CHAPTER 9

The Jury

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**Introduction**

Trial by jury has been an integral part of the American criminal justice system for well over 200 years. In serving to temper the power of the government to judge individuals to be in violation of the rules of society, the jury lets members of society itself determine if a person is worthy of condemnation. As explained by Supreme Court Justice Byron White in *Duncan v. Louisiana* (1968),

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. (p. 156)

While it is generally agreed that juries serve an important function in the criminal justice system, over the past several decades, they have come into some disrepute.
Verdicts of not guilty in high-profile trials of O. J. Simpson, Lorena Bobbitt, Marion Barry, Robert Blake, and the Los Angeles police officers who were videotaped beating Rodney King have raised outrage among members of the public and media. Critics complain that the system allows wealthy individuals with unlimited funds to hire top criminal defense attorneys to trick and manipulate the unfortunate 12 who weren’t able to get out of jury duty into gaining acquittals. At the same time, it is argued that many criminal defendants, who are poorly educated, non-White individuals living at or below the poverty line and being represented by an overworked public defender, have little hope of gaining an acquittal from a jury made up of people from the “other side of the tracks.”

In this chapter, we consider various aspects and some of the complexity surrounding the criminal trial jury. After exploring the historical roots of trial by jury and the role it played in the founding of the United States, we examine some of the nuts and bolts of serving on a jury. This includes the manner in which average citizens become jurors, the responsibilities and duties faced by jurors in criminal trials, and modern reforms to the jury system designed to make jurors more effective. In addition, we consider the role the jury plays in the criminal justice system and where the act of jury nullification fits in fulfilling this function.

History of Jury Trials

Employing juries to decide the guilt or innocence of their fellow citizens is not an American invention. In fact, juries were used hundreds of years before America was even discovered. While the use of average citizens to decide the fate of individuals charged with criminal offenses goes back more than 2,000 years to ancient Athens and Rome, the foundation of the modern jury has its origin in England. During the Middle Ages, the guilt or innocence of a person charged with a crime was determined through trial by ordeal (Bartlett, 1986). Under this process, the defendant would be required to perform a perilous task, such as walking across burning coals or removing a rock from boiling water. If the defendant performed these tasks and emerged without being harmed, he or she was judged innocent for surely God had intervened and provided protection. If the defendant were injured during the trial, he or she was adjudged guilty.

Over time, the trial by ordeal gave way to trial by a jury of citizens. In 1215, under pressure from a group of noblemen, King John signed the Magna Carta, which provided that “no freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed—nor will we go upon or send upon him—save by the lawful judgment of his peers or by the law of the land.” While initially, this right applied only to nobility, over time, it was construed to apply to all men equally.

The role of the jury as an independent decider of guilt was cemented in 1670. At this time, two young Quaker activists, William Penn and William Mead, were accused of
unlawful assembly for preaching Quaker beliefs that were contrary to the views espoused by the Church of England. At their trial—which was highly publicized and closely watched by the public, the government, and the monarchy—despite urging from the judge, the jury returned verdicts of not guilty. At that time, jurors could be and routinely were fined and imprisoned if it was determined that they returned an “erroneous” verdict. Believing the jurors were wrong in refusing to convict Penn and Mead, the trial judge ordered the jurors fined and imprisoned until they paid off their fines.

Although the jurors were eventually released, one juror, Edward Bushell, filed a lawsuit over his being imprisoned. The Court of Common Pleas ruled that jurors cannot be punished for their decisions. The court’s ruling stated that jurors must be free from coercion to decide a case independent from any intimidation or pressure from the government or the court. The jury was thusly guaranteed the power and freedom to acquit individuals wrongly prosecuted by the government.

The English jury system was established in colonial America long before the signing of the U.S. Constitution. While the basic structure of the colonial jury system was similar to the English system, as time passed by and colonists viewed themselves increasingly as Americans rather than Englishmen, the American jury became more American. By the 18th century, the right to trial by jury and the protection it provided from the strong arm of the government became a factor in the colonists’ declaring independence from England.

The divergence between the two jury systems began to take root in 1735 with the trial of John Peter Zenger. Zenger was the publisher of a small newspaper in New York that was critical of the king’s appointed governor. After repeated warnings, Zenger was arrested and charged with the crime of seditious libel. Under English law, the prosecution needed only to present evidence establishing the fact that Zenger published the newspaper that contained criticisms, a fact that was not in dispute. At trial, Zenger’s attorney argued to the jury that Zenger was no different from each of them and, like all citizens, should have the right to criticize the government without fear of punishment. As such, he argued, regardless of English law, the jury should find Zenger not guilty. The jury, despite being instructed by the judge that the only issue for them to decide was whether or not Zenger published the newspaper, returned a not guilty verdict in only 5 minutes.

Following the trial of John Peter Zenger, juries in the colonies increasingly refused to convict individuals charged with political crimes. In response, the English Parliament took steps to assert control of the court and jury system, ultimately implementing a law that required jurors be selected from names provided by the English government. This assault of the colonists’ perception of justice and wresting away control of the jury system was a significant factor in the move toward independence.

By the time America gained its independence from England, the founding fathers had general distrust regarding a government’s power over individuals. In their eyes, the
The jury was an essential safeguard against the power of the state. This attitude was illustrated by Thomas Jefferson (1789), who went so far as to write, “I consider trial by jury as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution” (p. 269). Considering this was a common belief at the time the United States was founded, it is not surprising that the Constitution and the Bill of Rights made explicit mention and protection of the right to a trial by jury.

Specifically, Article III, Section 2 of the Constitution states that “the Trials of all crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.” The particular requirements attendant to trial by jury in criminal matters were expounded upon in the Sixth Amendment to the Constitution.

The Sixth Amendment guarantees that a person accused of a crime shall have the right to a trial “by an impartial jury of the State and district wherein the crime shall have been committed.” Several items with the text of the amendment are interesting to note. First, recall that a concern raised by the founding fathers’ experiences with the jury system under English rule was the use of individuals handpicked by the English Crown to make up jury pools in the colonies. In response to this, the Sixth Amendment required that a jury be impartial and not stacked by the government. Second, due to general distrust of central government, individuals were guaranteed the right to be tried in the state where the crime occurred. This assurance was seen as an important protection against the government uprooting an individual charged with a crime and having him or her tried in a distant part of the country by jurors from different backgrounds.

While the Constitution and Sixth Amendment clearly guarantee the right to trial by jury in all prosecutions, as you have probably guessed, a number of matters associated with juries were not spelled out at the founding of the nation. Items such as exactly what crimes involve the right to a jury trial, the jury’s permissible and required roles and actions during a criminal trial, and the composition of the jury, both in terms of size and the demographic background of jurors, were left to courts and legislatures to consider.

The Role of the Jury

The jury’s role in a criminal trial is both simple and complex, logical and illogical. Under the law, the jury’s role in the process is that of fact finder. Individual jurors are to consider the evidence and testimony presented to them, much of which will be conflicting, and determine what the true facts are. This involves deciding which witnesses to believe and what evidence to trust as being reliable. While the individual jurors come to personal conclusions, it is during the give-and-take of deliberations that the jury reaches the ultimate determination of what really happened in the incidents giving rise to the criminal prosecution.
The jury has virtually unlimited discretion in how it interprets the evidence and establishes the facts of a case. If members of the jury believe a witness is lying, they can discount or reject all of his or her testimony. If they don’t accept the reliability of a scientific test, they can reject its results.

There are, however, some restrictions on what a jury can do in its role as fact finder. The jury is permitted to consider only facts presented in court as evidence. Jurors are not permitted to conduct their own investigations, look up information about the case in newspapers, or read scientific journals or other scholarly materials to weigh the validity of forensic evidence. In addition, jurors are to consider only evidence properly admitted in the case. If items were raised at trial but excluded by the judge, jurors are instructed to “disregard” that evidence. In reality, it is difficult for jurors to disregard what they actually hear in court. Such a process is commonly referred to as trying to unring a bell. That said, such items are not to be considered by a jury in its deliberations, and it is expected that the group dynamic of the deliberation process will keep individuals from considering items that are deemed inappropriate.

The most important restriction on what the jury can consider in establishing the facts of a case is prohibition of their considering a defendant’s failure to testify at trial. As the Fifth Amendment gives a defendant the right to refrain from testifying, it would be wrong for a jury to infer anything from the exercise of this right. Judges normally (although not always) instruct juries not to consider the defendant’s refusal to testify, and defense attorneys will emphasize this restriction and possible reasons for their client’s silence in their closing arguments.

Finally, the jury is not permitted to consider possible punishments. As the jury is to determine the facts of the case based solely on the evidence presented, and the consequences of their verdict are clearly outside this factual determination, juries are expressly instructed not to consider what will happen to the defendant should they vote to convict. Such considerations have no impact on what happened in the past and are therefore irrelevant to a dispassionate evaluation of the evidence.

Once a jury has established the facts of a case, the jury’s job is to apply the facts to law. The law is provided to the jury in the form of jury instructions. Jury instructions are read to the jury by the judge at the close of the trial. There are two central components of jury instructions. One section of these instructions is general in nature and applies to most criminal trials. These instructions may include items related to the burden of proof, the need for guilt to be proven beyond a reasonable doubt, the presumption of innocence, and the defendant’s right not to testify along with the jury’s obligation not to consider this fact. The second component of the jury instructions involves the specific elements of the crimes and affirmative defenses that are at issue in the trial.

Jury instructions can be dozens of pages in length and very complex. Over the past 20 years, extensive efforts have been made to require that jury instructions be written in
“plain English,” language easily understood by nonattorneys (American Bar Association, 2005). Research has shown that the movement toward using jury instructions with less legalese has a significant impact on the ability of the jury to fulfill its role in the system (Lieberman & Sales, 1997; Steele & Thornburg, 1989).

**COMPARATIVE PERSPECTIVE**

**The Jury in France: The Cour d’Assises**

The only type of court in France to conduct jury trials is the cour d’assises. First established shortly after the French Revolution, the cour d’assises conducts jury trials for cases involving offenses for which the minimum punishment is 10 years’ imprisonment. The jury in France, however, is much different from American juries. In France, a jury of 12 people consists of 9 lay jurors and 3 professional judges, one of whom is the trial’s presiding judge. A majority of 8 jurors is needed to convict, and the votes of lay jurors and professional judges are given equal weight.

Following the testimony of witnesses, obtained largely through questioning by the presiding judge, the jury deliberates as a group. Rather than being given jury instructions, the jurors are simply asked to decide if they are convinced that the defendant is guilty of the crime charged. If eight or more jurors vote to convict, the jury then deliberates to determine the sentence to impose. At the sentencing stage, jurors vote for one of the possible prison sentences permitted under the law using a secret ballot, and a bare majority of seven jurors is needed to impose a given sentence.

**Limits on the Right to Trial by Jury**

As has been discussed several times throughout this book, the rights guaranteed in the Bill of Rights are not directly applicable to states but only upon the federal government. Unless the Supreme Court determines that a right is a fundamental right and applicable to the states via the 14th Amendment, the specific liberty interest involved is not germane to state prosecutions. Unless the Supreme Court considered a right to be implicit in the concept of ordered liberty and basic to our system of jurisprudence, states would not be required to respect it.

For nearly 200 years, the Supreme Court did not consider whether the Sixth Amendment right to trial by jury in criminal matters was a fundamental right and therefore applicable to state prosecutions. That being said, throughout the nation’s history, every state provided defendants charged with certain kinds of offenses with the right to a jury trial through their state constitutions. Specifically, the types of cases, however, varied from state to state. It was not until the late 1960s, at the height of the Warren Court’s expansion of defendants’ rights under the U.S. Constitution, that the Sixth Amendment right to trial by jury was made applicable to the states.
The case of *Duncan v. Louisiana* (1968) involved a prosecution for simple battery, a misdemeanor punishable by up to 2 years in prison. Under Louisiana law, only defendants charged with crimes with a potential punishment of death or imprisonment at hard labor were entitled to a jury trial. Duncan was convicted at a bench trial and sentenced to 60 days in jail. After losing his appeal to the Louisiana Supreme Court, he sought review at the U.S. Supreme Court on the grounds that his right to a trial by jury for a crime punishable by 2 years in prison was violated.

The Supreme Court agreed to hear the case and held that the right to trial by jury for serious offenses was a fundamental right and applicable to the states. For prosecutions involving petty crimes, however, the Court ruled that there was no right to a jury trial. The Court refused to define what a serious or petty offense is, holding only that the case before it, where the defendant faced up to 2 years in prison, involved a serious offense.

Two years later, the Court clarified when an offense is to be considered petty or serious. In *Baldwin v. New York* (1970), the Court ruled that “no offense can be considered petty for purposes of the right to trial by jury where incarceration for over six months is authorized.”

The Supreme Court has held firmly to this standard in considering when a person has a right to a jury trial. For example, in 1996, the Court held that a person charged with several minor, petty offenses whose cumulative period of incarceration upon conviction could be longer than 6 months is not entitled to a jury trial (*Lewis v. United States*, 1998). Similarly, the Court held in *Muniz v. Hoffman* (1975) that regardless of how large a monetary fine may be, if an offense involves a potential period of imprisonment of 6 months or less, it is considered petty.

## Jury Size and Unanimity Requirements

Two aspects of the use of juries in criminal trials not addressed in the Constitution are how many jurors are needed to conduct a fair trial and whether all of the jurors must agree on a verdict before a person can be convicted or acquitted. Before we examine the constitutional requirements regarding these items, it is important to understand why they are important.

The importance of size and unanimity requirements hinges on the role of the jury in the criminal justice system. As the jury serves as the conscience of the community and speaks for society in considering a defendant’s fate, it is important that efforts be made to ensure that the jury represents the community for which it is speaking. The arguments in favor of requiring unanimous verdicts focus on these questions: If all members of the jury who represent various aspects of the community are not persuaded by the facts presented at trial to reach a certain verdict, is it appropriate to ignore the minority opinion and allow a nonunanimous verdict? Would accepting nonunanimous verdicts
encourage the majority of jurors to ignore or discount the input of the minority? Is there a minimum number of jurors needed to foster meaningful group deliberations? Would such a system truly have the jury represent the community as a whole? On the other hand, jury trials are expensive. Requiring unanimity as opposed to a substantial majority verdict (10 to 2) does not necessarily improve the accuracy of jury verdicts and costs the taxpayers significant expense in necessary retrials.

Relatedly, the number of jurors needed for jury trial also involves a balance of expense versus fulfilling the ideal of trial by jury. As juries deliberate as a group, a process that involves significant give-and-take, it is argued that juries with more members will have more constructive deliberations. In addition, larger juries are likely to have broader demographic representation and therefore be more representative of the community they represent. On the other hand, unnecessarily large juries are an added expense to an already burdened system. Requiring larger juries also entails an increased number of citizens to be called in for jury duty and increased costs in assembling and administering juries.

These factors have been key considerations in the size and unanimity requirements established by the U.S. Supreme Court, state supreme courts, and state legislatures.

### Jury Size

Since the 14th century, juries in England have been made up of 12 jurors. The use of 12 jurors in the American colonies was generally accepted as the correct size to fairly sit in judgment at a criminal trial and was the accepted standard at the time the nation was founded. More than 200 years later, juries made up of 12 people are still the norm.

While Rule 23(b) of the Federal Rules of Criminal Procedure, which states that juries must consist of 12 persons, governs federal prosecutions, the use of 12 jurors is not constitutionally mandated. In *Williams v. Florida* (1970), the Supreme Court ruled that juries do not have to be made up of 12 people to be constitutional. In considering the matter, the Court found that the tradition of juries having 12 members was an “historical accident, wholly without significance except to mystics.” Rather, the minimum number of jurors required under the Constitution should be determined by examining the function of the jury in the American system of justice, to ensure that the judgment of the community stands between the state and the defendant. This requires that the number of jurors be “large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility of obtaining a representative cross section of the community.” The Court concluded that six-person juries did not prevent the fulfillment of this function and were therefore constitutional.

As you might have guessed, once the Court ruled that six-person juries were allowed, the Court would be asked to consider whether even smaller juries were constitutional. In *Ballew v. Georgia* (1978), the Court unanimously held that six was the fewest number of jurors permissible. The Court based this holding on research that
smaller juries have less collective recall of trial testimony, are less likely to “foster effective group deliberation,” and are less likely to be representative of the community or include racial or ethnic minorities. While acknowledging that there is no clear distinction between five- and six-person juries, the Court held that juries with fewer than six members were unconstitutional.

Despite the Court ruling that juries of fewer than 12 people are constitutional, not all states have opted to use smaller juries. Only six states use juries with fewer than 12 members for trials involving a felony, while 35 states use six- or eight-person juries to hear misdemeanors.

**Unanimous Verdicts**

As with the use of 12-person juries, the requirement that a jury reach a unanimous verdict was also firmly established in England and the United States. Having all jurors agree on a verdict serves to legitimize the decision, thereby providing society a sense that the verdict must be correct. Despite the general sense that unanimous verdicts are a necessary component of the jury system, by the 20th century, several states permitted the use of nonunanimous verdicts in criminal prosecutions.

In 1972, the Supreme Court decided two cases that held that there was no constitutional requirement that jury verdicts in criminal trials be unanimous. In *Apodaca v. Oregon* (1972), the Court held that Oregon’s law permitting 10 to 2 verdicts in noncapital cases did not diminish the function of the jury as it articulated in *Williams* 2 years before. Similarly, in *Johnson v. Louisiana* (1972), the Court held that Louisiana’s statute permitting 9 to 3 verdicts in noncapital cases did not diminish the validity or reliability of the decision. Interestingly, since *Johnson* and *Apodaca* were decided, no other states have abandoned the requirement for unanimity. Moreover, the Court has not been asked to consider the constitutionality of verdicts with less than a 75% majority, but in 1979, the Supreme Court held that when a six-person jury is used, the verdict must be unanimous (*Burch v. Louisiana*, 1979).

**The Selection of Jurors**

A critical component of any court system that uses juries to determine guilt is how individuals are selected to be jurors. The makeup of a jury has the potential to affect the outcome of an individual trial, and the representativeness of the people asked to participate in the jury system as jurors also has an impact on the perceived fairness and legitimacy of the process. In addition, as is discussed next, to satisfy the Sixth Amendment, courts and states must take steps to ensure that their jury selection system provides the defendant with a trial before an impartial jury.

Consider the unfortunate defendant depicted in in the following photo. Undoubtedly, a cat would not feel comfortable being judged by a jury of 12 dogs.
While the trial of a cat is clearly fictional, it does illustrate important concerns with who sits on juries, how they are selected, and what impact the makeup of juries has on the criminal justice system.

As you reflect upon the cat’s predicament, ask yourself, “Would a man being judged by a jury of 12 women feel as uneasy as our cat defendant? How about a member of a minority group being judged by an all-White jury? Going beyond how individual defendants feel about their jury, are such juries constitutional?” These questions are paramount in considering how jurors are selected.

The jury selection process is designed to achieve two goals. First, it must ensure that a fair cross section of the community is included as potential jurors. Second, it must permit the seating of individual jurors who are unbiased with regard to the case on which they serve. To achieve these goals, the jury selection process is performed in three stages.

**Stage 1: Developing a Master Jury List**

The first step in the jury selection process involves a jurisdiction establishing a master list, or “jury wheel,” of all potential jurors within its jurisdictional boundaries who can be chosen at random to report for jury duty as needed. While the master lists developed in the 21st century are very broad and inclusive in their scope, this was not always the case.

Up until the 1960s, most courts used a “key-man” system to choose their jurors. Under this system, court clerks and jury commissioners would consult with civic and political leaders (the “key men”) for input on who should be placed on the master list of
potential jurors. Predictably, these “blue-ribbon” juries were not representative of the community and included a disproportionately high number of middle- and upper-class middle-aged White men. As Blacks began gaining civil rights, the makeup of juries in cases involving Black defendants came under increased scrutiny to determine whether defendants were being denied their Sixth Amendment right to an “impartial jury” and their 14th Amendment right to “equal protection of the laws.” As this scrutiny increased, the use of the key-man system began to wane.

A major step toward making jury lists more representative was taken with the enactment of the **Jury Selection and Service Act.** Under this legislation, all litigants in the federal courts entitled to trial by jury have the right to juries “selected at random from a fair cross section of the community in the district or division wherein the court convenes.” Importantly, the act further provided that all citizens must have the opportunity to serve on juries. To achieve these goals, the law required that a master jury list be drawn in each jurisdiction from the list of registered or actual voters as well as from other representative sources.

Several years later, in *Taylor v. Louisiana* (1975), the Supreme Court declared that the Sixth Amendment required that juries be selected from an impartially drawn jury panel representing a cross section of the community. This mandate does not require that each jury actually be representative of the community. Rather, it requires that there be no government actions or practices that serve to systematically exclude a segment of the community. In *Taylor*, for example, the law in Louisiana provided that a woman could not be selected for jury service unless she submitted to the state a written declaration stating her desire to serve on a jury. The Supreme Court held that this process systematically excluded women, an obviously major segment of the community, from the jury pool and consequently violated the fair cross section of the community requirement.

Following the passage of the Jury Selection and Service Act and the decision in *Taylor*, most states abandoned use of the key-man system. While the Supreme Court has ruled that a key-man system may be constitutional if done in a fair manner, the use of master wheels developed pursuant to state requirements was seen as significantly fairer and is now nearly universal.

When initially established, jury wheels were developed primarily from voter registration lists. The lists were chosen largely because they are administratively convenient to determine the location of where citizens reside, thereby making organization and selection at the county or jurisdictional level easier. It was soon recognized, however, that voter registration lists tend to be unrepresentative of the community at large. As individuals who are non-White, young, poor, and less educated tend to register to vote at much lower rates than the population as a whole, members of these groups would be left off the jury wheel at a disproportionate level. In an effort to make the jury wheel more representative, most states now use a combination of source lists, including driver’s licenses, utility and telephone directories, and fishing and hunting licenses to compile a master list.
Once the components of the various source lists are merged and placed into the jury wheel, when the clerk of court or jury commissioner determines the number of jurors that will be needed for a time period, names from the wheel are selected at random and sent a summons to report for jury duty at a specific time and place in the courthouse. Not all individuals who are selected off the jury wheel and sent a summons ever report to jury duty. In fact, in many places, a majority of those summoned do not report. Juror yields, the percentage of jurors summoned who report for jury duty, have been as low as 5% in Los Angeles; 20% in Washington, DC; 22% in Maricopa County, Arizona; and 26% in Baltimore, Maryland.

These shockingly low yield rates are due to several factors. The primary reason for the low-yield rates involves the staleness of the master jury lists. The names and addresses of potential jurors are obtained from lists updated on a periodic basis. Depending on the source and how often the list is updated, a significant portion of individuals will no longer reside at the address indicated on the master list. As jury summonses are generally not forwarded to a different address, these summonses get returned as undeliverable. In many places, one out of every four jury summonses sent out are returned to the court as undeliverable.

A second cause for low juror yields is the presence of statutory exemptions. Half of American states have laws stating that members of certain professions are exempt from serving as jurors. These professions generally involve public safety responsibilities or direct working with the criminal justice system. As can be seen in Table 9.1, others involve less obvious professions or even classes of personal responsibilities. Regardless of the merits of specific exemptions, the names of exempt persons are still kept on the jury wheel, and they are still likely to receive a jury summons. While they are able to notify the court of their exempt status without having to physically report to jury duty, the fact that summonses are still sent to them adds to the costs of the jury system and low juror yields.

Beyond these two factors, low juror yields are related to the inconvenience of jury service. Whether it be the inability to miss work or school to attend, the unavailability of transportation or parking, the low amount of compensation paid, or anticipated unpleasantness, perceived hardships lower juror yields. Over the past several decades, states have taken steps to address these items. In a number of states, jury fees have been increased to $50 a day, with additional payment (up to $300 per day) for trials that last longer than 1 week. Jurors are now typically provided reimbursement for transportation costs associated with jury duty and are provided with free parking. Many courts have implemented on-site child care programs or provide vouchers to help pay for child care if needed. Last, a number of courts have implemented systems in which jury service lasts only one day or one trial, eliminating lengthy terms of jury service that have caused problems in the past. These measures have a positive effect on juror yields and have been part of an overall movement to reform the jury system, which is discussed later in this chapter.
Stage 2: From Venire to Jury Panel

The group of individuals who report for jury duty at a given time is known as the venire, or jury pool. In midsize and large jurisdictions, it is typical for more than one jury trial to be scheduled to begin on the same day or in the same week. To fill this need, dozens and

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**Table 9.1  State Exemptions From Jury Service**

<table>
<thead>
<tr>
<th>Exemption</th>
<th>Number of States With Exemption</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political officeholders</td>
<td>16</td>
</tr>
<tr>
<td>Law enforcement</td>
<td>12</td>
</tr>
<tr>
<td>Judicial officers</td>
<td>9</td>
</tr>
<tr>
<td>Health care professionals (including dentists and veterinarians)</td>
<td>7</td>
</tr>
<tr>
<td>Sole caregivers (child care, elder care, and special needs persons)</td>
<td>7</td>
</tr>
<tr>
<td>Attorneys</td>
<td>6</td>
</tr>
<tr>
<td>Active military</td>
<td>5</td>
</tr>
<tr>
<td>Other exemptions, including clergy, teachers, journalists, mariners, accountants, and individuals with specific religious designations</td>
<td>12</td>
</tr>
</tbody>
</table>

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**CURRENT CONTROVERSY**

As discussed in this chapter, a significant percentage of individuals summoned to report for jury duty fail to report as directed. The lack of jurors has caused the rescheduling of trials, increasing the costs of administering the jury system in courts across the nation. In an effort to decrease the number of no-shows, more and more judges are taking the drastic step of holding people who do not report for jury duty in contempt of court. Along with contempt citations, judges have issued arrest warrants, and in rare instances, individuals who ignored repeated summonses and entreaties have been sentenced to jail.

These actions by courts have received mixed reviews. On one hand, crackdowns on those not reporting for jury duty have been associated with increased participation rates in the weeks and months following the actions. On the other hand, individuals, some of whom were exempt from jury duty or who did not receive a jury summons, have been shocked to be served with arrest warrants and fined up to $100 per day. An additional concern is the effect of having individuals who are “coerced” into appearing for jury duty actually sit on a jury. It is possible that these individuals will be bitter and unhappy about being on a jury and will take their anger out on one of the parties.

even hundreds of summoned jurors may be asked to report to the courthouse at the same time. Upon reporting, members of the venire are likely to be asked to fill out a questionnaire and administrative paperwork and to receive information about matters such as parking, scheduling, and the payment of fees for jury service. In addition, they are given an orientation about the jury system, their role as jurors, and what they should expect.

Following these preliminary matters, members of the venire wait in the jury assembly room until the jury commissioner’s staff is given notice that a court is ready to select a jury. At this point, a set number of members of the venire are selected at random to report to the given courtroom. This group of individuals is referred to as the jury panel. While the size of a jury panel will vary depending on the number of jurors needed and the nature of the case, it generally ranges from 20 people for cases using six-person juries to 40 people when a 12-person jury is to be selected.

### Stage 3: Voir Dire

Once prospective jurors report to a courtroom, they participate in what is known as voir dire ("to tell the truth"). The voir dire involves prospective jurors being questioned under oath by the attorneys and the judge to help determine their appropriateness to sit as a juror for a specific trial. The goal is to select jurors who can consider the case in a fair, impartial, and unbiased manner.

At the beginning of voir dire, the judge is likely to introduce the jury to the attorneys and the defendant. The judge will also read the names of people who are expected to testify at the trial. Jurors who know any of these individuals are asked to make this fact known and are typically removed from the jury panel. Next, the judge will explain the nature of the offense and acts involved in the case as well as ask if there is anything about these items that might make it difficult to consider the evidence and render a verdict fairly and impartially. For example, a person who is a member of Mothers Against Drunk Driving may find it difficult to be impartial in a prosecution for driving while intoxicated. Jurors who acknowledge being unable to consider the evidence and law presented to them impartially are likely to be removed from the jury panel.

The dismissal of a prospective juror from a jury panel because he or she is thought to be biased and unable to render fair and impartial judgment is known as a challenge for cause. During the voir dire, either the prosecution or defense can make a motion to challenge a juror for cause. If the judge agrees with the challenge, she or he will uphold it and remove the juror from the jury panel. As the goal of voir dire is to seat a fair and impartial jury, lawyers are allowed to challenge an unlimited number of potential jurors for cause.

A special class of cases in which challenges for cause are both critical and controversial involves murder prosecutions where the death penalty is a possible punishment. In an effort to seat a jury that can consider guilt or innocence in cases involving the death penalty, prospective jurors in capital cases go through a process known as death qualification.
Given the nature of the punishment, cases involving the death penalty are the most serious faced by the justice system. As such, jury selection in capital cases is often done individually (one juror at a time) and can be very time-consuming and detailed, often taking weeks to complete. A primary reason for this is the need to select a death-qualified jury.

A death-qualified jury is made up of jurors not categorically for or against the imposition of capital punishment for murder. In the case of *Wainwright v. Witt* (1985), the Supreme Court held that if the trial court judge determines during voir dire that a juror’s attitude toward the death penalty would *substantially impair* his or her ability to deliberate and render a verdict based on the law and the evidence, the juror should be excluded from the jury for cause. This standard has been highly controversial because it has the effect of removing many people generally opposed to the death penalty from sitting on juries in capital cases because they honestly state that this belief may (although would not definitely) affect their decision.

In capital as well as all criminal jury trials, once the attorneys and judge have completed questioning the prospective jurors and all challenges for cause have been ruled upon, the parties are allowed to make a number of peremptory challenges toward jurors. **Peremptory challenges** involve an attorney dismissing a prospective juror for no particular reason. These challenges may be based on a hunch, on a juror’s professional or educational background, or on a perceived bias that did not rise to the level to mandate removal for cause. For example, a defendant may not want a person whose father was a police officer to serve on the jury. Conversely, the prosecution may not want a person who had previously been acquitted of driving while intoxicated to be a juror for a similar case.

The number of peremptory challenges allowed is generally regulated by state statute. Typically, the prosecution and defense in noncapital cases are provided with four to six challenges. Frequently, however, this number is altered through an agreement between the parties and the judge.

While attorneys are given wide discretion in deciding how to use the peremptory challenges, this discretion is not limitless. In 1986, the Supreme Court, in the case of *Batson v. Kentucky*, held that a prosecutor’s use of peremptory challenges based on race violates the equal protection clause of the 14th Amendment. In *Batson*, the prosecution used its peremptory challenges to remove all four Black members of the jury panel. Batson’s attorney objected, arguing that the deliberate removal of all members of the defendant’s race violated his rights to a jury selected from a fair cross section of the community as well as equal protection under the law. The judge denied the motion, stating that the parties were entitled to use their peremptory challenges as they saw fit. Batson was subsequently convicted by an all-White jury.

The Supreme Court held that although a defendant does not have a right to a jury composed of any particular racial makeup, the 14th Amendment does prohibit the prosecution from excluding potential jurors solely on the basis of their race. If it is alleged that the prosecution systematically used peremptory challenges to remove potential members of the jury based on their race, the prosecution must be able to present a race-neutral basis
for the challenge. If the judge is satisfied that the challenge was made for a reason not related to the juror's race, the challenge will be permitted. If the reason is not accepted, the removed juror will be placed back on the jury. In practice, objections based on *Batson* are rarely sustained. Regardless of appearances, race is rarely the sole basis to want a person off of a jury, and as long as a race-neutral reason is articulated, the Batson objection will be denied.

Since 1986, the *Batson* rule has been expanded significantly. In 1992, the Supreme Court held that the rule applies to the prosecution as well as the defense (*Georgia v. McCollum*, 1992). The Court has also found that in addition to race, the use of peremptory challenges to remove potential jurors based on the gender of a juror is also unconstitutional (*J. E. B. v. Alabama*, 1994).

### Reforms to the Jury System

Over the past quarter century, several aspects of the jury system have been of concern to various groups of citizens, policy makers, and scholars. Seemingly irrational verdicts in high-profile trials have given rise to concern over the competence of jurors. Shockingly low juror yield and participation rates in many cities have raised concerns about the continued viability of the jury system.

Since the early 1990s, efforts have been under way in a number of states to reform a number of aspects of the jury system. In this period, 38 states have created statewide commissions to consider ways of improving the jury system. These commissions have made various recommendations to state policy makers, resulting in a myriad of reforms. The reforms can be placed into two general categories: jury management and trial practices. Several of the jury management reforms have been discussed previously in this chapter.

A central theme among the trial practices reforms has been to make changes that enhance the ability of jurors to accurately consider the evidence presented to them and apply it to the law. The following are reforms being used by a number of courts around the nation in criminal trials.

### Allowing Jurors to Take Notes

A major jury reform over the past 20 years has been permitting jurors to take notes during trial. It may seem logical to you that jurors should be permitted to take notes during a trial for use during later deliberations, but historically, under the common law, jurors were prohibited from taking notes during trial. The reason for this was twofold. First, as a practical matter, before the 20th century, most jurors were illiterate and therefore unable to take notes. This led to a legitimate concern that those jurors who could and did take notes would dominate the jury's deliberations.

While concerns still exist that jurors who have detailed notes from the trial will dominate deliberations, with near universal literacy, today it is assumed that all jurors
have the ability to take notes. Not surprisingly, most courts allow jurors to take notes during criminal trials.

The drive toward this reform is based on research that has shown that there are a number of benefits to allowing jurors to take notes (Horowitz & Forster Lee, 2003; Rosenhan, Eisner, & Robinson, 1994). These benefits include increased active participation of jurors during testimony and deliberations, increased levels of alertness and focus during the trial, and increased confidence in the factual accuracy of the jury’s verdict.

**Allowing Jurors to Question Witnesses**

One of the most controversial jury reforms involves allowing jurors to submit questions to be asked to witnesses. The basis for allowing jurors to question witnesses is the fact that as the ultimate fact finders, it would seem logical that they should be allowed to ask witnesses what they consider to be important. Moreover, it encourages active listening and engagement.

Allowing jurors to question witnesses is not without potential problems and must be facilitated carefully. Just as with traditional testimony, questions posed by jurors should only be asked if they are relevant and likely to elicit admissible testimony. Frequently, questions jurors seek to ask were deliberately omitted from an attorney’s questioning because they would likely lead to answers that would not be admissible into evidence.

Due to this problem, it is important that juror questions be submitted to the judge in writing rather than simply posed by a juror directly to a witness. The judge can then consult with the attorneys and decide if the question should be posed to the witness. If it is appropriate, the judge should ask the question. If not, the judge should explain to the jury why the court decided not to ask the question. This process can be time-consuming and has the potential to bog down a trial. This fact must be weighed against the potential benefits of permitting jurors to ask questions of witnesses.

**Providing Written Copies of Instructions for Each Juror**

Since the 1990s, a number of courts have begun providing each juror with an individual copy of the jury instructions to read along when the court presents them orally and to use during deliberations. As most people comprehend oral instructions better when they are able to read along, providing each juror with written instructions is likely to improve the quality of deliberations. Furthermore, letting each juror have a copy of the jury instructions during deliberations allows each juror equal access to them, thereby improving the deliberative process.

**Providing Jurors With a Trial Notebook**

In recent years, courts have begun providing jurors with individual trial notebooks. Trial notebooks contain items such as jury instructions, a list of witnesses with a photograph,
and copies of key documents and exhibits that have been admitted into evidence. Having these items in one place for each juror makes it easier to follow the trial, recall specific testimony, and conduct deliberations more effectively and efficiently.

**The Use of Jury Reforms**

In an effort to develop a picture of the status of jury reforms across the country, the National Center for State Courts, Center for Jury Studies conducted the *State-of-the-States Survey of Jury Improvement Effort* (National Center for State Courts, 2007). A central component of this research involved surveying nearly 12,000 judges and attorneys from across the country regarding practices related to jury reform efforts. Table 9.2 presents the outcome of this survey.

As is evident from the results, there are mixed levels of use of jury reforms. Two items stand out from these findings. First is the fact that 31.8% of respondents reported that jurors were not permitted to take notes during the trial. Second, in 31.6% of the cases, the jury was not given written copies of the jury instructions to use during its deliberations. Given the seeming unobtrusiveness of providing these conveniences to jurors, these findings are somewhat startling.

The implementation of jury reforms varies greatly across the country. While some states, such as Arizona, Colorado, and Indiana, have been aggressive in implementing reforms, a few jury reforms have been adopted by every state. Moreover, it is important to bear in mind that regardless of changes in state law, individual judges in local courts from across the nation have implemented a number of jury reforms.

Table 9.3 breaks down the results from lawyer and judge surveys in the *State-of-the-States Survey of Jury Improvement Effort* for certain reform-related items. As you can see, the practices of permitting jurors to take notes, allowing jurors to ask questions, and providing each juror with written jury instructions are used to varying degrees in each state. Importantly, the results of the survey indicate that individual judges in each state may permit one item to be used during a trial but not others.

<table>
<thead>
<tr>
<th>Trial Practice</th>
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<tbody>
<tr>
<td>Jurors allowed to take notes</td>
<td>69.2</td>
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<tr>
<td>Jurors given notebook</td>
<td>6.2</td>
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<tr>
<td>Jurors allowed to ask questions in criminal trial</td>
<td>13.8</td>
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<tr>
<td>Jury provided with at least one copy of jury instructions</td>
<td>69.4</td>
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<tr>
<td>All jurors given copy of written instructions</td>
<td>33.6</td>
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<td>State</td>
<td>Ask Questions</td>
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<tr>
<td>Alabama</td>
<td>3.5</td>
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<td>Alaska</td>
<td>14.2</td>
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<td>Arizona</td>
<td>91.3</td>
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<tr>
<td>Arkansas</td>
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<td>Colorado</td>
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<td>Delaware</td>
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<td>Hawaii</td>
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<td>Idaho</td>
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<td>Illinois</td>
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<td>Indiana</td>
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<td>Missouri</td>
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Rebecca M. Hayes-Smith, Lora M. Levett

The so-called “CSI effect” hypothesizes that jurors who watch television shows such as CSI will expect strong forensic evidence to be presented during the trial, and if the forensic evidence is not present or seen as weak then they will not be convinced that the defendant actually committed the crime. To test if in fact a CSI effect exists, Professors Hayes-Smith and Levett conducted a study that examined the impact of watching crime-related television shows, such as CSI, on jurors’ considerations of evidence and their verdicts.

The study used actual jurors who reported to a courthouse in a southern city for jury duty but were dismissed from jury selection. To measure their television watching behavior, the jurors were asked to report how many hours, in general, they watch television per day and per week and how many hours of crime-related television shows they watch per day and per week. The jurors were then presented with a trial vignette based on an actual case, which provided detailed information about the case. In order to determine how different levels of forensic evidence may shape the juror’s opinions, the amount of forensic evidence described in the vignette was varied across three different levels: no forensic evidence, low forensic evidence, and high forensic evidence. However, the other details of the case remained constant throughout each vignette. After reading the trial vignette, the jurors were asked to give a verdict of guilty or not guilty, how confident they were with their verdict, and how confident they were that the defendant had committed the crime. The jurors were also asked to rate the strength of the evidence that was described in their vignette.

The authors found that the jurors’ television watching behavior had a strong impact on their decisions concerning considerations of evidence and their verdicts. Jurors who reported watching crime dramas did in fact perceive the evidence in the cases differently from those jurors who did not watch crime dramas. Jurors who reported watching more hours of crime dramas rated themselves as less confident in their verdict when there was no forensic evidence compared to jurors who watched fewer hours of crime dramas, thus supporting the idea of the CSI effect. However, there was also some support for the theory that just watching more television in general is responsible for differences in jurors’ perceptions of the evidence. For example, jurors who watched more hours of television in general were less likely to give a guilty verdict when there was little forensic evidence compared to those jurors who watched less television. It is possible that being exposed to more hours of television in general, not just crime dramas, actually results in the skewing of a person’s overall perception of reality.
Section II Courtroom Actors and the Courtroom Workgroup

Jury Nullification

At the beginning of this chapter, we noted that the jury’s role in the trial process is to apply the facts presented during the trial to the law as given by the judge. While jurors are instructed to follow the law as given to them by the judge, at times jurors are faced with situations involving a particular case in which they believe strictly applying the law would bring about an injustice. In such circumstances, what can and should jurors do?

The answer to this question is not simple and involves an issue that dates back to the trial of John Peter Zenger. Recall the jury in Zenger’s trial for seditious libel refused to return a guilty verdict despite indisputable evidence that Zenger violated the law as it was written. The jury did this because it felt Zenger had a right to publish a newspaper and, as a jury, it would not hold him criminally responsible for doing so.

As Justice White wrote in Duncan v. Louisiana, the jury in a criminal trial serves as the conscience of the community. Rather than the government having the final say regarding whether a person has violated a criminal law, it is the jury, made up of typical citizens, that has the job of finding a defendant guilty of a criminal act. “If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it” (Duncan v. Louisiana, 1968). The use of ordinary people, who rather than strictly applying the law as provided may allow sympathy and common sense to enter into their deliberations and verdict, is a foundation of the jury system. It has also caused problems for the courts in the form of jury nullification.

Jury nullification occurs when a jury, based on its sense of justice and fairness, refuses to abide by law and convict in a particular case even though the defendant is unquestionably guilty under the law. It occurs when a jury refuses “to apply a law in situations where strict application of the law would lead to an unjust or inequitable result” (Scheflin & Van Dyke, 1980, p 54). What makes jury nullification so troubling for courts is the fact that the exercise of this authority is unreviewable due to the constitutional prohibition against “double jeopardy”—the retrying of an acquitted defendant for the same offense. It is important to note that jury nullification cannot be used to convict a person despite a lack of evidence. If there is insufficient evidence to sustain a conviction beyond a reasonable doubt and a jury returns a guilty verdict, the judge has a duty to override the verdict and enter a judgment of acquittal.

While jury nullification is often viewed negatively, there are times when a jury’s exercise of its nullification power is desirable. Examples include juries refusing to convict in cases involving northerners violating fugitive slave laws by harboring runaway slaves in the 1800s, Vietnam War protesters who refused to register for the draft, and battered women who kill their batterer in a situation not falling under the doctrine of self-defense. The use of nullification by a jury is rare, but it does occur. The types of cases giving rise to jury nullification today are likely to involve the medical use of marijuana, mercy killings or euthanasia, and instances when the jury knows or senses that a defendant will face
a unfairly long prison sentence if convicted due to “three strikes and you’re out” laws and other offenses involving mandatory sentences.

Despite its occasional benevolent and appropriate use, jury nullification is viewed harshly by American courts. Jurors are told they must apply the law as contained in the jury instructions. In fact, if a juror or jury asks the judge about jury nullification and their right to go beyond the letter of the law in reaching a verdict, judges tell the jury that jury nullification is not allowed and that they must follow the law. Moreover, jurors who refuse to apply the law may be removed from the jury if this fact is uncovered prior to a verdict being reached (United States v. Thomas, 1997).

While a legal argument can be made as to why jurors should be instructed about their right and power to partake in jury nullification, nearly all federal and state courts that have considered the issue have held that such an instruction is not required by the Constitution (Brody, 1995; Conrad, 1998). While it is acknowledged that jury nullification is appropriate in rare instances, courts are loath to encourage it and are willing to accept its occurrence when juries come to such a result on their own. For an excellent depiction of jury nullification in action, the 1986 episode of the PBS series Frontline titled “Inside the Jury Room” is highly recommended. The report presents the deliberations of an actual jury in which jury nullification becomes a central issue.

CURRENT CONTROVERSY
On June 18, 2012, New Hampshire Governor John Lynch signed into law HB 146 which made New Hampshire the first state to explicitly recognize that jurors have a right to practice jury nullification. The New Hampshire jury nullification law reads, in relevant part: “In all criminal proceedings the court shall permit the defense to inform the jury of its right to judge the facts and the application of the law in relation to the facts in controversy.” While many state legislatures have considered similar bills over the past several decades, states universally refused to adopt them as law. Now that New Hampshire has done so, it will be very interesting to see if it has any impact on the operation of the court system.

MOVIES AND THE COURTS
12 Angry Men (1957)
Jury deliberations are one of the least studied aspects of the court system; for good reason, as they occur in secret. Perhaps the most famous fictional depiction of the jury room is 12 Angry Men, a film that takes place almost entirely within the jury room. It involves a jury deliberating on the guilt of a young man charged with the first-degree murder of his father.

(Continued)
Since colonial times, the jury has played an important role in shaping how the American court system is viewed by society. The use of a jury, made up of average citizens, to determine the guilt of a person charged with committing a crime helps infuse the conscience and values of the community into how the criminal law is to be enforced. Regardless of the aims and actions of the government, if a body of average citizens refuses to find a defendant guilty, the government is powerless to impose a conviction and punishment.

While the philosophical underpinning of the right to trial by jury has stayed the same for more than 200 years, significant reform to the jury system has taken place, particularly over the past several decades. By implementing reforms designed to improve the ability of jurors to digest and consider testimony, physical evidence, and the law, states are striving to make serving on a jury less frustrating and more rewarding. As jury trials are an essential part of the criminal justice system, the implementation of reforms to improve their functionality, effectiveness, and efficiency is critical and necessary.

**DISCUSSION QUESTIONS**

1. Should juries be given less discretion to interpret evidence and establish the facts of the case? How do you ensure that a juror doesn’t get influenced by the media?

2. Should the right to a trial by jury be limited to only serious offenses, or should it be guaranteed regardless of the level of offense?
3. What are your thoughts on the way the Supreme Court has attempted to define what constitutes a serious offense versus a petty crime? Should there be a more concrete definition?

4. Should all verdicts be required to be unanimous or only a substantial majority? What are the advantages and disadvantages to both?

5. What are your thoughts on the “key-man” system for selecting juries versus current methods?

6. Should statutory exemptions for serving on a jury be declared illegal on a nationwide basis rather than letting each state choose whether to have this type of law?

7. Should jurors be allowed to take notes, or can this distract them from what’s going on in the trial?

8. Should there be greater attention paid to the racial and gender makeup of juries to ensure that it actually reflects every viewpoint of the community?

9. Should jurors be provided a copy of the jury instructions? What do you see as the advantages of giving these to them? Disadvantages?

10. Given the low level of juror yield rates, what else do you think should be done to improve the level of citizen participation?

11. If a jury serves as the conscience of the community, what can jurors do if they feel that applying the law would bring about injustice? Should they simply disregard the law and vote based on their own belief?

12. Is jury nullification always a bad thing? When might it be a correct outcome?

**KEY TERMS**

Challenge for cause  Jury Selection and Service Act  Petty offenses  Trial by ordeal
Fundamental right  “Key-man” system  Venire
Jury nullification  Master list/“jury wheel”  Voir dire
Jury panel  Peremptory challenge

**INTERNET SITES**

American Judicature Society’s National Jury Center: http://www.ajs.org/jc/index.asp
National Center for State Courts, Center for Jury Studies: http://www.ncsconline.org/D_Research/cjs/
CASES CITED


REFERENCES/FURTHER READING


STUDENT STUDY SITE

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