, each witness has a right not to incriminate himself and can decline to testify. Unlike the government, the defense cannot compel a witness to testify under a grant of immunity. Accordingly, the defense typically cannot prove innocence. Rather, the defense exposes weaknesses in the government's case and attempts to sow doubt among the jurors.

A criminal defense attorney has both the right, and indeed the obligation, to marshal all possible facts and arguments on behalf of the defendant, with the limitation that defense counsel may not knowingly advance false testimony.

Challenging Government

In the U.S. federal court system, the conviction rate is approximately 90 percent. However, the government's burdens at trial are substantial, particularly when opposed by skilled defense counsel with adequate resources to investigate the facts and bring legal challenges. For those who have the fortitude to test the government's evidence through the adversary process, the reward can be an acquittal and vindication. The government, unaccustomed to having its evidence challenged, may find that its witnesses are not as firm or its evidence more susceptible to an interpretation consistent with innocence than it anticipated.

I have been a criminal defense lawyer for nearly 20 years. While there have been exceptions, in most of my cases the result was fair and the process admirable.

The prosecution of executives from Enron Corporation illustrates both the powers and limitations of the government. Allegations of widespread fraud at Enron quickly led to its public vilification as a company that falsified financial records and the public perception that its employees were wealthy manipulators who profited handsomely while individual investors were left suffering the consequences.

The U.S. Department of Justice poured extraordinary resources into the prosecution of alleged fraud at Enron. More than 100 people were named as alleged conspirators in the collapse of Enron, approximately 20 guilty pleas were taken, and about a dozen executives defended their cases at trial. The government's record in the Enron cases that actually went to trial was mixed. Two people were acquitted of all charges, and a jury was unable to reach a verdict against several others. Some who were convicted obtained reversals on appeal. Ultimately, however, the government obtained the conviction of the two highest ranking officials at Enron.

My own client, a former Enron accountant with limited resources, could easily have pled guilty and likely would have served a fairly modest sentence. However, he firmly believed in his innocence. Despite the extraordinary resources of the government, the disdain with which the citizens of Houston (and members of the jury) held Enron, and the likelihood of many years in prison if convicted of even a single offense, my client chose to take on the U.S. government and force it to prove its case. I assisted him in challenging, through cross-examination, the government's witnesses, many of whom had been promised they would not be prosecuted in return for their testimony. I also assisted in presenting his defense, including expert accounting testimony, and, most importantly, his own testimony.

At the end of the day, a jury of his peers unanimously found him not guilty of all charges. For those like my client in this case, who have the courage to accept the extraordinary risks that a criminal jury trial entails, the system can and does work, and work well. ■

Nathan Lankford, an associate at Miller Chevalier, assisted in preparation of this article.

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American Bar Association Picks

The Wrong Man (1957) – Based on a true story, director Alfred Hitchcock's film portrays the ordeal of musician Manny Ballestero (played by Henry Fonda, left), who was mistakenly arrested and tried for a holdup at an insurance company office committed by another man. The distressing passage through the justice system tests the innocent defendant and, even more, his wife, who is placed in a mental institution. The film "reveals that the terrors of tedium in the bureaucracy of justice can be as psychologically damaging as outright injustice," the ABA says.

M (1931) – The judge and jury in this trial are Berlin's top criminals, who are passing verdict in a warehouse on Hans Beckert, played by Peter Lorre, a serial killer who preys on children. The criminals are intent on carrying out their form of justice quickly by ridding the world of Beckert, whose shocking acts have raised police obstacles to their other illegitimate businesses. The film "is a stinging expression of just how elusive and complicated justice really is," the ABA says.

Refining Jewels of Justice

Gregory E. Mize

Two organizations are promoting principles aimed at making juries more representative of their communities and changing the way trials are conducted to give jurors a better understanding of complex issues. Gregory E. Mize, a former trial judge in Washington, D.C., is now a judicial fellow at the National Center for State Courts. He welcomes your feedback at GMize@ncsc.org.

Although the United States declared independence from Great Britain in 1776, it retained the English institution of trial by jury as a centerpiece of its justice system. Americans' deep distrust of centralized government power led to overwhelming approval of federal and state constitutions ensuring that a litigant's peers would be the preferred deciders of guilt or innocence in criminal cases and of liability or non-liability in civil trials.

In the centuries that followed, the U.S. public maintained its solid consensus about the value of trial by jury. However, during that same time, jury trials were still being conducted with adherence to many 18th-century assumptions and practices. Specifically, judges and lawyers coveted control of the trial — speaking often in jargon and requiring other participants to follow legal procedures without explanation. As masters over the presentation of cases, judges ordered citizen-jurors to remain silent and totally passive until the very end when it came time to render their verdict.

These practices are changing. Beginning in the 1990s, authors in the popular and legal media have made sustained attacks against jury trials, especially in civil cases. Frequent litigants, often commercial enterprises, repeatedly pointed to a few large, seemingly irrational, jury damage awards as evidence that the civil jury system had spun out of control. Many lawyers and clients in both criminal and civil cases complained that the social features of citizens picked for jury service did not mirror the characteristics of the general population — namely, not enough representation of ethnic minorities and different economic classes.

Seeking Improvements

To address these criticisms (whether based in fact or perception), the American Bar Association (ABA) and the National Center for State Courts (NCSC) launched an intense effort to persuade judges and lawyers to improve jury trial practices with the aim of increasing public trust and confidence in the system. After commissioning a balanced group of trial practitioners and jury experts from across the country, the ABA promulgated *Principles for Juries and Jury Trials (http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf)*, with accompanying authoritative commentary. These principles are now the "gold standards" by which to measure U.S. jury trial practices. Thanks to NCSC's Center for Jury Studies and a growing number of trial judges and lawyers across America, the principles are being utilized at bench and bar education conferences for policy-making guidance and practical training.

Here are a few samples of the principles:

Principle 2 states, "Citizens have the right to participate in jury service and their service should be facilitated." Toward that end, the principle cautions that citizen eligibility for jury service should not be limited or denied on the basis of race, gender, age, national origin, disability, or sexual orientation. It suggests that the time required for jury service "be the shortest time period consistent with the needs of justice." Moreover, citizens who serve should be paid a reasonable fee to help meet their routine expenses such as travel, meals, and child care.

Principle 7 provides that courts should protect juror privacy. For example, it suggests that, following jury selection, the court should keep a juror's personal information confidential unless good cause to do otherwise is shown. The principle encourages courts, during jury selection, to question prospective jurors outside the presence of other jurors with respect to their prior exposure to matters that are potentially prejudicial or if the case contains issues that are personally sensitive.

Principle 10 advises courts to use open, fair, and flexible procedures to select a representative pool of prospective jurors. Responding to criticism that too many

juries do not mirror the demographic qualities of the court's community in terms of race, gender, and income level, this principle forcefully states that there should be no automatic exemption from jury duty based upon a citizen's occupation. Physicians, lawyers, police officers, politicians, and members of other occupations should not be presumed immune from jury service. Moreover, the principle says courts should summon citizens to jury service using multiple source lists, such as driver's license records, voter registration lists, and income tax rolls, in order to include the broadest portion of the community served by a court system. Underlying this principle is the view that when courts seek inclusiveness in their summoning process, they promote public confidence that litigants will likely be tried by a jury of their peers.

Promoting Understanding

To respond to criticism that juries are not competent to understand the facts and applicable law in many modern cases, such as those involving complex financial transactions or specialized medical procedures, several principles direct judges to be more than mere umpires and attorneys to be more than pure combatants.

For example, Principle 13 advocates that courts and parties "vigorously promote juror understanding of facts and the law" throughout the trial. Specifically, this principle recommends that jurors be allowed to take notes, have trial notebooks containing court instructions and common exhibits, submit written questions to witnesses in civil cases, and discuss the evidence among themselves during lengthy trials of civil disputes.

Even before the presentation of evidence in cases, Principle 6 says, courts should provide early orientation programs to citizens summoned for jury duty regarding the essential aspects of a jury trial, using a combination of written, oral, and audiovisual materials. Moreover, this principle urges courts to give not only comprehensive legal instructions at the end of each jury trial, but also pretrial instructions about basic concepts and procedures. Important also, to counter the widely held criticism that judges, lawyers, and expert witnesses too often use unintelligible jargon, the principles advise courts to instruct the jury "in plain and understandable language."

In response to the custom of courts to avoid giving concrete assistance to deliberating juries struggling to render a verdict, Principle 16 recommends that courts, in consultation with the trial lawyers, carefully offer assistance to juries "when an apparent impasse is reported." This principle challenges the age-old habit of courts to suddenly become passive and silence-prone when a deliberating jury communicates its trouble reaching agreement. Principle 16 suggests that, during jury deliberations, when, perhaps, a jury's need for clarity is highest, judges and lawyers be generous, not stingy, with their talents.

In the United States, where jury trials are a national treasure, these jewels of justice are being continuously polished. ■

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Jury Service in the United States

Percent of civil jury trials won by plaintiff: 49 percent (in 2005)

Average amount of damages awarded to prevailing plaintiffs: $28,000 (in 2005)

Source: *Civil Justice Survey of State Courts* (2005), National Center for State Courts.

A Witness's Role

Maurice Possley

© AP Images/Bill Robles

The way a witness presents the facts of a case can influence the emotions of a jury. Maurice Possley is a Pulitzer Prize-winning journalist who worked for the Chicago Tribune *for nearly 25 years before retiring in 2008. He is the author of two nonfiction books.*

The words of a witness are among the most powerful forms of evidence to be heard in an American court of law. Witness testimony has not only the power to inform, but also the power to influence the emotions of jurors who are hearing the case and ultimately will render a verdict.

Whether these words are spoken by the victim of a crime recounting how he or she was robbed, raped, or shot, or come from a mother whose son, brother, sister, or husband was murdered, or are spoken by a bystander who happened to be present at a crucial moment when bullets were fired or a knife was thrown, the words of a witness are frequently riveting and emotional, and provide the most dramatic moments of a trial.

Ultimately, jurors hearing a case must decide whether the testimony of a witness is the truth. In deciding this, jurors weigh a witness's words and demeanor, as well as his ability to withstand cross-examination designed to undermine his testimony.

There are many forms of evidence in a trial, no matter if the case is the prosecution of individuals accused of a crime or a company accused of committing a civil wrong.

There is physical evidence collected at crime scenes, such as fingerprints and DNA and bullet casings. There also is documentary evidence, such as records of financial institutions, corporate e-mails and resolutions, and signed agreements.

And while these forms of evidence have a power and significance that differs from case to case, the testimony

of witnesses — whether they are eyewitnesses to crimes, actual crime victims, or defendants accused of crimes — is frequently what sways jurors.

There are different types of witnesses. In criminal cases, the most common witnesses are police officers and eyewitnesses. Other witnesses may be called to testify about conversations with the accused. Lawyers for the accused may call witnesses to testify to an alibi for the defendant. The defendant may be a witness on his or her own behalf to deny participating in a crime.

In Rehearsal

By the time most witnesses in criminal and civil cases actually take the witness stand, their testimony has been picked apart, studied, and rehearsed many times with their lawyers. Most are prepared well in advance of their appearance in court. Some witnesses are even subjected to mock trials prepared by their lawyers, who then interview the mock "jurors" afterward to learn how the testimony of these witnesses was perceived.

Witnesses are instructed to sit erect in the witness box and to swivel their bodies toward the jurors so that the jury may see their face and body language during their response. This is important no matter whether the case is being heard by a judge or a jury, but it is exponentially important when jurors — men and women from all walks of everyday life — are going to be reaching a verdict.

In criminal cases, witnesses for the prosecution are prepared by prosecutors who inform them of the questions that likely will be asked so that their answers can be as precise and accurate as possible. These witnesses are usually subjected to mock cross-examinations so that they will not be unduly flustered and give possibly erroneous testimony.

In civil cases and, in some jurisdictions, criminal cases as well, witnesses (except for defendants in criminal cases) are allowed to be questioned under oath prior to trial. That testimony may be used to impeach their trial testimony should it diverge.

In many cases, both criminal and civil, juries and judges make decisions based on whether they believe the witnesses are telling the truth, telling lies or, most often, telling what they think they saw or remember to the best of their ability.

For centuries, eyewitness testimony has been considered one of the most reliable forms of evidence. In recent years, however, considerable research has revealed that eyewitness testimony can be very unreliable.

A study of cases by the Innocence Project in New York City shows that eyewitness misidentification is the single greatest cause of wrongful convictions in the United States. More than three out of four wrongful convictions identified through DNA testing involved faulty eyewitness identification.

A Witness Myself

I was a witness on my own behalf after I was sued by a former prosecutor who accused me of defaming him in an article I wrote for the *Chicago Tribune* in 1999. The lawsuit was filed in 2000, and I was called to the witness stand in the spring of 2005, more than five years after the events in question occurred.

As a witness, I was asked to take an oath and swear that I would tell the truth to the jury that was hearing my case. I was on the witness stand for nearly three days, answering questions from my lawyer and from the lawyer who alleged that I had defamed him.

I could not refuse to answer the questions without a constitutional reason, and in my case there was no such reason. After I was asked a question, I paused to consider my answer and then looked at the jurors to deliver my answer. I wanted them to be able to look me in the eye and judge whether I was telling the truth or telling a lie.

I knew the truth, but I found it emotionally difficult to focus while I was on a witness stand in front of a jury and a judge. Under cross-examination, it is easy to lose your train of thought and not fully understand the question and possibly give testimony that is not accurate or truthful.

As a witness, I had to concentrate on being truthful and answering questions — no matter how difficult — as accurately as possible.

In the end, I hoped the jurors would believe me.

And they did.

When they returned their verdict that found no damages against me, I wept. And I found a new appreciation for those persons who would be defendants and for whom the penalty would not be monetary damages, but the loss of liberty itself. ■

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Some Differences Between States

Paula L. Hannaford-Agor

In the U.S. federal system, the state and national laws cover different kinds of crimes and civil disputes. Jury practices differ somewhat between the state and federal courts and even among state courts. Paula L. Hannaford-Agor is director of the Center for Jury Studies at the National Center for State Courts.

Trial by jury is a trademark characteristic of the U.S. justice system. More jury trials are conducted in the United States each year than in any other country in the world. Moreover, the United States uses jury trials for less serious criminal cases (misdemeanors), civil cases, and, in some states, even in cases involving municipal ordinance violations. This is a marked contrast to other countries that reserve jury trials for their most serious criminal cases.

Although trial by jury is a relatively common event in U.S. courts, the procedures employed in those trials are anything but uniform. Significant differences exist in jury trial practices among the different state courts and between state and federal courts.

One difference is the number of jurors impaneled to hear cases. Historically, juries consisted of 12 persons, and this is still the number used for most serious criminal cases. But 16 states use smaller juries of six, seven, or eight people to try less serious criminal cases, and 17 states and the federal courts use smaller juries to try civil cases.

States also differ on whether a jury's verdict must be unanimous. Two states permit nonunanimous verdicts in criminal trials, and 16 states permit nonunanimous verdicts in civil cases.

For the most part, courts have similar rules about who is qualified to be a juror: adult (age 18 or older), U.S. citizen, and legal resident in the geographic area served by the court. But there are growing differences in practice concerning whether people who have been convicted of a crime are eligible to serve; some states have a permanent disqualification for any criminal conviction, others permit people to serve as jurors after some time has passed (10 to 20 years, for example), and others have no restrictions related to criminal background at all.

As the United States becomes more demographically and linguistically diverse, there is also increased discussion about permitting people who are not fluent in English to serve as jurors with assistance of foreign language interpreters. So far, only the state of New Mexico does this on a routine basis.

The U.S. justice system is also characterized by overlapping state and federal courts. There are only 94 federal district courts with 678 judges compared to more than 3,000 state courts and more than 16,000 state court judges. Many of the nation's founders were highly suspicious of a strong national government and specifically amended the U.S. Constitution to protect the authority of state governments against encroachment by the federal government. As a result, most of the laws enumerated in statutes, regulations, and common law are actually state laws.

Federal juries hear only cases involving violations of federal law, which typically involve crimes having national impact such as interstate drug manufacture and distribution, criminal racketeering, or terrorism; violations of federal civil regulations including labor conditions, employment discrimination, or environmental laws; and civil disputes involving people from different states. For the most part, federal jury practices tend to follow those of the state courts in which the federal courts are located. ■

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American Bar Association Picks

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Judgment at Nuremberg (1961) – The chief jurist in a 1948 military tribunal, an American judge played by Spencer Tracy, judges four German judges accused of crimes against humanity for carrying out Nazi laws. Just as the German judges abandoned their principles under political pressure, the American judge comes under political pressure to handle the case with lenience because convictions might be construed as a victory for Communists. Montgomery Clift (left) plays a concentration camp inmate on the witness stand.

© John Springer Collection/Corbis

Inherit the Wind (1960) – Based on a famous 1925 case in rural Tennessee, the slightly fictionalized film re-creates the sensational trial of a young secondary school teacher charged with the crime of teaching Darwin's theory of evolution. The defense attorney (played by Spencer Tracy, left) here spars with the prosecutor (played by Frederic March).

A Journalist's Role

Ted Gest

© Art Lien /NBC News

Scrutiny by news reporters of jury trials gives the public added assurance that the judicial system is working fairly. Ted Gest is president of Criminal Justice Journalists, a national organization based in Washington, D.C., and affiliated with the University of Pennsylvania and John Jay College of Criminal Justice in New York City. He covered jury trials for the St. Louis *(Missouri)* Post-Dispatch *newspaper and later wrote about criminal justice for the news magazine* U.S. News & World Report.

Most legal disputes in the United States are settled without the need for a trial, but the ones that involve juries can be among the most fascinating and unpredictable. The American tradition of open trials permits the public to judge whether the government is protecting its citizens by bringing charges with sufficient evidence against those suspected of crimes, and not by accusing innocent people.

The news media serve as the public's eyes and ears at trial. Even in places that allow trials to be televised, news stories include important information about a case's background, the legal strategy of both sides, and potential witnesses and other evidence.

In a case that gets wide attention, a journalist's role starts well before jury selection. Many stories will have been published or broadcast, and potential jurors will be asked if they have seen them. Judges who anticipate media

coverage may ask reporters to withhold "advance" stories about a trial that might contain information that would tend to bias juries.

The response by reporters to such a request may depend on how they view the case. Some cases have generated so much interest that a news organization decides that it must do a story about how the trial is likely to evolve. Or journalists may agree among themselves to defer stories until a jury can be chosen.

It is only in the few most celebrated cases that court reporters pay close attention to jury selection. In some, prosecutors are seeking the death penalty; observers look for clues on how many potential jurors object to executions generally.

Once the jury is seated, a reporter typically covers the trial just like any other case, deciding what evidence is worth mentioning in that day's story. Jurors normally aren't mentioned in day-to-day coverage. In some places, jurors may ask questions during the trial. Journalists take note to see if there is any clue as to which way the jurors may be leaning.

Journalists might influence juries in unusual ways. John Painter Jr., who covered courts for the *Oregonian*, a daily newspaper in Portland, Oregon, noticed jurors "surreptitiously watching me and taking notes when I took notes." He concluded that jurors believed he knew what was important and might have put greater emphasis on testimony he recorded. He decided not to sit in jurors' line of sight to avoid causing bias.

Jurors' Views

Jurors provide the climax to most trials when they announce the verdict, but that result rarely sheds light on whatever drama might have been involved in the closed-door deliberations. Some judges, knowing of intense media interest, arrange for jurors to speak to journalists in press-conference fashion after a trial. Reporters are able to ask questions without resorting to tracking jurors down in their homes or offices, which some jurors might regard as harassment.

Other courts try to prevent journalist-juror contact. Some courts use anonymous juries, meaning that jurors are identified only by number. Shawna Morrison, court reporter for the *Roanoke Times* newspaper in Virginia, says judges in her area prohibit naming jurors or photographing them. When the trial has ended, jurors are escorted to their autos, and no one may leave the courtroom until all the jurors have departed.

Judges usually tell jurors that they are not required to talk to anyone about their experiences, but that they have a right to speak. Many reporters have succeeded in getting jurors to give interviews about their impressions of a case and why a particular verdict was reached.

Journalist as Juror

Occasionally, a journalist is chosen for a jury and may choose to speak about the experience. Denis Collins, who had reported for the *Washington Post*, served on the Washington, D.C., jury that in 2007 convicted Lewis "Scooter" Libby, former adviser to Vice President Dick Cheney, of perjury and obstruction of justice. Fellow jurors chose Collins as their spokesman; he told reporters that many of them felt sympathy for Libby and believed he was the "fall guy" in a complicated case involving security leaks.

The fact that the Libby case was able to go before a jury and be witnessed by news reporters was a vivid demonstration that even cases that involve national-security issues can be subject to public scrutiny in an American courtroom.

Some jurors work with journalists in writing about their experiences. Seven jurors in the sensational California trial of Scott Peterson, convicted in 2004 of killing his pregnant wife, Laci, collaborated with writers on a book. One revelation was that some jurors "suffer from post-traumatic stress syndrome and have flashbacks … some have nightmares, some have received death threats, and some have physical pain."

Covering legal issues as a journalist isn't viewed as a conflict with jury service. This writer, called for jury duty in Washington, D.C., told a judge and the opposing lawyers that he had written a book on criminal justice that might bias his participation. He was placed on the jury anyway. ■

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Law & Order Reflects Real Life

An Interview With Richard Sweren

Pictured in a 2008 episode titled "Challenged," from left to right, are Anthony Anderson as Detective Kevin Bernard, S. Epatha Merkerson as Lieutenant Anita Van Buren, and Jeremy Sisto as detective Cyrus Lupo.

Law & Order *has attracted American TV fans for 19 years by reflecting the sometimes agonizing complexity of the criminal justice system in real life. Filmed entirely on location in New York, each hour-long show examines a crime, usually a murder, from the perspective, first, of the police investigating the case and making an arrest and, then, of the prosecutors trying to arrange a plea bargain or to persuade a jury of the accused person's guilt. Episodes often depict the arduous work of building a case when, for example, a judge might suppress police evidence over a legal technicality. Richard Sweren had a 15-year career as a criminal lawyer before becoming a writer and producer for* Law & Order. *He spoke to* eJournal USA *managing editor Bruce Odessey.*

Question: Trial scenes are a staple of movies and television. There is a new Russian remake of *12 Angry Men*, the classic American film from the 1950s about a murder trial jury. Why are so many films and TV shows focused on trials?

Sweren: It's a natural place where there is drama, conflict. People's lives are on the line. It's just conducive to telling dramatic stories.

Q: *Law & Order* has run on American TV for 19 years. It's popular overseas, including in countries without jury trials, maybe even in countries without rule of law. What's the secret to this show's appeal?

Sweren: It's popular because it tells a self-contained story in 45 minutes. You didn't have to watch the one before, or watch it for a year or five years — you can just get right

into it. You don't need any previous knowledge of the show when you turn it on.

We try to choose interesting crimes, and people are fascinated by crime, by cops and robbers. Crime is something that translates to any language.

Q: As a writer, how do you manage to get a sense of legal authenticity on the screen?

Sweren: I was a practicing criminal lawyer for 15 years before I had this job. There are several lawyers on the staff who are now writers, and we hope to portray things fairly authentically. Obviously, there are creative shortcuts we need to take to make a trial seem like it happens in 10 minutes. For example, sometimes we bring an accused murderer into a judge's chambers for a proceeding that in real life would only happen in a courtroom.

Q: Do you think the creative license you use might distort people's view of the justice system?

Sweren: No, I don't think so. I think in a way the show actually educates people to how the criminal justice system works. People talk to me about suppression hearings — when the judge excludes evidence against the accused that has been obtained in violation of the [U.S.] Constitution — things that they heard on *Law & Order* that they had not been exposed to before. I think it treats the criminal justice system in a more sophisticated way than any show before it that I'm aware of.

Q: As you watch the show over time you get the repeated message that the ethical issues, the moral issues involved in resolving a case are typically complex and require difficult choices. How much is this idea part of the show's formula?

Sweren: We'd like to say that in the good episodes of *Law & Order*, the first half where the police are investigating is a crime mystery and the second half is a moral mystery. The first half of the show is usually a "who-done-it," the second half a "why-done-it," which will motivate our prosecutors to stake out different viewpoints as to what constitutes justice in the given situation. We like to choose subjects that aren't slam dunks, that have some moral gray areas so that there can be some interesting positions staked out by our characters.

Q: Sometimes in the show, justice does not triumph in the end. Often there is some sort of compromise. Sometimes the criminal even avoids punishment. Why does the show depart from this pop culture tradition?

Sweren: In the real world, innocent people are convicted, guilty people get off, and the vast majority of cases are resolved through plea bargains. It's not supposed to make you feel good or satisfied at the end of every episode — justice doesn't always win, the bad guy doesn't always go down — but to reflect the reality of life. In the episode "Crimebusters," the murderer of a baby in an arson fire went unpunished because the prosecution could not prove its case against either of two equally plausible suspects.

Pictured in a 2005 episode titled "Ghosts," from left to right, are Dennis Farina as Detective Joe Fontana and Jesse L. Martin as Detective Ed Green.

Q: As a lawyer yourself, would you say that jury trials reach verdicts that achieve justice most of the time?

Sweren: Meaning more than 50 percent? Yes.

Q: Why don't juries reach just conclusions more often?

Sweren: I think there is gamesmanship between the parties. I think there is perjury; people do tell lies in court. The rules aren't perfect, judges and lawyers aren't perfect, juries aren't perfect. It's not a scientific process. It's only the best we can do. It has shortcomings.

© NBC Universal Photo Bank

Pictured in a 1994 episode titled "Virtue" is Regina Taylor as Sarah Masllin.

Q: The police and prosecutors are usually shown in a positive light on the show. Are they ever shown in a negative light?

Sweren: Our characters will occasionally do something that is in a gray area. We've done shows where other police officers, not our characters who are in the ensemble, have done bad things. We've prosecuted police officers. It's not always about how great the police are. In one episode, "Black, White and Blue," uniformed officers transported and left a young man in a crime-ridden area as punishment for some minor offense, and he was murdered there.

Q: When you write a show, who is the audience you have in mind, and how much legal knowledge do you assume on the part of the audience?

Sweren: The audience we have in mind is the average adult American television viewer. We try not to dumb down the shows too much. We expect people will be able to follow basic things about criminal justice and trials. We like to think we appeal to people on a fairly high level considering what else there is on television.

Q: What do other lawyers, police, judges say about the show?

Sweren: We get letters from time to time: That would never happen, or this would never happen. We occasionally get letters from lawyers saying, "Wow, that's a great idea! I can try that in this case that I have." But I think it's probably like most professions. If a doctor watches a medical show, it's easy to pick out the shortcuts and the creative licenses. I think people in criminal justice realize that we try very hard to make things authentic, but there are times when we did take license. And they understand that it's not a documentary — it's a television show.

Q: Has the focus of the show changed over the years?

Sweren: Not really. It's still crimes ripped from the headlines for the most part, shows based in some way on true stories. That's what we've been doing for 19 years.

Q: The entire cast of the show has changed several times. That's a lot different from most TV shows, which are built around a star performer. How does *Law & Order* succeed with such a different model?

Sweren: The show is about the story being told, not so much about the characters. It's all about the crime and the prosecution. You by and large don't go home with these characters; you don't know what they do when they're not at work. The only arena in which you get to know them is how they're dealing with the specific case that they're working on that week, and their character is developed from how they react to the case.

Q: This season you have two younger detectives where the earlier shows had older detectives. What is behind that change?

Sweren: Over 19 years the characters are going to age. It's always nice to have some fresh faces and appeal to a younger audience who may not be as familiar with the show as our long-time fans.

Q: Is the formulaic approach to the show a strength or a weakness?

Sweren: It's both. Obviously, as a writer I would like to be able to write things that aren't so formulaic, but it forces a kind of precision that is really difficult to execute. To put one of these shows together is actually very complicated; it's a skill that has to be mastered.

Q: As a former practicing lawyer and as a writer for the show, what is the message for countries outside the United States that don't use juries, that perhaps don't even have rule of law?

Sweren: Our police and prosecutors are sincere in their quest for justice. They're humans, and they make mistakes, and personal things get in the way. The system isn't perfect. Maybe other systems work better in other countries, but I believe ours works well in the United States. ■

The opinions expressed in this interview do not necessarily reflect the views or policies of the U.S. government.

Additional Resources

Books, articles, and Web sites concerned with U.S. juries and justice

Books and Articles

Abramson, Jeffrey. *We, the Jury: The Jury System and the Ideal of Democracy.* New York, NY: Basic Books, 1994.

Aitken, Robert. *Law Makers, Law Breakers and Uncommon Trials.* Chicago, IL: American Bar Association, 2008.

Asimow, Michael. "12 Angry Men: A Revisionist View." *Chicago Kent Law Review,* vol. 82, no. 2 (2007): pp. 711-726. *http://lawreview.kentlaw.edu/articles/82-2/Asimow%20Author%20Approved%20Edits(H)(P).pdf*

Burnett, D. Graham. *A Trial by Jury.* New York, NY: Knopf, 2001.

Burns, Robert. *The Death of the American Trial.* Chicago, IL: University of Chicago Press, 2009.

Digital Evidence in the Courtroom: A Guide for Law Enforcement and Prosecutors. Washington, DC: National Institute of Justice, 2007. *http://www.ncjrs.gov/pdffiles1/nij/211314.pdf*

Ferguson, Robert A. *The Trial in American Life.* Chicago, IL: University of Chicago Press, 2007.

Hans, Valerie P. *Business on Trial: The Civil Jury and Corporate Responsibility.* New Haven, CT: Yale University Press, 2000.

Mize, Gregory E., and Paula Hannaford-Agor. "Building a Better Voir Dire Process." *The Judges' Journal*, vol. 47, no. 1 (Winter 2008). *http://www.ncsconline.org/d_research/cjs/BuildgBetterVoirDire_000.pdf*

Ostrom, Brian J. *The Mosaic of Institutional Culture and Performance: Trial Courts as Organizations.* Washington, DC: National Institute of Justice, 2005. *http://www.ncjrs.gov/pdffiles1/nij/grants/212083.pdf*

Read, D. Shane. *Winning at Trial.* Louisville, CO: National Institute for Trial Advocacy, 2007.

Sandler, Paul Mark. *Anatomy of a Trial: A Primer for Young Lawyers.* Baltimore, MD: MICPEL, 2008.

Shdaimah, Corey S. *Negotiating Justice: Progressive Lawyering, Low-Income Clients, and the Quest for Social Change.* New York, NY: New York University Press, 2009.

Shelton, Donald E. " 'CSI Effect': Does It Really Exist?" *NIJ Journal,* issue 259 (March 2008): pp. 1-6. *http://www.ncjrs.gov/pdffiles1/nij/221501.pdf*

Strebeigh, Fred. *Equal: Women Reshape American Law.* New York, NY: W.W. Norton & Co., 2009.

Sundby, Scott E. *A Life and Death Decision: A Jury Weighs the Death Penalty.* New York, NY: Palgrave MacMillan, 2005.

Verrone, Patric M. "The 12 Best Trial Movies." *ABA Journal* (November 1989). *http://www.supremecourt.ne.gov/students-teachers/movies.shtml*

Vidmar, Neil, and Valerie P. Hans. *American Juries: The Verdict.* Amherst, NY: Prometheus Books, 2007.

Jury Service in the United States

Percent of criminal defendants convicted by jury trial: 71 percent

Percent of criminal cases that end in plea agreement rather than trial verdict: 69 percent

Percent of criminal cases in trial that are dismissed before jury deliberations: 10 percent

Source: *Are Hung Juries a Problem?* (September 2002), National Center for State Courts.

Web Sites

American Association for Justice
International coalition of legal professionals working to ensure that victims of negligence can obtain courtroom justice.
http://www.justice.org

American Bar Association
The national organization representating the legal profession.
www.abanet.org

American Judicature Society
Nonpartisan organization of judges and attorneys seeking to improve the justice system.
http://www.ajs.org

American Tort Reform Association
National organization dedicated to reforming the civil justice system.
www.atra.org

Brennan Center for Justice
Public policy and law institute focusing on fundamental issues of democracy and justice.
www.brennancenter.org

Center for Jury Studies
Features research papers on topics related to juries and jury trials. Topics include hung juries, juror stress, and jury trial innovations. From the National Center for State Courts (NCSC).
http://www.ncsconline.org/Juries/

Famous Trials
Accounts, maps, photos, transcript excerpts, and other materials about trials of the past.
http://www.law.umkc.edu/faculty/projects/ftrials/ftrials.htm

Justice at Stake Campaign
Works for reforms to ensure that politics and special interests do not influence the courtroom.
www.justiceatstake.org

National Center for State Courts
Seeks to improve the administration of justice through leadership and service to state courts.
www.ncsconline.org

The Plea
Accompanies a PBS *Frontline* television documentary on plea bargaining in criminal court cases.
http://www.pbs.org/wgbh/pages/frontline/shows/plea/

Real Justice
Accompanies a PBS *Frontline* television documentary on the experiences of real prosecutors and defense attorneys.
http://www.pbs.org/wgbh/pages/frontline/shows/bostonda/

U.S. Courts Library
A clearinghouse for information from and about the judicial branch of the U.S. government.
http://www.uscourts.gov/library.html

For Students

Anatomy of a Murder: A Trip Through Our Nation's Legal Justice System
Lessons about the U.S. justice system by following a murder case from the discovery of the body through the trial of the accused, including topics such as search and seizure, right to an attorney, self-incrimination, and the death penalty.
http://library.thinkquest.org/2760/

The Case of Stolen Identity
A graphic novel from the National Center for State Courts to help readers understand how courts preserve a democratic system.
http://www.ncsconline.org/D_Comm/Images/justice_case_files_02_preview.pdf

Inside the Courtroom: **United States Attorneys Kids Page**
An introduction to the workings of U.S. courtrooms, including a description of federal prosecutors and U.S. attorneys, an illustrated guide to a courtroom and its participants, and a glossary.
http://www.usdoj.gov/usao/eousa/kidspage/

Our Courts: 21st-Century Civics
Civic games, lesson plans, resource links, civics-in-action projects, and more. Sponsored by retired U.S. Supreme Court Justice Sandra Day O'Connor, Georgetown University, and Arizona State University.
http://ourcourts.org/

Washington Courts: Educational Resources
Online educational resources from the Washington State courts, including lesson plans and video lessons for grades K-12. Also provides guides to the court system, court terminology, and jury duty, and resources on judicial education and mock trials.
http://www.courts.wa.gov/education/

The U.S. Department of State assumes no responsibility for the content and availability of the resources listed above. All Internet links were active as of July 2009.

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http://america.gov/publications/ejournalusa.html

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