chapter 1

Institutions and Processes

A. THE STRUCTURE OF THE CRIMINAL JUSTICE SYSTEM

NOTES[1]

1. A general view. The criminal justice system is society's primary mechanism for enforcing standards of conduct designed to protect the safety and security of individuals and the community. Yet to speak of a criminal justice "system" is something of a misnomer. To be sure, the various agencies and institutions of criminal justice are highly interdependent, and efforts to address problems in one of them are likely to fail if they do not take into account the repercussions of reform on all the others. But the agencies of criminal justice are not part of a single, coherent organization. Their relationships with one another often are haphazard and uncoordinated.

Police, prosecutors, courts and correctional agencies inevitably interact. The results of police effort—suspects arrested—are passed on to prosecutors for the filing of charges, those charged move into the judicial system for adjudication, and those convicted and sentenced become the responsibility of the probation services, jails, and prisons. Yet each of these steps in the process is managed by an official who is, to a considerable degree, independent of the others, and the officials are responsible to different groups of constituents. There are some 40,000 independent police departments in the country, roughly one for every city and town in the nation. The chief of police is typically appointed by a mayor, who in turn is elected by the voters of the *municipality*. But the chief prosecutor typically is not appointed by or responsible to the mayor. The prosecutor is usually an independent elected official; she may or may not represent the same political party as the mayor. Either way she may be a political rival, and in most instances, she is elected by the voters of the *county*, a constituency that may be larger (as in the Chicago area) or smaller (as in

1. Except as otherwise noted, the material in these Notes is drawn from U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—2003 (2004); Federal Bureau of Investigation, Crime in the United States—2005 (Preliminary) (2006); id., Crime in the United States—2004 (2005); and President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society 7-12, 91-107, 127-137, 141-150 (1967).

New York City) than the constituency that elects the mayor. Judges are often elected on a countywide basis, but sometimes they are appointed by the governor of the *state.* The agencies responsible for punishment and corrections are similarly fractured. Probation services and jails are typically run and paid for by the county, but prisons and parole systems are run and paid for by the state.

In practice, criminal justice authority is even more dispersed and decentralized than this oversimplified picture suggests. State governments have their own police forces (state troopers), many cities have independent police agencies with specialized missions (transit police, housing police), and most cities and states have independent prosecuting authorities with specialized mandates (a city department for municipal code enforcement, a state attorney general's office). Alongside all of this, and entirely independent of it, is the powerful engine of *federal* law enforcement. The federal process (again, it would be an exaggeration to call it a "system") has its own complement of prosecutors (U.S. Attorneys, centrally supervised, to a degree, by the Department of Justice), independent judges (appointed for life terms by the president, on the advice and consent of the Senate), and correctional authorities (the U.S. Probation Service, responsible to the courts, and the Federal Bureau of Prisons, within the Department of Justice). For its police force, the federal government of course has the FBI, responsible to the Department of Justice, but that is not all: Also of great importance are the Drug Enforcement Administration (DEA), also in the Department of Justice; the Bureau of Alcohol, Tobacco and Firearms (ATF) in the Treasury Department; the bureaus of Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) in the Department of Homeland Security; and the Enforcement Division of the Securities and Exchange Commission (SEC) for certain white collar offenses — to name only a few.

The criminal justice system, in short, is extremely *decentralized.* Many view the uncoordinated, overlapping, and conflicting responsibilities of its various agencies as inefficient and even irrational. Others view the same chaotic arrangement as a valuable mechanism for preventing the accumulation and centralization of power, with its accompanying dangers of abuse. Either way, extreme decentralization is and will remain a dominant fact of life in American criminal justice. As a Presidential Commission stated in 1967:[2]

> What most significantly distinguishes the system of one country from that of another is the extent and the form of the protections it offers individuals in the process of determining guilt and imposing punishment. Our system of justice deliberately sacrifices much in efficiency and even in effectiveness in order to preserve local autonomy and to protect the individual.

Three other features of American criminal justice deserve particular mention. First, the agencies of criminal justice must deal with what is, by any measure, a *high volume of cases.* As a result, although the mission of the criminal process is to deliver carefully individualized justice, in practice "the process is in fact one of mass production."[3] Second, the agencies of criminal justice face a

2. President's Commission, supra note 1, at 12.

3. Geoffrey C. Hazard, Jr., Criminal Justice System: Overview, in 2 Encyclopedia of Crime and Justice 450, 454 (S.H. Kadish, ed. 1983).

chronic shortage of resources and personnel. The interaction of these two factors, heavy volume and restricted resources, multiplies the pressures for a mass-production approach and mandates a high degree of selectivity in choosing the individuals who will be arrested, charged, convicted, and sentenced at the highest available levels.

Finally, that selection process operates through the exercise of broad, largely unguided and largely uncontrolled *discretion.* Within police departments, decisions about what crimes to target and which individuals to arrest are often left to the personal judgment of the police officer on the beat. Within the prosecutor's office, charging decisions are often left to the personal judgment of the assistant district attorney assigned to the case, subject to guidance and review that is extensive in some offices but virtually nonexistent in others. The result can be wide variation in the criminal justice treatment of similarly situated offenders and outcomes determined by many considerations extraneous to the formal criteria of the law on the books. We examine the phenomenon of discretion is some detail in Chapter 10, infra.

2. The police. To an important extent, crimes are defined, in practice, by the police officer on the beat. Because officers cannot possibly arrest all the offenders they encounter, they must decide which scuffles warrant an arrest for assault. They must decide when a juvenile responsible for vandalism should be arrested rather than merely warned or taken home to his parents. Sometimes the police chief or precinct captain sets guidelines. More often, the decision is made ad hoc by the individual officer. It may or may not be the same as the decisions made in similar circumstances by other officers or even by the same officer at other times.

3. Prosecutors. The decision whether there is sufficient evidence to send a case to trial is initially made by the prosecutor. Although that judgment must be approved by a judge at a preliminary hearing or by a grand jury, these steps are largely formalities, because the level of proof required at those stages is low. The grand jury and the preliminary-hearing judge almost always ratify the prosecutor's decision. As a result, the prosecutor wields enormous power, deciding whether to press or drop a case, whether to file the highest possible charges or something less, and whether to reduce the charges after they are filed. Only the judge, and sometimes not even the judge, is as important as the prosecutor.

Yet many prosecutors serve only part-time, while conducting a private law practice on the side. And whether full-time or part-time, prosecutors generally are elected on a partisan political basis and serve for relatively short terms. Often the position serves as a stepping-stone to higher political office. Only the federal government and four states (Alaska, Connecticut, Delaware, and New Jersey) choose their chief prosecutors by appointment. The system of choosing chief prosecutors by popular election (rather than by professional training and advancement) is a distinctively American practice, virtually unknown elsewhere in the world.

Large cities always have a chief prosecutor employed full-time and a large staff of full-time assistants, but 25 percent of American jurisdictions do not have

a full-time chief prosecutor, and 35 percent of the chief prosecutors have no full-time assistant prosecutors.[4]

4. Defense counsel. Only about 20 percent of criminal defendants have the means to hire their own lawyers, so the kind of defense representation commonly seen in civil litigation is the exception on the criminal side. Five distinct criminal-defense systems are in use — two for defendants who can afford to retain counsel and three for those who cannot.

In the approach most analogous to representation in major tort and contract suits, a defendant of substantial means retains a highly experienced attorney (or team of attorneys), agreeing to compensate them on an hourly basis or paying up front a substantial retainer (often in the range of $100,000 or more). This approach is often used in white-collar and political-corruption cases, but overall it is the rare exception, even for the minority of defendants who can afford to retain counsel at all.

Far more common for these nonindigent defendants is a second system, in which a person with limited financial resources retains an attorney by paying in advance a modest fee (a few hundred or a few thousand dollars) that will constitute the lawyer's sole compensation. Because rules of court typically prevent a retained attorney from withdrawing from a case once an appearance is entered, the lawyer's compensation under this approach remains identical, regardless of whether the defendant quickly accepts a guilty plea offer, prefers to negotiate at length, or seeks to present an elaborate defense at trial. Attorneys who defend cases under this arrangement must manage their ethical obligation to provide vigorous representation along with their personal need to avoid strategies that require large amounts of uncompensated time.

For indigent defendants, one common approach is the *appointed counsel system*: A judge or court official selects defense counsel from a list of attorneys in private practice. The system of conscripting these lawyers to serve "pro bono," without compensation, still exists in a few jurisdictions but is now rare. Instead, appointed attorneys typically are compensated at a fixed hourly rate up to a predetermined maximum. The maximum usually is higher for felonies than for misdemeanors, but it usually is not higher for complex cases that go to trial than for simple cases that plead out quickly. In a second approach, the *contract system*, a lawyer or group of lawyers in private practice agree that over the course of a year, in return for a substantial retainer paid by the government, they will represent a specified number of indigent criminal defendants along with their own paying clients. Again, the attorney's compensation for the indigent defense side of her work remains independent of the time and effort spent on the representation. Finally, in the *defender system*, often used in the larger cities, an agency funded by the city, county, or state (sometimes with partial support from private sources) represents most or all criminal defendants in the jurisdiction. Its staff attorneys are paid an annual salary and usually serve full-time. As a result, they are not under personal financial pressure to control the time spent on individual cases, and many defender offices are organized to permit a team of attorneys, social workers, and investigators to work intensively on felony jury

4. See U.S. Dept. of Justice, Bureau of Justice Statistics, Prosecutors in State Courts, 2001 (May 2002), pp. 1-2.

trials and other high-stakes cases. Many defender offices, however, are characterized by high caseloads and strong pressures for staff attorneys to budget their time carefully.

5. Judges. The mechanism for selecting judges varies from jurisdiction to jurisdiction, and some states use different methods of selection for appellate judges than for lower court judges. In 21 states, judges are chosen by popular election. In 29 states judges are initially appointed either by the governor or the legislature, but in some of these states they must run for election after serving their first term. Thus, in the great majority of states, judges must stand for election at some point. In some states a nonpartisan screening committee identifies well-qualified candidates, but that safeguard of competence and quality is not in widespread use, nor is it always effective in jurisdictions where it exists. Political party influence and, more recently, expensive television advertising are widely used in the effort to achieve electoral success. Among Western democracies, the United States is virtually unique in selecting its judges predominantly by popular election.

Congestion, delay, and hasty decisions when a case is finally ready for disposition are especially common in the lower criminal courts where misdemeanors and "petty offenses" are handled. These courts process the overwhelming majority of offenses and offenders, yet they are chronically understaffed. In many jurisdictions, judges in the lower courts must handle a hundred cases or more in a single day. Observers report that speed becomes more important than care, and casual out-of-court bargains are often substituted for adjudication.[5] In 1998, American courts achieved an average of 3,766 criminal case dispositions per judge. Federal judges have, on average, only 105 criminal cases per year, but the average number of felony case filings per judge in a single year (1995) was 487 in Los Angeles, 516 in San Francisco, and 776 in Denver.

6. Corrections. Although it remains customary to identify the agency responsible for a state's prison system as the "Department of Corrections," incarceration no longer aims primarily to "correct" (i.e., rehabilitate) offenders. Punishment itself and incapacitation have become the system's principal purposes. There are now more than 2.1 million prisoners in federal and state custody at any given time, and these account for only 30 percent of the offenders under supervision; more than 4.8 million offenders are on probation or parole.

The population subject to criminal justice supervision has grown at a striking rate, and each year new records are set. At midyear 2005, 1 of every 31 American adults was subject to some form of criminal justice system control, including over 4 million offenders on probation (a 35 percent increase since 1995) and 765,000 offenders on parole (a 13 percent increase since 1995). The growth in incarceration has been especially dramatic. At midyear 2005, there were over 1.4 million offenders in state or federal prisons (a 32 percent increase since 1995) and 748,000 inmates in local jails (a 48 percent increase since 1995).[6] Compared to the figures for 1980, there have been increases of 250 percent in

5. For a recent, vivid account, see Steve Bogira, Courtroom 302 (2005).

6. See U.S. Dept. of Justice, Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 2005 (May 2006), pp. 1-2.

parole, 270 percent in probation, 290 percent in jail populations and 345 percent in prison populations.[7] The United States now imprisons more people per capita than any country of Europe, including Russia.[8] Some observers believe that America's high rate of imprisonment is a consequence of our greater volume of serious crime and the more extensive reach of our criminal law; others argue that the phenomenon is primarily a result of the prevalence of more punitive attitudes in American culture and of more aggressive policies in the enforcement of our drug laws.[9]

Increases in incarceration were especially steep during the 1980s and early 1990s; the rate of increase in the correctional population has slowed in the past decade. Nonetheless, the trend has been steadily in the upward direction, despite the fact that crime rates have not increased substantially since the 1970s. The rate of violent crime remained roughly constant during the 1980s, while the rate of property crime actually declined; crime rates for both types of offenses then declined steeply throughout the 1990s and stabilized in the early 2000s at "the lowest levels recorded since the [Justice Department] survey's inception in 1973."[10]

Women are incarcerated at a far lower rate than are men. In jails and prisons at midyear 2004, there were 123 female inmates per 100,000 women in the United States, compared to approximately 1,300 male inmates per 100,000 males in the United States.

The precipitous growth of the corrections system has had a particularly severe impact on young black males. Studies in the District of Columbia suggest that at any one time, 42 percent of the city's black males aged 18 to 35 are subject to some form of criminal justice system control (incarceration, probation, parole, or bond for release pending disposition of criminal charges).[11] For Baltimore the corresponding figure is 56 percent.[12] For an inner-city black male, the lifetime risk of arrest and incarceration may approach 90 percent.[13] Nationally, nearly one in three African American males aged 20-29 is under some form of criminal justice supervision.[14] Much of the recent increase in these numbers appears to be attributable to patterns of enforcement in the

7. Sourcebook of Criminal Justice Statistics Online, http://www.albany.edu/sourcebook/pdf/t612004.pdf.

8. See Marc Mauer, Comparative International Rates of Incarceration, Paper Presented to the U.S. Commission on Civil Rights (The Sentencing Project, June 20, 2003).

9. See James P. Lynch, A Comparison of Prison Use in England, Canada, and West Germany, 79 J. Crim. L. & Criminology, 180 (1999).

10. U.S. Dept. of Justice, Bureau of Justice Statistics, Criminal Victimization—2004 (Sept. 2005), p. 1. Preliminary data for 2005 suggest a possible shift in this trend. Although the crime rate for property offenses continued to decline, dropping by 1.6 percent, the crime rate for violent offenses rose by 2.5 percent in 2005. FBI, Preliminary Annual Uniform Crime Report—2005 (June 12, 2006).

11. See Jerome G. Miller, Hobbling a Generation: Young African American Males in D.C.'s Criminal Justice System (Natl. Center on Institutions & Alternatives 1992); Mark Mauer, Young Black Men and the Criminal Justice System: A Growing National Problem 8 (The Sentencing Project 1990).

12. Jerome G. Miller, Hobbling a Generation: Young African American Males in the Criminal Justice System of America's Cities: Baltimore, Maryland (Natl. Center on Institutions & Alternatives 1992).

13. Miller, supra, footnote 12.

14. Young Black Americans and the Criminal Justice System: Five Years Later (The Sentencing Project, 1995), available at http://www.sentencingproject.org/pdfs/9070smy.pdf.

"war on drugs,"[15] and to the persistence of disturbing evidence that "African Americans and Hispanics routinely receive . . . harsher sentences than whites for crimes of equivalent severity."[16]

One result of the emphasis on incapacitation is that there is little interest in, or resources for, creative programs to treat or educate offenders. This is true not only of prison inmates but also of offenders on probation and parole. While probationers and parolees need varying degrees of assistance and supervision, most experts agree that an average of no more than 35 cases per officer is necessary to give convicted offenders sufficient attention and support. Yet probation supervision caseloads now average about 117 offenders per officer, and parole officers in a recent study each supervised an average of 84 released prisoners.[17]

B. CRIMINAL JUSTICE PROCEDURES

NOTES

1. Overview. A common impression of the criminal justice process is that when a crime is committed, a policeman finds the perpetrator, if he can, arrests him and brings him promptly before a magistrate. If the offense is minor, the magistrate disposes of it on the spot. If the offense is serious, the magistrate retains the case for further action and releases the defendant on bail. Next, again according to the theory, the file goes to a prosecutor, who charges the defendant with a specific offense. The charge is reviewed at a preliminary hearing, where a judge determines whether there is a prima facie case sufficient to hold the defendant for trial, and in some jurisdictions, if the offense is a felony, the charges must be presented to a grand jury, which determines whether to issue an indictment. If the defendant pleads "not guilty," the case goes to trial, and witnesses called by the opposing attorneys describe the facts to a jury. If the jury finds the defendant guilty, the judge sentences him to probation, jail (a local facility for sentences under one year), or prison (for offenders serving longer terms).

Some cases do proceed in that fashion, especially when they involve acts of violence or thefts of large amounts of money. But not all major cases follow this route. And in any event, the great majority of criminal offenses are far less serious — petty thefts, disorderly conduct, simple assaults, and the like. These relatively minor cases and many of the more serious ones are disposed of in informal and sometimes haphazard fashion.

15. See, e.g., Michael Tonry, Malign Neglect (1995); Joseph E. Kennedy, Drug Wars in Black and White, 66 Law & Contemp. Probs. 153 (2003).

16. Sharon L. Davies, Study Habits: Probing Modern Attempts to Assess Minority Offender Disproportionality, 66 Law & Contemp. Probs. 17, 29 (2003).

17. See Joan Petersilia, Probation and Parole, in The Handbook of Crime and Punishment (M. Tonry, ed., 1998), p. 579.

2. The initial stages of a case. (a) Investigation. Unless an arrest has been made at the scene, police must attempt to identify the perpetrator, and in all cases they must assemble sufficient evidence to prove guilt beyond a reasonable doubt. Most large police departments have a corps of detectives who question victims, suspects, and witnesses; seek physical evidence at the crime scene; and undertake other investigative work. Often, however, the crime simply is not solvable. In most cases, personal identification by a victim or witness is the only clue to the perpetrator's identity. FBI statistics for 2003 indicate that of the violent crimes (murder, aggravated assault, forcible rape, and robbery) reported or otherwise known to the police, 46 percent were cleared by an arrest. Of the serious property crimes (burglary, motor vehicle theft, and other larceny-theft), only 16 percent of offenses known to the police were cleared by an arrest. For cities over one million population, only 42 percent of violent offenses and 13 percent of serious property offenses were cleared.

(*b*) *Dismissal and diversion.* In roughly half of the cases initiated by an arrest, the case is eventually dismissed at an early stage, either by the police, a prosecutor, or a magistrate. Some suspects avoid prosecution because they are not guilty, or cannot be proved guilty, either because they did not commit the acts in question or because they have a legally acceptable explanation for committing them. Often, however, offenders who could be convicted are released simply because police or prosecutors are too busy to pursue their cases. In other instances, police or prosecutors decline to proceed because an offender appears to have mental, emotional, or social problems that can be better dealt with by official agencies, private organizations, or private individuals outside the criminal justice process. First offenders are often dealt with in this way, as are those who commit minor offenses such as shoplifting (if restitution has been made), statutory rape (when both boy and girl are young), and automobile theft (when committed by teenagers solely for the purpose of joyriding).

In many jurisdictions, these dismissals sometimes have a more formal character. The defendant may be placed in a "pretrial diversion" program that requires him to meet certain conditions (such as attending a drug or alcohol treatment program or an anger management class) and to avoid rearrest for a designated period, usually a year. Defendants who complete such a program successfully then qualify to have all charges formally dismissed; those who fail the program have their cases reopened.

(*c*) *Pretrial release.* Most arrestees brought into a magistrate's court are released (or convicted and sentenced) within 24 hours of their arrest. The remainder may wait weeks or months for the disposition of their cases, depending on the prosecutor's workload, the complexity of the case, and the calendar of the judge assigned to hear it. Usually, the magistrate who conducts this initial proceeding decides whether to release the defendants pending further proceedings. Traditionally, the device most often used to free an untried defendant and at the same time assure his or her appearance for trial was money bail. In this system, still in use in many areas, the court fixes the amount of a bond to be posted in cash or by a secured pledge; defendants able to post the required amount win their release and recover the sum upon appearance for trial. Defendants unable to raise the required amount usually attempt to secure the services of a bail-bond agency, which posts the necessary bond in return for a fixed fee,

typically 10 percent of the total bail. In this system the bondsman's obligations are satisfied upon the defendant's appearance, but the 10 percent charge has to be paid by the defendant in any event.

The money bail system is unsatisfactory in many respects. It results in confinement of large numbers of untried defendants, solely on account of inability to raise the required amounts. For those who can raise funds to pay the bondsman's fee, the system provides release but no financial incentive to appear. And in many localities, the relationships between bail-bond agencies and court officials have been a source of malfeasance and corruption.

During the 1960s and 1970s bail-reform projects were initiated in numerous cities around the country. The principal aims of these projects were to ascertain the kinds of community ties that would make defendants safe candidates for release without financial guarantees, to establish procedures for expeditiously collecting the information necessary to identify these defendants, and to develop a better system of financial guarantees for defendants who could not qualify for release on any other basis. Pretrial release projects are now operational in more than 100 cities. They help the local magistrates to identify defendants who can be released without money bail and often provide follow-up to help insure that the defendant returns for any scheduled appearances. When money bail is used, many jurisdictions now follow a "10 percent plan," under which the defendant is permitted to post directly with the court 10 percent of the face amount of the bail bond, and most or all of this sum is refundable when the defendant appears for trial. These reforms led to dramatic increases in the proportion of defendants released rather than detained for trial.[18] Nevertheless, traditional money bail survives in many localities as the primary avenue of pretrial release.

The Bail Reform Act of 1984, 18 U.S.C. §§1341-1350, expressly authorizes preventive detention prior to trial in federal criminal prosecutions, on a finding that "no condition or conditions [of release] will reasonably assure the appearance of the [defendant] as required and the safety of any other person and the community." §3142 (e). The Supreme Court upheld the constitutionality of the preventive detention provisions in United States v. Salerno, 481 U.S. 739 (1987). Partly as a result, pretrial detention in the federal courts has been rising sharply since the 1990s. In 1996, 34 percent of federal defendants were detained prior to trial, but for cases filed during 2002, 62 percent of the defendants were detained until their trials.[19] And at least one study suggests that blacks and Hispanics are much more likely to be detained than white defendants facing similar charges.[20] Detention rates in state court remain significant, but have not increased substantially since the reforms of the 1970s; in 2002, 38 percent of the felony defendants in large urban counties were

18. For example, from 1962 to 1971, the percentage of defendants who were detained throughout the period prior to trial dropped from 52 percent to 33 percent in felony cases and from 21 percent to only 12 percent in major misdemeanor cases. See W. Thomas, Bail Reform in America (1976).

19. U.S. Dept. of Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2002, p. 37 (September 2004); U.S. Dept. of Justice, Bureau of Justice Statistics, Federal Pretrial Release and Detention, 1996, p. 1 (February 1999).

20. Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, 1997 Ann. Surv. Am. L. 124, 318 (1997).

detained prior to trial.[21] Again, there are disturbing indications that minority defendants must meet higher bail and are more likely to be detained than similarly situated whites.[22]

3. The guilty plea. Most convictions—more than 90 percent in most jurisdictions—are not the result of adjudications at trial but of guilty pleas, often obtained by negotiation over the charge or the sentence.[23] A plea negotiation can involve lengthy conferences in which the relevant facts and applicable legal defenses are explored in detail. More often, however, the guilty plea discussion involves little more than a hurried conversation in a courthouse hallway or even a prosecutor's quick "take it or leave it" offer to defense counsel. In some courts there are no explicit negotiations at all, but most defendants plead guilty nonetheless, usually in the expectation that their plea will win them some leniency from the sentencing judge. The guilty plea, a crucially important feature of the American criminal justice system, is considered briefly infra in Section C ("The Process for Determining Guilt") and explored in more detail infra in Chapter 10 ("Discretion").

4. The trial. Cases decided at trial are a small fraction of the total. In one study, 96 percent of the cases filed were resolved by guilty plea, dismissal or pretrial diversion; only 4 percent of the defendants went to trial, and only 1 percent were acquitted.[24] But the exceptional, fully adjudicated cases establish standards that influence much of what happens in matters that never reach the trial stage. The legal rules that define crimes and defenses, the effectiveness of prosecutors, the attitudes of judges, and the conviction propensities of juries all have an impact (*how much* of an impact is an important, much debated question) on decisions whether to arrest, charge, dismiss, divert before trial, and bargain over a plea.

5. Sentencing. Although the adjudication of guilt in contested cases is an elaborately formal procedure, the determination of punishment for convicted offenders is always much less formal, and it can even be exceedingly informal. We examine the sentencing process in depth in Chapter 10, infra.

6. The flow of cases through the criminal justice system. The chart presented on the following page[25] sets forth in graphic form the flow of cases through the agencies of criminal justice. It dramatically illustrates the filtering process that winnows out the vast majority of cases prior to trial.

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21. U.S. Dept. of Justice, Bureau of Justice Statistics, Felony Defendants in Large Urban Counties—2002, p. 16 (December 2005).

22. Ian Ayres & Joel Waldfogel, A Market Test for Race Discrimination in Bail Setting, 46 Stan. L. Rev. 987 (1994).

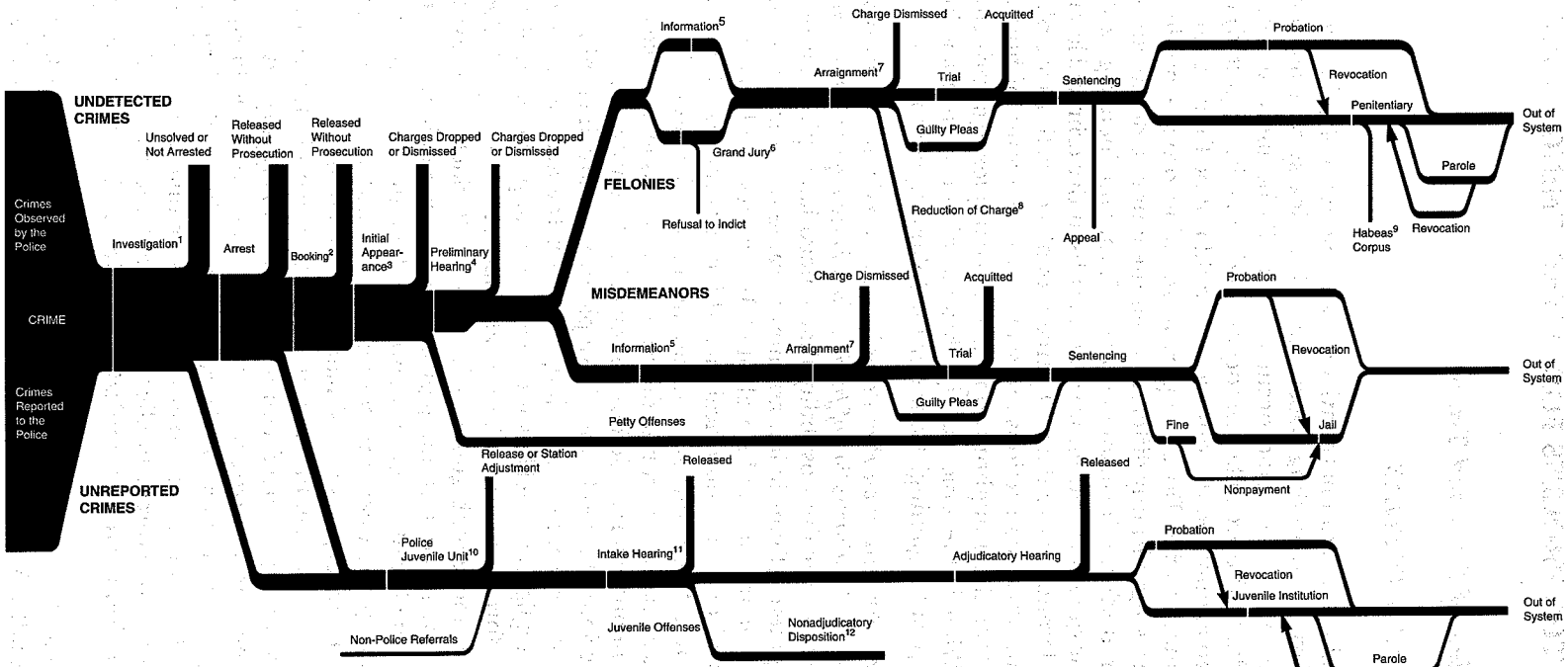
23. Guilty pleas now account for 95 percent of felony convictions in state courts, U.S. Dept. of Justice Bureau of Justice Statistics, Felony Convictions in State Courts, http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc00.pdf, at 1, and 96 percent of convictions in federal courts. U.S. Dept. of Justice Bureau of Justice Statistics, Federal Criminal Case Processing, 1982-2002, http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp02.pdf, at 1.

24. Daniel Givelber, Lost Innocence: Speculation and Data About the Acquitted, 42 Am. Crim. L. Rev. 1167, 1172 (2005).

25. The chart is based on one that appears in President's Commission, supra note 1, at 8.

A General View of the Criminal Justice System

This chart seeks to present a simple yet comprehensive view of the movement of cases through the criminal justice system. Procedures in individual jurisdictions may vary from the pattern shown here. The differing weights of line indicate the relative volumes of cases disposed of at various points in the system, but this is only suggestive since no nationwide data of this sort exists.



1. May continue until trial.
2. Administrative record of arrest. First step at which temporary release on bail may be available.
3. Before magistrate, commissioner, or justice of peace. Formal notice of charge, advice of rights. Bail set. Summary trials for petty offenses usually conducted here without further processing.
4. Preliminary testing of evidence against defendant. Charge may be reduced. No separate preliminary hearing for misdemeanors in some systems.
5. Charge filed by prosecutor on basis of information submitted by police or citizens. Alternative to grand jury indictment; often used in felonies, almost always in misdemeanors.
6. Reviews whether Government evidence sufficient to justify trial. Some States have no grand jury system; others seldom use it.
7. Appearance for plea; defendant elects trial by judge or jury (if available); counsel for indigent usually appointed here in felonies. Often not at all in other cases.
8. Charge may be reduced at any time prior to trial in return for plea of guilty or for other reasons.
9. Challenge on constitutional grounds to legality of detention. May be sought at any point in process.
10. Police often hold informal hearings, dismiss or adjust many cases without further processing.
11. Probation officer decides desirability of further court action.
12. Welfare agency, social services, counselling, medical care, etc., for cases where adjudicatory handling not needed.

C. THE PROCESS FOR DETERMINING GUILT

1. *An Overview of Pleas and Trials*

NOTE ON GUILTY PLEAS

The vast majority of criminal convictions are the result of guilty pleas entered without any formal factfinding. Does the guilty plea system produce results different from those that would occur at trial? To be more specific, does it convict defendants who are in fact innocent (*and* would be acquitted) or convict defendants who committed the offense but could not be found guilty beyond a reasonable doubt at trial? Does the plea negotiation process produce convictions for offenses significantly different from the crimes a defendant may actually have committed? For the many observers who are inclined to give affirmative answers to these questions, the entire body of substantive criminal law may seem a supreme irrelevance; more than 90 percent of all convictions are obtained by guilty pleas, and these convictions are seen as the outcome of hurried horse-trading rather than the thoughtful application of complex legal principles to the known facts. What is the practical significance of substantive law in a world dominated by plea bargaining? Consider the following comments:

Arnold Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts 113-114 (1967): [C]oncern over the possibility that a negotiated plea can result in an erroneous judgment of conviction assumes a frame of reference by which the accuracy of the judgment is to be evaluated. It assumes an objective truth existing in a realm of objective historical fact which it is the sole function of our process to discover. Some, but by no means all, criminal cases fit this image. For example, this is a relatively accurate description of the issues at stake in a case in which the defendant asserts a defense of mistaken identity. . . .

But not all criminal cases fit the above picture. . . . Much criminal adjudication concerns the passing of value judgments on the accused's conduct as is obvious where negligence, recklessness, reasonable apprehension of attack, use of unnecessary force, and the like are at issue. . . . In many of these cases, objective truth is more ambiguous, if it exists at all. Such truth exists only as it emerges from the fact-determining process, and accuracy in this context really means relative equality of results as between defendants similarly situated and relative congruence between the formal verdict and our understanding of society's less formally expressed evaluation of such conduct.

The negotiated plea can, then, be an accurate process in this sense. So long as the judgment of experienced counsel as to the likely jury result is the key element entering into the bargain, substantial congruence is likely to result. Once we recognize that what lends rationality to the factfinding process in these instances lies not in an attempt to discover objective truth but in the devising of a process to express intelligent judgment, there is no inherent reason why plea negotiation need be regarded any the less rational or intelligent in its results.

Indeed, it may be that in some instances plea negotiation leads to more "intelligent" results. A jury can be left with the extreme alternatives of guilty of a crime of the highest degree or not guilty of any crime, with no room for any

intermediate judgment. And this is likely to occur in just those cases where an intermediate judgment is the fairest and most "accurate" (or most congruent). . . . The low visibility of the negotiated plea allows this compromise which may be more rational and congruent than the result we are likely to arrive at after a trial. While the desire to protect the symbolism of legality and the concern over lay compromises may warrant limiting the jury to extreme alternative[s], it does not follow that to allow the defendant to choose such a compromise is an irrational or even a less rational procedure.

Arlen Specter, Book Review, 76 Yale L.J. 604, 606-607 (1967): The dictum that "justice and liberty are not the subjects of bargaining and barter" does not fit the realities of a typical barroom killing. . . .

There is ordinarily sufficient evidence of malice and deliberation in such cases for the jury to find the defendant guilty of murder in the first degree, which [in Pennsylvania] carries either life imprisonment or death in the electric chair. Or, the conceded drinking by the defendant may be sufficient to nullify specific intent . . . to make the case second-degree murder, which calls for a maximum of 10 to 20 years in jail. From all the prosecutor knows by the time the cold carbon copies of the police reports reach the district attorney's office, the defendant may have acted in "hot blood," which makes the offense only voluntary manslaughter with a maximum penalty of 6 to 12 years. And, the defense invariably produces testimony showing that the killing was pure self-defense.

When such cases are submitted to juries, a variety of verdicts are returned, which leads to the inescapable conclusion of variable guilt. Most of those trials result in convictions for second-degree murder or voluntary manslaughter. The judges generally impose sentences with a minimum range of 5 to 8 years and a maximum of 10 to 20 years. That distilled experience enables the assistant district attorney and the defense lawyer to bargain on the middle ground of what experience has shown to be "justice" without the defense running the risk of the occasional first-degree conviction . . . and without the Commonwealth tying up a jury room for 3 to 5 days and running the risk of acquittal.

Albert W. Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50, 71-79 (1968): [District Attorney Specter's] argument seems to rest on the notion that when a man has seen one barroom killing, he has seen them all. [Yet] Specter's argument is a forceful one. In the homicide area particularly, . . . the distinctions drawn by the criminal code . . . sometimes prove too fine for workable, everyday application.

. . . If the perspective of these practitioners is sound, the best solution to the defects they perceive in the trial system does not lie in a shift from trial procedures to off-stage compromises. It lies instead in a simplification of the criminal code to reflect "everyday reality." [But] it seems doubtful that plea negotiation can eliminate the irrationalities of the criminal code without substituting more serious irrationalities of its own. . . . Most barroom killings seem to end in bargained pleas to voluntary manslaughter; but some end in bargained pleas to second-degree murder; some end in bargained pleas to various categories of felonious assault; and I know of one barroom shooting that was resolved by a guilty plea to the crime of involuntary manslaughter, which, under the circumstances, seemed to be the last crime in the code of which the defendant might be guilty. It is therefore not clear that plea negotiation leads to greater uniformity of result than trial by jury.

Juries, of course, have biases, but the rules of evidence attempt to direct their attention to relevant issues. There are no rules of evidence in plea negotiation; individual prosecutors may be influenced not only by a desire to smooth out the irrationalities of the criminal code but by thoroughly improper considerations that no serious reformer of the penal code would suggest. . . . Juries may react differently to the circumstances of indistinguishable crimes, but at least they react to the circumstances of the crimes. A jury is unlikely to seek conviction for the sake of conviction, to respond to a defense attorney's tactical pressures, to penalize a defendant because he has taken an inordinate share of the court's and the prosecutor's time, to do favors for particular defense attorneys in the hope of future cooperation, or to attempt to please victims and policemen for political reasons.

Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2464-2468 (2004): The conventional wisdom is that litigants bargain toward settlement in the shadow of expected trial outcomes. [T]he classic shadow-of-trial model predicts that the likelihood of conviction at trial and the likely post-trial sentence largely determine plea bargains. . . .

The shadow-of-trial model is, however, far too simplistic. . . . First, there are many structural impediments that distort bargaining in various cases. Poor lawyering, agency costs [the difficulty a client faces in trying to monitor the performance of her agent, the lawyer] and lawyers' self-interest are prime examples, as are bail rules and pretrial detention. The structural skewing of bargains has grown in the last two decades with the proliferation of mandatory sentences and sentencing guidelines. . . . Second, the shadow-of-trial model assumes that the actors are fundamentally rational. Recent scholarship on negotiation and behavioral law and economics, however, undercuts this strong assumption of rationality. Instead, overconfidence, self-serving biases, . . . denial mechanisms, . . . and risk preferences all skew bargains.

[As a result,] many plea bargains diverge from the shadows of trials. By "the shadows of trials," I mean the influence exerted by the strength of the evidence and the expected punishment after trial. Structural forces and psychological biases sometimes inefficiently prevent mutually beneficial bargains or induce harmful ones. [Some] defendants plead when they would otherwise go to trial, or go to trial (and usually receive heavier sentences) when they would otherwise plead. Furthermore, some defendants' plea bargains diverge from trial shadows much more than others'. . . . Rather than basing sentences on the need for deterrence, retribution, incapacitation, or rehabilitation, plea bargaining effectively bases sentences in part on wealth, sex, age, education, intelligence, and confidence. Though trials allocate punishment imperfectly, plea bargaining adds another layer of distortions that warp the fair allocation of punishment.

NOTES

1. Conflicts of interest. What sorts of "lawyers' self-interest" could skew the bargaining process in the ways that Professor Bibas describes? Can you think of personal motivations that might (consciously or subconsciously) lead a defense attorney to advise her client to accept an unduly severe plea offer? Can you think of personal motivations that might lead a prosecutor to offer an overly lenient plea offer? Would it ever be in a defense attorney's self-interest to recommend *rejection* of a favorable plea agreement?

2. Agency costs. Where potential conflicts of interest exist, monitoring is essential; there must be some way to assure that attorneys act in the best interests of their clients — the accused in the case of the defense attorney and the general public in the case of the prosecutor. What factors make it difficult for some (or all) defendants to determine whether their attorney's advice is influenced by the attorney's personal interests? What factors make it difficult for the general public to determine whether the prosecutor's actions are influenced by her personal interests? For further discussion of the problems of attorney self-interest and agency costs, see Stephen J. Schulhofer, Criminal Justice Discretion as a Regulatory System, 17 J. Legal Stud. 43 (1988).

3. Implications for substantive criminal law. Despite the distortions described by Alschuler and Bibas, there undoubtedly remains a degree of truth in the picture painted by Enker: At least to some extent, the substantive law and the expected outcome of a trial remain important elements (though not the only elements) in determining the outcome of plea negotiation. At this early point in the study of criminal law, it is premature to discuss plea bargaining in greater detail or to investigate possibilities for reform. We defer those issues to Chapter 10, where we will consider the ways in which the modern administrative state uses prosecutorial discretion, plea bargaining, and sentencing practices to determine culpability and impose punishment outside the framework of the formal criminal trial.

For present purposes, our concern is to set the stage for the study of substantive criminal law by taking realistic account of the extent to which its principles actually matter in a world dominated by plea bargaining. On that question, there can be no doubt that criminal law matters, though it is not the only thing that matters. And we can expect the role of the substantive law to grow when cases are handled by the most sophisticated attorneys and when they know the doctrines of criminal law well enough to invoke them effectively in the course of bargaining.

NOTE ON FORMAL TRIAL PROCEDURE

Section A of this chapter describes the organization of the criminal justice system and typical pretrial procedures. To introduce our examination of the trial stage itself, the present note briefly summarizes the typical course of a formal criminal trial. Naturally, the procedure followed in some jurisdictions or in particular cases may differ in points of detail from that set out in this preliminary overview.

A formal trial typically begins with the selection of the jury. A panel of prospective jurors (called a *venire*) enters the courtroom, and the judge describes the nature of the case and the identity of the parties so that any prospective jurors who are personally involved may be excused. Prospective jurors are then questioned individually by the judge or by opposing counsel to determine possible bias. On the basis of this questioning (called *voir dire*) prospective jurors may be excused *for cause*, and both prosecution and defense may remove a certain number of the panel, without showing cause, by exercising *peremptory challenges*. When the requisite number of acceptable jurors (usually 12) has been obtained by this procedure, the panel is sworn.

Now the presentation of the case begins. Usually the indictment is read to the jury; the prosecutor then makes an opening statement outlining the facts she plans to prove. Defense counsel also may make an opening statement. Claims made in these statements do not constitute *evidence;* they serve only to help the jury understand the testimony about to be presented. In many jurisdictions, motions relating to the scope or validity of the indictment and motions to suppress evidence must be made prior to trial. In others, such motions can be made at the outset of the trial. If the judge grants a motion to dismiss the indictment, the case will terminate at this point. Otherwise the trial goes forward, although motions may be made or renewed as the trial proceeds.

Next the prosecution calls its witnesses. Their testimony often evokes objections from counsel, and the judge must decide the bounds of permissible testimony under complex rules of evidence. We examine some of these rules in the sections to follow. When the prosecution has completed the presentation of its evidence, the defense may choose to stand on the *presumption of innocence* and move for a *directed verdict* or *judgment of acquittal* on the ground that the charges have not been proved beyond a reasonable doubt. If such a motion is not made, or if the motion is made and denied, the defense may decide to offer its own evidence (through the defendant or other witnesses). The prosecution then will have an opportunity to present further evidence in rebuttal. When both sides have finished presenting their evidence, counsel may make a closing argument to the jury. Ordinarily the prosecution's closing argument is presented first (because it bears the burden of proof), and the prosecutor is usually allowed an opportunity for rebuttal after the closing argument of the defense.

At this point the work of the opposing parties has been completed. The judge now intercedes with his most important contribution — the *instructions to the jury.* Ordinarily, judicial comment on the evidence tends to be cautious and limited. Formal instructions on the law, however, are always given, and they are typically quite detailed. The instructions serve both as a guide for the jury's deliberations and as a focal point for challenges on appeal in the event of a conviction. Usually the instructions cover responsibilities of the jurors (for example, how to elect a foreperson, when to refrain from discussing the case with other jurors or outsiders), matters related to the relevance of particular kinds of testimony, and, above all, detailed explanations of the substantive criminal law applicable to the case, including the facts necessary to establish the offense and definitions of legal concepts that the jury is called on to apply.

The jury at last retires to deliberate. Its verdict of guilty or not guilty on each charge must be reached by a substantial majority (and usually by unanimity). After a verdict of guilty and the imposition of sentence (usually by the judge), the trial terminates. There may of course be an appeal. If it finds trial errors, the reviewing court may reverse the conviction and order another trial, since American double jeopardy principles generally do not bar the retrial of a defendant who has successfully appealed her conviction.[26] A verdict of not guilty is not subject to review of any kind, even when flagrant errors prejudicial to the

26. Burks v. United States, 437 U.S. 1 (1978). The English practice is somewhat different. In that country, when a reviewing court finds prejudicial error, the conviction is "quashed," and ordinarily no retrial is permitted. Criminal Appeal Act, ch. 19, §2(2)-(3). But the English courts have discretion to order a new trial when "the interests of justice so require." Id. §7.

prosecution occurred at trial.[27] When the jury is unable to agree by the requisite majority on a verdict of either guilty or not guilty (a hung jury case), a *mistrial* is declared, and the defendant then may be retried at the prosecutor's discretion.

Such, in rough outline, is the procedure by which guilt must be established when a criminal case is fully litigated through the formal trial stage. Of course, as we have already seen, guilt often is established by entry of a guilty plea before the trial stage is ever reached.

Further treatment of trial procedure lies beyond the province of this book. Nevertheless, a book devoted primarily to the substantive law should provide an introduction to the central features of the process of proof, in order to illuminate the context in which criminal law is applied and the ways in which the procedural system shapes the substantive content of the criminal law. The remaining sections of this chapter undertake such an exploration.

2. *The Presentation of Evidence*

INTRODUCTORY NOTES

1. *The order of proof.* At trial the evidence is presented in a formally prescribed order. The prosecution first calls witnesses in an effort to prove the elements of the offense charged. As we have seen, page 16 supra, the case may terminate at this point if the prosecution fails to sustain its burden of proof. If not, the defense may then call witnesses to refute the prosecution's *case-in-chief* or to establish some *affirmative defense.* The prosecution has an opportunity to recall witnesses or to call new witnesses for purposes of *rebuttal,* that is, to refute evidence offered by the defense. The defense in turn is afforded a chance to answer by *rejoinder* any matters introduced in the prosecutor's rebuttal.

Within these stages the examination of each witness follows a similar pattern. The witness is first questioned by the party that called the witness (*direct examination*), and afterward the opposing party has an opportunity to question that witness (*cross-examination*). Further questioning by the first party (*re-direct*) and by the opposing side (*re-cross*) may follow.

2. *Relevance.* The rules governing the admissibility of evidence are extremely complex. For present purposes, it will be useful to begin by focusing on one obvious but deceptively simple requirement, the rule of relevancy. Irrelevant evidence is *never* admissible. The converse cannot be stated so categorically. Relevant evidence is *generally* admissible, but there are many exceptions to this principle. Before turning to the exceptions, we must first be clear about the meaning of *relevancy.*

Evidence is considered relevant for purposes of the rules of evidence only if it is both *probative* and *material,* and these are precise terms of art. Evidence is

27. To avoid this difficulty many states provide for rulings prior to the start of trial on significant issues of law and permit the prosecutor to appeal an adverse ruling at that point. For discussion of prosecution appeals, see James A. Strazzella, The Relationship of Double Jeopardy to Prosecution Appeals, 73 Notre Dame L. Rev. 1 (1997).

probative only if it tends to establish the proposition for which it is offered or—to be precise—if the proposition is more likely to be true given the evidence than it would be without the evidence. Thus, if the proposition to be proved is that *H* was the person who killed his wife *W*, evidence of a motive (that is, that *H* stood to inherit a substantial estate on *W*'s death) is probative. Of course, the existence of the motive does not, by itself, make it probable that *H* is the killer, but *H* is more likely to be the killer if he had a motive than if he did not; this greater likelihood is all that is required to establish probative value.

Probative value alone is often thought of as synonymous with relevancy. But relevancy for purposes of the rules of evidence requires in addition that the proposition that the evidence tends to prove be one that will affect the outcome of the case under applicable law. So, for example, evidence in a homicide prosecution that the defendant acted in self-defense is material, because under the substantive law self-defense is a defense. But evidence that the deceased consented to be killed is not material, because under the substantive law consent by the victim is not a defense to a homicide charge. Thus, evidence may be excluded as irrelevant for one of two distinct reasons—either because the evidence does not tend to establish the proposition in question or because that proposition is not material to the outcome of the case. The materiality requirement means that the first prerequisite for determining the relevancy and hence the admissibility of evidence is a command of the substantive law of crimes.

We may sum up what we have so far said about relevancy by quoting the formulation used in the Federal Rules of Evidence:

> RULE 401
>
> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
>
> RULE 402
>
> All relevant evidence is admissible, except as otherwise provided. . . . Evidence which is not relevant is not admissible.

3. Privilege. Under what circumstances is relevant evidence *not* admissible? The law of evidence embodies dozens of distinct rules requiring the exclusion of relevant evidence. For example, the various rules relating to *privilege* give individuals the right to withhold certain kinds of testimony, often in order to protect particular interests of a witness or specially important relationships with others.

One of the most important privileges is the privilege against self-incrimination. The Fifth Amendment provides: "[N]or shall [any person] be compelled in any criminal case to be a witness against himself." The Supreme Court has construed this provision to imply that the government cannot require a criminal defendant to take the witness stand, cannot invite a jury to draw adverse inferences from a defendant's refusal to testify, and cannot in any other way compel the defendant to disclose potentially incriminating facts about the case. These principles are of great significance for the substantive criminal law. They not only make the prosecutor's task more difficult than it otherwise would be, but they pose an especially difficult barrier when the defendant's own frame of mind is an essential part of what the prosecutor must prove. The effect of the privilege against self-incrimination is to place largely beyond the government's reach the

best (and sometimes the only) source of information about these elusive state-of-mind facts. As a result, substantive criminal law must constantly consider whether government should be obliged to prove state-of-mind facts, and if so, what kinds of evidence will satisfy that obligation.

4. Other exclusionary rules: prejudice. Like the rules of privilege, many other rules of evidence operate to exclude relevant evidence. One of the best known is the rule barring the use of evidence obtained through an illegal search. Indeed criminal lawyers often refer to this prohibition as *the* exclusionary rule, and it is a major topic of study in criminal procedure. We will consider some of the other important exclusionary rules in connection with the substantive crimes for which they have the greatest significance.[28] The balance of the present section is devoted to exploring one open-ended rule — the rule that evidence must be excluded whenever its probative value is outweighed by its *prejudicial effect.* This exclusionary rule is of pervasive importance in the substantive criminal law, and we will encounter it repeatedly in the chapters that follow. The principle of weighing probative value against prejudicial effect is particularly central to developing doctrines in such areas as rape-shield laws; the adequacy of victim provocation in homicide; battered spouse evidence; and testimony concerning intoxication, diminished capacity, and the insanity defense. As a foundation for the study of such topics throughout this book, the present section considers the problem of prejudicial effect in depth, in a context of recurring importance for criminal prosecutions — the rules concerning evidence of other crimes.

The term *prejudicial effect* has a technical meaning. To pursue the example previously mentioned, suppose that in *H*'s murder prosecution, testimony is offered that shortly before the discovery of *W*'s bullet-ridden body, *H* was seen running from the scene carrying a smoking revolver. This testimony will undoubtedly be harmful to *H*'s chances for acquittal, but it will not be prejudicial in the technical sense, because its harmfulness flows solely from its legitimate probative value. Evidence is considered prejudicial only when it is likely to affect the result in some *improper* way. Thus, prejudice is involved if the jury is likely to overestimate the probative value of the evidence or if the evidence will arouse undue hostility toward one of the parties.

The next case illustrates these principles and their relationship to basic conceptions of criminal responsibility.

PEOPLE v. ZACKOWITZ

New York Court of Appeals
254 N.Y. 192, 172 N.E. 466 (1930)

[Defendant was convicted of first-degree murder and sentenced to death.]

CARDOZO, C.J. On November 10, 1929, shortly after midnight, the defendant in Kings county shot Frank Coppola and killed him without justification or excuse. A crime is admitted. What is doubtful is the degree only.

28. Special restrictions intended to protect the privacy of a witness are examined in connection with the materials on rape, pages 363-371 infra.

Four young men, of whom Coppola was one, were at work repairing an automobile in a Brooklyn street. A woman, the defendant's wife, walked by on the opposite side. One of the men spoke to her insultingly, or so at least she understood him. The defendant, who had dropped behind to buy a newspaper, came up to find his wife in tears. He was told she had been insulted, though she did not then repeat the words. Enraged, he stepped across the street and upbraided the offenders with words of coarse profanity. He informed them, so the survivors testify, that "if they did not get out of there in five minutes, he would come back and bump them all off." Rejoining his wife, he walked with her to their apartment house located close at hand. He was heated with liquor which he had been drinking at a dance. Within the apartment he induced her to tell him what the insulting words had been. A youth had asked her to lie with him, and had offered her two dollars. With rage aroused again, the defendant went back to the scene of the insult and found the four young men still working at the car. In a statement to the police, he said that he had armed himself at the apartment with a twenty-five calibre automatic pistol. In his testimony at the trial he said that this pistol had been in his pocket all the evening. Words and blows followed, and then a shot. The defendant kicked Coppola in the stomach. There is evidence that Coppola went for him with a wrench. The pistol came from the pocket, and from the pistol a single shot, which did its deadly work. . . .

At the trial the vital question was the defendant's state of mind at the moment of the homicide. Did he shoot with a deliberate and premeditated design to kill? Was he so inflamed by drink or by anger or by both combined that, though he knew the nature of his act, he was the prey to sudden impulse, the fury of the fleeting moment?[a] If he went forth from his apartment with a preconceived design to kill, how is it that he failed to shoot at once? How reconcile such a design with the drawing of the pistol later in the heat and rage of an affray? These and like questions the jurors were to ask themselves and answer before measuring the defendant's guilt. Answers consistent with guilt in its highest grade can reasonably be made. Even so, the line between impulse and deliberation is too narrow and elusive to make the answers wholly clear. The sphygmograph records with graphic certainty the fluctuations of the pulse. There is no instrument yet invented that records with equal certainty the fluctuations of the mind. At least, if such an instrument exists, it was not working at midnight in the Brooklyn street when Coppola and the defendant came together in a chance affray. With only the rough and ready tests supplied by their experience of life, the jurors were to look into the workings of another's mind, and discover its capacities and disabilities, its urges and inhibitions, in moments of intense excitement. Delicate enough and subtle is the inquiry, even in the most favorable conditions, with every warping influence excluded. There must be no blurring of the issues by evidence illegally admitted and carrying with it in its admission an appeal to prejudice and passion.

a. Under New York law, a deliberate and premeditated killing would be first-degree murder, while a killing in "the fury of the fleeting moment" would be second-degree murder. At the time of the *Zackowitz* decision the former offense was punishable by death and the latter by imprisonment from a minimum of 20 years to a maximum of life. N.Y. Penal Law §§1045, 1048 (Penal Code of 1909, as amended 1928). For current penalty provisions in New York and other representative states, see pages 375-380 infra. — EDS.

Evidence charged with that appeal was, we think, admitted here. . . . Almost at the opening of the trial the People began the endeavor to load the defendant down with the burden of an evil character. He was to be put before the jury as a man of murderous disposition. To that end they were allowed to prove that at the time of the encounter and at that of his arrest he had in his apartment, kept there in a radio box, three pistols and a teargas gun. There was no claim that he had brought these weapons out at the time of the affray, no claim that with any of them he had discharged the fatal shot. He could not have done so, for they were all of different calibre. The end to be served by laying the weapons before the jury was something very different. The end was to bring persuasion that here was a man of vicious and dangerous propensities, who because of those propensities was more likely to kill with deliberate and premeditated design than a man of irreproachable life and amiable manners. Indeed, this is the very ground on which the introduction of the evidence is now explained and defended. The District Attorney tells us in his brief that the possession of the weapons characterized the defendant as "a desperate type of criminal," a "person criminally inclined." The dissenting opinion, if it puts the argument less bluntly, leaves the substance of the thought unchanged. "Defendant was presented to the jury as a man having dangerous weapons in his possession, making a selection therefrom and going forth to put into execution his threats to kill." The weapons were not brought by the defendant to the scene of the encounter. They were left in his apartment where they were incapable of harm. In such circumstances, ownership of the weapons, if it has any relevance at all, has relevance only as indicating a general disposition to make use of them thereafter, and a general disposition to make use of them thereafter is without relevance except as indicating a "desperate type of criminal," a criminal affected with a murderous propensity. . . .

If a murderous propensity may be proved against a defendant as one of the tokens of his guilt, a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent, must be first declared away. [C]haracter is never an issue in a criminal prosecution unless the defendant chooses to make it one. In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the bar. There has been a homicide in a public place. The killer admits the killing, but urges self-defense and sudden impulse. Inflexibly the law has set its face against the endeavor to fasten guilt upon him by proof of character or experience predisposing to an act of crime. . . . The principle back of the exclusion is one, not of logic, but of policy. There may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime. "The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge" (Wigmore, Evidence, vol. 1, §194, and cases cited).

A different question would be here if . . . the defendant had been shown to have gone forth from the apartment with all the weapons on his person. To be armed from head to foot at the very moment of an encounter may be a

circumstance worthy to be considered, like acts of preparation generally, as a proof of preconceived design. There can be no such implication from the ownership of weapons which one leaves behind at home.

The endeavor was to generate an atmosphere of professional criminality. It was an endeavor the more unfair in that, apart from the suspicion attaching to the possession of these weapons, there is nothing to mark the defendant as a man of evil life. . . . If his own testimony be true, he had gathered these weapons together as curios, a collection that interested and amused him. Perhaps his explanation of their ownership is false. There is nothing stronger than mere suspicion to guide us to an answer. Whether the explanation be false or true, he should not have been driven by the People to the necessity of offering it. Brought to answer a specific charge, and to defend himself against it, he was placed in a position where he had to defend himself against another, more general and sweeping. He was made to answer to the charge, pervasive and poisonous even if insidious and covert, that he was a man of murderous heart, of criminal disposition. . . .

The judgment of conviction should be reversed, and a new trial ordered.

NOTES ON ZACKOWITZ

1. On the facts of *Zackowitz*, we may assume that the killing was intentional. The principal issue at trial was whether the killing was "deliberate" (that is, whether the intent to kill was formulated before the shot, making the crime first-degree murder) or whether the killing was instead "impulsive" (that is, whether the intent to kill was formulated during the final scuffle, making the crime second-degree murder). Does the defendant's possession of the weapons have some bearing on this issue? Recall that very slight probative value is usually sufficient to render evidence admissible; for example, evidence that Zackowitz stood to inherit money from the victim would undoubtedly be admissible as tending to show a motive for a deliberate killing. Does the evidence of weapons possession have at least that much probative value?

2. If the weapons evidence was relevant, as Judge (later Justice) Cardozo seems to assume, are there convincing reasons for excluding it? Cardozo stresses that the issue in the case was a "delicate" and "subtle" one. Under these circumstances was it not particularly important for the jury to have access to as much relevant evidence as possible? In which case will the trier of fact be better able to evaluate what actually happened: when it knows about the weapons, knows the defendant's explanation for them and has a chance to judge the credibility of that explanation, or when—as *Zackowitz* requires—all of this information is withheld?

NOTES ON "OTHER-CRIMES" EVIDENCE UNDER CURRENT LAW

1. The general rule and its foundations. Subject to certain exceptions to be explored below, the basic principle invoked by the majority in *Zackowitz* appears to enjoy universal acceptance: Other crimes (and indeed any other kind of evidence designed to show "bad character") may not be introduced to show

that the accused had an evil disposition and thus was more likely to have committed the offense charged.

Rules 403 and 404(b) of the Federal Rules of Evidence illustrate one rigorous statement of these principles:

> RULE 403 . . .
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
>
> RULE 404 . . .
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

What is the justification for these principles? McCormick states that such evidence "is not irrelevant, but in the setting of jury trial the danger of prejudice outweighs the probative value." C. McCormick, Evidence §190, at 447 (2d ed. 1972). See also Michelson v. United States, 335 U.S. 469, 475-476 (1948): "The inquiry is not rejected because character is irrelevant; on the contrary it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Undoubtedly, this statement holds true in a very wide range of contexts. But there can be situations in which the danger of prejudice is arguably insufficient to justify the exclusion. Are there more basic reasons for restricting the admissibility of other-crimes evidence?

Consider how the criminal process would be affected if the prosecution were free to support its case by proving previous instances of criminal conduct by the accused. The defendant, who of course is contesting the charges of the present indictment, may deny having committed the other crimes as well. In particular, if the prosecution has not already obtained a formal conviction for the other crimes (that was the case in *Zackowitz*, for example), the entire focus of the trial could be diverted by the dispute about whether the other crimes were in fact committed.

Even if the defendant admits to committing other crimes or the other crimes are easily proved by a record of prior convictions, the defendant may feel called upon to explain the background of the other offenses or to claim extenuating circumstances. (This too happened in *Zackowitz*.) The vice here is not simply that time and attention may be diverted from the main issue in the case. It is also that a defendant should not be forever obliged to explain prior transgressions in order to dispel suspicions of further misconduct. Thus, a person who has suffered conviction and sentence is said to have "paid his debt to society"; the slate should be wiped clean. Cardozo alludes to these concerns when he states: "In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the bar. . . . Whether the explanation [for Zackowitz's possession of the weapons] be true or false, he should not have been driven by the People to the necessity of offering it."

Whether or not a defendant has already "paid his debt" for the prior offense, basic assumptions about criminal responsibility are tested when the focus of the

trial becomes centered on the defendant's general character rather than on his behavior in a discrete situation. To be sure, a trial designed to determine a defendant's responsibility for particular events often must explore many circumstances of his life, but ultimately the events themselves are at issue, the concrete behavior precisely specified in the charges. The criminal trial usually is not viewed as a vehicle for passing judgment on the whole person. Again, Cardozo alludes to this principle: "Brought to answer a specific charge, [the defendant] had to defend himself against another, more general and sweeping[,] ... pervasive and poisonous even if insidious and covert, that he was a man of murderous heart, or criminal disposition." Consider Gerard E. Lynch, RICO: The Crime of Being a Criminal, Parts III & IV, 87 Colum. L. Rev. 920, 934-936 (1987):

> [T]he model of crime based on specific incidents or acts [is] associated with a particular conception of the individual as a moral actor. ... The individual is implicitly conceived not only as free in principle to act in accordance with or in violation of defined norms, but also as free at any given moment to make choices at odds with any consistent character that may be deduced from his prior acts. To infer that a defendant committed the particular offense for which he is being tried from the fact that he has previously committed other crimes of a generally similar nature — or, worse still, other crimes of an entirely different nature — is not only unfair, but inconsistent with a fundamental supposition that criminal behavior is punishable because it represents a free choice at a particular moment in time to commit an immoral act.

Questions: To what extent are the values described fundamental to a just system of criminal law? Are they, for example, more important than the most accurate possible determination of the truth? Should they apply with as much force in proceedings to determine sentence (or the *degree* of the offense in *Zackowitz*) as they do when the issue is guilt versus innocence?[29] Consider the extent to which these values in fact *are* respected, or flouted, by the doctrines of criminal law examined in the remainder of this section and throughout this book.

2. Exceptions to the rule. Despite the concerns mentioned by the court in *Zackowitz*, the rule against admitting other-crimes evidence is subject to a number of "exceptions." For example, evidence that the defendant had previously stolen the pistol with which the victim was shot will be ordinarily admissible — not to show the defendant's disposition to crime but to help *identify* him as the killer. Similarly, evidence that the defendant had previously committed a robbery witnessed by the victim ordinarily will be admissible — not to show propensity but to show his *motive* for this particular killing. See, e.g., White v. Commonwealth, 178 S.W.3d 470 (Ky. 2005).

Technically speaking, these situations do not involve exceptions to the rule of exclusion because, properly stated, that rule renders other-crimes evidence inadmissible only when offered "to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). In other words, the

29. For exploration of the question whether punishment should be tailored to the character of the offender rather than the seriousness of the offense, see Chapter 2 infra.

rule itself does not bar the use of other-crimes evidence for some purpose *other than* that of suggesting that he acted in conformity with a bad character. See Estelle v. McGuire, 502 U.S. 62 (1991).

When evidence of other crimes is not offered to prove propensity, and therefore is not barred by Rule 404(b), the evidence nonetheless may run afoul of some other prohibition. In particular, evidence offered to prove identity or other nonpropensity matters will be barred by Rule 403 if its prejudicial effect substantially outweighs its probative value. Evidence, even when relevant, must be excluded when it "tends to subordinate reason to emotion in the factfinding process." United States v. Queen, 132 F.3d 991, 997 (4th Cir. 1997). When other-crimes evidence is both highly relevant and highly inflammatory, courts face a dilemma; in such cases, the Supreme Court has held, judges must consider using factual stipulations or other alternative methods for conveying the essential facts to the jury in less prejudicial fashion. Old Chief v. United States, 519 U.S. 172 (1997).

It is not always easy to tell whether prior-crimes evidence links the defendant to the crime in some legitimate way or whether it simply suggests a criminal propensity. The problem generates a large volume of litigation. For helpful discussions, see Miguel Angel Mendez, California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies, 31 UCLA L. Rev. 1003 (1984); Richard Uviller, Evidence of Character to Prove Conduct: Illusion, Illogic and Injustice in the Courtroom, 130 U. Pa. L. Rev. 845 (1982).

3. Sex offenses. The Violent Crime Control and Law Enforcement Act of 1994 amended the Federal Rules of Evidence by adding the following provision (Fed. R. Evid. 413(a)):

> In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

An analogous provision (Fed. R. Evid. 414(a)) rendered the defendant's commission of child molestation admissible in a prosecution for other acts of child molestation. Evidence of prior sex crimes can be admitted under Rules 413-414 only when the evidence also passes the Rule 403 requirement that its prejudicial effect not outweigh its probative value. United States v. Guardia, 135 F.3d 1326 (10th Cir. 1998). With this safeguard in place, most courts have held, the admission of evidence of prior sex crimes does not amount to an unconstitutional denial of due process. People v. Falsetta, 986 P.2d 182 (Cal. 1999); Enjady v. United States, 134 F.3d 1427 (10th Cir. 1998). Nonetheless, most courts treat Rules 413 and 414 as creating a presumption of admissibility for prior sexual offenses, and courts rarely hold such evidence to be barred under Rule 403. See Aviva Orenstein, Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403, 90 Cornell L. Rev. 1487, 1519-1521 (2005).

What is the justification for treating prior sexual acts differently from other evidence of bad character or criminal propensity? Can an exception to the rule of exclusion be justified on the ground that sexual misconduct has greater value than other misconduct in predicting future behavior? Or should the rule of

exclusion be applied even *more* strictly, on the ground that evidence of prior sexual misconduct has especially strong prejudicial effects?

For an in-depth examination of the issues, see Katharine K. Baker, Once a Rapist? Motivational Evidence and Relevancy in Rape Law, 110 Harv. L. Rev. 563 (1997). Professor Baker charges that "Rule 413's proponents rely on antiquated notitions of rapists as rare, depraved psychopaths who have some sort of perverse psychological need for sex." The empirical evidence, she argues, indicates that convicted rapists are much less likely to repeat their crimes than are convicted larcenists and burglars. Professor Baker concludes that Rule 413 is misguided because it "relies on outmoded and demonstrably false stereotypes of who rapes, what rape is, and why rape might be different from other crimes." Id. at 565, 578, 589.

In accord with Professor Baker's analysis, the Judicial Conference of the United States, the policy-making body of the federal judiciary chaired by Chief Justice Rehnquist, sharply criticized the new rules and urged Congress to repeal them. The Judicial Conference concluded that "the new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases," and noted that the rules posed a "danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person." The Judicial Conference also noted that its conclusions about the undesirability of Rules 413 and 414 reflected a "highly unusual unanimity" of the judges, lawyers, and academics who serve on its advisory committees. See 56 Crim. L. Rptr. 2139-2140 (Feb. 15, 1995). Nonetheless, Congress has declined to modify or repeal the new rules.

Several states have adopted special rules, modeled on Federal Rule 413, for admitting evidence of prior sex crimes, and other states have long permitted the use of such evidence on the theory that a defendant's "lustful disposition" was especially probative in sex-offense prosecutions.

In most states, the usual rule excluding evidence of prior misconduct continues to apply in rape and child abuse trials, just as it does in other kinds of prosecutions. But in some of those states, courts find ways to bring the prior misconduct into evidence through the back door. Nevada, for example, has rejected proposals modeled on Rules 413-414, but its courts have permitted prior sex offenses to be admitted as evidence of "motive." E.g., Ledbetter v. State, 129 P.3d 671 (Nev. 2006). In a few states, legislative changes similar to Rules 413-414 have been held to violate the state constitution. E.g., State v. Burns, 978 S.W.2d 759 (Mo. 1998). See David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 Minn. L. Rev. 529 (1994); Sara Sun Beale, Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse, 4 Crim. L. Forum 307 (1993).

4. The impeachment exception. In all of the situations so far discussed, the question has been whether the prosecution can use evidence of other crimes as part of its case-in-chief. Even when the other-crimes evidence is clearly inadmissible for this purpose, if the accused chooses to testify in his own defense, then the prosecution generally will be permitted to ask about the other crimes in its cross-examination of the accused. The prosecution will also be permitted to introduce other-crimes evidence in its rebuttal for purposes of impeaching the defendant's testimony. In theory, the other-crimes evidence may not be used to

provide affirmative support for the prosecution's case. It may be considered only for purposes of judging the credibility of the defendant's testimony, and the jury will be so instructed.

The rationale of the impeachment exception appears to be that a person convicted of crime may be more likely to give false testimony than a citizen with a "clean" record. Whatever the soundness of this rationale when the previous misconduct involves perjury or similar crimes of dishonesty, its invocation in the case of other crimes can border on the absurd. In a prosecution for burglary, previous burglary convictions are clearly inadmissible for the purpose of showing the defendant's disposition to commit this crime, but if the defendant claims to have been elsewhere at the time, the burglary convictions will generally be held admissible to show a possibility that the defendant may be disposed to perjury!

The impeachment exception is premised on the assumption that the jury will consider the other crimes *only* for the limited purpose of judging credibility and will not treat the other crimes as affirmative evidence of guilt. Is this a plausible assumption? Lawyers and social scientists have studied the question but have not reached definitive conclusions. The note that follows explores the effectiveness of cautionary instructions and collects some of the available findings. The problem immediately at hand is to understand how the rules concerning other-crimes evidence actually function, but questions about the effectiveness of jury instructions are central to understanding the actual impact of all the elaborately crafted rules of criminal law and evidence that the jury is called upon to apply.

NOTE ON THE EFFECTIVENESS OF JURY INSTRUCTIONS

When other-crimes evidence has been introduced for impeachment purposes, a typical instruction to the jury might read as follows (1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions §11.12 (4th ed. 1992)):

> Evidence of a defendant's previous conviction of a crime may be considered by the jury only insofar as it may affect the credibility of the defendant as a witness and must never be considered as any evidence of [his] [her] guilt of the crime for which the defendant is now on trial.

Such an instruction calls on the jury to perform an intellectual task that is bound to run counter to the jury's natural inclinations. Indeed the rule generally excluding other-crimes evidence is premised on the assumption that such evidence *is* relevant to guilt and is very difficult for the jury to keep in perspective once it becomes known. Thus jurors may be strongly tempted to disregard the instruction, even if they are able to grasp the subtle distinction it asks them to draw. The problem arises over and over in administering the complex rules that ostensibly govern the criminal process. Yet just as the jury creates the need for many of these rules, the nature of the jury raises doubts about whether subtle or counterintuitive instructions actually affect the outcome of the case.

Experienced judges have expressed sharply divergent views about the effectiveness of jury instructions. In Spencer v. Texas, 385 U.S. 554, 565 (1967), the Supreme Court expressed its faith in "the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper

instructions." Others have been more skeptical. Justice Jackson warned: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949) (concurring opinion). In Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962), the court was equally pessimistic:

> [O]ne cannot unring a bell; after the thrust of the saber it is difficult to say forget the wound; and finally, if you throw a skunk into the jury box, you can't instruct the jury not to smell it.

The empirical evidence is mixed. A study of pretrial publicity found that volunteer "jurors" exposed to a sensational newspaper account of the case were much more likely to convict, but among jurors instructed to disregard the newspaper accounts, the difference in conviction rates disappeared.[30] In contrast, researchers found that exposure to a legally inadmissible confession significantly increased the likelihood of a guilty verdict when other evidence was weak and that instructions to disregard the confession had no significant effect on the likelihood of conviction.[31] Studies focusing on the impact of juror exposure to a defendant's record of prior convictions often find that evidence of previous similar offenses substantially increases the likelihood of conviction and that cautionary instructions remove little or none of the prejudicial effect.[32]

To the extent that cautionary instructions fail to eradicate prejudicial effects, the result could be due, in part, to jurors' inability to *understand* the subtle distinctions that such instructions sometimes require. Several studies have produced disturbing evidence that jurors often do not grasp the judge's explanations of legal concepts. *One study found that the average juror understands less than half of the judge's instructions on the law.*[33]

QUESTIONS ON JURY INSTRUCTIONS

Whatever the available evidence may suggest about the usefulness of jury instructions, there clearly remain substantial doubts about whether instructions are as effective in practice as they are assumed to be in theory. What are the implications of this situation? Granted that jury instructions function imperfectly (at best), what is the alternative?

One pragmatic approach has been to work on improving the wording of instructions, so that their meaning is more clearly explained to the jury.[34] Beyond this, when a judge tells a jury to disregard evidence, should she explain *why* the law considers the evidence misleading? The standard cautionary

30. Rita James Simon, The Effects of Newspapers on the Verdicts of Potential Jurors, in R. Simon, The Sociology of Law 617-627 (1968).

31. See Saul M. Kassin & Lawrence S. Wrightsman, Coerced Confessions, Judicial Instruction and Mock Juror Verdicts, 11 J. Applied Soc. Psych. 489 (1981).

32. See Joel D. Lieberman & Bruce D. Sales, What Social Science Teaches Us About the Jury Instruction Process, 3 Psychol. Pub. Pol'y & L. 589, 601-602 (1997).

33. Alan Reifman, Spencer Grusick & Phoebe C. Ellsworth, Real Jurors' Understanding of the Law in Real Cases, 16 L. & Hum. Behav. 539 (1992).

34. William E. Schwartzer, Communicating with Juries: Problems and Remedies, 69 Cal. L. Rev. 731 (1981). See also Lawrence J. Severance, Edith Greene, & Elizabeth F. Loftus, Toward Criminal Jury Instructions that Jurors Can Understand, 75 J. Crim. L. & C. 198 (1984).

instructions tend to be rather perfunctory. For ways to convey a more forceful message, see Albert W. Alschuler, Courtroom Misconduct by Prosecutors and Trial Judges, 50 Tex. L. Rev. 629, 652-654 (1972).

Can ameliorative reforms cure the difficulties of overly cumbersome jury instructions, or is the basic problem more fundamental? Note that jury instructions are necessary in the first place only because we want citizens without special training to participate and at the same time we want their decisions to conform to law. Do these partially inconsistent desires require a system that is simply too complex to function properly? This problem can be reconsidered in connection with the materials on other countries' approaches to lay participation. See page 49 infra.

3. *Proof Beyond a Reasonable Doubt*

IN RE WINSHIP

Supreme Court of the United States
397 U.S. 358 (1970)

[The defendant, a juvenile, was charged with committing acts that, if done by an adult, would have constituted larceny. The juvenile court found by a preponderance of the evidence that the defendant had committed the acts as charged, and it ordered him confined for one and a half years at a "training school." In one part of its opinion, the Supreme Court held that the judge in a juvenile delinquency proceeding cannot apply a lower standard of proof than that applicable in a criminal trial. The Court accordingly had to decide whether the preponderance-of-the-evidence standard was constitutionally permissible in a criminal case.]

JUSTICE BRENNAN delivered the opinion of the Court. . . . The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. . . . The reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence — that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." . . .

The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. . . .

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

JUSTICE HARLAN, concurring. . . . If . . . the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

When one makes such an assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. . . .

In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . . In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

NOTES

1. The basis of the reasonable-doubt requirement. Is it clear, as Justice Harlan argues, that the "social disutility" of convicting an innocent person is always far worse than that of releasing a guilty person? Blackstone went even further, asserting the often-repeated view that it is "better that ten guilty persons escape, than that one innocent suffer." 4 William Blackstone, Commentaries on the Laws of England *352 (1765). Other judges and commentators have approved even higher ratios, such as one hundred to one or even more. See Alexander Volokh, *n* Guilty Men, 146 U. Pa. L. Rev. 173, 187-191 (1997). But how can we really be sure that it is less "costly" to release ten (or one hundred) suspected serial killers who are guilty than to convict one suspected serial killer who is innocent?

Although the reasonable-doubt requirement appears to enjoy broad support, some skeptics wonder where Blackstone and Harlan can get the information necessary to calculate and compare these kinds of social costs. If the cost comparisons are arbitrary and indeterminate, does it follow that the reasonable-doubt requirement is not justified after all? Or does the reasonable-doubt requirement rest on a different principle? Regardless of any alleged balance of societal gains and losses, doesn't every individual enjoy a fundamental right not to suffer punishment in the absence of reliable proof of fault?

2. How burden-of-proof problems arise. Problems relating to the reasonable-doubt standard normally arises first at the close of the prosecution's case. If the judge decides that the evidence raises a reasonable doubt about guilt *as a*

matter of law (an elusive concept explored in the next note), the judge must direct a verdict for the defendant. The same problem of assessing the sufficiency of the evidence may be presented to the judge again at the close of all the evidence (when the defendant may again move for a directed verdict); it will be a central concern of the jurors in their deliberations; and it may arise again on appeal (when the defendant may seek reversal on the basis of insufficient evidence).

3. Reasonable doubt "as a matter of law." Courts often have difficulty determining whether the evidence is insufficient as a matter of law. In a sense the judges must give the defendant the *benefit of the doubt.* If there is a reasonable doubt, then a guilty verdict would seem improper. On the other hand, before taking a case away from the jury (or reversing a jury's verdict), judges must resolve all evidentiary doubts against the proponent of the motion; in this sense the courts must give the *prosecution* the benefit of the doubt on the question whether its evidence does prove guilt beyond a reasonable doubt. The following comment from the opinion in Curley v. United States, 160 F.2d 229, 232-233 (D.C. Cir. 1947), helps clarify this elusive problem and explains the test that judges apply to determine evidentiary sufficiency:

> [It is sometimes said] that unless the evidence excludes the hypothesis of innocence, the judge must direct a verdict . . . [and] that if the evidence is such that a reasonable mind might fairly conclude either guilt or innocence, a verdict of guilt must be reversed on appeal. But obviously neither of those translations is the law. Logically the ultimate premise of that thesis is that if a reasonable mind might have a reasonable doubt, there is, therefore, a reasonable doubt. That is not true. . . .
>
> The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province: The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. . . .
>
> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. . . . If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

4. Explaining reasonable doubt. The problem of evidentiary sufficiency arises not only for judges but for the jury, and the instructions accordingly must tell the jury how it should evaluate the evidence. Empirical studies confirm that jurors convict more readily when instructed under a more-likely-than-not standard than when instructed under the reasonable doubt

standard,[35] and courts must protect the jury against any instruction that might dilute the latter standard. Accordingly, a conviction must be reversed for error in explaining the reasonable doubt standard to the jury, even when the appellate court does not find the evidence insufficient as a matter of law.

(*a*) In McCullough v. State, 657 P.2d 1157 (Nev. 1983), the trial judge had explained degrees of proof to the jury in terms of "a scale of zero to ten." He placed the preliminary hearing standard of probable cause at one and the burden of persuasion in civil trials at just over five. He then described beyond a reasonable doubt as "seven and a half, if you had to put it on a scale." The Nevada Supreme Court reversed, stating (id. at 1159): "The concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify."

(*b*) Courts often get into trouble when attempting to explain "reasonable doubt" in qualitative terms. In Cage v. Louisiana, 498 U.S. 39 (1990), the trial judge in a first-degree murder prosecution had instructed the jury that "a reasonable doubt [must be] founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty. . . . A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. . . . What is required is not an absolute or mathematical certainty, but a moral certainty." The Supreme Court reversed the conviction, holding that the references to "grave uncertainty," "substantial doubt," and "moral certainty" improperly diluted the *Winship* standard.

(*c*) A traditionally accepted definition of reasonable doubt is the following, which is required by Cal. Penal Code §1096:

> Reasonable doubt is . . . not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

This language is drawn verbatim from an 1850 jury instruction given by Massachusetts Chief Justice Lemuel Shaw, see Commonwealth v. Webster, 59 Mass. 295, 320 (1850), and it is still in widespread use today. What is the meaning, to a modern juror, of "moral evidence" and "moral certainty"? Does the instruction meet the requirements of *Winship* and Cage v. Louisiana?

In Sandoval v. California, 511 U.S. 1 (1994), the Court distinguished *Cage* and upheld the constitutionality of the California instruction. The court conceded that "the phrase 'moral evidence' is not a mainstay of the modern lexicon," and that "moral certainty is ambiguous" but concluded that the instruction as a whole gave sufficient content to the reasonable-doubt requirement. Several concurring justices agreed that use of the nineteenth-century

35. See Barbara D. Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299, 1309-1311 (1977). For exploration of the impact of jury instructions generally, see pages 27-29 supra.

phrases was not unconstitutional, but they urged states to choose more comprehensible modern language.

(*d*) Because reasonable doubt is difficult to explain correctly, several courts consider it preferable to give the jury no explanation at all. In United States v. Walton, 207 F.3d 694 (4th Cir. 2000), a jury that had received no explanation of reasonable doubt sent the judge a note asking him to define it. After the judge refused, the jury convicted. The Fourth Circuit affirmed, stating that trying to explain things will "confuse rather than clarify." Is this an appropriate solution to the problem?

a. Allocating the Burden of Proof

INTRODUCTORY NOTE

An important aspect of the overall sufficiency of the evidence is the burden of proof on particular subsidiary issues in the case. Even though the prosecution must prove guilt beyond a reasonable doubt, the state is sometimes permitted to allocate the burden of persuasion on certain subsidiary issues to the defense.

The Supreme Court considered one such effort to subdivide the burden of proof in Mullaney v. Wilbur, 421 U.S. 684 (1975). *Mullaney* involved a Maine homicide statute that defined murder as a killing with "malice aforethought." The statute defined malice aforethought as a state of mind consisting of, among other things, an intent to kill "without a considerable provocation." A killing *with* provocation was classified as the less serious offense of manslaughter. At the defendant's trial, the jury was instructed that any intentional killing would involve "malice aforethought" and would therefore constitute murder, unless the defendant could rebut malice aforethought by proving, by a preponderance of the evidence, that he had acted "in the heat of passion, on sudden provocation."

The Supreme Court held that the defendant's due process rights were violated by Maine's decision to place upon him the burden of proving provocation. Because provocation negated the "malice aforethought" required to convict him of murder, the approach used in Maine had violated the *Winship* requirement that the state prove "beyond a reasonable doubt every fact necessary to constitute the crime charged."

Mullaney, however, left room for argument about the crucial question of *why* the absence of provocation was a necessary fact. Was it because provocation was inherently important in determining the degree of culpability and punishment? Or was it because the absence of provocation had been included in the statutory definition of what murder was? The Supreme Court soon faced a case requiring it to choose between these two approaches.

PATTERSON v. NEW YORK

Supreme Court of the United States
432 U.S. 197 (1977)

JUSTICE WHITE delivered the opinion of the Court. . . .

After a brief and unstable marriage, the appellant, Gordon Patterson, Jr., became estranged from his wife, Roberta. Roberta resumed an association with

John Northrup, a neighbor to whom she had been engaged prior to her marriage to appellant. On December 27, 1970, Patterson borrowed a rifle from an acquaintance and went to the residence of his father-in-law. There, he observed his wife through a window in a state of semiundress in the presence of John Northrup. He entered the house and killed Northrup by shooting him in the head.

Patterson was charged with second-degree murder. In New York there are two elements of this crime: (1) "intent to cause the death of another person"; and (2) "caus[ing] the death of such person or of a third person." Malice aforethought is not an element of the crime. In addition, the State permits a person accused of murder to raise an affirmative defense that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse."[a]

New York also recognizes the crime of manslaughter. A person is guilty of manslaughter if he intentionally kills another person "under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance." Appellant confessed before trial to killing Northrup, but at trial he raised the defense of extreme emotional disturbance.

The jury was . . . instructed, consistently with New York law, that the defendant had the burden of proving his affirmative defense by a preponderance of the evidence. The jury was told that if it found beyond a reasonable doubt that appellant had intentionally killed Northrup but that appellant had demonstrated by a preponderance of the evidence that he had acted under the influence of extreme emotional disturbance, it had to find appellant guilty of manslaughter instead of murder. The jury found appellant guilty of murder. [The New York Court of Appeals affirmed, rejecting Patterson's argument that the statutory scheme had improperly shifted to him the burden of proof on the crucial question of extreme emotional disturbance.]

In determining whether New York's allocation to the defendant of proving the mitigating circumstances of severe emotional disturbance is consistent with due process, it is . . . relevant to note that this defense is a considerably expanded version of the common-law defense of heat of passion on sudden provocation and that at common law the burden of proving the latter, as well as other affirmative defenses — indeed, "all . . . circumstances of justification, excuse or alleviation" — rested on the defendant. 4 W. Blackstone, Commentaries *201. This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified.

In 1895 the common-law view was abandoned with respect to the insanity defense in federal prosecutions. Davis v. United States, 160 U.S. 469 (1895). This ruling had wide impact on the practice in the federal courts with respect to the burden of proving various affirmative defenses, and the prosecution in a majority of jurisdictions in this country sooner or later came to shoulder the burden of proving the sanity of the accused and of disproving the facts constituting other affirmative defenses, including provocation. *Davis* was not a constitutional ruling, however, as Leland v. Oregon, [343 U.S. 790 (1952)], made clear.

a. The relevant provisions of the New York Penal Code may be found at pages 378-380 infra. — EDS.

At issue in Leland v. Oregon was the constitutionality under the Due Process Clause of the Oregon rule that the defense of insanity must be proved by the defendant beyond a reasonable doubt. Noting that *Davis* "obviously establish[ed] no constitutional doctrine," the Court refused to strike down the Oregon scheme, saying that the burden of proving all elements of the crime beyond reasonable doubt, including the elements of premeditation and deliberation, was placed on the State under Oregon procedures and remained there throughout the trial. To convict, the jury was required to find each element of the crime beyond a reasonable doubt, based on all the evidence, including the evidence going to the issue of insanity. Only then was the jury "to consider separately the issue of legal sanity per se. . . ." This practice did not offend the Due Process Clause even though among the 20 States then placing the burden of proving his insanity on the defendant, Oregon was alone in requiring him to convince the jury beyond a reasonable doubt. . . .

We cannot conclude that Patterson's conviction under the New York law deprived him of due process of law. . . . The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. . . . It seems to us that the State satisfied the mandate of *Winship* [page 29 supra,] that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [Patterson was] charged."

Even if we were to hold that a State must prove sanity to convict once that fact is put in issue, it would not necessarily follow that a State must prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment. Here, in revising its criminal code, New York provided the affirmative defense of extreme emotional disturbance, a substantially expanded version of the older heat-of-passion concept; but it was willing to do so only if the facts making out the defense were established by the defendant with sufficient certainty. The State was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state. . . . The Due Process Clause, as we see it, does not put New York to the choice of abandoning such defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment. . . .

This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard. "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." McFarland v. American Sugar Rfg. Co., 241 U.S. 79, 86 (1916). The legislature cannot "validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." Tot v. United States, 319 U.S. 463, 469 (1943). . . .

It is urged that Mullaney v. Wilbur necessarily invalidates Patterson's conviction. . . . *Mullaney*'s holding, it is argued, is that the State may not permit

the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt. In our view, the *Mullaney* holding should not be so broadly read. . . . The Maine Supreme Judicial Court made it clear that . . . malice, in the sense of the absence of provocation, was part of the definition of that crime. Yet malice, i.e., lack of provocation, was presumed and could be rebutted by the defendant only by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation. . . .

As we have explained, nothing was presumed or implied against Patterson. . . . The judgment of the New York Court of Appeals is affirmed.

JUSTICE POWELL, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting. . . .

Mullaney held invalid Maine's requirement that the defendant prove heat of passion. The Court today, without disavowing the unanimous holding of *Mullaney,* approves New York's requirement that the defendant prove extreme emotional disturbance. The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's. It does so on the basis of distinctions in language that are formalistic rather than substantive. . . . The test the Court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime. . . .

With all respect, this type of constitutional adjudication is indefensibly formalistic. . . . What *Winship* and *Mullaney* had sought to teach about the limits a free society places on its procedures to safeguard the liberty of its citizens becomes a rather simplistic lesson in statutory draftsmanship. Nothing in the Court's opinion prevents a legislature from applying this new learning to many of the classical elements of the crimes it punishes. . . . [8]

The Court understandably . . . issues a warning that "there are obviously constitutional limits beyond which the States may not go in this regard." . . . But if the State is careful to conform to the drafting formulas articulated today, the constitutional limits are anything but "obvious." This decision simply leaves us without a conceptual framework for distinguishing abuses from legitimate legislative adjustments of the burden of persuasion in criminal cases.

It is unnecessary for the Court to retreat to a formalistic test for applying *Winship*. . . . The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. The requirement of course applies a fortiori if the factor makes the difference between guilt and innocence. But a substantial difference in punishment alone is not enough.

8. For example, a state statute could pass muster under the only solid standard that appears in the Court's opinion if it defined murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable mens rea. The State, in other words, could be relieved altogether of responsibility for proving *anything* regarding the defendant's state of mind, provided only that the face of the statute meets the Court's drafting formulas. . . .

It also must be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance. If either branch of the test is not met, then the legislature retains its traditional authority over matters of proof. . . .

I hardly need add that New York's provisions allocating the burden of persuasion as to "extreme emotional disturbance" are unconstitutional when judged by these standards. "Extreme emotional disturbance" is, as the Court of Appeals recognized, the direct descendant of the "heat of passion" factor considered at length in *Mullaney*. . . . The presence or absence of extreme emotional disturbance makes a critical difference in punishment and stigma, and throughout our history the resolution of this issue in fact, although expressed in somewhat different terms, has distinguished manslaughter from murder. . . . New ameliorative affirmative defenses, about which the Court expresses concern, generally remain undisturbed by the holdings in *Winship* and *Mullaney*—and need not be disturbed by a sound holding reversing Patterson's conviction.

NOTES AND QUESTIONS

1. The burden of production versus the burden of persuasion. Rules allocating the burden of proof deal with two distinct problems. The first concerns allocating the burden of coming forward with enough evidence to put a certain fact in issue. This is commonly referred to as the burden of *production.* The second problem concerns allocating the burden of convincing the trier of fact. This is commonly referred to as the burden of *persuasion.* With respect to most elements of most crimes, the prosecution bears *both* burdens. That is, the prosecution must introduce enough evidence not only to put the facts in issue but also to persuade the trier of fact beyond a reasonable doubt. In some instances state law may require the defense to bear both burdens. But note that an intermediate position is possible: State law might allocate the burden of *production* to the defense but the burden of *persuasion* to the prosecution. For example, the state might provide that a defendant seeking acquittal on grounds of duress must introduce some evidence of duress, but that once this is done, the prosecution must prove the absence of duress beyond a reasonable doubt. In this situation it is sometimes said (confusingly) that the defendant bears the initial burden of proof and that, once duress is at issue, the burden *shifts* to the prosecution. Or it may be said that absence of duress is *presumed,* but that when evidence of duress is introduced the presumption is *rebutted* or simply *disappears.* All these expressions are equivalent to the more straightforward statement that the defendant bears the burden of production and the prosecution the burden of persuasion.

When the defendant bears the burden of production on an issue, the issue is commonly referred to as an *affirmative defense.* In some states, when an issue is designated an affirmative defense, the defendant must bear the burdens of both production and persuasion, but it is common practice to treat burdens of production and persuasion as separate issues. Thus, the defendant may bear the burden of persuasion on *some* affirmative defenses, but with respect to others he may bear *only* the burden of production. Under the Model Penal Code, the defendant generally bears only the burden of production, and once an

affirmative defense is raised, the prosecution must disprove it beyond a reasonable doubt. See Model Penal Code §1.12(2)(a), Appendix.

When the defendant bears the burden of production, how much evidence is necessary to satisfy that burden so that the prosecution will be required to disprove the claim beyond a reasonable doubt? Most courts require that the evidence be sufficient to raise at least a reasonable doubt on the matter. See Frazier v. Weatherholtz, 572 F.2d 994 (4th Cir. 1978). When the defense produces evidence sufficient to satisfy the threshold requirements, it becomes necessary to determine which party must bear the burden of persuading the trier of fact.

2. Allocating the burden of persuasion: the basis of Patterson. Are states free to allocate the burden of persuasion however they choose, or does the reasoning of *Patterson* suggest some limits? Consider the following problems.

(*a*) *Liberalizing and nonliberalizing changes in the law.* In *Patterson* the affirmative defense involved "a substantially expanded version of the older heat-of-passion concept," and the Court stressed the need for permitting the states flexibility in this situation. But what if, after *Patterson,* a state shifts to the defendant a burden of persuasion previously imposed on the prosecution and does not enlarge the scope of the defense? Should it matter whether the traditional defense might otherwise have been restricted or repealed?

(*b*) *Gratuitous defenses.* The *Patterson* majority assumed that New York could eliminate the "extreme emotional disturbance" defense altogether, a point conceded by Justice Powell's dissent. If this is so, how can there be any serious challenge to the constitutionality of recognizing the defense only in diluted form, that is, when the defendant can prove it? Several commentators argue that "the greater power should include the lesser."[36] Under this analysis, states would be free to reallocate burdens of persuasion relating to any fact that is not a constitutionally mandated prerequisite to just punishment. But conversely, states would be required to prove a fact beyond a reasonable doubt if punishment would be impermissible (or excessive, violating Eighth Amendment proportionality requirements) as applied to conduct not involving that fact. See, e.g., Ronald Allen, The Restoration of *In re Winship:* A Comment on Burdens of Persuasion in Criminal Cases after *Patterson v. New York,* 76 Mich. L. Rev. 30 (1977). Consider the following comment:

John C. Jeffries Jr. & Paul B. Stephan, Defenses, Presumptions and Burdens of Proof in the Criminal Law, 88 Yale L.J. 1325, 1345-1347 (1979): Implementing the presumption of innocence—whether on an actual or a symbolic level—requires that *something* be proved beyond a reasonable doubt. It does not, however, speak to the question of *what* that something must be. [When] the state considers a gratuitous defense, that is, one that it may grant or deny as it sees fit, a constitutional insistence on proof beyond a reasonable doubt no longer makes sense. Such a rule would purport to preserve individual liberty and the societal sense of commitment to it by forcing the government *either* to disprove the defense beyond a reasonable doubt *or* to eliminate the defense altogether.

36. The originator of the greater-includes-the-lesser argument in this context is generally thought to be Justice Holmes, who advanced it in his opinion for the Court in Ferry v. Ramsey, 277 U.S. 88 (1928).

The latter solution results in an extension of penal liability despite the presence of mitigating or exculpatory facts. It is difficult to see this result as constitutionally compelled and harder still to believe that it flows from a general policy, whether actual or symbolic, in favor of individual liberty. . . .

The trouble lies in trying to define justice in exclusively procedural terms. *Winship*'s insistence on the reasonable doubt standard is thought to express a preference for letting the guilty go free rather than risking conviction of the innocent. This value choice, however, cannot be implemented by a purely procedural concern with burden of proof. Guilt and innocence are substantive concepts. Their content depends on the choice of facts determinative of liability. If this choice is remitted to unconstrained legislative discretion, no rule of constitutional procedure can restrain the potential for injustice. . . .

For scholarship critical of *Patterson*'s "greater includes the lesser" approach, see Scott E. Sunby, The Reasonable Doubt Rule and the Meaning of Innocence, 40 Hastings L.J. 457 (1989); Donald A. Dripps, The Constitutional Status of the Reasonable Doubt Rule, 75 Cal. L. Rev. 1665 (1987). Both authors argue that the due process clause should be construed to require proof beyond a reasonable doubt for any fact that makes a significant difference in the authorized range of punishment.

(*c*) *Nongratuitous defenses.* In *Patterson* the affirmative defense was "gratuitous," in the sense that the state could have eliminated the defense completely. Should the state's freedom to shift the burden of proof extend to defenses that are *not* gratuitous? Consider, for example, the insanity defense. There is a long-standing debate (see pages 886-889 infra) over the question whether some form of an insanity defense is constitutionally mandated. Yet in Rivera v. Delaware, 429 U.S.877 (1986), the court summarily dismissed a challenge to a Delaware law that required the defendant to bear the burden of proving insanity. Should *Rivera* be read as holding, by implication, that states are free to eliminate the insanity defense completely? If not, what is the justification for permitting states to avoid the reasonable doubt requirement and to "dilute" a defense that may be constitutionally mandated?

In connection with these questions, consider Martin v. Ohio, 480 U.S. 228 (1987). The defendant, a battering victim, shot her husband in what she claimed was an act of self-defense. She was charged with aggravated murder, which is defined under Ohio law as a killing "purposely, and with prior calculation and design." Ohio law also provides that self-defense is a complete defense when "the defendant was not at fault in creating the situation giving rise to the argument; [and] had an honest belief that she was in imminent danger of death or great bodily harm and that her only means of escape from such danger was in the use of such force. . . ." At trial, the jury was instructed that the prosecution had to prove beyond a reasonable doubt all the elements of aggravated murder, but that the defendant was required to prove her self-defense claim by a preponderance of the evidence. The defendant's aggravated murder conviction was upheld by the Supreme Court. Writing for the majority, Justice White said (id. at 233-235):

> The State did not exceed its authority in defining the crime of murder as purposely causing the death of another with prior calculation or design. It did not seek to shift to Martin the burden of proving any of those elements, and the jury's verdict reflects that none of her self-defense evidence raised a reasonable doubt

about the state's proof that she purposefully killed with prior calculation and design. . . .

Justice Powell, writing for the four dissenters, argued that the defense claim of imminently necessary self-defense was inherently inconsistent with the prosecution claim of killing "by prior calculation and design." As a result, he argued, the instruction requiring the defendant to prove self-defense was in direct conflict with the instruction requiring the prosecution to prove aggravated murder beyond a reasonable doubt. As to this point, the majority asserted (id. at 235) that "the instructions were sufficiently clear to convey to the jury that the state's burden of proving prior calculation did not shift."

Note that no member of the Court challenged Justice White's assertion, supra, that "[t]he State did not exceed its authority in defining the crime of murder as purposely causing the death of another. . . ." Is this so clear? Could a state constitutionally abolish the defense of self-defense altogether? Could the state condemn as a murderer, and sentence to long-term imprisonment, a person who kills when such an act is the only available means to avoid an unlawful threat of imminent death?

3. Sentencing enhancements. Legislatures often define a crime and then specify that the punishment to be imposed will depend on certain characteristics of the offense committed (such as whether a firearm was used; whether a given quantity of drugs was involved). Usually the judge determines at a sentencing hearing whether such circumstances exist and then imposes sentence accordingly. The procedure at the sentencing hearing is relatively informal, and the judge is not required to find beyond a reasonable doubt every fact she considers in fixing the sentence. Thus, McMillan v. Pennsylvania, 477 U.S. 79 (1986), involved a state statute imposing a mandatory minimum sentence of five years' imprisonment on anyone convicted of certain felonies if the judge found at sentencing by a preponderance of the evidence that he had possessed a firearm during the commission of the offense. The Court held that this provision did not violate the constitutional requirement of proof beyond a reasonable doubt because the fact in question — possession of a weapon — did not increase the maximum sentence that the judge was authorized to impose, and accordingly the judge *could have* imposed the same five-year sentence whether or not the defendant had possessed a firearm.

Clearly, this technique affords an easy way to ease the burden of compliance with the requirement of proof beyond a reasonable doubt — facts that dictate a large increase in punishment can be established merely by a preponderance of the evidence. But this technique is available only when the facts at issue are merely "sentencing factors," rather than elements of a separate offense. For facts of the latter sort, as *Mullaney* holds, nothing less than proof beyond a reasonable doubt will suffice. A technical question of statutory structure therefore takes on great importance — when is a fact that enhances the sentence merely a sentencing factor and when is it an element of a separate, aggravated offense?

In a landmark decision, Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court made clear that the states do not have unlimited discretion to characterize facts as mere sentencing considerations rather than elements of the offense. *Apprendi* involved a "hate-crimes" statute that provided for doubling the

maximum punishment applicable to any offense if the sentencing judge found by a preponderance of the evidence that the offense was committed with "a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity." (Id. at 469.) The Court held this scheme unconstitutional, ruling that any fact (other than prior criminal record) that increases the maximum penalty applicable to an offense is an "element" of the offense, which therefore must be proved beyond a reasonable doubt. And the Court has held the *Apprendi* principle applicable not only to facts that increase a *statutory* maximum but also to facts that increase the maximum punishment authorized under sentencing guidelines. Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005).

In contrast, however, facts that affect the choice of sentence within an authorized range continue to be treated merely as "sentencing factors," and such facts do not have to be proved beyond a reasonable doubt. Legislatures therefore can give themselves considerable flexibility simply by setting a very high maximum sentence for an offense. They can then authorize or even require judges to impose a *lower* sentence if certain facts are proved by a mere preponderance. Similarly, as in *McMillan*, legislatures can require judges to impose a severe mandatory *minimum* sentence whenever the prosecution proves certain facts by a mere preponderance at the sentencing hearing. Although this approach to statutory drafting seems to dilute the reasonable-doubt requirement in almost the same way that the New Jersey hate-crimes statute did in *Apprendi*, the Court has explicitly reaffirmed the *McMillan* holding that the reasonable-doubt requirement does not apply to facts that trigger a mandatory minimum. Harris v. United States, 536 U.S. 545 (2002).

This distinction between facts that are offense "elements" and those that are mere "sentencing factors" has important implications not only for the reasonable-doubt principle but also for the right to jury trial and for the dynamics of the sentencing process. We explore those implications below at pages 62-64 with respect to jury trial, and at pages 1064-1070 with respect to sentencing.

4. How should a state exercise its discretion? Even where *Patterson* leaves a state free to impose a burden of persuasion on the defendant, the decision does not imply that the state must do so or should do so. Legislatures (or courts, when statutes do not control) must decide what is desirable with respect to each defense of this kind. The Supreme Court recently held, for example, that in the specific context of a federal prosecution for illegally receiving a firearm and making false statements when acquiring the firearm, a defendant who claims duress must bear the burden of proving that defense by a preponderance of the evidence. Dixon v. United States, 126 S. Ct. 2437 (2006). Burden-of-proof questions therefore should be reconsidered in light of problems associated with particular substantive law doctrines.

b. Presumptions

As the preceding section shows, the prosecution's burden of proof often can be eased by defining an offense in such a way that the burden of proving certain facts can be assigned to the defense. Another device that can ease the prosecutor's burden is the *presumption*. The presumption can come into play even when

the state has not exercised (or cannot exercise) the *Patterson* option of reallocating the burden of proof. Suppose, for example, that murder is defined as an *intentional* killing. The state might hesitate to redefine murder as including all killing (with lack of intent relevant only as an affirmative defense). Can the state instead choose to retain intent as a required element of murder, but then provide that the existence of the necessary intent will be *presumed* from some other fact (for example, from the use of a deadly weapon)? The question assumes great practical importance because intent is a required element of so many criminal offenses, but there is often no direct evidence of what was going on in the defendant's mind. Rather than give a straightforward answer to the question, the Supreme Court has held that it is sometimes — but not always — permissible to presume the existence of an essential fact (like intent) from proof of some other fact. The Court has said that a *mandatory* presumption — one that the jury is required to accept in the absence of defense rebuttal — is constitutionally acceptable only if, over the universe of all cases in general, the presumed relationship holds true beyond a reasonable doubt. In contrast, in order for the prosecution to rely on a *permissive* inference — one that the jury may choose to accept or reject even in the absence of any defense rebuttal — all that is required is that the relationship be "more likely than not" to hold true under the circumstances of the particular case. County Court v. Allen, 442 U.S. 140 (1979).

Consider the application of this standard to one of the criminal law's most commonly invoked presumptions — the presumption that a "person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts." After *County Court*, is reliance on this presumption constitutionally permissible? For example, if the defendant, a person of sound mind, shoots at the victim, hitting him in the chest and killing him, is it permissible to presume that the defendant intended to kill? The issue was presented in Francis v. Franklin, 471 U.S. 307 (1985). The case involved an escaped convict (Franklin) who shot a 72-year-old man in the course of an attempt to steal the man's car. The trial judge told the jury that Franklin was "presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." Franklin was convicted of murder and sentenced to death. The Supreme Court held the jury instruction unconstitutional and reversed the conviction. Do you see why?

4. *The Role of the Jury*

DUNCAN v. LOUISIANA

Supreme Court of the United States
391 U.S. 145 (1968)

JUSTICE WHITE delivered the opinion of the Court.

Appellant, Gary Duncan, was convicted of simple battery in the Twenty-fifth Judicial District Court of Louisiana. Under Louisiana law simple battery is a misdemeanor, punishable by two years' imprisonment and a $300 fine.[a]

a. The applicable Louisiana statute provided that "Simple battery is a battery, without the consent of the victim, committed without a dangerous weapon." La. Rev. Stat. §14:35 (1950). As traditionally understood, a battery includes any "offensive touching"; neither pain nor physical injury is required. See Wayne R. LaFave, Criminal Law 816 (4th ed. 2003). — EDS.

Appellant sought trial by jury, but because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed, the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $150. Appellant sought review in the Supreme Court of Louisiana, asserting that the denial of jury trial violated rights guaranteed to him by the United States Constitution. The Supreme Court [of Louisiana denied review.] We noted probable jurisdiction. . . .

While driving on Highway 23 in Plaquemines Parish on October 19, 1966, [appellant] saw two younger cousins engaged in a conversation by the side of the road with four white boys. Knowing his cousins, Negroes who had recently transferred to a formerly all-white high school, had reported the occurrence of racial incidents at the school, Duncan stopped the car, got out, and approached the six boys. . . . The testimony was in dispute on many points, but the witnesses agreed that appellant and the white boys spoke to each other, that appellant encouraged his cousins to break off the encounter and enter his car, and that appellant was about to enter the car himself for the purpose of driving away with his cousins. The whites testified that just before getting in the car appellant slapped Herman Landry, one of the white boys, on the elbow. The Negroes testified that appellant had not slapped Landry, but had merely touched him. The trial judge concluded that the State had proved beyond a reasonable doubt that Duncan had committed simple battery, and found him guilty.

. . . Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee. Since we consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused.

The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to the Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. . . .

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. 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. . . . The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States. . . .

We are aware of the long debate, especially in this century, among those who write about the administration of justice, as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings. [M]ost of the controversy has centered on the jury in civil cases. [A]t the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact and that they are . . . little better than a roll of dice. Yet, the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.[26]

The State of Louisiana urges that holding that the Fourteenth Amendment assures a right to jury trial will cast doubt on the integrity of every trial conducted without a jury. . . . We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial. However, the fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court. Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely.

Louisiana's final contention is that even if it must grant jury trials in serious criminal cases, the conviction before us is valid and constitutional because here the petitioner was tried for simple battery and was sentenced to only 60 days in the parish prison. We are not persuaded. It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. . . .

We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purpose to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense. Consequently, appellant was entitled to a jury trial and it was error to deny it. . . .

Reversed and remanded.

JUSTICE HARLAN, with whom JUSTICE STEWART joins, dissenting. . . .

[There] is a wide range of views on the desirability of trial by jury, and on the ways to make it most effective when it is used; there is also considerable

26. Kalven & Zeisel, [The American Jury (1966)].

variation from State to State in local conditions such as the size of the criminal caseload, the ease or difficulty of summoning jurors, and other trial conditions bearing on fairness. We have before us, therefore, an almost perfect example of a situation in which the celebrated dictum of Mr. Justice Brandeis should be invoked. It is, he said, "one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory. . . ." New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 311 (dissenting opinion). This Court, other courts, and the political process are available to correct any experiments in criminal procedure that prove fundamentally unfair to defendants.

NOTES

1. Duncan *in context.* Justice White mentions, early in his opinion, that Duncan's cousins had recently transferred to a previously all-white high school where "racial incidents" had been reported. That description of the circumstances was a colossal, and no-doubt deliberate, understatement. The previous year, the U.S. attorney general had declared Plaquemines Parish one of the nine most discriminatory counties in the nation, and in 1966, at the time of incident, the parish was in the midst of a ferocious school desegregation battle, pitting Justice Department attorneys, civil rights lawyers, and the federal courts against Leander H. Perez, Sr., a political figure and ardent segregationist (known locally as "the Bonaparte of the Bayou") who had ruled the parish with an iron fist for decades. Perez had hand-picked all judges and other officials in the parish, and he tolerated no opposition. Many civil rights activists who dared to enter the parish were arrested as "outside agitators." When the civil rights lawyer who had taken Duncan's case appeared at the courthouse to file a motion needed for the appeal to the U.S. Supreme Court, the Plaquemines sheriff arrested him on a charge of practicing law without a license and confiscated the briefcase that contained all of Duncan's appeal papers. For a fascinating, in-depth description of this background, see Nancy J. King, *Duncan v. Louisiana*: How Bigotry in the Bayou Led to Federal Regulation of State Juries, in Criminal Procedure Stories (C. Steiker, ed., 2006).

Why didn't the Court make more of these local circumstances? The political situation in Plaquemines Parish seems to afford a perfect opportunity to make vivid the value of the jury as a check on official power. Would an emphasis on these facts have made the Court's opinion more persuasive? Or would such an emphasis detract from the Court's effort to establish a more general principle — that the jury should be considered an important safeguard against abuse even in a well-functioning democracy?

2. The scope of the right to jury trial. Justice Frankfurter once wrote that "[n]o changes or chances can alter the content of the verbal symbol of 'jury' — a body of twelve men who must reach a unanimous conclusion if the verdict is to go against the defendant." Rochin v. California, 342 U.S. 165, 170 (1952). Except for the limitation to males, which had passed away long before Frankfurter reiterated it, this statement expressed a nearly universal view about what was meant by a jury. Nevertheless, in Williams v. Florida, 399 U.S. 78, 86 (1970), the Court said that the decision to fix the size of the jury at 12 "appears to have been

a historical accident, unrelated to the great purposes that gave rise to the jury" and held that a 6-member jury satisfied the constitutional requirement.[37] In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court held that unanimity was not required in state criminal trials, so long as a substantial majority of the jury supports the verdict. The Court in that case upheld guilty verdicts obtained by 11–1 and 10–2 votes, without ruling explicitly on whether a smaller majority could also be sufficiently substantial.[38]

Duncan had raised, but not resolved, the question of what may be deemed a "petty offense," for which the Sixth Amendment jury trial guarantee would be inapplicable. In Baldwin v. New York, 399 U.S. 66 (1970), the Court held that no offense may be deemed petty where imprisonment for more than six months is authorized. In such cases a defendant has a constitutional right to jury trial, whether or not imprisonment is in fact likely to be imposed.

3. The representative jury. Contrary to popular folklore, there is no requirement that a defendant be tried by a jury of "his peers." Nor is there any requirement that the trial jury of 6 or 12 reflect the demographic character of the locality. But the Supreme Court has held that under the Sixth Amendment, the "venire" — the panel of potential jurors from which the trial jury is drawn — must reflect "a fair cross section of the community." Taylor v. Louisiana, 419 U.S. 522, 537 (1975). The Court has treated the "fair cross section" requirement as a means to ensure the *impartiality* of the jury, but has not recognized an independent Sixth Amendment right to a jury that *represents* the community in any broader sense. See Holland v. Illinois, 493 U.S. 474 (1990); Laura G. Dooley, The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community, 54 DePaul L. Rev. 79 (2004).

Once an appropriate venire is assembled, potential jurors who know the defendant, the victim, or a witness can be challenged "for cause" and removed from the pool. The opposing attorneys are then allowed "peremptory challenges," which permit them to remove a certain number of potential jurors without giving any reason, simply because they suspect that the potential juror may be unsympathetic to their side. In Batson v. Kentucky, 476 U.S. 79 (1986), and J.E.B. v. Alabama, 511 U.S. 127 (1994), the Supreme Court held that attorneys cannot use their peremptory challenges to deliberately exclude potential jurors on grounds of race or gender. But the requirement is often difficult to enforce because a peremptory challenge can pass muster when the attorney can offer a plausible race-neutral and gender-neutral explanation for making it. As a result, the trial jury ultimately empanelled often will differ markedly from the character of the community as a whole, even when the venire was well balanced and fully representative.

37. In Ballew v. Georgia, 435 U.S. 223 (1978), the Court held that a 5-person jury did not fulfill the constitutional jury trial requirement.

38. In Burch v. Louisiana, 441 U.S. 130 (1979), the Court held that a 5–1 vote did not satisfy constitutional requirements. Thus, where states elect to use a 6-person jury, the verdict must be unanimous. The opinions in *Apodaca* suggest that for *federal* criminal trials, a majority of the Court would continue to view unanimity as constitutionally mandated. In any event, Rule 31(a) of the Federal Rules of Criminal Procedure requires a unanimous verdict in federal prosecutions.

4. The effect of jury trial on the criminal justice system. (*a*) The entire texture of the trial is influenced by the existence of the jury. Instead of addressing arguments to one law-trained person, the lawyers address themselves to 12 lay people. Obviously, lawyers believe that nonlegal factors will influence the jury and attempt, with some success, to put such matters before it.

(*b*) Because lay people may not assess items of proof as carefully as the law trained, Anglo-American law includes an elaborate structure of rules providing for the exclusion of certain evidence at the trial.

(*c*) The judge is judge of the law; the jury decides questions of fact. The legal system must characterize the nature of a given question: Is it a question of law or of fact?

(*d*) Judges must formulate for jurors' use an acceptable statement of applicable legal rules, though these rules may be the most difficult imaginable. When significant errors are made in stating these rules, a conviction must be reversed and a new trial must be held.

5. The policies served (and disserved) by jury trial. The Court in *Duncan* summarizes the principal reasons why it regards the availability of trial by jury as an essential component of fair procedure. Is it clear that the advantages of jury trial outweigh its costs or that experimentation with different kinds of factfinding procedures should be considered intolerable? Consider the following comments:

Glanville Williams, The Proof of Guilt 271-272 (3d ed. 1963): [I]t is an understatement to describe a jury, with Herbert Spencer, as a group of twelve people of average ignorance. There is no guarantee that members of a particular jury may not be quite unusually ignorant, credulous, slow-witted, narrow-minded, biased or temperamental. The danger of this happening is not one that can be removed by some minor procedural adjustment; it is inherent in the English notion of a jury as a body chosen from the general population at random.

Dale W. Broeder, The Functions of the Jury—Facts or Fictions?, 21 U. Chi. L. Rev. 386, 413-417 (1947): From the time of the Alien and Sedition Acts, the government's attempted inroads on civil rights seem to have received the enthusiastic support of jurors. . . .

But the case against the criminal jury as a protector of individual liberty extends further than to contests between government and citizens opposed to its policies. Minority groups have often suffered at the hands of jurymen. Wholesale acquittals of lynch-law violators, convictions of Negroes on the slightest evidence, and numerous other occurrences which have now almost become a part of the jury tradition might be instanced as examples. . . .

Aside from the incidental psychological functions which the criminal jury is alleged to perform, the sole remaining virtue claimed for it lies in its ability to make allowances for the circumstances of the particular case—to dispense with a rule of law. As noted previously, however, law-dispensing is a two-edged sword, and there is no current means of ascertaining which way it more often swings. It may seriously be doubted whether entrusting the jury with law-dispensing powers is justified. While flexibility of legal

administration is desirable, it would seem that the necessary exceptions to the normal rules could with better reason be fashioned by the legislature or court.

Harry Kalven & Hans Zeisel, The American Jury 7-9 (1966): The [jury] controversy centers around three large issues. First, there is a series of collateral advantages and disadvantages that are often charged against, or pointed to on behalf of, the jury as an institution. In this realm fall such positive points as that the jury provides an important civic experience for the citizen; that, because of popular participation, the jury makes tolerable the stringency of certain decisions; that, because of its transient personnel, the jury acts as a sort of lightning rod for animosity and suspicion which otherwise might center on the more permanent judge; and that the jury is a guarantor of integrity, since it is said to be more difficult to reach twelve men than one. Against such affirmative claims, serious collateral disadvantages have been urged, chiefly that the jury is expensive; . . . that jury service imposes an unfair tax and social cost on those forced to serve; and that, in general, exposure to jury duty disenchants the citizen and causes him to lose confidence in the administration of justice.

Second, there is a group of issues that touch directly on the competence of the jury. . . . On the one hand, it is urged that the judge, as a result of training, discipline, recurrent experience, and superior intelligence, will be better able to understand the law and analyze the facts than laymen, selected from a wide range of intelligence levels, who have no particular experience with matters of this sort, and who have no durable official responsibility. On the other hand, it is argued that twelve heads are inevitably better than one; that the jury as a group has wisdom and strength which need not characterize any of its individual members; that it makes up in common sense and common experience what it may lack in professional training, and that its very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye.

The third group of issues about the jury goes to what is perhaps the most interesting point. The critics complain that the jury will not follow the law, either because it does not understand it or because it does not like it, and that thus only a very uneven and unequal administration of justice can result from reliance on the jury; indeed, it is said that the jury is likely to produce that government by man, and not by rule of law, against which Anglo-American political tradition is so steadfastly set.

This same flexibility of the jury is offered by its champions as its most endearing and most important characteristic. The jury, it is said, is a remarkable device for insuring that we are governed by the spirit of the law and not by its letter; for insuring that rigidity of any general rule of law can be shaped to justice in the particular case. One is tempted to say that what is one man's equity is another man's anarchy.

6. The symbolic implications of decision making by jury. Consider George C. Harris, The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused, 74 Neb. L. Rev. 804, 805 (1995):

> [There is] a public interest in trial by jury in criminal cases that is distinct from the public's interest in a fair trial for the accused or the reliable

determination of guilt and innocence. This separate public interest derives from what can be called the criminal jury's "communitarian" function. The communitarian function of public trial by jury in criminal cases can be divided into three related aspects: 1) a democratic vehicle for community participation in government in general and the criminal justice system in particular; 2) a means by which the community is educated regarding our system of justice; and 3) a ritual by which the faith of the community in the administration of justice is maintained.

Question: Suppose that the defendant prefers *not* to be tried by a jury. Should the defendant's preference control, or should the community's interest in jury decision making trump the defendant's perception of the procedure most likely to afford him a fair trial? American jurisdictions are closely divided on the question. See Harris, supra, at 810-820.

7. Lay adjudicators in other countries. In Canada, the criminal trial jury remains a "robust" institution that continues to account for a significant proportion of criminal case dispositions. See Neil Vidmar, The Canadian Criminal Jury: Searching for a Middle Ground, 62 Law & Contemp. Probs. 141, 172 (1999). Elsewhere in the common law world, however, jury trials have become rare, as governments concerned about costs and the jury's competence have steadily narrowed the range of criminal cases in which jury trial is available. See Freedom's Lamp Dims, The Economist, June 23, 2005. For discussion of current practice in Australia, Canada, Ireland, New Zealand, and Scotland, as well as such civil law countries as Japan, Russia, and Spain, see Symposium on the Common Law Jury, 62 Law & Contemp. Probs. 1 (1999). Consider the following comment:

Glanville Williams, The Proof of Guilt 254-256, 307 (3d ed. 1963): So great was the prestige of the British jury that it was transplanted to one Continental country after another as a symbol of new-found political freedom. . . .

[E]fforts to acclimatise jury trial have generally met with indifferent success, partly because of a failure to settle satisfactorily the relative provinces of judge and jury. Perhaps another contributing factor was the failure to apply the restrictive rules of the law of evidence (particularly in respect of the character of the accused) which English experience had shown to be necessary. . . . The strong tendency on the Continent of late years has been to replace the jury by lay justices or assessors, sitting with the judges and sharing with them the responsibility of deciding both fact and law and determining sentence. These lay justices may, as in France since 1941, bear the name of a jury and be very close to the English jury in being chosen at random from the community, differing, however, in that they sit on the Bench for a whole session and constitute a joint tribunal with the professional judges; or they may, as in Sweden, be somewhat similar to the English justices of the peace, being lay magistrates specially chosen to serve for a period of office and not merely for a particular case or short series of cases; in Sweden the choice of magistrates is made by election. . . .

Looking at these strains and stresses of the jury system in other countries, we may find the comparative success of the English jury is not in its ability to nullify unpopular laws, nor in its superior ability to ascertain facts, but in the fact that our system of summing up enables the judge to give the jury

a lead,[a] which the jury follow sufficiently often to give an appearance of reliability to the mode of trial. It need hardly be pointed out that this explanation of the jury's success is not one that yields any very strong argument for a continuation of the system.

8. The behavior of the jury in the United States. The empirical study referred to by the Court in *Duncan,* Harry Kalven & Hans Zeisel, The American Jury (1966), represents an effort to determine the extent to which juries decide cases differently from the way judges would and to determine the sources of such differences. The entire book warrants careful reading in connection with efforts to understand the impact of jury trial in American criminal cases.[39] The authors find that judges and juries disagree in roughly 25 percent of jury trial cases. In a small portion of these (2 percent of the total cases), the jury convicts when the judge would acquit; in 17 percent of all cases the jury acquits when the judge would convict; in roughly 6 percent of the cases the jury "hangs" (fails to agree on a verdict). Id. at 56-57.

The authors examine in great depth the possible reasons for judge-jury disagreement. They conclude that of the various factors apparently involved, differences in assessing the evidence in close cases played a significant role. They attributed 79 percent of the disagreements to this source. The other major factors that helped account for disagreement were jury sentiments about the law (50 percent of the cases), jury sentiments about the defendant (22 percent), facts only the judge knew (5 percent), and disparity of counsel (8 percent). Id. at 111. Often there was more than one reason for disagreement in a case. In fact, the closeness of the evidence usually appeared with one of the other reasons, so that this factor apparently "liberated the jury to respond to non-evidentiary factors." Id. at 106. It thus appeared that jury sentiment about the law was one of the most significant considerations, and this factor of course lies close to the heart of the jury's function as a guarantor of lenity and equity in dispensing criminal justice. The study suggests that "in cases having a de minimus cast or a note of contributory fault or provocation . . . the jury will exercise its de facto powers to write these equities into the criminal law." Id. at 285. Other sentiments about the law that appeared to have significant impact included "impatience with the nicety of the law's boundaries hedging the privilege of self-defense" (id. at 241) and resistance to the enforcement of a few unpopular laws, primarily hunting, liquor, gambling, and drunken-driving laws. While the study provides extensive evidence of jury nullification, it also should be noted that judge and jury *agreed* in 75 percent of the cases, that only half the disagreement cases involved jury sentiments about the law, and that these sentiments usually (78 percent of the time, id. at 113) emerged in combination with other

a. This role for the judge is generally not seen in the United States. In most American states, judicial commentary on the evidence is viewed as a violation of state constitutional or statutory provisions making the jury the exclusive trier of fact, and even in jurisdictions that permit such commentary, judges must be careful not to give a "one-sided rendition" of the case. Nancy Jean King, The American Criminal Jury, 62 Law & Contemp. Probs. 41, 47-48 (1999). — Eds.

39. This groundbreaking study is still considered a revealing landmark of jury trial research. For a critique of its methodology, see Michael H. Walsh, The American Jury: A Reassessment, 79 Yale L.J. 142 (1969). For an exploration of more recent empirical research, with particular attention to the issues of provocation, self-defense and insanity, see Norman J. Finkel, Commonsense Justice: Jurors' Notions of the Law (1995).

factors, principally the closeness of the evidence. The authors thus observe that the "jury's war with the law is now a polite one" (id. at 76) and conclude (at 498):

> The jury thus represents a uniquely subtle distribution of official power, an unusual arrangement of checks and balances. It represents also an impressive way of building discretion, equity and flexibility into a legal system. Not the least of the advantages is that the jury, relieved of the burdens of creating precedent, can bend the law without breaking it.

Notice that in *Duncan* the Court, referring to Kalven and Zeisel, says that when juries differ from the judge "it is usually because they are serving some of the very purposes for which they were created." Does this mean that the jury's equity-dispensing function is constitutionally protected and that procedures designed to minimize nullification would be unconstitutional?

UNITED STATES v. DOUGHERTY

United States Court of Appeals, District of Columbia Circuit
473 F.2d 1113 (1972)

LEVENTHAL, J. Seven of the so-called "D.C. Nine" bring this joint appeal from convictions arising out of their unconsented entry into the Washington office of the Dow Chemical Company, and their destruction of certain property therein. [The defendants had disrupted Dow's operations in an attempt to publicize their opposition to the Vietnam War. They then sought to use their criminal trial as a platform to further publicize their views. They made efforts to transform the trial into a "political fray" and attempted to argue to the jury that they should be acquitted because their actions were morally justified.] . . . [A]fter a six-day trial, the seven were each convicted of two counts of malicious destruction. . . .

Appellants urge [that] the judge erroneously refused to instruct the jury of its right to acquit appellants without regard to the law and the evidence, and refused to permit appellants to argue that issue to the jury. . . .

[Appellants] say that the jury has a well-recognized prerogative to disregard the instructions of the court even as to matters of law, and that they accordingly have the legal right that the jury be informed of its power. . . .

There has evolved in the Anglo-American system an undoubted jury prerogative-in-fact, derived from its power to bring in a general verdict of not guilty in a criminal case, that is not reversible by the court. The power of the courts to punish jurors for corrupt or incorrect verdicts . . . was repudiated in 1670 when Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670), discharged the jurors who had acquitted William Penn of unlawful assembly. Juries in civil cases became subject to the control of ordering a new trial; no comparable control evolved for acquittals in criminal cases.

The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge. Most often commended are the 18th century acquittal of Peter Zenger of seditious libel, on the plea of Andrew Hamilton, and the 19th century acquittals in prosecutions under the fugitive slave law. The values involved drop a notch when the liberty vindicated by the verdict relates to the defendant's shooting of his wife's paramour, or purchase during Prohibition of alcoholic beverages. . . .

The existence of an unreviewable and unreversible power in the jury, to acquit in disregard of the instructions on the law given by the trial judge, has for many years co-existed with legal practice and precedent upholding instructions to the jury that they are required to follow the instructions of the court on all matters of law. . . .

The rulings [in the early cases] did not run all one way, but rather precipitated "a number of classic exchanges on the freedom and obligations of the criminal jury."[36] This was, indeed, one of the points of clash between the contending forces staking out the direction of the government of the newly established Republic. . . . As the distrust of judges appointed and removable by the king receded, there came increasing acceptance that under a republic the protection of citizens lay not in recognizing the right of each jury to make its own law, but in following democratic processes for changing the law. . . .

Since the jury's prerogative of lenity . . . introduces a "slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions," it is only just, say appellants, that the jurors be so told. It is unjust to withhold information on the jury power of "nullification," since conscientious jurors may come, ironically, to abide by their oath as jurors to render verdicts offensive to their individual conscience, to defer to an assumption of necessity that is contrary to reality.

This so-called right of jury nullification is put forward in the name of liberty and democracy, but its explicit avowal risks the ultimate logic of anarchy. This is the concern voiced by Judge Sobeloff in United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969): "To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. . . ." [T]he advocates of jury "nullification" apparently assume that the articulation of the jury's power will not extend its use or extent, or will not do so significantly or obnoxiously. Can this assumption fairly be made? . . .

The way the jury operates may be radically altered if there is alteration in the way it is told to operate. The jury knows well enough that its prerogative is not limited to the choices articulated in the formal instructions of the court. The jury gets its understanding as to the arrangements in the legal system from more than one voice. . . .

When the legal system relegates the information of the jury's prerogative to an essentially informal input, it is not being duplicitous, chargeable with chicane and intent to deceive. The limitation to informal input is, rather, a governor to avoid excess: the prerogative is reserved for the exceptional case, and the judge's instruction is retained as a generally effective constraint. We "recognize a constraint as obligatory upon us when we require not merely reason to defend our rule departures, but damn good reason."[49] The

36. M. R. Kadish and S. H. Kadish, On Justified Rule Departures by Officials, 59 Calif. L. Rev. 905, 914 (1971).

49. Kadish and Kadish, supra, note 36, 59 Cal. L. Rev. at 926. [The "damn-good-reason" position is criticized in Alan Scheflin & Jon Van Dyke, Jury Nullification: The Contours of a Controversy, 43 Law & Contemp. Probs. 51, 98-108 (1980). — Eds.]

practicalities of men, machinery and rules point up the danger of articulating discretion to depart from a rule, that the breach will be more often and casually invoked. . . . The danger of the excess rigidity that may now occasionally exist is not as great as the danger of removing the boundaries of constraint provided by the announced rules. . . .

Moreover, to compel a juror involuntarily assigned to jury duty to assume the burdens of mini-legislator or judge, as is implicit in the doctrine of nullification, is to put untoward strains on the jury system. It is one thing for a juror to know that the law condemns, but he has a factual power of lenity. To tell him expressly of a nullification prerogative, however, is to inform him, in effect, that it is he who fashions the rule that condemns. That is an overwhelming responsibility, an extreme burden for the jurors' psyche. [A] juror called upon for an involuntary public service is entitled to the protection, when he takes action that he knows is right, but also knows is unpopular, either in the community at large or in his own particular grouping, that he can fairly put it to friends and neighbors that the was merely following the instructions of the court. . . .

[W]hat is tolerable or even desirable as an informal, self-initiated exception, harbors grave dangers to the system if it is opened to expansion and intensification through incorporation in the judge's instruction. . . .

BAZELON, C.J., concurring in part and dissenting in part. . . .

[T]he Court apparently concedes—although in somewhat grudging terms—that the power of nullification is a "necessary counter to case-hardened judges and arbitrary prosecutors," and that exercise of the power may, in at least some instances, "enhance the over-all normative effect of the rule of law." We could not withhold that concession without scoffing at the rationale that underlies the right to jury trial in criminal cases, and belittling some of the most legendary episodes in our political and jurisprudential history.

The sticking point, however, is whether or not the jury should be told of its power to nullify the law in a particular case. Here, the trial judge not only denied a requested instruction on nullification, but also barred defense counsel from raising the issue in argument before the jury. The majority affirms that ruling. I see no justification for, and considerable harm in, this deliberate lack of candor.

[T]he justification for this sleight-of-hand lies in a fear that an occasionally noble doctrine will, if acknowledged, often be put to ignoble and abusive purposes—or, to borrow the Court's phrase, will "run the risk of anarchy." . . . The Court assumes that these abuses are most likely to occur if the doctrine is formally described to the jury by argument or instruction. . . . It seems substantially more plausible to me to assume that the very opposite is true. . . .

[T]he Court takes comfort in the fact that informal communication to the jury "generally convey[s] adequately enough the idea of prerogative, of freedom in an occasional case to depart from what the judge says." . . . [But if] awareness is preferable to ignorance, then I simply do not understand the justification for relying on a haphazard process of informal communication whose effectiveness is likely to depend, to a large extent, on whether or not any of the jurors are so well-educated and astute that they are able to receive the message. If the jury should know of its power to disregard the law, then the power should be explicitly described by instruction of the court or argument of counsel. . . .

NOTES AND QUESTIONS ON NULLIFICATION

1. Empirical studies have probed the impact of nullification instructions. One pair of studies[40] considered the effect of instructing mock juries that "nothing would bar them from acquitting the defendant if they feel that the law . . . would produce an inequitable or unjust result." In a case involving a nurse tried for the "mercy" killing of a terminally ill cancer patient, mock juries given the nullification instruction were, predictably, less likely to convict than mock juries not given the instruction. But, unexpectedly, the instructed mock juries were *more* likely to convict in a homicide case involving a drunk driver who struck and killed a pedestrian. In deliberations, mock juries spent less time discussing the evidence and more time discussing the defendant's character when a nullification instruction had been given.

2. The federal courts and nearly all the states follow *Dougherty* and refuse to permit instructions informing the jury of its nullification power. See, e.g., United States v. Edwards, 101 F.3d 17 (2d Cir. 1996); State v. Hatori, 990 P.2d 115 (Haw. App. 1999).

In three states the approach rejected in *Dougherty* still survives through constitutional provisions that the jury shall be the judge of the law as well as the fact. Ga. Const. art. 1, §1, ¶11(a); Ind. Const. art. 1, §19; Md. Const., Decl. of Rights, art. 23. In Georgia, however, courts have tended to confine the effect of the provision, for example by upholding a charge that the jurors are the judges of the law but are obliged to apply the court's instructions to the facts and by forbidding defense counsel to argue to the jury that it should disregard the law. See State v. Freeman, 444 S.E.2d 80 (Ga. 1994); Drummond v. State, 326 S.E.2d 787 (Ga. App. 1985). Current practice in Indiana and Maryland is summarized in Richard St. John, Note, License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking, 106 Yale L.J. 2563 (1997).

3. The *Dougherty* court appears to believe that the jury's nullification power is desirable, so long as it is not exercised too often. Compare State v. Ragland, 105 N.J. 189, 519 A.2d 1361, 1371-1372 (1986):

> [J]ury nullification . . . is absolutely inconsistent with the most important value of Western democracy, that we should live under a government of laws and not of men. . . . With jury nullification, [the jurors] are told, either explicitly or implicitly, that *they* are the law, . . . and that if they want to, they may convict every poor man and acquit every rich man; convict the political opponent but free the crony; put the long-haired in jail but the crew-cut on the street; imprison the black and free the white; or, even more arbitrarily, just do what they please whenever they please.
>
> One of the biggest problems in the administration of criminal justice is the inequality of its enforcement. . . . Absolutely nowhere in the system is there some notion that someone should have the power, arbitrarily, to pick and choose who

40. Irwin A. Horowitz, The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making, 12 Law & Hum. Behav. 439 (1988); Irwin A. Horowitz, The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials, 9 Law & Hum. Behav. 25 (1985).

> shall live and who shall die. But that is precisely what jury nullification is: the power to undo everything that is precious in our system of criminal justice, the power to act arbitrarily to convict one and acquit another where there is absolutely no apparent difference between the two. It is a power, unfortunately, that is there, that this Court cannot terminate, but a power that should be restricted as much as possible.
>
> . . . The lengths to which we go to exclude irrelevant evidence, the expenditures made to protect defendants from juror prejudice, the energy, study, and work devoted to a particular prosecution, all of these are prodigious. Having gone through that process, admired by us both for its thoroughness and its goals, astonishing to others for its devotion to fairness and reason, it is incomprehensible that at the very end we should tell those who are to make the judgment that they may do so without regard to anything that went before and without guidance as to why they should disregard what went on before, and without the obligation of explaining why they so disregarded everything. . . .
>
> Jury nullification is an unfortunate but unavoidable power. It should not be advertised, and, to the extent constitutionally permissible, it should be limited.

Professor Andrew D. Leipold agrees that nullification is undesirable, but he challenges the *Ragland* court's premise that the nullification power is unavoidable. Professor Leipold argues that procedural doctrines protecting the nullification power (such as the rule barring prosecution appeal from unjustified acquittals) impede the truth-seeking function of the criminal process. He would restrict the de facto nullification power by authorizing prosecution appeals (a view that would require reversal of current double jeopardy case law);[41] at the same time, he would permit explicit instructions authorizing nullification in cases involving de minimis harms, and prosecution appeal from an acquittal on that ground (if made explicit by a jury's special verdict) would be barred. See Leipold, Rethinking Jury Nullification, 82 Va. L. Rev. 253 (1996).

A diametrically opposed view is developed in Sherman J. Clark, The Courage of Our Convictions, 97 Mich. L. Rev. 2381 (1999). Professor Clark argues that jury trials "serve as a means through which we as a community take responsibility for — own up to — inherently problematic judgments regarding the blameworthiness or culpability of our fellow citizens." Id. He suggests, accordingly, that "procedures governing the criminal jury trial [should] engender in jurors a sense of personal responsibility for the fate of the accused." Id. at 2382. He recommends that jurors be instructed in a way that stresses their responsibility for their decision and makes them aware of their nullification power, without expressly encouraging them to use it — for example by telling the jurors (id. at 2446) that "the responsibility for this decision is entirely yours and . . . you will not be required to explain or justify your verdict except to your own conscience."

4. Constraining jury nullification. If jury nullification is usually or (as the *Ragland* court argues) always undesirable, how far can courts go to discourage it? In a civil suit, the judge can set aside a jury verdict for one party and enter judgment notwithstanding the verdict (often called "judgment n.o.v.") for the other side. But the Supreme Court has held that in a criminal case, a judgment n.o.v. for the

41. E.g., United States v. Ball, 163 U.S. 662 (1896).

prosecution violates the defendant's Sixth Amendment right to trial by jury. Connecticut v. Johnson, 460 U.S. 73, 84 (1983). Are other judicial efforts to prevent nullification similarly barred by the Sixth Amendment? Consider these situations:

(*a*) In People v. Fernandez, 31 Cal. Rptr. 677 (Ct. App. 1994), the jurors interrupted their deliberations to send the judge a note in which they stated their belief that the defendant had committed battery with serious bodily injury and then asked whether they nonetheless had the power to acquit on that charge and instead return a verdict of guilty on the lesser offense of assault. The trial judge simply replied, "No." The court of appeal held that this response was not error.

(*b*) In People v. Engelman, 92 Cal. Rptr. 2d 416 (Cal. App. 2000), the defendant was convicted of robbery after the trial judge instructed the jury: "[S]hould it occur that any juror refuses to deliberate or expresses an intention to disregard the law . . . , it is the obligation of the other jurors to immediately advise the Court of the situation." The appellate court held that the instruction was proper, rejecting the defendant's argument that the instruction would pressure jurors in the minority to acquiesce in the majority view or to abandon any intention to nullify.

(*c*) United States v. Thomas, 116 F.3d 606 (2d Cir. 1997), was a prosecution of several African American defendants charged with conspiracy to distribute cocaine. During deliberations, several jurors informed the trial judge that Juror No. 5, the sole African American on the panel, was refusing to follow the judge's instructions, was calling his fellow jurors "racists," and was adamantly holding out for acquittal. The judge interrupted the deliberations and conducted interviews with each of the jurors. According to several of them, Juror No. 5 had said he thought the government's evidence was unreliable, and Juror No. 5 told the judge that he needed "substantial evidence" of guilt. But several other jurors testified that Juror No. 5 had said he favored acquittal because the defendants were black and had committed the alleged crimes out of economic necessity. The trial judge accepted the latter account and dismissed Juror No. 5 on the ground that he would not convict "no matter what the evidence was" and had "preconceived . . . economic [or] social reasons [for acquittal] that are totally improper." The remaining jurors then unanimously convicted.

On appeal, the court, per Cabranes, J., "categorically reject[ed] the idea that jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent it." The court held that the Constitution permits removal whenever there is unambiguous evidence of a juror's refusal to follow the judge's instructions. The court reversed the convictions, however, on the narrow ground that Juror No. 5's intentions were ambiguous and that there was "some possibility" he had based his vote on his view of the evidence.

Roughly in accord with the *Thomas* standard, most of the recent decisions hold that it is error to remove an allegedly recalcitrant juror if there is "any reasonable possibility" that the juror is following the judge's instructions. State v. Elmore, 123 P.3d 72 (Wash. 2005). In United States v. Abbell, 271 F.3d 1286, 1302 (11th Cir. 2001), the court described this as "basically a 'beyond reasonable doubt' standard." Nonetheless, courts often find that this tough requirement

has been met and accordingly uphold decisions to remove a juror who has been holding out for acquittal. In *Abbell*, supra, at 1303, one juror told the others that "she did not have to follow the law and that the court's instructions were only advisory and not binding on the jury." Although the juror insisted in subsequent deliberations that she was merely evaluating the evidence, other jurors complained that she was not, and the trial judge's decision to remove her was upheld on appeal. Similarly, in Braxton v. United States, 852 A.2d 941, 944 (D.C. 2004), the appellate court upheld a trial judge's decision to remove a juror who had stated during deliberations that "most police are liars."

(*d*) Merced v. McGrath, 426 F.3d 1076 (9th Cir. 2005), involved a defendant on trial for the attempted murder of a peace officer. During voir dire, one of the potential jurors stated that he believed in exercising jury nullification "where appropriate." The state trial judge then excused the juror for cause. The Ninth Circuit held that action permissible. Do you agree?

Questions: If jury departures from the law are so unequivocally bad, why should the defendant have a constitutional right to jury trial in the first place? Was *Duncan* wrongly decided? Conversely, if the jury's equity-dispensing function is central to its constitutional role, how can it be proper for a trial judge to remove jurors who reveal their intent to exercise that function? And what effect will the existence of such a removal power have on jurors' ability to express their views candidly during deliberation? For discussion of the issues, compare Nancy S. Marder, The Myth of the Nullifying Jury, 93 Nw. U. L. Rev. 877, 947-952 (1999) (criticizing *Thomas*), with Nancy J. King, Silencing Nullification Advocacy Inside and Outside the Courtroom, 65 U. Chi. L. Rev. 433, 438-491 (1998) (supporting the *Thomas* approach).

(*e*) The Fully Informed Jury Association (FIJA) is a Montana-based organization supported by a politically diverse array of protest groups, including anti-abortion activists, supporters of alternative medicines, and opponents of laws regulating firearms, marijuana, motorcycle helmets, prostitution, and the right to die. See King, supra at 434; Marder, supra at 942. Through a national newsletter, website, and handbills distributed at courthouses, FIJA seeks to spread awareness of the nullification power and encourage its use. At many courthouses throughout the country, FIJA distributes pro-nullification literature to potential and actual jurors, and encourages them to call an 800 number to hear a recorded message describing what one juror discovered were "more rights than what was read to me by the judge."[42]

Recall that in *Dougherty*, the majority considered formal nullification instructions unnecessary, in part because "the jury gets its understanding . . . from more than one voice"; the court concluded that awareness of the nullification power can best come from "informal input." Are FIJA's activities therefore legitimate and perhaps even desirable? Many judges and other court officials apparently do not think so. FIJA activists who contact jurors or engage in leafleting at the courthouse have been charged with jury tampering, obstruction of justice, and contempt of court, even though FIJA's informational materials are not alleged to be incorrect or misleading. A recent Alaska case involved an FIJA activist who approached three potential jurors and urged them to call a toll-free

42. Turney v. State, 936 P.2d 533, 537 n. 4 (Alaska 1997).

number to hear a recorded message about the jury's powers. He was convicted of jury tampering under state statute that prohibits "directly or indirectly communicat[ing] with a juror . . . with intent to . . . influence the juror's vote, opinion or decision." See Turney v. Pugh, 400 F.3d 1197, 1199 (9th Cir. 2005) (rejecting first amendment challenge to the conviction).

Municipalities have also responded to FIJA's efforts by enacting new laws to more tightly restrict contact with potential jurors in or near the courthouse.[43] Freedom of speech principles do not prohibit reasonable restrictions on advocacy within a fixed distance from decision-making sites like courthouses or voting booths.[44] But First Amendment considerations aside, why should it be a crime to give a juror truthful information about her rights and responsibilities? If society wants to block both formal and informal sources of information about the jury's equity-dispensing role, why bother having a jury at all? For analysis of judicial efforts to silence nullification advocacy, see King, supra 492-499.

5. Suppose that the jurors are instructed, over the defendant's *objection,* that they are the judges of the law as well as the facts. Does such an instruction subject the defendant to capricious judgment and violate his right to be tried in accordance with ascertainable law? See Wyley v. Warden, 372 F.2d 742 (4th Cir. 1967); Isaacs v. State, 31 Md. App. 604, 358 A.2d 273 (1976).

6. Race-based nullification. In Detroit, Washington, D.C., parts of New York City, and several other urban centers, observers have claimed that jury nullification is becoming more common, especially in drug prosecutions involving African American defendants. See Marder, supra note 4(b) at 899-901. Consider the following comments:

Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677 (1995). Considering the costs of law enforcement to the black community and the failure of white lawmakers to devise significant nonincarcerative responses to black antisocial conduct, it is the moral responsibility of black jurors to emancipate some guilty black outlaws. . . . I hope that the destruction of the status quo will not lead to anarchy, but rather to the implementation of certain noncriminal ways of addressing antisocial conduct. . . .

According to [some], whom I will call law enforcement enthusiasts, . . . it is in the best interest of the black community to have more, rather than less, [law enforcement]. Allowing criminals to live unfettered in the community would harm, in particular, the black poor, who are disproportionately the victims of violent crime. Indeed, the logical conclusion of the enthusiasts' argument is that African-Americans would be better off with more, not fewer, black criminals behind bars.

To my mind, the enthusiasts embrace law enforcement too uncritically: They are blind to its opportunity costs. . . . [W]hen locking up black men means that "violent criminals . . . who attack those most vulnerable" are off the streets, most

43. See, e.g., Fully Informed Jury Assn. v. San Diego, 1996 U.S. App. LEXIS 4254 (9th Cir.) (upholding restrictions).

44. Burson v. Freeman, 504 U.S. 191 (1992).

people — including most law enforcement critics — would endorse the incarceration. But what about when locking up a black man has no or little net effect on public safety, when, for example, the crime with which he was charged is victimless? . . .

There is no question that jury nullification is subversive of the rule of law. . . . To borrow a phrase from the D.C. Circuit, jury nullification "betrays rather than furthers the assumptions of viable democracy. . . ." [But] "democracy," as practiced in the United States, has betrayed African-Americans far more than they could ever betray it. . . .

Because the United States is both a democracy and a pluralist society, it is important that diverse groups appear to have a voice in the laws that govern them. Allowing black people to serve on juries strengthens "public respect for our criminal justice system and the rule of law." . . . But what of the black juror who endorses racial critiques of American criminal justice? Such a person holds no "confidence in the integrity of the criminal justice system." If she is cognizant of the implicit message that the Supreme Court believes her presence sends, she might not want her presence to be the vehicle for that message. . . . In a sense, the black juror [who nullifies] engages in an act of civil disobedience, except that her choice is better than civil disobedience because it is lawful. Is the black juror's race-conscious act moral? Absolutely. It would be farcical for her to be the sole color-blind actor in the criminal process, especially when it is her blackness that advertises the system's fairness. . . .

In cases involving violent *malum in se* crimes like murder, rape, and assault, jurors should consider the case strictly on the evidence presented, and, if they have no reasonable doubt that the defendant is guilty, they should convict. For nonviolent *malum in se* crimes such as theft or perjury, nullification is an option that the juror should consider, although there should be no presumption in favor of it. A juror might vote for acquittal, for example, when a poor woman steals from Tiffany's, but not when the same woman steals from her next-door neighbor. Finally, in cases involving nonviolent, *malum prohibitum* offenses, including "victimless" crimes like narcotics offenses, there should be a presumption in favor of nullification. . . . Black people have a community that needs building, and children who need rescuing, as long as a person will not hurt anyone, the community needs him there to help. . . .

I am not encouraging anarchy. Instead, I am reminding black jurors of their privilege to serve a higher calling than law: justice. . . . I hope that there are enough of us out there, fed up with prison as the answer to black desperation and white supremacy, to cause retrial after retrial, until, finally, the United States "retries" its idea of justice.

Randall L. Kennedy, Race, Crime, and the Law 301-310 (1996): [J]ury nullification is an exceedingly poor means for advancing the goal of a racially fair administration of criminal law. . . . Jury nullification as typically implemented is a low-visibility, highly ambiguous protest unlikely to focus the attention of the public clearly on social problems in need to reform. [Moreover, if] a large number of blacks clearly engage in "guerrilla warfare" as jurors, their action might call into question the right of blacks to be selected for jury service on precisely the same terms as others. Widespread adoption of Butler's proposal would likely give rise to measures designed to exclude prospective nullifiers from juries, measures that would result almost certainly in the disproportionate exclusion of blacks. . . .

Butler exudes keen sympathy for nonviolent drug offenders and similar criminals. By contrast, Butler is inattentive to the aspirations, frustrations, and fears of law-abiding people compelled by circumstances to live in close proximity to the criminals for whom he is willing to urge subversion of the legal system. Butler simply overlooks the sector of the black law-abiding population that desires more rather than less prosecution and punishment for all types of criminals. . . .

If a large number of blacks have views on the administration of criminal law that are counter to Butler's, why worry about his proposal? . . . [I]t would not take many people to wreak havoc with the jury system. The unanimity requirement renders juries uniquely susceptible to disruption by a resolute cadre of nullifiers. . . .

The most fundamental reason to oppose Professor Butler's call for racially selective jury nullification is that it is based on a sentiment that is regrettably widespread in American culture: an ultimately destructive sentiment of racial kinship that prompts individuals of a given race to care more about "their own" than people of another race. [Butler] assumes that it is proper for prospective black jurors to care more about black communities than white communities, that it is proper for black jurors to be more concerned with the fate of black defendants than white defendants, and that it is proper for black jurors to be more protective of the property (and perhaps the lives?) of black people than white people. Along that road lies moral and political disaster. The disaster includes not only increasing but, worse, legitimizing the tendency of people to privilege in racial terms "their own." Some will say that this racial privileging has already happened and is, in any event, inevitable. The situation can and will get worse, however, if Butler's plan and the thinking behind it gains adherents. His program, although animated by a desire to challenge racial injustice, would demolish the moral framework upon which an effective, attractive, and compelling alternative can and must be built.

For further discussion of Professor Butler's proposals, see Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 Minn. L. Rev. 1149, 1185-1191 (1997); Andrew D. Leipold, The Dangers of Race-Based Jury Nullification, 44 UCLA L. Rev. 109 (1996); Marder, supra note 4(b), at 937-943.

NOTES ON THE JURY'S ROLE IN SENTENCING

Because *Duncan* emphasizes that a central part of the jury's function is to afford protection against the "compliant, biased, or eccentric judge," it might seem that the constitutional right to jury trial should include not only a right to have the jury decide matters of guilt and innocence but also a right to have the jury fix the offender's punishment. In capital cases, nearly all states do give the jury this broader responsibility; we explore the jury's special role in this context in Chapter 5, pages 479-489 infra. But for other sentencing matters, only six states provide for punishment to be fixed by the jury. In all the others, the sentencing decision is left to the judge, and this arrangement is normally not thought to violate Sixth Amendment requirements. Why not? Why should decisions about the sentence be treated differently from decisions about whether to convict? And what freedom should states have to shift factual questions from the

guilt phase, where the jury must resolve them, to the sentencing phase, where the prosecution needs only to convince a single judge? Consider the Notes that follow.

1. Jury sentencing. In Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia, defendants who plead guilty or opt for a bench trial are sentenced by a judge, but those who elect to go to trial before a jury are sentenced by the same jury, usually in a "bifurcated" proceeding—the trial on guilt or innocence occurs first, and if the jury convicts, it then hears further evidence and retires to deliberate separately on the question of punishment. (The principal exception is Oklahoma, where first offenders are tried and sentenced in a unitary proceeding.)

At the penalty phase, sentencing juries typically are not asked to direct their attention to any particular aggravating or mitigating circumstances and, unlike judges who have sentencing responsibility, they are not given guidelines of any sort. Instead, they are simply asked to pick any sentence within the authorized statutory range. The result is enormous variation in the sentences imposed on similarly situated offenders. See Nancy J. King & Roosevelt L. Noble, Felony Jury Sentencing in Practice: A Three-State Study, 57 Vand. L. Rev. 885 (2004); Jenia Iontcheva, Jury Sentencing as Democratic Practice, 89 Va. L. Rev. 311 (2003). In addition, sentencing juries typically are afforded fewer options for leniency than are available when the sentence is fixed by the judge. For example, in several of the jury-sentencing states, judges can grant probation or a suspended sentence, but juries cannot. For this reason and others, studies suggest, defendants sentenced by a jury typically receive more severe sentences than similarly situated defendants sentenced by a judge. See King & Noble, supra at 908-912, 923-924.

Despite these features (or perhaps because of them), state officials have shown little enthusiasm for reforms that would permit more leniency or consistency in jury sentencing, through sentencing guidelines and other devices like those now widely used to promote uniformity in sentencing by judges. Prosecutors and legislators in jury-sentencing states seem to believe that the greater severity and unpredictability of jury sentencing is an important factor in inducing guilty pleas, so that cases can be disposed of quickly and cheaply. Professor Nancy King concludes that "[T]he wild card aspect of jury sentencing helps to funnel defendants to guilty pleas and bench trials. . . . For criminal justice insiders, the unpredictability of jury sentencing is a blessing, not a curse; the more freakish, the better." Nancy J. King, How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared, 2 Ohio St. J. Crim. L. 195, 198 (2004). Yet courts have consistently rejected the argument that unguided jury discretion in non-capital cases violates due process. E.g., Torres v. United States, 140 F.3d 392, 397 (2d Cir. 1998).

Do these problems suggest that at the sentencing stage, the jury cannot serve as an effective equity-dispensing mechanism for the benefit of defendants? Or do they simply show that jury sentencing has not been permitted to fulfill its potential?

2. Judicial sentencing: What is the jury permitted to know? Does it follow from *Dougherty* that a judge not only may refuse to inform the jury of its nullification power but also may refuse to inform the jury about the severity of the sentence

that a defendant faces upon conviction? The question has become increasingly important with the proliferation of mandatory minimum sentencing laws, which often dictate long terms of imprisonment for possession of small quantities of drugs, even when the defendant is a first offender. Nearly all courts hold that because the jury's role is solely to determine the facts relevant to guilt, the jury has no legitimate concern with the consequences of a conviction. E.g., Shannon v. United States, 512 U.S. 573 (1994); United States v. Chesney, 86 F.3d 564 (6th Cir. 1996). Compare United States v. Datcher, 830 F. Supp. 411, 414-418 (M.D. Tenn. 1993):

> [R]espect for nullification flows from the role of the jury as the "conscience of the community" in our criminal justice system. [T]he essential purpose of the jury trial [is] "to prevent oppression by the Government." And it is this essential purpose that is to be used in determining the constitutional requirements of a jury trial.
>
> When measured by this standard, a defendant's right to inform the jury of that information essential "to prevent oppression by the Government" is clearly of constitutional magnitude. [T]o deny a jury information necessary to such oversight is . . . to defeat the central purpose of the jury system.
>
> Argument against allowing the jury to hear information that might lead to nullification evinces a fear that the jury might actually serve its primary purpose, that is, it evinces a fear that the community might in fact think a law unjust. The government, whose duty it is to seek justice and not merely conviction, should not shy away from having a jury know the full facts and law of a case. . . .
>
> Overly harsh punishments were the impetus to development of jury nullification. Institution of the jury system was meant to protect against unjust punishment perpetrated by government, not merely unjust conviction. . . .
>
> No instruction on jury nullification was requested by the defendant, and none would be given if it were requested. . . . But Mr. Datcher is entitled to have the jury perform its full oversight function, and informing the jury of possible punishment is essential to this function. The court finds no good reason for opposing candor.

3. Judicial sentencing: When can factual questions be shifted from the jury's domain to that of the judge? Duncan protects the defendant's right to have the jury determine, under a strict beyond-a-reasonable-doubt standard, all facts necessary to constitute the crime charged — that is, all "elements" of the offense. But a single judge, acting under a preponderance-of-the-evidence standard, can determine all other facts relevant to the level of punishment — that is, all "sentencing factors." If the legislature provides that the sentence in a certain type of case will be governed by a particular fact (for example, the use of a firearm or the sale of a specified quantity of drugs), then under what circumstances should that fact be considered an "element" of the offense, rather than a mere "sentencing factor"?

As in the case of jury instructions about the sentencing consequences of conviction (Note 2 above), the question whether a fact counts as an "element" of the offense has taken on enormous significance, because mandatory minimum sentencing laws often come into play, making severe sanctions unavoidable when particular facts are found. Years of imprisonment can turn on whether the fact must be found by a jury beyond a reasonable doubt or can instead be found by a judge by a mere preponderance of the evidence.

The standard the Supreme Court has used to resolve this question is explored above in connection with the requirement of proof beyond a reasonable doubt. (The note on "sentencing enhancements," page 40, Note 3 above, should be re-read at this point.) As we saw in that connection, the Supreme Court has ruled that any fact (other than prior criminal record) that increases the *maximum* penalty for an offense is an "element" of the offense, and the defendant therefore has the right to have such a fact determined by a jury beyond a reasonable doubt. But facts that affect the choice of sentence within an authorized range are considered "sentencing factors" rather than "elements" of the offense. As a result, mandatory *minimum* sentences largely escape the reasonable-doubt and jury trial requirements. So long as the facts triggering the mandatory minimum do not increase the maximum authorized sentence and merely require the judge to impose a punishment that she *could have* imposed in any event, the constitutional rights to trial by jury and proof beyond a reasonable doubt are rendered inapplicable.

To what extent does this approach enable the legislature to defeat the jury's constitutionally protected functions identified in *Duncan*—the functions of restraining overly harsh laws and preventing prosecutors from using generally reasonable laws in an oppressive manner? Consider the following comment:

Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 34-38, 46 (2003): [T]he jury's role as a check on the government's power has become far more limited [than the Framers of the Constitution envisaged]. [The jury's] power to issue an unreviewable general verdict despite the letter of the law introduces a critical check on the government before it can impose criminal punishment and provides a mechanism for correcting overinclusive general criminal laws. This powerful safety valve can operate, however, only if the jury retains control over laws that dictate criminal punishment.

[M]andatory minimum sentencing laws . . . dictate criminal punishment upon the finding of particular facts, yet these general laws are being applied by judges, not by juries. As a result, prosecutors can seek review of trial judges' decisions, thereby preventing judges from individualizing punishment and tempering the law in particular cases. . . .

But to describe the effect of mandatory sentencing laws on judges tells only half the story. . . . It is the effect of these laws on judges and juries in tandem—the *judiciary*—that makes them so troubling. . . . Because of . . . prosecutors' ability to seek review when judges depart from them, trial judges lack the necessary discretion and flexibility to ensure that these laws make sense in individual cases.

[T]he Constitution provides a ready-made safety valve for precisely this problem. Juries by design, with their unreviewable power to acquit, can act as a check on overinclusive or overrigid criminal laws. To be sure, this is an imperfect check, especially given the limited information the jury now receives at trial. But even with its limitations, the jury retains the power to individualize laws to some extent and to ensure an equitable result. . . .

[Therefore, in place of] the Supreme Court's test for determining when a fact must be found by a jury[,] the key determinant should be whether a binding law links the presence or absence of a fact with a prescribed amount of punishment and limits judicial discretion to depart from that legislative judgment. [I]t is

this legislative judgment that upsets the constitutional balance of powers and undercuts the valuable role the jury serves. Thus, under this analysis, juries, not judges, must apply mandatory sentencing laws.

NOTES AND QUESTIONS ON INCONSISTENT VERDICTS

1. The problem and the prevailing solution. When a prosecution involves several separate counts, it sometimes happens that the jury's verdict on one count will be irreconcilably in conflict with its verdict on another count. Consider, for example, DeSacia v. State, 469 P.2d 369 (Alaska 1970). The defendant's reckless driving forced another vehicle off the road, and both the driver (Hogan) and passenger (Evangelista) in the other vehicle were killed. The defendant was prosecuted on two counts of manslaughter. The jury convicted on the count charging manslaughter of Evangelista but acquitted on the count charging manslaughter of Hogan. Because the defendant's conduct had endangered the two victims in precisely the same way, he was in principle guilty of manslaughter either in both cases or in neither. Should the inconsistent verdicts nevertheless be allowed to stand?

In the *DeSacia* case, the court noted that the verdict of acquittal was final; any relitigation of that count would violate the double jeopardy clause. But the court set aside the conviction on the other count, to assure that the conviction was not the product of jury confusion or irrationality. The court therefore remanded for a new trial on the count relating to the death of Evangelista. Some courts go even further. In People v. Klingenberg, 665 N.E.2d 1370 (Ill. 1996), the court not only set aside the inconsistent conviction but also held that retrial on that charge was barred. The court noted (id. at 1376) that "the jury, by its acquittal on another [charge], has rejected an essential element needed to support the conviction" and reasoned that double jeopardy principles should preclude the prosecution from attempting to establish that missing element on retrial.

Although several other American jurisdictions refuse to accept inconsistent verdicts, see, e.g., Shepherd v. State, 626 S.E.2d 96 (Ga. 2006), the federal courts and the great majority of the states permit the inconsistent conviction to stand. See Priest v. State, 879 A.2d 575 (Del. 2005); Eric L. Muller, The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts, 111 Harv. L. Rev. 771, 787-788 (1998). Which approach seems more faithful to the premises of jury trial? If the jury is expected to give voice to the rough common sense of the community, isn't the *DeSacia* court's desire for logic out of place? Do inconsistent verdicts facilitate the exercise of the jury's leniency or do they encourage compromise *convictions* on counts about which the jury may not really be persuaded beyond a reasonable doubt? In United States v. Powell, 469 U.S. 57, 65 (1984), the Supreme Court noted:

> Inconsistent verdicts . . . present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course. . . . For us, the possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest.

2. Criticism of the prevailing approach. The *Powell* Court's assumptions have drawn sharp criticism. Professor Andrew Leipold notes that "[f]or every case where the jury extends mercy to a deserving defendant, there may well be another (or two, or five others) where the verdict is based on improper considerations." Leipold, Rethinking Jury Nullification, 82 Va. L. Rev. 253, 304 (1996). Professor Muller, supra note 1, at 795, argues that "by refusing to disturb inconsistent verdicts, the Court is buying a chance for [leniency] at the price of protecting jury confusion, mistake, and compromise." He concludes that fundamental trial values require courts to set aside inconsistent convictions unless the evidence supporting the conviction is so overwhelming that any jury error can be deemed harmless.

Questions: What if the prosecution seeks an instruction, in a case like *DeSacia,* that the jury must either acquit on both counts or convict on both counts? Does the result in *DeSacia* in effect require such an instruction in future cases? If so, would the defendant then be justified in claiming that the instruction improperly constrained the jury's equity-dispensing function?

In connection with these problems, consider whether it was entirely a coincidence that the *DeSacia* jury convicted for the death of Evangelista, who was a passenger, but acquitted for the death of Hogan, the other driver. As we shall see, contributory negligence ordinarily is not a defense in a criminal prosecution, see page 414 infra, but the Kalven and Zeisel study, page 48 supra, at 242-257, showed that jury nullification often occurred when contributory fault by the victim was involved. If this factor played a role in the acquittal with respect to Hogan, then wasn't the jury—to quote from Duncan v. Louisiana, page 44 supra—"serving some of the very purposes for which [it was] created"? Or are the dangers identified by Professor Muller (jury confusion, mistake, inappropriate compromise, and disregard of the reasonable-doubt requirement) more substantial than the risk of chilling the jury's equity-dispensing function?