

JURY PSYCHOLOGY: Social Aspects of Trial Processes

Psychology in the Courtroom,
Volume I

Edited by
Joel D. Lieberman
Daniel A. Krauss

PSYCHOLOGY, CRIME AND LAW
Series Editor: David Canter

**JURY PSYCHOLOGY:
SOCIAL ASPECTS OF TRIAL PROCESSES**

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Jury Psychology: Social Aspects of Trial Processes

Psychology in the Courtroom, Volume 1

Edited by

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ASHGATE

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Contents

<i>Notes on Contributors</i>	vii
<i>Series Preface</i>	xi
<i>Preface to the Two-Volume Set</i>	xiii
<i>Joel D. Lieberman and Daniel A. Krauss</i>	
<i>Preface to Volume I—Jury Psychology: Social Aspects of Trial Processes</i>	xvii
<i>Joel D. Lieberman and Daniel A. Krauss</i>	
<i>Psychology in the Courtroom</i>	xxi
1 The Validity of Jury Decision-Making Research	1
<i>David DeMatteo and Natalie Anumba</i>	
2 Procedural Justice	25
<i>Tom R. Tyler</i>	
3 Theoretical Models of Jury Decision-Making	41
<i>Jennifer Groscup and Jennifer Tallon</i>	
4 Inadmissible Evidence and Pretrial Publicity: The Effects (and Ineffectiveness) of Admonitions to Disregard	67
<i>Joel D. Lieberman, Jamie Arndt and Matthew Vess</i>	
5 The Psychology of Jury Selection	97
<i>Joel D. Lieberman and Jodi Olson</i>	
6 The Psychology of the Jury Instruction Process	129
<i>Joel D. Lieberman</i>	
7 The Social Psychology of Capital Cases	157
<i>Mona Lynch</i>	
8 Psychological Issues in Civil Trials	183
<i>Edith Greene</i>	
<i>Index</i>	207

To Celia—JDL

To Trina—DAK

To Bruce Sales, a mentor and a friend—JDL and DAK

Notes on Contributors

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Jamie Arndt is Associate Professor in the Department of Psychological Sciences at the University of Missouri, Columbia. He received his BS from Skidmore College and his PhD in 1999 from the University of Arizona. Arndt's research is concerned with how the existential realities of the human condition impact diverse forms of social behavior. Along with previous theoretical work on social psychological perspectives on limiting instructions, he and his colleagues have applied this existentially-based analysis to understanding how extraneous psychological factors can influence juror decision-making and thus undermine the presumption of fairness that is at the heart of legal intent. Some specific applications have focused on reactions to hate crimes and inadmissible evidence.

David DeMatteo received a PhD in Clinical Psychology from MCP Hahnemann University and a JD from Villanova University School of Law. He is Assistant Professor of Psychology at Drexel University, and Co-Director of the JD/PhD Program in Law and Psychology. His research interests include forensic mental health assessment, psychopathy, and drug policy. He has published more than 30 articles and book chapters, and co-authored two books. He was recently appointed a member of APA's Committee on Legal Issues.

Edith Greene is Professor of Psychology at the University of Colorado in Colorado Springs. She received a BA from Stanford University and a PhD from the University of Washington. Her research focuses on decision-making by jurors and juries. She is the author or co-author of many articles in law reviews and psychology journals and three books about psychology applied to the legal system, including *Determining Damages: The Psychology of Jury Awards* (2003) and *Psychology and the Legal System* (2007). She serves on the editorial boards of *Law and Human Behavior* and *Psychology, Public Policy, and Law* and is a past-president of the American Psychology-Law Society.

Jennifer L. Groscup, JD, PhD received her JD from the University of Nebraska-Lincoln College of Law and her PhD in Social/Personality Psychology from the University of Nebraska-Lincoln as part of the joint degree program in psychology and law. She received her BA from Georgetown University. Her main areas of research interest are legal decision-making, expert evidence, scientific evidence, and the impact of attitudes and pre-existing knowledge on perceptions in the courtroom.

Daniel A. Krauss received a joint PhD in psychology (clinical psychology and psychology, policy and law) and law degree from the University of Arizona, and he received his BA from The Johns Hopkins University. He is currently Associate Professor of Psychology at Claremont McKenna College. His research explores the use of psychological expertise in the legal system. Dr Krauss is the author of over 30 articles and chapters related to the intersection of law and psychology, was a member of the APA Committee on Legal Issues from 2004 to 2007, and was the United States Supreme Court Fellow at United States Sentencing Commission in 2002–3.

Joel D. Lieberman, PhD is Associate Professor and Chair of the Criminal Justice Department at the University of Nevada, Las Vegas. He received his PhD from the University of Arizona in Psychology. His work focuses on the application of social psychological theories to criminal justice issues. This research has led to numerous published articles and book chapters involving the identification of psychological factors that explain why jurors have difficulty comprehending judicial instructions, and why jurors rely on inadmissible evidence, defendant characteristics, and less reliable expert witness testimony, in their decision-making. In addition, he has authored a recent book on *Scientific Jury Selection* (with Bruce Sales).

Mona Lynch is Associate Professor of Criminology, Law and Society at UC Irvine. She received her BA, MS, and PhD degrees from the University of California, Santa Cruz in Social Psychology, and an MA from Stanford University in Communication. Her research and writing focuses on the social, psychological, and cultural dynamics of contemporary punishment processes. Among other projects, she recently completed a book, due out with Stanford University Press in late 2009, that examines the development of the state of Arizona's penal system over a 50 year period as a mode for understanding and explaining the multiple dynamics underlying the dramatic penal transformations that occurred across the United States in the late twentieth century.

Jodi Olson earned her MA in criminal justice from the University of Nevada, Las Vegas. She has conducted research focused on the criminal career paths of sex offenders, and how the absence or presence of specialization in sex offending affects current sex offender legislation and stereotypes.

Jennifer A. Tallon, MA is a doctoral candidate in the Forensic Psychology doctoral program at The Graduate Center, CUNY. She received her BA and MA in Forensic Psychology from John Jay College of Criminal Justice. Her research focuses upon juror and jury decision-making in cases that elicit general and specific prejudices. For example, she is currently examining how the affective components of Victim Impact Statements may influence jurors in capital trials and what a defendant may do to moderate these effects. In addition to the study of affect and juror decision-making, her research has focused on juror perceptions of expert testimony. She has also done extensive research on child sexual abuse in the Catholic Church and juror perceptions of sex offenders.

Tom Tyler is a University Professor of Psychology and Chair of the Psychology Department at New York University. He teaches in the psychology department and the law school. He received his BA from Columbia University and his MA and PhD from the University of California at Los Angeles. His research explores the dynamics of authority in groups, organizations, and societies. In particular, he examines the role of judgments about the justice or injustice of group procedures in shaping legitimacy, compliance and cooperation. His extensive research career focuses on the psychology of procedural justice—the fairness of group rules and processes. Dr Tyler is the author of several books, including *The Social Psychology of Procedural Justice* (1988); *Trust in Organizations* (1996); *Social Justice in a Diverse Society* (1997); *Cooperation in Groups* (2000); *Trust in the Law* (2002); and *Why People Obey the Law* (2006).

Matthew Vess is a graduate student in the Department of Psychological Sciences at the University of Missouri, Columbia working under the supervision of Dr Jamie Arndt. He earned his BA from Ohio University in 2005 and his MA from the University of Missouri-Columbia in 2007. His research has broadly examined how people construct and extract meaning when managing existential fears regarding the fragility of existence.

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Series Preface

Over recent years many aspects of law enforcement and related legal and judicial processes have been influenced by psychological theories and research. In turn concerns that derive from investigation, prosecution and defence of criminals are influencing the topics and methodologies of psychology and neighbouring social sciences. Everything, for example, from the detection of deception to the treatment of sex offenders, by way of offender profiling and prison management, has become part of the domain of a growing army of academic and other professional psychologists.

This is generating a growing discipline that crosses many boundaries and international frontiers. What was once the poor relation of applied psychology, populated by people whose pursuits were regarded as weak and arcane, is now becoming a major area of interest for many students and practitioners from high school through to postgraduate study and beyond.

The interest spreads far beyond the limits of conventional psychology to disciplines such as Criminology, Socio-Legal Studies and the Sociology of Crime as well as many aspects of the law itself including a growing number of courses for police officers, and those associated with the police such as crime analysts or forensic scientists.

There is therefore a need for wide-ranging publications that deal with all aspects of these interdisciplinary pursuits. Such publications must be cross-national and interdisciplinary if they are to reflect the many strands of this burgeoning field of teaching, research and professional practice. The *Psychology, Crime and Law* series has been established to meet this need for up to date accounts of the work within this area, presented in a way that will be accessible to the many different disciplines involved.

In editing this series I am alert to the fact that this is a lively new domain in which very little has been determined with any certainty. The books therefore capture the debates inherent in any intellectually animated pursuit. They reveal areas of agreement as well as approaches and topics on which experts currently differ. Throughout the series the many gaps in our knowledge and present-day understanding are revealed.

The series is thus of interest to anyone who wishes to gain an up-to-date understanding of the interplays between psychology, crime and the law.

Professor David Canter

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Preface to the Two-Volume Set

Joel D. Lieberman and Daniel A. Krauss

Over the past three decades there has been dramatic growth in the amount of research conducted that focuses on the application of psychology to legal issues. During that time period, researchers have examined issues related to evidence, testimony, and courtroom procedures with perspectives guided by their training in a variety of sub-disciplines within the field of psychology, including the areas of social, clinical, and cognitive psychology.

This two-volume set is designed to review the major areas in which psychology has been applied to court proceedings, to discuss relevant problems identified by psychological research, and to offer some perspective on how courts within and outside the United States endeavor to handle these problems. We have called upon a well-respected group of scholars to discuss psychological issues related to the procedures used by courts as well to specific types of evidence, and to specific types of trials.

The material presented in these two volumes is intended to offer an authoritative and comprehensive treatment of psychology in the courtroom. Recognizing that subdividing the chapters into two volumes has substantial benefits over one large tome, we are able to provide more expansive treatment of a wide variety of important topics by known experts in their respective fields. Such depth of coverage would not be possible in a single volume. Yet, at the same time, the two volumes afford the reader the opportunity to choose a single volume that offers exceptional depth on the topics in which he or she may be most interested.

Book Structure

The first volume, *Jury Psychology*, focuses on broad issues related to how courts and juries make decisions across a wide variety of topics with special emphasis placed on the application of psychological evidence and theory to factors that occur before and after the presentation of evidence in a standard trial, and to the nature of the trial itself. Issues from procedural justice to the psychology of jury instructions are examined in this volume. The second volume, *Psychological*

Expertise in Court, focuses on the use of psychological expert testimony and evidence in a diverse group of areas, from false confessions to sexual harassment.

Moving Beyond the Traditional Localized Focus of Research Application

In the process of conceptualizing the structure of these volumes, we realized that much of the research in psychology and law focuses on issues relevant to the United States. For example, research on jury instructions typically examines U.S.-based jury instructions; research on juror decisions in death penalty cases typically evaluates the impact of capital trial procedures in the U.S.; research in the area of defendant competency or insanity typically reviews U.S.-based criteria for such determinations. To some extent this ethnocentric focus is not surprising. Much of the relevant research has been conducted in the United States, thus researchers are simply more familiar (and concerned) with U.S.-based procedures and standards.

However, at the same time, the work in this area is generally not driven by a desire to understand U.S.-based procedures specifically, but rather from an interest in identifying problems and solutions in legal proceedings and decision-making from a psychological perspective. Psychology is based on cognitive and behavioral processes and responses, and not on national differences. Thus, many of the principles identified in U.S.-based research may be highly applicable to the legal systems of other countries as well.

We asked all of the contributors to these volumes to consider how the findings and conclusions they were writing about had international applicability. It should be noted that this volume set is not designed to provide a full international comparative analysis of the issues. Such a task would be truly daunting given the large number of legal systems that exist throughout the world. We believed that above all else, the main focus of the chapters should be on discussing the psychological principles relevant to the topic being written on. However, we felt that by asking authors to contemplate the international relevancy of their topics we could advance the application of existing research to legal systems outside the United States. In addition, we are hopeful that some international consideration of procedures used by legal systems in other countries might stimulate research in the United States, leading to the identification and application of new methods for increasing the overall fairness of the trial process.

Volume Integration

As previously noted, we felt that the topics covered in this two-volume set naturally fit into the areas covered by each volume, and that the two-volume approach allowed us (and the contributing authors) to provide greater coverage and depth for the topics than would have been feasible in a single volume. However, it is important to avoid

viewing the two volumes as separate works, or to think of the chapters within the volumes as entirely distinct. Rather, the material reviewed in various chapters is inherently inter-related. For example, to understand the impact of a specific type of evidence (e.g., sexual harassment, syndrome, insanity) one must first consider the admissibility of such information, and the likelihood that such information will be presented in court. One should then consider the type of trial in which testimony will be used (e.g., civil versus criminal, or perhaps even one where capital punishment may be considered), and special challenges that jurors may face within that type of trial. Further, it is important to understand how that testimony will impact the jurors, and how jurors will combine that testimony with information they are exposed to outside the courtroom, with previous relevant experiences they may have had, or with factors related to any important individual differences between jurors. One must then consider the instructions that a judge will provide jurors with regard to how such testimony is to be used, as well as the general instructions provided in that type of trial. Finally, overall theories of jury decision-making should be applied when attempting to determine how jurors will combine all of the information.

Thus, a true understanding of the issues involved in these volumes necessitates that readers approach the chapters in each book with a motivation to integrate the various topics. Doing so is critical for advancing one's understanding of the topics, as well as advancing future research in the field, and ultimately developing procedures that can be implemented to improve legal decision-making.

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Preface to Volume I—Jury Psychology: Social Aspects of Trial Processes

Joel D. Lieberman and Daniel A. Krauss

Jury Psychology: Social Aspects of Trial Processes focuses on the influence of trial procedures on jurors (and ultimately on other trial participants, most notably defendants). In this volume, a number of global trial context issues are discussed in chapters on procedural justice, civil trials, and capital cases. In addition, as noted above, this volume focuses on the influence of factors that occur before and after the presentation of evidence, by reviewing topics such as pretrial publicity, jury selection, and jury instructions, rather than on the evidence itself, which is covered in *Volume II—Psychological Expertise in Court*. The authors address these issues by considering how trial procedure in the United States is similar to, and different from, that of other nations.

As this volume focuses on jurors as they experience the trial process, it is not surprising that many of the chapters reflect a strong social psychological orientation. Social psychology studies how people think about, relate to, and influence each other in social settings. As juries are groups who must work together to evaluate evidence, and may bring their biases, fears, and desires produced by a lifetime of experiences into the deliberation room, social psychology is highly relevant. As a result, social psychological theories provide a framework for predicting how jurors will incorporate different types of information into their decision-making. In addition, the traditional social psychological approach to conducting research involving a heavy emphasis on laboratory experiments is clearly seen in the techniques commonly used to study jurors (and other trial participants).

As a result, this volume begins by addressing the validity of jury decision-making research. In Chapter 1 David DeMatteo and Natalie Anumba discuss the development of research in this area. They then focus on the methodological approaches commonly used to study jurors, including the strengths and limitations of the typical research design. DeMatteo and Anumba then discuss the response of the legal community and social scientists to jury decision-making studies. The chapter concludes with a consideration of the degree to which valid inferences can be made from the findings that are obtained. Consequently, this

introductory chapter allows a context for interpreting the conclusions of many of the other chapters in this volume, as well as many of the chapters in the accompanying volume (*Volume II—Psychological Expertise in Court*).

Next, Chapter 2, provided by Tom Tyler, focuses on a discussion of procedural justice issues. Tyler reviews relevant research that has been conducted in this area over the past two decades. This research reveals that individuals are not motivated exclusively by self-interest, where their only concern is the outcome of a trial, but rather that the perceived fairness associated with the trial process itself is also highly important. Tyler discusses these issues in the context of the importance of maintaining public trust in the courts.

Chapter 3 presents a review of theoretical models of jury decision-making that have been developed by psychologists. In this chapter, Jennifer Groscup and Jennifer Tallon discuss the “Story Model” theory that maintains jurors attempt to integrate trial evidence as well as extra-legal evidence (e.g., pre-existing beliefs about the defendant based on defendant characteristics) through the development of a narrative structure. In addition, the theory of “Commonsense Justice” is examined. Commonsense justice maintains that jurors’ notions regarding what the law is or should be may differ from the law that is presented by the judge. The theory also maintains that jurors tend to rely on their commonsense beliefs over the stated law in their verdict determination. Groscup and Tallon also discuss more specific models that have been used to better understand jury decision-making, such as persuasion theories and other dual process models. This chapter provides readers with a basis for integrating the material presented in chapters that focus on specific elements of the trial process such as pretrial publicity, types of evidence, and jury instructions.

The biasing effects of pretrial publicity and inadmissible evidence are discussed by Joel Lieberman, Jamie Arndt, and Matthew Vess in Chapter 4. Procedural solutions to the problems of exposure to this type of information are reviewed. In terms of pretrial publicity, the authors compare approaches used in the United States (e.g., change of venue) with those commonly used in other nations, most notably the use of *sub judice* restrictions that prevent those involved with the case from publicly discussing it. A central focus throughout the chapter is the effects of admonitions delivered by the judge to disregard information. Lieberman et al. use a social psychological perspective to discuss these issues and to make several policy recommendations.

In Chapter 5, Joel Lieberman and Jodi Olson review the process and effectiveness of jury selection. More specifically, the authors discuss the relationship between individual differences (in terms of demographic and personality factors) and verdict decisions in criminal and civil cases. The authors also examine the “scientific jury selection” approach, and attempt to answer whether this recent approach to selecting jurors is superior to traditional approaches used by attorneys. In addition, the authors compare the jury selection approaches used in the United States, where jurors may be questioned extensively, leading many to be excluded from serving on a jury

(based on their responses or individual characteristics), to approaches used in other countries where minimal questioning occurs and exclusions are quite rare.

In Chapter 6, Joel Lieberman discusses the overall comprehensibility of jury instructions. Lieberman points out that jury instruction comprehension rates tend to be alarmingly low, and examines potential causes for the low comprehension rates among jurors. A variety of potential procedural solutions to improving the instruction process are presented. The chapter concludes with a discussion regarding the extent to which courts in the United States have begun to revise their instructions based on the recommendations proposed by social scientists.

Although jurors' primary job is to determine verdicts, in some cases jurors may have the power to sentence a defendant as well. The most important type of case where jurors have sentencing power is death penalty cases. In Chapter 7, Mona Lynch discusses issues associated with juror selection and decision-making in capital cases. In particular, the issue of bias created by the "death qualification" process of selecting jurors is explored. Lynch also reviews the impact of defendant and victim characteristics, evidence factors, and jurors' confusion and resistance to instruction guidance in capital cases.

The broad topic of civil trials is reviewed by Edith Greene in Chapter 8. Greene begins with a review of the nature of civil trials and provides a comparative look at civil trials in other countries. The issue of the vanishing civil jury in nations outside the United States is an area of particular interest for this author. Greene explores concerns that have been raised about civil juries, and whether their decisions tend to occur on an arbitrary and unpredictable basis. Greene concludes with a discussion as to whether jurors are able to understand the complexity of evidence and instructions that may be present in civil trials.

We hope that readers will enjoy the depth of coverage of each of these chapters. The authors have not only provided a thorough discussion of the relevant literature, but have also taken into account a variety of international considerations for each topic. It is our hope that this approach will stimulate readers to consider the effects of different trial procedures (as well as cultural customs) on the dynamics of juror behavior, as well as the behavior of other trial participants.

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Psychology in the Courtroom

This two-volume set explores the major areas in which psychology has been applied to court proceedings. A renowned group of psychological and legal scholars explore relevant problems that are created by or influence courtroom procedure and trial outcome from a psychological perspective. The authors discuss how courts within and outside the United States endeavor to handle these problems, and present empirically based potential policy solutions for these issues.

Readers may also be interested in the accompanying volume: *Psychological Expertise in Court* edited by Daniel A. Krauss and Joel D. Lieberman. In this volume, authors direct their attention to the use of psychological expert testimony and evidence in a variety of legal contexts. They explore the controversies that surround it, from questions of its admissibility to its effects on eventual juror decisions. A wide range of topics are covered including expert testimony on psychological syndromes and recent research on false confessions. The authors also provide a comparative analysis exploring how different types of psychological expert testimony and evidence are used by different countries' legal systems. The authors conclude by making specific recommendations for how psychological research and information could be better utilized by courts around the world.

Contents to Volume II: Preface, *Daniel A. Krauss and Joel D. Lieberman*; The Admissibility of Expert Testimony in the United States, the Commonwealth, and Elsewhere, *Daniel A. Krauss, Desiree Cassar, and Allison Strother*; Psychological and Cultural Aspects of Interrogations and False Confessions: Using Research to Inform Legal Decision-Making, *Richard A. Leo, Mark Costanzo, and Netta Shaked*; System and Estimator Variables in Eyewitness Identification: A Review, *Solomon M. Fulero*; Insanity in the Courtroom: Issues of Criminal Responsibility and Competency to Stand Trial, *Patricia A. Zapf, Tina M. Zottoli, and Gianni Pirelli*; Psychological Syndrome Evidence, *M. Alexis Kennedy*; Child Sexual Abuse and the Courts, *Susan R. Hall*; Sexual Harassment: Antecedents, Consequences, and Juror Decisions, *Sarah M. Greathouse, Lora M. Levett, and Margaret Bull Kovera*.

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Chapter 1

The Validity of Jury Decision-Making Research

David DeMatteo and Natalie Anumba

Synopsis

The past several decades have witnessed remarkable growth in the amount of research that examines the application of psychology to legal issues. One important focus of this growing body of research is jury decision-making. Although researchers have amassed a considerable body of research examining various aspects of jury decision-making, there is often a reluctance among social scientists and legal practitioners to accept the research findings due to doubts regarding the validity of the research. In particular, critics of jury decision-making research point to concerns relating to the methodological soundness and resulting ecological validity of much of the research. As such, the validity of jury decision-making research, as well as other research that examines the application of psychology to legal issues, remains a hotly debated topic. We begin this chapter with a brief discussion of the history of jury decision-making research and the typical research designs used to study jury decision-making. Next, we discuss the responses to jury decision-making research among the legal community and social scientists. Finally, after addressing the major criticisms that have been leveled against jury decision-making research, we address the important question of whether jury decision-making research permits valid inferences.

The Validity of Jury Decision-Making Research

Perhaps the most interesting and noteworthy aspect of the legal system in the United States is the means by which many decisions are made. In many criminal and civil trial contexts, the outcomes are not determined by legal experts; rather, the decisions are made by a group of laypeople who typically have no formal legal education (Devine et al., 2001). As noted by Kalven and Zeisel (1966), the

only legal “training” these individuals typically receive is the instructions provided to them by the judge presiding over the specific case, yet they are often expected to parse legal intricacies, weigh evidence and testimony that may be confusing or even contradictory, and come to a consensus regarding criminal culpability or civil liability.

Because of their prominent role in the United States legal system, juries have attracted a considerable amount of attention from those who work within the legal system and those who study the legal system. The role, utility, and functioning of juries have been the frequent subjects of debate among legal practitioners and legal scholars. Further, as noted by Greene and colleagues (2002), social scientists have devoted a great deal of attention to various aspects of jury functioning over the past 30 years. Despite the wealth of research on juries, the validity of the research findings is still a hotly debated topic. Methodological limitations and sampling considerations, among other concerns, have led some researchers and practitioners to conclude that findings derived from jury research are suspect. On the other hand, many researchers assert that the methodological concerns relating to jury decision-making research have been largely overstated and do not provide sufficient justification for questioning the ultimate utility of this line of research.

This chapter will begin with a brief discussion of the history of jury decision-making research. Next, we will describe the research designs that are most commonly used in jury decision-making research. We will then address the important question of whether the research that examines jury decision-making, particularly those studies that employ jury simulation approaches, permits valid inferences. Finally, after discussing the reception and use of jury research by legal practitioners, we will conclude this chapter by identifying promising avenues for future research.

The History of Jury Decision-Making Research

Despite the jury’s longstanding role in the legal system, conducting research on topics related to jury decision-making is a fairly recent endeavor. The beginning of social scientists’ systematic and empirical inquiry into the legal phenomenon of jury decision-making is often traced to the University of Chicago Law School’s Jury Project (Bornstein, 1999; Devine et al., 2001; Dunn, 2003; Greene et al., 2002; MacCoun, 1989). The Chicago Jury Project, which began in the early 1950s, was an investigation into the role and function of U.S. juries. The goal of the project was to bring together social scientists and attorneys in an effort to answer a variety of interdisciplinary questions about juries. The project’s findings were subsequently described in two publications: Zeisel, Kalven, and Buckholz’s *Delay in the Court* (1959), and Kalven and Zeisel’s *The American Jury* (1966). The researchers involved with this project gathered data from 3,576 U.S. criminal jury trials and compared the verdicts rendered by the juries with hypothetical verdicts the judges would have rendered. The project examined when and how the judges and juries disagree, and

results revealed total agreement between judge and jury in roughly 75 percent of the cases. When judge and jury disagreed, Kalven and Zeisel (1966) noted that the disagreement was most often due to the jury's lenience in comparison to the judge's preferred verdict.

The Chicago Jury Project and its resulting publications were noteworthy for their empirical examination of the legal decision-making process. Despite its importance, the end of the project brought with it a temporary halt on most research related to the functioning of juries (Devine et al., 2001; Dunn, 2003). One possible explanation for the decrease in jury decision-making research after the Chicago Jury Project is the uncertainty that permeated the field at the time. Greene et al. (2002) highlight the presence of several questions that plagued jury decision-making research after the Chicago Jury Project: Does jury decision-making, in its characteristic study of people functioning as a group, belong more properly in the domain of social psychology? Alternatively, does the investigative attention to the mental processes responsible for the evaluation of evidence and selection of a verdict place it in the purview of cognitive psychology? Precisely what is the purpose of such research, and who are its consumers? Is such research intended for psychologists as another facet of basic research, or is this inquiry a new application of social science principles that would be of interest to legal practitioners? It was not until the 1970s that answers to these questions began to come forward.

The Revival of Jury Decision-Making Research

The 1970s marked the end to the self-imposed moratorium on jury decision-making research. Several factors were responsible for this revival. First, during the 1970s, social psychologists were undergoing an identity crisis of sorts; the field of social psychology had earned an unfavorable reputation for being largely irrelevant in the "real world," and social psychologists sought to address this criticism by researching the legal process. Second, the study of psychology and law became its own field in the 1970s, and one of its first targets of research was jury decision-making. Finally, as will be discussed in the next few paragraphs, several noteworthy decisions from the Supreme Court of the United States generated new interest in social science research applied in legal contexts.

In 1968, in *Witherspoon v. Illinois*, the U.S. Supreme Court addressed the issue of whether excluding potential jurors during the *voir dire* process due to their reservations regarding the death penalty violated the defendant's Sixth and Fourteenth Amendment rights to a trial by an impartial jury. To support his case, the defendant presented studies conducted by social scientists. The Court concluded that it is a violation of the defendant's constitutional right of due process to exclude from the jury those who have general objections to the death penalty or moral or religious concerns about inflicting it. Although the Court ruled in favor of the defendant, the Court was not impressed with the state of the social science research

into jury decision-making, calling it “tentative and fragmentary” (*Witherspoon v. Illinois*, 1968, p. 517). Importantly, however, this case demonstrated the Court’s willingness to consider relevant social science research (Bersoff, 1987; Diamond, 1997; Wrightsman, 2001).

The Supreme Court further demonstrated its willingness to review social science research in *Williams v. Florida* (1970), when it considered the constitutionality of using a six-member jury rather than the traditional 12-member jury in the context of a criminal trial (Suggs, 1979). Citing six relevant research studies, the Court held that using a jury of six people in state criminal courts was as equally effective as using a jury of 12 people and, therefore, would not violate the defendant’s right to a jury trial guaranteed by the Sixth Amendment to the U.S. Constitution, or the defendant’s right to due process of law guaranteed by the Fourteenth Amendment to the U.S. Constitution (MacCoun, 1989; Suggs, 1979; Wrightsman, 2001).

After *Williams*, researchers took renewed interest in jury decision-making research, and the controversial *Williams* decision was followed by a number of studies that addressed jury size (Devine et al., 2001; Schuller and Yarmey, 2001). This research was acknowledged by the Supreme Court in *Colgrove v. Battin* (1973), in which the Court upheld its earlier decision in *Williams* by concluding that six-member juries in civil cases do not violate one’s right to a trial by jury (Devine et al., 2001; see Chapter 8 in this volume for further discussion of civil trial issues). In the aftermath of *Colgrove*, it was discovered that the four studies cited by the Supreme Court were not scientifically sound and actually provided weak support for the Court’s decision (Suggs, 1979; Wrightsman, 2001; Zeisel and Diamond, 1974). The discovery of the flawed research sparked a demand within the legal community for methodologically sound research, which led to increased legal research by social scientists (Devine et al., 2001; Schuller and Yarmey, 2001).

In 1978, in *Ballew v. Georgia*, the Supreme Court again addressed the issue of jury size. In *Ballew*, the Court addressed the constitutionality of using a five-member jury in a criminal trial. Relying on social science research, the Court concluded that juries smaller than six persons engage in biased decision-making that violates a defendant’s Sixth and Fourteenth Amendment rights (Thompson, 1993; Suggs, 1979). The Court’s reliance on social science research led to a sharp rise in jury decision-making studies. Importantly, as noted by Thompson (1993), *Ballew* demonstrated a real legal interest in psychological research and the potential for such research to influence procedural and policy decisions in an effort to make the legal system function more efficiently.

As Greene et al. (2002) noted, jury decision-making research received another boost in the 1970s when psychology and law became an established independent field, as opposed to an unclearly defined subset of various psychological disciplines. Several developments in the 1970s are noteworthy. The early 1970s witnessed the founding of the first joint-degree program in psychology and law (at the University of Nebraska). Further solidifying the independence of the field was the birth of the American Psychology-Law Society as both an official division of the American

Psychological Association (Division 41) and a freestanding organization. Bornstein (1999) noted that the year 1977 marked the publication of *Law and Human Behavior*, which was the first journal dedicated to research in the interdisciplinary field of psychology and law. Greene et al. (2002) noted that the formation of an independent field of study and an organization dedicated to such research stimulated jury research on newer topics and made the social science literature more visible to those in the legal community.

Methods Used to Study Jury Decision-Making

Before discussing the research methods commonly used in jury decision-making research, it is important to emphasize that the majority of jury decision-making research conducted in the U.S. focuses on the American legal system. The almost exclusive research focus on the American legal system is attributable to several factors, perhaps the most noteworthy of which is the often times widely differing legal systems used outside of the U.S. Lloyd-Bostock (1995) noted that in England, for example, the use of juries has declined in recent years largely due to concerns regarding the efficiency of the legal process. According to Martin et al. (2003), France, Italy, Germany, and Portugal use the *escabinado* system, in which laypeople and professional judges decide the verdict and sentence for criminal cases only. In other countries, such as Canada, the jury trial process is similar to the process used in American courts, but federal law prohibits the disclosure of deliberation contents by any member of the jury (see Canada Criminal Code, R.S.C. c. C-46 § 649, 1985). These differences from the American jury system make it difficult for researchers to conduct international research because it would require the researchers to develop a high degree of familiarity with these different legal processes. The almost exclusive focus on the American legal system also means that the research findings may have limited generalizability outside of the U.S.

Although the interest in jury decision-making research resurfaced in the 1970s, the ability to conduct such research did not, primarily because researchers faced a variety of obstacles in their efforts to collect data. Interestingly, the most significant obstacle was in reality a result of the hallmark study responsible for the birth of jury decision-making research. As noted by Devine et al. (2001), in addition to collecting survey data from judges trying jury cases, the Chicago Jury Project covertly recorded actual jury deliberations. Dunn (2003) noted that the researchers, with the consent of the trial judge and counsel for both sides, recorded the deliberations of five civil cases tried through the federal district court in Wichita, Kansas without the knowledge of the jurors involved. Eventually, the matter came to the attention of the U.S. Congress and, after an investigation by the Subcommittee on Internal Security of the Senate Judiciary Committee, Congress passed federal legislation in 1956 prohibiting the recording or observation of the deliberations of any grand or petit jury (18 U.S.C. § 1508; see Devine et al., 2001; Dunn, 2003; MacCoun, 1989). Similar legislation

followed in many states (Devine et al., 2001; Kalven and Zeisel, 1966). This type of legislation brought about the halt of many other research efforts until the 1970s. Even after such research was revived in the 1970s, researchers faced significant legal difficulties (Devine et al., 2001; Dunn, 2003). As a result of the bar on recording or observing juries during deliberations, several commentators, such as Schuller and Yarmey (2001), have noted that jury deliberations have become a mysterious and even secretive aspect of the legal process.

In addition to legal impediments, there are several relevant practical considerations that affect research efforts into jury decision-making. For example, court procedures may conflict with the requirement of the experimental protocol, which can affect the resulting validity of the study. In addition, key players in the legal process—i.e., judges, attorneys, jurors—may be difficult to recruit as study participants. Moreover, enlisting the cooperation of the judge or attorney may be a difficult process, and this cooperation is subject to change at any time during the study as dictated by the demands of justice and the whim of the court. It is also impossible to replicate actual trials, which makes replication of previous research more difficult. Finally, as noted by Kerr and Bray (2005), the process of manipulating variables in a research context may violate the Fourteenth Amendment's equal protection mandate that every defendant enjoy legal protection equal to that of other defendants in comparable situations.

Limited access to the jury and numerous hindrances associated with jury decision-making research slowed the progress of research in this arena, but did not completely derail it. In the face of these challenges, researchers developed a host of alternative methods to conduct jury decision-making research (Dunn, 2003; MacCoun, 1989; Schuller and Yarmey, 2001). Devine et al. (2001) noted that social scientists have since adopted four principal approaches to the study jury behavior, with each approach bearing unique strengths and weaknesses. The approaches are field studies, post-deliberation interviews, archival record review, and jury simulation research.

Field Studies

In the jury research context, a field study involves the natural observation of actual jurors during a trial (Devine et al., 2001; Kerr and Bray, 2005). MacCoun (1989) reports some instances in which a court cooperating with researchers agreed to use random assignment to compare one type of legal procedure with another. However, MacCoun notes that due to legal, ethical, and practical considerations, these instances are the exception rather than the rule. According to Dunn (2003), although the field study is not often used in jury research, it can be informative because it draws upon actual jurors in a live setting. However, field research uses small sample sizes, and it tends to be expensive, time-consuming, and difficult to conduct (Kerr and Bray, 2005; Devine et al., 2001; Dunn, 2003). Moreover, the validity of results obtained from such research is usually quite limited.

Importantly, there have been attempts in recent years to study courtroom processes using highly valid field studies. In 1995, the Arizona Supreme Court reformed the civil trial process by authorizing jurors to discuss trial evidence with each other before formal jury deliberations take place. A group of researchers has begun examining the potential effects of this reform on the jury decision-making process. Preliminary studies of civil jury trials that were randomly assigned to either a no discussion condition or a trial discussion condition have revealed generally positive responses from judges and jurors, and mixed responses from attorneys and litigants (see Hans et al., 1999).

Post-Deliberation Interviews

Another method employed by researchers is the post-deliberation interview of jurors who recently completed their service (Devine et al., 2001; Kerr and Bray, 2005). In a variation of this method, researchers survey more expert and experienced legal participants, such as the judge, about what they believe were the major influences in the development of the jury's verdict (Kerr and Bray, 2005). The post-deliberation interview, used primarily by researchers in the U.S., is an uncomplicated research approach that yields useful data about actual jurors. According to Dunn (2003), although this method has not been employed often, it is increasing in popularity. However, the post-deliberation interview is vulnerable to inaccuracies in memory, hindsight bias, and participants' unawareness of the factors that influenced their decision-making (Devine et al., 2001; Schuller and Yarmey, 2001).

Archival Records

Court records are a valuable source of data for researchers, as are court reporting services, police records, criminal report records, and prosecution files (Devine et al., 2001; Kerr and Bray, 2005; MacCoun, 1989). The archival analysis method entails coding data previously recorded during the course of routine court administration. Researchers subsequently analyze these data in an effort to detect and describe patterns, trends over time, or relationships between case characteristics and the verdict (Dunn, 2003; MacCoun, 1989). According to Dunn (2003), like the field observation and interview methods, the archival analysis obtains its data from actual events. Conversely, archival study data are not collected for the purpose of research and, as such, tend to omit variables of interest to researchers (Devine et al., 2001; MacCoun, 1989). In addition, according to Schuller and Yarmey (2001), the absence of control over the variables that may influence outcomes limits the conclusions researchers can draw from the data.

Jury Simulation Research

The final method employed by researchers is an experimental method more removed from the court environment in which a simulated trial may be developed in lieu of an actual court proceeding (Devine et al., 2001). Although the simulation is removed from the court environment, Kerr and Bray (2005) note that researchers use this method because simulations attempt to mimic certain key features of the legal process. When conducting jury simulation studies, researchers recruit study participants and ask them to adopt the role of jurors. The mock jurors then review a case presented to them, come to a decision regarding the outcome, and answer questions about their final decision and their decision-making process (MacCoun, 1989; Schuller and Yarmey, 2001; Thompson, 1993). Within these trials, the researchers systematically manipulate the variables of interest (Schuller and Yarmey, 2001; Thompson, 1993). Such a method may elucidate how jurors behave in the legal setting, a benefit not found with the field methods, because it allows for control over the variables of interest and the exclusion of unimportant and/or confounding variables (Dunn, 2003; Kerr and Bray, 2005). In jury decision-making research, the trial simulation is by far the most common method used by social scientists (Bornstein, 1999; Dunn, 2003; Kerr and Bray, 2005; Levett et al., 2005; Lieberman and Sales, 2000; Schuller and Yarmey, 2001; Thompson, 1993).

More about Trial Simulations

Given the frequency with which researchers use the jury simulation method, additional attention is warranted. Dunn (2003) observed that the term *simulated trial* is a broad label that incorporates many dimensions, including the sample used, trial presentation medium, research setting, trial elements included, measurement of the dependent variable, and unit of analysis. The samples employed in jury simulations vary from undergraduate students to jury-eligible adults residing in the community (Bornstein, 1999; Diamond, 1997; Kerr and Bray, 2005). Some studies also recruit as their sample former jurors who recently completed their service, prospective jurors who appear for jury duty but are not seated, or jurors who are in the midst of an extended term of service (Devine et al., 2001; Diamond, 1997).

Also adjustable are the way in which the trial evidence is presented to the mock jurors and the setting for the simulation. Commonly used presentation media are written descriptions of facts, written trial summaries, transcripts, audio-taped or video-taped testimony, and live re-enactments (Bornstein, 1999; Devine et al., 2001; Diamond, 1997; Greene et al., 2002; Kerr and Bray, 2005; Thompson, 1993). In terms of research setting, simulation research may occur in a laboratory, classroom, mock courtroom, or actual courtroom (Bornstein, 1999; Kerr and Bray, 2005).

Researchers who conduct trial simulations may also include or exclude various aspects of trials according to the specific study purposes and available resources. As

such, trial simulations in the context of research may differ in the presence or absence of certain trial elements, including *voir dire*, opening and closing statements, witness testimony, jury instructions, and jury deliberations (Bornstein, 1999; Diamond, 1997; Kerr and Bray, 2005). Depending upon the nature of the specific research question and the variables of interest, some studies may involve an elaborate trial simulation that includes many trial elements, while other studies include only one element of interest.

The manner in which the dependent variable is measured and the unit of analysis being employed also stem from the research question being addressed in the study. The dependent variable may be dichotomous, such as the guilty/not guilty determination applied by courts during most criminal cases, or continuous, such as asking jurors to estimate the probability of guilt. Importantly, the continuous scale lends itself to more sensitive statistical analysis of the potential relationship between the variables of interest (Bornstein, 1999; Diamond, 1997; Kerr and Bray, 2005; Mitchell et al., 2005). Some studies may employ categorical measures, such as a set of verdict choices that include any combination of guilty, guilty but mentally ill, not guilty by reason of insanity, and not guilty (Devine et al., 2001; Kerr and Bray, 2005). Kerr and Bray (2005) also note the inclusion of sentence recommendations and civil damage awards as dependent variables. In reaching their conclusions, researchers can focus on jury decision-making at the level of the individual juror or the level of the jury as a group.

Given financial, practical, legal, and ethical considerations, researchers tend to rely on a relatively small set of methodological approaches. For example, as noted by Lieberman and Sales (2000) and Mitchell et al. (2005), study samples are frequently composed of undergraduate students due to their high availability and easy accessibility. As such, the most common trial simulation approach used by researchers consists of casting undergraduate psychology students as mock jurors who are asked to read a brief written summary of the facts of a case in a laboratory setting (Köhnken, 1996; Wilson and Donnerstein, 1977). Schuller and Yarmey (2001) noted that jury simulations tend to be much shorter and less complex than actual trials as a way of maintaining control over the variables of interest. As such, findings derived from jury simulation research may not generalize to actual cases, which may be lengthy and complex.

Research Methodology

One important goal of applied research is accurately answering a research question in a way that will ultimately be useful to consumers. Central to this goal are the notions of internal validity and external validity. *Internal validity* may be conceptualized as the ability of a research design to rule out or make implausible alternative explanations of the results (Campbell, 1957; Kazdin, 2003; Marczyk et al., 2005). In other words, a study high in internal validity allows a researcher to conclude that changes in

the dependent variable are due to changes in the independent variable. According to Marczyk et al. (2005), internal validity is generally enhanced by eliminating or minimizing the effects of extraneous influences, variables, and explanations that might detract from the accuracy of a study's findings—i.e., maintaining a high level of experimental control. By contrast, *external validity* refers to the degree to which research results generalize beyond the study to other samples, settings, and conditions. External validity can therefore be enhanced by using samples, settings, and conditions that are similar to the aspects of the phenomenon in which the researcher is primarily interested (Dunn, 2003; Kazdin, 2003). Notably, there exists an inverse relationship between internal and external validity, so that too much attention to one sacrifices the other. Consequently, according to Kazdin (2003), designing a study often involves striking a delicate balance between internal and external validity.

A concept related to external validity is ecological validity. Although these terms are occasionally (and incorrectly) used interchangeably, Marczyk et al. (2005) note that a clear distinction can be made between these two concepts. External validity is a more general concept that is ultimately concerned with the conclusions that can be drawn about the strength of the inferred causal relationship between the independent and dependent variables to circumstances beyond those experimentally studied. By contrast, ecological validity is a more specific concept that refers to the generalization of findings obtained in a laboratory setting to the real world. According to Dunn (2003), ecological validity is often described as a measure of structural verisimilitude, or how realistic the research design appears to be.

Much of the discussion of research in the field of psychology and law concerns itself with the delicate balance that yields research of good quality. Although research of good quality is important in all fields, the issue of quality is given somewhat more weight in the interdisciplinary field of law and psychology due to its diverse consumers and the potential impact it can have on the functioning of the legal system. One measure of the quality of jury decision-making research is the degree to which the research has been well received by the legal community.

Legal Response to Jury Decision-Making Research

Thompson (1993) reports that legal practitioners and scholars rarely make use of available social science data. Historically, courts have been reluctant to accept social science research for two reasons. First, social scientists have often focused on questions that are not of direct interest or relevance to the legal field. According to Thompson (1993), this was particularly true in the developmental stages of the field of psychology and law, when researchers were concerned more with theoretical science issues than with applied legal questions. This focus resulted in jury studies that were an inaccurate representation of the legal phenomena with which they were concerned. Thompson (1993) noted that these studies consequently diminished

social scientists' credibility to legal practitioners and infused the legal community with a high degree of skepticism regarding social science research.

Second, as noted by Bornstein (1999), legal practitioners are critical of research that does not seem relevant outside of the research context or to processes actually found inside the courtroom. In short, legal practitioners appear to place a disproportionately high premium on the external and ecological validity of research when gauging a study's usefulness (Dunn, 2003; Kerr and Bray, 2005). Because of this emphasis, findings from studies conducted in ways that do not precisely approximate the workings of a courtroom are not very persuasive to legal practitioners; as noted by Kerr and Bray (2005), judges, legislators, and attorneys are most swayed by research that displays high levels of ecological validity. A general lack of ecological validity is one of the oldest and most significant criticisms the legal system has leveled at social science research, particularly jury research, because there is an implicit concern that low ecological validity indicates low external validity. In other words, there is a concern that a study's findings will apply only in the laboratory setting and be of little use outside of it (Dunn, 2003; Wrightsman, 2001). This concern has occasionally led the U.S. Supreme Court to discount or reject research on relevant issues.

One striking example of such a rejection occurred in *Witherspoon v. Illinois* (1968), in which the Court rejected several research studies due to methodological concerns. Among the criticisms of the studies was the complaint that three studies failed to sample actual jurors, and two studies failed to simulate deliberations and did not exclude potential jurors whose strong opposition to capital punishment rendered them ineligible to serve on a capital jury. The remaining study was considered inappropriate because of its use of simulations. Because of the flaws in the available research, the Court noted that it is impossible to conclude that excluding potential jurors strongly opposed to capital punishment left the remaining jury unconstitutionally predisposed to convict the defendant (*Witherspoon v. Illinois*, 1968; see Diamond, 1997; Wrightsman, 2001).

Despite increases in the amount of jury decision-making research since *Witherspoon*, the concern over the ecological validity of jury research has remained firmly intact. *Lockhart v. McCree* (1986) is particularly notable in this regard. In *Lockhart*, the Supreme Court examined 15 empirical studies presented by the petitioner and rejected all but one study on the grounds that they were unacceptable on methodological grounds. Of the 15 studies presented, only six claimed to examine empirically the issue of interest to the Court (Diamond, 1997; *Lockhart v. McCree*, 1986; Penrod and Cutler, 1987). Of these six studies, the Court noted that three had been previously rejected in *Witherspoon v. Illinois* (1968) and, therefore, remained inappropriate. The three remaining studies used randomly selected individuals from the general population rather than sworn jurors. In addition, two of these three studies engaged in unrealistic simulations in that they did not mimic jury deliberation or predict the effect of excluding jurors strongly opposed to capital punishment on the final verdict. Because of these concerns, the Court concluded that it was unable to

use these studies to predict the behavior of sworn jurors in an actual trial (Dunn, 2003; *Lockhart v. McCree*, 1986).

Similar concerns were expressed by the United States Court of Appeals for the Seventh Circuit in *Free v. Peters* (1993), a case that examined jurors' ability to comprehend legal instructions provided to them. In *Free*, the court was not persuaded by a study in which potential jurors were given a written test to assess their comprehension of jury instructions. The court placed no reliance on the study, citing concerns relating to poor internal validity and poor ecological validity. In terms of internal validity, the court was concerned because the study lacked a control group. In terms of ecological validity, the court was concerned about the lack of comparability between the test setting and the setting of the sentencing hearing.

The primary concern illustrated by these cases, and many other cases not discussed in this chapter due to space limitations, is that jury simulation research is low in ecological validity and, therefore, not particularly useful in actual civil and criminal trials. Stated more specifically, there is lingering concern that research studies involving college students pretending to be jurors in a trial that consists entirely of brief written summaries do not yield information that is relevant to and predictive of the behavior of actual jurors in an actual trial. In the next section, we take a look at the major criticisms leveled by social scientists against jury decision-making research.

However, before proceeding, it is important to note that the ultimate decision regarding the admissibility of particular research rests with the judge, which raises several concerns. Although judges often express justifiable apprehension regarding the scientific rigor of some of the research sought to be introduced in their courts, there exists some concern regarding judges' abilities to properly evaluate the methodological integrity of social science research (Bersoff, 1987; Diamond, 1979; Suggs, 1979). For many years, scholars have argued that a lack of guidance for judges regarding what constitutes good science, combined with a lack of training in research methodology, may leave the inclusion or exclusion of scientific evidence subject to judges' assumptions and bias (Diamond, 1979; Suggs, 1979). Although the U.S. Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals* provided trial court judges with guidance regarding what constitutes good science, it still requires judges to have some degree of knowledge regarding things such as the scientific method, the concept of falsifiability, and measurement error rates.

Criticisms from Social Scientists

Legal professionals are not the only ones to express concerns about jury decision-making research. Indeed, fellow social scientists have also disputed the validity of jury decision-making research. Debates over the validity of jury decision-making research are not new; the published results of the Chicago Jury Project generated criticisms of the project's methodology and conclusions (Bornstein, 1999; Dunn,

2003). Despite the popularity of simulation research, the criticism from social scientists grew as research expanded during the late 1970s. The concerns were centered primarily on the lack of ecological validity (Dunn, 2003; Kerr and Bray, 2005; Levett et al., 2005; Lieberman and Sales, 2000). The fact that social scientists have expressed concerns over the validity of such research is significant. It is often easy to dismiss the concerns expressed by legal professionals on the grounds that they lack formal training in research design and methodology, but the same cannot be said of social scientists (Greene et al., 2002).

Validity concerns came to the forefront in 1979, when *Law and Human Behavior* published a special issue that focused on research in the field of psychology and law (Diamond, 1997; Greene et al., 2002). The articles in this issue highlighted the importance of jury decision-making research, publicized validity concerns, examined the usefulness of the research, and discussed misuse of the research (Diamond, 1979; Greene et al., 2002). The criticisms articulated in the special issue were well known before the issue's publication and have since been echoed by a number of authors. These criticisms revolve around the study samples commonly used in jury research, choice of dependent variables, the use of hypothetical cases and decisions, and the use of unrealistic trial presentations. Ultimately, concerns centered on the artificiality of jury simulation research, which resulted in low ecological validity. These criticisms will be addressed in the sections that follow.

Study Samples

The samples used in jury decision-making research are a focus of concern because many studies make use of undergraduate psychology students (Greene et al., 2002; Levett et al., 2005; Lieberman and Sales, 1997). Marczyk et al. (2005) note that criticisms associated with using samples of convenience are not new. Some assert that student samples do not adequately reflect actual juries because students tend to be younger, perform better on certain cognitive tasks, and are more vulnerable to social pressures relative to adult community members (Diamond, 1997; Dunn, 2003). Students also tend to be less demographically diverse than community members. According to Mitchell et al. (2005), also noteworthy is the fact that African-American mock jurors were often excluded in studies of racial bias in jurors, thus rendering the sample more homogenous than the population of interest. Ultimately, concerns expressed about the study samples center on the lack of representativeness of the sample, which can negatively affect the external validity of the study's findings.

Dependent Variables

Another major source of criticism is the choice of dependent variable and how it is measured (Bornstein, 1999; Dunn, 2003; Greene et al., 2002; Lieberman and Sales, 1997). Although a continuous guilt probability scale allows for more precise statistical tests, it is not realistic given that trial outcomes are either dichotomous

(i.e., guilty, not guilty) or categorical (i.e., guilty, not guilty, guilty but mentally ill, not guilty by reason of insanity) (Diamond, 1997; Mitchell et al., 2005). Moreover, according to MacCoun (1989), jurors' decisions tend to be influenced by the presence of multiple response options, which further limits the validity of this research.

Hypothetical Cases

Researchers have also expressed doubts about the validity of decisions made by participants pretending to be jurors trying a hypothetical case whose outcome had no actual consequences (Bornstein, 1999; Diamond, 1997; Greene et al., 2002; Levett et al., 2005; Lieberman and Sales, 1997). Jury decision-making research involving hypothetical scenarios has been criticized for assuming that participants acting as jurors will have the ability to accurately predict their actions in real-life situations (Diamond, 1997; Wilson and Donnerstein, 1977). These concerns raise serious doubts about the validity of such research. However, as will be discussed later, the use of simulations does not inevitably lead to the conclusion that the results are of limited utility. Many other fields of study make use of simulations, in both research and training contexts, and there is little reason to believe that simulations yield unusable results.

Unrealistic Trial Presentations

Some commentators have noted that the lack of realism in jury decision-making studies negatively affects the external validity of the findings; the reliance on transcripts and written summaries to present evidence truncates trials to an unacceptable degree, which reduces the generalizability of the study's findings (Bornstein, 1999; Devine et al., 2001; Diamond, 1997; Kerr and Bray, 2005; Levett et al., 2005). Moreover, critics assert that the exclusion of jury deliberations from the simulations is problematic because of an increasing amount of research demonstrating that deliberations can sometimes influence the final verdict (Diamond, 1997; Lieberman and Sales, 1997). Specifically, this research shows that deliberations can be influential on verdicts because they provide jurors with the opportunity to correct misunderstandings of the jury instructions, which results in verdicts that are more likely to follow legal standards (Diamond, 1997; Lieberman and Sales, 1997). Kerwin and Shaffer (1994) maintain that a problem with simulation research that excludes deliberations is the improper emphasis that it places on the decisions of individuals as opposed to groups engaged in discussion. According to Kerwin and Shaffer (1994), mock jurors functioning in groups are more likely to follow judicial admonishments to disregard inadmissible evidence than mock jurors considering the case individually. They posited that the increased adherence to legal instructions in group settings is derived from jurors' accountability for their opinions and decisions when involved in group discussion and scrutiny. Wheatman and Shaffer (2001) suggest that in addition to increasing accountability, group discussion also improves

jurors' legal comprehension and assuages fear about the potential consequences of a particular verdict (e.g., the likelihood that a not guilty by reason of insanity verdict will endanger society).

However, it is also important to consider the limitations of jury deliberations. For example, some studies have found that deliberations do not necessarily yield increased juror comprehension. For instance, although jurors may be able to correct each other's factual misunderstandings during the deliberation process, the same has not been demonstrated for errors in comprehension of the law and legal process. Moreover, jury deliberation may replace individual jurors' correct understandings of the facts or the law with incorrect information (see Lieberman and Sales, 1997, for a fuller discussion of this issue).

Critics have argued that all of these methodological shortcuts lead to simulations that are highly artificial (Kerr and Bray, 2005). Supporting this view are studies which found that simulated trials may actually exaggerate the impact of the variables of interest because the independent variables became more prominent in the truncated trials than they would be in actual cases (Kerr and Bray, 2005; MacCoun, 1989). A meta-analytic review by Mitchell et al. (2005) suggested that racial bias in jurors decreased in more ecologically valid studies; the effect was most likely because the mock jurors were placed in ambiguous situations with few of the instructions typically provided in real trials. Critics have argued that these studies do not yield usable information about court processes and the people involved in them and, as such, should not be relied upon as providing useful (i.e., valid) information (Kerr and Bray, 2005). In fact, some critics have asserted that methodological concerns and the associated lack of external and ecological validity render jury decision-making studies inappropriate, particularly for research questions that require the application of scientific principles to legal issues (Kerr and Bray, 2005). Despite these valid concerns, Kerr and Bray (2005) and Thompson (1993) note that some researchers have attempted to inappropriately generalize their findings.

Is Jury Decision-Making Research (and Related Research) Valid?

Despite what appear to be myriad methodological and validity concerns, one should not simply dismiss the extant research on jury decision-making. The question of whether jury decision-making research is valid is not as straightforward as one would think. The safest conclusion may be that jury decision-making research is potentially of high value to the discerning consumer of research (Dunn, 2003; Lieberman and Sales, 2000).

Although various criticisms have been leveled against jury decision-making research, supporters of such research have responded by noting that those criticisms are overly broad, simplistic, and inadequately supported by research (Kerr and Bray, 2005). Supporters argue that part of the problem is a lack of understanding of research methodology; for example, according to Dunn (2003) and Kerr and

Bray (2005), it is common for some critics to confuse verisimilitude for ecological validity, or ecological validity for external validity. Dunn (2003) notes that although strong ecological validity contributes to high external validity, the two concepts are not identical and there are other indicators of external validity. Therefore, lack of realism in a study does not necessarily indicate low external validity, or denote a lack of usefulness of the study's findings. Furthermore, although external validity is important and must be established through replication of the study, it is impossible to replicate an experiment across all imaginable conditions, particularly one as complex as a simulated jury trial (Kerr and Bray, 2005; Thompson, 1993).

It is also important to note that jury simulation research can often be highly accurate and ultimately quite useful (Thompson, 1993). Despite differences in demographics, research thus far has discovered very little difference between student and nonstudent samples with regard to jury decision-making (Bornstein 1999; Dunn, 2003; Lieberman and Sales, 1997). Moreover, researchers in this area are becoming much more savvy in designing studies, which is contributing to the value and usefulness of the findings (Kerr and Bray, 2005; Thompson, 1993). Although continuous dependent variables that do not precisely mimic dichotomous verdicts are still in use, some researchers are using more realistic dichotomous variables paired with a continuous scale of confidence. These variables, although not entirely realistic, are useful because they help to identify jurors who are most likely to change their verdicts (Diamond, 1997; Kerr and Bray, 2005). Kerr and Bray (2005) report empirical findings indicating that the use of hypothetical scenarios with no actual consequences does not affect juror decision-making. Moreover, research suggests that the manner in which researchers present the trial to mock jurors rarely influences the outcome, most likely because the issues and decision-making processes presented in simulations are the same ones that real jurors face in an actual trial (Bornstein 1999; Dunn, 2003; Levett et al., 2005; Thompson, 1993).

Occasionally, statistically significant differences arise between more and less realistic methods. One area in which this is seen is research on the comprehension of jury instructions. These studies have found that comprehension of jury instructions is quite low among college-age students. According to Lieberman and Sales (1997), these results may be usefully extrapolated to the actual trial setting despite the finding that college students demonstrate higher levels of reading comprehension than community adults; there exists a logical implication that if even relatively cognitively accomplished persons cannot understand the intricacies of how they are to perform, then more average individuals will also encounter difficulty. The exaggeration of the independent variables that is a result of the artificial setting is valuable as well because many times the effect of the variables is rather weak. Therefore, according to Diamond (1997), if exaggerated variables yield weak effects, it is safe to conclude that the independent variable would have relatively little effect, if any, in busier real-world settings in which the independent variable is muted.

Further, a review of the literature reveals no substantive or crippling differences between student and non-student participants in simulations when examining trials

and verdicts more generally (Bornstein, 1999). The research thus far indicates that when considering the methodological value of a study and its selected sample, one must also take into account other considerations, such as the type of research being conducted and the specific variables of interest. Although university students show differences from community participants in certain dimensions, research examining the relationship between juror education and trial verdicts is inconsistent, as is research examining the relationship between other demographic variables and trial verdicts (Bornstein, 1999; Lieberman and Sales, 2007). As such, the importance of the sample composition varies between studies and is largely dependent upon the characteristics of the research study, the particulars of the case, and the issues of specific interest to the researchers.

It is interesting to note that the concerns expressed about jury decision-making research are not unique to this line of research. Similar concerns have been expressed regarding other areas of research examining the application of psychology to legal issues because they are rational points associated with the tricky balancing act involved in designing a good study. Although space limitations preclude us from providing an in-depth review of the criticisms of each area of research represented in this book, we will summarize the concerns below.

Expert testimony regarding eyewitness identification has also been subject to scrutiny by researchers and the legal community. As a result, some researchers and legal practitioners have expressed skepticism about its validity and ultimate utility, typically for the same reasons cited above in relation to jury decision-making research (Egeth, 1993; Kassir et al., 1989). Despite the debate, the body of knowledge about eyewitness testimony continues to grow at a rapid pace, and what has emerged has led to a conclusion that this topic has great potential to be useful to courts (Egeth, 1993).

Similarly, research on pretrial publicity and its potential effects on jurors' decision-making has existed for over 30 years. Although academic scrutiny of pretrial publicity research has led to the conclusion that this research has a high degree of internal validity, legal practitioners have made little use of this type of research. Moreover, according to Studebaker et al. (2002), there is still a debate among legal professionals and social scientists regarding the ecological validity of this type of research and its utility in the live trial setting.

Another controversial topic is jury selection, particularly related to the ultimate effectiveness of jury selection techniques (Lieberman and Sales, 2007; Seltzer, 2006). The controversy stems in part from the absence of clear-cut, unequivocal research supporting the use of jury selection techniques. Lieberman and Sales (2007) note that it is difficult to experimentally compare scientific and traditional methods of selection in terms of success rates regarding the prediction of trial outcomes (see Seltzer, 2006 for a discussion of situations that illustrate the difficulty in defining and identifying "success"). Although some research measures and assesses selection success, much of this research is plagued by conflicting effect sizes (Seltzer, 2006). There are also methodological concerns that mirror the concerns present in other types

of psycholegal research. Critics cite a litany of factors that can diminish the validity of jury selection research, including the artificiality of the legal cases constructed in the studies, samples that are small or have low response rates, samples that are not representative of the juror population, and the omission of legal procedures such as deliberations and judicial admonishments to set aside personal biases (Lieberman and Sales, 2007). However, one common finding that surfaces in the literature is that the effectiveness of scientific jury selection depends upon the individual case characteristics and the variables in question (Lieberman and Sales, 2007; Seltzer, 2006). Lieberman and Sales (2007) conclude that despite limitations and concerns, the field of scientific jury selection continues to develop and progress, and the addition of more research studies incorporating simulations will only enhance the field and the usefulness of this technique.

Research on false confessions has also yielded mixed results and methodological criticisms. As discussed in Kassin and Gudjonsson (2004), in this field, apprehension centers around the inability of researchers to produce stress-induced false confessions in the laboratory setting; participation in a study does not require a great deal of emotional involvement from volunteers, and it is unethical to subject volunteers to the extremely distressing conditions characteristic of police interrogations. Some express worry that laboratory studies on this topic may not generalize to actual, stressful interrogation situations. However, convergent validity plays a role here; Kassin and Gudjonsson (2004) note that different methods with complementary strengths and weaknesses together build a solid empirical foundation that may ultimately prove itself useful outside of research contexts.

With regard to the civil arena, research is emerging with attendant methodological concerns. Wiener (1999) argues that it is necessary for civil trial research to undergo further development by incorporating a variety of methods and procedure. MacCoun (1999), although speaking primarily about research in the civil trial context, makes an observation with relevance to jury research more generally in his statement that “given the inherent difficulty in anchoring jury research to objective standards of truth, some disagreements among researchers strikes me as a healthy development” (p. 729).

Particularly noteworthy is the fact that other fields make use of the simulation methods, with little evidence that the use of simulations has a detrimental effect. For example, medical schools make regular use of simulations to teach their students how to perform lifesaving procedures (Shukla et al., 2007). The National Aeronautics and Space Administration (NASA) also incorporates simulations into its training (Klein et al., 2007). Furthermore, several police departments across the U.S. use a video simulator called the Behavioral Personnel Assessment Device to predict performance and assist in police personnel selection (The B-PAD Group, Inc., 2001). In these contexts, the use of simulations is necessary, and there is little reason to believe that the simulations produce questionable results.

There is little agreement regarding the “right” or “best” way to study jury decision-making. Instead, what emerged over time is a compromise of sorts reflecting

the realization that different research questions require different methods of study, and recognition that the researcher should balance the requirements of the research question with the strengths and weaknesses of the methods available. Perhaps, as noted by Kerr and Bray (2005), the best way to determine which methods to use in a simulation study is to consider the research question and identify what behavior is under scrutiny. For example, field studies are most appropriate when assessing the magnitude of the relationship between variables, in situations featuring formal and explicit rules for behaviors, and in contexts in which behaviors are performed by those who are experienced in and knowledgeable about functioning within these rules and settings, namely, judges and lawyers. Conversely, when examining the underlying processes of a relationship or in situations in which there exist few formal rules and the behavior in question is performed by laypersons, more controlled and artificial settings may be most appropriate (Kerr and Bray, 2005; MacCoun, 1989).

Research methods may also vary depending on how far research has progressed in investigating a topic of interest. More specifically, artificial and highly controlled settings may be appropriate when examining a new topic and it is not clear whether a potential relationship exists. By contrast, replications in more realistic environments are more appropriate once internal validity has been established (Bornstein, 1999; Kerr and Bray, 2005). If a variety of methods yield similar findings, doubts about the validity and applicability will diminish and the empirical evidence will be more persuasive to those who are encouraged to use it (Devine et al., 2001; Levett et al., 2005; Schuller and Yarmey, 2001). As more research is conducted, the use of meta-analyses will become particularly important. Meta-analytic studies enable researchers to summarize an often-times seemingly diverse body of research in a succinct, easy-to-interpret manner. Meta-analyses will help researchers to examine the existence and extent of relationships between variables of interest across several studies, further strengthening the methodological foundations of this line of research.

Conclusions

Despite the wealth of research on jury decision-making and the attendant great advances in relevant knowledge, many agree that the state of knowledge is not sufficiently well developed at the present time (Greene et al., 2002; MacCoun, 1989; Mitchell et al., 2005; Thompson, 1993). Of particular importance to this chapter, our knowledge is quite limited with regard to the direct evaluation of the validity of jury decision-making research (Bornstein, 1999; Devine et al., 2001; Diamond, 1997; Dunn, 2003; Kerr and Bray, 2005). Importantly, however, recognizing the limitations of available research is important from both scientific and pragmatic viewpoints, and it is the sign of a maturing discipline.

The limited knowledge about jury decision-making suggests that researchers in this area will not be short of work for the foreseeable future. Perhaps one way to ensure that research in this area reaches its potential is to reduce the misunderstandings

that have led to some of the controversy surrounding the research. This can be readily accomplished by improving upon the teamwork that interdisciplinary research requires. The relationship between social scientists and legal practitioners may be developed constructively by taking care that researchers are familiar with the workings of the legal system and that legal practitioners are familiar with the principles of good research (Kerr and Bray, 2005; Suggs, 1979). Researchers should exercise caution when applying or generalizing their findings outside of their study unless the external validity of the study is sufficiently high (Kerr and Bray, 2005; Thompson, 1993). Additional research is required to examine directly the external validity of research in this field. Perhaps most important, methodological concerns must be addressed. One suggestion proffered in this regard is that researchers make a greater effort to incorporate jury deliberations in their research (Diamond, 1997; Lieberman and Sales, 1997; see Kerwin and Shaffer, 1994).

Despite the concerns expressed about jury decision-making research, the existing evidence and tenets of research methodology suggest that jury decision-making research has the potential to contribute to a better understanding of how decisions are made in the courtroom. As the interdisciplinary field of psychology and law continues to grow and more research is conducted, the increasing availability of more globally-oriented studies, such as meta-analyses and validity evaluations, will likely confirm the validity of research conducted thus far. Although somewhat sparse, the existing research into jury decision-making is valid, informative, and worthy of application in the courts, as long as one keeps in mind the caveats expressed in this chapter. However, to make best use of the available literature, one must be an informed consumer. In the case of jury decision-making research, this means that both social scientists and legal practitioners must be aware of the contributions and limitations of such research.

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Chapter 2

Procedural Justice

Tom R. Tyler

Synopsis

This chapter reviews the literature on procedural justice. Its focus is upon the role of procedural justice judgments in shaping people's reactions to the processes used to resolve conflicts within the legal system. Studies suggest that people focus heavily upon the fairness of procedures when evaluating their experiences with the legal system, and are much more willing to accept outcomes that they do not like or feel they deserve if they consider those outcomes were arrived at through a fair procedure. This suggests the importance of evaluating legal procedures from the perspective of public views about their fairness as procedures. Such evaluations suggest that people are concerned about a variety of issues when evaluating a procedure, including whether it provides opportunities for the parties to present their evidence and express their views; whether decisions are made in neutral, factual ways; whether people are treated with dignity and in ways that respect their rights; and whether the authorities are sincerely trying to do what is right.

Procedural Justice

One prediction that can be advanced with sure confidence is that human life on this planet faces a steady increase in the potential for interpersonal and intergroup conflict. The rising expectations of a continuously more numerous population in competition for control over rapidly diminishing resources create the conditions for an increasingly dangerous existence. It seems clear that the quality of future human life is likely to be importantly determined by the effectiveness with which disputes can be managed, moderated, or resolved. Procedures or methods that may be put to this task of conflict resolution therefore claim our attention. (Thibaut and Walker, 1975, Preface)

The function of trials is to manage the conflicts that inevitably arise among the people living together within communities and societies. One way that legal authorities and institutions perform this function is to create laws that define both the nature of acceptable behavior for people to engage in and specify the rules of entitlement that should guide the distribution of disputed resources. For the legal system to be effective, most people must adhere to those laws most of the time (Tyler, 2006a; 2006b).

When conflicts arise about what these laws mean (i.e. what type of behavior is acceptable or how resources should be distributed), trials provide one mechanism through which those conflicts can be resolved. Many conflicts are resolved by police officers or mediators, or informally by negotiations involving judges and lawyers, and never make it to the formal trial settings. In fact, most cases are resolved informally and never reach a trial. However, some cases, typically those that are the most contentious or serious in their social consequences, are resolved by judges and juries in trials. However conflicts are dealt with, the success of the legal system depends upon being able to resolve conflicts in ways that people generally accept.

The creation of institutions, the development of rules, and the resolution of disputes all require procedures. There must be some process by which people work together collectively to make decisions about what to do in the face of a conflict, i.e. some way to come to a solution. The jury trial, for example, is a procedure by which a group of people follow an established set of rules about how they will work together to determine either, in a criminal case, whether someone is guilty of a crime and what punishment is appropriate and, in a civil case, how to allocate contested resources.

The manner in which a trial is conducted can be clearly separated from the verdict. The verdict is the outcome of the trial and determines what will happen to the people involved in the case. We can evaluate that verdict against many criteria, including whether we think it is favorable to particular parties and whether we think it is distributively fair, in the sense that people receive what they deserve according to accepted principles of entitlement. In addition, we can evaluate separately the procedures by which the trial was conducted. Those procedures can be evaluated in terms of their swiftness, their cost, their fairness, and so on.

When evaluating procedures and outcomes, legal scholars often employ objective criteria derived from ethics or social theory to evaluate desirability. In contrast, behavioral scientists typically focus on subjective assessments. They use data obtained from people who participate in or observe procedures and their outcomes to establish people's judgments about those procedures. So, for example, people are asked whether a procedure was just and/or whether it produced a fair outcome.

Irrespective of whether objective or subjective criteria are being used, a key attribute of procedures and their outcomes is the degree to which they are just. Social philosophers such as Rawls (1971) suggest that justice is a key virtue to be sought in the workings of social institutions. Similarly, research indicates that people typically demonstrate great concern about whether or not they feel that justice is being done

when they deal with others (Lind and Tyler, 1988). In other words, while they need not do so, people show great concern about the justice of the procedures used in both formal legal procedures, such as trials, and informal procedures such as mediation. Satisfaction with dispute resolution efforts, as well as the willingness to accept them, is found to be strongly shaped by evaluations of their procedural justice.

In the past several decades there has been an explosion of research on issues of procedural justice (see Tyler and Smith, 1998). The focus of most of this research has been on issues of subjective procedural justice. Both laboratory studies (Thibaut and Walker, 1975) and field experiments (see Lind and Tyler, 1988; 2000a; Tyler et al., 1997) demonstrate that judgments about the justice of legal procedures shape people's thoughts, feelings, and behaviors following third party conflict resolution decisions.

Social scientists began to study procedures to address an important issue within the legal system—the need to make decisions that people would accept. Research on the functioning of the legal system found that people whose problems were dealt with by the legal system were often unwilling to accept the decisions made by legal authorities. Similar concerns were raised about people's willingness to defer to the law in their everyday lives. The law relies heavily upon the willingness of the public to generally obey laws, since it is difficult to enforce the law. In cases such as the use of illegal drugs, the illegal copying of DVDs, or even hiding income from tax authorities it is difficult to police the public and to bring their behavior into line with the law if many people are not complying. These problems created difficulties for the legal system, a system whose effectiveness depends upon the ability to secure widespread deference.

In other words, interest in procedural justice developed from the broader question of how authorities can effectively manage disputes. One way that authorities can gain acceptance for their decisions is by threatening the parties involved. For example, the police gain compliance in part because they carry weapons and make clear to the people with whom they deal that there are potentially dangerous and damaging consequences involved in failing to comply with their directives. Judges lack these overt weapons, but have the power to call on the police and can fine or jail those who disobey them.

While authorities can regulate public behavior using sanctions, this approach to exercising authority is costly and inefficient. The authorities must constantly demonstrate their credibility by maintaining high levels of deterrent potential, something that is difficult and sometimes impossible to do given the fiscal constraints of modern societies. Although the United States, for example, expends large amounts of money to make the risk of being caught and punished for murder sufficiently high that some researchers suggest that it can be a deterrent, it does not devote similarly high levels of resources to combating speeding, littering, or drinking on public streets. Hence, people who engage in these behaviors face, at best, a low risk of being caught and punished for wrongdoing. A chronic speeder, for example, has a

reasonable expectation of breaking the law repeatedly for years before they receive even a single traffic ticket.

Further, when people do bow to authority in the immediate presence of a judge or a police officer, they can easily renege. If people turn off their offensive stereo when the police arrive at their door, they can turn it back on when the police leave. A famous example of the ability to renege is the issue of “deadbeat dads.” Fathers ordered to pay child support by judges in family courts were a chronic problem for the courts during the early years of the alternative dispute resolution movement. They repeatedly had to be found and dragged into court so that mothers could obtain another judicial order compelling payment, an additional order that was often ignored just as the first one was.

In this context procedural justice findings suggest an alternative way to gain acceptance. If, for example, fathers experience the child support and child custody hearings they are involved in as being procedurally just, it is expected that they would be more willing to defer to judicial orders. Procedural justice leads outcomes, favorable or unfavorable, fair or unfair, to be more acceptable to the parties to a dispute. And, in fact, studies of family court show that if they experience hearings as procedurally just, husbands are more willing to pay child support even when they are denied custody of their children (Kitzmann and Emery, 1993).

Encouraged by these social concerns, social scientists began to study the psychology underlying people’s reactions to laws and conflict resolution decisions. A now classic example of this research is the collaborative effort of John Thibaut, a psychologist, and Laurens Walker, a law professor. Their work explored the reasons underlying people’s willingness to defer to the decisions reached during trials (Thibaut and Walker, 1975).

While the question addressed by this research seems straightforward, the answer is not. To understand why this work became important, consider the question of why a person would accept the decision reached by a judge about how to resolve a dispute in which they were involved.

If we accept the widely held view that people are motivated by self-interest, we would predict that people would be more willing to accept the outcome when it was favorable. Hence, we would expect the winner to accept the outcome, while the loser would resist accepting it.

Most people in groups recognize that they cannot always win. Instead of expecting to win, people might evaluate the dispute resolution outcome against the criterion of outcome fairness. Distributive fairness is a set of principles that allow people to decide whether or not their outcomes are reasonable in the context of the principles of compromise that are necessary for social life. If they did not evaluate their outcomes by their favorability, people might evaluate them against these principles of fairness, asking whether the outcomes “seemed appropriate, reasonable, and fair.”

The standards outlined above—outcome favorability and outcome fairness—are based upon the assumption that people’s willingness to accept an outcome depends upon the outcome. However, outcomes are arrived at by a process, and it is also

possible that people's willingness to accept the outcome is based, at least in part, on the process by which the outcome is generated. The procedural justice argument is that people are more willing to accept an outcome, irrespective of what that outcome is, if they feel that the outcome was generated through a fair procedure.

The procedural justice hypothesis goes against the strong intuition of many people that they and others are motivated by self-interest. Lawyers in particular are often found to hold this view of human motivation quite vigorously. It is striking therefore that the research conducted to address this question has strongly supported the procedural justice argument, showing that people's reactions to conflict resolution decisions are powerfully shaped by their views about the procedure that generated those outcomes.

Empirical Research

This finding emerges from the experimental work of Thibaut and Walker (1975). That program was broad in scope and covered a number of issues concerning procedures, all examined within the context of comparing adversarial and inquisitorial legal procedures. It examined both objective and subjective perspectives on procedures, with the researchers seeking to establish which system was objectively fairer, and which was experienced as fairer by those involved in the resolution of a conflict. Fortunately for the researchers no conflict was found between these perspectives, since their findings suggested that the adversary procedure was both objectively fairer and experienced as being fairer by disputants and observers.

These findings have interesting implications for legal systems outside the United States. Many European systems use the inquisitorial system. Do the people in those societies experience their legal system as unfair? Thibaut and Walker conducted research in Europe and argued that Europeans in countries that have the inquisitorial system view the adversary system as a fairer trial procedure. This suggests, they argue, that the features of the adversary system are generally valued by people, irrespective of whether their legal system uses that procedure.

Thibaut and Walker also considered both prospective and retrospective evaluations of procedures. Prospective evaluations of procedures occur before people experience them, and involve choices among possible procedures. For example, if given the choice, would people choose to have their dispute resolved in a trial by mediation. Retrospective evaluations occur after the procedures have been enacted, and reflect the "customer satisfaction" characteristics widely found in service evaluations. In other words, they examine whether the people who have their cases resolved by mediation, for example, are more satisfied than those who go to trial. And, of course, in both cases, the procedural justice hypothesis is that these evaluations are shaped by judgments about the fairness or unfairness of the procedures involved. In both cases their experimental findings support this procedural justice argument.

While Thibaut and Walker's work provides an important experimental demonstration of the procedural justice effect, their findings were immediately

questioned because of the use of artificial disputes and student participants. Fortunately, this experimental research has been replicated in a wide variety of experimental and field settings involving conflict resolution and allocation procedures of many types. Lind et al. (1993) is one such demonstration. It shows that the willingness of the parties to disputes to accept mediated outcomes is shaped by the fairness of the mediation session, as well as its outcome. Wissler (1995) similarly confirms the importance of procedural justice in the context of mediation and adjudication.

Although the early work on procedural justice focused on the resolution of disputes, and hence was most directly relevant to civil cases, an important area into which the work was extended was the area of criminal trials. Casper et al. (1988) used interviews with people accused of felonies to demonstrate the impact of the fairness of the felony case disposition process on satisfaction among defendants. While this research examines the disposition of criminal cases, it suggests that many of the aspects of fair procedure, from the defendant's point of view, are linked to more informal procedural elements, such as whether the authorities allowed them to present their evidence or asked them what they felt was the fair outcome. Not surprisingly, subsequent studies of everyday experiences with the police and courts, of the type illustrated by Tyler and Huo (2002), show that procedural justice is key to people's willingness to defer to legal authorities.

The breadth of procedural justice findings is illustrated by several further studies. Kitzmann and Emery (1993) focus on an area of great contentiousness in the law—child custody hearings. Family law has been a focus of the legal system for decades because issues of divorce are highly emotional and resolving disputes about child support payment and child custody has required judges to manage very difficult disputes. It is common in this area for litigants to return to court on multiple occasions to dispute agreements imposed by the courts. This study shows that people are more likely to adhere to child support agreements if they think they were reached via fair procedures.

Cascardi et al. (2000) consider procedural justice in another important area of the law—civil commitment. The area of mental health law illustrates the tension between incapacitation and rehabilitation. The goal of mental health treatment is to help people to get better, while the goal of mental health law is both to compel treatment and to protect society. It is recognized, and shown in this study, that people are more likely to do well in their later therapy if they experience the initial hearings about commitment to be conducted via fair procedures.

These findings about the importance of procedural justice were consistent with and helped to explain the popularity of the alternative dispute resolution movement both in the United States and internationally, i.e. the move toward informal legal procedures such as mediation (Lind et al., 1997; Lind et al., 1994). Because of increases in the number of people bringing cases into the courts, the courts developed a number of forms of informal justice, such as mediation, which could serve as alternatives to the court system. People's cases could be resolved by authorities besides judges, freeing the court to spend more time handling more serious cases.

Some alternative dispute resolution programs were housed within courthouses, while others were community based.

The general finding was that alternative dispute resolution procedures led to outcomes that people were more willing to accept than was typically true of trial outcomes or of the outcomes of settlement conferences. Procedural justice research demonstrated that people experienced these informal procedures as being fairer, primarily because people felt that they had greater opportunities for stating their cases and explaining how they felt that the dispute should be resolved.

A similar movement was occurring during this time within policing—the movement toward community policing. Police departments were deploying officers to patrol particular neighborhoods so that they could get to know the people and problems within those neighborhoods. Again, this move to a more informal and personalized style was popular with people within the communities policed. And, again, this popularity is easily understood within a procedural justice framework. People feel that they have greater opportunities for input and consultation when they have a personal connection with a community police officer.

While the focus of early work on procedural justice is on courts, the findings apply more generally to regulation. For example, tax payment is a notoriously difficult area of regulation. Murphy (2004) demonstrates that people accused of tax avoidance are more likely to defer to government authorities if they are treated fairly. Murphy shows that procedural justice is important because it builds trust in governmental authorities, lowering resistance to their regulatory actions.

The findings also apply to another issue central to the courts, whether people go to court when they experience injustice. Lind et al. (2000), for example, explore the circumstances under which employees terminated from their jobs sue their former employers. They demonstrate that employees are influenced both by the procedural justice of the termination process and by the general procedural justice of their workplace. Both procedural justice factors influence the likelihood of claiming, independently of expectations about winning the case.

After several decades of research, the procedural justice literature is diverse and compelling. A variety of studies involving the courts consistently find support for the core procedural justice argument—people are more willing to defer to decisions when those decisions are made fairly. Similar findings have emerged in other arenas. For example, a number of studies in management settings show that employees more willingly defer to managers who make decisions fairly. Hence, procedural justice has emerged as a well documented phenomenon, and one with important implications for third party settings such as courtroom trials.

The Meaning of Procedural Justice

At the same time that procedural justice was being shown to be influential in shaping people's reactions to third party decisions, the conception of procedural justice itself broadened in response to studies exploring people's subjective conception of

fair process. Early studies were based upon an instrumental view in which people wanted fair procedures, in particular trials in which they had voice, so that they could persuade the judge and win their case (Thibaut and Walker, 1975). However, research has identified other concerns, many of which were initially outlined by Leventhal (1980).

Later studies find a broader set of procedural justice concerns (see Schiller and Hastings, 1996; Sheppard and Lewicki, 1987; Tyler, 1988). It was found, first, that people value the opportunity to speak and present evidence (voice) partly because they want to influence the outcome of disputes. However, people also value voice because there are expressive functions of being able to address authorities (Lind et al., 1990; Tyler, 1987). People also want to talk to authorities because they value being treated with respect and having their status in the community acknowledged.

The important role of interpersonal treatment emerges in numerous studies of people's experiences with legal, political, and managerial authorities. It is more than just the desire to be listened to. People broadly value treatment with respect and dignity, politeness from others, and acknowledgement of their status both as people and as members of society, who are entitled to certain rights (Tyler, 1988).

People are also to have a broader conception of fair decision-making than just being allowed to participate. They also believe that decisions-makers should be fair and impartial; should make decisions based on facts; and should apply rules consistently across people and situations (Lind and Tyler, 1988).

Finally, people's procedural fairness judgments are found to be based, in part, on their inferences about the intentions of the authority. People believe that authorities should be sincere and honest and should act out of a concern for the well-being for members of the community. They should consider and care about the needs and concerns of the people with whom they are dealing and ought to make decisions that are linked to the well-being of the people with whom they are dealing (Tyler and Huo, 2002).

In summary, what makes a process fair in the eyes of the members of the public? Four factors dominate evaluations of procedural justice. First, people want to have an opportunity to state their case to legal authorities. They are interested in having a forum in which they can tell their story, i.e. they want to have a voice. Second, people react to evidence that the authorities with whom they are dealing are neutral. This involves making decisions based upon consistently applied legal principles and the facts of the case, not their personal opinions and biases. Transparency or openness about how decisions are being made facilitates the belief that decision-making procedures are neutral. Third, people are sensitive to whether they are treated with dignity and politeness, and to whether their rights as citizens are respected. Finally, people focus on cues that communicate information about the intentions and character of the legal authorities with whom they are dealing. People react favorably to the judgment when the relevant authorities are benevolent and caring, and are sincerely trying to do what is best for the people with whom they are dealing. Authorities communicate this type of concern when they listen to people's

accounts and explain or justify their actions in ways that show an awareness of and consideration for people's needs and concerns.

When people are dealing with a particular legal authority, such as a judge, they focus heavily upon whether they think that person is trustworthy and caring. They try to discern whether that person is concerned about their situation and is sincerely trying to do "what is right". Trust, in other words, is a key issue in personal experiences with judges and other court personnel. If people are not personally involved in a court case, but are generally rating their trust and confidence in the courts, they focus more on issues of neutrality—i.e. whether they believe that judges are honest, make their decisions based upon the facts, and consistently apply the principles of law to everyone. In either situation, however, it is process-based evaluations that are central to people's reactions to the courts.

Of course, this concern about fair procedure does not mean that people do not care about the outcome of their case. They do. No one is happy if they feel that they have received an unfavorable or an unfair outcome. In particular, people care about whether or not they feel that the outcome of the case is fair. However, studies consistently find that procedural judgments are more central to people's willingness to accept the outcome of court cases than are outcome judgments (Lind and Tyler, 1988; Tyler, 2000a). And, this is true both with cases handled through formal trials and with informal processes such as mediation.

The Range of Procedural Justice Effects

In addition to expanding the conception of the subjective meaning of procedural justice, research has also expanded the range of issues to which the idea of procedural justice has been applied. As noted, early research focused heavily on issues of decision satisfaction and decision acceptance following personal experiences with the police and the courts (Lind and Tyler, 1988). This research has repeatedly demonstrated that people's reactions to their experiences with police officers, mediators, and judges are shaped by the procedural justice of their experiences. Later research has demonstrated that similar types of effects occur with other authorities, including managers, teachers, doctors, and so on (Tyler, 2000a; Tyler and Blader, 2000).

One important extension of the early procedural justice findings has been the demonstration that procedural justice effects persist over time. This suggests that people are more likely to "buy into" and willingly and voluntarily accept outcomes arrived at in a fair procedure. It has been shown, for example, that people are more likely to continue to adhere to mediated agreements over time following procedurally fair mediation sessions. A frequent problem for authorities is that people comply in the presence of a police officer or judge, but then cease complying in subsequent situations. This requires the authorities to continually revisit the problem by holding further hearings or revisiting the person, costly actions that strain the resources of the legal system. Hence, findings suggesting that procedural justice shapes long-term acceptance have drawn particular attention.

Pruitt et al. (1993) demonstrate that people are more likely to be complying with mediated agreements four to eight months later if those agreements were reached via a fair procedure. They are also more likely to adhere to the law after procedurally fair encounters with police officers. For example, Paternoster et al. (1997) show that if someone accused of breaking the law (in this case abusing their spouse) experiences fair treatment when dealing with the police, they are more likely to follow the law in the future. In both cases, procedural justice does not just produce deference, but leads to long-term “buy in” to rules and agreements.

The persistence of procedural justice effects over time becomes understandable through research showing that a key effect of making decisions in fair ways is the building of commitment to authorities and institutions (Tyler and Blader, 2000). The particular authorities involved in such procedures, as well as the institutions they represent, are viewed as more legitimate and trustworthy after people experience procedural justice. Further, members of the community who may or may not have had personal dealings with legal authorities and institutions, similarly express more favorable views about those authorities if they believe that they generally make decisions using fair procedures and treat members of the community in fair ways.

If we consider not particular experiences in a trial or other legal forum but the general everyday behavior of people in relation to the law, we find that people are more law abiding when they believe that the police and courts exercise their authority fairly (Tyler, 2006a). Procedural justice in the exercise of authority confers legitimacy on the police and the courts, legitimacy which motivates acceptance of the law. This effect occurs even in highly coercive environments such as prison, where studies show that inmate compliance is higher when the authorities are viewed as exercising their authority fairly.

Procedural justice arguments have also found strong support within work organizations. A key issue within work organizations is how management can motivate high levels of job performance, and in particular how voluntary efforts can be encouraged (Tyler and Blader, 2000). Research indicates that employees who feel that management exercises its authority through fair procedures are more likely to do their jobs and to engage in voluntary extra-role behaviors motivated by the desire to aid their company. These efforts become understandable through research showing that experiencing fair procedures increases job commitment and leads employees to merge their sense of self-interest with the interests of the company more completely. To a greater degree employees want their company to be successful and are willing to engage in work efforts designed to achieve that objective.

Finally, procedural justice has been found to be important in policy settings. A key issue within government is gaining acceptance for policies that promote the interests of some members of the community over others. One such example is policies that redistribute resources and opportunities to the disadvantaged at the expense of the advantaged. Examples of policies of this type that have been recent sources of controversy are welfare and affirmative action policies. Studies show that

the advantaged are more willing to accept such policies if they view the government agencies that make them as being procedurally fair (Tyler, 2000a).

In all of these arenas one important aspect of procedural justice that consistently emerges is the social consensus that exists among people about the elements of a fair procedure. People who differ in their ethnicity, income, age, education, ideology, and gender are found to have very different views about the principles defining a distributively fair outcome and/or a fair reaction to someone who has broken a rule. However, these same people are found to have more similar views about a fair procedure to use in deciding how to make a policy or resolve a dispute (Tyler, 1994). As a consequence, procedures have great possibilities as a mechanism through which diverse communities can find generally acceptable solutions to social problems (Tyler, 2000b).

While a generally optimistic view of procedural justice has been presented, it is also important to acknowledge that there are limits to the range within which procedural justice effects occur. One important limit is that procedural fairness is more effective in shaping the reactions of people who feel identification with and loyalty towards society and its institutions and authorities. Further, procedures become less influential when people have strong moral feelings about the issues involved in a dispute. In an era of forceful ideologies, it is more difficult to reach a common position when there are authorities advocating a position of moral correctness based upon political or religious authority.

Finally, evidence suggests that there are cultural contexts within which procedural justice effects are weaker (Tyler et al., 2000). In China, for example, people are found to put less emphasis on issues of procedural justice. This difference is linked to having cultural values which place less weight on consultation and more weight on deference to authority (“high power distance”). In sum, procedural justice effects are not universally important. They have, however, been shown to be important across a wide variety of socially important settings.

Procedural Justice and the Courts

What is particularly striking about procedural justice judgments is that they shape the reactions of those who are on the losing side of cases. If the person who does not receive an outcome that they think is favorable or fair feels that the outcome was arrived at in a fair way, they are more likely to accept it. And, studies conducted over time show that people continue to adhere to fairly-arrived-at decisions over time, suggesting that their acceptance of those decisions is genuine and not simply the result of fear or coercion. Further, people who experience procedural justice in court rate the courts and court personnel more favorably, indicating higher levels of trust and confidence in the courts and the court system (Lind and Tyler, 1988).

These same procedural justice judgments are also a key factor in the evaluations made by the general public of the courts as institutions. The findings of the recent California study of the courts conducted by the judicial authorities to understand

public feelings are typical of studies of trust and confidence in the courts (Rottman, 2005). For example, consider a national survey of public trust and confidence in state courts (Tyler, 2001). This study shows that public evaluations of state courts are based upon evaluations of the fairness of court procedures. In particular, people were sensitive to whether the courts protected their rights and to whether they thought that judges were honest. While these procedural justice judgments were the most important factors shaping trust and confidence in the courts, those interviews were also sensitive to whether the courts treated the members of different groups equally, as well as to other structural issues about the courts. But, their primary basis for evaluation was the procedural justice judgments noted.

The results of studies of both personal experiences with the courts and of general evaluations of the courts is that these results are true irrespective of the ethnicity or race of the person involved, or of their economic or social status. Procedural justice concerns are central to people's reactions to the court, irrespective of who the people are. Since ethnicity and economic status often shape people's views about what constitutes a fair outcome, it is especially striking that there is a general willingness to defer to fair procedures. And, there is also general agreement about what constitutes a fair procedure. The four elements outlined—participation, neutrality, treatment with dignity and respect, and trust in authorities—generally shape reactions to the courts regardless of the type of person involved. The use of just procedures is, therefore, an ideal way to bridge differences in backgrounds among those who are disputing in court.

These findings have implications for the design of the court procedures. In particular, they suggest the value of building public trust and confidence by designing court procedures which lead the people who personally deal with the courts to have positive experiences. Based upon the recent California survey (Rottman, 2005) efforts should concentrate on traffic, family, and juvenile courts, where dissatisfaction is currently high because these courts typically do not operate using procedures that people experience as being fair. And they should be directed at all of those members of the community who deal with the legal system, since the same survey indicates that jury duty, or serving as a witness, also educate people about the legal system.

Of course, these comments about the design of court procedures are based upon lay views of judicial procedures. If public trust and confidence is a key issue, then lay views are important. But, it is also important to consider the views of legal experts. Those experts have had mixed reactions to many of the procedures that the public endorses. For example, informal procedures such as mediation and plea bargaining are often evaluated as being fair by lay people, but raise concerns on the part of experts because they do not enforce people's legal rights, or focus on reaching the legally appropriate outcome. Ideally the legal system should be sensitive to both lay and expert opinion.

Conclusions

The findings outlined suggest that people are more willing to accept and abide by legal outcomes when those outcomes are arrived at through fair procedures. Further, the strength of such procedural influences is quite high, and suggests that focusing on procedural issues in designing the processes used by the legal system to manage conflicts is a good strategy for effectively dealing with many of the problems that come into the courts. The findings further suggest that people's views about the fairness of legal procedures are shaped both by issues about how decisions are made and by evaluations of how people are treated by legal authorities.

Why do people care about the fairness of procedures as much as or more than they do about their outcomes? Recent discussions of this issue within the psychological literature (Tyler and Blader, 2003) have noted that people care deeply about their identities and use their status in important groups, such as the society in which they live, as information about their status. As representatives of society legal authorities (i.e. police officers, judges, lawyers) express the views of the group through their actions and communicate important information about group values and norms (Sunshine and Tyler, 2003).

In other words, the manner in which people are treated by others, particularly by societal authorities, communicates information both about whether people are respected and valued members of society and about whether their membership in society has positive identity implications. The procedures of society, i.e. whether they treat people with dignity, respect their rights, give them voice, and treat their concerns in a manner that is consistent with the treatment of others, and free of prejudice, all tell people about the stature of the society to which they belong as well as about its willingness to include them as members in good standing.

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Chapter 3

Theoretical Models of Jury Decision-Making

Jennifer Groscup and Jennifer Tallon

Synopsis

The jury is a central part of the American legal system and is also an important legal decision-maker across the world. Much research has been conducted to further our understanding of what verdicts juries are likely to render when faced with particular trial facts and players. Considering not only *what* decisions a jury might make but also *how* those decisions are made is crucial to the investigation of jury decision-making. In this chapter, we discuss specific jury decision-making theories, and we discuss more basic social cognition and decision making-theories that have been applied to legal situations. First, we briefly review mathematical models of jury decision-making. Then, we describe jury decision-making theories that are rooted in social psychology and the research examining these theories including the Story Model, Commonsense Justice, and a recent theoretical explanation focused on “generic prejudice.” Finally, we discuss other relevant social cognition and decision-making theories and the research applying them to the jury, including dual process models. For each of these approaches, the theory is described, and research relevant to jury decision-making is reviewed. Implications for future research in this area are also discussed.

Theoretical Models of Jury Decision-Making

The jury is a central part of the American legal system. Indeed, it is so important that a trial by jury is a fundamental right guaranteed by the U.S. Constitution. Although the legal system assumes that jurors can be rational processors of information, research has illustrated that jury decision-making is more complex. What has emerged is a contradictory portrait of the juror as being rational and yet influenced by variables such as prior knowledge, media influence, complexity

of information, and extralegal factors (Finkel and Sales, 1997). Further, there is substantial evidence suggesting that jurors are unaware of these potential biases (Vidmar, 2002).

Juries' tendency to make particular decisions given certain evidence and the particular biases they might fall prey to in their decisions are both important areas of research, but they do not speak to the process underlying these decisions. Understanding not only *what* decisions they make but also *how* those decisions are made is crucial to the investigation of jury decision-making. In this chapter, we discuss specific jury decision-making theories and more basic decision-making theories that have been applied to legal situations. First, we briefly review mathematical models of jury decision-making. Then, we describe jury decision-making theories that are rooted in social psychology and the research examining these theories including the Story Model, Commonsense Justice, and a recent theoretical explanation focused on "generic prejudice." Finally, we discuss other relevant social cognition and decision-making theories and the research applying them to the jury, including dual process models.

Mathematical Models of Jury Decision-Making

Mathematical models based on probability, Bayesian modeling, algebraic approaches, and stochastic process models have been applied to jury decision-making (for a comprehensive review see Hastie's *Inside the Juror* [1993a]). Two mathematical models that warrant mention are the information integration and the Bayesian models. In an early review of the literature on mathematical models Pennington and Hastie (1981) describe the information integration model as being driven by the weighted average of the trial evidence. This model assumes that jurors independently assign a weight to each piece of evidence on a single dimension: the certainty of guilt. When it comes time to render their verdict, jurors will then average these weighted values across the evidence in order to arrive at their final decision (Pennington and Hastie, 1981). For decades, studies have supported this averaging effect of information integration. In one of the earliest applications of this model to jury decision-making, Kaplan and Kemmerick (1974) varied how much the evidence incriminated the defendant and how the defendant was characterized across a series of traffic felony cases. The authors found that the verdict was a function of adding together both types of evidence. Ostrom et al. (1978) varied the type of case, number of evidentiary statements, and the incriminating value of the trial evidence and found that jurors started with the assumption of innocence and then averaged the evidence in order to render their verdict. Moore and Gump (1995) more recently investigated whether an additive or averaging model of information integration better fit juror decision-making in a case involving an eyewitness. They varied the quality of the evidence and eyewitness accuracy and found empirical support for the averaging model.

Bayesian models similarly assume that verdicts are ultimately determined through a series of mathematical judgments about the evidence (Hastie, 1993b). In the Bayesian approach, jurors independently assess each piece of evidence according to how diagnostic it is of verdict. The assessment of each new piece of evidence is then multiplied by the prior opinion of the juror in order to determine the probability of guilt. Thus, with the introduction of every new piece of evidence, beliefs about evidence are updated and verdict determinations are shifted. When making a verdict decision, the final probability of guilt reached through this process will be compared to the probability of culpability required for a verdict against the defendant, and a verdict will be selected based on that comparison. According to Hastie (1993b), the Bayesian model differs from the information integration model in two ways. First, the Bayesian model assumes that evidence is multiplied not added to a juror's overall belief concerning verdict. Second, Bayesian models assume that the mental ruler by which jurors determine their verdicts is bounded by the probability of 0 or 1, whereas the mental meter is not bounded by these numbers in the information integration model. Additionally, although there is evidence of a weighted averaging approach to the integration of evidence, there is little empirical evidence in favor of Bayesian models of juror decision-making. Smith et al. (1996) manipulated the strength of statistical evidence as well as instructions on the use of Bayes's theory and found that jurors underused probabilistic evidence as compared to Bayesian norms. This finding is consistent with several other empirical studies (Faigman and Baglioni, 1988; Schklar and Diamond, 1999; Koehler, 2001).

Although these two models differ in terms of the mathematical operations used to integrate the evidence, there are two important similarities. Pennington and Hastie (1981) posit that both models possess the underlying assumptions that a) pieces of evidence are examined independent of one another and b) the presentation order of the evidence is irrelevant. As an alternative approach to these models, Pennington and Hastie proposed the Story Model of juror decision-making.

Social Psychological Theories of Jury Decision-Making

The Story Model

The Story Model, proposed by Pennington and Hastie (1986; 1988; 1992), is a comprehensive model that attempts to explain how jurors process evidence and reach individual decisions. The Story Model is an explanation-based model of juror decision-making. According to explanation-based models, a person making a decision creates a cause and effect explanation of the available information and then bases any decisions about that information on that explanation. In the Story Model, it is theorized that jurors create one or more narrative explanation-based stories about the trial. Stories may be constructed from any combination of trial facts, pre-existing knowledge, and expectations. Therefore, stories constructed about the trial may

not be based solely on trial evidence but may also be based on jurors' inferences about the trial, the crime, and the defendant. These inferences are most likely to be incorporated when a crucial element of the story is not presented as evidence. Story construction helps jurors to organize the information and make decisions about it relative to the available verdict choices. Verdict decisions are determined by the explanation created in the constructed story. The Story Model assumes an active constructive process in which jurors combine trial information and transform it into a cohesive explanation. As active processors of the trial information, it is assumed that jurors are seeking cause and effect relationships that inform their verdict (Pennington and Hastie, 1992). There are three phases of processing in the Story Model: story construction, verdict representation, and story classification (Pennington and Hastie, 1992).

In the story construction phase, jurors will typically construct multiple stories as evidence is presented (Pennington and Hastie, 1992). Ultimately, one story will be chosen as the most acceptable. The story will be selected based on what Pennington and Hastie describe as "certainty principles": coverage, coherence, and uniqueness. Coverage involves the fit between the evidence presented at trial and how well it can be integrated into the story. When more of the evidence is integrated into the story, there will be increased coverage, and when there are crucial pieces of evidence that are not integrated into the story, there will be decreased coverage. When there is increased coverage, a story may appear to be more acceptable to a juror and confidence in the story will increase (Pennington and Hastie, 1992). Coherence consists of three components called consistency, completeness, and plausibility. A story has consistency if it lacks internal contradictions. This means that the story cannot be inconsistent with key pieces of trial evidence and that the pieces of evidence integrated into the story cannot be inconsistent with each other. A story has completeness if the trial evidence provides all of the essential components of the story. For example, if a particular motive is required for a particular story and if no evidence of that motive is presented, then an essential component of the story will be missing from the evidence and the story will lack completeness. Plausibility is achieved if the story would be possible in or consistent with the real world. In order for a story to have coherence, all three of these components must be present otherwise the story will be rejected. In order for the story to be accepted, it must also have uniqueness in addition to coverage and coherence. A story is a unique explanation of the evidence if it is the only coherent story. A lack of uniqueness works against the perceived coverage and coherence of a story. Based on the satisfaction of all of these elements, the best story constructed by the juror will be accepted (Pennington and Hastie, 1992).

In the verdict representation phase, jurors are presented with verdict alternatives (Pennington and Hastie, 1992). Jurors must understand each alternative in terms of concepts such as *mens rea*, *actus reus*, and case circumstances. Pennington and Hastie postulate that a juror's ability to conceptualize different verdict categories can be influenced by the judicial instructions they receive as well as their prior

knowledge concerning crime categories. This prior knowledge can interfere with the appropriate understanding of verdict options during the verdict representation stage of the Story Model (Pennington and Hastie, 1992). For example, if a juror has a negative perception about the insanity defense from the media, that perception may interfere with that juror's ability to understand and consider a not guilty by reason of insanity verdict.

Finally, jurors will determine which verdict alternative best matches the accepted story during the story classification stage (Pennington and Hastie, 1992). In the story classification stage, the accepted story is compared to the conceptualization of each of the possible verdict options. The "goodness of fit" between the story and the verdict category will determine if that verdict is selected and with how much confidence it is selected. If there is a good fit between the story and the verdict, that verdict will be selected. The juror's confidence in the verdict will be influenced by the level of convergence of the evidence and verdict. If the story and any available verdict indicating culpability do not match, then the juror will determine that the defendant is not guilty (Pennington and Hastie, 1992).

Research testing the Story Model In their early research on the model, Pennington and Hastie had jurors describe their decision-making process (Pennington and Hastie, 1986). They found that jurors' discussions of and interpretations of the evidence were structured like stories. Evidence that was not relevant to the stories was less likely to be discussed by the jurors, and the presence of story-relevant elements that were missing from the evidence were inferred. They also found that the stories constructed by jurors differed based on the verdicts they rendered. Pennington and Hastie (1988) provided further evidence for jurors' spontaneous use of narratives in order to develop an explanation of events. In the first study, participants read a mock trial summary, rendered a verdict, and performed a trial evidence recognition task. Participants' recognition of trial facts that supported a story consistent with their chosen verdict was better than for story-inconsistent facts, and story-consistent trial facts were rated as more important to their stories than story-inconsistent facts. In a second study, participants read a mock trial summary in which the presentation of the evidence was varied such that it was presented in a witness-by-witness format or in a story format. This manipulation was done separately for the prosecution and the defense. Participants rated the evidence as stronger when presented in story format. The ease with which stories could be constructed affected verdict decisions, such that participants were more likely to favor the side of the case presented in story format. Evidence was also found supporting the principle of coherence as a determinant of ultimate decision-making. Although the strength of the evidence was an important factor, the findings suggest that it is rather the strength of one story compared to another which has a greater influence on the final decision (Pennington and Hastie, 1988). This endorses the notion of coherence because the more coherent a story is the more likely it will be accepted with confidence by the juror.

Pennington and Hastie (1992) found further evidence supporting the Story Model when they varied the presentation of information to jurors as either in a narrative format or an issue-by-issue format and extended their investigation to vary the credibility of the witnesses and the decision-making rules. In the narrative format, each witness's testimony contained information about the whole story presented, and in the issue-by-issue format, each witness provided discrete pieces of information without providing story context. In the first study, they varied presentation and credibility. Similar to previous research, when information was presented to participants in the form of a narrative, free recall of the facts had a story organization. The presentation of the evidence in the form of a narrative also affected juror perceptions of evidence concerning credibility. The more easily the credibility information could be integrated into a story, the greater the impact it had on decision-making. In the second study, they varied ease of story construction for guilty and not guilty verdicts, and they varied whether decisions were made globally at the end of the evidence or item-by-item, as each new piece of evidence was presented. When jurors were told to make global judgments, their processes followed the pattern of the Story Model, and their decisions were more affected by the slant of the evidence. However, when jurors were instructed to evaluate the evidence item-by-item, they engaged in an anchoring and adjustment strategy, starting with one opinion and changing it slightly as each new piece of evidence was presented. These decisions were less affected by the slant of the story. Pennington and Hastie argued that the increased impact of changes in the evidence on global judgments supports the argument that the participants were constructing stories (Pennington and Hastie, 1992).

The theoretical constructs in the Story Model have been expanded in subsequent research. The *empathy-complexity theory* of juror story-making has been proposed by Olsen-Fulero and Fulero (1997) as an extension of the Story Model. This theory is based on the observation that the Story Model's path between story selection and determinations of guilt/culpability is unclear. Further, many of the significant results observed in the literature on juror decision-making in rape trials are qualified by complex interaction between individual differences and case facts. Jurors may make attributions towards both the defendant and victim behavior that are moderated by aspects of the case (relationship between victim and defendant) and individual differences (e.g., authoritarianism). For example, in their previous but unpublished research, they found that rape empathy attitudes predisposed the jurors to construct particular stories and that the types of stories constructed were related to verdict. This led the authors to propose an addendum to the Story Model focusing on two new dimensions: how the juror identifies with the victim/defendant and the cognitive complexity of the juror (i.e. critical thinking, need for cognition, etc.). Olsen-Fulero and Fulero propose that closer examination of these variables will help researchers to understand why "jurors vary in the number of stories they are willing to consider as well as in the complexity, extremity, accuracy, and certainty of these stories" (Olsen-Fulero and Fulero, 1997, p. 419).

Past research has demonstrated that the presentation format of the evidence affects story construction; however, as highlighted by Olsen-Fulero and Fulero (1997), it is also possible that there are individual differences in story construction. Huntley and Costanzo (2003) investigated the impact of personal characteristics in sexual harassment cases, and how this impact might be mediated by the stories constructed by jurors. Participants were exposed to one of four sexual harassment cases during mock trials run by a trial consulting firm. Participants rendered a verdict and were asked about their reactions to sexual harassment story elements, including evidence relevant to verdict and extra-legal factors. Reactions to these story elements were strongly related to verdict. Story elements were much stronger predictors of verdict than the individual characteristics of the jurors, with only gender having predictive value such that females favored liability. The effect of gender on verdict was somewhat mediated by the story elements endorsed by participants. This research provided further evidence that story elements are a powerful part of decision-making and that there may be individual differences in how stories are constructed and accepted (Huntley and Costanzo, 2003).

A major strength of the Story Model is its comprehensiveness. It attempts to inform the process from start to finish. It addresses the decision-making process jurors undergo during a trial, and suggests tactics trial lawyers might use to maximize their effectiveness. Based on this body of research, Pennington and Hastie concluded that it might be most effective for attorneys to present evidence in a narrative story sequence in order for jurors to come to a concise conclusion (Pennington and Hastie, 1992). It might even be beneficial for attorneys to present a variety of potential themes to suggest multiple stories to jurors (Huntley and Costanzo, 2003), although this could present a challenge to the uniqueness of the ultimate story that is accepted by the juror. However, there is a lack of research testing the elements of the model.

Although much research has been informed by the Story Model in general, very little research has been conducted to test the individual constructs in the model such as coherence and completeness, in contrast to other information processing theories (such as Elaboration Likelihood Model and Heuristic-Systematic Model, discussed later). Due to the internal processes involved in the Story Model, we also know little about the process of story construction. We know that evidence presentation in a story-like format makes processing the evidence easier, but we know little about the individual and internal process by which the stories are constructed and compared to verdict categories. Additionally, the Story Model is well-articulated in terms of the individual juror's information processing, but there is a lack of research investigating the impact story construction has on *jury* decision-making. It is largely unknown how the Story Model will interact with the deliberation process to influence and inform decision-making. It is also unclear how a similar model for alternative jury systems might operate. More empirical support is clearly needed in this area.

Commonsense Justice

Commonsense Justice is the notion that jurors' concepts of what the law is or should be may differ from what the law actually is. The theory was developed by Finkel (1995) who describes this dichotomy as such:

There are two types of "law." There is the type we are most familiar with, namely "black letter law," the "law on the books." This is the law that legislators enact, the law that was set down by the Founding Fathers in the Constitution, the law that evolves through common-law cases and appeals decisions. It is the law that law school students study, judges interpret, and jurisprudes analyze. But there is another "law" – although "law" may be too lofty or lowly a term to describe it: I call it commonsense justice, and it reflects what ordinary people think is just and fair. It is embedded in the intuitive notions jurors bring with them to the jury box when judging both a defendant and the law. It is what ordinary people think the law ought to be. (Finkel, 1995, p. 2)

Finkel (1995) asserts that commonsense ideas such as human nature, culpability, and punishment "are at once legal, moral, and psychological" (p. 2). At its heart, Commonsense Justice is concerned with the manner in which citizens conceive of notions such as fairness and punishment. These concepts come into conflict when jurors are asked to base their decisions upon black letter law as against what they themselves understand as fair and just. These naïve, everyday concepts of law may be very different from the black letter law. This provides some explanation for those instances when jury decision-making seems inconsistent with the law within the lab and the jury box. It also highlights the problem of creating legal policy based on public sentiment when commonsense notions may be difficult to determine or are rife with bias (Haney, 1997).

At its base, Commonsense Justice is concerned with people's everyday concepts of fairness and justice (see Finkel, 2001 for in-depth coverage of commonsense fairness). Relevant to jury decision-making, commonsense notions of fairness and justice are likely to differ across countries and systems with different legal procedures. To begin addressing this issue, Finkel et al. (2001) had participants in the United States and Japan write narrative accounts detailing instances of unfairness either they or someone else had experienced, and these narratives were coded for themes. They found similarities between the cultures in that participants from both countries had concepts of unfairness, and those concepts shared themes like misfortune, punishment, and harm. They also found some differences relevant to the legal system. For example, American participants were more concerned about misfortune in the form of the innocent being punished and in wrongful behavior going unpunished, whereas the Japanese participants were more concerned with discriminatory treatment. This general examination of unfairness highlights that Commonsense Justice notions may differ importantly across cultures but that the

examination of these notions can provide us with important understandings of justice on an international level (Finkel et al., 2001).

Commonsense Justice proposes an approach to understanding jury decision-making and also highlights a new way to study the phenomenon. One area where commonsense notions of the law have been investigated is in crime prototypes. In social cognition, prototypes are people's abstract concepts of what constitutes a typical member of a group or category (see Finkel and Groscup, 1997a; Skeem and Golding, 2001; Wiener et al., 2002). A prototype for a crime would be a person's concept of a typical crime of that type (for example, a typical armed robbery), and people may have a prototype for the typical defendant for a particular crime (for example, a typical armed robber). Prototypes may be an essential component in jurors' information processing during the course of a trial. Previous research on crime prototypes demonstrated that they do exist and can impact juror decision-making (see Smith, 1991; Smith, 1993; Smith and Studebaker, 1996; Stalans, 1993; Stalans and Diamond, 1990; Stalans and Lurigio, 1990). However, the methods used in this research may not have captured the complexity of these commonsense notions of crimes (Finkel and Groscup, 1997a). In an attempt to examine prototypes and culpability from a Commonsense Justice standpoint, Finkel and Groscup (1997a) used a story construction approach placed within the framework of Commonsense Justice. Participants wrote stories about different crimes and verdicts, and this method yielded stories rich in prototypical content and context. Different prototypes emerged on the basis of motive and the type of crime, and there were multiple prototypes for each type of crime. The story construction method permitted an examination of participants' complex commonsense notions of these crimes and defendants (Finkel and Groscup, 1997a). This research paradigm and methodology was used to examine prototypes for insanity (Skeem and Golding, 2001) and first-degree murder (Wiener et al., 2002). Skeem and Golding (2001) found evidence that people may have at least two prototypes of insanity defendants, one in which the defendant's behavior is like a "wild beast" and one in which the defendant exhibits controlled but malevolent behavior. Wiener et al. (2002) found evidence of three prototypical murder themes including what they call "unemotional murder involving a secondary crime," "planful shooting of an acquaintance," and "multiple victims told with a judgment in mind." Overall, this research, conducted with a Commonsense Justice approach, confirmed that multiple prototypes exist for various legal concepts, that these prototypes can be quite complex, that they may affect verdict decision-making, and that they may be influenced by the media (Finkel and Groscup, 1997a; Skeem and Golding, 2001; Wiener et al., 2002).

Commonsense Justice is based on the premise that everyday people may and indeed do have very different conceptualizations of the law than the law has of itself. This difference can be the driving force behind what appears to be nonsensical jury decision-making but which is actually quite reasoned. One of the strengths of this approach to jury decision-making is the potential to illuminate the reason in these decisions. Commonsense Justice has helped us to better understand many trial

phenomena including notions of legal fairness (Finkel, 2000a), the examination of mistaken and impossible criminal acts (Finkel and Groscup, 1997b), the use and misuse of jury instructions (Finkel, 2000b), and the death penalty (Haney, 1997), among others. Although there has been little research to date, Commonsense Justice approaches could be instrumental in helping us understand international differences in legal policy, legal procedures, and legal decision-making. Our understanding of jury decision-making would benefit from further application of this global understanding and particular empirical methodology.

Generic Prejudice

In a series of articles in recent years, Vidmar has developed a highly useful framework for conceptualizing the types of prejudice that can infuse the trial process (see, e.g., Vidmar, 1997; 2002; 2003). This framework proposes several different types of prejudice that can bias jurors' decision-making. This approach is focused on the effects of extra-legal bias, and thus it is less comprehensive than the previous theories discussed. Because it is a newer framework for understanding jury decision-making, it has also received less empirical examination than other jury decision-making theories, creating many research opportunities. Vidmar discusses several different types of prejudice that can affect jurors' decision-making including interest, specific, conformity, and generic prejudice. Interest prejudice is defined as a potential juror having a direct or indirect interest in the outcome of the trial itself; specific prejudice occurs when jurors hold beliefs about specific issues in the case at bar or specific opinions about one or more parties or facts; conformity prejudice is defined as community expectations about the appropriate verdict outcome influencing the jury verdict; this occurs when jurors know what outcome the community expects and would be influenced to reach a verdict in accordance with that pressure (Vidmar, 2002, pp. 77–82). As discussed elsewhere in this volume (see Chapter 4 – Inadmissible Evidence and Pretrial Publicity), courts have recognized that specific prejudice can impair a defendant's ability to receive a fair trial (see, e.g., *Sheppard v. Maxwell*, 1966), and may be remedied by removing the case from that venue to a less affected community (see, e.g., *U.S. v. McVeigh*, 1996). Social scientists have played key roles in developing the supporting evidence that might justify a change of venue, and have provided insight into its effects on jury decision-making (see, e.g., Kovera, 2002; Steblay et al., 1999). Conformity prejudice may also be at play in verdict choices in highly-publicized trials once a jury is seated, or in any trial in which public outrage could be an issue.

Generic prejudice is different from other types of judicial bias as “the nature of the crime or the type of parties involved cause the juror to classify the case as having certain characteristics, thereby invoking stereotyped prejudices about *any* defendant accused of the crime” (Vidmar, 1997, p. 6). Thus, by simply hearing that the defendant at trial has been accused of having committed a particular crime, a set of biases are triggered in the mind of jurors due to the nature of that crime regardless

of the case facts. This type of generally held negative attitude or perception, or “generic prejudice,” involves the “transfer of pre-existing prejudicial attitudes, beliefs, or stereotypes about categories of persons, entities, or events to the trial setting in a legally inappropriate manner” (Vidmar, 2003, p. 1152). Although generic prejudice is difficult to identify, it may have a significant effect on the legal system’s ability to empanel an impartial jury (Vidmar, 1997).

In contrast to the extensive laboratory research that has examined the specific prejudicial effects of pretrial publicity in a controlled setting, there is significantly less empirical work on generic prejudice. Vidmar has examined the operation of generic prejudice in a variety of emotionally charged real-world cases using a case-study methodology (see, e.g., Vidmar, 1997; 2002; 2003). In the Lindh terrorism case, he conducted an extensive survey in five venues showing that the respondents’ assertions that prospective jurors could be fair and impartial in the case were inconsistent with their prejudicial attitudes and beliefs (Vidmar, 2003). He concluded that a change of venue was not likely to solve the problem as the generic prejudice was neither local nor trial specific. Vidmar has also examined generic prejudice in sexual abuse cases by analyzing transcripts of the questioning of potential jurors in those cases (Vidmar, 1997). The jurors comments indicated that they found child sexual abuse and abusers abhorrent, and many reported that they could not be impartial in the case because of that, regardless of the case facts. Vidmar argued that these attitudes were the type that could interfere with jurors’ ability to presume innocence in sex abuse cases. Finally, Vidmar (2002) applied generic prejudice to the insanity defense context. He described the results of community member surveys conducted for two insanity cases (*R. v. McGregor*, 1992 and *R. v. Theberge*, 1994). Respondents were asked about their general attitudes toward the insanity defense and their willingness to render an insanity verdict. Across the two samples, up to a third of the respondents said the defense should never be allowed, and almost a fifth of respondents said they would never render an insanity verdict. Vidmar interpreted these results as demonstrating that generic prejudice against the defense might prevent jurors from considering all of the verdict options (Vidmar, 2002). All of Vidmar’s field research on generic prejudice indicates that it has the potential to affect case relevant beliefs and the interpretation of the trial evidence.

Wiener and his colleagues investigated two competing processes possibly underlying the influence of generic prejudice on trials using an experimental design: cognitive resource theory and attention models (Wiener et al., 2006). They describe that under cognitive resource theory, people are more likely to make decisions based on stereotype-like information, such as generic prejudice, when their cognitive resources are limited. Under attention models, a reduction in cognitive resources should focus attention on relevant, non-stereotypic information, relying less on generic prejudice types of information. They tested which of these theories better explained the impact of generic prejudice by presenting participants with sexual abuse and homicide mock trial summaries and by varying the amount of time participants had to read them and make verdict decisions, either providing ample time for the task

or rushing them to limit their cognitive resources. They found compelling evidence of generic prejudice in sexual abuse cases and some evidence of generic prejudice in homicide cases, independent of the specific case circumstances. Results provided less clear but important evidence on the process by which generic prejudice asserts its influence. In the sexual assault cases, Wiener et al. found support for cognitive resource theory because generic prejudice was even more influential when the participants were rushed in their decision-making. They were more likely to rely on general attitudes about sex offenders in their decisions than they were to rely on case facts. On the other hand, they found that generic prejudice exerted less influence when participants were rushed in their decisions about homicide cases. They found that when time was constrained, participants' attention was more focused on the case and this focus of attention reduced the influence of generic prejudice. The authors argue that the results provide additional information that generic prejudice occurs and that it may be more influential in some types of cases and under certain circumstances.

Vidmar provides jury researchers with a highly useful framework for understanding the potential for a broad array of biases that could arise in jury decision-making. However, the conceptualization of the various types of prejudice does not clearly explain the process jurors undergo when influenced by them or how it could be prevented. The framework could be informed by social cognition theories, such as the dual process models that will be discussed next. In his 1997 article, Vidmar highlighted a number of limitations of the work to date on generic prejudice mostly related to the research methods used, indicating that experimental research on generic prejudice including control conditions, assessing jurors' beliefs about impartiality, and investigating the link between the attitudes and verdicts would increase our understanding of this phenomenon. Recent research has begun to test experimentally the presence of generic prejudice and the processes underlying its influence in the courtroom (Wiener et al., 2006), but more empirical research is required to compliment Vidmar's field research. Because generic prejudice concerns biases that are often operating unconsciously, it is likely that this framework could be applied to legal systems worldwide.

Summary of Jury Decision-Making Models

Together, these models paint a complex picture of jury decision-making. Commonsense Justice and generic prejudice take a global approach to the potential influences on jurors' interpretation of the trial evidence, the defendants, the crimes, and the justice system itself. Once in court, the Story Model proposes an explanation for the process jurors undergo while hearing trial evidence. These models are well conceptualized frameworks that aid different aspects of our understanding of the jury situation. Basic psychological theories in social cognition applied to the jury situation can provide us with additional information about the specific tasks jurors must perform.

Psychological Theories Applied to Jury Decision-Making

Dual Process Models

Cognitive psychology may be able to inform us about the processes in which jurors engage during their decision-making. Dual process models of information processing and persuasion have been particularly useful in jury decision-making research. There are several variations on this model, but all share common features. All of the models propose that there are two ways people can process the information, either by carefully considering the content or by using some less effortful processing. Generally, when decision-makers are motivated and have an adequate amount of time and ability, the information involved in the decision-making will be processed carefully and systematically (Chaiken, 1980). Systematic processing leads to careful scrutiny of a persuasive message, and decisions are made based on the quality of the arguments made. When decision-makers are rushed, unmotivated, and/or are lacking in ability, they will process the information involved in the decision heuristically, rapidly, and carelessly (Chaiken et al., 1989).

Less effortful processing is also theorized to occur more often in situations of uncertainty or when the information available for the decision is ambiguous. Legal decision-making is a process that takes place in conditions of great uncertainty, and the information presented in the form of evidence can often be ambiguous (Saks and Kidd, 1980). There is a high level of pressure and urgency in the courtroom which may result in the need for quick and confident decision-making. Less effortful processing enables legal decision-makers to reduce the complexity of their decision-making tasks (Saks and Kidd, 1980). Each of the following variations on this model have been applied to jury decision-making and have helped us better understand this process.

Elaboration Likelihood Model and Heuristic-Systematic Model

Several theoretical models attempt to predict when heuristics (i.e., mental shortcuts such as stereotypes—heuristics are discussed in detail in the following section) are more or less likely to be used or when processing is more or less likely to be effortful. The Elaboration Likelihood Model (ELM) proposed that a message can persuade the listener focusing attention either on central or on peripheral cues (see Petty and Cacioppo, 1981; Petty and Wegener, 1999). In the central route to persuasion, information is carefully, actively, and elaboratively processed. In the peripheral route to persuasion, information affects decisions without much cognitive effort. The route to persuasion that will be activated depends on the individual's motivation and ability to focus on and understand the message. When the listener is unmotivated or unable to attend to the message, it is more likely that peripheral processing will occur. When the difficulty or complexity of a message increases, it is also more likely that peripheral processing will occur, if that complexity interferes

with the individual's ability to understand the message. If the message is processed peripherally, the listener will rely on peripheral cues, such as the communicator's credibility which is readily understandable, in order to make a decision. When the listener is motivated and able to attend to the content of the message, central processing of the actual message content is more likely. When a message is simple, the decision-maker is more likely to engage in central or careful processing even if unmotivated to do so (Fiske and Taylor, 1991; Petty and Cacioppo, 1981).

The Heuristic-Systematic Model (HSM) relies on many of the same principles of information processing as ELM (see Chaiken, 1980; Chaiken et al., 1989; Chen and Chaiken, 1999). HSM also assumes two processing routes that will be used based on the motivation and ability of the individual. HSM adds several principles of interest to this dual processing approach. For example, HSM assumes that a person can process information heuristically and systematically at the same time, and predictions are made about when this is likely to occur (Chen and Chaiken, 1999). When perceivers are motivated and able, the heuristic information and relevant evidence will either indicate the same decision or differing decisions. When they indicate the same decision, they may operate at the same time and are likely to have an additive effect on decision-making. When they indicate divergent decisions, it is more likely that the perceiver will follow the systematic route in which the heuristic route is "attenuated," assuming there is motivation and ability. However, heuristic processing is likely to occur alone when motivation and ability are low (Chen and Chaiken, 1999). This brief summary of the interaction between heuristic and systematic processing may help us to better understand when jurors are most likely to engage in either one or both of these processes.

The peripheral versus central processing dichotomy is very relevant to juror judgments about the persuasiveness of trial evidence. For example, Cooper and his colleagues manipulated the complexity of the testimony provided by the expert to determine if at increased levels of complexity, peripheral processing and reliance on credibility cues would be observed (Cooper et al., 1996). They predicted that when complexity was high, jurors would be more likely to rely on the amount of expertise the witness had as a peripheral cue to the expert's credibility. As hypothesized, when the complexity was high jurors were more persuaded by the highly credentialed expert and when the complexity was low jurors were equally persuaded by the highly and moderately credentialed experts. Cooper et al. interpreted this as demonstrating that when the testimony is simple, central processing occurs. The jurors were equally persuaded by the highly and moderately credentialed expert because they were attending to the content of the message itself, and did not rely on peripheral credibility cues. However, when jurors have difficulty understanding the evidence, they rely on peripheral cues to judge credibility and make verdict determinations, resulting in the increased reliability on the expert's credentials to make decisions (Cooper et al., 1996). Consistent with the results observed by Cooper et al. (1996), Cooper and Neuhaus (2000) found that jurors only used the peripheral information to determine credibility when the testimony was complex. These results were consistent

with ELM in that central processing was used in decision-making and evidence evaluation when the message was simple, but peripheral cues became influential when the testimony presented was complex (Cooper and Neuhaus, 2000).

Heuristics

One way in which people who are not processing information carefully can make decisions would be to base those decisions on heuristics. Heuristics are cognitive shortcuts that enable people to make rapid decisions in complex situations (Fiske and Taylor, 1991). Inherent in the use of each of these shortcuts are biases in the decision-making process (Tversky and Kahneman, 1974). Several heuristic decision-making rules were identified by Tversky and Kahneman (1974) and have been applied to the jury decision-making context, including decisions based on representativeness, availability, and the system of anchoring and adjustment.

The representativeness heuristic is a shortcut used to estimate probability that a new stimulus is similar to or resembles a category of stimulus with which the perceiver is already familiar (Tversky and Kahneman, 1974). In social situations, one might attempt to estimate whether a stranger is either a factory worker or a lawyer based on the limited information given by appearance. This is a good strategy for situations in which similarity indicates a probability. However, this process can potentially be biased in several ways (Tversky and Kahneman, 1974). When people rely on representativeness, they ignore base-rate and sample size information, which are important to understanding probabilities. There is also a general insensitivity to information which has actual predictive value. In other words, a person will rely on information which appears representative regardless of its predictive utility to the exclusion of information having actual predictive utility but which is unrepresentative (Tversky and Kahneman, 1974).

The availability heuristic is used when the task at hand is to estimate the probability or likelihood of an event occurring (Tversky and Kahneman, 1974). “[P]eople assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind” (Tversky and Kahneman, 1974, p. 11). Likelihood is determined by how easily similar events can be brought to mind. However, information which can be retrieved easily will be relied upon more heavily, even though ease of retrieval is not necessarily predictive of probability. Information that is easily retrieved will be retrieved more frequently, which can increase the chances of forming an illusory correlation, or thinking one thing predicts another when they are actually unrelated (Tversky and Kahneman, 1974).

Anchoring and adjustment occurs in situations of uncertainty (Fiske and Taylor, 1991). It is used to make an estimate of a value (Tversky and Kahneman, 1974). Typically, a decision-maker is faced with a problem in which he or she must estimate the value of something and is given some sort of initial estimate, either from the situation itself or some preliminary calculations. This serves as the anchor, and it

provides a bit of certainty around which the final estimate can be made. Starting with the anchor, the decision-maker adjusts his or her estimate up or down. This process is biased by the tendency to under adjust or to choose an inappropriate anchor (Tversky and Kahneman, 1974).

Jurors' use of various heuristics in their decision-making has been investigated. For example, Kovera et al. (1999) attempted to explain jurors' use of hostile work environment expert evidence in a sexual harassment case with the representativeness heuristic. The expert described research that was either conducted using college students or factory workers as participants. This evidence was perceived as more credible when the research was done on factory workers, who were more similar to the plaintiff in the case. The authors explained jurors' evaluations of the expert by using the representativeness heuristic. Jurors appeared to compare the similarity of the research to the facts of the case in the vignette, with closer matches being judged of higher quality (Kovera et al., 1999). Thus, support for the use of the representativeness heuristic in juror decision-making concerning expert testimony was found.

The availability heuristic has also been used to explain juror decision-making. Brekke and Borgida (1988) used the availability heuristic to explain mock jurors' under-utilization of group probability data presented via expert testimony. Expert testimony was being provided about typical rape victim behavior in the context of a rape trial. The purpose of the study was to investigate the differential effect of presenting the expert testimony in a standard, research/data driven manner or in a concrete format, in which the group probability data was related to the specific case at hand with a hypothetical. Overall, the results indicated that jurors are much more persuaded by the expert's group probability data when the testimony included a hypothetical connection to the case. This pattern of use of group probability data is consistent with the use of the availability heuristic in the participants' decision-making. The group probability information was made more available to the participants when it was specifically related to the case they were deciding.

The anchoring and adjustment heuristic has often been used to explain jury behavior in awarding punitive damages. When given a cap by the court, jurors will use that number as an anchor and adjust the actual award given depending on the facts of the case (Robbenolt and Studebaker, 1999). Jurors will also follow specific damages recommendations by choosing either the defendant's or the plaintiff's recommendation, much like an anchor, instead of using the differing recommendations as extremes in a range of potential damage awards (Raitz et al., 1990). However, reliance on these suggestions as anchors is not absolute. Other research indicates that deliberation might moderate the use of anchoring and adjustment, although more information is needed (Greene et al., 1999). These results serve as a good example of jurors' use of the anchoring and adjustment heuristic in legal compensation decision-making.

Cognitive-Experiential Self-Theory

Another dual-process model that holds particular relevance for the mock juror paradigm is Cognitive-Experiential Self-Theory (CEST) (Epstein, 1994; Epstein and Pacini, 1999). CEST posits that information is processed through two partially independent systems: the experiential mode and the rational mode. This experiential mode is driven by affect and is best characterized as “a crude system that automatically, rapidly, effortlessly, and efficiently processes information” (Epstein, 1994, p. 715). In contrast, the rational mode is dominated by effortful, analytical, and logical relationships. This mode is best conceptualized as a “deliberative, effortful, abstract system” (Epstein, 1994, p. 715) that operates according to effortful cognitive appraisals of the situation within which the individual is placed. The experiential system is the default mode of processing. A shift in processing cannot occur unless a direct appeal is made to the rational system emphasizing the importance of effortful, logical processing. Conversely, individuals can shift back to the experiential mode if there is emotional arousal (Epstein, 1994).

The empirical evidence indicates that individuals rely on heuristic processing when they are in an experiential mode, but reliance upon these peripheral cues is substantially reduced when individuals enter the rational mode of processing. CEST scholars have examined the role of heuristics such as counterfactual thinking, representativeness, and availability (Epstein et al., 1992; Kirkpatrick and Epstein, 1992; Denes-Raj and Epstein, 1994). Although heuristics serve an important function in moderating the flow of information, they increase the likelihood of processing error. According to Epstein et al. (1995), these results can be accounted for by the experiential mode’s predilection for concrete exemplars and narratives based on past experiences. It is only when individuals are primed to enter a rational mode that they can think in terms of effortful abstraction. The ease by which this shift can occur is contingent upon individual difference and situational demands (Denes-Raj and Epstein, 1994).

A few studies have examined the role of legal decision-making as using the CEST paradigm. Lieberman (2002) primed individuals to process information either rationally or experientially before awarding damages in a civil trial in order to examine the influence of extralegal cues, specifically defendant attractiveness. When individuals were primed to process information experientially via emotional language and vivid photographs, they awarded lower damages for the plaintiff when the defendant was attractive. However, motivating individuals to process information rationally through language emphasizing the importance of the rational consideration of the evidence and unemotional photographs controlled the attractiveness-leniency effect. Further evidence for the relevance of CEST and juror decision-making was provided by Krauss et al. (2004) who examined juror reliance upon actuarial versus clinical expert testimony in a capital case. The authors induced rational or experiential processing in participants and observed that participants in the experiential mode

were heavily influenced by clinical testimony whereas those in the rational mode were more influenced by more objective and reliable actuarial testimony.

Summary of Dual Process Models

As demonstrated by this research, dual process models have the potential to inform the jury decision-making process by helping us determine when and under what conditions jurors engage in different levels of processing. The provision of an in-depth understanding of the process jurors are likely to use in decision-making is one of the strengths of these models. They are particularly useful in explaining jurors' use of complex evidence. However, there is little empirical information about how these models inform the deliberation process. Additionally, more information is needed on the motivation and ability assumptions of these models and more legally relevant manipulations of processing modes should be developed.

Need for Cognition

One of the tenets of dual processing theories is that a person listening to a persuasive message must be motivated to process that message, as discussed above. The Need for Cognition (NC) is an index of how much a particular individual enjoys thinking and problem solving. This concept was developed out of work associated with the ELM, and is also associated with CEST related personality dimensions. The earliest studies of this model operationalized the NC as a drive for the individual to provide a meaningful definition and structure to the world (Cohen et al., 1955; Cohen 1957). According to these early theorists, individuals differ in the levels to which they will exert the effort necessary to define ambiguous situations. This enjoyment is potentially related to motivation and ability to process information carefully. These earlier studies failed to find significant differences in the level of effort exerted by those individuals defined as low or high in NC, but did reveal that those high in NC rated structured situations as more satisfying than ambiguous situations (Cohen et al., 1955; Cohen, 1957). Jurors differ greatly in their abilities to understand, interpret, and use evidence in their decision-making. Because NC has the potential to inform us further about these individual differences in information processing, it has begun to receive attention in the jury decision-making literature.

Cacioppo and Petty (1982) recognized the methodological problems associated with these studies and developed the Need for Cognition Scale (later revised by Cacioppo et al, 1984) as a validated measure of how much individuals enjoy and engage in complex cognitive tasks. Research has illustrated that those high in NC are strongly affected by the quality of arguments, report exerting more cognitive effort, and recall/elaborate upon more information (regardless of argument quality) than those low in NC (Cacioppo et al., 1983; Cacioppo et al., 1986; for a complete review see Cacioppo et al., 1996). The current literature has been focused upon the multi-

dimensionality of the NC scale and has proposed that it is in fact measuring four different domains: enjoyment of cognitive stimulation, preference for complexity, commitment of cognitive effort, and desire for understanding (Lord and Petruvu, 2006).

NC has been used to understand how variations in the presentation of evidence may influence the manner in which mock jurors perceive and use such information. Kassir et al. (1990) found that presentation order of ambiguous evidence was significantly moderated by NC. Individuals high in NC were more influenced by attorney arguments that preceded ambiguous evidence whereas those low in NC were more influenced by post-evidentiary arguments. These results were somewhat surprising as it was expected that those low in NC would fall prey to a first impression bias due to their reliance upon heuristic processing. Kassir et al. explain this effect as evidence of the active processing that those high in NC engage in resulting in early opinion formation, hypothesis confirming search strategies, and finding evidence in ambiguous situations whereas those low in NC are passive processors that do not form opinions until much later (Kassir et al., 1990).

Leippe et al. (2004) applied a similar perspective to understanding how the timing of expert testimony about eyewitness memory may influence verdict. The authors observed a curvilinear relationship between NC and determinations of guilt by breaking NC scores into three categories (low, moderate, high). Individuals high in NC found more evidence of reasonable doubt even when the case evidence strongly favored the prosecution. The authors attribute this pattern to the greater cognitive efforts those extremely high in NC exert in examining the evidence. Those high in NC also displayed the same pattern of behavior when the *prosecution* had a weak case as demonstrated by greater determinations of guilt (Leippe et al., 2004).

It has also been demonstrated that NC may influence the level of participation in the deliberation process. Shestowsky and Horowitz (2004) found that mock jurors who scored higher on the NC scale were more active and involved in the deliberation process, as compared to their counterparts who were more passive toward the trial and the evidence presented. However, those low in NC were more sensitive to variations in the strength of arguments and were more likely to re-align their opinion with the individual that made stronger arguments compared to those high in NC. These results are important as they demonstrate that those low in NC may not be the lazy processors the literature paints them as but are indeed “quiet contemplators” (p. 305) of the evidence (Shestowsky and Horowitz, 2004).

In addition to different perceptions of evidence, NC may help us understand why some individuals are motivated to see justice carried out in the courtroom. Sommers and Kassir (2001) examined how the NC may moderate selective compliance with judicial admonitions to disregard inadmissible evidence (an incriminating wiretap). Those high in NC were more likely to display this selective compliance and tended to disregard an unreliable wiretap, but they used a reliable wiretap in their verdicts even though it was inadmissible and violated the defendant’s due process. Sommers and Kassir (2001) also report evidence that those high in NC may be motivated by

a sense of justice as explained by an overcorrection effect in which those high in NC had lower verdict-confidence scores and conviction rates in the inadmissible-unreliable condition. Despite these interesting findings, the authors are quick to caution that there was little evidence of processing differences between those high in NC and those low in NC and that more research is needed to understand the mediational properties of NC (Sommers and Kassin, 2001).

Conclusion

Understanding how juries process information and reach decisions is a crucial component of our understanding of the law and of justice. Psycho-legal scholars have proposed several theories designed to illuminate these issues. There is some overlap in the explanatory power of these theories, but each contributes a unique understanding of the jury. Commonsense Justice provides insight into the conflict between lay understanding of the law and the legally structured decisions jurors are bound to make. The idea of generic prejudice highlights ways in which difficult to identify juror biases can affect trial fairness. Once in the courtroom, the Story Model explains how jurors globally integrate and use trial evidence in their decisions. Social cognition theories that touch on and inform each of these jury-specific theories deepen our understanding of jurors' use of particular pieces of evidence, and of how they can be biased despite the best intentions of the jurors. These theories have not only discussed the process of jury decision-making, but they have also suggested new empirical approaches that enrich our study of jury decision-making. Together, all of these theories provide clues to the mysterious, complex, and often confusing world of jury decision-making.

Although the theories discussed in this chapter were primarily developed on the American jury system, they have the potential to inform international research and policy on jury decision-making. Most of these theories are directed at the cognitive processing, integration, and application of trial evidence. The Story Model, Commonsense Justice, and generic prejudice are all derived from basic psychological theories, and many elements of these theories are likely to inform jury decision-making in any system or country. The social cognition theories presented have been applied to the U.S. jury system, but they should also be applicable to jury systems with slightly different procedures.

No one theory explains all of jury decision-making. However, an integration of current theories could expand our understanding of jury decision-making. The impact of each of the theories discussed in this chapter could and should also be expanded to the deliberation process. Currently, the applicability of the proposed theories to group decision-making is unclear. Future research on these theories should systematically investigate the effect of deliberations to broaden their applicability in the jury situation. Additionally, future research should attempt to develop further the less well-understood elements of the jury-specific theories and

to expand our knowledge of the operation of these theories in a wider variety of jury decision-making tasks. The challenge in all of this research will be to construct legally relevant but theoretically informative manipulations because a theoretical basis for research on jury decision-making is essential to our understanding of this fundamental component of the legal system.

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Chapter 4

Inadmissible Evidence and Pretrial Publicity: The Effects (and Ineffectiveness) of Admonitions to Disregard

Joel D. Lieberman, Jamie Arndt and Matthew Vess

Synopsis

During a trial, jurors may be admonished to ignore pretrial publicity or inadmissible statements made by witnesses or attorneys. Pretrial publicity has been a long-standing concern of courts around the world. Constitutional guarantees of free speech compound the problem in the United States. This chapter discusses the findings of social science studies that have examined the effects of pretrial publicity. Various safeguards that are employed to control publicity effects are discussed. These safeguards include using jury selection to identify and remove biased jurors, delaying the start of the trial or changing the location of it, and admonishing jurors to disregard information. In addition, the chapter focuses on the effects of admonishing jurors to ignore inadmissible information revealed in court. Empirical research has demonstrated that admonitions are relatively ineffective and sometimes produce a “backfire effect,” resulting in jurors relying more heavily on information they have been instructed to disregard. The issue of admonition ineffectiveness is explored through the application of several social psychological theories, including belief perseverance, the hindsight bias, reactance theory, and the theory of ironic processes of mental control. It appears that no single theory can provide a complete explanation for observed effects, and that it may be necessary to integrate several theoretical perspectives in order to improve admonition effectiveness. The chapter concludes with a discussion of policy recommendations and suggestions for future research in this area.

Inadmissible Evidence and Pretrial Publicity: The Effects (and Ineffectiveness) of Admonitions to Disregard

One clear axiom to emerge from social science research on human behavior is that peoples' judgments are often fueled, both intentionally and unintentionally, by a wide variety of biases and heuristic processes. Such influences have diverse implications for understanding how individuals generally go about making decisions, and can be particularly useful for understanding how the decisions made by a presumably "unbiased" juror can, in fact, become biased. Although jurors are tasked with deciding a case based on evidence presented during a trial, they may also be influenced by a variety of additional sources of information. For example, jurors may make assumptions about the character of defendants, victims, or witnesses on the basis of heuristic beliefs (i.e., mental shortcuts such as stereotypes that allow for the quick and efficient processing of information) activated by attributes possessed by a target (see Chapter 3 in this volume for an extensive discussion on the use of heuristics). Such assumptions may impact how jurors interpret the strength of evidence presented on behalf of each party. In addition, jurors may possess mental prototypes for the nature of specific crimes and rely on their mental prototypes, rather than on specific instructions delivered by the judge when deciding whether a crime has been committed or whether specific legal defenses such as "insanity" are appropriate (e.g., Finkel, 2000; Finkel and Groscup, 1997). Jurors may also rely on specific information they have been instructed to disregard. This type of information may come from outside the courtroom in the form of pretrial publicity, or in the form of inadmissible statements made in court during the trial. This chapter examines relevant research regarding the biasing effects that pretrial publicity and inadmissible evidence may have.

Pretrial Publicity

In the United States, there has been a long-standing conflict between the protections afforded to a free press under the First Amendment of the Constitution and the Sixth Amendment's guarantees to criminal defendants of a trial by an impartial jury held in the district where a crime was committed. When a person becomes a suspect in a criminal investigation, or is tried for a crime, media outlets can provide extensive coverage of the case. In high profile trials, the media may report on the person's background including any prior criminal record, their actions before and after the crime was committed, details of the case, and perhaps most damaging, opinions regarding the likely guilt or innocence of the accused made by legal experts and others. Those commenting on the case may go out of their way to publicly shame and excoriate the suspect/defendant. The means for conveying this information are not restricted to traditional news reports, but can also take other forms such as talk-shows which are designed to entertain viewers as much as they are to inform

them. Further, case-relevant information may be transmitted over the internet by news or entertainment organizations (e.g., tabloid sites such as TMZ.com) or from blogs posted by anyone with an opinion regarding the case. Although the recent proliferation of cable news channels and the internet may have exacerbated this conflict between the First and Sixth Amendments, the problems of pretrial publicity are not new and date back to at least the early nineteenth century (Lieberman and Arndt, 2000).

The Search for Impartial Jurors

Courts in the United States have taken the approach that in some cases it may be almost impossible to find a juror that has not been exposed to some degree to publicity surrounding a trial and that exposure to pretrial publicity does not necessitate excluding a prospective juror. Rather, the chief criterion used to determine whether a prospective juror should be excluded is whether the individual has developed a strong opinion regarding the guilt or innocence of the accused, such that he or she cannot impartially hear the case. For example, in *Murphy v. Florida* (1975), Murphy argued that he was unable to receive a fair trial due to the widespread reports of his prior convictions in the media. The Court concluded that jurors do not have to be completely unaware of a defendant's history, as long as such knowledge does not interfere with their ability to be impartial.

Unfortunately, self-reports of impartiality made by jurors may hold little value. Nisbett and Wilson (1977) revealed rather clearly that people are often unwilling or unable to accurately report factors that influence their judgments. This general principle seems to hold true for jurors as well. For example, Moran and Cutler (1991) found that there was no relationship between exposure to case details and respondent claims of impartiality in an examination of two highly publicized trials in Florida. Many respondents who claimed that they could be impartial also reported that they would be unable to set aside case-relevant news stories to which they had been exposed. Thus, even though potential jurors may recognize that they have been exposed to damaging pretrial publicity, and may have already developed a prejudicial opinion of the defendant, they may still claim impartiality and satisfy the courts' criteria, especially if additional probing questions are not asked.

Notably, even if such querying is pursued, people may still erroneously endorse their impartiality. For example, Dexter et al. (1992) found that pretrial publicity led mock jurors to be more punitive toward defendants, despite an extended *voir dire* process where jurors were directly asked about the influence of the publicity. Similar findings have also been obtained by other research teams (Kerr et al., 1991; Sue et al., 1975; but see Padawer-Singer et al., 1974).

Evidence indicates that it becomes quite difficult to eliminate the biasing effects of pretrial publicity, whether it occurs via print media or in a video format (Wilson and Bornstein, 1998; but see Ogloff and Vidmar, 1994), once exposure has occurred (Bornstein et al., 2002; Steblay et al., 1999). Such exposure also does not tend to result

in a level playing field in terms of the direction of bias. Research has consistently shown that individuals who have been exposed to media crime stories develop a pro-prosecution bias (Constanti and King, 1980; Freedman and Burke, 1996; Moran and Cutler, 1991; Simon and Eimermann, 1971). Further, several studies have indicated that exposure to either factually or emotionally oriented publicity is damaging to defendants (Kramer et al., 1990; Ogloff and Vidmar, 1994; Wilson and Bornstein, 1998). Factual publicity refers to information that has probative value (e.g., prior conviction information or other incriminating evidence). Emotional publicity refers to information that arouses negative feelings toward the defendant, but does not make it more or less likely that the defendant committed the crime that he or she is charged with (e.g., that a murder was carried out in a particularly violent and brutal manner).¹

The specific content of negative publicity also appears to have an impact on jurors. Otto et al. (1994) report that comments about the character of a defendant and both strong and weak inadmissible statements regarding the defendants' guilt directly affected mock jurors' pretrial judgments of guilt. Pretrial judgments influenced overall perceptions of the defendant, beliefs in the strength of the prosecution's case and ultimately, final verdicts. Other types of pretrial publicity had indirect effects on final verdicts. For example, prior record information led participants to perceive the defendant to be a "typical criminal," which in turn influenced final verdict judgments.

The effects regarding statements about a defendant's character are particularly troubling because community members may be commonly exposed to such information. Imrich et al. (1995) conducted a content analysis of crime stories reported in 14 newspapers around the United States. The researchers recorded whether the news stories reported categories of information that the American Bar Association (ABA) considers to be highly prejudicial to a defendant, and as a result should not be publicly disseminated (e.g., prior criminal record, details about the character or reputation of the accused; American Bar Association, 1983).

The results of the content analysis indicated that 27 percent of suspects identified in newspaper crime stories were described in ways that violated the ABA standards. Among the most common types of publicly revealed information were negative statements about the suspect, prior arrest information, opinions of guilt, confessions, and prior conviction information. Law enforcement officers and prosecutors were often the sources of prejudicial information to the newspapers.

In a similar study, Dixon and Linz (2002) examined the same categories of inadmissible evidence as those used by Imrich et al. (1995) in a content analysis focused on the influence of defendant race on pretrial publicity, using a sample

1 However, somewhat discrepant findings regarding the influence of factual publicity were obtained in England by Horness et al. (2003). They report that participants' affective/evaluative recall of publicity was associated with greater confidence in defendant guilt but recall of factual publicity was not.

of Los Angeles television news reports. The results indicated that 19 percent of defendants were described in ways associated with at least one of the damaging categories of information identified by the ABA. In addition, African-Americans and Latinos were twice as likely as Whites to be described in prejudicial ways, and Latinos who victimized Whites were almost three times as likely as Whites to be described in ways that violated the ABA standards.

Pretrial publicity has been shown to exert a stronger effect on individuals who hold more neutral, rather than strong, relevant attitudes. For example, Kovera (2002) found that exposure to rape media affected judgments of the importance of evidence in rape cases only among participants with neutral attitudes toward rape (as opposed to those identified as holding pro-defendant or pro-victim attitudes).

In addition, Hope et al. (2004) conducted an experimental study in which they found that participants exposed to negative pretrial publicity about a defendant tended to display larger perceptual distortion regarding whether evidence favored the prosecution or the defense. More specifically, negative pretrial publicity led participants to view new evidence as supporting the prosecution's side.

In sum, a number of studies point to the problems associated with pretrial publicity. The findings of individual studies in this area are strengthened by the results of a meta-analysis done by Steblay et al. (1999) that examined overall effects of pretrial publicity across 44 studies involving 5,755 participants. Steblay et al. found that negative pretrial publicity was clearly damaging to defendants, and that the effect is not limited to artificial laboratory investigations that may present pretrial publicity just prior to the presentation of trial evidence. Rather greater effects sizes were obtained in studies with higher external validity such as when real pretrial publicity was used as opposed to simulated publicity, with longer time periods between publicity exposure and judgments (e.g., verdict decisions), and when individuals who were representative of jurors in the local community (rather than undergraduates) were used as participants.²

Procedural Remedies to Pretrial Publicity Problems

A variety of remedies have been used to deal with the problem of pretrial publicity, such as delaying the start of the trial with a continuance, moving the trial to a different community, removing biased prospective jurors during *voir dire*, and delivering judicial admonitions to ignore the publicity. These remedies, however, are typically either ineffective or rarely implemented.

2 Although "pretrial" publicity has been discussed in this section, the general findings are, of course, relevant to publicity that a juror may be exposed to during the course of the trial itself. Admonitions to avoid the news and to refrain from discussions regarding topics related to the trial are the principle recourse used by courts to prevent the influence of such information (with removal of the juror as an alternative if the judge becomes aware that exposure has occurred).

Issuing a continuance or a change in venue In situations where pretrial publicity is high, courts may attempt to reduce its impact by using a continuance. A continuance is a postponement of a trial, hearing, or some other legal proceeding. There is minimal research on the effects of continuances at reducing publicity effects, but some extant research indicates that increasing the length of time between exposure to pretrial publicity and presentation of trial information reduces the impact of factual publicity, but not neutral or emotionally oriented publicity (Davis, 1986; Kramer et al., 1990). However, the continuances used in these studies have been relatively short (7 days and 12 days, respectively) so there is little external validity associated with the findings because real world continuances would be substantially longer.

Courts may also grant requests for changing the venue of the trial to another community where the extent of community bias may be less because it has received less publicity. This procedure has the potential to be an effective remedy for pretrial publicity, because it may facilitate the selection of more impartial jurors. This is likely even when a case has received extensive national publicity, such as the Timothy McVeigh trial for the bombing of the Oklahoma City Federal Building in 1995 (Studebaker et al., 2000). However, in the United States, Constitutional guarantees that a defendant will receive a speedy trial in the district where a crime was committed, combined with the logistical difficulties of moving a trial to a different location cause these remedies to be rarely used. As a result, courts tend to rely on other potential solutions.

Voir dire Courts in the United States typically use voir dire to counter the impact of pretrial publicity by identifying and excluding prospective jurors who indicate that they cannot be impartial. However, a juror may be unaware as to the extent they have been biased by pretrial publicity and inaccurately claim impartiality. Alternatively, jurors may be motivated to serve on a case where there has been a high degree of publicity because they hope to gain something from the experience (capitalize on their status as a juror in some way when the trial is over, or be responsible for the conviction, and in some cases the sentence, of a defendant charged with a particularly heinous crime), or may want to serve on the trial simply out of curiosity about the potential experience. However, as previously discussed, social science research indicates that voir dire is unlikely to completely eliminate the problem of pretrial publicity, and there is evidence that voir dire may actually exacerbate the problem of pretrial publicity if jurors are asked to express pretrial verdict inclinations (Freedman et al., 1998; Steblay et al. 1999).

Further, if a juror is dishonest regarding the impact of exposure to publicity, it will be difficult to exclude that juror on the basis of a “challenge for cause.” In the United States attorneys may be able to exclude a juror they believe is being dishonest using one of the “peremptory challenges” they have been allotted. However, most other countries do not allow jurors to be excluded using this approach (relevant international issues are discussed in detail below; in addition, see Chapter 5 in this volume for a discussion of different methods of excluding jurors). In fact, in some

counties (e.g., within the United Kingdom) *voir dire* typically does not focus on jury selection, but is centered on rather intense legal arguments over what evidence may or may not be presented to the jury. Even in the United States where peremptory challenges are available to attorneys, there is no guarantee attorneys will be able to exercise them intelligently if only limited, or dishonest, information is being provided by jurors. Consequently, it does not appear that *voir dire* is an adequate remedy. This is particularly true in countries outside the United States, who tend to conduct jury selection in a very different (and far more restricted) manner than how it is done within the U.S.

Judicial admonitions Judges often try to supplement efforts to eliminate the influence of pretrial publicity through direct instructions to jurors to ignore the information. However, admonitions do not appear to be an effective remedy in either criminal or civil cases (e.g., Bornstein et al., 2002; Sue et al., 1974) in terms of reducing the influence of either factual or emotionally oriented publicity (Kramer et al., 1990). However, in cases where admonitions have failed to control pretrial publicity (and hearsay testimony), jurors have been shown to set aside such information when suspicion was cast regarding the motivation of the source of the information (Fein et al., 1997).

It should be noted that several early studies (Kline and Jess, 1966; Simon, 1966) revealed contrary findings regarding the influence of pretrial publicity, however the studies tended to have a variety of methodological limitations. For example, Kline and Jess (1966) based results on a sample of only four mock juries exposed to pretrial publicity, and Simon (1966) informed participants that the purpose of the research was to study “the problem of pretrial publicity,” thus, creating potential demand characteristics for participants. In general, it appears that simply instructing jurors to ignore information they have heard outside the courtroom is not an effective solution. The problems associated with admonitions are discussed in greater detail in the In-Court Inadmissible Evidence section later in this chapter.

International Considerations—Restrictions on the Media

In nations outside the United States that use juries, courts often deal with the problem of pretrial publicity by restricting individuals from publicly discussing details of a case *sub judice* (e.g., Australia [Chesterman, 2000], Canada [Vidmar, 2002], England [Lloyd-Bostock and Thomas, 2000], Ireland [Jackson et al., 2000], and Scotland [Duff, 2000]). When a case is *sub judice* or “under judgment” it is inappropriate to make public comments about the parties at trial, the evidence, or other aspects of the case. Doing so can lead to contempt of court punishments or other types of injunctions. Specific laws vary from country to country regarding the extent of such restrictions. Some nations even prevent the reporting of the progress or nature of a police investigation. Thus, once a person officially becomes a suspect, he or she is free from any further speculation in the media (D. Canter, personal

communication, July 17, 2007). In the United States, First Amendment rights under the U.S. Constitution guaranteeing free speech generally prevent such restrictions from being imposed on the press. However, even in the United States, there may be some limits placed on the press in certain situations. For example, in the United States (and other nations as well) the names of juveniles who are offenders or victims are typically not publicly disseminated. Similar restrictions often exist in order to protect the privacy rights of sexual assault victims. In addition, United States judges occasionally issue “gag orders” to prevent trial related information from being made public, but such orders are targeted to specific aspects of a case, rather than a more complete ban on reporting of the case as exists under *sub judice* restrictions, and do not extend to those commenting on the case (such as on a news related talk-show).

Official control on the dissemination of trial related information to the public may seem to be the surest remedy to overcoming the problem of pretrial publicity. However, jurors may still become aware of (and influenced by) details surrounding a case. Despite *sub judice* restrictions imposed on the media, community member involvement in the case, as well as rumor and gossip, may cause jurors to enter the courtroom in possession of considerable amounts of case related information (and misinformation). In addition, jurors may attempt to obtain greater knowledge about a case through stories reported by news agencies outside the country (Vidmar, 2002). For example, the 1993 Canadian trial of Paul Bernardo for the rape (recorded on videotape) and murder of several women with the assistance of his wife, generated a great deal of national and international interest. Although members of the Canadian press were barred from reporting on the details of the case, 26 percent of individuals living in Ontario reported obtaining information about the case from U.S. publications such as the *New York Times* and the *Washington Post* or from television broadcasts (Angus Reid Group [1993], as cited in Vidmar, 2002).

The internet has of course greatly simplified the process of obtaining news from other countries, which jurors may use before or during a trial. Indeed, Chesterman et al. (2001) found that jurors on three of 41 Australian juries admitted to using the internet to seek information about the case they served on, even though they had been specifically admonished not to seek such information by the trial judge. As a result, legislation has been introduced in Queensland and New South Wales that would impose two-year jail sentences on jurors who use the internet to obtain trial related information (Goodman-Delahunty and Tait, 2006; Meade and Hart, 2005).

The problems created by jurors’ gathering information about a case before and during a trial may be exacerbated by the jury selection procedures used in countries outside the United States (see Chapter 5 in this volume). Most countries have trial procedures that place greater restrictions on attorneys’ ability to exclude prospective jurors (e.g., prohibiting the use of peremptory challenges, with which an attorney can exclude a limited number of jurors without providing a justification) and do not allow the same extent of questioning of prospective jurors as in the United States. As a result, in many countries (e.g., New Zealand and Scotland; Cameron et al., 2000; Duff, 2000) it may be difficult to ascertain the extent, nature, and source of pretrial

publicity a juror has encountered, and it may be impossible to effectively exclude jurors who have been exposed to extensive publicity (although, as previously discussed, even in the United States it is difficult for attorneys to effectively eliminate biased jurors).

Summary of Pretrial Publicity Effects

Thus, on the basis of a considerable number of pretrial publicity studies conducted to date, it appears that negative pretrial publicity about a defendant interferes with his or her right to receive a fair trial. Although Constitutional protections of free speech allow for extensive coverage of a case before and during a trial in the United States, the problems associated with publicity may extend to other nations as well, even if restrictions are placed on the press from reporting details of the case. In the United States, courts attempt to manage the influence of publicity through various procedural remedies. Some of the most effective remedies such as issuing a continuance or changing the venue of the trial may be difficult to implement on a routine basis. As a result, courts often try to identify and eliminate biased jurors, and instruct jurors who make it through the selection process to ignore information they have heard about the trial outside the courtroom. These approaches have not been shown to control the biasing influence of negative publicity on a routine basis, and in some cases may increase jurors' adherence to their pretrial verdict inclinations (i.e., their belief, in the absence of evidence presented in court, that a defendant may or may not be responsible for what they are accused of).³ Similar problems have emerged regarding inadmissible evidence presented in-court.

In-Court Inadmissible Evidence

The United States has very strict rules governing the admissibility of evidence at trial. For example, search and seizure rules govern the investigative activities of law enforcement agencies, and may lead to the exclusion of highly damaging information when it has been obtained in violation of those rules. In addition, restrictions apply on the admissibility of information regarding the prior criminal record of a defendant, confessions if they are coerced, the testimony of expert witnesses and

3 It should be noted that deliberation has also been proposed to be a solution to the problem of pretrial publicity. That is, if a juror brings up information they have heard outside the confines of the courtroom, the hope is that other jurors will remind them that it is inappropriate to consider such information. However, research has shown that deliberations actually tend to increase the effect of publicity on jurors (Kramer et al., 1990). This may be due to the occurrence of the social psychological phenomenon known as group polarization, where group discussion tends to increase the strength of pre-discussion opinions (Moscovici and Zavalloni, 1969).

many other types of information that may have probative value. As a result, in the United States, there is a wide range of information that may be deemed inadmissible. Although other nations vary in this regard, and differences in admissibility may be the result of “judge-made law that develops out of different conceptions of the role and competence of the jury” (Vidmar, 2000a, p. 45), courts around the world generally have some form of criminal procedure rules that prohibit the admission of certain types of evidence. This is true in countries with new jury systems such as Spain and Russia (juries were reintroduced in these countries in 1993 and 1995, respectively), and in countries where jury systems have long been in place. For example, the Russian Constitution and Code of Criminal Procedure allows for the suppression of information such as: illegally seized evidence, confessions that were obtained in violation of a defendant’s right to counsel, or certain forensic evidence such as blood stains or semen, when that evidence has been gathered in a manner that does not follow specific protocol (Thaman, 2000). Similar restrictions exist in most other countries where juries are used, such as Australia, Canada, and England (Chesterman, 2000; Lloyd-Bostock and Thomas, 2000; Thaman, 2000; Vidmar, 2000b). However, jurors may still be exposed to inadmissible evidence during a trial through (inadvertent or intentional) but nonetheless inappropriate witness testimony. In these situations, judges respond by instructing the jurors to disregard the information and inform them that it should play no role in their decision-making. A complete discussion of the specific evidentiary rules of various nations that use juries is beyond the scope of this chapter. Regardless of the specific rules in place, basic psychological processes that transcend jurisdictional differences may make it difficult for jurors to adhere to admonitions to disregard information.

In-Court Inadmissible Evidence Studies

Despite the worldwide relevance of the issue of how inadmissible evidence may affect juror decision-making, the vast majority of research has been performed in the United States. In general, this research indicates that jurors are often biased by such information, and that even concerted efforts to ignore it may fail, especially when the information is viewed as highly relevant. Indeed, a recent meta-analysis conducted by Steblay et al. (2006) reported that inadmissible evidence introduced in court has a reliable influence on verdicts and that judicial instructions intended to reduce these impacts are often ineffective. Jurors also appear to have difficulty following instructions designed to limit their consideration of certain evidence (e.g., Wissler and Saks, 1985). That is, under certain circumstances jurors may be told that they can consider evidence for one purpose, but not another. For example, if a defendant testifies in a criminal trial, evidence that the defendant has a prior criminal record (normally inadmissible altogether) may be introduced to jurors, accompanied by a “limiting instruction” that they are to use it for purposes of determining the credibility of statements made by the defendant, and not as an indicator of the defendant’s guilt.

Factors Affecting the Success of Admonitions

Despite the generally consistent effects of inadmissible evidence studies, research has identified factors that can tend to make jurors more or less likely to adhere to admonitions to ignore evidence. These factors include: the similarity between the inadmissible evidence and the charge at hand, the strength of the evidence, the case seriousness, jury deliberation, extra-legal biases, and whether jurors are given a clear rationale for the admonition. We consider work relevant to these factors below.

Wissler and Saks (1985; see also Sealy and Cornish, 1973) provided evidence that the similarity between prior convictions and current charges can influence the extent to which jurors adhere to limiting instructions. In their study, participants were told that the defendant had previously been convicted of either a similar crime, a dissimilar crime (perjury), or were given no information about a prior record. Participants who were provided with prior record information were given limiting instructions to use the information only to determine the credibility of the defendant. Interestingly, information about the defendant's prior record did not impact the extent to which he was perceived as being credible. The type of prior offense, however, did affect the verdicts rendered such that more guilty verdicts were returned for defendants with similar convictions (75.0%), than defendants with dissimilar convictions (52.5%), perjury convictions (60.0%), or no convictions (42.5%). Similar findings have been obtained by other researchers (Doob and Kirshenbaum, 1973; Hans and Doob, 1976). However, the effects of prior conviction information do not seem to carry over to prior acquittal information. Greene and Dodge (1995) found no difference in the percentage of guilty verdicts between jurors who were given prior acquittal record information and no prior record information.

The effectiveness of judicial admonition also seems to be affected by the strength of the evidence. Sue et al. (1973) found that when participants were presented with weak evidence, they rendered more guilty verdicts if that evidence was deemed inadmissible than when it was not presented at all. In contrast, when the evidence against a defendant was strong, individuals obeyed judicial admonitions and were not influenced by evidence ruled inadmissible. Consequently, it seems that jurors may be most biased by inadmissible evidence in situations where the evidence is weak or equivocal. In related fashion, Rind et al. (1995) found that evidence ruled inadmissible had a smaller impact on verdicts for more serious crimes (e.g., homicide) than for less serious ones (vandalism). These results were consistent with those obtained by Sealy and Cornish (1973), which found that mock jurors were unaffected by inadmissible evidence in a serious rape case but were affected in a minor theft case. At first glance, this implies that due process concerns are greater when a defendant is charged with serious crimes or has overwhelming evidence stacked against him or her. However, it is important to keep in mind that these were juror simulation studies and no actual defendants were on trial. When there is a threat of returning a potentially dangerous individual back into society, as is the case

in real criminal trials, jurors may be more likely to contemplate all the probative information (regardless of its admissibility) at their disposal.

Another discrepancy between real criminal trials and many laboratory-based juror simulations is that juror simulation studies often do not incorporate a deliberation process. London and Nunez (2000) noted that several studies using group verdicts have failed to obtain inadmissible evidence effects (Carretta and Moreland, 1983; Kerwin and Shaffer, 1994; Kline and Jess, 1966; Sealy and Cornish, 1973; but see Hans and Doob, 1976 and Kramer et al., 1990). In light of this, London and Nunez predicted that the impact of incriminating inadmissible evidence was greater before deliberation than after it and obtained results supporting this hypothesis.

In addition to the contextual factors reviewed above, whether or not inadmissible evidence is considered can also be influenced by extra-legal biases. For example, Johnson et al. (1995) demonstrated that the race of the defendant had a moderating impact on the effects of inadmissible evidence. Caucasian participants were more likely to consider incriminating inadmissible evidence when the defendant was Black than when the defendant was White.

Kassin and Sommers (1997; see also Thompson et al., 1981) provide converging support for the notion that jurors can selectively consider inadmissible evidence. They suggested that if jurors are given a logical reason for why evidence is inadmissible and they believe it to be legitimate, then instructions to disregard the evidence can be successful. In this study, mock jurors in a control condition were exposed to circumstantial and ambiguous evidence about a man on trial for murder. In the experimental conditions, jurors were presented with an audio-taped conversation between the defendant and a friend in which the defendant confessed to murder. Within the experimental conditions, the audio-taped confession was either ruled admissible, inadmissible because it was illegally obtained, or inadmissible because it was barely audible and difficult to accurately ascertain what was said. The results indicated that the admissible confession produced significantly more guilty verdicts relative to the control condition. However, when participants were provided with the justification to ignore the evidence because it had been illegally obtained, they tended to disregard the admonition and rendered verdicts similar to participants in the admissible evidence condition. In contrast, when the justification to disregard was based on the poor quality of the tape, they reached verdicts no different than participants who were not exposed to the incriminating evidence. In a similar study, Sommers and Kassin (2001) demonstrated that this effect emerged only among individuals high in the need for cognition (Cacioppo and Petty, 1982). Individuals high in need for cognition typically prefer to engage in more elaborate and analytical information processing. Need for cognition is typically measured using an 18-item scale containing items such as "I would prefer complex to simple problems" and "I really enjoy a task that involves coming up with new solutions to problems" (Petty et al., 1984). Sommers and Kassin attributed their findings to people high in need for cognition having an increased motivation to arrive at accurate decisions (i.e., correctly identifying guilt) based on the systematic examination of

all relevant information. Thus, mock jurors who were high in the need for cognition were reluctant to use evidence that was ruled inadmissible because its reliability was questionable, presumably because doing so could potentially lead to inaccurate judgments. However, high need for cognition participants did not hesitate to use the illegally obtained inadmissible evidence. Apparently, these individuals placed the desire to render an accurate verdict over the desire to provide a fair trial to the defendant.

The above findings suggest that mock jurors may be hesitant to use inadmissible information that they feel is unreliable. Consistent with this, other research suggests that inadmissible evidence is less influential when mock jurors are suspicious about it. For example, pretrial publicity or hearsay testimony was less influential in jurors' decision-making if suspicion had been cast about the motivation of its source (Fein et al., 1997). Yet both types of inadmissible information were influential in the absence of aroused suspicion despite being accompanied by a judicial admonition to disregard.

Backfire Effect

One of the most concerning findings of research on judicial admonitions has been the demonstration of a "backfire effect" (Cox and Tanford, 1989). The backfire effect refers to the tendency for jurors to paradoxically pay *greater* attention to information ruled inadmissible than if the judge had not drawn attention to the admissibility of the information and simply allowed it into evidence. In an early demonstration of this effect, Broeder (1959) found that mock jurors presented with information that a defendant was covered by insurance (information that should not be considered by jurors when rendering damages) awarded slightly more damages (\$37,000) compared to a group of participants not told about the defendant's insurance coverage (\$33,000). However, when that insurance information was ruled inadmissible, jurors were unable to set the influence of that information aside, resulting in the highest amount of damages (\$46,000) awarded.

Cox and Tanford (1989, Study 2) reported similar findings in a study in which they presented participants with either limited use or inadmissible evidence. Limited use evidence did not influence jurors when it was not accompanied by instructions to disregard it. However, when a judicial admonition was issued in regards to limited use evidence, mock jurors demonstrated a backfire effect and made significantly more punitive judgments, stronger negligence ratings, and more negative character trait ratings (e.g., credibility) of the defendant. Interestingly, inadmissible evidence (such as whether the defendant had liability insurance or had offered to settle the case) did not have an impact when accompanied with an admonition to disregard it. However, inadmissible evidence did increase liability judgments when presented without admonitions (similar effects for inadmissible evidence were also obtained in a prior study—Cox and Tanford, Study 1). According to Cox and Tanford, this discrepancy can be explained by the possibility that limited use evidence (compared

to inadmissible evidence) creates more character trait attributions. They further argued that it might be easier to disregard a discrete element of evidence than to ignore an impression of a defendant's character rooted in inappropriate evidence. However, this would imply that jurors may still consider inadmissible evidence if such evidence would produce character attributions.

The backfire effect appears more likely to occur when jurors are instructed to disregard prior conviction evidence as opposed to more tangential hearsay evidence (i.e., out-of-court statements by a third party not testifying and who therefore cannot be cross-examined), which may be viewed as less reliable. Pickel (1995) found that jurors were unable to ignore inadmissible prior conviction evidence when it was accompanied by a judicial explanation about the basis behind the ruling. However, a backfire effect did not occur when the same type of instructions accompanied hearsay evidence. According to Pickel, jurors may not only have schemas for crimes and criminals, but also for what should be considered "admissible evidence." For example, participants may have believed that it was unfair to consider hearsay evidence, yet reasonable to utilize other types of inadmissible evidence (e.g., prior conviction information, illegally obtained evidence). This possibility is consistent with other studies demonstrating that the impact of hearsay evidence can be assuaged by both judicial admonitions and limiting instructions (Landsman and Rakos, 1991; Miene et al., 1992; Paglia and Schuller, 1998; Rakos and Landsman, 1991; but see Lee et al., 2005, and Schuller, 1995).

Finally, Cook et al. (2004) hypothesized that a backfire effect may be most likely to occur among individuals who are predisposed to use all relevant information when making legal judgments. Their results demonstrated that individuals who tended to utilize their own ideas of procedural justice when making legal decisions were more punitive towards a defendant when presented with inadmissible evidence accompanied by judicial admonitions. In contrast, such a backfire effect did not emerge among individuals oriented towards strictly adhering to the law.

Thus, judicial instructions to disregard or limit the use of inadmissible evidence are frequently unsuccessful. In addition, such instructions can also paradoxically focus jurors' attention to the inadmissible information and thus amplify its impact on legal decisions. Despite several factors that can reduce the likelihood that judicial admonitions will "backfire," the general trend of the findings seems unsettling for legal systems built on notions of due process.

Theoretical Explanations for the Ineffectiveness of Limiting Instructions

The extant research highlights rather clearly that people have difficulty ignoring inadmissible or limited use-evidence. Of course, a critical step in designing effective solutions to such a problem is to first understand why it occurs. In this light, a number of social psychological theories provide some degree of clarification regarding underlying causes and potential remedies for the biasing effects of various

types of inadmissible information. It should be noted that each of these theoretical explanations is relevant to explaining the powerful effects of both pretrial publicity and in-court inadmissible evidence.

Belief Perseverance

Once an individual forms a belief, the belief becomes highly resistant to change, and influences how that person perceives and subsequently processes future information; a phenomenon known as belief perseverance (Anderson et al., 1980). Such reactions may often take the form of discrediting new belief-inconsistent information. Importantly, although belief perseverance can be a powerful force, it can be overcome by prompting participants to explain why beliefs opposite to their own may be true (Anderson, 1982; Anderson and Sechler, 1986).

In the present context, to the extent that individuals who hear pretrial publicity may form initial beliefs about a defendant in a case, these cognitions should persist and influence later interpretation of trial evidence. Indeed, if during the course of a trial jurors are presented with damaging information about a defendant, the resultant beliefs should have an enduring effect that renders them resistant to change. Hence, when a judge issues an admonition to jurors to disregard the damaging information, the jurors' initial beliefs should persist. This should be particularly problematic in situations where jurors are exposed to inadmissible evidence early in the trial (e.g., during the prosecutor's presentation of evidence).

It is important to note that although belief perseverance provides an adequate explanation for the persistence of beliefs previously formed through exposure to pretrial publicity or inadmissible evidence (and thus the general failure of limiting instructions), belief perseverance cannot explain why jurors are *more* likely to rely on information when it is ruled inadmissible (i.e., the backfire effect). Moreover, belief perseverance cannot account for situations in which the backfire effect is attenuated or limiting instructions are effective; for example, when the limiting instruction is based on admonitions revealing doubts in the quality or confidence of incriminating evidence (Kassin and Sommers, 1997).

Hindsight Bias

Another suggested explanation for the ineffectiveness of limiting instructions stems from a cognitive process relating to the "hindsight bias" (Casper et al., 1989). Hindsight bias refers to the process whereby once the outcome of a particular event is known, individuals are prone to overestimate the likelihood that the outcome would have occurred, to better remember events consistent with the outcome, and to judge less likely the feasibility of alternative outcomes (Fischhoff, 1975). In the context of reactions to judicial admonitions, this process may interfere with jurors' ability to ignore information of which they are aware, but instructed not to use, in their decision-making.

Casper et al. (1989) reported evidence in support of this possibility. Using a videotaped simulation of a trial involving an illegal search and seizure civil suit, Casper et al. found that participants did not adhere to admonitions to disregard the outcome of an illegal search. Specifically, despite the admonition, participants exposed to the (subsequently deemed illegal) search outcome awarded significantly lower actual and punitive damages to the defendant when participants heard that evidence of illegal conduct was found, as compared to conditions where police did not find any incriminating evidence or where no outcome information was provided. In addition, testimony interpretation was the strongest predictor of damages, suggesting that outcome information appears to affect how evidence is encoded, recalled, and retrieved. However, although this study provides support for a hindsight bias interpretation of the failure of judicial admonitions, it is not clear that this theoretical explanation can account for studies that have demonstrated a backfire effect.

Reactance Theory

One of the more common explanations for the failure of limiting instructions is that judicial admonitions produce “reactance” in jurors. Reactance theory (Brehm, 1966; Brehm and Brehm, 1981) maintains that when individuals perceive that their ability to perform “free behaviors”—behaviors for which they have requisite physical or psychological ability—is threatened they become psychologically aroused, which in turn increases the attractiveness of the now forbidden action and impels the individual to reassert the undermined freedom (Brehm et al., 1966). Perhaps most notably, reactance effects frequently occur in contexts involving attempts at persuasive communication (Brehm and Sensenig, 1966; Worchel and Brehm, 1970), and thus are particularly applicable to reactions to jury instructions.

The research of Wolf and Montgomery (1977; see also Clark, 1994) provides a classic demonstration of the applicability of this analysis. Mock jurors were presented with a simulated trial wherein specific testimony was ruled either admissible or inadmissible. In the inadmissible conditions, the ruling was accompanied by a weak or strong admonition. The results revealed that participants receiving a strong admonition (“I want to remind you that the testimony ... was ruled inadmissible. Therefore, it must play no role in your consideration of the case. You have no choice but to disregard it” [p. 211]) were actually more influenced by the inadmissible evidence than either the weak admonition condition or the admissible control condition.

The reactance explanation holds that jurors may consider their ability to process any relevant probative testimony or information a free behavior. To deny them that right is to deny what may be a desired freedom, especially if instructions to ignore information run counter to more global conceptions of justice and the motivation for perceived fairness in legal contexts (Tyler, 1988). Admonitions to ignore either pretrial publicity or in-court statements (or to restrict the use of information to

specific purposes) may thus arouse reactance, leading jurors to seek to reestablish their freedom by more heavily weighing the information they have been instructed to disregard. Thus, the inadmissible evidence would be considered more strongly, either in their private contemplation or in the context of deliberation. Further, as work on reactance makes clear, the threatened “freedom” (in this case the ability to consider the inadmissible evidence) can be viewed as more attractive as people reevaluate that freedom, and thus jurors may not only fail to ignore the evidence, but also may perceive it as being an even more critical piece of information.

The Wolf and Montgomery (1977) findings are illustrative of a number of studies showing that inadmissible evidence accompanied by a judicial admonition is more powerful than evidence not accompanied by an admonition, or even admissible evidence (e.g., Clark, 1994). This follows from the reactance idea that the greater the limits jurors perceive to exist on their deliberative freedom (as would be expected by stronger versus weaker admonitions), the greater the likelihood that they will be influenced by inadmissible evidence.

The theoretical architecture of reactance also enables understanding of a number of nuances to the inadmissible evidence literature. For example, the assumptions of reactance theory are such that the individual must be motivated to consider the inadmissible evidence. In this way the theory may also be useful for understanding why the backfire effect occurs for certain types of evidence, but not others. Such was the case in research conducted by Pickel (1995), in which explanations for inadmissibility eliminated a backfire effect for hearsay evidence but not for prior conviction evidence. This pattern makes sense if jurors do not perceive the probative value of hearsay to be as great as other evidence that is more direct (see e.g., Landsman and Rakos, 1991; Miene et al., 1992; Paglia and Schuller, 1998; Rakos and Landsman, 1991), and thus an admonition to ignore hearsay evidence would arouse less reactance.

However, in the context of a civil trial, Lee et al. (2005) found a backfire effect occurred for hearsay evidence when a strong admonition, as opposed to a weak admonition (or no admonition), had been given. The backfire effect occurred on a variable measuring jurors’ decisions to award punitive damages to a defendant, but not on a measure of liability judgments. Lee et al. attributed these disparate findings to the specific hearsay evidence presented being more relevant to determining the egregiousness of the defendant’s behavior, than to liability decisions. Consequently, the nature of hearsay evidence may cause jurors to feel that it is relevant in certain circumstances, thus producing a reactance effect in those cases.

Similarly, Johnson (1994) investigated the impact of admonitions to disregard victim sexual history information and rape type (stranger vs. acquaintance rape) on perceptions of rape victims. Participants in this study did not differ in their perceptions of victim enjoyment when exposed to admissible information about the victim’s prior sexual history. In stark contrast, when the same information was ruled inadmissible, perceptions of victim enjoyment were reduced in the stranger rape condition but not in the acquaintance rape condition. These results indicate that participants may have

an easier time disregarding inadmissible information if it is perceived as irrelevant, as in the stranger rape scenario. However, in the acquaintance rape case, participants may have viewed the prior sexual history information as relevant which made it more difficult for them to ignore.

In sum, within a rather simple framework, reactance theory offers a cogent explanation for the effects of inadmissible evidence instructions and the general finding that not only are they ineffective, but may also produce a backfire effect. It is important to point out that a core assumption of this perspective is that jurors are motivated to retain their decision freedoms and that limiting instructions are perceived as a threat in this regard. This would suggest that when an individual is motivated to be a “good” juror and honor the judge’s admonitions, such admonitions should be largely effective. The ironic-process theory of mental control (Wegner, 1994), however, elucidates cognitive processes that suggest otherwise.

Ironic Processes of Mental Control

Imagine a juror who is told to disregard a piece of incriminating evidence and who desires to adhere to the judge’s admonition. Unfortunately, the harder he tries to ignore this evidence the more it seems to come back into his mind. As a result, despite the juror’s well-intentioned efforts he is ultimately influenced by the very evidence he has tried so hard to ignore. From a social psychological perspective, this outcome is not surprising because it has been well established that the more accessible information is, the more that information will influence subsequent judgments (see e.g., Bargh, 1989, for a review). This process of a juror motivated but still failing to successfully ignore the information can perhaps best be explained by Wegner’s (1994) theory of ironic mental processes.

From this perspective, efforts toward mental control over unwanted thoughts involve a combination of an active, conscious, operating process that searches for thoughts reflecting the desired absence of the unwanted thought (e.g., distracters), and a more unconscious monitoring process that checks the success of the operating process. That is, whether or not the thought is indeed absent from consciousness. The irony of the theory’s proposition is that the very processes that are engaged to distract the individual from the thought also monitor the possible recurrence of that thought that in turn may lead to a subsequent identification and heightened accessibility of that construct. With a more accessible construct, its influence on subsequent judgment may be greater.

Empirical demonstrations of ironic-process effects are numerous (see e.g., Wegner and Wenzlaff, 1996; Wenzlaff and Wegner, 2000, for a review). Procedurally, such experiments often involve the administration of a cognitively taxing task that undermines the effortful mental resources associated with the operating process. For example, studies reveal that when participants are placed under cognitive load (mental demand; e.g., rehearsing a number, time pressure) and instructed or self-motivated to suppress a particular thought, the suppressed thought comes to mind

even more strongly (e.g., Arndt et al., 2007; Page et al., 2005; Wegner and Erber, 1992).

The ironic process theory can help to illuminate an understanding of the effects of limiting instructions wherein the inadmissible testimony, for example, becomes information that the juror attempts to suppress. Moreover, there are facets of the trial process that may render attempts to follow judicial admonitions to limit consideration of evidence particularly vulnerable to the ironic effects of mental suppression. Due to the nature of the courtroom situation, the cognitions the person uses to distract him/herself via the operating process (e.g., other evidence) are likely to be associatively connected to the cognitions the individual is attempting to suppress (e.g., the inadmissible evidence). In this light, it might be especially challenging to employ an operating process that does not also prime the inadmissible information.

A second aspect to note about ironic process studies is that such effects typically emerge when participants are placed under elevated cognitive loads. Might such cognitive taxation exist in a trial context? The answer most certainly seems to be “yes.” In many cases, jurors will be exposed to extensive information over the course of several days or weeks, typically accompanied by judicial instructions that are written using complex language filled with legal jargon (see Chapter 6 in this volume for a review). Accordingly, it may be that such a setting creates processing demands that pose a cognitive burden that can function much like a cognitive load manipulation does in laboratory studies.

Given this framework, we can now see another explanation for understanding the greater influence often observed for both pretrial publicity and in-court inadmissible evidence that is accompanied by stronger admonitions. The more a juror attempts to suppress the inadmissible evidence, as may be the case with strong versus weak admonitions, the more accessible the evidence should become. As the evidence becomes more accessible, it should have a greater tendency to influence subsequent judgment, which in this case could be the verdict of the trial. In this way, the ironic-process theory can explain why admonitions to disregard information are often found to be ineffective, and indeed, can even backfire.

Like reactance theory, the ironic-process theory also helps to inform a number of nuances to the literature regarding instructions to ignore information. For example, because people are particularly sensitive to emotional information (e.g., Clore et al., 1994; Wilson and Brekke, 1994), the theory suggests that people should be more effective at limiting their consideration of factual versus emotional information (Edwards and Bryan, 1997). Indeed, Edwards and Bryan found that affective inadmissible evidence had a greater influence on culpability and verdict ratings than factual inadmissible information, even though the two were of similar probative value. Similarly, Kramer et al. (1990) found that a continuance more effectively reduced the impact of factual pretrial publicity than of emotional pretrial publicity (see Horness et al., 2003).

By focusing on the cognitive mechanics of mental suppression and its relevance to the failure of limiting instructions, the ironic-process theory suggests avenues

that may help to mitigate the problems this phenomenon raises. For example, to the extent that ironic effects are particularly likely to occur under conditions fostering increased mental demands, procedural innovations that reduce the mental demands placed upon jurors during a trial (e.g., allowing jurors to take notes during a trial, permitting written copies of instructions in the deliberation room) may be helpful. Another potential avenue toward reduction of ironic process effects is to actually have the individual focus on the to-be-suppressed thought (Wegner and Wenzlaff, 1996), a technique that has shown promise in the clinical arena of paradoxical interventions for psychological disorders (e.g., Rohrbaugh and Shoham, 2001). This suggests that it may be useful to provide jurors with instructions that acknowledge the potential influence of inadmissible evidence. Such instructions should emphasize that when jurors think about inadmissible evidence, they remember why it is unfair to let the evidence influence their judgments. This possibility might also work to resolve reactance motivations emanating from strong versus weak admonitions, in part by capitalizing on people's motivation for perceived procedural fairness (Tyler, 1988).

Theoretical Integration

Thus, a number of social psychological theories have been developed that offer potential explanations for the ineffectiveness of admonitions to disregard information. Both belief perseverance and the hindsight bias provide reasonable explanations as to why schemas and beliefs are persistent and resistant to change, and how such beliefs can impact the processing of information. Although both perspectives can certainly explain aspects of the available literature, they suffer in their capacity to explain why jurors are sometimes more likely to rely on evidence after it has been ruled inadmissible. In contrast, reactance theory, and the theory of ironic processes of mental control, can account for the failure (and limited use) of inadmissible evidence instructions generally, and the backfire effect specifically.

The two theories, however, do present different strengths, and there are nuances to the literature that one can explain better than the other (see Lieberman and Arndt, 2000 for a full discussion). For example, Pickel (1995) found a backfire effect for admonitions to ignore inadmissible prior conviction evidence, but found that jurors were successfully able to ignore hearsay evidence when instructed to do so. This suggests that participants' conceptions of what is "just," and thus their motivation to suppress, played a critical role (presumably ignoring hearsay evidence was considered more palatable); a complexity that is less conducive to an ironic-process interpretation. But one can also note that Edwards and Bryan (1997) found mock jurors effectively suppressed factual testimony but were less successful at limiting the influence of emotional testimony. This suggests that the level of cognitive encoding may play a critical role; a finding which is more amenable to an ironic-process explanation.

From our perspective, we suggest that it may be more profitable to consider more global conceptions of each theory's sphere of applicability. Reactance theory explains the backfire effect and the general failure of limiting instructions when the juror is motivated more to maintain their decisional freedom. Thus, from this perspective, a judge's instructions are perceived to be a threat to freedom and it is this external threat that instigates processes manifesting reactance. In contrast, in situations where the juror is motivated to comply with the judge's admonitions, ironic-process theory offers a vehicle for understanding the ineffectiveness of limiting instructions. From this perspective, a judge's instructions would initiate the juror's efforts toward mental suppression, thus establishing the precondition for the occurrence of ironic effects. As we have noted elsewhere (Lieberman and Arndt, 2000), a rather sobering view of the effectiveness of limiting instructions emerges from the conjunction of these two theories.

Yet from this sobriety emerges the potential for empirically informed interventions that might help to alleviate the unwanted problems engendered by admonitions to disregard information or use it for limited purposes. To address the influence of reactance motivations, efforts need to be engaged to short-circuit the perceived threat to the juror's decisional freedom that are provoked by judicial admonitions. Indeed, the research pointing to the comparative effectiveness of limiting instructions when jurors endorse the rationale for the limitation (e.g., the information is unreliable) points to the potential efficacy of this approach. Once a juror is motivated to comply, a secondary line of defense, perhaps employing procedural innovations in the consideration of evidence (e.g., reducing cognitive demands by allowing note taking and presenting more easily comprehensible jury instructions), can be engaged to mitigate the ironic rebound effects of effortful suppression. Taken together, this double-barreled approach raises the hopeful possibility of moving closer to the standard of justice that legal systems that emphasize due process aspire to.

Future Research

Thus, the integration of several theoretical approaches (i.e., reactance and ironic processes of mental control) may be necessary in order for admonitions to disregard information to be more successful. Hopefully, future research will explore the topic of admonition effectiveness from an integrative theoretical approach. In addition, it would be useful for future studies to go beyond the focus on United States procedure, and instead consider the relationship between international jurisdiction rules and theoretical explanations. For example, in countries such as the United Kingdom, do *sub judice* restrictions generally create reactance in individuals? Alternatively, have the system-wide *sub judice* rules created strong perceptions in the general population that it is inappropriate to discuss case details? As a result, do jurors in such nations actively seek to independently ignore any rumors or gossip they hear regarding a case? Do such cultural beliefs increase ironic-process effects?

Future research should also examine whether the general findings reported in this chapter are limited to jurors or extend to judges as well. Can judges completely compartmentalize information heard inside and outside the courtroom? Does pretrial publicity affect judicial decision-making regarding factors such as making determinations regarding whether to include certain instructions, or regarding the admissibility of evidence (e.g., in cases where judges must serve as “gate keepers” and make determinations regarding the reliability and validity of evidence as discussed in Chapter 1 of Volume 2 in this compilation)? How is sentencing affected by awareness of inadmissible evidence and pretrial publicity?

Finally, many studies reviewed in this chapter are based on experimental studies using mock jurors as participants. Many of the limitations associated with this general methodology discussed in Chapter 1 of this volume are certainly relevant. Hopefully, future research will attempt to explore the topic with a greater focus on ecological validity. That is particularly important in pretrial publicity studies where the extent of exposure to publicity that can be created in a simulation is far different to what individuals in an actual high profile trial are exposed to. Similarly, it would be useful to determine whether backfire effects that have been observed in short simulations can also be observed over the course of an actual trial which may last for several days, weeks, or longer. Despite these shortcomings, it is important to remember that the general trends of the findings have been observed in a multitude of studies, using different sets of materials, and in several studies focused on actual cases.

Conclusion

Empirical research has clearly demonstrated that inadmissible evidence is damaging to defendants. This is the case regardless of whether jurors are exposed to pretrial publicity or in-court inadmissible evidence. In many countries that use juries, courts often attempt to control the effects of pretrial publicity by preventing case details from being publicly discussed. However, in the United States, First Amendment guarantees of free speech force courts to turn to alternative means of controlling the effects of publicity on jurors, including issuing continuances or changing the venue, relying on *voir dire*, and admonishing jurors to disregard what they have heard outside the courtroom. Admonitions to disregard information are also delivered to jurors when they are exposed to inadmissible information during a trial. Social science research has indicated that admonitions are generally ineffective. However, there are a number of factors that contribute to jurors being more or less likely to successfully adhere to admonitions, such as the similarity between the inadmissible evidence and the charge at hand, the strength of the evidence, the case seriousness, whether jurors hold extra-legal biases about the defendant, and whether jurors are given a clear rationale for the admonition. In some studies, a “backfire effect,” has

been observed resulting in jurors relying more heavily on information they have been instructed to disregard.

Several social psychological theories have been used to understand the psychological underpinnings of the backfire effect and the general failures of admonition to disregard information. The two most useful explanations appear to be reactance theory and the theory of ironic processes of mental control. However, it appears that neither theory can provide a complete explanation for observed effects, and that it may be necessary to base any policy changes on the integration of these (and perhaps other) theoretical perspectives.

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Chapter 5

The Psychology of Jury Selection

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Synopsis

In this chapter, we discuss jury selection procedures used by courts in the United States as well as other nations where jury trials occur. Attorney effectiveness at identifying and excluding biased jurors is discussed, as is the influence of juror characteristics on the outcome of trials. Demographic factors such as occupation, socioeconomic status, age, race, and gender are reviewed. Personality and attitudinal factors such as authoritarianism, locus of control, just world beliefs, and factors specific to a “legal personality,” are also focused upon.

In order to more effectively identify and exclude jurors whose backgrounds, attitudes, or life experiences may predispose them to being biased against a particular side in the case, attorneys in the United States have turned to using jury selection consultants in certain cases. The techniques used by selection consultants are reviewed, and the effectiveness (and ethics) of this approach is evaluated. The chapter concludes with recommendations for future research to allow for a more complete understanding of the true utility of scientific jury selection.

The Psychology of Jury Selection

Although the use of juries around the world is growing, the majority of countries do not use juries. Ultimately, a nation’s decision to implement or abolish the use of juries is likely related to its general philosophy of government or cultural beliefs regarding the freedom of citizens. Many countries have implemented or maintained the use of juries because the adversarial approach and lay juror participation provides a mechanism to protect and advance democratic principles (Thaman, 2002). For example, juries are a fundamental part of trials in the United States. The Sixth and Seventh Amendments of the U.S. Constitution guarantee defendants a right to a trial by jury in criminal cases and in most civil cases, respectively. One reason why juries are so strongly ingrained within

the U.S. legal system is that they fit with the framework of the principles that the U.S. government was founded upon—keeping power in the hands of the general population, rather than allowing it to be wielded by a few elite individuals.

In countries that provide citizens the power to participate in layperson juries, individuals must be selected from the general population to serve on trials. The process of identifying people who will serve as jurors is often known as *voir dire*. This chapter will explore the process of jury selection, and review social science research investigating the accuracy of attorney assumptions regarding juror verdict inclination. In addition, the effectiveness of “scientific jury selection” is discussed.

Voir Dire

During *voir dire* the judge, and in some cases the attorneys, question prospective jurors to determine if they are qualified to serve as jurors, and to identify whether or not they possess any biases that would interfere with their ability to be impartial. In the United States, the process of selecting individuals to serve as jurors is often viewed as being critically important to the outcome of a trial. In fact, some legal scholars have argued that cases are won or lost on the basis of jury selection (Mogill and Nixon, 1986). For several reasons the importance of *voir dire* is likely greater in the United States than in most other countries that use juries.

First, in the United States, juries are frequently used in both criminal and civil cases. Vidmar (2000a) provides an excellent and extensive review of the contemporary use of juries from an international perspective. He notes that although juries are used in at least 46 other countries, many nations use juries much less frequently than the U.S. to resolve legal disputes (Vidmar, 2000b). For example, in Scotland, juries are used almost exclusively in the context of criminal cases. Other countries such as England and New Zealand have also placed severe restriction on the use of juries in civil cases. Even in criminal cases, the international use of juries is becoming more rare (Lloyd-Bostock and Thomas, 2000).

Second, in the United States jurors are generally exposed to far greater questioning during *voir dire* than in other countries. It is common for *voir dire* to last for several hours, and it can last for weeks or even several months in rare cases where complex legal issues are present or a considerable amount of pretrial publicity surrounds a case. However, it is a misconception that American trials always involve extensive questioning of jurors. For example, the norm in federal courts is to have the judge exclusively question jurors, which can be a short process.

Mechanisms for Excluding Jurors During Voir Dire

As a general rule however, attorneys in the United States have more information about the backgrounds, attitudes, beliefs, and experiences of prospective jurors than their international counterparts. This information in turn is frequently considered

when attempting to have a prospective juror excused from service. If an attorney feels that a juror is biased, that juror can be excluded in one of two ways: either by a challenge for cause or a peremptory challenge. Some nations also allow both procedures, or in some cases only challenges for cause. In addition, a “stand-aside” procedure (similar to a challenge for cause) is used by the prosecution in a few countries, such as England and Australia.

Challenge for cause Under a challenge for cause, an attorney can eliminate a juror because that individual has expressed information or opinions that indicate he or she is prejudiced in some way. In the United States, an unlimited number of challenges for cause can be made during voir dire on the basis of these types of prejudices. However, the judge must approve each challenge for the juror to be excused.

In theory, the legal systems of the countries where most jury trials occur (e.g., the United States, England, Scotland, Canada, Australia, and New Zealand) allow prospective jurors to be excused under this type of challenge. However, in many of those countries, jurors are only asked a few questions, if any at all, during jury selection. As a result, it is extremely difficult to identify prejudicial attitudes jurors may hold. Further, a number of countries also allow for majority verdict decisions (e.g., England, Ireland, and Scotland) and assume that the biases of a particular juror will not interfere with the final jury verdict if the majority holds a different perspective, thus reducing benefits of exercising challenges for cause. As a result, challenges for cause are made relatively infrequently in most countries other than the United States.

Peremptory challenge Attorneys can also exclude jurors using peremptory challenges. This type of challenge does not require an attorney to state any justification to the court for eliminating a juror. Peremptory challenges are useful in cases where an attorney has a strong suspicion that a juror is biased, but that juror has not made any statements that clearly indicate bias. Thus, peremptory challenges provide a safeguard against jurors who are either intentionally deceptive regarding prejudicial attitudes they may hold, or unaware as to the extent that they are influenced by such attitudes. In the United States, each side is given a limited number of peremptory challenges (with the total number dependent upon the jurisdiction, type of trial [civil versus criminal], seriousness of the case, and, typically, the side of the party). The defense is often given more preemptory challenges in criminal cases. Internationally, some countries allow peremptory challenges, such as New Zealand, Ireland, Canada, and Australia (but in Tasmania, only the defense can exercise them) (Cameron et al., 2000; Heinz, 1993; Jackson et al., 2000). However, in many of these countries it is difficult for attorneys to exercise them intelligently, because (as noted above) questioning of jurors is quite restricted. For example, in Canada, jurors are usually asked just a few questions that can be responded to with “yes” or “no”. In countries where so few questions (or perhaps even no questions) are asked, attorneys have almost no information to base peremptory challenges on.

Other countries that use juries have abolished peremptory challenges altogether. For example, Scotland eliminated the use of peremptory challenges in 1995. The general view in Scotland is that both parties must accept the 15 jurors chosen at random in criminal cases (12 in civil), and that biases and prejudices of individual jurors will not have a large impact on the ultimate verdict. Verdicts should not be affected because they are a product of a group decision-making experience that can be resolved by a simple majority decision of eight to seven (Duff, 2000).

In contrast to the strong restrictions (or elimination altogether) of peremptory challenges in many countries, attorneys in the United States have significant discretion as to whom they will choose to eliminate. However, there have been several restrictions placed on these challenges (e.g., attorneys are prohibited from excluding jurors on the basis of race [*Batson v. Kentucky*, 1986] or gender [*J.E.B. v. Alabama ex. rel.*, 1994]).

Stand aside procedure In 1988 England also eliminated peremptory challenges, however, the prosecutor for the crown can use a “stand aside” (or “standby”) procedure. The stand aside allows a prosecutor to assign a juror to the back of the group of prospective jurors, until all other jurors by both sides have been examined. The individual will only be recalled if a jury cannot be seated following the initial examination of all potential jurors. A stand aside can be used because jurors have a previous criminal record and are ineligible or because they may be biased against the Crown’s case. As a result, the stand aside procedure ultimately works as a preemptory challenge, which the defendant is not allowed to use (Heinz, 1993; Kagen, 2001; Lloyd-Bostock and Thomas, 2000). The stand aside procedure is also allowed in Australia. However, other countries have either not adopted the stand aside procedure or eliminated it (e.g., Canada in 1993) because it was viewed as unfair to the defense (Vidmar, 2000b).

Effectiveness of Traditional Jury Selection Methods

The legitimacy of the practice of excluding prospective jurors is based on the assumption that if each side eliminates the most heavily biased jurors, those that remain will be the most impartial (Fukurai et al., 1993). However, that assumption implies that the backgrounds and attitudes of jurors can affect the outcome of a case. This belief is strongly held within the legal community in the United States. As noted above, “experienced trial lawyers agree that the jury selection process is the single most important aspect of the trial proceedings ... In fact, once the last person on the jury is seated, the trial is essentially won or lost” (Covington, 1985, pp. 575–6).

Social science research investigating the actual effectiveness of *voir dire* jury selection has produced mixed results. Typically, these studies involve either presenting attorneys with trial simulation materials such as the profiles of prospective jurors and asking attorneys to predict verdicts (e.g., Olczak et al., 1991), or comparing the verdict of an actual trial jury to one composed of individuals excluded from

jury service (e.g., Diamond and Zeisel, 1974). Using those types of methodologies, several studies have indicated that attorneys are somewhat effective at identifying and eliminating biased jurors, and that jurors selected through the *voir dire* process render different verdicts than those selected on a random basis (Baldus et al., 2001; Diamond and Zeisel, 1974; Padawer-Singer et al., 1974). However, other research has found that attorneys have difficulty identifying unfavorable jurors, and sometimes perform at a chance level at this task (Fulero and Penrod, 1990; Kovera et al., 2003; Olczak et al., 1991; Zeisel and Diamond, 1978; see Lieberman and Sales, 2007 for a review).

Use of Demographic Factors as Criteria for Jury Selection

Unless a juror makes a statement during *voir dire* that clearly indicates bias towards one of the parties involved, the attorney will have to use other strategies to eliminate biased jurors in countries where peremptory challenges are allowed. Trial tactics manuals are filled with guidelines for identifying the characteristics of desirable and undesirable jurors based upon demographic characteristics such as: ethnicity/race, occupation, wealth and social status, age, religion, gender, marital status, demeanor and appearance (Fulero and Penrod, 1990). However, empirical research has generally demonstrated that demographic factors produce weak effects and inconsistent findings.

Occupation It has been frequently suggested that attorneys use juror occupation as a selection criteria. Occupation may often be considered in peremptory challenge decisions because it is a characteristic that people choose during the course of their lives, rather than a characteristic they are born with (e.g., race). As a result, it may be viewed as having greater predictive value (Lieberman and Sales, 2007). Research has generally not supported this viewpoint, and instead found that occupation does not significantly affect verdict decisions (e.g., Bridgeman and Marlowe, 1979; Simon, 1967; but see Adler, 1973). In addition, there has been only a minimal amount of research that has demonstrated occupation has predictive ability in civil trials (Lieberman and Sales, 2007). In one of the few civil studies that tested the influence of occupation on jury decisions, Denove and Imwinkelried (1995) found that although occupation did not predict liability decisions, it did predict damage awards when measured along with jurors' income level. Blue-collar workers awarded greater damages for emotional injuries than white-collar workers, but the opposite pattern occurred when damages were awarded for physical injuries.

Socio-economic status/income/education Mixed results have been obtained when the influence of juror socio-economic status is investigated. For example, criminal trial research has indicated that socio-economic status has been correlated with verdicts (Hastie et al., 1983; Visher, 1987), however, the findings are inconsistent as to exactly how socio-economic status is associated with verdict. In civil cases,

some research has demonstrated that lower socio-economic status among jurors is associated with a tendency to render a verdict in favor of the plaintiff (Bornstein and Rajki, 1994) and higher damage awards (Darden et al., 1991). When education is examined independently, findings are again inconsistent (Denove and Imwinkelried, 1995; Reed, 1965).

Age Several studies have found a relationship between age and verdict choice, that indicated older people are more conviction prone (Hepburn, 1980; Mills and Bohannon, 1980; Wiener and Stolle, 1997). However, other research has failed to find a relationship between age and verdict (e.g., Moran and Comfort, 1982; Simon, 1967). Mixed results for the influence of age have also been obtained in civil trials. Some studies have found middle-aged jurors to be more plaintiff-oriented than older or younger jurors (Denove and Imwinkelried, 1995; Hans and Lofquist, 1994; Green, 1968), whereas other studies have concluded that age is not at all related to verdict choice or to damage awards (Diamond et al., 1998; Goodman et al., 1990; Reed, 1965).

Ethnicity/race Racial/ethnic characteristics have long been articulated to be useful predictors of juror behavior (Lieberman and Sales, 2007; Van Dyke, 1977). Although the aforementioned Batson decision prohibits the use of race in peremptory challenge decisions, there is evidence that race/ethnicity continues to be used on a routine basis (Baldus et al., 2001; Rose, 1999). Research has shown a relationship between ethnicity/race and verdict, however, the findings are inconsistent across studies (Broeder, 1959; Cutler et al., 1992; Mills and Bohannon, 1980; Simon, 1967; Visher, 1987; Williams and McShane, 1990) and often dependant on other factors such as crime seriousness or racial similarity between jurors and the defendant (Baldus et al., 1990; King, 1993; Ugwuegbu, 1979). In addition, in some cases jurors may be more punitive towards racially similar defendants (i.e., when the majority of jury members are of a different race and strong evidence against the defendant is present), a phenomenon known as the “black sheep effect” (Kerr et al., 1995; Nietzel and Dillehay, 1986).

Gender As with many of the demographic factors discussed thus far, gender has been demonstrated to be an unreliable predictor of verdicts. Some research has shown that females are more conviction prone than males in child sexual abuse cases (Bottoms and Goodman, 1994; Kovera et al., 1997), and in rape cases (Brekke and Borgida, 1988; see also Kovera et al., 1999), as well as in insanity cases and drug trafficking cases (Cutler et al., 1992; Moran et al., 1990). However, other research has failed to find a relationship between gender and verdicts in criminal cases, and has obtained mixed results in civil cases as well (see Lieberman and Sales, 2007, for a review).

Summary of demographic factors Thus, the influence of a wide variety of juror demographic characteristics has been explored, and the findings have been relatively consistent in their inconsistency. For the most part, demographic factors are unreliable predictors of juror behavior when examined across studies. Further, demographics typically account for only a minimal amount of verdict variance, often less than 2 percent when tested individually, and less than 5 percent when combined (Diamond et al., 1998; Hastie et al., 1983; Moran and Comfort, 1982; Visher, 1987; Wissler et al., 1999). However, some social scientists have argued that demographic factors serve as moderators of personality factors (e.g., Moran and Comfort, 1982), and that personality and attitudinal factors are more useful predictors of verdicts.

The Influence of Personality and Attitudinal Factors

Although the terms personality and attitudes are sometimes used interchangeably, there are different meanings associated with each. Social psychologists generally consider personality factors to be consistent patterns of thoughts, feelings and/or behaviors held by individuals (e.g., neuroticism vs. emotional stability, extraversion vs. introversion, agreeableness vs. antagonism), whereas attitudes refer to evaluative judgments towards specific issues or targets (e.g., support or opposition for the death penalty, abortion, or gun control). In the context of jury decision-making, the influence of a variety of personality factors have been explored, including general personality traits (e.g., authoritarianism, just world beliefs, locus of control), and more specific attitudinal inclinations towards issues such as legal claims, the death penalty, and psychiatrists.

Authoritarianism and dogmatism Authoritarianism refers to a desire for well-defined rules, a clear authoritative leadership structure and order, and limited tolerance for ambiguity. (Adorno et al., 1950). Authoritarians typically display conformity to society's conventional norms and express negative reactions to individuals who deviate from those norms. Research has generally shown that authoritarians tend to be more conviction prone, and demonstrate a stronger recall of prosecutorial evidence than defense evidence (Bray and Noble, 1978; Lamberth et al., 1982; Moran and Comfort, 1982). A meta-analysis of authoritarianism jury decision-making studies has indicated that the overall influence of this personality characteristic appears to be quite weak (Narby et al., 1993). In addition, the effects of authoritarianism are affected by the nature of the case. For example, in some cases, authoritarians may actually be less punitive towards a defendant, such as when the defendant is an authority figure or has committed an obedience-oriented crime (e.g., carrying out an order from a superior officer) (Garcia and Griffitt, 1978; Hamilton, 1978).

Similarly, dogmatism has been investigated as well. Dogmatism reflects a more general form of authoritarianism that is free of right-wing ideology commonly associated with the authoritarian personality. It focuses on how inflexible, closed-minded, and intolerant of ambiguity a person is. The effects of dogmatism on juror

behavior are similar to those of authoritarianism, with highly dogmatic individuals being generally more punitive (e.g., Shaffer and Case, 1982; Shaffer et al., 1986; but see Buckhout [1973] cited in Penrod and Linz, 1986). However, highly dogmatic jurors do not appear to operate from a simple “knee-jerk” conviction proneness perspective. Rather, they appear to be more concerned with closely adhering to judicial instructions, and in some cases (e.g., euthanasia) can exhibit leniency to a defendant if instructed by the judge to consider their personal feelings about a case (Kerwin and Shaffer, 1991).

Locus of control Locus of control refers to a tendency to attribute the outcome of events to either internal or external causes (Rotter, 1966). An internal locus of control is associated with beliefs that an individual is responsible for the outcomes of events in his or her life, and that he or she is in control of his or her destiny. An external locus of control refers to the tendency to attribute outcomes to factors beyond one’s control such as fate, luck, or the actions of others. Individuals with an internal locus of control have been shown to be more punitive towards defendants in both criminal and civil cases (Phares and Wilson, 1972; Sosis, 1974). However, factors such as the severity of the crime, and defendant-juror similarity influence the relationship between locus of control and verdict decisions (Phares and Wilson, 1972; Sosis, 1974; Kauffman and Ryckman, 1979). There have also been several studies that have not found locus of control to be a significant predictor of juror decisions (Lussier et al., 1977; Osborne et al., 1986).

Just world beliefs Just world beliefs (Lerner, 1980; Montada and Lerner, 1998) reflect the attitude that people get what they deserve in life, and that positive outcomes are the result of good behavior and choices and negative outcomes are the result of some type of bad behavior. Just world beliefs actually buffer us against anxiety that comes from the idea that the world is a chaotic and random place in which bad things can happen to us or loved ones unexpectedly. The relationship between just world beliefs and juror behavior is complex, and findings have been mixed, relatively weak, and dependent upon other case relevant factors (Lieberman and Sales, 2007). For example, although it has been shown that just world beliefs are correlated with greater punitive reactions towards law breakers (e.g., Rubin and Peplau, 1975), other research has indicated that individuals with high just world beliefs are more likely to consider the actions of a victim to determine whether or not the victim deserved their fate, and may be more lenient to a defendant as a result (Gerbasí and Zuckerman [1975] as cited in Gerbasí et al., 1977; Montada, 1998; Visher, 1987).

Legal Personality Factors

A variety of more specific legal personality and attitudinal factors have been evaluated. Some factors focus on an individual’s general orientation towards the criminal justice system and due process issues (e.g., legal authoritarianism measures

and the Juror Bias Scale). Other research has investigated attitudes towards specific aspects of a particular case (e.g., tort reform, the death penalty, or attitudes towards psychiatrists in an insanity case).

Legal authoritarianism A more specific form of authoritarianism known as “legal authoritarianism” that measures attitudes towards the rights of the accused and civil liberties has been examined (Boehm, 1968; Cutler et al., 1992; Narby et al., 1993). Research has shown that this more specific form of authoritarianism is a better predictor than the general authoritarianism measure, yet it is still a weak predictor of verdicts, accounting for less than 4 percent of verdict variance (Narby et al., 1993).

Juror Bias Scale The Juror Bias Scale has been developed in an attempt to measure factors more specifically relevant to legal decision-making (Kassin and Wrightsman, 1983). The scale consists of several subscales measuring concepts relevant to legal decisions in criminal cases. The first subscale measures the concept of Probability of Commission, which refers to beliefs regarding the probability that an individual actually committed a crime. It contains items such as “If a suspect runs from the police, then he probably committed the crime” and “Generally, the police make an arrest only when they are sure about who committed the crime.” A Reasonable Doubt subscale measures an individual’s level of certainty regarding a defendant’s guilt necessary to render a conviction (Kassin and Wrightsman, 1983; but see Myers and Lecci, 1998). The Reasonable Doubt scale contains items such as “For serious crimes like murder, a defendant should be found guilty so long as there is a 90 percent chance that he committed the crime” and “A defendant should be found guilty if 11 out of 12 jurors vote guilty.” Research has indicated that the juror bias scale appears to be a stronger predictor of verdicts than the other more general personality measures discussed thus far. However, the scale appears to account for less than 15 percent of verdict variance, and in some cases, measures of legal authoritarianism may be more useful (Cutler et al., 1992).

Attitudes toward tort reform and legal claims An alternative to measuring the influence of general personality characteristics or attitudes towards the legal system is to examine case specific attitudes. In this vein, several researchers have investigated the effects of attitudes toward tort reforms (in order to reduce frivolous litigation) (Hans and Lofquist, 1992; 1994), with the assumption that individuals who believe that frivolous litigation is problematic (and are concerned that excessive damages are being awarded) may hold negative attitudes toward plaintiffs, and will be more defense-oriented in civil cases (Goodman et al., 1990; Hans and Lofquist, 1992; 1994; Moran et al., 1994, Study 4). The results of studies in this area have supported these basic predictions and have produced generally stronger and more consistent results than those obtained when more global personality and attitudinal measures (such as those discussed above) are used (Lieberman and Sales, 2007).

Attitudes toward the death penalty Similarly, case specific attitudes regarding the death penalty also appear to be useful predictors of juror behavior. Death penalty attitudes are highly relevant to the legal system, because the U.S. Supreme Court has established criteria for excluding prospective jurors from capital cases if their attitudes towards the death penalty would prevent or substantially impair the performance of their duties as a juror (*Witherspoon v. Illinois*, 1968; *Wainwright v. Witt*, 1985). Research has indicated that pro-death penalty attitudes have been consistently shown to be associated with conviction proneness among jurors (e.g., Cowan et al., 1984; Jurow, 1971; Zeisel, 1968). As a result, capital trial juries are likely to be comprised of individuals who are more pro-conviction, because the jurors who were morally opposed to the death penalty were excused. Further, positive attitudes toward the death penalty have been shown to be associated with positive attitudes toward police and prosecutors, and less favorable attitudes toward defense attorneys and due process factors in death penalty cases (Bronson, 1970; Fitzgerald and Ellsworth, 1984; Thompson et al., 1984; Vidmar and Ellsworth, 1974). Although the findings in this area have been relatively consistent, the effects have generally been weak or moderate.

Additional case-specific factors Other case-specific factors have also been tested and been shown to have utility in terms of predicting verdicts: for example, in attitudes towards psychiatrists in insanity cases (Moran et al., 1994; Cutler et al., 1992), attitudes toward lawyers and drugs in a case where a lawyer was accused of a number of drug crimes (Moran et al., 1990), attitudes toward rape judgments in rape cases (Field, 1978; Penrod, 1979), and in the endorsement of myths about battered women (e.g., battered women can always leave home) in cases where a battered woman was accused of killing her husband (Schuller, 1990, reported in Vidmar and Schuller, 1989). In general, it appears that greater predictive ability is achieved when case-specific attitudes such as these are used.

Variability of Effects Across Cases

Thus, the effects of a variety of personality traits and attitudes on verdict decisions have been explored. These factors have generally been found to have more predictive power than demographic characteristics, but are still weak predictors of verdicts overall. Even the combination of demographics and personality/attitudinal factors does not account for much more than about 5 to 14 percent of verdict variance (e.g., 8.0% – Hepburn, 1980; 13.0% – Saks, 1976; 4.9–14.1% – Penrod, 1990). Further, the effects of attitudinal and demographic factors are not consistent across cases (Wiener and Stolle, 1997). For example, Penrod (1990) found that the predictive ability of 12 attitudinal and 15 demographic factors varied considerably across three criminal (murder, rape, and robbery) cases and one civil case. None of the variables tested were useful predictors in more than two of the cases. As a result, individual characteristics that predict juror decisions in one case may be of little

utility in predicting juror decisions in another type of case (Hans and Vidmar, 1982). In addition, as Penrod and Cutler (1987) note, attitudinal factors may not even exert a consistent effect across localities.

Improving the Attitude-Behavior Relationship Through the Application of Social Psychological Factors

The general relationship between attitudes and behavior has been studied for many years by social psychologists. Initial research frequently demonstrated that the relationship between these two factors is relatively weak, and that attitudes account for about 10 percent of behavioral variation in most cases (e.g., Calder and Ross, 1973; McGuire, 1985; Wicker, 1969). However, a more recent meta-analysis of attitude-behavior studies revealed that attitudes can substantially predict behavior when other factors are taken into account (Kraus, 1995). Over half of the 88 studies analyzed by Kraus had attitude-behavior correlations above .30, and one quarter had correlations greater than .50.

A number of factors affect the strength of the relationship between attitudes and behavior (Kraus, 1995). For example, specific behaviors are better predicted by specific attitudes (e.g., Ajzen and Fishbein, 1977; Fishbein and Ajzen, 1975; Moran et al., 1990; Vidmar and Schuller, 1989). Attitudes that are stable and consistent over time are better predictors of behavior than less stable attitudes (Davidson and Jaccard, 1979; Schwartz, 1978), particularly if those attitudes are based on direct experience (Fazio and Zanna, 1981; Regan and Fazio, 1977). Attitudes that are easily accessible (Kraus, 1995) are more likely to predict behavior. As a result, Starr and McCormick (2000) suggest that attorneys repeatedly make references to jurors' attitudes that are favorable to the attorney's side during *voir dire*, to make these attitudes more salient. Attitudes are more likely to be salient when jurors are made more self-aware and their sense of anonymity is de-emphasized (Duval and Wicklund, 1972; Hazlewood and Brigham, 1998; Lieberman and Sales, 2007).

In addition, attitudes better predict behavior among individuals who are less concerned with their self-presentation to others (known as self-monitoring) (Jamieson and Zanna, 1989; Kraus, 1995; Snyder, 1987) and when individuals have a high need for structure (Kruglanski and Freund, 1983). Need for structure represents a state where a person has a strong desire to acquire clear and unambiguous information. This state can be aroused when an individual is experiencing a high level of "cognitive demands" (Gilbert and Hixon, 1991) that are mentally taxing (such as when jurors believe they face a long or complicated trial with a large amount of information to be considered). A heightened need for structure motivates individuals to halt the process of acquiring new information. As a result, individuals turn to pre-existing knowledge, that may be in the form of stereotypes or other pre-existing beliefs, to aid in their decision-making.

Thus, the strength of the relationship between attitudes and behavior can be increased through the application of a number of social psychological factors. Trial

consultants may be able to assist attorneys by capitalizing on these factors through the identification of specific juror attitudes using “scientific jury selection” techniques.

Scientific Jury Selection

In recent years, attorneys have tried to improve their ability to identify and eliminate undesirable jurors by going beyond the traditional approach of jury selection, and employing the services of trial consultants to perform scientific jury selection. Scientific jury selection refers to using social science research techniques to identify desirable and undesirable jurors. Rather than relying on gross generalizations of groups of individuals, jury selection consultants attempt to identify backgrounds and attitudes of individuals who live in the jurisdiction from which the jury will be drawn that are relevant to the specific case at hand. The enhanced specificity of this approach should lead to greater predictive ability. In this process, consultants use a variety of techniques including pretrial community surveys as well as pre-trial surveys of venire members, and in some cases will create mock (i.e., simulated) juries to examine the relationship between juror characteristics and verdict preferences (Lieberman and Sales, 2007).

In the United States, attorneys have increasingly come to use consultants to aid in the process of selecting jurors. In fact, trial consultants are now called upon in almost all major litigation (Strier, 1999). The approach, known as “scientific jury selection” has even been popularized in bestselling fiction and films (e.g., *Runaway Jury*, Grisham, 1996) where trial consultants are portrayed as having almost a mystic like power to select jurors favorable to the side the consultant is working with. However, the reality is that consultants typically use rather mundane social science research techniques to provide attorneys with recommendations regarding the characteristics of desirable and undesirable jurors. This process is used almost exclusively in the United States because of the far greater influence attorneys have on the selection of jurors, relative to other nations that use juries, during the *voir dire* process. It is not surprising then that studies on the effectiveness of this approach are almost exclusively based in the United States.

History of Scientific Jury Selection

Scientific jury selection emerged in the 1970s and was used for the first time in the “Harrisburg Seven” trial in 1972 (Schulman et al., 1973) in which a group of political activists were charged with conspiring to destroy records held by draft boards, conspiring to kidnap Presidential advisor Henry Kissinger, and conspiring to blow up heating tunnels in Washington, D.C. Schulman and his colleagues felt that it would be very difficult for defendants to receive a fair trial, due to the considerable pretrial publicity surrounding the case, and because of a variety of actions the government had taken in regard to the case. These actions included the relocation of

the trial to the heavily politically conservative location of Harrisburg, Pennsylvania rather than holding it in cities mentioned in the indictments and assigning the case to a politically conservative judge. Schulman and his research team used social science research techniques to predict the most desirable and undesirable characteristics of potential jurors. The defense team utilized the guidelines developed by the social scientists and viewed the ultimate verdict of a hung jury (the defendants were not retried) as a success of this new approach.

The practice of jury selection grew out of cases like the Harrisburg Seven trial in which social scientists worked with defense attorneys, often on a pro-bono basis, to counter perceived overzealous government prosecution. However, it quickly became a technique conducted by highly paid professional consultants who work with either side in civil trials where large damage awards are at stake, as well as in high profile criminal trials. Some of the most well-known recent criminal cases in the United States involving consultants include the trials of O.J. Simpson, Michael Jackson, Scott Peterson, Martha Stewart, and the case brought against Kobe Bryant (Chawkins, 2005; Dearen, 2004; Kalajian, 2004; *Rocky Mountain News*, 2004; Toobin, 1996). Jury selection consultants have also been involved with major civil litigation, such as lawsuits against tobacco companies, the *MCI v. AT&T* anti-trust suit, and the Dow Corning breast implant litigation (Strier, 1999). The practice of working with consultants has become so common in the United States, that some attorneys maintain that it is almost unthinkable that a lawyer in a major trial would not use a consultant (Walker, 1995). However, scientific jury selection is much less common in more routine trials.

One reason that scientific jury selection is frequently limited to “high profile” and “high stakes” cases is the costs associated with trial consultant activities. Although the fees are beyond the means of many individual litigants, the costs are easily absorbed in corporate litigation. In addition, the potential for huge punitive damage awards makes the utilization of jury consultants a reasonable expense in certain cases.

Even though the use of scientific jury selection has grown dramatically since the early 1970s, for the most part the practice is limited to the United States. Vidmar (2000b) notes the use of jury selection consultants has not spread internationally, because *voir dire* may not be conducted in the same manner outside the United States (e.g., no peremptory challenges allowed), and because there may be “judicial hostility toward these practices” (p. 41). Further, in other nations, civil trials involving juries occur much less frequently and damage caps may exist. In addition, restrictions on publicly disseminating information about the case may be enforced by courts, thus minimizing jurors’ exposure to pretrial publicity (see Chapter 4 in this volume). As a result, outside the United States there is less need to use jury consultants, although it should be noted they have been used in rare instances in Canada, and in at least one case in Australia (Vidmar, 2000b).

Scientific Jury Selection Techniques

Community surveys As noted above, community surveys may be used to aid the jury selection process (Nietzel et al., 1999) by facilitating the development of demographically based profiles of prospective jurors who are more likely to agree with the attorney's case, feel sympathy for one of the litigants, or be generally more impartial. Surveys may also be used to identify case themes that particular types of jurors may be most responsive to that can be used as a framework for presenting the evidence (Lieberman and Sales, 2007).

The process of conducting a community survey typically involves exploring the relationship between community members' demographic characteristics as well as experiences, and their responses about perceptions of litigants (particularly in high profile trials), case characteristics, and other trial related issues. Through the analysis of this data, the consultant can identify specific factors that are predictive of desirable and undesirable jurors (see Lieberman and Sales, 2007, or Nietzel et al., 1999, for an extensive review of the procedures for conducting community surveys for the purposes of jury selection). Consequently, when scientific jury selection is used, attorneys can more accurately identify individuals that should be questioned extensively (assuming the judge allows the attorneys to question prospective jurors) and challenged during *voir dire* on a more reliable basis than if the attorney relied on his or her professionally-based hunches.

In addition to identifying the characteristics of desirable and undesirable jurors, community survey data can be used in some cases to request an extended *voir dire* of prospective jurors, to support a motion for a change of venue (discussed below), or to form the basis for a challenge to the composition of a jury pool if a high percentage of community members hold negative attitudes towards one of the parties involved in the case (Kairys et al., 1975; Lieberman and Sales, 2007; Nietzel and Dillehay, 1983). Strong community bias may be the product of a number of factors, including: the composition of the community and existing community values, the nature of the case, characteristics of defendants or victims, and the nature and extent of pretrial publicity (Nietzel et al., 1999). In the United States, Constitutional First Amendment guarantees regarding freedom of speech sometimes create situations where extensive publicity surrounds a case. However, highly publicized cases may threaten the protection defendants are afforded by the Sixth Amendment, regarding the right to trial by an impartial jury (for a review of pretrial publicity issues in the United States and in other countries, see Chapter 4 in this volume).

When there is a "reasonable likelihood of prejudice" in a community (*Sheppard v. Maxwell*, 1966) judges in the United States may grant a change of venue motion. A change in venue involves moving the location of the trial to another jurisdiction where there is less community bias, and a greater likelihood of an impartial jury being empanelled. Courts typically prefer not to move the locale of trial, because doing so means that it cannot be held in the jurisdiction where the crime was committed, and because it increases expenses and inconveniences for the parties involved in

the trial. However, community survey data can be useful at clearly and accurately demonstrating the extent of community bias and overcoming courts' reluctance to grant a change of venue.

Pretrial questionnaires Attorneys and judges may attempt to gain more information about prospective jurors through the use of pretrial questionnaires. Jury selection consultants may assist with the development of such questionnaires. This procedure allows for more detailed information to be obtained regarding basic background characteristics of the jurors (and their family members), as well as important behaviors and experiences (e.g., newspaper and television viewing preference), relevant relationships, attitudes toward law enforcement (in criminal cases), and knowledge regarding or attitudes towards case-specific information. In addition, questionnaires can be useful for addressing topics that jurors may be uncomfortable discussing in a public setting (Wiley, 1997) because of their sensitive nature (e.g., homosexuality, AIDS, attitudes toward race).

In most cases, questionnaires are relatively short (4–12 pages). However, in cases that have received considerable pretrial publicity, questionnaires may be much longer. For example, prospective jurors in the O.J. Simpson criminal trial received a 75-page questionnaire containing over 300 questions (Wiley, 1997). Aside from the efficiency of gathering information on prospective jurors, pretrial questionnaires have the potential to elicit more accurate responses than traditional oral questioning. Typically self-administered questionnaires lead to greater respondent honesty than when questions are delivered in a face-to-face manner (Babbie, 1998). However, the overall utility of pretrial questionnaires has not been established, because no peer-reviewed research evaluating the utility of pretrial questionnaires has been published to date.

Nonverbal behavior observations In some cases jury selection consultants may supplement the verbal (or pretrial questionnaire) responses given with observations of nonverbal behavior of prospective jurors during voir dire questioning (e.g., Dimitrius and Mazzarella, 1999; Frederick, 1984; McConahay et al., 1977; Starr and McCormick, 2000). This approach can potentially be useful because attorneys often are forced to exercise peremptory challenges even though they have not gathered sufficient information about juror attitudes to allow for well-reasoned decisions to be made. Attorney information may be limited because the attorneys have not been able to question the jurors (and the judge has only done a limited amount of questioning), or because the judge restricted the scope of questions that could be asked, or enforced short time limits on voir dire. In addition, attorneys may believe that jurors have been deceptive in their responses, and desire additional data to confirm their hunches.

Nonverbal behaviors fall into two general categories: paralinguistic cues and kinesic cues. Kinesic cues refer to information revealed by the body itself such as body movement and orientation, facial expressions, eye contact, and hand movements. Paralinguistic cues refer to factors related to the delivery of verbal

statements, such as the speed of communication, speech disturbances (disruptions to normal speech delivery), the speaker's tone of voice and pitch, as well as pauses and latencies (Suggs and Sales, 1978). Suggs and Sales (1978) argue that observing jurors' paralinguistic and kinesic behavior when they are asked relatively neutral questions (that establish a baseline for behavior), and comparing that information to behavioral observations of jurors as they respond to case specific or sensitive questions, may reveal an indication that the juror is experiencing situational anxiety. Situational anxiety may be produced because the respondent is being deceptive, has strong emotional feelings about the topic being discussed, or holds negative feelings about the person questioning them at the time.

Unfortunately, there has been almost no research that has directly investigated the utility of nonverbal behavior for jury selection purposes. However, in one of the few relevant studies conducted in this area, Frederick (1984) found a correlation between nonverbal behaviors that revealed negative attitudes towards the defense and ratings of authoritarianism, which is a trait often associated with conviction proneness (see also McConahay et al., 1977). Unfortunately, Frederick did not clearly specify specific nonverbal behaviors that were observed in the study. Consequently, although there is potential for nonverbal behavior to provide some useful supplementary information during *voir dire*, more research is clearly needed before definitive recommendations can be made.

Mock juries Jury selection consultants may also use mock juries and focus groups in the jury selection process. Mock juries can be used to verify information obtained in pretrial surveys and to determine which types of jurors will respond most or least favorably to different trial strategies, and different approaches to the presentation of information (e.g., opening or closing arguments and trial evidence). Mock jurors are presented with some type of case information, and observed as they consider the information. Individuals from the local community are often recruited as mock jurors because they fit specific criteria of interest (e.g., they possess characteristics that are prevalent in the community where jurors will be drawn from). Mock juries may be conducted in a relatively informal manner similar to a focus group, where a relatively free-flowing discussion of evidence or opening statements is conducted, or in a more structured form where the presentation of statements and evidence is designed to mimic more closely that of an actual case. The information obtained through mock juries may be quite useful to attorneys when they exercise peremptory challenges. Although it has become common for jury selection consultants to use mock juries there is almost no empirical research on the effectiveness of this approach.

Effectiveness of Scientific Jury Selection

The overall effectiveness of scientific jury selection is a well-debated issue. Selection consultants may claim high success rates, however, such claims are confounded by several factors. Most notably, the costs associated with jury selection and trial

consulting are typically substantial. As a result, consulting services are most likely to be used by clients who can also afford top legal representation. In such cases, the clients receive both the consultant's services, as well as the skills of highly successful attorneys. Thus, it becomes difficult to disentangle the differences between the consultant's contributions and the attorney's general skill level. In addition, in these types of cases, more resources can be devoted to paying for top-level expert witnesses as well as enhancing other aspects of evidence presentation (e.g., compelling graphic and computer animated displays as courtroom exhibits). Further, attorneys may be inclined to devote more time and effort to cases where jury selection consultants have been hired, because such cases are of greater importance for one reason or another.

Finally, a specific determination of jury selection usefulness is difficult without a meaningful definition of success. Is an acquittal in a criminal case or a finding in favor of the defendant in a civil case necessary to consider the outcome a success? Can a conviction on lesser charges or lower damage awards than initially feared be considered a success for the defense? Can a hung jury be viewed as a success?

Despite the problems that exist with evaluating scientific jury selection, social scientists have attempted to evaluate the process either indirectly by looking at the relationship between demographics or personality factors and verdict inclination, or in some cases with more direct (but often limited) examinations of real and simulated cases where scientific jury selection is used.

Academic researchers have frequently pointed to findings that indicate demographic and attitudinal variables are typically weak and unreliable predictors of verdicts as evidence that the scientific jury selection is likely to be only marginally more successful than the accuracy of decisions made by experienced trial lawyers (Berman and Sales, 1977; Diamond, 1990; Hastie, 1991; MacCoun, 1989; 1993; Vidmar, 1999; but see Moran et al., 1994). However, such approaches do not apply a full-scale scientific jury selection approach involving presenting attorneys with data to use in decisions regarding who to challenge or at least who to question extensively. Researchers who have conducted more direct studies on the effectiveness of scientific jury selection (and trial consulting more generally) have produced more encouraging findings (Horowitz, 1980; Schulman et al., 1973). However, the studies that have been conducted suffer from a variety of methodological limitations that temper conclusions that can be drawn.

For example, Horowitz (1980) compared the outcome of cases that had been tried by law students who were trained in a traditional method of jury selection or in a scientific jury selection approach. "Conventional method" students observed local attorneys conducting *voir dire* in a traditional manner (no scientific methods used). The scientific jury selection group was presented with the results of pretrial surveys that were conducted on a group of prospective jurors, and profiles that indicated their desirableness as jurors. These two jury selection approaches were applied to four cases. The results indicated that law students who used the scientific jury selection approach had more successful trial outcomes in cases where there was a strong

relationship between the demographic, personality, and attitudinal factors (e.g., cases involving sale of illegal drugs and a court martial). However, the conventional approach to jury selection was superior in cases where the relationship between these factors was weak (e.g., a murder and a drunk driving case). Clearly, the artificiality of the methodology limits the conclusions that can be drawn from these findings. The law students were not actual attorneys with many years of experience to rely on. In addition, the students in the scientific jury selection condition did not have the full resources of a consulting firm at their disposal. An experienced consultant may have been able to provide much more useful information to the students. However, despite these limitations Horowitz's (1980) conclusion that the effectiveness of scientific jury selection is dependent upon the case where it is used is important to consider.

Other researchers have reported the utility of scientific jury selection in actual cases. For example, Schulman et al. (1973) compared the verdicts of actual jurors who had been selected through scientific jury selection to jurors excused during *voir dire* as well as to jury-eligible community members who did not undergo the *voir dire* process. Unfortunately, only the actual jurors were exposed to the full trial, so it is difficult to conclude that the success of the defense team was due to the application of scientific jury selection, and not to other differences between the groups. Similar limitations exist with the conclusions of other researchers who have reported accuracy rates as high as 70 percent for scientific jury selection, but based estimates on post-trial interviews comparing actual jurors exposed to the trial to those challenged and excused from jury service, or compared success in cases where they served as trial consultants to cases they did not work on, rather than making comparisons between groups exposed to similar evidence (e.g., Nietzel et al., 1987; Silver, 1978).

Some findings have been highly anecdotal in nature. For example, Zeisel and Diamond (1976) report that the defense team used scientific jury selection in the Mitchell-Stans conspiracy trial (the defendants were charged with conspiring to impede a Securities and Exchange Commission investigation of a financier, Robert Vesco, in return for a \$200,000 contribution to President Nixon's re-election campaign). Although the defense was successful in this case, there was no true control group to be used as a basis of comparison to evaluate the effectiveness of scientific jury selection.

Frederick (1984) provides a more detailed analysis of the application of scientific jury selection techniques in a criminal and civil trial where community surveys were used. Frederick found that community survey results were useful at identifying desirable and undesirable jurors, and that specific personality factors (i.e., authoritarianism) were related to non-verbal behaviors observed during *voir dire* and were predictive of verdict preferences. However, Frederick's results were based on a small sample of cases, and he was unable to validate data in the civil case because the case settled prior to the trial start date.

Consequently, there is some evidence that scientific jury selection is useful, but there is a great need to conduct higher quality studies. Although the general

relationship between verdicts and demographic factors, attitudes, and personality characteristics is weak, it may be more powerful in certain cases where there is a clear relationship between the nature of the case and these factors. Moran et al. (1994) argued that scientific jury selection is likely to have a stronger effect on verdicts in cases where the evidence is equivocal. Thus, the role of evidence strength should be considered when evaluating the effectiveness of jury selection techniques.

The Role of Evidence Strength

Although juror characteristics may exert some influence on verdict decisions, and that influence may be enhanced through the application of scientific jury selection techniques, it appears that evidence strength has a far stronger effect on jury verdicts than juror characteristics (e.g. Hepburn, 1980; Narby et al., 1993; Saks, 1976; Visser, 1987). For example, Visser (1987) interviewed 331 jurors who had served on 38 forcible sexual assault trials, regarding their demographic characteristics (sex, race, age, education, and occupation) and case-relevant attitudes towards “blaming the victim” and being “tough on crime.” In addition, attitudes regarding the defendant (e.g., prior record, appearance, education) and victim behavior (e.g., use of alcohol or drugs before incident, sexual activity outside marriage), as well as evidence and case characteristics (e.g., physical evidence, eyewitness testimony, use of a weapon, use of force) were examined. Visser reported that the strength of evidence was a much stronger predictor of verdict variance (accounting for 34% of the variance) than victim and defendant characteristics (8%) and juror characteristics (2%). None of the juror demographic factors had a significant effect on verdict decisions. Similar findings have also been obtained by other researchers using simulated trials (e.g. Hepburn, 1980; Kaplan and Miller, 1978; Saks, 1976).

Consequently, scientific jury selection (and traditional jury selection methods) should exert a relatively weak effect in cases where the evidence is particularly one-sided. Of course, in the United States, such cases are unlikely to go to trial, and typically are settled prior to the start of the trial or are dismissed altogether. Rather, juries are more likely to hear cases with ambiguous evidence. In addition, even if small increases in predictive ability can be obtained the procedure may be worthwhile.

The Utility of Small Increases in Predictive Ability

If the utilization of scientific jury selection improves attorneys’ ability to identify and eliminate biased jurors by only a minimal amount over the accuracy rates they would achieve using traditional approaches, the benefits may justify the costs. As Moran et al. (1994) have noted, if scientific jury selection techniques can improve an attorney’s rate of predicting jurors’ verdict inclination from 50 to 60 or 65 percent, then the outcome of a case may be substantially affected, particularly because the majority position of the jury at the beginning of deliberations will almost always

be the final verdict (Kalven and Zeisel, 1966). Such gains could be achieved by identifying predictors with correlations to verdicts of roughly $r = .20$ to $.30$. Of course, such gains may be smaller if the opposing side employs a selection consultant as well.

Although some attorneys may be highly skilled, and able to identify biased jurors at a rate greater than 50 percent, thus reducing the impact of gains achieved by scientific jury selection, there are theoretical reasons to expect scientific jury selection to be a superior approach to traditional jury selection approaches. Research has consistently demonstrated that human behavior is better predicted using actuarial based techniques, rather than by intuitively-based judgments based on individual experience (Diamond, 1990; Grove and Meehl, 1996; Saks, 1976). Individuals typically make a number of errors in judgment when relying on personal experience to predict behavior. For example, individuals may be overly influenced by heuristics (Kahneman and Tversky, 1982; Tversky and Kahneman, 1974) such as the representativeness heuristic (i.e., overestimating the likelihood of something because it matches a particular mental prototype, such as believing that a person who has a short haircut is conservative and therefore conviction prone) and ignore more useful and accurate base rate information. Consequently, the actuarial based scientific jury selection approach can be expected to produce more accurate and reliable results than attorneys' intuitive judgments.

Ethical Issues

Scientific jury selection has been criticized on several grounds, including that it can create a competitive imbalance in the courtroom, and that the costs associated with the practice make it unaffordable to many parties involved with legal disputes (e.g., Etzioni, 1974; Saks, 1976). Although there is some potential for an imbalance to be created, scientific jury selection is most commonly used in cases involving large-scale civil litigations where both sides are easily able to afford consultants, rather than criminal litigation (Ellis, 2005). When the practice is used in criminal cases, the cases usually involve high-profile trials of celebrities or other wealthy individuals (Lieberman and Sales, 2007). Consultants may offer their services *pro bono* to the prosecution in these types of cases, as well as to both sides in high-profile trials of non-wealthy defendants, thus eliminating potential imbalances. In addition, several procedural solutions to eliminating a competitive imbalance have been proposed such as requiring discovery of pretrial jury selection data, or more frequently using court appointed jury selection consultants in cases where substantial biases or imbalances may exist (Barber, 1994; Herbsleb et al., 1979; Lieberman and Sales, 2007; Stolle et al., 1996; Strier, 1998–99; 1999).

In order for scientific jury selection (or traditional jury selection) to create a competitive imbalance in the courtroom, it necessitates that the number of peremptory challenges is substantial enough to affect the jury composition in such a way that the trial verdict is ultimately altered. However, attorneys are typically only allowed to

exercise a few peremptory challenges, and, as previously noted, juror characteristics typically account for only a small portion of verdict variance. Thus, the actual impact of this practice may be minimal. In addition, the influence of jury selection may be even further minimized in jurisdictions in the United States (and in other countries) that permit majority rather than unanimous decisions. Consequently, the concern that a competitive imbalance may be created appears to be based on an unrealistic expectation regarding the actual influence of this technique, and an inaccurate perception of the types of cases where such practices are actually used.

When considering the ethical concerns associated with jury selection procedures, it is important to remember that attorneys ultimately have no power to select jurors in a trial, because jury selection does not truly exist. Although the term is frequently used, it is a misnomer. Attorneys cannot identify any particular jurors they want to serve on a case. Rather, attorneys can only exclude certain jurors. In countries that allow jurors to be excluded under peremptory challenges, challenges for cause, or stand aside procedures, specific jurors who are believed to be the most biased are those that are excused. As long as both sides have the ability to exclude biased jurors, a more impartial jury should be the result. Thus, the fairness of the trial procedure may be far more threatened in countries that allow only one side to remove potential jurors, than in countries that allow extensive questioning of jurors or where jury selection consultants are operative.

Future Research Directions

Social scientists have attempted to identify the utility of scientific jury selection in numerous studies conducted over the past three decades. However, there is considerable room for future research in this area. Many studies have attempted to address the issue of the effectiveness of this approach by looking at the predictive ability of specific demographic and personality factors. However, these studies typically do not cover the scope of potentially predictive factors explored by actual consultants. Other research has tried to simulate the work of consultants (e.g., Horowitz, 1980), but such studies have not evaluated the practice of consulting using the full resources of an actual consulting firm. Studies with greater ecological validity are clearly needed.

Once better methodologies have been developed, it would be useful to explore the relationship between jury selection and other factors such as trial complexity. If heuristics and biases are more pronounced in conditions of uncertainty (e.g., Kahneman and Tversky, 1982) or when individuals are under high cognitive load (e.g., Gilbert and Hixon, 1991), one would expect such factors to be especially influential in lengthy or complex trials. As a result, scientific jury selection should have a greater impact in such trials rather than in more simple or shorter trials. On a related point, a considerable body of research has shown that jurors have considerable difficulty understanding the instructions delivered to them by the judge (see Chapter 6 in this volume). Consequently, it is worth examining whether scientific jury selection

is more successful in cases where jurors have particularly low comprehension of instructions. This might occur because in the face of incomprehensible instructions, jurors are forced to turn to alternative sources of information such as their intuitive beliefs about what the law should be (i.e., their “commonsense justice” notions—discussed in Chapter 3 in this volume). If this is shown to be the case, then it may cast light on the overall utility of scientific jury selection in jurisdictions where pattern instructions have recently been revised to improve comprehensibility (e.g., California) relative to other jurisdictions.

In addition, studies have not focused on evaluating the effectiveness of consulting when both sides have employed consultants. Are “dueling” consultants able to produce a jury that is far more impartial and balanced than what would be achieved if neither side used consultants? It would also be useful to know how much confidence attorneys have in trial consultants. Do attorneys feel that consultants give them a competitive edge, or are they primarily used to satisfy clients that all avenues for success are being pursued? How do attorneys respond when a consultant’s recommendations are at odds with strong beliefs they hold about jurors, based on their past experience?

Conclusion

Attorneys in the United States place considerable emphasis on the selection of jurors, relative to their counterparts in other countries, because of the flexibility allowed by U.S. courts regarding this part of the trial process. However, social science research has indicated that juror characteristics have a relatively weak influence on verdicts. Fortunately, predictive ability can be increased by developing more specific measures of attitudes, and by examining the influence of juror characteristics on a case-by-case basis, rather than by attempting to predict behavior by applying broad stereotypes or personality factors across cases. Scientific jury selection allows for enhanced specificity, and consultants may also work with attorneys to develop more effective case strategies for presenting evidence. Given the relative importance of evidence when compared to juror characteristics, such supplementary activities related to evidence presentation may be of greater importance than simple jury selection assistance. Although there is some potential for a competitive imbalance to be created when consultants are used, the nature of cases where they are actually employed and the relatively weak impact of jury selection on trial outcome reduces ethical concerns. Ultimately attorneys are not able to truly select any jurors to serve on a trial, and can only exclude jurors believed to be the most biased against their side. Hopefully, future academic and applied psychological research will produce findings that can be used to further improve attorneys’ ability at eliminating biased jurors. Such advancements should ultimately lead to greater fairness of the trial process.

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Chapter 6

The Psychology of the Jury Instruction Process

Joel D. Lieberman

Synopsis

The process of instructing jurors on the laws they are to apply and the procedures for carrying out their duties is a critical part of the trial process. Unfortunately, a substantial amount of social science research indicates that jurors have considerable difficulty comprehending the instructions delivered to them. This chapter examines that research and discusses factors that contribute to instruction ineffectiveness, such as: the problematic language and writing style associated with instructions, the complexity of the trial, individual differences among jurors including education level, and jurors' pre-existing beliefs about the law. In addition, a variety of solutions that have been proposed for increasing comprehension rates are explored. Among these proposed solutions are: rewriting instructions following psycholinguistic principles, changing the delivery method of the instructions, and providing special verdict forms and flow charts. The chapter concludes with a discussion of public policy issues that are relevant to the topic of jury instructions.

The Psychology of the Jury Instruction Process

In many countries, including the United States, that use juries to determine the outcome of trials, lay people with no special legal training or background serve as jurors. As a result, these individuals must be educated about the laws and procedural rules that are applicable to the case at hand. This is typically done through instructions delivered by the judge. The assumption is that jurors can be sufficiently educated through this process, and can, as a result, render a verdict that is based on adequate comprehension of the law. However, social science research has revealed that jurors typically have great difficulty understanding the instructions they are presented with. Fortunately, over the past three decades

a number of procedural solutions have been identified that can significantly improve comprehension. This chapter will discuss the general problem of jury instruction comprehension as well as suggest modifications that can be made to the process of drafting and administering instructions.

Purpose of Instructions

Prior to deliberation, jurors must be educated on relevant procedural and substantive law governing the case. Procedural instructions refer to the general duties of jurors and serve a similar function across cases. Examples of procedural instructions include: the decision rule (either a unanimous or majority decision), legal thresholds (such as “reasonable doubt” in criminal cases or “clear and convincing evidence” in most civil cases in the United States), and admonitions to ignore inadmissible evidence or to refrain from discussing the trial until all the evidence has been presented. During the instruction process, jurors may have to be educated on concepts such as a “reasonable person.” In cases where expert witnesses are used, jurors are often instructed as to how they should consider or not consider such testimony. Instructions may accompany specific types of evidence, such as eyewitness evidence (discussed below). In certain jurisdictions jurors may even be given instructions informing them of the nullification power and that they are the final authority as to whether they should apply a given law. In contrast to the more general nature of procedural instructions, substantive instructions refer to laws that apply to the specific case at hand. For example, the definition of first and second-degree murder, manslaughter, grand larceny, aggravated assault, relevant civil laws, and so on.

History of Jury Instructions in the United States

Historically in the United States, jury instructions were created on a case-by-case basis. Up until the 1930s it was typical for opposing counsel to submit proposed instructions to the judge, who would either agree to read them, or reject them (with counsel allowed to appeal a judicially rejected objection). This process created a number of problems. First, it was quite time consuming to create new instructions on a case-by-case basis. This became problematic with the great wave of immigration during the late nineteenth and early twentieth centuries that contributed in part to dramatic increases in litigation. Second, the practice of allowing counsel to submit instructions often resulted in either instructions that did not sufficiently clarify the law, or that were strongly biased towards one of the parties involved. In addition, judges may have allowed biased instructions as a result of being swayed by a particular party during the case or as a result of pressure from increasing large caseloads. As a result, it was possible that jurors in similar cases would hear different types of jury instructions, providing little uniformity (Nieland, 1979). Third, the use of individualized instructions for cases led to frequent appeals and reversals because they were indeed prejudicial or inaccurately conveyed the law (Nieland, 1979).

Fourth, to avoid appeals, judges were forced to focus their attention on delivering instructions that were legally accurate, rather than easily comprehensible to jurors (Elwork, Sales, and Alfini, 1982).

These problems led to the development of pre-written “pattern jury instructions.” In 1938, the state of California published the first set of pattern instructions in the *Book of Approved Jury Instructions (BAJI)*. Although there was some general reservation as to whether it was possible to draft instructions that could be used across all cases, the use of pattern instructions quickly spread to jurisdictions across the United States at both the state and federal level. The widespread adoption of pattern instructions was likely the result of evidence that they were successful at saving judges and lawyers time, reducing the number of appeals due to the use of erroneous instructions, and ensuring that jurors in similar cases heard the same jury instructions (although in at least some jurisdictions attorneys may request modifications to the instructions, undermining these goals). However, there has been little evidence that the final goal of increasing comprehension among jurors has been accomplished with the pattern instructions that were developed as a result of this movement (Blanck et al., 1985; Elwork et al., 1977).

Jury Instruction Comprehension Rates

Regardless of whether pattern instructions are used, jurors have considerable difficulty adequately comprehending a large portion of the judicial instructions (Buchanan et al., 1978; Charrow and Charrow, 1979; Elwork, Sales, and Alfini, 1977; 1982; Elwork, Alfini, and Sales, 1982; Ellsworth, 1989; Forston, 1975; Kassin and Wrightsman, 1979; Reifman et al., 1992; Severance and Loftus, 1982; Steele and Thornburg, 1988). This is not surprising, because traditionally the focus of jury instructions has been on legal accuracy, and minimal attention has been paid to making the instructions comprehensible to jurors (Elwork, Sales, and Alfini, 1977; 1982).

As noted above, a considerable amount of social science research has indicated that jurors misunderstand a large portion of the instructions they are presented with. Many studies have found that jurors typically understand a little more than half the instructions (e.g., 49% – Benson, 1985; 51% – Ellsworth, 1989; 51% – Elwork, Alfini, and Sales, 1982; 54% – Charrow and Charrow, 1979 [asking participants to give an approximate, rather than a full definition of legal concepts]; 60% – Elwork, et al., 1977; 60% – Greene, 1988). Some studies have even found no difference in comprehension rates between participants presented with instructions, and those who *are not* presented with any, using both mock jurors as participants (Elwork et al., 1977; Wiener et al., 1995) and actual jurors (Kramer and Koenig, 1990).

The type of dependent measure used to assess comprehension appears to have an important effect on reported comprehension rates. The lowest levels of instruction comprehension have generally occurred in studies where participants are asked to paraphrase instructions completely, with Charrow and Charrow (1979) reporting

a 39 percent comprehension rate on a full paraphrasing measure and Steele and Thornburg (1988), reporting a dramatically low 13 percent rate. Higher rates of comprehension have typically been achieved with multiple-choice (including true and false) dependent measures (e.g., 65% – Severance and Loftus, 1982; 67% – Forston, 1970; 70% – Severance et al., 1984; 70% – Strawn and Buchanan, 1976). Buchanan et al. (1978) reported a very high rate of 73 percent, but did not specify the exact measure used beyond noting that it was a 40-item questionnaire. Several researchers have assessed comprehension by asking participants to apply the law rather than simply recall or define it (e.g., Rose and Ogloff, 2001; Severance and Loftus, 1982). Although some utility has been demonstrated by this approach, comprehension rates do not appear to be appreciably different from studies that have not used this methodology.

Instruction comprehension problems have been found in jurisdictions throughout the country in both criminal and civil trials. In addition (as discussed below), comprehension problems are not limited to complex substantive laws, but exist for procedural instructions as well.

Problematic Procedural Instructions

Burden of proof/presumption of innocence instructions Burden of proof is a fundamental legal concept that jurors must adequately comprehend for a defendant to receive a fair trial. In a United States criminal trial the prosecution has the burden of proof, and the defendant is presumed innocent until proven guilty (beyond a reasonable doubt) by the prosecution's evidence. Although this is a relatively straightforward instruction, and one that individuals may be familiar with from a lifetime of media reports, there is evidence that jurors do not have true understanding of the concept. Strawn and Buchanan (1976) reported that only 50 percent of participants presented with Florida Standard Jury Instructions believed that the defendant did not have to present any evidence and that the state held the burden of proof. In addition, Reifman et al. (1992) report that among jurors who had previously served on criminal trials, less than one third correctly understood that the burden of proof was on the prosecution.

Similar comprehension problems have emerged in examinations of presumption of innocence instructions. Steele and Thornburg (1988) report that 79 percent of participants were unable to paraphrase the presumption of innocence concept and only 17 percent were able to correctly paraphrase it. Buchanan et al. (1978) reported a higher (but still problematic) rate of 51 percent of participants who comprehended the concept. However, Strawn and Buchanan (1976) found that 90 percent of participants understood the meaning of presumption of innocence. As noted earlier, the variability in comprehension rates may be the product of the dependent measures used by the researchers. Strawn and Buchanan used a multiple-choice test to assess comprehension, whereas Steele and Thornburg used a potentially more challenging measure, requiring participants to paraphrase instructions.

Standards of proof The “standard of proof” is the level of certainty necessary for a fact finder (i.e., the jury) to find that charges against a defendant in a criminal case, or the claims against a defendant/respondent in a civil case are true. In the United States, “beyond a reasonable doubt” is the standard used in criminal trials and a “preponderance of evidence” is the standard used in most civil cases. In addition, the standard of “clear and convincing evidence” is also used in cases of a substantial deprivation of liberty such as civil commitment, denaturalization, deportation, and termination of parental rights. This third standard is intended to be an intermediate threshold that falls between the other two in terms of the level of certainty required (Kagehiro and Stanton, 1985).

Within the legal community, there is some consensus regarding what quantitative meanings are implied by these qualitative terms. Preponderance of evidence (the most lenient standard of proof) requires that the plaintiff establish a certainty above 50 percent that the allegations against a defendant are true. The clear and convincing evidence requirement has been interpreted as requiring a certainty level between 67 and 75 percent, reflecting the more restrictive meaning of this standard. Beyond a reasonable doubt, has been estimated by judges to require approximately 90 percent certainty of guilt, reflecting the fact that it is the highest level of proof required, and the belief that it is far worse to convict an innocent person than to acquit a guilty one, yet absolute certainty need not be achieved for a conviction (McCauliff, 1982; Kagehiro and Stanton, 1985; Stoffelmayr and Diamond, 2000). Although members of the court and bar may have a clear understanding of the distinction between these different standards as a result of their familiarity with the concepts and their extensive legal training, the subtle differences between the standards may be lost on jurors.

The results of empirical studies on this issue have been mixed. Ogloff (1998) reported that jury eligible participants exposed to a mock trial estimated reasonable doubt to correspond to a 95 percent certainty of defendant’s guilt. Unfortunately, there was considerable variability in the estimates, the majority of jurors believing that reasonable doubt meant 100 percent certainty of guilt, and 15 percent of participants believing the standard meant an 80 percent or less certainty level. Simon (1970) reported that under the reasonable doubt standard that the level of guilt needed for conviction for student participants ranged from 74 to 80 percent. Simon and Mahan (1971) compared estimates made by judges, jurors, and undergraduate students on different standards of proof. The results revealed that all three groups had a good sense of the reasonable doubt standard and reported similar estimates, around the 90 percent level (judges – 88%, jurors – 86%, students – 91%; see also Ellsworth (1989) who reported that jurors have adequate understanding of the concept). However, the results were less encouraging when participants were asked to report the probability of guilt necessary to convict under the preponderance of evidence standard. Judges provided a predictably accurate estimate of 55 percent probability, but jurors and undergraduates reported much stricter estimates (75% and 74%, respectively) that are more appropriate for the clear and convincing evidence standard. Thus, jurors may not be sensitive to the subtle distinctions between the standards.

In many jurisdictions (e.g., Illinois, Mississippi, Texas, and Wyoming, as well as the Courts of Appeals for the Fourth, Fifth and Seventh Circuit among others; Diamond, 1990) the attitude that courts have adopted is that “beyond a reasonable doubt” is an easily comprehended term that does not require explanation. As a result, courts typically do not encourage providing explanatory instructions on reasonable doubt, and in some cases have stated that providing elaborations on the reasonable doubt concept may lay the groundwork for appeals (Diamond, 1990; Ellsworth, 1989). In instances where courts have attempted to explain reasonable doubts a variety of definitions have been used including: a doubt “for which reasons can be given,” a doubt “which would cause a reasonable man to hesitate in making an important decision,” a doubt “which is serious and well founded on the evidence,” a doubt “which is substantial,” and a doubt “which is not trivial or imaginary” (Kerr et al., 1976, p. 383). Unfortunately, such elaborations do not appear to be terribly enlightening. For example, defining reasonable doubt as doubt that a reasonable person would have necessitates a definition of a reasonable person, which may be equally difficult to define. The concept of the behavior of a reasonable person may be even more obscure in other countries. For example, the obscure phrase “the man on the Clapham omnibus” has been used in England and several other countries, to describe a reasonable person.

Kramer and Koenig (1990) found that even when reasonable doubt is defined for jurors there is still uncertainty regarding the true meaning of the concept. For example, 69 percent of individuals who had previously served as jurors and been instructed regarding the meaning of reasonable doubt, incorrectly believed that a juror had to be 100 percent certain of the defendants’ guilt before returning a guilty verdict (74 percent of individuals without prior jury experience also held this erroneous belief; the difference between the groups was not significant).

It is possible that greater clarity regarding the meaning of different standards might be achieved by quantifying the meaning or legal thresholds (e.g., specifically telling jurors that preponderance of evidence means being more than 51 percent sure of their decision). However, courts have been very reluctant to provide clarification in this manner. Despite reluctance on the part of courts, empirical research has shown that quantifying instructions does allow jurors to distinguish meaningfully between different thresholds such as preponderance of evidence, clear and convincing evidence and reasonable doubt. Presenting the different standards at the same time and explaining the distinction between each is also effective (Dane, 1985; Kagehiro, 1990).

Ultimately, in the absence of a clear definition of reasonable doubt (and other standards of proof), each juror must make verdict decisions based on individual definitions of the legal concept, which may be influenced by specific case factors and by their own commonsense beliefs (Finkel, 1995; 2000), leading to a potentially inconsistent administration of justice (Diamond, 1990).

Additional procedural instruction comprehension and application problems A considerable amount of social science research has indicated that jurors have difficulty comprehending other procedural instructions and/or applying them in a legally appropriate manner. For example, eyewitness testimony cautionary instructions (commonly known as “Telfaire” instructions; *U.S. v. Telfaire*, 1972), are designed to educate jurors about issues that may impact eyewitness identification accuracy, by highlighting factors such as the opportunity the witness had to observe the offender, the emotional state of the witness at the time, the length of time between the crime and later identification, and the degree of certainty demonstrated by the witness at the time of identification. Greene (1988) found that jurors exposed to these instructions are no more sensitive to the problems associated with eyewitness testimony than jurors not given these instructions (see also Katzev and Wishart, 1985; Ramirez et al., 1996). Greene also reported that although the presentation of Telfaire instructions led jurors to be less influenced by eyewitness testimony when visibility conditions were poor, they tended to give greater weight to eyewitness testimony under good visibility conditions, thus defeating the cautionary nature of the instructions. However, jurors were better able to recall more instructions, and evaluated the instructions as more effective and understandable, after the instructions had been revised according to psycholinguistic principles (discussed below).

Limiting instructions that admonish jurors to ignore inadmissible information, or to use information for certain purposes but not others (e.g., that they may use a defendant’s prior record as an indicator of deception if the defendant testifies, but may not use prior record information as an indicator of guilt) have been shown not only to be ineffective, but also in some cases to produce a “backfire effect” (Broeder, 1959; Cox and Tanford, 1989; Lieberman and Arndt, 2000) where jurors pay undue attention to the inadmissible information after judicial admonitions. This line of research is discussed in detail in Chapter 4 of this volume.

One specific type of limiting instruction that has been shown to be ineffective is a “joinder” instruction. In the United States (and in other countries), a defendant can be tried for multiple offences in the same indictment, as long as the offenses are of similar nature. This process (known as “joinder”) allows both time and expenses to be saved by combining offences into a single trial. However, as Bordens and Horowitz (1985) note, joinder may unfairly bias the jury in favor of the prosecution because the jury might infer a criminal disposition of the defendant as a result of hearing testimony regarding multiple offences, and that jurors may confuse and combine evidence from different offences during their decision-making.

Empirical evidence has indicated that these concerns have considerable merit. Defendants are more likely to be convicted of a particular charge in a joined trial than when the same charge is tried by itself. In addition, joining multiple offenses has been shown to lead to less favorable impressions of the defendant (e.g., credibility, criminal tendency, nervousness, attractiveness, dangerousness, and goodness), confusion of evidence between offences, and a perception that the defense’s evidence is weaker and the prosecution’s stronger (Bordens and Horowitz, 1983; 1986; Greene and

Loftus, 1985; Horowitz et al., 1980; Kerr and Sawyers, 1979; Tanford and Penrod, 1982; 1984). The court's solution to the problem of joinder has been to include a limiting instruction to jurors to consider each case separately. However, research has generally shown that such a limiting instruction is ineffective (Greene and Loftus, 1985; Tanford and Penrod, 1984; but see Tanford et al., 1985).

Thus, an examination of the extant jury instructions studies indicates that procedural instructions are difficult for jurors to understand. In the face of ambiguous instructions, jurors often do not understand the subtle differences between types of instructions (e.g., standards of proof or presumption instructions), are unable (or unwilling) to adhere correctly to cautionary and limiting instructions, and as a result, may not incorporate safeguards that exist in the United States legal system to protect defendants (e.g., burden of proof upon the prosecution). An examination of social science research investigating the comprehension and use of substantive instructions reveals similar problems.

Substantive Instructions

Criminal jury instructions Substantive instructions in both criminal and civil trials have been shown to cause difficulties for jurors. For example, Kramer and Koenig (1990) found that approximately one third of jurors did not correctly indicate that intent is required for first-degree murder. In addition, approximately two thirds of instructed participants incorrectly believed physical injury must be present with an assault charge. Smith (1991a) found that jurors have difficulty distinguishing between robbery and theft. In addition, Ogloff (1991) found that jurors were not sensitive to differences between different insanity standards (i.e., the American Law Institute standard, the M'Naughten standard, or the Guilty but Mentally Ill standard), and that most participants were unable either to identify or to recall insanity defense standards.

One type of criminal instructions that appears to be particularly problematic to jurors is penalty phase instructions in capital murder trials (e.g., Frank and Applegate, 1998; Levi, 1993; Diamond and Levi, 1996; Haney and Lynch, 1994; Weiner et al., 1995). Jurors have difficulty understanding the critical concepts of aggravation (factors that must be present to sentence a defendant to death) and mitigation (factors that help explain the defendant's actions, though not justifying them, and make life imprisonment an appropriate verdict, when they outweigh aggravating factors). For example, Haney and Lynch (1994) found that 21 percent of the sample either incorrectly defined the concept of aggravation or provided no definition at all for the concept, and 47 percent were either incorrect or unable to define mitigation. As mitigation represents the instructional component that determines when it is not justifiable to impose the death penalty on a defendant, it is critically important that this concept be well understood. See Chapter 7 of this volume for an extensive discussion of death penalty instructions.

Civil jury instructions Civil instructions have also been repeatedly shown to lead to poor comprehension rates. In fact it has been argued that jurors may have greater difficulty comprehending civil instructions compared to criminal, as jurors are required to try to decipher difficult and unfamiliar legal standards. Jurors also have less exposure to these concepts in television and film portrayals of the legal system as well as news reports, compared to criminal concepts (Cecil et al., 1991; Greene and Bornstein, 2000; Hastie et al., 1998; Ogloff and Rose, 2005). Jurors appear to have difficulty comprehending a variety of fundamental concepts such as negligence, liability, and damage awards, which are, of course, central to civil jury decisions (e.g., Charrow and Charrow, 1979; Elwork et al., 1977; Greene and Johns, 2001; Hastie et al., 1998). For example, Greene and Johns (2001) found that mock jurors had an overall comprehension rate of 64 percent for civil negligence instructions. Hastie et al. (1998) found that the mean comprehension rate of liability instructions was only 9 percent (but see, Landsman et al. [1998], who reported a 90 percent comprehension rate using multiple choice response items as opposed to a free recall task used in Hastie et al. [1998]). An examination of the content of typical civil jury instructions reveals that comprehension problems are not only due to the complexity of the language used, but also the result of language that is not present. In the United States, civil jurors are given little guidance on how to transform abstract concepts such as pain and suffering into specific dollar amounts (Greene and Bornstein, 2000; Saks et al., 1997). See Chapter 8 of this volume for an extensive discussion of problems associated with civil jury instructions.

International Instruction Comprehension Problems

Although much of the previous research discussed in this chapter has focused on evaluating pattern instructions in the United States, the basic problems that have been identified appear to be present in the jury instructions used in other countries that rely on lay persons to serve as jurors as well.

For example, Ferguson and Bouck (1987) reported that half of the 98 cases appealed in Ontario, Canada between 1981 and 1989 were found to have problematic instructions and as a result, new trials were ordered. According to Bouck (1993) a more recent sampling of appellate court decisions in Canada indicates that 70 percent of orders for new trials are the result of problematic jury instructions. It should be noted that in Canada judges must determine the appropriate means of conveying the law to jurors and often must convey the law using the exact language used by Parliament or the decisions of higher courts. As a result, "Canadian law adds layers of academic complexity on top of ... common law rules" (Bouck, 1993, p. 144). In addition, the judge must convey the theory of the prosecution and the defense. As a result, it appears that Canadian jury instructions are difficult to understand. Indeed, Jones and Myers (1979) reported a 62 percent comprehension rate for Canadian murder/manslaughter instructions prior to attempting to revise the language used. Rose and Ogloff (2001) obtained similar rates for conspiracy instructions.

In New Zealand, judges have access to a “Bench Book” that contains both model directions as well as discussions on the law and other relevant trial matters. However, judges are not required to follow the specific wording in the book. Although some judges follow the model directions very closely, others use it as a general guide regarding the substance of the instructions, but not the specific style, and some create their own jury instructions (Cameron et al., 1999; Eames, 2003). Perhaps the flexibility that judges have in New Zealand has caused instructions to be delivered in a more conversational manner, as jurors have responded favorably when interviewed about instructions. Eames (2003) reports that 85 percent of jurors serving on 48 trials responded that instructions were “clear,” and 80 percent also found the instructions to be helpful. However, in 35 of the 48 trials jurors misunderstood the law, revealing a serious disconnect between jurors’ perceptions of their comprehension and actual understanding.

In England and Wales, jurors have also reported high rates of comprehension, with 65 percent of participants reporting that they understood “all” of the instructions they were delivered, and an additional 25 percent indicating that they understood “most” of the instructions (Jackson, 1992). Even higher rates were obtained in a 1993 Crown Court Study, which found that 90 percent of former jurors said that it had been “not at all” or “not very” difficult to understand scientific evidence and follow the judge’s instructions (Zander and Henderson, 1993, pp. 216–17). However, there is no guarantee that jurors were accurate in their self-assessments, and social pressures to appear knowledgeable may have produced the high rates reported. Indeed, self-reported rates of comprehension in the United States have also been quite high. For example, Cutler and Hughes (2001) reported that 97 percent of jurors sampled from both criminal and civil cases reported that they understood the judicial instructions they were given. Similarly, Saxton (1998) reported that 97 percent of jurors in Wyoming trials reported that they understood instructions, however, actual measures of comprehension indicated that criminal jurors understood only 74 percent of instructions and civil jurors understood only 58 percent.

The process of instructing jurors is particularly complicated in Scotland, where jurors are given a copy of an elaborately worded indictment before the trial that conveys the charge against the defendant using “archaic legal jargon” (Hope and Memon, 2006, p. 38) before the presentation of witnesses and evidence (no opening statements are given, but the judge delivers more traditional instructions prior to deliberations). In a study on the effects of presenting charges to jurors in such a complex way, Hope and Memon found that the Scottish-style indictment led to significantly more negative attributions about the defendant, and a greater belief that the defendant was guilty, than when the same information was conveyed in a simple statement.

The quantity of international research that has been conducted on jury instructions is quite limited in comparison to what has been performed in the United States. However, the general findings that exist appear to indicate the challenges of

conveying complex legal instructions is a problem in countries that use lay persons as jurors throughout the world.

Factors Affecting Instruction Effectiveness

Language of Instructions

The typical language used to instruct jurors about the relevant law appears to be a fundamental obstacle to jurors comprehension of the legal concepts. As previously noted, the emphasis has historically been on stating the law in a legally accurate manner, rather than on creating instructions that are written to maximize comprehensibility. However, the problems associated with the language used in instructions may be compounded by several other factors including trial complexity, individual differences, and jurors' pre-existing beliefs about the law.

Complexity of Trial

Not surprisingly, the problems jurors face with understanding and following instructions are compounded in complex trials. A study by the Federal Justice Center found that jurors in complex civil trials (trials lasting longer than six months) were more likely to report difficulty in understanding the judge's instructions than jurors who served on shorter trials (Cecil et al., 1987).

Individual Differences

Education level Education level has been consistently shown to relate to instruction comprehension, with higher instruction comprehension rates found among well-educated jurors (Benson, 1985; Buchanan et al., 1978; Charrow and Charrow, 1979; Elwork, Alfini, and Sales, 1982; Forston, 1970; Kramer and Koenig, 1990; Severance et al., 1984; Strawn and Buchanan, 1976). However, even highly-educated individuals may not understand a large portion of instructions. For example, Benson (1985) found that the average comprehension rate among a sample of Loyola University law students who were given California standard jury instructions was only 62 percent. Rose and Ogloff (2001) report that law students had higher comprehension of Canadian hearsay and conspiracy instructions (72%) than undergraduate students or community members (62%), but the levels obtained by the law students were still far from ideal.

Personality factors Personality factors have been shown to influence (albeit weakly) jury verdicts across a wide variety of studies (see Chapter 5 of this volume for a discussion of jury selection issues). Although there is no clear theoretical reason to expect personality factors to influence comprehension rates, it is possible

that juror willingness to adhere to instructions could be affected. Indeed, dogmatism has been shown to affect adherence to judicial instructions. Dogmatism refers to a general form of authoritarianism that is free of politically rightist ideology typically associated with authoritarians (Rokeach, 1960). Shaffer and Wheatman (2000) report that the general perception of dogmatic jurors as hyper-punitive individuals who are more likely to convict defendants than non-dogmatic jurors is incomplete. Rather, it appears that dogmatic jurors are more likely to adhere carefully to instructions they are presented with (presumably out of a desire to follow closely the instructions of a perceived legitimate authority figure—the judge). When instructions allow jurors to consider their own feelings about euthanasia, dogmatic jurors were less likely to convict a defendant charged with the euthanasia death of his mother (Kerwin and Shaffer, 1991). In addition, Shaffer and Kerwin (1992) demonstrated that dogmatic jurors carefully adhered to entrapment instructions even though they required jurors to question the behavior of the police.

Shaffer and Wheatman (2000) also suggest that high self-monitors may be more likely to follow judicial instructions. Self-monitoring refers to an individual's tendency to use either internal or external/situational cues to guide behavior (Snyder, 1987). Thus, high self-monitors are very concerned with impression management and following situational norms. As a result, such individuals may be more inclined to pay close attention to instructions regarding appropriate conduct delivered by the judge. It is possible that the effect of heightened attention to situational behavioral guidelines may not only affect adherence to the instructions, but may also lead to increased overall comprehension of the instructions as well. However, to date this line of reasoning as applied to jury instructions is purely speculative, and has not been empirically tested.

Pre-Existing Beliefs About the Law

Jurors enter the courtroom with a lifetime of collected experiences regarding legal concepts that are developed through popular portrayals of legal issues in the media, including both actual and fictional depictions, from conversations with others, and from other sources. Finkel (1995) has used the term “commonsense justice” to describe the beliefs about the law produced by these experiences as well as other moral and psychological influences. Thus, this term refers to the intuitive notions about both the defendant and the law that ordinary people bring to court with them. Consequently, these commonsense justice beliefs may substantially differ from the “black-letter law” conveyed in the jury instructions. Research has indicated that preconceived beliefs about the law are very powerful, and that jurors tend to rely on their commonsense notions of the law over the instructions provided by the judge (Finkel, 2000; Finkel and Handel, 1988; Ogloff, 1991; Smith, 1991a). For example, Ogloff found that mock jurors had low levels of comprehension for insanity defense instructions (which did not affect their verdicts), and that they relied on commonsense beliefs regarding insanity to develop their own standards that were

used in their decision-making. For a more detailed review of commonsense justice see Chapter 3 of this volume and/or Finkel (2000).

It should be noted that this line of research has typically used the methodology of presenting mock jurors with standard pattern instructions, rather than instructions that have been rewritten to maximize comprehensibility according to psycholinguistic principles (discussed below). As a result, it is not clear whether jurors would be more likely to set aside commonsense beliefs if they are able to understand clearly the instructions delivered by the judge. In the absence of comprehensible instructions, jurors are forced to rely on some other form of guidance in their decision-making. As such, commonsense justice beliefs likely play an important role in determining verdicts on a frequent basis.

Pre-existing commonsense beliefs about morality are also important in terms of determining when jurors will intentionally ignore the instructions provided by the judge, a process known as “nullification.” Nullification is most likely to occur “in cases involving social change” (Abbott et al., 1993, p. 46) when a jury must decide between what is legally appropriate and what is morally correct, such as euthanasia, refusing the military draft, or “victimless” crimes (Kadish and Kadish, 1971; Levine, 1984).

Jury Instruction Process Reforms

Rewriting Instructions Using Psycholinguistic Principles

The jury instruction research that has been conducted to date clearly shows that jurors have difficulty comprehending instructions that they are presented with at trial. This is likely due to the general emphasis that has been placed on creating pattern instructions that are legally accurate, rather than focusing on the comprehensibility of the material to a non-legal audience. However, legal accuracy and comprehensibility are not mutually exclusive goals. Through the application of general psycholinguistic principles, it is possible to rewrite instructions in a manner that greatly enhances comprehensibility (Charrow and Charrow, 1979; Elwork, Sales, and Alfini, 1977; 1982; Sales et al., 1977).

Among the most basic recommendations for redrafting instructions is the replacement of legal jargon and uncommon words with more familiar language; in addition, replacing abstract words (e.g., “plaintiff”) with more concrete names and terms (e.g., the plaintiff’s actual name). Other changes include replacing homonyms (e.g., “respect”) with words that do not have multiple meanings, eliminating negatively-modified sentences, and replacing sentences written in the passive voice with active sentences; in addition, replacing nominalizations (nouns that have been constructed from a verb) with verbs (e.g., change “the thinking of” to “think about”), and removing prepositional phrases (e.g., phrases that start with the words “as to”). Further, complex sentences should be broken down and reorganized using a logical

structure. See Elwork, Sales, and Alfini (1982) for an extensive guide to revising jury instructions.

By applying the psycholinguistic recommendations noted above, multiple research teams (e.g., Benson, 1985; Charrow and Charrow, 1979; Elwork, Sales, and Alfini, 1977; 1982; Frank and Applegate, 1998; Jones and Myers, 1979; Ramirez et al., 1996; Severance et al., 1984; Severance and Loftus, 1982; 1984; Steele and Thornburg, 1988), using diverse samples of undergraduate students, law students, and representative samples of actual jurors and individuals who match the general characteristics of jurors in a community, have demonstrated considerable success at improving instruction comprehension rates, often between 20 to 30 percent. For example, Elwork, Sales, and Alfini (1977; 1982) increased comprehension rates from approximately 60 percent to the 80 percent range.

Typically, improvement gains vary as a function of the stimuli (i.e., specific instructions) and the dependent measure used. In addition, some research teams such as Elwork, Sales, and Alfini (1977; 1982) have included a member who specializes in psycholinguistics, whereas others have indicated that they have no training in linguistics or English composition (e.g., Steele and Thornburg, 1988). Undoubtedly, the skill of the research team at rewriting the instructions has an impact on comprehension rates of revised instructions.

In addition, just as a revision to a paper or a chapter of a book is improved through multiple drafts, it may be possible to increase comprehension beyond reported rates through additional revisions to instructions. However, it appears that researchers have sought to publish their results after a single revision of instructions, rather than through a process of additional revisions and comprehension assessments. It would be beneficial for future research to determine maximum comprehension rates that can be achieved. It would also be beneficial to determine the effect of applying more recent findings in the field of psycholinguistics than those originally identified by Charrow and Charrow (1979) and Elwork, Sales, and Alfini (1977; 1982).

Although researchers have not identified the maximum comprehension gains that can be achieved through revising pattern instructions, it has been shown that some degree of improvement can clearly be achieved while retaining legal accuracy in the instructions. For example, Severance et al. (1984) revised a set of jury instructions using the psycholinguistic principles discussed above. The revised instructions were shown to produce higher comprehension rates than the original Washington State pattern instructions. In addition, jurors presented with the revised instructions were better able to apply the law to novel situations. Severance et al. then asked a group of state superior court justices across the United States to review both the original and the revised instructions. The judges found the revised instructions to be legally adequate and less biased than, and preferable to the original instructions.

In addition, Halverson et al. (1997) report that jurors are less influenced by judicial biases when presented with revised instructions. In that study, jurors presented with standard instructions were more likely to render guilty verdicts, when judges thought a defendant was guilty, and acquittals when judges believed in

the defendant's innocence. However, this bias was not present among jurors given instructions that had been revised according to the aforementioned principles. The authors hypothesized that in the absence of clear instructions, jurors were using additional cues to aide in their decision-making, including the non-verbal behavior of judges.

Changing Delivery of Instructions

Providing written instructions Judges have traditionally delivered instructions to jurors in an oral format. However, an alternative approach to delivering instructions is to provide jurors with a written copy of the instructions either as a supplement or replacement for the oral delivery. Mixed results regarding the benefits of written instructions have been obtained. Several studies have shown that jurors presented with written instructions are better able to apply the law (Forston, 1975), and have higher instruction comprehension levels, particularly if the instructions have been revised using psycholinguistic principles (Frank and Applegate, 1998; Kramer and Koenig, 1990; Prager et al., 1989). However, other studies have demonstrated that written instructions do not aid comprehension (Reifman et al., 1992) or affect juror verdicts (Greene and Johns, 2001), despite the fact that jurors may believe that written instructions were beneficial in terms of improving comprehension of the law (Heuer and Penrod, 1989). To some extent, it is not surprising that written instructions do not improve comprehension in cases where the instructions have not first been revised according to psycholinguistic principles to make them more understandable. If jurors are presented with a complex sentence containing a number of words they have never or only rarely been exposed to they should have considerable difficulty deciphering the sentence, regardless of the format it is in.

Timing of instructions Traditionally, jurors are presented with instructions after all the evidence has been presented, and just prior to deliberations. Delivering instructions at the end of the trial allows material to be relatively fresh in the minds of jurors when deliberations commence. However, it is possible that if instructions are presented first, jurors may have a framework to interpret trial evidence (Heuer and Penrod, 1989). The results of studies examining the impact of pre-instructions have produced mixed results in terms of comprehension, with some studies finding pre-instruction to be beneficial (e.g., Smith, 1991b) and other research indicating that it does not improve comprehension (e.g., Elwork et al., 1977). However, additional research has indicated that pre-trial instructions allow jurors to focus on the evidence better in civil cases (ForsterLee et al., 1993), and that jurors in a criminal case were more acquittal prone after being presented with pre-instructions that highlighted due-process issues designed to protect the defendant (e.g., burden of proof – Kassin and Wrightsman, 1979). Finally, several studies have found that repeating instructions improves comprehension and affects verdict decisions (Cruse and Browne, 1987; Smith, 1991b).

Because empirical research has not revealed any strong disadvantages to including pre-trial instructions, and a number of benefits have been identified, it appears that this practice should be encouraged in jurisdictions where it is not currently being practiced.

Providing Special Verdict Forms and Flow Charts

To ensure jurors reach appropriate verdicts, special verdict forms or flow chart/decision-tree models may be used to illustrate essential components of instructions. A special verdict form consists of a series of questions that jurors must respond to. Each question pertains to a separate issue of fact relevant to a legally appropriate decision. Thus, special verdict forms ensure that jurors attend to key elements that are conveyed in jury instructions. Such forms are used in both civil and criminal trials in the United States and in other countries (e.g., New Zealand, see Ogloff and Rose, 2005). Similarly, researchers have also explored the effects of presenting a flow chart (decision-tree) to identify the legal questions that need to be answered, the order that they should be dealt with, and the appropriate verdict that should be rendered as a result of the decisions made (Heuer and Penrod, 1994; Ogloff, 1998; Wiggins and Breckler, 1990).

Although there is potential for these types of approaches to improve comprehension by highlighting key elements, and potentially arranging them in a logical manner, fundamental comprehension problems may still be present if psycholinguistic issues are not first addressed. Although some special verdict forms are short and easily read, others are complex and contain difficult language structure for jurors. In addition, special verdict forms may ask jurors whether they are convinced “beyond a reasonable doubt” or “by a preponderance of evidence” without providing definitions of these essential legal thresholds.

Due to these limitations, it is not surprising that mixed results have been obtained in the few studies that have examined special verdict forms or flow chart (decision tree) models. For example, Semmler and Brewer (2002) found that instruction comprehension was improved in community drawn mock jurors through the use of a flow chart indicating the order legal questions should be addressed. In addition, Wiggins and Breckler (1990) found that a special verdict form improved mock jurors’ understanding of burden of proof questions, but did not affect overall verdict decisions. However, Ogloff (1998) found that the use of a flow chart did not improve comprehension levels, and that jurors tended not to use the chart during deliberations. Finally, Heuer and Penrod (1994) examined reactions to special verdict forms among actual juries. They found that jurors felt the forms were helpful in obtaining a good understanding of the instructions, and in reaching verdicts that the jurors were more satisfied with and confident in. However, there were no direct measures of comprehension, so it is not clear whether true comprehension improvements were achieved.

Special verdict forms and flow charts appear to have the potential to improve comprehension by highlighting the structure that should be followed when deliberating about complex legal concepts. However, it is important that the material presented in these approaches is conveyed in a way that is truly clear and meaningful to jurors. As a result, the psycholinguistic principles identified by researchers (e.g., Charrow and Charrow, 1979; Elwork, Sales, and Alfini, 1977; 1982) discussed above should be applied to special verdict forms and other graphical decision models.

Animation and Illustration of Instructions

A computer animation technique has recently been used to improve instruction comprehension by Brewer et al. (2004) in an experimental setting. In that study, the researchers presented mock jurors (both law students and community members with no legal training) with audio-taped self-defense instructions in either a traditional format (alone), supplemented with a flow chart, or accompanied by a computer animation used to explain legal concepts. For example, when the judge discussed the issue of “reasonable proportionality” in a self-defense case, participants viewed two animations to describe it. The first animation was of a man slapping a woman once, before she responded disproportionately by shooting him. The second animation showed the man slapping and kicking the woman repeatedly until she fell to the ground and responded proportionately by shooting the man. The results indicated that although law students had higher comprehension levels than the community members when only the traditional instructions were given, the difference between the groups was eliminated by the computer-animated instructions, which improved community members’ comprehension. However, despite this improvement, comprehension rates remained low ranging from 41 to 64 percent depending upon the recall measure used (e.g., recognition versus application).

Dattu (1998) has proposed a similar technique of illustrating instructions, based on research findings that the presentation of pictures aids learning. However, Dattu does not present the results of any empirical assessments of this proposed approach. Clearly, the use of computer or other animation/illustration of legal concepts requires far greater investigation by researchers before any policy recommendations can be made. However, as was the case with special verdict forms, there may be some potential to this approach, particularly if it is applied to instructions that have been psycholinguistic revised. Further empirical research investigating whether these techniques are superior to a simple instruction redrafting approach is needed.

Seeking Clarification from the Judge and Other Jurors

Periodically, jurors turn to the judge for additional clarification of instructions. In an analysis of questions submitted to judges by juries in criminal trials, Severance and Loftus (1982) found that jurors were unclear about issues such as intent, reasonable doubt, and some of their general responsibilities, particularly in cases where multiple

charges were involved. Reifman et al. (1992) reports that requesting clarification from the judge was beneficial for substantive (but not procedural) instructions. However, judges are typically reluctant to clarify or reword instructions in the United States. Rather, judges typically respond to questions about the instructions by telling jurors to rely on their best memory and understanding of the instructions, or by simply rereading the original instructions (Prager et al., 1989; Severance and Loftus, 1982). Judges' reluctance to clarify instructions is driven by concerns over appeals. As pattern instructions represent pre-approved instructions, there is little room for a decision to be reversed on the basis of the instructions provided. However, any deviation from the original wording in an effort to provide clarification to jurors raises the possibility that the clarification was done in an inappropriate manner.

In the absence of judicial clarification, jurors must rely on each other to clarify instructions during their deliberations. It is possible that if one or two jurors understand the law, they will explain it to others, thus bringing the comprehension rate of the jury to that of the level of the juror with the best understanding. Of course, this possibility is based on the assumption that the law will actually be discussed during deliberations. Steele and Thornburg (1988) analyzed questionnaires returned by former jurors and found that the meaning of instructions is frequently discussed during deliberations. More specifically, they found that the probability that a jury discusses the instructions during deliberation is between 83 and 91 percent. Further, there is between a 32 and 41 percent probability that jurors will disagree about the meaning of the instructions. Jurors resolve the disagreements the majority of the time (between 77 and 89 percent). However, it is possible that jurors overestimated the frequency of discussing instructions in these self-reports. Support for this possibility comes from an examination of videotaped deliberations of 500 jury-eligible mock jurors by Ogloff (1998) who found the jurors spent only 8 percent of the deliberation time discussing instructions.

Even when instructions are discussed, there is no guarantee that the final consensus that jurors reach regarding the meaning of the instructions will be the correct one. In fact, Ellsworth (1989) found that jurors were just as likely to replace an incorrect understanding of instructions with a correct understanding (52 percent of the time) as they were to replace an initially correct understanding of instructions with an incorrect one (48%). Similarly, Ogloff (1998) found that jurors correctly defined instructions during deliberations only 61 percent of the time. Other research has also indicated that deliberation does not improve comprehension (Elwork, Alfini, and Sales, 1982; Hastie et al., 1998; Kerr et al., 1976; Rose and Ogloff, 2001).

A few studies have shown that comprehension is improved following deliberation (Forston, 1970; 1975; Kerwin and Shaffer, 1994; Severance and Loftus, 1982, Experiment 2), but the totality of research findings in this area cast considerable doubt as to whether jurors are capable of clarifying misunderstood points for each other on a regular basis. In addition, clarification during deliberations requires discussion of the instructions, and there may frequently be cases where jurors are

reluctant to mention to others that they are confused by the instructions they have been given, due to self-presentation or other concerns.

Ultimately, if jurors do not understand instructions, it is possible that one or two jurors who have a greater understanding may control the deliberations, or the deliberations will turn to a discussion of legally inappropriate topics rather than a discussion of the relevant and important points of law (Elwork and Sales, 1985).

Policy Implications

Thus, a fundamental paradox exists in so far as the legal process is set up for judges and lawyers to be able to practice the law in accordance with the legal system of which they are a part, but at the heart of this process are people who are not legal professionals. Unless specific care is taken to adjust the legal system to those non-professionals who operate in it, it is inevitable that lay people will struggle in their attempts to comprehend and apply the law as they try dutifully to fulfill their obligations as jurors. For almost three decades, social scientists have argued that comprehension problems associated with pattern instructions could be significantly improved through the application of psycholinguistic revisions. However, the legal community has been slow to redraft instructions. There may be a number of reasons for the slow pace of reforms on this front.

First, much of the research that has been done on jury instructions has been presented in social science journals. As members of the legal community are more inclined to read law reviews rather than social science journals it is not clear that the extent of instruction problems and potential solutions have been adequately disseminated to appropriate parties. In addition, even in cases where members of the legal community are aware of the problem, the process of revising the instructions may be viewed as a task that is too large, and one that may open the door for appeals if substantive changes are made to the language used to instruct jurors (Lieberman and Sales, 1997; Steele and Thornburg, 1988).

To some extent, the impact of the publication of empirical research on jury instructions has been dependent on the body that is responsible for legal policymaking in a given area. In the United States, legal policy decisions are made by courts, the legislature, or relevant commissions. These different groups have typically responded to empirically based recommendations in different ways. Legislatures and the courts have been very slow to implement any changes based on social science research. However, commissions tend to be the most active bodies, and have made substantial reforms to the jury instruction process (Tanford, 1991).

In fact, despite the overall slow pace of instruction reforms, the work of commissions has led a few states to put forth substantial effort in terms of revising pattern instructions. In 1981, Alaska was the first state to attempt to redraft (civil) instructions for improved comprehensibility. More recently, California approved approximately 800 new civil jury instructions and special verdict forms with an

emphasis of delivering instructions that are in “plain English.”¹ In 2006, California also revised its criminal jury instructions.² Other states have followed California’s lead, and have either implemented revisions to instructions (e.g., Delaware, Iowa, Michigan, Minnesota, Missouri, and North Dakota) or formed committees that are working on redrafting instructions (e.g., Arizona, Florida, Vermont, and Washington) in a “plain-English” style.³

It is encouraging that some of the recommendations made by social scientists are being attended to. However, it is important that revisions are accompanied by comprehension assessments to ascertain the actual rates of improvement. In that process, it is important to consider not only the overall rates of comprehension, but the range as well. That is, are there some jurors who are still unable to understand certain concepts despite the best efforts to revise the instructions? Is it sufficient that only some jurors have a strong understanding of the instructions? If not, an important policy issue emerges in terms of what to do with jurors who are incapable of achieving a high level of instruction comprehension. Issues of bias have long been a basis of excluding jurors under challenges for cause. Should courts consider broadening the scope of challenges for cause to allow for the exclusion of jurors who are unable to understand certain essential parts of instructions? Would doing so undermine the concept of a trial by a representative jury, because jurors of lower education levels would be excluded more frequently leading to fewer lower income and minority jurors? Of course, enacting such a policy requires a determination of what an acceptable level of comprehension is for jurors, which courts are understandably reluctant to specify, as the implications of doing so would be dramatic. However, as there is a growing national emphasis in the United States to improve the comprehensibility of instructions, discussion of such policy issues may be merited.

Conclusions

Pattern instructions have been shown to be beneficial in terms of saving time for judges and attorneys, ensuring that jurors hear consistent instructions across cases of a similar nature, and reducing the number of appeals based on problematic instructions being delivered. Unfortunately, pattern instructions are typically written in a manner that focuses on legal accuracy at the expense of comprehensibility. As a result, jurors have considerable difficulty understanding both procedural and substantive instructions.

A variety of techniques for improving jury instruction comprehension have been developed. The approach of applying psycholinguistic principles to redraft

1 See, <http://www.courtinfo.ca.gov/jury/civiljuryinstructions/about.htm>.

2 See, <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR46-05.PDF>.

3 See, http://www.ajs.org/jc/juries/jc_improvements_plainenglish.asp.

instructions appears to be the most reliable remedy. It may be beneficial to compliment this approach with other techniques that have been identified (many of which are easy to implement), including providing written instructions presented at both the beginning and the end of the trial, and conveying difficult or abstract concepts either through flow charts/decision trees or in special verdict forms (and perhaps with an illustrated/animated approach in some instances). More work is needed to assess empirically the benefits of combining all of these techniques.

However, as Ellsworth and Reifman (2000) note, empirical assessments of new techniques and recently redrafted instructions are only part of the reform process. For additional improvements to be made, it is important to consider recent advancements in the areas of social, cognitive, and educational psychology, such as new psycholinguistic theories, schema-based models, or active learning principles. Educational psychology-based approaches focused on improving jurors ability to study and retain the instructions they have been presented with may be particularly useful, especially when combined with psycholinguistic revisions. The application of theoretical perspectives to the jury instruction process may produce new techniques for reforms, leading to greater instruction comprehension among jurors, and a more fair trial process for defendants, where verdicts are rendered in accordance with the law rather than in the absence of understanding it.

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Chapter 7

The Social Psychology of Capital Cases

Mona Lynch

Synopsis

This chapter reviews the existing empirical literature that examines the social psychological aspects of the trial court processes in American capital cases. Research related to prosecutorial decision-making in death penalty cases; capital jury selection and issues surrounding death qualification; defendant, victim, and witness effects; evidentiary issues in the penalty phase; and jury decision-making processes are discussed in detail, with a focus on the gap between the legal ideals that underlie capital jurisprudence and psychological realities of how death penalty cases actually unfold. As is described in the body of the chapter, a broad range of empirical approaches have been used to examine these aspects of capital case procedure, including mock juror and mock jury experimental designs, retrospective interview studies of former capital jurors, and regression analyses of archival data from capital cases, adding breadth and depth to our overall understanding of the impact of psychological processes on capital cases. As the conclusion points out, this body of research, taken together, indicates that due to the nature of capital cases, and especially due to the difficulties faced by capital juries, serious threats to fairness and justice pervade the death penalty trial process.

The Social Psychology of Capital Cases

Psychology plays an integral and multifaceted role in American capital cases as they proceed through the trial process. Because of the structure of the capital penalty trial, especially in terms of how mitigating evidence is statutorily defined, the capital defendant's individualized psychological history almost always factors into the defense case presentation and thus is often central to the jury decision-making process. Defense counsel in many capital cases will rely upon expert testimony from psychiatrists or psychologists to help explain the mental health background of the defendant, including how previous traumas and stressors may

have contributed to his history of criminality,¹ his mental state at the time of the capital crime, and in cases in which the defendant may be developmentally disabled, his cognitive capacities.² Prosecutors may well also call their own psychological experts to demonstrate the defendant's lack of "mental disease or defect" or to elaborate upon the defendant's psychopathic tendencies, which purportedly increase his dangerousness and confirm his inability to feel guilt or remorse.

Moreover, social psychological phenomena infuse the capital legal process. A large body of research paints a somewhat problematic picture of how capital cases are processed in court, including how various participants' judgments and actions are shaped by contextual stimuli throughout the proceedings in such a way as to jeopardize equal and impartial justice. Craig Haney (2005) provides the most comprehensive account of the social psychology of capital punishment in his recent book, *Death by Design*, which systematically lays out the serious problems with the death penalty process in the U.S. This work addresses the totality of the context in which capital cases are created, sensationalized, and ultimately tried in courts in order to illustrate the fundamental injustices that pervade the death penalty.

In this chapter I will primarily assess and review the existing empirical research that addresses the trial court processes in capital cases in an effort to delineate some of the fundamental challenges that the death penalty poses to the legal system. I will begin with a brief overview of the general capital procedure in the United States, highlighting the more unique features of these cases. I will then examine key aspects of the death penalty case at the trial court level, highlighting what research has suggested about the social psychological processes at play.³ Included in these sections will be an overview of the research that illuminates the effect of victims' and defendants' characteristics on case outcomes, as well as the differential effects of juror characteristics (i.e., demographic variables and attitude variables) on their perceptions of case facts and decision-making outcomes. As a general note, like many other areas of law, there is much more research and, consequently, a better understanding of what happens at the trial stage, particularly in terms of how jurors or mock jurors perceive the capital case, than there is for the equally important pre-trial and post-conviction stages. Thus, by virtue of its share of the research, I will devote the bulk of this chapter to what happens at the trial stage, particularly in terms of jury decision-making.

1 I refer to the defendant throughout this chapter in the masculine since the vast majority of capital defendants are men.

2 This kind of testimony has become especially important in capital cases since the U.S. Supreme Court ruled in *Atkins v. Virginia* (2002) that it is unconstitutional under the 8th Amendment (which prohibits cruel and unusual punishment) to subject mentally retarded persons to capital punishment.

3 No intent is meant to diminish the importance and centrality of clinical and forensic psychology in death penalty cases by this focus of the chapter.

Capital Cases in Court

The U.S. is anachronistic among its Western peer nations in that it retains the death penalty for ordinary crimes. The bulk of jurisdictions that still practice capital punishment are concentrated in the Middle East, the Caribbean, Asia, and Africa, and tend to be less economically and industrially developed than the United States. They also generally operate under very different legal systems, especially in terms of how capital cases are adjudicated.⁴ Japan stands as one of the only other fully industrialized nations that continues to use capital punishment; however, their legal procedure in such cases differs substantially from that of the United States, most significantly in terms of the absence of jury trials (however, see Ohtsubo, 2006, for a discussion of upcoming reforms in the Japanese trial procedures). Thus, the trial process for death penalty cases in the U.S. is relatively unique from a global perspective.

In the U.S., most capital cases are tried at the state level. At present, 37 of the 50 states authorize capital punishment, as does the federal government and the U.S. military system.⁵ These jurisdictions' statutes differ from each other, but all have some common features, largely due to requirements imposed by the U.S. Supreme Court since the mid-1970s. First, death eligible offenses (in practice, homicides) must be more serious than ordinary instances of the crime, so prosecutors need to allege some form of statutorily defined "aggravation" or "special circumstance" in order to seek death. If the death penalty is sought, the trial itself is bifurcated, with a guilt stage preceding a penalty stage, which will only take place if the defendant is convicted of the capital crime.

Jurors in capital cases must be death qualified, which means that they must hold views on the death penalty that are not so strong that they substantially impair their ability to follow the law in sentencing. The death qualification process typically involves individualized questioning of jury panel members about their attitude towards capital punishment by the attorneys and judge, and those deemed "excludable" are dismissed from service on the case. Thus, those who are so deeply opposed to capital punishment that they would have difficulty sentencing a convicted defendant to death, and those who are so in favor of capital punishment that they would be compelled to impose it in any capital case are supposed to be excluded from participation on capital juries through the death qualification process.

The procedure in the guilt phase of the trial is comparable to that in non-capital criminal matters, and conforms to the same evidentiary requirements and burdens of

4 Miethe, Lu, and Deibert (2005) provide a good recent review of the variety of legal procedures worldwide in the *International Criminal Justice Review*.

5 New York's capital statute was declared unconstitutional by the state's highest court in 2004 so is not currently "active"; nonetheless I have included it here among the 37. New Jersey legislatively abolished the death penalty in December 2007, making it the first state to do so in over 40 years. The District of Columbia does not authorize the use of capital punishment.

proof. The penalty stage, however, is quite different. In most jurisdictions, sentencing after conviction on non-capital charges is the exclusive purview of the judge, however in death penalty cases, the sentencing decision is now exclusively made by the jury. As of 2002, following the Supreme Court decision in *Ring v. Arizona*, a jury comprised of death qualified community members must be responsible for the life or death sentencing decision in all jurisdictions that currently authorize capital punishment. Because the sentencing decision requires consideration of evidence in aggravation which may lead to a death sentence, the Court ruled that it was a 6th Amendment violation of the right to a jury (per *Apprendi*⁶) if states imposed judicial sentencing on capital defendants when a finding of fact on aggravation was a component of sentencing. Prior to *Ring*, most death penalty jurisdictions already relied upon jury sentencing, thus it is a longstanding norm in capital cases.

The scope of evidence considered in the penalty stage is also quite different from most other proceedings. First, in most jurisdictions, the prosecutor presents evidence about statutorily defined aggravating circumstances in order to make the case for a sentence of death. Common aggravators include: 1) the circumstances of the crime itself that have been legislatively defined as especially serious (i.e., multiple victims, use of torture, the murder occurred in conjunction with another felony, even if there was no intent to kill); 2) prior felony record; 3) prior acts or threats of violence; and 4) victim impact evidence. The defense presents evidence in mitigation, which can include anything that might lead the jury to arrive at a sentence less than death. Mitigating evidence often includes: 1) social history testimony; 2) psychological or psychiatric assessments of the defendant's mental status; 3) evidence about the defendant's prior good acts; and 4) evidence indicating his suitability for a sentence of life in prison. Two states, Texas and Oregon, use a "special issues" model that center the case around the question of future dangerousness of the defendant in determining death. Nonetheless, even under this model, the defendant has the right to present any mitigating evidence that would warrant a life sentence.

In short, the sentencing phase of the trial is focused upon judging and assessing the criminal actor, rather than simply the criminal acts, which makes it a much more difficult, more individualized task by its very nature. Unlike the guilt phase, where the parameters of what the jury must find are circumscribed (although they can be quite complicated), the very evidence, particularly the mitigating evidence, upon which penalty phase determinations are to be weighed and decided is generally of a

6 In *Apprendi v. New Jersey* (2000), The U.S. Supreme Court took on sentencing enhancements imposed by judges that require a finding of fact of the existence of aggravation. The Court ruled that the defendant in this case had his 6th Amendment right to a jury trial violated when the judge imposed a sentence that was longer than the statutory maximum for the crime to which he pleaded guilty when the judge determined that the crime had been motivated by bias. The effect of the case has been to curtail a range of judicially imposed enhancements that typically were tacked on during sentencing if the judge found by a preponderance of evidence that some "aggravating" circumstances did exist.

subjective quality and the decision, at its core, is an emotional, morally charged one rather than a matter of mere fact finding.

After the presentation of evidence and the closing arguments, jurors are given instructions on how to determine the appropriate penalty, generally a choice of either life without the possibility of parole or death.⁷ Because most death penalty statutes rely on a guided discretion model of penalty decision-making, capital juries are directed, via judge delivered jury instructions, to consider and weigh aggravating and mitigating circumstances against each other in order to determine the appropriate sentence. Depending upon how the statute is designed, there must either be a specific finding of aggravation in this stage before death can be considered, or there is generally a statutory provision requiring that the aggravating evidence outweighs the mitigating evidence before death can be imposed.⁸ Once instructed, jurors then deliberate to a sentencing decision.

Pretrial Issues

Prosecutorial Decision-making

Perhaps the biggest black box in the capital case process has to do with the prosecutorial decision to seek death. This is an area ripe for further study, since there is relatively strong evidence that the filing process is influenced by a number of “extra-legal” factors, yet little empirical work exists to illuminate why this is the case. A number of regression analyses of archival data suggest that race of victim, race of defendant, gender of victim, social status/class of victim, and locale of crime all have predictive value in determining which cases are pursued as death penalty cases. Most of the research focus has been on race effects in capital cases, in large part because of the racist history of the use of the death penalty in this country and because of its constitutional implications for equal protection under the post-*Furman* (1972) model of capital punishment.

The most expansive study of this kind conducted in the “modern” era of the death penalty,⁹ is the well-known ‘Baldus study’, which figured prominently in the

7 New Mexico is currently the only state that does not offer life without parole (LWOP) as an alternative to a death sentence.

8 This is not mandated under the U.S. Constitution. See, for instance, *Walton v. Arizona* (1990) and *Kansas v. Marsh* (2006), both cases in which the Court approved statutes that did not require that aggravation outweigh mitigation as long as the statutory scheme has a mechanism for “rationally” narrowing the class of death-eligible defendants. Thus, several states do not specify such a formula in the weighing portion of the statute.

9 This era begins with the reconstituted death penalty statutes, crafted by states in the wake of *Furman v. Georgia* (1972) which ruled that capital punishment, as was then being administered, was unconstitutional. It ushered in a new era in which statutes attempted

U.S. Supreme Court decision, *McCleskey v. Kemp* (1987). This study accounted for more than 230 legally relevant and extra-legal independent variables among the population of death-eligible homicides in the state of Georgia from 1973 to 1980 to assess whether race of victim and race of offender were significantly related to the decision to seek death (Baldus et al., 1990). The researchers demonstrated that, after controlling for a number of legally relevant factors (i.e., level of aggravation, relationship between the defendant and the victim), prosecutors were significantly more likely to seek death for those who killed White victims than those who killed Black victims. They were most likely to seek death against Black defendants who killed White victims.

Similarly designed studies have been conducted in Illinois, North Carolina, Ohio, Mississippi, California, among other states, and most indicate that those charged and convicted of killing Whites are significantly more likely to end up with a death sentence than those convicted of killing non-White victims. In 1990, the Government Accounting Office published a review of all such studies that had been conducted to date, and concluded that a race of victim effect appeared to exist across studies at all stages of the legal process. This is especially true at the early stage of the prosecutorial decision to seek death or not. A race of defendant effect, although more equivocal, was demonstrated in the more high quality studies, especially as an interaction effect with race of victim.

The most recent of these kinds of studies that specifically examine prosecutorial decision-making were conducted in Maryland (Paternoster and Brame, 2003) and Nebraska (Baldus et al., 2002). The Maryland study found that prosecutors were significantly more likely to seek death against those who killed White victims, especially in cases where Blacks were charged with killing Whites, when compared to those who killed non-Whites in potential capital cases from 1978 to 1999. The Nebraska study, which involved significantly fewer cases, found no significant defendant or victim race effects in charging decisions, when locale and culpability factors were used as control variables. The authors attribute the Nebraska findings to a combination of factors. First, they acknowledge that the small number of cases that existed in the state might mean that the analyses had insufficient power to reveal differences (which were present but statistically non-significant). Nonetheless, they primarily attributed the findings to the unique structure of Nebraska's death penalty scheme at the time, which exclusively relied on judicial sentencing, and which had a proportionality review system in place that was taken very seriously by judges. This then appeared to influence the filing practices of prosecutors who tended to seek death predominantly in cases with multiple aggravators present and few or no clear mitigators.

Other than these regression analysis studies of prosecutorial decision-making outcomes (which generally also look at outcomes that follow in the trial stage),

to "guide" the discretion of juries through the weighing of aggravating and mitigating evidence.

there is no significant body of empirical work that is specifically designed to study how prosecutors in different jurisdictions come to make filing decisions in potential capital cases. Because the existing data indicate that a substantial share of the “irrationality,” including the disparities that are related to the race of defendants and victims, in capital case outcomes is produced at this stage of the legal process, there is a real need for new methodological approaches, especially ones that consider the social psychology of organizational decision-making, to understand further how prosecutors make decisions to seek death.

Death Qualification

The death qualification process has been more extensively studied, and the existing research suggests that the process itself contributes to some notable biases in shaping the capital jury as a decision-making body. The death qualification process is supposed to identify and exclude all those potential jurors whose attitudes would “prevent or substantially impair” their ability to follow the law in terms of sentencing (*Wainwright v. Witt*, 1985), thus eliminating those at either extreme of the attitudinal spectrum (pro and con). The *Witt* standard replaced what was a more inclusive standard for death qualification, articulated by the U.S. Supreme Court in *Witherspoon v. Illinois* (1968), mandating that only those who would automatically vote against the death penalty without regard to evidence, or would not be able to make an impartial decision on the question of guilt could be disqualified. While both *Witherspoon* and *Witt* primarily implicated potential jurors who oppose the death penalty, *Morgan v. Illinois* (1992) specifically mandated that prospective jurors whose support for the death penalty was so great that they would always vote for the death penalty would not be death qualified. Yet research indicates that those who should be disqualified for being “automatic death penalty” (ADP) voters because they believe that death should be imposed on all convicted murderers are much less likely to be detected through death qualification than those who oppose capital punishment to the extent that they would be impaired during sentencing (Dillehay and Sandys, 1996). As Sandys and McClelland (2003) point out, it is conceptually trickier to ascertain, before guilt is even determined, those who would always sentence to death. Most potential jurors strive to present themselves as fair-minded in terms of finding guilt, so it becomes challenging for judges and attorneys to get them to think about how they would behave once guilt was determined (see Haney, 2005, Chapter 5, for a full discussion of these problems). As a result, the death qualified jury runs a greater risk of being impermissibly biased toward death just by virtue of this flaw.

Prior research also indicates that the death qualified jury is likely to be demographically different than a non-death qualified jury selected from the same pool. Attitudes about capital punishment correlate with several demographic variables, and given the lower proportion of people who are identified and excluded for being potential automatic death voters compared to those excluded based on their opposition to capital punishment, the death qualified jury will disproportionately

lose members who are opposed to the death penalty. Death penalty attitudes are correlated to some degree with gender, in that women are more opposed to the death penalty than men as a group (Pew Research, 2005; Smith, 1984), with religious beliefs and specific affiliation, especially among Whites in that Christian fundamentalism is associated with support (Britt, 1998), with socio-economic status—higher SES correlates positively with support (Borg, 1997)—and with race and ethnicity, in that Whites as a group express more support than Blacks and Hispanics in the U.S. for the death penalty (Cochran and Chamlin, 2006).

Thus, several studies indicate that the death qualification process has the potential to result in a jury pool that is proportionately wealthier, more White, and comprised disproportionately of men than the larger pool from which the jury is commonly drawn (Haney, Hurtado, and Vega, 1994; Lynch and Haney, 2000; Thompson, Cowan, Ellsworth, and Harington, 1984). Consequently, the persistent problem in obtaining diverse, demographically representative juries (Fukurai and Krooth, 2003) is exacerbated in the case of capital juries.

There is a corollary consequence to the demographic and attitudinal skewing of the capital jury, in that such bodies tend to behave in ways that threaten procedural justice in capital cases. Thompson, Cowan, and Ellsworth (1984), for example, found that death qualified persons are more conviction prone than excludable potential jurors. The death qualified participants in their study gave more credence and weight to prosecution witnesses than did the excludables, which contributed to their conviction proneness. This finding has been replicated in other work (see, e.g., Filkens, Smith, and Tindale, 1998; Moran and Comfort, 1986; Seltzer et al., 1986), and appears to hold with actual jurors (Ziesel, 1968).

Conviction proneness appears at least in part to result from the death qualification process itself. Haney (1984) conducted an experiment that exposed an experimental group to a tape of death qualification questioning of potential jurors while the control group did not view such an experience. Both groups also viewed a tape of a general *voir dire* process in a capital case. The death qualification-exposed participants were significantly more likely to believe that the defendant in the case was guilty than were those in the control group, even though the only difference in the information that they were exposed to was the death qualification process. The experimental group was also more likely to feel that the attorneys and judge favored the death penalty and that death was the appropriate response in the case. Allen et al.'s (1998) meta-analysis of 14 death qualification studies indicate that conviction proneness is a significant effect on the selection process, and that the process of death qualification questioning appears to exacerbate the effect.

Death qualified mock and actual jurors also evaluate evidence in the penalty phase in ways that disfavor the defendant, and often in ways that lead toward a death sentence. Several studies have shown that death qualified persons are more receptive to aggravating evidence than are excludables, and are less receptive to mitigating evidence than excludables, resulting in significantly more endorsements of a death sentence. This line of research has used both the *Witherspoon* (1968)

and more stringent *Witt* (1985) standards for exclusion of jurors, and has still consistently found this effect (Butler and Moran, 2002; Haney, Hurtado, and Vega, 1994; Luginbuhl and Middendorf, 1988; Robinson, 1993).

Juror, Defendant, and Victim Racial Characteristics and Capital Cases

Within the population of death qualified jurors, there appear to be some differences, based upon the characteristics of the jurors themselves, in how capital cases are evaluated and decided. The extensive data from the Capital Jury Project (CJP), a multi-year, multi-state research endeavor in which nearly 1,200 former jurors from over 350 capital cases were interviewed about their experiences serving on capital juries, is most revealing on this issue. The researchers analyzed the effect of the jury's racial composition (as well as gender composition) on case outcomes, and found a "White male dominance" effect in cases where Black defendants were accused of killing White victims, in that when the jury included five or more White men, the jury was significantly more likely to sentence the defendant to death than when the jury had four or fewer White men (71% vs. 30% ending in death sentences). They also uncovered a "Black male presence" effect in these cases, where the presence of one or more Black men on the jury significantly reduced the likelihood of a death sentence in the case (72% vs. 38% ending resulting death sentences) (Bowers et al., 2001).

Fleury-Steiner (2004) conducted extensive qualitative analyses of the CJP interview data to further understand this finding, and suggests that the hegemonic, "insider" narratives about criminality, race, and personal responsibility that many White male jurors use during the deliberation process to overcome resisters' counter-narratives help account for the "White male dominance" effect. His analysis indicates that women of color who resist death sentences are particularly likely to be bullied and demeaned into compliance, which may help explain why the "Black male presence" effect is notable, but its corollary—a Black female presence—is not. Data from mock capital trial studies also indicate that even among death qualified participant populations, there exist demographic differences in sentencing decisions. Women are generally more likely to opt for a life verdict, as are non-Whites (Lynch and Haney, 2000; forthcoming). Furthermore, women are more likely to succumb to group pressure to switch their vote to death than are men (Lynch and Haney, forthcoming).

Actual and mock death qualified juries have also been shown to be (improperly) influenced by defendant and victim characteristics such as race. The numerous regression analysis studies that have examined capital case outcomes indicate that in addition to disparities based on race in prosecutorial filing decisions, significant disparities also exist in terms of jury outcomes (see Government Accounting Office, 1990). For instance, recent studies that examined jury sentencing decisions in the state of New Jersey and in the city of Philadelphia, Pennsylvania in the 1980s and 1990s indicate significant race of defendant effects, in that juries were significantly more

likely to sentence Black defendants to death in comparison to non-Black defendants (Baldus et al., 1998). The Philadelphia data, which examined all potentially capital cases from 1983 to 1993 in that jurisdiction, indicated that a Black capital defendant was 9.3 times more likely to be sentenced to death by the jury than a similarly situated non-Black defendant. While these studies demonstrated a race of victim effect as well—in that White victims prompted more death sentences—this effect was weaker than the race of defendant effect. A recent examination of data from Ohio (Williams and Holcomb, 2004) indicates an interactive race and gender victim effect in that cases involving White women victims were most likely to result in death sentences when compared to all other victim characteristic combinations.

In two studies using a mock juror/jury experimental paradigm, Craig Haney and this author have also found significant race of defendant effects in sentence outcomes. The first study involved 348 jury-eligible adult participants who individually viewed a tape of a simulated capital penalty trial that varied the race of defendant and victim (Black or White) and then determined sentence. The second study, in which 539 jury-eligible, death qualified adults participated, added group deliberations. In both studies, the Black defendant was sentenced to death at a significantly higher rate than the White defendant, and that effect was amplified by race of victim, such that the White defendant who killed a Black victim received the fewest death verdicts (Lynch and Haney, 2000; forthcoming).

Evidence Factors

Aggravation and Mitigation Generally

Mock and actual capital jurors also appear to evaluate the evidence presented in the penalty phase in a manner that disadvantages the defendant. The penalty phase of capital trials generally requires a shift in thinking by jurors, as they are asked to consider evidence that goes beyond the criminal act itself. Indeed the penalty phase is structured so that jurors can assess the defendant in a more holistic way, taking into account his background and history when rendering the sentencing judgment. Research indicates that jurors are not always successful in making that shift.

Generally, mock and actual jurors are able to understand and consider the aggravating evidence, especially as it directly relates to the crime itself, more easily than the mitigating evidence. Numerous studies have demonstrated jurors' increased tendency to disregard or downplay mitigation, and particularly non-statutory mitigation such as life history testimony, deeming it irrelevant to the sentencing decision.

For example, Haney, Sontag, and Costanzo (1994) found in their interviews with former capital jurors from Oregon and California that they were generally unclear about the relevance of the mitigating evidence to the sentencing decision. Indeed, many dismissed non-crime related mitigating evidence (i.e., defendant character and

background) from consideration in deciding on appropriate sentence if it did not directly lessen culpability for the offense itself.¹⁰ Analyses of the Capital Jury Project interview data reveal a similar problem. The researchers found that “mitigating factors play a disturbingly minor role in jurors’ deliberation” (Bentele and Bowers, 2001, p. 1041) even though in most cases, substantial mitigating evidence was presented by the defense. Instead, the jurors were preoccupied with the issue of guilt even in the penalty decision-making process—they reported in their interviews that the guilt of the defendant was a major factor in determining sentence (Bentele and Bowers, 2001).

In two studies that examined the impact of race and instructional comprehension on sentencing decisions, Craig Haney and this author found that three key pieces of mitigating evidence were given significantly more weight in support of a life sentence when the defendant was White than when he was Black, and that the cross-racial conditions (White defendant/Black victim and Black defendant/White victim) had the largest differences between them (Lynch and Haney, 2000; forthcoming). The differential evaluation of mitigation by racial condition appeared to be the major contributing factor to the significant differences in sentencing outcomes as a function of defendant race that was obtained in both studies (Lynch and Haney, 2000, forthcoming; Lynch, 2006). We generally did not find such an effect for the evaluation of aggravation. Brewer’s (2004) regression analysis of Capital Jury Project data indicates that Black jurors tended to be more receptive to mitigation than White jurors, especially in cases where the defendant is also Black, and that generally (as we found in our mock jury research), across all jurors, receptivity to mitigation was highest in White defendant/Black victim cases.

Nonetheless, the presentation of mitigating evidence is key to obtaining a sentence of less than death. Using an experimental design that employed multiple written vignettes, Barnett et al. (2004) found that mock juror subjects were significantly more likely to sentence a defendant to death when no mitigation was presented than when social and psychological mitigating evidence was included. Haney (1995) illuminates the central importance of the presentation of mitigation in capital trials as a way to overcome the “myth of demonic agency” (p. 547) which infuses our popular culture, and by extension, the cultural framework in which capital juries operate. According to Haney, most jurors come to the death penalty trial having been exposed to an image of those who commit capital murder as less than human, infused with evil, yet full of free will to choose to commit heinous acts. The presentation of a mitigation case with a complete life history to help explain the defendant’s

10 The courts are clear on this issue—not only must a capital defendant be able to present any mitigation he deems relevant, but the evidence offered by the defendant must be taken into consideration by his sentencer for a sentence less than death (see *Lockett v. Ohio*, 1978; *Eddings v. Oklahoma*, 1982). In this stage, not only the deed, but the doer must be considered for the appropriateness of a death sentence.

behavior is key to getting jurors to consider a life sentence and lessen the impact of the broader cultural tropes about violent offenders.

Psychiatric Evidence and Risk Assessment

There is mixed research about the role of expert testimony—especially psychiatric and psychological testimony about the defendant’s mental state—in capital jury sentencing decisions. As noted at the beginning of this chapter, psychiatric experts are frequently used by both sides in a capital trial (Sundby, 1997). The defense will often use such experts to testify about the effects of childhood traumas on the defendant, about the specifics of existing psychiatric disorders and their impact on the defendant, and about the state of mind of the defendant at the time of the crime. Prosecutors may use mental health experts to counter the defense experts and/or to testify that the defendant will continue to pose a threat to those around him if not executed.

The expert testimony about future dangerousness plays an important role in capital trials, especially in states where jurors are explicitly asked to consider this issue in rendering a sentence verdict. Six states include future dangerousness as a primary consideration in their sentencing statutes: Idaho, Oklahoma, Texas, Oregon, Virginia, and Wyoming (Dorland and Krauss, 2005). Texas, Virginia, and Oklahoma, respectively, are the top three executing states in the nation, and are collectively responsible for 54 percent of all post-*Furman* executions. In these states, prosecutors put on experts who may testify about the defendant’s psychopathy or anti-social personality disorder, which renders him remorseless and less amenable to therapeutic improvements. More recently, prosecutors have also relied upon experts who use actuarial risk assessment measures to bolster or supplant more clinically based predictions, yet their use is often inappropriate since the instruments are designed to predict future dangerousness in open society, rather than in an institutional setting (Dorland and Krauss, 2005). Nonetheless, while still highly problematic, actuarial predictions tend to be more reliable than are clinically based predictions.

Even though predictions of future dangerousness have been demonstrated to be only of minimal substantive value due to the high level of inaccuracy and tendency toward over-prediction of risk (Edens, Colwell, Desforges, and Fernandez, 2005), it appears that jurors may find such evidence to be compelling in aggravation (Garvey, 1998). Edens, Colwell, Desforges, and Fernandez (2005) found that college student participants who were told a defendant was diagnosed as psychopathic rated him as significantly more dangerous and were significantly more likely to recommend a death sentence than when they were told he was diagnosed as either psychotic or not mentally disordered at all. Krauss and Sales (2001) used college student mock jurors to assess how influential actuarial and clinical predictions of future dangerousness were, and found that both kinds of predictions significantly increased participants’ dangerousness ratings of the defendant, and that the clinical predictions were the most influential even though they are in fact less reliable than actuarially based

predictions. The finding that clinical predictions were especially influential was replicated by Krauss and Lee (2003) in a study that used college student mock jurors, but added the component of jury deliberation. The influence of expert testimony about future dangerousness has also been demonstrated to be differentially influential as a function of the mode in which jurors assess and evaluate the evidence—when forced to “rationally process” the information, their judgments of clinical testimony were tempered (Krauss et al., 2004).

The Capital Jury Project data indicate that actual capital jurors almost always consider the potential risk posed by the defendant in their deliberations (Garvey, 1998; Blume et al., 2001), so they may be susceptible to the testimony of experts on this issue. The consideration of future dangerousness is particularly problematic since those jurors often also incorrectly assume that the defendant will one day be released from prison (Bowers and Steiner, 1999). Scott Sundby’s (1997) analysis of the Capital Jury Project data suggests that capital jurors are more skeptical of psychiatric expert witnesses who testify for the defense than those who testify for the prosecution, thus also potentially giving an advantage to those experts who assert that the defendant will be dangerous over those experts who question such predictions. More recent quantitative analyses of the CJP data, however, indicate that the testimony of experts on future dangerousness was not significantly impactful on jurors (Montgomery et al., 2005).

Victim Impact Evidence

Victim impact statements comprise another body of specific evidence that has been examined to assess its impact on decision-making. Such evidence, which is introduced into the penalty phase by prosecutors through affidavits, live testimony, and even via “documentary” style films and slide shows, entails accounts by survivors of the murder victims about the harm done and pain caused by the capital crime. Victim impact evidence was deemed to be potentially too prejudicial and generally irrelevant to the assessment of the defendant’s blame-worthiness by the U.S. Supreme Court in 1987, thus it was barred from capital cases (*Booth v. Maryland*, 1987); however, four years later the Court performed a turnabout and ruled that such evidence was not *per se* inadmissible and may in fact have some relevance to the sentencing decision (*Payne v. Tennessee*, 1991). Consequently, since the early 1990s, such evidence has been a part of the prosecutor’s arsenal of aggravating circumstances in the penalty phase.

Most of the work to assess the effect of victim impact evidence has used a mock juror experimental design. That body of work indicates that there is a fairly direct effect of this evidence on sentencing decision. In studies where victim impact evidence was either present or absent, those who were exposed to the victim impact testimony were significantly more likely to opt for a death sentence than those who were not so exposed (e.g., Luginbuhl and Burkhead, 1995; Myers and Arbuthnot, 1999; and see Myers and Greene, 2004 for a full review). On the other hand, a

longitudinal analysis of archival data of case outcomes and analysis of CJP juror interview data in the state of South Carolina indicate no significant effects from victim impact evidence over time (Eisenberg et al., 2003).

Generally, then, as a function of the constricted view by capital jurors as to what is relevant to the sentencing task, as well as the pre-existing notions about criminality, race, and responsibility that jurors often bring to the penalty phase, the defense has a much more difficult task in making the case for life than does the prosecutor in making the case for death, despite the fact that capital statutes are, in most jurisdictions, designed to favor a life over a death sentence.

Following the Law in Reaching Sentencing Verdicts

Overview of Problem

Contemporary sentencing statutes, which form the basis for capital jury instructions, are central to the constitutionality of modern death penalty schemes (*Furman v. Georgia*, 1972; *Gregg v. Georgia*, 1976), because they represent the mechanism by which sentences are to be meted out equitably and rationally. Therefore, capital sentencing instructions should presumably be crafted to maximize their clarity, applicability, and understandability. For the most part, though, they are not. Indeed, a large body of work has consistently demonstrated that laypersons' ability to understand and properly apply capital penalty phase jury instructions is compromised in a number of fundamental ways. As with other patterned jury instructions, the language of most death penalty instructions is linguistically difficult. Furthermore, due to the nature of the capital jury's penalty phase task, the problems with capital instructions are uniquely troublesome.

As Lieberman points out in this volume, a fairly large body of research has established that jury instructions are generally difficult for laypersons to understand and apply to facts and evidence (see Chapter 6 in this volume). Numerous critics have identified the legalistic language of the instructions as a primary source of confusion (i.e., Charrow and Charrow, 1979; Elwork, Sales, and Alfani, 1982; Lieberman and Sales, 1997; Tiersma, 1993; 1995). There is also a body of work which indicates that laypersons do, under certain circumstances, disregard the law as presented in the instructions and instead rely upon their own sense of "justice" to come to a verdict decision. While this difficulty may in part be related to instructional comprehension problems on the part of laypersons, evidence suggests that such commonsense justice is also frequently driven by underlying values and beliefs held by the decision-makers (Finkel, 1996). Furthermore, there are instances where jury instructions try to guide and direct laypersons' decision-making process, yet due to the nature of human cognitive processes, people are generally unable to adhere to those directives fully. For example, instructions that admonish jurors to disregard testimony, as well as limiting instructions which direct jurors to restrict the purpose

of evidence in their evaluation, are demonstrably difficult to follow (e.g., Kassin and Sommers, 1997). In these kinds of situations, the instructions ask jurors to limit or restrict their information processing in ways that they cannot consciously control; thus, even if jurors have the intention and desire to follow the law, they may not be able to regardless of their efforts, and in some cases, these instructions may make the prohibited evidence more salient in the jurors' decision-making. All of these categories of problems have been demonstrated to exist with capital penalty phase instructions.

Comprehension Problems and Death

In terms of overall comprehensibility of standard capital jury guidelines, there are three central areas within weighing instructions that appear to contribute substantially to juror confusion. First, at the heart of these guidelines—the terms aggravation and particularly mitigation—are concepts that are likely to be unfamiliar to those outside the legal arena, especially in their intended meaning within a capital trial context (Haney and Lynch, 1994; 1997; Lynch and Haney, 2000; Tiersma, 1995). Second, the scope of evidence (again, especially mitigating evidence) that qualifies as relevant to the decision-making process is not always apparent to jurors. Finally, the delineated procedures of weighing the aggravators and mitigators, including relevant burdens of proof, unanimity rules, and the intent of the statutes in terms of presumption of life or death, appear unclear to lay persons, according to previous research.

For example, jury eligible citizens in Tennessee (Blankenship et al., 1997) and Ohio (Frank and Applegate, 1998) have demonstrated serious difficulty with understanding and applying their respective states' pattern instructions on the issues related to mitigation, but not on those instructional components dealing with aggravation. Blankenship et al. (1998) found that the majority of their jury-eligible participants in Tennessee, "failed to understand the concept of nonenumerated mitigating circumstances" after being tested on the comprehensibility of the pattern instruction (Blankenship et al., 1998, p. 336). Research that Craig Haney and this author have done with both college students and jury-eligible non-student adults also demonstrates that the problems with the concept of "mitigation" are much more serious than the problems with "aggravation" (Haney and Lynch, 1994; 1997; Lynch and Haney, 2000; forthcoming).

Along those lines, Wiener and his colleagues (Wiener et al., 1998; Wiener et al., 1995; Wiener et al., 2004) have completed several studies on the comprehensibility of Missouri's capital penalty phase instructions. In the earlier studies, they found a pattern of errors that undervalued the role of mitigation (see also, Blankenship et al., 1998; Frank and Applegate, 1998). In all of the studies, they found that incomprehension was positively related to opting for a sentence of death.

Research participants also demonstrate notable confusion about which side has the burden of proof as to the appropriate sentence in the weighing process with pattern instructions, generally creating a potential bias toward death (Blankenship

et al., 1998; Diamond and Levi, 1996). The work that Craig Haney and this author have completed examining California's pattern instruction¹¹ indicates widespread confusion about the weighing scheme. For instance, in one study, only half of the participants correctly understood that the instructions indicated that a life sentence must be rendered if mitigation outweighs aggravation, and only 15 percent understood that a life verdict was required in a case where aggravation and mitigation are equal in value. Generally, our data indicated that the pattern of errors in understanding the weighing portion of California's penalty instruction created a bias toward a death verdict that goes against the intent of the actual statute (Haney and Lynch, 1997).

Our most recent work with California's capital penalty instruction examined the interplay between juror comprehension and racial bias in sentencing in the mock juror/jury studies described above. We hypothesized that juror incomprehension would contribute to racial bias in sentencing. The influence of race was expected to be greatest for those subjects who had the most difficulty understanding and applying the instructions they were to follow in rendering the decision. The pattern of instructional errors demonstrated by the participants in this setting was strikingly similar to what we found in earlier studies, using college student subjects who did not have the opportunity to apply the instructions to an actual case.

In both of the more recent studies (Lynch and Haney, 2000; forthcoming) instructional comprehension played a significant role in whether racial characteristics of the defendant and victim influenced our mock jurors' sentencing decision. We assessed the interactions between how well subjects understood the jury instructions, the racial characteristics of the case, and verdict choice and found that low comprehension among the subjects was significantly related to a higher percentage of *life* verdicts for the White defendant when compared to high comprehension subjects; whereas the opposite pattern was evident for Black defendants—low comprehension was associated with a larger percentage of *death* verdicts than high comprehension. This finding was even more pronounced in the cross-racial conditions, in that in the White defendant/Black victim condition low comprehension among the subjects was again related to a higher percentage of life verdicts when compared to high comprehension subjects; and in the Black defendant/White victim condition, the opposite pattern was evident—low comprehension was associated with a larger percentage of death verdicts than high comprehension. These studies, then, reveal one of the serious adverse consequences of laypersons relying on incomprehensible instructions. Our findings that race was a particularly influential cue in death sentencing by our low comprehension mock jurors points to a most pernicious potential consequence of inadequate sentencing guidance.

Basic misunderstandings of the law are also evident in interview data collected from experienced capital jurors about how they reached their penalty decision. For instance, Eisenberg and Wells' (1993) analysis of the CJP data from South

11 This state's standard instruction recently underwent major revision, with the new instructions going into use in early 2006.

Carolina indicated that the jurors tended erroneously to view death as the default sentence. Similarly, Luginbuhl and Howe's (1995) analysis of the North Carolina CJP data indicated serious misunderstandings about burdens of proof and unanimity requirements in finding the existence of mitigating evidence. Indeed, most of the data from the Capital Penalty Project indicate that the jurors operated with serious misunderstandings concerning the law and that the pattern of errors contributed to a bias toward a death verdict (Bowers, 1995; 1996). Luginbuhl and Burkhead (1994) point out that this kind of confusion has the probable effect of increasing jurors' likelihood of voting for death in capital penalty trials (see also, Haney, Sontag, and Costanzo, 1994).

Research also indicates that misunderstandings involving the scope of mitigation can be somewhat improved by offering laypersons more clearly written instructions, but that the problem may not be fully rooted in simple language issues. For instance, Diamond and Levi (1996) were able to significantly improve comprehension among death qualified jury eligible participants on issues related to the scope of allowable mitigation through rewording the pattern instructions in more accessible and understandable language; nonetheless, the confusion persisted for close to half of their subjects even with the revised instructions.

Resistance to Instructional Guidance

While the lack of understandable and usable guidance in capital case settings may contribute to an over-reliance on schemas, stereotypes, and simple "commonsense" by laypersons, there is evidence to suggest that not all "intuitive" decision-making in capital cases is simply due to comprehension problems. Indeed, a more deeply rooted and pervasive mechanism may be at work that also accounts for the patterns of arbitrary capital sentencing that persist, in spite of the statutes enacted to control that problem (Baldus et al., 1990). A growing body of literature suggests that capital jurors (and mock jurors in capital case scenarios) may selectively attend to, selectively apply, and in some instances, even totally disregard judicial instructions, and instead rely on their own set of decision-making criteria in meting out punishment in capital cases, even when they understand the guidelines they are to follow.

For instance, interviews with Florida capital jurors indicated that the statutory list of aggravating and mitigating factors had minimal influence in the determination of verdicts, in that almost two thirds of the interviewed jurors said that the list was of little or no significance in rendering a decision (Geimer and Amsterdam, 1988). Instead, jurors reported that such factors as time pressures, courtroom demeanor of the defendant, and even race of defendant in one case, played a role in the decision-making process. Data gathered from interviews with California capital jurors also indicate that jurors actively resist considering evidence that was offered in favor of a life verdict when it does not meet their "commonsense" notions of what qualifies as mitigation. Some of the interviewed jurors in the Haney, Sontag, and Costanzo (1994) study appeared to use improperly what was offered as mitigating evidence

as aggravation (e.g., a good upbringing was reportedly held against one defendant, being borderline mentally retarded against another) when it did not comport with their view of a justifiable “excuse” for the crime. In fact, the researchers report that all five of the juries that imposed death had, to some degree, inappropriately considered mitigation as aggravation and weighed that in their sentence decision. While this misconstrual is likely due in part to an inadequate understanding of the meaning and scope of mitigation in the context of a capital case, the reasoning for the errors expressed in the interviews also indicated that deeply held attitudes and beliefs drove the interpretation.

The data from the Capital Jury Project similarly indicate the operation of such intuitive decision-making at work (Sundby, 1997). Interviewed jurors expressed an understanding about the intent of some of the mitigating evidence, yet they also freely admitted their rejection of that evidence when it offended their notions of responsibility, free will, and the nature of human behavior (Sundby, 1997, pp. 1135–9).

Haney and this author also found (Lynch and Haney, 2000; forthcoming) that the evaluation of mitigating evidence differed dramatically depending upon whether our participants chose life or death, across racial conditions. For example, in the first study, among those who voted for death, fully one-third (34%) improperly used the mitigating evidence that the defendant was impaired as a result of substance abuse as a factor in favor of death, which was almost three times the percentage (12%) of death voters who weighed that evidence on the side of life (the remaining 54 percent said it did not weigh in their decision at all). Except in the case of the testimony that the defendant had been abused as a child, juror comprehension level played no significant role in the weighing of mitigation evidence among the death voters. Rather, the misuse or disregarding of the mitigation among those who selected death was largely a product of beliefs, attitudes, and “commonsense” notions about the validity of the mitigating evidence. This was also reflected in the mock jurors’ open-ended responses to a question asking them to describe how they reached their decision.

Similarly, Luginbuhl and Middendorf (1988) found that death penalty attitudes were strongly related to the acceptance of mitigation, such that the stronger the support for the death penalty, the stronger the resistance to mitigation among jury-eligible adults in North Carolina. The same did not hold true for the death qualified jurors on aggravation; they were equally accepting of the aggravation across levels of support for the death penalty.

Guiding the Unguidable?

Finally, it may well be that the task that is assigned to capital juries is ultimately impossible to reduce into a set of rules and guidelines that will logically and systematically lead to a correct sentence outcome. As numerous critics have pointed out, trying to rationally guide the decision-maker on how to determine whether another person deserves to live or die by weighing such things as a defendant’s

brutal childhood or his past good deeds against the facts surrounding his violent capital crime may not be achievable (e.g., Weisberg, 1984) or at least only partially achievable (Steiker, 1996).

With the pretense of guidance offered by the instructions, jurors and juries are left to their own resources to reach a decision with few limits on their discretion. The instructions may be used to justify a decision in such a way that allows jurors to avoid fully coming to grips with the awesome responsibility that they bear in making the life and death sentencing decision (Haney, 1997b; Hoffmann, 1995; Eisenberg et al., 1996). Thus, capital jurors are in some sense unguided in their decision, all the while being able to rationalize that the law and the guidelines have led them to the outcome they have chosen. Perhaps because it is an inherently unguidable task that jurors are asked to undertake, the instructions offered to capital juries reveal quite clearly the “limits of legal language” (Steiker, 1996, p. 2590) in trying to lay out some kind of a rational process for deciding whether to sentence a fellow human to death.

And indeed, research suggests that capital jurors are likely to divert responsibility for their decision to the law itself. Haney (1997b) has described the “mechanisms of moral disengagement” that are at work in the capital trial which allow jurors to come to sentence a peer to death. Because of the importance of the task being asked, capital jurors tend to psychologically distance themselves and their decision from their own moral self, and one way to do that is through ascribing the ultimate responsibility to the law itself, or its agents. Indeed, research examining the Indiana data from the Capital Jury Project indicates that capital jurors frequently deflect responsibility for the sentencing decision away from themselves, by asserting that their sentence verdict is only a recommendation (Hoffmann, 1995).

Conclusions

There now exists a large and varied body of empirical research designed to assess the gap between the ideals and the realities of the modern (post-*Furman*) death penalty machinery in the U.S. The totality of that research indicates that the prognosis for a fair, equitable, and procedurally sound capital legal process is grim. Research results from studies that have quantitatively examined capital case outcomes through regression analyses, qualitative and quantitative work that assesses former capital jurors’ experiences, and simulated experiments that aim to uncover the influence of key troublesome elements on capital case judgments generally converge on a similar conclusion: the remedies designed to fix the broken system of capital punishment that was declared unconstitutional in 1972 have not worked.

In some jurisdictions, the contributions of this body of research have helped prompt interventions. Several states have opted in recent years for moratoria on executions until their systems could be further studied and improved upon to ensure higher quality justice (e.g., Maryland and Illinois) and in others, courts have halted capital punishment while considering its constitutionally troubling aspects (e.g., New

York, California). Most recently, upon the recommendation of the New Jersey Death Penalty Study Commission Report (2007), that state abolished the death penalty in part out of concern for the arbitrariness that existed in terms of who ended up on death row and who did not.

Ultimately, as suggested in the preceding section of this chapter, it may be that the very nature of the task—trying to rationalize the process of determining who deserves to live or die among those who commit murder—makes the realization of a constitutionally sound and fair death penalty system an ideal impossible to fully realize. Certainly, the body of empirical evidence that now exists suggests that this may be the case.

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Chapter 8

Psychological Issues in Civil Trials

Edith Greene

Synopsis

Civil juries resolve disputes between individuals or between individuals and commercial entities. Most civil jury trials occur in the United States; a few other countries use civil juries occasionally. Spurred by media attention to large damage awards in prominent cases, commentators have expressed concerns about the ability of laypeople to resolve these disputes. They suggest that civil juries are overly sympathetic to plaintiffs, biased against wealthy defendants, and likely to make unpredictable and unreasonable decisions. Psychologists and other social scientists have examined these suppositions and found that although civil jury trials *do* involve complicated and technical issues that tax some jurors' abilities and although the applicable laws are sometimes poorly understood, most judges agree with most jury verdicts. Furthermore, reforms in trial procedures can improve jurors' ability to understand the evidence and apply the law, enhancing the likelihood of reasoned and predictable verdicts.

Psychological Issues in Civil Trials

A civil trial is a legal forum in which juries and judges resolve disputes between individuals or between individuals and businesses or corporations. The vast majority of civil jury trials take place in just one country, the United States, where the right to a trial by jury in a civil case is provided by the Seventh Amendment to the Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Though the institution of trial by jury is gaining a foothold in many countries where only a few years ago no such entity existed (Vidmar, 2000), the vast majority of these countries provide for jury trials only in criminal cases; far fewer legal systems resolve civil disputes by means of a jury trial. Although vestiges of civil jury trials do still linger in some of the countries of the former British Commonwealth (e.g., England, Wales, Canada, and New Zealand), the right to a jury trial in these jurisdictions is not absolute and often seems more theoretical than actual.

In this chapter, I first describe the nature of American civil trials, detailing the kinds of disputes that they involve and their typical outcomes, and then analyze civil jury trial practices in other countries. I then detail some oft-heard concerns about the unpredictable nature of civil juries and jury verdicts. To address these concerns, I review the results of psychological research studies that have examined some obstacles to reasoned and predictable decision-making. These include the complexity inherent in many civil cases and the general difficulty that civil jurors experience in understanding and applying their instructions. Finally, I outline the ways that trial procedures are being modified and civil jurors helped to make better, more predictable decisions, along with the psychological data on the effects of these reforms.

The Nature of American Civil Trials

Two issues typically loom in every civil trial in the United States. The first concerns the liability of the defendant (and, in cases of comparative negligence in which the plaintiff has some responsibility for injuries sustained and in cases involving counter-claims, the liability of the plaintiff). The second concerns the amount of money (or damages) to be awarded to the plaintiff as compensation. Damage awards can be of several sorts. Compensatory damage awards are generally intended to return the plaintiff to pre-injury levels of functioning or to repair the harms caused by the injury or wrong. These monies cover the financial costs incurred by the plaintiff such as lost income, medical expenses, lost business opportunity, and damage to one's reputation. These damages are termed "economic" or "pecuniary" because they are based on an arguably quantifiable metric. Compensatory damages can also include a noneconomic (or "nonpecuniary") component to compensate the plaintiff for intangible injuries including pain and disfigurement, emotional distress, and loss of enjoyment of life. These losses are less easy to quantify. In addition to compensatory damages, punitive damages are occasionally awarded to punish the defendant for malicious or egregious conduct and to deter future transgressions. Punitive damages are usually awarded only if compensatory damages have also been awarded and appellate courts expect that there will be some reasonable relationship between the two (*BMW v. Gore*, 1996).

Although jurors and judges must make multiple decisions about liability and damages (e.g., Was the plaintiff harmed? Did the defendant's actions cause the

harm? Should the plaintiff receive compensatory damages?) on the basis of discrete sets of evidence presented at trial, there is some evidence that juries may lack the ability to effectively separate the two broad sets of evidence (i.e., those relevant to liability and to damages) and rely only on the evidence pertinent to each decision. For example, Greene et al. (2001) showed that mock jurors used evidence of injury severity—theoretically related only to damages—when assessing liability, and Greene et al. (1999) showed that jurors used evidence related to the reprehensibility of the defendant's conduct—theoretically related only to liability—when assessing damages. In general, judgments of responsibility are positively correlated with injury severity (Robbennolt, 2000).

Psychologists who study decision-making in civil trials have tended to focus on damages rather than liability.¹ The reasons for this preference are many, including the fact that damage awards are inherently arbitrary and that it is sometimes extremely difficult to attach a monetary value to suffering and losses. In addition, damages are certainly more variable than liability judgments, allowing jurors' sentiments, preferences, and biases to have more impact on the decision. But the primary reason that psychologists have become interested in examining damages determinations is that much controversy surrounds jurors' assessments of damages, spurred in large part by attention from the media.

The media tend to cover large, class-action lawsuits (cases filed by a group of individuals who claim similar injuries allegedly inflicted by large corporations such as tobacco companies and drug manufacturers) and smaller, though still sensational cases brought against corporate executives. Through this process, the public learns, for example, about multi-million (and occasionally, multi-billion) dollar punitive damage awards against large corporations like Philip Morris, Exxon, or Merck (often, these awards are reduced or thrown out on appeal) and about corporate debacles at WorldCom, Enron, HealthSouth, and Tyco, among others.

But are these the kinds of disputes that are typically resolved in civil trials? The answer is a resounding "No"; despite their prominence in the media and in debates about the fairness and efficiency of civil jury trials, Bailis (1996) suggests that these large-stakes cases are, in fact, highly atypical.

Systematic analyses of civil jury trials provide information on typical case characteristics and trial outcomes. For example, data compiled by Cohen (2004) from the 75 most populous counties in the United States in 2001 show the types of disputes that are commonly resolved in civil trials. According to these data, torts (civil wrongs such as automobile negligence and medical malpractice) accounted for two thirds of the 12,000 civil trials held in U.S. state courts. (Contract and real property disputes accounted for the remainder.) Juries decided 90 percent of these cases and judges decided only 10 percent. Automobile accidents were the most

1 Notable exceptions that examine how jurors determine liability include studies by Bornstein, 2004; Cooper et al., 1996; Feigenson et al., 2001; Greene et al., 1999; and Kamin and Rachlinski, 1995.

common source of the dispute (53% of tort trials), followed by premises liability (16%) and medical malpractice (15%). Cases involving intentional torts, product liability, and slander and libel were less common. In terms of the litigants, 70 percent of tort trials involved only one plaintiff and 56 percent involved only one defendant. Four fifths of all tort trials involved one individual suing either another individual or a business, making this constellation of circumstances the most typical form of civil trial overall. Across all trials, plaintiffs won approximately half the time, although they were more likely to be successful in automobile cases (61% win rate) than in premises liability (42% win rate), medical malpractice (27% win rate), or slander/libel cases (42% win rate).

The median damage award for plaintiff winners was not in the million dollar range but rather, was a modest \$27,000 though awards varied considerably by type of case (e.g., the median award was only \$16,000 in automobile cases and \$422,000 in medical malpractice cases.) Damages of \$1 million or more were awarded rarely; only 8 percent of plaintiffs who won their cases won more than \$1 million. Punitive damages, intended to punish the defendant and to deter the defendant and others from similar conduct in the future, were also rare and, when awarded, were modest. Several of these findings (e.g., that most cases involve single individuals suing other individuals or businesses, that plaintiffs win only half the time and when they do, that awards are generally modest) run counter to public perceptions of civil juries as biased in favor of plaintiffs who receive a windfall by taking their cases to court, and of jurors eager to extract large sums of money from well-heeled corporate defendants.

A slightly different pattern emerges from analysis of cases tried in federal courts (i.e., courts that resolve cases in which the federal government is a party or that involve complaints based on federal laws including statutes and the federal constitution). In his compilation of data from U.S. District Courts, Galanter (2004) showed that of the 4,500 cases tried in 2002, fully one third involved civil rights disputes, slightly fewer than one quarter involved torts, 15 percent concerned contracts, and 11 percent involved prisoner petitions regarding their release and their civil rights claims. Regardless of the precise nature of the civil trial, it is actually of a vanishing breed. Although most civil cases have historically been resolved well short of trial, Galanter (2004) has shown a dramatic drop in the actual number of cases being tried in the past 40 years. The reasons for this are many, including the fact that fewer cases get to court in the first place (perhaps because lawyers are more likely to opt not to represent people whose cases are likely to fail), cases are diverted to alternative dispute forums, and it is becoming increasingly expensive to mount a trial.

A Comparative Look at Civil Trials in Other Countries

While trial by civil jury is becoming less common in the U.S., civil jury trials have become almost nonexistent in most other countries. In fact, only a handful

of countries use any kind of lay panels to resolve non-criminal disputes; most are resolved by judges, magistrates, or commissions. And countries that *do* allow for civil juries, including Canada, New Zealand, England, and Wales, use them only rarely. According to Bogart (2000), the notion of the civil jury in Canada “dangles by a shoestring despite the fact that it enjoys broad public support” (p. 415). Civil juries exist in little more than name only in some jurisdictions in Canada and have been abolished outright in others. Juries are used more in Ontario, the largest province, than in other provinces, but even in Ontario, jury trials are far less common than in the United States. In New Zealand, despite the fact that either party can request a jury trial, they are so rare that the Department of the Courts has apparently stopped keeping statistics on their use (Cameron et al., 2000). In England, less than 1 percent of civil trials involve a jury (Lloyd-Bostock and Thomas, 2000).

One explanation for the paucity of civil jury trials in these jurisdictions is that by law, jury trials are reserved for only specific types of cases: only defamation and personal injury cases in New Zealand (Cameron et al., 2000), primarily tort cases in Canada (Bogart, 2000), and only four, relatively obscure kinds of cases in England: defamation, fraud, malicious prosecution, and false imprisonment (Lloyd-Bostock and Thomas, 2000). A second explanation for the infrequent use of jury trials is concern about jurors’ abilities to be fair and impartial. In Canada, for example, if either side moves to eliminate the jury, the judge is likely to grant the request, citing concern about the undue complexity of the factual issues for laypeople. In New Zealand and England, if judges believe that a case presents difficult questions of law or especially complex or technical issues, they can opt to decide that portion of the case themselves. There is also concern about the size of jury damage awards in these venues. Some awards in England, for example, have engendered the outcries commonly heard in the U.S. and have resulted in the promulgation of guidelines for assessing damages. For example, in a case involving the singer Elton John, an appellate court ruled that both the judge and attorneys should have taken actions to rein in excessive jury awards in a libel case, particularly in the way that they instructed jurors on the assessment of damages. The “guidance” to which the court referred could involve reference to other, “appropriate” awards and award brackets (*John v. MGN, Ltd.*, 1996). English appellate courts have also established guidelines for the assessment of punitive, or exemplary damages in false imprisonment and malicious prosecution cases (e.g., a maximum award of £50), including an advisement to juries that exemplary damages represent a windfall profit to the plaintiff whose losses were already covered through the compensatory award.

Trio of Concerns about Civil Juries and the Reasonableness of Their Verdicts

In the United States, concerns about the legitimacy of civil jury verdicts have been voiced for some time. The genesis of contemporary denunciations was the tort reform movement of the 1980s that portrayed Americans as excessively litigious and civil

juries as unable to differentiate legitimate from bogus lawsuits and overly generous in their damage awards (Huber, 1988; Olson, 1991). With only brief respites since then, the criticisms have continued. They invariably focus on the jury's ability to assess damage awards (both compensatory and punitive) in a fair and even-handed manner. Thus, recent critics have claimed that awards are capricious and immoderate (Sunstein et al., 1998) and "predictably incoherent" (Sunstein et al., 2002). There is far less concern that juries might undercompensate plaintiffs—which they sometimes do, particularly in cases that involve serious injuries.

Three distinct concerns about civil juries can be identified: first, that they are overly sympathetic to plaintiffs in awarding excessive sums of money, especially for punitive damages; second, that they are biased against wealthy, deep-pocketed defendants; and third, that their decisions are unpredictable and arbitrary (Hans and Albertson, 2003; Vidmar et al., 2000). In the next sections, I examine the data relevant to each of these allegations. But first, a comment about methodology: some data described here were derived from archival studies; others came from simulations. Each methodology has its strengths and weaknesses: archival studies involve data from actual cases but do not allow for cause-and-effect conclusions whereas simulation studies that can provide conclusions about causation (e.g., that complexity of expert testimony caused impaired decision-making) also lack real world consequences. If future results replicate earlier findings, we can be more confident that the data are providing a clear window into the decision-making processes of civil jurors and juries.

Are Civil Jurors Overly Sympathetic to Plaintiffs in Awarding Excessive Damages?

As previously noted, plaintiffs win approximately 50 percent of civil trials and the median damage award is less than \$30,000. One might argue that these seemingly moderate figures, standing alone, provide sufficient proof that civil jurors are not overly sympathetic to the plight of plaintiffs. But such extrapolation is unnecessary; empirical data make it clear that laypeople tend to be rather suspicious of plaintiffs and their motives for suing. As part of a series of studies that examined lay perceptions of businesses and corporations, Hans and Lofquist (1994) interviewed jurors who had served in civil cases. Most jurors agreed that there are far too many frivolous lawsuits and that people are too quick to sue. These jurors indicated that during deliberations they carefully scrutinized the plaintiffs' motives and questioned the legitimacy of their complaints. They were especially hostile toward plaintiffs who did not seem to be as injured as they claimed, had pre-existing medical conditions, and might have contributed to, or did little to mitigate their own injuries. Some of these jurors portrayed themselves as acting as a defense against illegitimate grievances and frivolous lawsuits, claiming that they were indeed suspicious of plaintiffs' motives.

These findings are consistent with public opinion polls showing that Americans tend to be distrustful of plaintiffs and suspect that many lawsuits are unnecessary (Greene et al., 1991; Hans and Lofquist, 1994). General distrust of plaintiffs and

their behavior is also apparent in simulation studies showing that mock jurors hold plaintiffs accountable even when their actions are legally blameless (e.g., Feigenson, 2000; Feigenson et al., 1997) and discount a compensatory damage award to a partially negligent plaintiff (as compared to a blameless plaintiff) despite instructions to the contrary (Zickafoose and Bornstein, 1999). Finally, simulation studies have shown that jurors' attitudes about civil litigation (e.g., the "litigation explosion") affect the magnitude of the damages they award (Goodman et al., 1990; Greene et al., 1991; Hastie et al., 1999): those jurors who believe that there is a litigation crisis and that people are overly eager to sue tend to award less.

Although it is not my intent to provide an exhaustive review of the data on punitive damage awards, reference to a few studies may be useful in addressing the concern that juries tend to award excessive amounts as punitive damages. As noted, punitive damages are awarded infrequently. According to Cohen's (2005) analysis of the punitive awards in the 75 largest U.S. counties in 2001, only 6 percent of winning plaintiffs were awarded punitive damages and these awards tended to be given only in certain kinds of cases (e.g., tort cases involving slander/libel and intentional torts, and contract cases involving partnership disputes, employment discrimination, and fraud). In addition, awards tended not to be large: the median punitive damage award in civil jury trials in 2001 was \$50,000 (\$83,000 in contract trials and \$25,000 in tort trials). Only 12 percent of plaintiff winners who received punitive damages were awarded \$1 million or more; 69 percent of those receiving punitive damages were awarded less than \$250,000.

Other studies suggest that punitive damages tend to be proportionate to the extent of wrongdoing (e.g., Rustad, 1998) and to the level of compensatory damages awarded. For example, Vidmar and Rose (2001) analyzed Florida state court verdicts between 1989 and 1998 and concluded that although the ratio of punitive awards to compensatory awards varied considerably by case type (ranging from 0.1:1 in impaired driver accidents to 6.3:1 in cases involving improper treatment of deceased people), the average punitive damage award was only 68 percent of the compensatory award. Thus, most indices of punitive damages suggest that they are awarded relatively rarely, are concentrated in a few kinds of cases, and, when awarded, tend not to be extremely large. Still, critics point to a few very large punitive damage awards as proof that punitive damage verdicts can be wildly extravagant and that jurors' assessments of punitive awards are both capricious and arbitrary (Sunstein et al., 2003). Fervent debate over the pattern and predictability of punitive damage awards continues to this day (e.g., *Philip Morris v. Williams*, 2006).

Are Civil Jurors Biased Against Deep-Pocketed Defendants?

It is widely believed that civil juries are biased against defendants with extensive financial resources. Huber (1988), for example, suggested that juries in civil damages cases are committed to running a generous sort of charity, transferring money from wealthy defendants to impoverished and injured plaintiffs. This belief may be

related to the media's attention to large damage awards assessed against corporate defendants and their lack of attentiveness to the more common but less sensational situation in which a tort plaintiff wins \$18,000 from an apartment manager or from an insurance company.

Although plaintiff win rates are approximately equivalent regardless of whether the defendant is an individual or a corporation, awards do tend to be higher in cases involving the latter. For example, Chin and Peterson (1985) analyzed 20 years of verdicts in Cook County, Illinois and found that juries awarded significantly more money in cases with corporate defendants than in cases with individual defendants. In a mock jury study, Hans and Ermann (1989) found that the defendant "Jones Corporation" was assessed higher damages in a toxic tort case than was the defendant "Mr. Jones." Robbennolt (2002) determined that the punitive damage awards of both jury-eligible citizens and judges were influenced by the wealth of the defendant.

Recent work (e.g., Hans, 2000; MacCoun, 1996) has cast doubt on the assumption that deep-pocketed defendants are treated more harshly than individual defendants because they are perceived as wealthier, however. Using experimental methodology, MacCoun (1996) varied the identity of the defendant in a series of mock personal injury cases by describing the defendant as a corporation, a wealthy individual, or a poor individual. The verdicts on damages were insensitive to differences in perceived defendant wealth: although corporate defendants paid more than wealthy individuals, those wealthy individuals paid no more than poor individual defendants. MacCoun suggests that jurors may treat corporations differently because they find it easier to impose costly sanctions against an impersonal entity such as a corporation and because they hold corporations to a higher standard than individuals (a "reasonable corporation" standard). They expect that corporate resources—both human and capital—should allow a corporation to anticipate harm and act proactively to prevent it. Corporations may indeed be treated differently than individual defendants, but not, apparently, because of their financial status.

Are Civil Jury Decisions Unpredictable and Arbitrary?

The focus of concern about unpredictability is whether damage awards, particularly those for punitive purposes, are highly variable (Sunstein et al., 2003). Although compensatory damages tend to correlate positively with the severity of the plaintiffs' injuries (Wissler et al., 1997), some studies have shown variability in these awards even after controlling for important case characteristics (e.g., Sloan and Hsieh, 1990; Viscusi, 1988).

To what might we attribute this variability? Sunstein et al. (2003) suggest that civil jury verdicts are essentially groundless; that because jurors lack the ability to understand their instructions and to transform their evaluations of the evidence into any kind of reasoned metric, their judgments can be influenced by biases in reasoning (termed "cognitive illusions"), sometimes based on little more than whim and supposition. If this were the case, then one might expect jurors' judgments to

differ markedly from judges' decisions about the same set of evidence because judges have both the requisite training and experience to render predictable and legally-appropriate judgments. Fortunately, several studies have compared the decision-making of judges and civil juries.

These studies typically include judges' appraisal of the nature of the evidence (including its complexity), an indication of what their own verdicts would have been, and a measure of their satisfaction with the jury's decision. According to Hannaford et al. (2000) and Sentell (1991; 1992), judges tend to agree with the jury's verdict in the vast majority of cases. Furthermore, judges' awards are similar in magnitude and variability to those of jurors (Eisenberg et al., 2002; Robbennolt, 2002), and they tend to rely on the same evidence to inform their decisions (Robbennolt, 2002). According to these findings, we have little reason to believe that jurors' reasoning processes or verdict preferences are inherently different from those of judges. In fact, judges have been shown to employ the same cognitive illusions as laypeople (Guthrie et al., 2001).

As Diamond (2003) points out, jurors *do* face challenges in civil trials that can occasionally undermine their ability to reach predictable and legally-appropriate decisions, however. One obstacle is the complex and highly-technical nature of many civil trials, particular those that involve various expert witnesses and multiple intricate and unfamiliar legal claims. Judges interviewed by Goodman et al. (1985) pointed to expert testimony as a significant source of the difficulty for jurors, particularly in complex trials. According to Diamond though, the most serious challenge for a jury involves applying the facts it finds to the law it receives in the form of judicial instructions: "Both the persistently opaque language and construction of jury instructions and the reluctance to address issues that almost inevitably will come up in deliberation impair the ability of the jury to apply the instructions ... the jury invests considerable effort during deliberations attempting to apply incomprehensible or ambiguous directives on the applicable law" (Diamond, 2003, p. 154). Could either or both of these difficulties—technical complexity and problems with the instructions—explain the variability that exists in some jury damage awards and the fact that, on occasion, awards seem less rational than might be desired? I consider these possibilities next.

Complexity Inherent in Civil Jury Trials

Civil jury trials have become increasingly complicated. Most now involve expert witnesses and economic forecasting and many require jurors to understand and interpret complicated business transactions, sophisticated medical procedures and terminologies, or detailed industry standards and regulations. Some trials involve multiple plaintiffs and defendants suing and counter-suing one another. Often these proceedings are couched in highly technical language.

Expert Testimony

One clear source of complexity at trial is expert testimony. The use of expert witnesses in civil trials has increased in recent years; in surveys of U.S. District Court judges and attorneys during the 1990s, judges reported information on their most recent civil trial involving experts. In 1991, there was an average of 3.0 experts per trial and by 1998, the average had risen to 4.1 experts per trial. The most frequently presented expert testimony came from economists, followed by experts in the fields of medicine (including mental health);² business, finance, or law; and engineering and safety (Krafka et al., 2002). In a review of 529 civil trials, Gross and Syverud (1991) found that 86 percent involved expert testimony and that it was ubiquitous in medical malpractice and product liability cases.

Given that expert testimony is omnipresent in civil trials and that its intent is to inform jurors of standards, findings, or conclusions of which they would otherwise be unaware, the ability of an expert to convey complex points and the ability of the jury to understand those points will often determine how a civil trial is resolved. There is an interesting paradox here, however. As Gross (1991) has noted, “We call expert witnesses to testify about matters that are beyond the ordinary understanding of lay people (that is both the major practical justification and a formal legal requirement for expert testimony) and then ask lay judges and jurors to judge their testimony” (p. 1182). How *do* lay jurors respond to the testimony of expert witnesses? Are they mesmerized by the authority vested in experts and overly accepting of experts’ conclusions? Or are they careful to scrutinize the experience and motivation of experts and discriminating in how they use the concepts conveyed by these experts?

There is a large literature detailing jurors’ use of expert testimony; only the most cursory of reviews is presented here. These studies have proceeded via case analyses, interviews, and simulation methodology. For example, in a comprehensive analysis of 13 complex civil trials, Lempert (1993) concluded that there was little indication of jury irrationality or of uncritical acceptance of the experts’ opinions.

Interview studies also suggest that jurors are not particularly mesmerized by expert witnesses and, in fact, tend to evaluate an expert’s testimony rather critically. Shuman et al. (1996) interviewed 156 Texas jurors who had served in civil cases. They determined that jurors scrutinized the credentials of the experts, their familiarity with the facts of the case, the bases for their opinions, and their impartiality—all factors that play into judgments of the experts’ credibility. Vidmar (1995) reported that jurors interviewed in medical malpractice cases were often highly skeptical of

2 Medical experts often detail the cause and extent of personal injuries. Testimony of this sort can be especially effective in justifying damages for noneconomic injuries because plaintiffs sometimes lack insight into their own injuries, may have no basis on which to compare their experiences to those of others, and occasionally downplay the extent of their psychological injuries so as not to appear emotionally fragile or vulnerable (Goodman-Delahunty and Foote, 1995).

the experts they heard during trial. In interviews with 55 jurors from seven trials that included expert testimony, Ivkovic and Hans (2003) discerned that even when jurors faced problems with technically complex expert evidence, they used sensible procedures to try to decipher it: assessing the completeness and consistency of the information, comparing it to related information, and relying on more knowledgeable jurors to lead the way. In general, these studies show that jurors neither ignore nor uncritically accept the testimony offered by expert witnesses; even when it is highly technical, the expert evidence is analyzed in a fairly rational and methodical way (Vidmar et al., 2000).

Jury simulation studies have attempted to clarify some of the factors that affect jurors' understanding and use of expert evidence. The inherent complexity of the testimony is obviously an important variable and has been manipulated in several studies. In one study designed to assess the effects of complexity, Cooper et al. (1996) examined jurors' reactions to expert testimony from two scientists who opined about the possibility that the plaintiff's colon cancer resulted from exposure to PCBs. Researchers varied the quality of the experts' credentials as well as the complexity of their messages and found that the highly credentialed expert was more influential but only when the testimony was highly complex and difficult for jurors to evaluate. In the complex version of the trial, jurors tended to use heuristical reasoning processes, relying more on peripheral details of the messenger (i.e., the expert's credentials) than on the content and quality of the message.

In a subsequent study using the same case facts, Cooper and Neuhaus (2000) showed that mock jurors were not affected by peripheral facts such as the frequency with which the expert had testified in the past or the amount of money that he or she received to do so—provided that the expert testimony was presented in terminology that they could understand. When jurors were unable to understand the substance of the testimony, they used characteristics such as the expert's high pay and frequent appearances in court as cues for assessing believability. These findings fit with Petty and Cacioppo's (1986) dual-process, cognitive model of persuasion that suggests that when the message is engaging, accessible, and meaningful, a perceiver will attend to its content; when it is obtuse or seemingly irrelevant the perceiver attends to its non-essential details.

Other studies have shown that when faced with complex statistical expert testimony, civil jurors will sometimes use fallacious reasoning processes. For example, mock jurors in Kovera et al.'s (1999) hostile work environment case relied on heuristic cues like representativeness (i.e., the extent to which the research relied on by the expert represented the facts of the case) and general acceptance (i.e., others' evaluations of the quality of the evidence) when gauging the value of an expert's testimony—factors that may not be reliable indicators of scientific validity. In Bornstein's (2004) simulated toxic tort case, mock jurors were more likely to be persuaded by expert testimony that described anecdotal case histories than data from scientific research studies, suggesting the presence of the base-rate fallacy (i.e., people are more influenced by vivid and salient individual cases than by data drawn

from larger samples). These findings suggest that jurors who are confronted with particularly complicated or abstruse sets of evidence are more likely than those with simpler information to rely on heuristical reasoning processes to reach a verdict.

These studies also show that jurors may have some difficulty making sense of complicated scientific or statistical evidence. (Though even here, findings are not uniform. For example, Diamond and Casper [1992] varied the nature of the expert testimony in a mock antitrust trial. The expert presented either a complex statistical regression model or a more concrete “yardstick” analysis. Mock jurors’ damage awards were unaffected by this manipulation.) Still there is little reason to suspect that they passively defer to experts, even when faced with evidence of a highly technical nature. A consistent finding from both interview and simulation research is that jurors attempt to scrutinize both the message and the messenger; in judging the expert’s credibility, they critically evaluate both the content of the evidence and the motives of the expert witness (Ivkovic and Hans, 2003). In addition, as Vidmar et al. (2000) point out, juries tend to rely on the thinking of their strongest members (i.e., those jurors with the most experience or knowledge of scientific and technical methodologies and conclusions) who may be able to help the jury perform optimally even in the face of complex evidence.

Judicial Instructions in Civil Jury Trials

As Greene and Bornstein (2003) note, a civil jury’s task is further complicated by the fact that jurors must answer several questions yet use different sources of evidence and decision rules for each. For example, jurors in a product liability case would be instructed first to determine, by a preponderance of the evidence (typically deemed to be 51 percent of the evidence), whether the product in question was defective. To do so, they would have to rely on industry standards and policies—writings that may be puzzling and unfamiliar to them. They are instructed next to determine whether any alleged defect in the product caused injury to the plaintiff and must use a different set of evidence to answer this question. They then turn to their next set of tasks—deciding whether the plaintiff is entitled to damages and in what amount. Here, they are instructed to award the plaintiff compensatory damages for both the economic and noneconomic losses that were caused by use of the defective product. In many cases, the plaintiff may have done something to contribute to his or her own injuries, in which case jurors are instructed to determine the extent of the plaintiff’s contribution, but then to assess the *full* extent of the damages, being instructed that the judge will reduce the award proportionate to the plaintiff’s involvement. Finally, jurors may have the option to award punitive damages. Here, they are instructed to focus not on the plaintiff’s condition but instead on the conduct and wealth of the defendant manufacturer. They are instructed to determine whether the plaintiff has proven (often by a higher standard of proof, i.e., by clear and convincing evidence) that the defendant’s conduct was willful and wanton and, if so, to impose a punitive damages award that will effectively punish and deter the defendant. Obviously, each

of these multiple decisions involves a complex judgment in and of itself, and each relies on a unique set of evidentiary information. Taken together, they represent a formidable task for most laypeople.

The jury instructions relevant to damage award determinations are particularly difficult to apply. Although jurors are informed about the components of economic damages (including past and future economic losses and past and future noneconomic losses), they are not typically instructed on the definitions of various terms (e.g., pain and suffering, emotional stress) so they must use their own intuitions about what these concepts mean. They also receive no instructions about how to consider and weigh these components, or about how to translate these components into an aggregate award. Further, they are instructed to discount the assessed damages to present economic value (based on the idea that over time, the discounted award will increase in value and eventually reach the amount that jurors opt to award) but may not be told explicitly how to do this.

Perhaps most perplexing for jurors are instructions on punitive damages, often criticized for their ambiguity. For example, Ellis (1989) argued that the vagueness and uncertainty surrounding punitive damages “invite juries to indulge their biases and penchant for wealth redistribution and induce plaintiffs and their lawyers to seek punitive damages from defendants with deep pockets rather than from morally guilty persons” (p. 979). Many judges, including some on the highest court in the United States, are aware of the difficulties presented by jury instructions on punitive damages. According to former U.S. Supreme Court justice William Brennan: “The typical instructions given to jurors, advising them to consider the character and wealth of the defendant and the nature of the defendant’s conduct, provide guidance that is scarcely better than no guidance at all” (*Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 1989, p. 281).

Judges instruct jurors simply to assess punitive damages sufficient to punish and deter and to consider the nature of the defendant’s conduct and the defendant’s wealth in this assessment. Some courts supplement these instructions with criteria used by appellate courts in post trial review of awards. These considerations include the requirement that the award bear some reasonable relationship to compensatory damages, that it not bankrupt the defendant, and that the jury not be motivated by passion or prejudice. Even those jurors who *do* understand their instructions may nonetheless apply them inappropriately because they do not correctly assess the social costs (e.g., the death of a few dozen people who took a certain medication) and benefits (e.g., a reduction of symptoms in many million users of the same medication) of the defendant’s product or conduct. Melsheimer and Stodghill (1994) suggest that instructions on punitive damages provide juries with broad discretion and little guidance, thus allowing their biases and judgmental deficiencies to operate in an unrestrained manner.

Psychological research data on use of jury instructions A number of psycholegal research studies show that jurors have difficulty comprehending and applying

civil jury instructions (see Chapter 6 in this volume for a general discussion of instruction comprehension issues). For example, Landsman et al. (1998) assessed comprehension in jury-eligible adults who, after being instructed, answered multiple choice questions related to liability and compensatory damages. The data were highly skewed: jurors had quite good understanding of some concepts (approximately 80 percent recognized the requirements for proving liability and 90 percent correctly recognized the factors they are to consider in determining compensatory damages) whereas they had significant difficulty understanding other concepts (only 25 percent correctly recognized the standard of proof used in civil trials and only 31 percent knew who would win if the evidence was equally balanced).

Mock jurors in a simulated automobile negligence case, after being instructed on elements of negligence, deliberated on the liability of the defendant and then answered several questions related to their jury instructions (Greene and Johns, 2001). Only a third of mock jurors were able to recognize the definition of negligence or the legal standard associated with that concept. Finally, in a study that assessed comprehension of judicial instructions on liability for punitive damages, Hastie et al. (1998) provided summaries of previously decided cases and instructions that set out factors jurors were to consider in determining whether a defendant's conduct was reckless enough to warrant punitive damages. Participants were asked specific questions about each of several elements of their instructions (e.g., "What is the legal definition of reckless or callous disregard for the rights of others?"). Comprehension was very low: the median score was 5 percent correct. These data suggest that jurors may have difficulty understanding and applying the instructions they receive from the judge, particularly those relating to damage awards.

There is another reason for concern about jurors' ability to apply the law accurately. In comparison to jurors in criminal cases, civil jurors typically have less knowledge of the issues that arise in their trials and fewer resources on which to rely when attempting to understand the novel ideas presented to them in court. To what extent these obstacles result in variability in civil damage awards is difficult to determine, but the lack of clarity in jurors' explanations of the law is concerning and suggests that processes in place to inform jurors may instead be handicapping them in significant ways.

Reforming Trial Procedures to Enhance Civil Jury Decision-Making

As previously described, civil trials can involve complicated and technical evidence, jury instructions replete with legalese, and unique tasks and rules with which most jurors are unfamiliar. It should come as little surprise then that verdicts are occasionally difficult to fathom. In recent years, though, observers of civil juries have begun to suspect that apparent deficiencies or inconsistencies in verdicts may be a result of the ways that the task is structured and presented to juries. Lempert (1993) articulated the situation well:

A close look at a number of cases, including several in which jury verdicts appear mistaken does not show juries that are befuddled by complexity. Even when juries do not fully understand technical issues, they can usually make enough sense of what is going on to deliberate rationally, and they usually reach defensible decisions. To the extent that juries make identifiable mistakes, their mistakes seem most often attributable not to conditions uniquely associated with complexity, but to the mistakes of judges and lawyers, to such systematic deficiencies of the trial process as battles of experts and the prevalence of hard-to-understand instructions. (p. 234)

Increasingly, psycholegal researchers have begun to examine the prospects for enhancing decision-making in civil trials by changing trial processes and procedures. They have proposed and tested a number of procedural innovations intended to provide jurors with access to tools that will simplify and streamline their decision-making tasks. Some of these modifications (e.g., allowing jurors to ask questions and to discuss the evidence shortly after it is presented rather than wait until the end of the trial) reflect the fact that jurors are naturally active consumers and processors of information who strive to make sense and meaning of the evidence, especially when it is complex or unclear to them. Other innovations (e.g., giving pretrial instructions, simplifying and rewriting instructions by applying principles of psycholinguistics, allowing jurors to take notes, and providing written copies of jury instructions, transcripts, and summaries of witness testimony) allow jurors better access to the arguments, testimony, and the law presented during the trial and increase the chances that verdicts will be based on a full and accurate recollection of the facts and an understanding of the relevant legal concepts and requirements.

Allowing Jurors to Ask Questions and Discuss Evidence Prior to Deliberating

In many jurisdictions jurors are now allowed to ask questions of the witnesses and to discuss the evidence in the midst of trial. A study by Dann and Hans (2004) on the effectiveness of these policy changes showed that jurors like the process of asking questions of the witnesses and believe that it enables them to better comprehend the evidence. Mott's (2003) analysis of the content of more than 2,000 questions posed in 164 actual trials (both civil and criminal) characterized the nature of jurors' questions: jurors questioned both lay and expert witnesses in order to fit the witnesses' testimony with previously-presented testimony and to inquire about common practices in unfamiliar professions. Despite the fact that this process can sometimes be cumbersome and time-consuming, it can clarify jurors' understanding of the evidence, enhance their involvement in the trial process, and lead to more accurate decision-making.

A somewhat more radical reform permits jurors to discuss the evidence during the trial rather than to wait until their formal deliberations begin. Psychologists have hypothesized a number of advantages of such mid-trial discussions based on

fundamental principles of cognitive and social psychology, including the possibility that early discussions will allow jurors to: 1) organize the evidence into a coherent framework over the course of the trial; 2) improve their recollection of the evidence; 3) allow them to clarify points made in mid-trial; and 4) promote greater cohesiveness among jurors. In a field experiment in which researchers randomly assigned approximately one hundred civil jury trials to an experimental “trial discussion” condition and an equal number to a control “no discussion” condition, Hannaford et al. (2000) found that jurors who reported having these discussions were quite positive about them. They said that trial evidence was remembered very accurately during these discussions, that discussions helped them understand the evidence in the case, and that all jurors’ points of view were considered during the course of the discussions. Unfortunately, the authors were not able to measure *actual*, as opposed to *perceived*, gains in comprehension because a general comprehension measure applicable to all trials was not feasible. But a study by Vidmar et al. (2003) of videotapes from 50 civil jury trials in Arizona showed that jurors use these discussions to seek information from one another, raise questions they intend to ask in the courtroom, and talk about the evidence they hope to hear; moreover, these discussions led to modest enhancements in understanding of the testimony and did not result in premature judgments.

Restructuring the Presentation of Information to Jurors

In most civil trials, the jury receives judicial instructions about case-specific law only once, after all of the evidence has been presented. This chronology means that throughout the trial, jurors are kept in the dark about the substantive law that applies in the case and about procedural matters such as how to weigh the credibility of witnesses, assess the importance of experts, and reach a verdict during deliberations. Commentators have pointed out that jurors would have an easier time applying the law if it was explained to them at the start of the trial. Such pre-instruction could provide a cognitive structure or schema that would serve as an organizing framework and memory aid. It would help jurors to evaluate the relevance of evidence and to determine whether the requirements of proof have been satisfied. It could also provide a clearer and earlier picture of the law relevant to the case, and allow attorneys to tailor more effectively their case presentations to the relevant legal principles.

The impact of substantive pre-trial instructions has been examined in a series of sophisticated jury simulation studies involving multiple tort plaintiffs with injuries of varying severity (e.g., ForsterLee and Horowitz, 1997; ForsterLee et al., 1993). Data showed that jurors who were given case-specific pretrial instructions produced damage awards that were better calibrated to each plaintiff’s degree of injury than did jurors who were not pre-instructed. In addition, the former were better able to recall the evidence than were the latter. These findings suggest that pretrial instruction can moderate the effects of complex testimony, a result of particular import in civil trials.

Judicial instructions are replete with complicated legal terminologies and concepts that are unfamiliar to most laypeople. Accordingly, some researchers (e.g., Charrow and Charrow, 1979; English and Sales, 1997) have used principles of psycholinguistics to simplify and clarify jury instructions. Their procedures involved minimizing or eliminating the use of abstract terms, negatively modified sentences, and passive voice and reorganizing instructions into a more logical format (see Chapter 6 in this volume for a detailed discussion of jury instruction reform issues). In general, these revised instructions are easier for jurors to comprehend and apply. For example, consider this California jury instruction on “burden of proof”:

Preponderance of the evidence means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issues must be against the party who had the burden of proving it.

And compare it to a revised instruction on the same topic:

When I tell you that a party must prove something, I mean that the party must persuade you, by the evidence presented in court, that what he or she is trying to prove is more likely to be true than not true. This is sometimes referred to as “the burden of proof.”

Juror cognition can also be enhanced by the opportunity to take notes during the trial. Although this is a relatively simple procedure to implement, it is still not widely used. (Critics suspect that it will distract jurors from attending to the evidence and that jurors with the more voluminous notes will dominate deliberations.) Note-taking has obvious benefits as a memory aid to jurors. Indeed, several studies have shown its advantages (e.g., ForsterLee et al., 1994; Horowitz and Bordens, 2002), particularly as an encoding device, as a way to distinguish among multiple plaintiffs with differing claims, and as a means to focus the discussion during deliberations. Jurors who are allowed to take notes express greater satisfaction with the trial process than those who are not (Horowitz and ForsterLee, 2001).

The accuracy of jurors’ decisions can apparently be enhanced further by allowing jurors to take notes *and* by providing them with statements summarizing the testimony of expert scientific witnesses (ForsterLee et al., 2005). In a study designed to test the synergistic effects of these decision tools, aided jurors gave significantly higher damage awards to the most severely injured plaintiffs without increasing compensation to less seriously injured plaintiffs. In addition, jurors who were both allowed to take notes and given witness summaries recalled more evidence than other jurors. Although the provision of summary statements can be cumbersome, it can provide jurors some much-needed assistance in deciphering the essential elements of the testimony and in having a record of what each expert said.

In general, then, significant progress has been made in recent years in advancing and testing procedures to enhance the quality of civil jury decision-making. Procedural innovations change the way the case is presented to jurors and provide opportunities for them to become engaged in the process of receiving and making sense of the evidence. As judges become more familiar with these procedures, we can expect increased usage in courtrooms—a welcome prospect to most civil jurors.

Conclusions

Although the media attend to high-stakes and high-profile cases, most civil trials are of a humbler nature, concerning matters like automobile accidents and slips and falls, and in these cases, damage awards are of modest size. Still, even these seemingly simpler trials can involve legal issues with which most lay jurors are unfamiliar, complex expert testimonies that need to be evaluated, and opaque jury instructions that need to be understood.

Psycholegal research that plumbs the ways jurors manage these tasks during trial has revealed both decision-making triumphs and tribulations. It has shown, for example, that civil juries are not particularly biased in favor of plaintiffs but rather, are suspicious of many plaintiffs and their motives for suing; that judges tend to agree with jury decisions in most civil trials; and that although plaintiffs have somewhat higher win rates when the defendant is a corporation rather than an individual, it is because they hold corporations to a higher standard of conduct and not because they desire to take money from the pockets of well-healed defendants. But these studies have also shown that expert testimony detailing complicated scientific or technical information is poorly comprehended by civil jurors and that judicial instructions tend to be problematic for many jurors. Yet psycholegal research on civil juries has also suggested and tested methods for reforming the ways that information is presented to juries (e.g., through pretrial and simplified jury instructions and by way of trial summaries) and that jurors are allowed to participate in the trial (e.g., by taking notes, asking questions of witnesses, and discussing the case prior to deliberation). These studies show that reforms can enhance the process for all participants and lead to more predictable, reasoned verdicts by civil juries.

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Index

Note: page numbers followed by “n” refer to footnotes.

- actuarial testimony, 57–8
- additive model of information integration, 42
- admonitions to disregard
 - backfire effect, 79–80, 83, 85–6, 135
 - effects and ineffectiveness, 68
 - future research, 87–8
 - in-court inadmissible evidence, 76–80
 - as jury instructions, 135
 - Need for Cognition and selective compliance with, 59–60
 - pretrial publicity and, 73–5
 - theoretical explanations for ineffectiveness, 80–86
 - theoretical integration, 86–7
- age and verdict choice, 102
- aggravation, *see under* capital cases
- alternative dispute resolution, 30–31
- ambiguous evidence, 59
- American Bar Association (ABA)
 - standards, 70–71
- American legal system, *see* legal system, American
- American Psychological Association, 4–5
- American Psychology-Law Society, 4–5
- anchoring and adjustment strategy, 46, 55–6
- animation of jury instructions, 145
- anonymity, sense of, 107
- anxiety, situational, 112
- Apprendi v. New Jersey* (2000), 160n
- archival study data, 7
- Atkins v. Virginia* (2002), 158n
- attention models, 51–2
- attitudes; *see also* heuristics; prejudice
 - behavior, relationship to, 107–8
 - on death penalty, 106, 174
 - evidence strength and, 115
 - jury selection and, 102–3
 - legal personality factors, 104–6
 - predictive power of, 106–7
- Australia, 100
- authoritarianism, 103, 105
- authority, exercise of, 27–8, 32, 34
- automatic death penalty (ADP) voters, 163
- availability heuristic, 55, 56
- averaging model of information integration, 42
- backfire effect, 79–80, 83, 86–7, 135
- Baldus study, 161–2
- Ballew v. Georgia* (1978), 8
- Batson v. Kentucky* (1986), 100, 102
- battered women, attitudes toward, 106
- Bayesian models, 43
- belief perseverance, 81, 86
- Bench Book (New Zealand), 138
- Bernardo, Paul, 74
- “beyond a reasonable doubt” standard, 133–4
- bias; *see also* race and ethnicity
 - in capital cases, 163–4
 - community, 110
 - conviction proneness, 106, 164
 - death qualified jurors and, 164–5
 - extra-legal biases and admonitions to disregard, 78
 - hindsight bias, 81–2
 - judicial, 142–3
 - pretrial publicity and, 65–71
 - “Black male presence” effect, 165
- black sheep effect, 102
- Book of Approved Jury Instructions* (California), 131
- Booth v. Maryland* (1987), 169
- Brennan, William, 195

- Bryant, Kobe, 109
- Buckholz, B., 2
- burden of proof, 132, 171–2, 199
- California, 131, 146–7, 172, 199
- Canada, 99, 137, 187
- capital cases
 overview, 158
 aggravation and mitigation
 common factors, 160
 comprehension of, 136, 166–7, 171
 importance of mitigation, 167–8
 improper use of, 173–4
 risk predictions and, 168
 weighing of, 161, 164–5, 171–2
 attitudes toward death penalty, 106, 174
 court procedures in guilt and penalty phases, 159–61
 death qualification process, 159, 163–5
 evidence factors
 future dangerousness and risk assessment, 168–9
 psychiatric testimony, 157–8, 168–9
 scope of evidence, 160, 171
 victim impact statements, 169–70
 international comparison, 159
 jurisdictions, 159
 jury instructions
 comprehension of, 136, 167, 169, 171–3
 guided discretion model and, 157
 resistance to, 170, 173–5
 moratoria and abolition of death penalty, 175–6
 prosecutorial decision-making, 161–3
 race effects in, 161–2, 165–6, 167
 sentencing verdicts and jury decision making
 bias in death qualified persons, 164–5
 following the law in, 170–95
 guided discretion model, 161
 juror comprehension and racial bias in, 172
 jury vs. judge, 160
 law, misunderstandings of, 172–3
 race and instruction
 comprehension, impacts of, 167
 responsibility, diversion of, 175
 Capital Jury Project (CJP), 165, 167, 169, 172–3, 174, 175
 categorical measures, 9
 cautionary instructions for eyewitness testimony (Telfaire instructions), 135
 central processing, 53–5
 certainty principles, 44
 challenges for cause, 72, 99, 148
 Chicago Jury Project, 2–3, 5, 12
 child custody hearings, 30
 China, 35
 civil cases
 American civil trials, nature of, 184–6
 backfire effect and, 83
 criticisms of civil jury process, 187–91
 expert testimony, 172–3
 jury instructions and comprehension, 157, 194–6
 methodological research concerns, 20
 other countries, comparison with, 83, 86–7
 reforms, 9, 196–200
 right to jury in, 83–4
 civil commitment, 30
 clarification of jury instructions, requesting, 145–7
 clear and convincing evidence standard, 133
 clinical testimony, 57–8
 cognitive demands, 85, 107
 cognitive psychology, 53
 cognitive resource theory, 51–2
 Cognitive-Experiential Self-Theory (CEST), 56–8
 coherence certainty principle, 44, 45
Colgrove v. Battin (1973), 4
 commonsense justice, 48–50, 140, 170, 173–4
 community policing, 31
 community surveys, 110–11
 competitive imbalance, 116–7
 completeness in story construction, 44
 complexity, 139, 191–6

- computer animation of jury instructions, 145
- confessions, false, 18
- conflict resolution, 27, 28–9
- conformity prejudice, 50
- consistency in story construction, 44
- consultants, trial, *see* jury selection: scientific
- continuances, 72
- continuous variables, 13, 16
- conviction proneness, 106, 164
- coverage certainty principle, 44
- crime prototypes, 49
- criminal cases and procedural justice, 30
- criminal jury instructions, 136
- Crown Court Study (U.K.), 138
- cultural contexts, 35, 48–9; *see also* international comparisons
- damage awards
 - amount of, 186, 187, 188–9
 - CEST paradigm and, 57
 - compensatory, 184
 - deep pockets and, 190
 - jury instructions and, 195
 - liability vs., 184–5
 - occupation of jurors and, 101
 - punitive
 - amounts of, 186, 189
 - anchoring and adjustment and, 56
 - defined, 184
 - instructions on, 195, 196
- Daubert v. Merrell Dow Pharmaceuticals* (1993), 16
- “deadbeat dads,” 28
- Death by Design* (Haney), 158
- death penalty, *see* capital cases
- death qualification process, 159, 163–5
- decision-making, jury
 - in capital cases
 - bias in death qualified juries, 164–5
 - following the law in, 170–75
 - guided discretion model, 161
 - juror comprehension and racial bias in, 172
 - jury vs. judge in sentencing, 160
 - law, misunderstandings of, 172–73
 - race and instruction
 - comprehension, impacts of, 167
 - responsibility, diversion of, 175
 - in civil cases
 - instructions and, 194–5
 - reforms and, 196–200
 - unpredictability and arbitrariness, 190–91
 - intuitive, 173–4
 - research on
 - American legal system and, 5–6
 - Chicago Jury Project, 2–3, 5, 12
 - choice of methods, 19–20
 - criticisms from Social Scientists, 12–13
 - impediments to, 6–7
 - internal and external validity, 9–10
 - legal response to, 10–13
 - methodological alternatives, 10–12
 - revival of, 3–5
 - validity, question of, 15–17
 - theoretical models of
 - overview, 41–2
 - Cognitive-Experiential Self-Theory (CEST), 56–8
 - Commonsense Justice model, 48–50
 - dual process models, 53–8
 - Elaboration Likelihood Model (ELM), 53–4
 - future research, 60–61
 - generic prejudice, 50–52
 - heuristics, 55–6
 - Heuristic-Systematic Model (HSM), 54–5
 - international applications, 60
 - mathematical models, 42–3
 - Need for Cognition (NC), 58–60
 - Story Model, 43–7- decision-making, prosecutorial, in capital cases, 161–3
- decision-tree models, 144
- deep-pocketed defendants, 189–90
- deliberations, jury, *see* jury deliberations
- demographic factors
 - community surveys and, 110
 - death qualified juries and, 163–5

- evidence strength and, 115
 - as jury selection criteria, 101–3
- demonic agency, myth of, 167
- dependent variables, 9
- dichotomous variables, 9, 16
- distributive fairness, 28; *see also*
 - procedural justice
- diversity and procedural justice, 35, 36
- dogmatism, 103–4, 140
- drug cases, 106
- dual process models
 - overview, 53
 - Cognitive-Experiential Self-Theory (CEST), 56–8
 - Elaboration Likelihood Model (ELM), 53–4
 - expert testimony and, 193
 - heuristics, 53, 55–6
 - Heuristic-Systematic Model (HSM), 54–5
 - strengths and limitations of, 58
- ecological validity, 10, 11, 12, 16
- economic damages, 184
- economic status, *see* socio-economic status
- education levels, 102, 139
- Eighth Amendment, 158n
- Elaboration Likelihood Model (ELM), 53–4
- emotional information, 70, 85
- empathy-complexity theory, 46
- England, *see* United Kingdom (U.K.)
- escabinado* system, 5
- ethical issues in jury selection, 116–7
- ethnicity, *see* race and ethnicity
- evidence; *see also* inadmissible evidence
 - admonitions to disregard and strength of, 77
 - aggravating and mitigating (*see under* capital cases)
 - in capital cases
 - future dangerousness and risk assessment, 168–9
 - psychiatric testimony, 157–8, 168–9
 - scope of evidence, 160, 171
 - victim impact statements, 168–70
 - in civil cases, 185, 194
 - clear and convincing evidence standard, 133
 - hearsay, 80, 83
 - juror question asking and mid-trial discussion, 11, 197–8
 - limited use evidence and backfire effect, 79–80
 - Need for Cognition and, 59
 - perceptual distortion of, 71
 - preponderance of evidence standard, 133
 - prior convictions, 77, 80
 - procedural justice and voice, 32
 - Story Model and, 45
 - verdict modeling and, 42–3
- evidence strength
 - admonitions to disregard and, 77
 - jury selection and, 115
 - pretrial publicity and, 68
 - Story Model and, 45
- exclusion of jurors, *see* jury selection
- experiential mode, 57
- expert testimony
 - actuarial vs. clinical, 57–8
 - availability heuristic and, 56
 - in civil cases, 172–3, 191
 - complexity of, 54
 - methodological research concerns, 21
 - psychiatric, 157–8, 168–9
 - summarizing statements, 199
- external locus of control, 104
- external validity, 10, 11, 16
- eyewitnesses, *see* witness testimony
- factual publicity, 70
- fairness and commonsense justice, 48–9; *see also* procedural justice
- false confessions, 18
- family law, 30
- fathers, “deadbeat,” 28
- field studies, 6–7, 19
- First Amendment, 68–9, 74, 88, 110
- flow charts, 144–5
- Fourteenth Amendment, 3–4, 6
- free speech, 68–9, 74, 88, 110
- Free v. Peters* (1993), 12
- frivolous litigation, attitudes toward, 105

- Furman v. Georgia* (1972), 161n
 future dangerousness, 168–9
- gag orders, 74
- gender
 in capital cases, 165–6
 jury selection and, 102
 verdict, effect on, 47
- generic prejudice, 50–52
- Georgia, 162
- government policy and procedural justice, 34–5
- group polarization, 75n
- guided discretion model, 161
- guilt phase of a capital trial, 159–61
- Haney, Craig, 158, 166, 167, 172
- Harrisburg Seven trial (1972), 108–9
- hearsay evidence, 80, 83
- heuristics
 CEST and, 57
 ELM and HSM models, 53–5
 influence of, 64
 jury selection and, 116
 representativeness, availability, and anchoring and adjustment, 55–6
- Heuristic-Systematic Model (HSM), 53–5
- high-profile cases, 109, 116, 185
- hindsight bias, 81–2, 86
- homicide cases, 49, 51–2
- identity and procedural justice, 37
- illustration of jury instructions, 145
- imbalance, competitive, 116–7
- impartiality, 69–71; *see also* bias; jury selection
- inadmissible evidence
 admonitions to disregard
 backfire effect, 79–80, 83, 86–7
 factors affecting success of, 77–9
 future research, 87–8
 theoretical explanations for
 ineffectiveness of, 80–86
 theoretical integration, 86–7
 biases and heuristic processes, 68
 in other countries, 76
 research on, 76
 rules governing inadmissibility, 75–6
 selective consideration of, 78
 independent variables, exaggeration of, 20
 indictment, Scottish-style, 138
 information integration model, 42–3
 innocence, presumption of, 132
- insanity cases
 attitudes and, 106
 generic prejudice and, 51
 prototypes and, 49
 standards of insanity, 136
- insanity defense, 140–42
- instructions, jury, *see* jury instructions and comprehension
- interest prejudice, 50
- internal locus of control, 104
- internal validity, 9–10
- international comparisons
 challenges for cause, 99
 civil trials by jury, 184, 186–7
 death penalty, 159
 inadmissible evidence, 76, 87
 juries, use of, 97
 jury instruction comprehension, 137–9
 peremptory challenges, 99–100
 pretrial publicity, 72–5, 87
 procedural justice and, 29
 reasonable person standard, 134
 scientific jury selection, 109
 stand aside procedure, 100
 theoretical models, 60
 voir dire, 98
- internet and pretrial publicity, 74
- interpersonal treatment, 32
- interviews, post-deliberation, 7
- ironic processes theory, 84–6
- issue-by-issue testimony, 46
- Jackson, Michael, 109
- J.E.B. v. Alabama ex rel.* (1984), 100
- John, Elton, 187
- joinder instructions, 135–6
- judges
 civil decision-making compared to juries, 190–92
 inadmissible evidence and pretrial publicity, effects of, 88
 jury instructions, hesitancy to clarify, 146

- jury instructions and judicial bias, 142–3
- trust and, 33
- jurisdictions in capital cases, 159
- Juror Bias Scale, 105
- jury decision-making, *see* decision-making, jury
- jury deliberations
 - admonitions to disregard and, 78
 - legislation prohibiting recording or observation of, 5–6
 - limitations of, 15
 - Need for Cognition and level of participation in, 59
 - pretrial publicity and, 75n
 - simulations, exclusion from, 18–9
- jury instructions and comprehension
 - overview, 169–70
 - in capital cases
 - comprehension issues, 136, 167, 169, 171–3
 - guided discretion model and, 161
 - resistance to, 170, 173–5
 - in civil cases, 190–91, 194–6
 - factors in effectiveness, 139–41
 - history of, 130–31
 - international comprehension problems, 137–9
 - pattern instructions, 131, 142, 146, 171, 173
 - policy implications, 147–8
 - procedural instructions, problematic, 132–6
 - purpose of instructions, 130
 - rates of comprehension, 16, 131–2, 137–9
 - reforms
 - animation and illustration, 145
 - civil cases and, 198–200
 - clarification from judges and other jurors, 145–7
 - delivery changes, 143–4, 173
 - psycholinguistic principles,
 - rewriting with, 141–3, 199
 - slow pace of, 146
 - special verdict forms and flow charts, 144–5
 - research on, 12, 16
 - scientific jury selection and, 117–18
 - substantive instructions, 136–7
- jury selection
 - overview, 97–8
 - methodological research concerns, 17–18
 - nonexistence of, 117
 - and pretrial publicity in other countries, 74–5
 - scientific
 - overview, 108
 - effectiveness of, 112–15
 - ethical issues, 116–17
 - evidence strength, role of, 115
 - future research, 117–18
 - history of, 108–9
 - predictive ability, small increases in, 115–16
 - techniques, 110–12
 - voir dire*
 - overview, 98
 - attitude-behavior relationship,
 - improving, 107–8
 - community surveys and, 110
 - death qualification, 3–4, 159, 163–5
 - demographic factors, 101–3
 - effectiveness of traditional methods, 100–101
 - exclusion mechanisms, 98–100
 - legal personality factors, 104–6
 - nonverbal behavior and, 112, 114
 - personality and attitudinal factors, 113–14
 - pretrial publicity and, 69, 72–3
 - variability of effects across cases, 106–7
- jury simulation, *see* simulated trials and jury simulation
- jury size, 4
- just world beliefs, 104
- Kalven, H., Jr., 2–3
- Kansas v. Marsh* (2006), 161n
- kinesic cues, 111–2
- Kissinger, Henry, 108

- language, comprehensibility of, 139,
141–2, 170, 191, 199
- Law and Human Behavior*, 5, 13
- laws
- “black letter law” vs. commonsense
justice, 48
 - misunderstandings of, 172–3
 - procedural justice and, 26, 27–8, 34
- legal authoritarianism, 105
- legal personality factors in jury selection,
104–6
- legal system, American
- confidence in (*see* procedural justice)
 - juries, use of, 97–8
 - laypeople, decisions by, 1–2
 - research focus on, 5
- legal systems, international, *see*
international comparisons
- Lempert, R., 196–7
- liability instructions, 137
- liability vs. damages, 184–5
- limited use evidence and backfire effect,
79–80
- limiting instructions on inadmissible
evidence, *see* admonitions to
disregard
- limiting instructions on joinder, 135–6
- Lindh terrorism case, 51
- Lockhart v. McCree* (1986), 11–12
- locus of control, 104
- long-term effects of procedural justice,
33–4
- majority verdict decisions, 99, 100, 117
- Maryland, 162
- mathematical models, 42–3
- McCleskey v. Kemp*, 162
- media and civil cases, 185
- media coverage of trials, *see* publicity,
pretrial
- medical experts, 192n
- mental control, ironic processes of, 84–6
- mental health experts, 168–9
- mental health law, 30
- mental retardation, 158n
- meta-analyses, 19
- Missouri, 171
- Mitchell-Stans conspiracy trial, 112
- mitigation, *see under* capital cases
- mock juries, in jury selection process, 112
- mock juries studies, *see* simulated trials
and jury simulation
- moral disengagement mechanisms, 175
- Morgan v. Illinois* (1992), 163
- murder, first-degree, 49
- Murphy v. Florida* (1975), 69
- narrative testimony, 46
- Nebraska, 162
- Need for Cognition (NC), 58–60, 78–9
- need for structure, 107
- negligence instructions, 137, 196
- New Jersey Death Penalty Study
Commission Report, 176
- New Mexico, 161n
- New Zealand, 138, 187
- Nixon, Richard, 114
- nonverbal behavior observations, 111–12
- note-taking, 86, 199
- nullification, 141
- objective vs. subjective assessments of
procedural justice, 26–7
- occupation of jurors, 101
- outcome favorability and fairness, 28–9, 37
- paralinguistic cues, 111–12
- pattern instructions, 131, 142, 146, 171,
173
- Payne v. Tennessee* (1991), 169
- pecuniary damages, 184
- penalty phase of a capital trial; *see also*
capital cases
- evidence evaluation in, 164–5
 - holistic assessment in, 166
 - law, problem of following, 170–75
 - process of, 160–61
 - victim impact evidence, 169–70
- peremptory challenges
- competitive imbalance and, 116–17
 - defined, 99
 - international comparisons, 99–100
 - nonverbal behavior observations and,
110–12
 - pretrial publicity and, 72–3
- peripheral processing, 53–5

- personality factors, 102–7, 139–40
- persuasion and dual processing models, 53, 54
- Peterson, Scott, 109
- plaintiffs, distrust of, 188–90; *see also* civil cases
- plausibility in story construction, 44
- policing, community, 31
- post-deliberation interviews, 11
- prejudice, 50–52; *see also* bias
- preponderance of evidence standard, 133
- presumption of innocence, 132
- prior conviction evidence, 77, 79
- Probability of Commission, 105
- procedural instructions, 130, 132–6; *see also* jury instructions and comprehension
- procedural justice
 - overview, 25–9
 - in capital cases, 164
 - courts and, 35–6
 - cultural context and, 35
 - empirical research, 29–31
 - factors dominating evaluations of, 32–3
 - meaning of, 31–2
 - range of effects, 33–5
- proportionality reviews, 162
- prosecutorial decision-making in capital cases, 161–3
- prospective evaluations of procedures, 29
- prototypes, 49, 68
- psychiatric testimony, 157–8, 168–9
- psycholinguistics, 141–3, 199
- public confidence in legal system, *see* procedural justice
- publicity, pretrial
 - overview, 68–9
 - admonitions to disregard
 - future research, 87–8
 - ineffectiveness of, 73
 - theoretical explanations for
 - ineffectiveness of, 80–86
 - theoretical integration, 86–7
 - biasing effects, 69–71
 - continuances and changes of venue, 72
 - free speech and, 68, 110
 - in Harrisburg Seven trial (1972), 108–9
 - impartiality, self-reports of, 69
 - international restrictions on media, 73–5
 - jury deliberation and, 75n
 - methodological research concerns, 17
 - voir dire* and, 69, 72–3
- punitive damages
 - amounts of, 186, 189
 - anchoring and adjustment and, 56
 - defined, 184
 - instructions on, 195, 196
- questionnaires, pre-trial, 111
- race and ethnicity
 - capital cases, race effects in, 161–2, 165–6, 167
 - inadmissible evidence and, 78
 - jury selection and, 102
 - pretrial publicity and, 70–71
 - procedural justice and, 36
- rape cases
 - admonitions to disregard and, 77–8, 83–4
 - attitudes and, 106
 - Bernardo, 74
 - empathy-complexity theory and, 46
 - pretrial publicity and perceptual distortion in, 71
- rational mode, 57
- reactance theory, 82–4, 86–7
- Reasonable Doubt scale, 105
- reasonable doubt standard, 133–4
- reasonable person standard, 134
- reasonable proportionality, 145
- regulation and procedural justice, 31
- representativeness heuristic, 55, 56, 116
- research methodology
 - archival study data, 7
 - choice of methods, 18–19
 - court reluctance to accept, 10–12
 - debates over methodological concerns, 12–13, 15–18
 - dependent variables, 9, 13–14
 - field studies, 6–7, 19
 - history of jury decision-making
 - research, 2–5
 - hypothetical cases, 14

- impediments to research, 5–6
- internal, external, and ecological
 - validity, 9–10, 11, 13, 16
- jury simulation method, 8–9
- meta-analyses, 19
- post-deliberation interviews, 7
- procedural justice and, 26–7, 29–30
- samples, 13
- students as study samples, 9, 13, 16–17
- unrealistic trial presentations, 14–15
- responsibility for sentencing decisions,
 - deflection of, 175
- retrospective evaluations of procedures, 29
- right to trial by jury
 - capital trials and, 160
 - civil trials and, 183–4
 - community bias and, 110
 - free press and, 68–9
 - jury decision-making research and, 3–4
 - jury selection and, 97–8
- Ring v. Arizona* (2002), 160
- risk assessment in capital sentencing,
 - 168–9
- Scotland, 98, 100, 138
- selection of juries, *see* jury selection
- self-defense, 145
- self-interest, motivation by, 28–9
- self-monitoring, 107, 140
- self-reporting
 - of jury instruction comprehension, 138
 - on partiality, 69
 - pretrial questionnaires, 111
- sentencing in capital cases, *see under* capital cases
- Seventh Amendment, 97, 183
- sexual abuse cases, 51–2
- sexual harassment cases, 47, 56
- Simpson, O.J., 109, 111
- simulated trials and jury simulation
 - admonitions to disregard and, 77–9, 82
 - CEST and, 57
 - choice of methods, 19
 - civil cases, 189, 190, 196
 - in civil cases, 193–4
 - court responses to, 11–12
 - dependent variables, 13–14
 - ecological validity and, 12
 - future dangerousness predictions,
 - 168–9
 - heuristics and, 56
 - hypothetical cases, 14
 - jury instructions in, 133, 140–41, 145
 - method of, 8–9
 - other fields, simulation in, 18
 - study samples, 13
 - unrealistic trial presentations, 14–15
- situational anxiety, 112
- Sixth Amendment, 3–4, 68–9, 97, 110, 160
- social psychology, 3; *see also* research methodology
- socio-economic status, 36, 101–2
- special issues model, 160
- special verdict forms, 144–5
- specific prejudice, 50
- stand aside (standby) procedure, 100
- standards of proof, 133–4; *see also* burden of proof
- statistical expert testimony, 193
- status and procedural justice, 37
- Stewart, Martha, 109
- Story Model, 43–7
- structure, need for, 107
- students as study samples, 9, 13, 16–17
- study samples, 9, 13, 16–17
- sub judice* restrictions, 73
- subjective vs. objective assessments of
 - procedural justice, 26–7
- Sundby, Scott, 169
- Supreme Court, U.S., 3–4; *see also specific cases*
- surveys, community, 110–11
- systematic processing, 53, 54
- tax avoidance, 31
- Telfaire instructions (cautionary instructions for eyewitness testimony), 135
- Tennessee, 171
- testimony, *see* expert testimony; witness testimony
- theoretical models of decision-making, *see under* decision-making, jury
- Thibaut, John, 25, 28, 29–30
- time, persistence of procedural justice effects over, 33–4

- timing of jury instructions, 143–4, 198
- torts, 105, 185–6; *see also* civil cases
- trust
 - plaintiffs, distrust of, 188–9
 - procedural justice and, 33, 36
- uniqueness certainty principle, 44
- United Kingdom (U.K.)
 - civil cases, 187
 - juries, use of, 5
 - jury instructions and comprehension, 138
 - reasonable person standard in, 134
 - stand aside procedure, 100
- validity
 - confusion of, 16
 - criticisms from social scientists, 12–15
 - of expert testimony, 17
 - internal, external, and ecological, 9–10, 11, 13, 16
 - in *Law and Human Behavior*, 13
 - legal responses to research, 10–12
- venue, 51, 72, 110–11
- verdict representation phase of story
 - modeling, 44–5
- verdicts; *see also* decision-making, jury
 - mathematical models, 42–3
 - Need for Cognition and, 59
 - special verdict forms, 144–5
 - trial procedure vs., 26
- Vesco, Robert, 114
- victim impact statements, 169–70
- Vidmar, N., 50–52
- voice and procedural justice, 32
- voir dire*, *see under* jury selection
- Wainright v. Witt* (1985), 163
- Walker, Laurens, 25, 28, 29–30
- Walton v. Arizona* (1990), 161n
- “White male dominance” effect, 165
- Williams v. Florida* (1970), 4
- Witherspoon v. Illinois* (1968), 3–4, 11, 163, 164–5
- witness testimony; *see also* evidence; expert testimony; inadmissible evidence
 - inadmissible, 76
 - juror question asking and mid-trial discussion, 197–8
 - methodological research concerns, 17
 - narrative vs. issue-by-issue format, 46
 - Telfaire instructions, 135
- Witt* standard, 163, 165
- women, *see* gender
- workplace, procedural justice in, 31, 34
- written jury instructions, 143
- Zeisel, H., 2–3