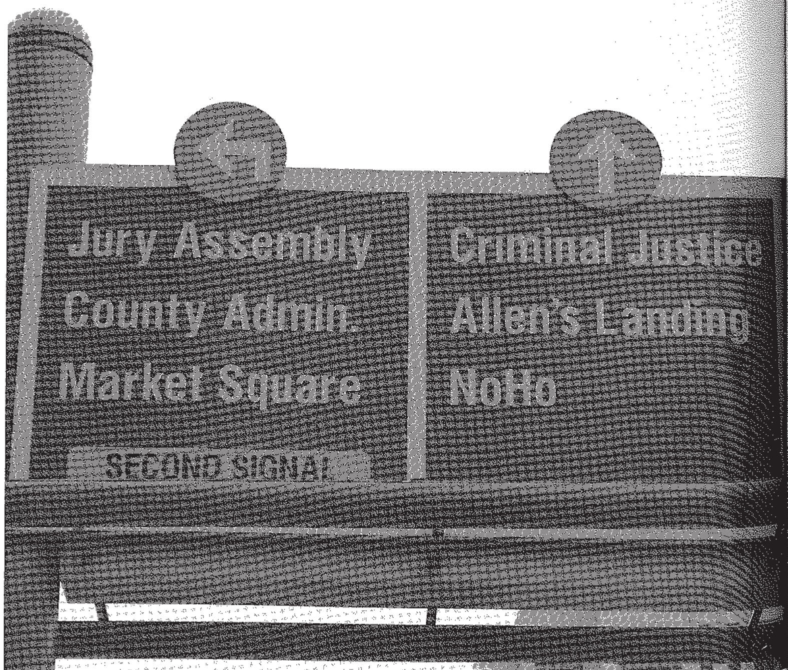
CHAPTER 12

TRIALS AND JURIES



David Neubauer

Although the right to trial by jury is a fundamental constitutional right, some citizens find jury duty to be a frustrating experience. At least in Houston, Texas, signs minimize frustration in trying to find the courthouse.

"Why Isn't Sam Sheppard in Jail?" screamed the headline of a front-page editorial in a prominent Cleveland newspaper. For weeks, vivid headlines like that one made it clear that the press thought the police were not pressing hard enough in arresting Dr. Samuel Sheppard—a socially prominent physician—for the brutal murder of his wife. Live radio coverage of the coroner's inquest contributed to the intense media scrutiny: For six hours, Dr. Sheppard was questioned (without counsel) about his activities that night. During trial, jurors were allowed to read the daily press coverage of the trial. After conviction, Sheppard served twelve years in prison before the Supreme Court reversed his conviction, likening the trial to a "Roman holiday" (*Sheppard v. Maxwell* 1966). In holding that prejudicial pretrial publicity denied Sheppard the right to a fair and impartial trial, the Court set off a long and often-heated battle over where freedom of the press ends and the right to a fair trial begins.

Trials attract more attention than any other step of the judicial process. The national media provide detailed accounts of the trials of defendants such as Sam Sheppard and Scott Peterson. The local media offer extensive coverage of the trials of local notables, brazen murderers, and the like. Books, movies, and television use courtroom encounters to entertain. The importance of trials, however, extends far beyond the considerable public attention lavished on them. They are central to the entire scheme of Anglo-American law. Trials provide the ultimate forum for vindicating the innocence of the accused or confirming the liability of the defendant. For that reason, the right to be tried by a jury of one's peers is guaranteed in several places in the Constitution.

Given the marked public interest in trials, as well as their centrality to U.S. law, we would expect trials to be the prime ingredient in the trial court process. But trials are relatively rare events; most cases filed in court, whether criminal or civil, are settled through negotiations (Chapters 9 and 11). In a very fundamental sense, then, a trial represents a deviant case. But, at the same time, the few cases that are tried have a major impact on the operations of the entire judicial process, providing benchmarks that guide negotiations.

This chapter examines the history and the function of trials, jury selection, how prosecutors and plaintiffs approach trial, defense strategies during trial, and how jurors reach a decision. This chapter also discusses prejudicial pretrial publicity in criminal cases and considers the amount of discretion that jurors should exercise.

HISTORY AND FUNCTION

Trial juries are also called **petit juries** to differentiate them from grand juries. Although judges decide questions of law that arise during trial, jurors are the judges of the facts of the case. Thus, they are responsible for returning a verdict of guilty or innocent, liable or not liable.

The tradition of using lay citizens as impartial finders of fact developed as part of a long struggle against centralized power in Britain and later in those countries that inherited the British traditions of justice. This role was first formalized in the Magna Carta of 1215 (see Exhibit 12.1), when English noblemen forced the king to recognize limits on the power of the Crown:

EXHIBIT 12.1 Key Developments Concerning the Right to Trial by Jury

Case	Year	Development
Magna Carta	1215	English noblemen have the right to a trial by a jury of their peers.
U.S. Constitution, Article III, Section 2	1789	The trial of all crimes shall be by jury and shall be held in the state where the crime was allegedly committed.
Sixth Amendment	1791	"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."
Seventh Amendment	1791	The right to a trial by a jury is preserved in civil suits under common law.
Griffin v. California	1965	The privilege against self-incrimination prohibits the prosecutor from commenting on the defendant's failure to testify during trial.
Sheppard v. Maxwell	1966	The defendant was denied a fair trial because of prejudicial pretrial publicity.
Duncan v. Louisiana	1968	The due process clause of the Fourteenth Amendment incorporates the Sixth Amendment's right to a jury trial.
Baldwin v. New York	1970	Defendants accused of petty offenses do not have the right to be tried by a jury of their peers.
Williams v. Florida	1970	State juries are not required by the U.S. Constitution to consist of twelve members.
Johnson v. Louisiana	1972	Federal criminal juries must be unanimous.
Apodaca v. Oregon	1972	There is no federal requirement that state juries must be unanimous.
Taylor v. Louisiana	1975	Women cannot be excluded from juries.
Ballew v. Georgia	1978	Six is the minimum number for a jury.
Burch v. Louisiana	1979	Six-member criminal juries must be unanimous.
Chandler v. Florida	1981	The right to a fair trial is not violated by electronic media and still photographic coverage of public judicial proceedings.
Batson v. Kentucky	1986	If a prosecutor uses peremptory challenges to exclude potential jurors solely on account of their race, the prosecutor must explain his or her actions.
Daubert v. Merrell Dow	1993	The trial judge must ensure that any and all scientific evidence is not only relevant but also reliable.
J.E.B. Petitioner v. Alabama	1994	Lawyers may not exclude potential jurors from a trial because of their gender.
United States v. Scheffer	1998	Doubts about the accuracy of lie detector tests justifies banning their use in court.
Kumho Tire v. Carmichael	1999	*Daubert* standards for scientific testimony apply to nonscientific testimony as well.
Apprendi v. New Jersey	2000	Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.
Portuondo v. Agard	2000	Prosecutors can tell jurors that the defendant's presence during trial helps them tailor their testimony to fit the evidence.
Ring v. Arizona	2002	It is unconstitutional to have a judge, rather than a jury, decide the critical sentencing issues in death penalty cases.
Blakely v. Washington	2004	Under the Sixth Amendment, juries, not judges, have the power to make a finding of guilt beyond a reasonable doubt for facts used in state sentencing guidelines.
United States v. Booker	2005	The first part of the opinion struck down federal sentencing guidelines as unconstitutional for the reasons expressed in *Blakely v. Washington*. The second part of the opinion allows federal judges to continue to use federal sentencing guidelines as advisory.
Rita v. United States	2007	Sentences imposed under the federal sentencing guidelines may be presumed to be reasonable, but federal appellate courts are not required to consider them so.

> No Freeman shall be taken or imprisoned, or be disseized of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled or otherwise destroyed, nor will we pass upon him nor condemn him but by lawful Judgment of his peers or by Law of the Land.

In the centuries after the signing of the Magna Carta, the jury's role changed greatly. Initially, the right to be tried by a jury of one's peers applied only to noblemen (freemen), but later it was extended to average citizens. Likewise, early English juries were, it composed of witnesses; later, juries became impartial bodies selected from citizens who knew nothing of the events in question.

The American colonists considered the jury trial a fundamental right, and they specifically guaranteed this protection in their charters. The pivotal role that the right to trial by jury plays in U.S. law is underscored by the fact that it is mentioned three times in the U.S. Constitution:

- Article III, Section 2, provides that "the trial of all crimes, except cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed." This section not only guarantees the right to a trial by jury to persons accused of a crime but also specifies that such trials shall be held near the place of the offense. This prevents the government from harassing defendants by trying them far from home.
- The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The requirement of a public trial prohibits secret trials, a device commonly used by dictators to silence their opponents. The specification of an impartial jury goes to the heart of current U.S. practices.
- The Seventh Amendment provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." This provision is a historical testament to the fact that the framers of the Constitution greatly distrusted the judges of the day.

Throughout most of U.S. history, these broad constitutional provisions had little applicability to trials in state courts. As part of the Warren Court revolution in criminal justice, however, the Supreme Court ruled that the jury provisions of the Sixth Amendment applied to state as well as federal courts (*Duncan v. Louisiana* 1968). The jury's primary purpose is to protect citizens against arbitrary governmental actions by providing the accused a "safeguard against the corrupt or overzealous prosecutor and against the

COURTS IN COMPARATIVE PERSPECTIVE

Russia

What if the O. J. Simpson trial had been held in Russia? The procedures and perhaps the outcome would have been different.

- Whereas, in the United States, Simpson could not be forced to testify during his criminal trial, in Russia, he would have been obligated to take the stand.
- Whereas, under U.S. procedure, the victims' families play no role during the trial beyond offering testimony, in Russia, they would have been able to question Simpson directly and also offer emotional statements to the jury during closing arguments.
- Whereas the U.S. prosecution could not allude to any violent episodes in Nicole and O. J. Simpson's past, the victims' relatives would have been able to mention it in a Russian trial.
- Whereas U.S. juries must be unanimous in all but two states, in Russia, it takes only seven of twelve jurors to convict ("What If . . ." 1995).

These contrasts highlight not only unique features of American justice but also a rapidly changing Russian justice system in the post-Soviet era.

The fall of the Russian Empire at the end of World War I led to the seizure of power by the communists and the formation of the Union of Soviet Socialist Republics (USSR). The brutal rule of Josef Stalin (1924–1953) strengthened Russian dominance of the Soviet Union at a cost of tens of millions of lives. The Soviet economy and society stagnated in the following decades until General Secretary Mikhail Gorbachev (1985–1991) introduced *glasnost* (openness) and *perestroika* (restructuring) in an attempt to modernize the nation, but his initiatives inadvertently released forces that, by December 1991, splintered the USSR into fifteen independent republics. Since then, Russia has struggled to build a democratic political system and market economy to replace the strict social, political, and economic controls of the communist period. Russia is still struggling to establish a modern market economy and achieve strong economic growth (Central Intelligence Agency 2008).

Today, Russia has a federated type of government. The capital is Moscow, and there are forty-nine administrative divisions throughout this large country of 147,000,000 people. At the apex of the judicial branch is the Constitutional Court. Judges for all courts are appointed for life by the Federation Council on the recommendation of the president.

After the collapse of the USSR, Russia reintroduced jury trials, which had been used from 1864 to 1917 (Thaman 1999). During the Soviet era, jury trials (called "people's forums") were used to try petty crimes (with the primary purpose of showing the miscreant that deviation from the communist model was not acceptable). First reinstated in a few administrative districts, juries are now used in many jurisdictions.

The use of jury trials is meant to correct widespread abuses in the Soviet justice system. During the 1930s, for example, show trials with scripted confessions of treason were common. Although the worst abuses of the KGB (secret police) appear to be over, occasional use of laypeople is not likely to correct many problems facing the Russian justice system. Russian courts are understaffed; judges are underqualified and underpaid (earning around $100 a month). Moreover, they still see themselves as governmental bureaucrats who respond to the real power in the Russian justice system—the prosecutors. In short, the Russian legal system has yet to emerge as a truly independent branch of government ("Path to Reform . . ." 2001).

Opinion varies on the impact of juries. To some, jurors are overreacting to years of authoritarian rule—jurors choose not to believe the police and acquit guilty defendants way too often (Kolesnikov 2006). Others counter that Russian jurors are not "softhearted old uncles" and highlight numerous trial convictions for rape and murder, noting that only once did the presiding judge disagree with a jury's guilty verdict (Rudnev 1995). Interestingly, many of the features of the jury system that some see as flaws exist in the United States also (Kislov 1998).

The re-introduction of jury trials is one of many recent changes occurring in the Russian justice system. But often the pace of change is slow (Nikiforov 1995). Discussions of Russian justice in the post-Soviet era invariably turn to the interrelated phenomena of corruption and organized crime. Bribery and black markets were common activities in Soviet society. Corruption has likewise been the hallmark of the post-Soviet era. Some old party bosses, for example, used their connections to create new banks with public money. In the absence of bank regulations, those institutions became cash laundromats with enormous sums of untraceable money. In an environment like this, legitimate and illegitimate businesspeople alike need protection, which is what Russian-speaking organized crime has provided on a large scale (O'Rourke 2000).

The trial of oil billionaire Mikhail Khodorkovsky focused international attention on the Russian legal system. To some, he was prosecuted because he and his colleagues had committed criminal fraud and large-scale tax evasion in the rough-and-tumble world of Russian business. But, to others, he was prosecuted because he was a political opponent of Russian president Vladimir Putin (White 2005). Thus, to some observers, this was a show trial too closely resembling the show trials of the Soviet era (Chazan 2005). Khodorkovsky was sentenced to nine years in prison.

Other opponents of the Russian regime, including Garry Kasparov, a former world chess champion, have been detained by the Russian police before important elections (Belton and Buckley 2007).

compliant, biased, or eccentric judge" (*Williams v. Florida* 1970). Having incorporated the Sixth Amendment into the due process clause of the Fourteenth Amendment, the Court proceeded to consider the scope of the right to a jury trial, the size of the jury, and unanimous versus nonunanimous verdicts. In a somewhat confusing line of decisions, the Court has differentiated between juries in civil and criminal cases and between juries in state and federal courts. (See Courts in Comparative Perspective: Russia.)

Scope of the Right to a Trial by Jury

Although juries are considered "fundamental to the American scheme of justice" (*Duncan v. Louisiana* 1968), not all litigants are entitled to a trial by jury. Youths prosecuted as juvenile offenders have no right to have their cases heard by a jury. Similarly, adult offenders charged with **petty offenses** enjoy no constitutional right to be tried by a jury of their peers. The Sixth Amendment covers only adult criminals charged with serious offenses, and "no offense can be deemed 'petty' for the purposes of the right to trial by jury where imprisonment for more than six months is authorized" (*Baldwin v. New York* 1970). As a result, drunk drivers in five states—Louisiana, Mississippi, Nevada, New Jersey, and New Mexico—have no right to a jury trial if they face a jail term of six months or less (*Blanton v. City of North Las Vegas* 1989). Some state constitutions, however, guarantee a jury trial to a wider group of offenders.

Nor are all civil litigants entitled to a trial by jury. The Seventh Amendment covers only civil cases that would have gone to a jury under English practice in 1791 (*United States v. Wonson* 1812). Moreover, because the Seventh Amendment has never been incorporated (that is, applied to states), each state has established its own rules on which types of civil disputes warrant a jury trial. As a result, equity proceedings (injunctions) and family matters (divorce and child custody) are rarely heard by juries. Likewise, some civil cases are viewed as too complex to be decided by juries (Drazan 1989). In protracted antitrust violations, for instance, judges are considered better suited to the task of sorting out evidence presented over a months-long trial (*Matsushita Electric Industrial Co. v. Zenith Radio Corp.* 1980).

Jury Size

During the fourteenth century, the size of English juries became fixed at twelve, and, by the time of the American Revolution, that number was universally accepted in the

colonies. To the Supreme Court, however, the number twelve was a "historical accident, wholly without significance except to mystics," and, therefore, not a constitutional requirement (*Williams v. Florida* 1970). As a result, in federal courts, criminal defendants are entitled to a twelve-person jury. In state courts in noncapital criminal cases, however, a six-person jury is large enough to promote group deliberations and provide a fair possibility of obtaining a representative cross section of the community. In *Ballew v. Georgia* (1978), the defendant's misdemeanor conviction by a five-member jury was reversed because "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members."

Thirty-three states specifically authorize juries of fewer than twelve in criminal cases but often only in misdemeanor cases. In federal courts, defendants are entitled to a twelve-person jury unless the parties agree in writing to a small jury. However, both state and federal courts are allowed to use six-person juries in civil trials (*Colegrove v. Battin* 1973).

There is a good deal of debate over whether small juries provide litigants with a fair trial (Landsman 2005; McCord 2005; Saks 1996). Critics contend that six-member juries are more likely to ignore conflicting points of view and are too hasty in reaching a verdict. Social science evidence suggests that few differences exist between six- and twelve-person juries:

- Small and large juries spend about equal time deciding similar cases (Pabst 1973).
- Small juries do not exclude important points of view in reaching a verdict (Roper 1979).
- Jury size has little effect on verdicts in criminal cases (Roper 1986).

A few studies, however, find some small differences. Twelve-member juries in civil cases are more likely to vote for the plaintiff and are also more generous in their financial awards (Beiser 1975; Zeisel and Diamond 1974). Twelve-member juries are slightly more likely to be unable to reach a verdict; an ally increases the dissenter's ability to resist pressures to conform (Roper 1980).

Unanimity

The requirement that a jury reach a unanimous decision became a firm rule in England during the fourteenth century. An agreement by all jurors was perceived as an indication that their conclusion was correct and, therefore, legitimized the verdict in the eyes of the entire community. Those assumptions were shaken, however, by a pair of Burger Court decisions. Although the Court held that verdicts in federal criminal trials must be unanimous, they also upheld guilty findings by votes of 9–3 and 10–2 in state proceedings (*Johnson v. Louisiana* 1972; *Apodaca v. Oregon* 1972). In 1979, the Court applied a different arithmetic to smaller juries, requiring six-member juries to be unanimous (*Burch v. Louisiana* 1979). Those interpretations of the U.S. Constitution have had relatively little effect, however, because most state constitutions specifically require unanimity in criminal trials. Indeed, only two states—Louisiana and Oregon—permit nonunanimous criminal verdicts in felony trials.

Nonunanimous verdicts serve as a hedge against one or two jurors who refuse to go along with the conclusion of their colleagues no matter what the evidence. To their

supporters, these verdicts are justified because they reduce deliberation time and eliminate the expensive, time-consuming process of conducting a second trial. Opponents counter that proof beyond a reasonable doubt has not been shown if only some of the jurors vote to convict. Those concerns receive some empirical support (Zeisel 1982). A carefully controlled experiment compared unanimous with nonunanimous juries and found that nonunanimous juries tend to hang less often, deliberate less thoroughly, and result in less satisfied jurors (Hastie, Penrod, and Pennington 1984).

Jury Selection

Before the first word of testimony is spoken, trials pass through the critical stage of jury selection. Juries are chosen in a process that combines random selection with deliberate choice. Whether the three stages of jury selection—compiling a master list, drawing the venire, and conducting the voir dire—actually produce fair and impartial juries has been the subject of much concern. Many lawyers believe that trials are won or lost on the basis of which jurors are selected.

Master Jury List

The first step in jury selection is the compilation of a **master jury list**, which must reflect a representative cross section of the community in which the lawsuit arose. This legal standard emerged in response to ample evidence that state and federal jury selection was systematically biased (Munsterman and Munsterman 1986). In most of the South, for example, African-American citizens were never allowed to serve on juries. In a series of cases, the Court ruled that African Americans (*Strauder v. West Virginia* 1980), Mexican Americans (*Castenada v. Partida* 1977), and women (*Taylor v. Louisiana* 1975) cannot be systematically excluded from petit juries solely on the basis of race, ethnicity, or gender. That does not mean that every jury must include African Americans or Mexican Americans if they exist in the community—but such groups may not be denied the opportunity to be equally chosen for jury service.

Voter registration lists are the most frequently used source for assembling names for the master jury list, because they are readily available, frequently updated, and collected according to the political districts that correspond to a court's geographical jurisdiction. Basing the master jury list on voter registration, however, tends to exclude the poor, the young, racial minorities, and the less educated (Kairys, Kadane, and Lehorsky 1977). Because of those limitations, many courts use additional sources, such as city or telephone directories, utility customer lists, or driver's license lists. The use of multiple sources achieves a better representation of a cross section of the community on jury panels (Munsterman and Munsterman 1986).

Venire

The second step in jury selection is the drawing of the **venire** (or jury pool). Periodically, clerks of court randomly draw names from the master jury list and then send the persons chosen a questionnaire requesting information on their eligibility to serve as

jurors. State standards on these matters vary tremendously but generally involve four areas: People are excused from jury duty if they are not U.S. citizens, if they fail to meet a minimum local residency requirement, if they are unable to understand English, or if they have been previously convicted of a felony. Individuals will also be excused on the basis of **statutory exemptions** (passed by legislatures) granted doctors, lawyers, educators, ministers, and various other occupational groups. Finally, others are excused because jury duty would result in undue hardship.

Although serving on a jury is a right and a privilege of citizenship, many people consider it a nuisance. Indeed, in some jurisdictions, 60 percent of all people whose names are pulled from the master jury list return their questionnaires asking to be excused. The responses of court officials to those requests play a major role in determining the makeup of juries. In some areas, all requests are automatically granted on the assumption that any person who does not want to serve will not be a good juror (Van Dyke 1977). But, in other areas, only a few requests involving extreme hardship are granted. Citizens who are not excused from jury duty eventually receive a summons, ordering them to appear at the courthouse on a given date. The clerk's office randomly selects a number of potential jurors from the venire and directs them to a specific courtroom. It is from this venire that a trial jury is selected.

Voir Dire

The final step in jury selection is the **voir dire** ("to speak the truth"), which involves the preliminary examination of a prospective juror to determine his or her ability to judge the case fairly and impartially. Typically, judges also select several alternate jurors, who serve if one of the regular jurors withdraws during the trial.

The manner in which the voir dire is conducted varies tremendously. In some jurisdictions, the judge alone conducts the voir dire, whereas, in other jurisdictions, attorneys participate in some or all of the questioning. The scope of the questioning also varies. The pretrial examination of jurors may be restricted to relatively narrow issues, such as their knowledge of the case, or may contain more expansive questions about their attitudes, general experiences, and preconceptions of the case (Hans 1986). The length of time also varies. In some courts, jury selection is accomplished in less than two hours; in others, voir dire is a time-consuming process, and jury selection for even a routine case can take two or three days. Moreover, major cases have been known to require six weeks or more before the jury is seated.

During voir dire, the litigants may excuse a potential juror in one of two ways. On the basis of a **challenge for cause**, the person in question will be removed only if the trial judge agrees that the prospective juror has some deep-seated bias that would interfere with a fair trial. Although there are no limits to the number of challenges for cause, few are made and even fewer are sustained (Simon and Marshall 1972). Each party may also exercise a limited number of **peremptory challenges**, excusing prospective jurors without giving a reason. On the basis of hunch, insight, whim, or prejudice, the trial attorneys determine who will sit on the jury for that case.

Lawyers have tremendous freedom in exercising peremptory challenges, but they may not use them to exclude potential jurors solely on the basis of race (*Batson v. Kentucky* 1986) or gender (*J.E.B. Petitioner v. Alabama* 1994). Citing *Batson*, the

Supreme Court has ordered new trials for several death row inmates because of racial bias during jury selection (*Miller-El v. Dretke* 2005; *Johnson v. California* 2005).

In practice, attorneys use the voir dire for more than just trying to choose a fair and impartial jury. One primary function is to educate citizens about the role of jurors. Attorneys and judges make frequent requests for the juror's assurance that he or she can set aside past experiences and biases to judge the case fairly and objectively. But, most important, the voir dire provides the lawyers the opportunity to attempt to influence jurors' attitudes and perhaps their later vote. Particularly in criminal cases, defense attorneys view the voir dire as necessary to ensure that potential jurors will presume the defendant is indeed innocent until proven guilty. Many lawyers, therefore, view the voir dire as the final safeguard against jurors' unstated biases or prejudices, ensuring a fair and dispassionate jury. But some critics fear that attorneys seek to select jurors prejudiced to their side. After all, a defendant is entitled to an unbiased jury but not to a jury biased in his or her favor.

Jury Consultants

In recent decades, jury selection has taken a scientific turn. Rather than relying on personal hunch, attorneys in a few highly publicized cases have employed social scientists to aid them in a more intelligent, systematic use of the voir dire. Using public opinion polls and focus groups, jury consultants help lawyers formulate questions to use in jury selection to uncover hidden biases harbored by potential jurors and to develop a profile of jurors who are most and least favorable to each side. The O. J. Simpson defense team enlisted the services of a prominent Pasadena-based trial consultant, Dr. Jo-Ellan Dimitrius, to assist in the selection of the most favorable jury possible for the former football star.

Trial consultants are hired more often by defense attorneys than by prosecutors. In reality, the consultant is deselecting jurors who are likely to be adverse to the client (Gollner 1995). This practice of packing the jury is not new; however, the profession of jury consultant is. Attorneys have always attempted to bias the jury in their favor, but now they are beginning to employ outsiders who specialize in the areas of psychology and body language. The role of jury consultants is at the heart of the movie *Runaway Jury*. (See Law and Popular Culture: *Runaway Jury*.) Perhaps the most valuable aid social science consultants can offer is to help attorneys develop trial presentations that are clear and convincing (Diamond 1990).

Jury Duty

Every year, thousands of Americans are called to serve as jurors. Jury duty is currently the only time that citizens are required to perform a direct service for their government. Nonetheless, getting out of jury duty is a national pastime. "Everybody likes jury duty—just not this week," concludes Patricia Refo, a Phoenix lawyer who chaired the American Jury Project for the American Bar Association ("Getting Out of Jury Duty . . ." 2007).

Some jurors experience great frustration with the process. They are made to wait endless hours in barren courthouse rooms; minimal compensation often works a

LAW AND POPULAR CULTURE

■ Runaway Jury *(2003)*

"Trials are too important to be left up to juries," stresses jury consultant Rankin Fitch (Gene Hackman). He exudes great confidence that he can deliver the jury verdict for his corporate clients. In court, he says, "Somebody always loses. Just not me." But is his confidence misplaced?

Set in pre-Katrina New Orleans, *Runaway Jury* is the story of a mysterious man, Nick Easter (John Cusak), who gets himself on the jury of a landmark case against a gun manufacturer. His motives are part swindle and part revenge. The case involves a suit filed by the widow of a man killed in an office shooting against the manufacturer of the weapon that was used. The woman claims that the manufacturer knew that the store that sold it was not obeying the laws governing firearms sales.

Runaway Jury, based on the John Grisham novel of the same name, highlights the involvement of courts in major public policy issues (see Chapter 7). In the novel, the issue is tobacco-related deaths. (See Debating Law, Courts, and Politics: Who Should Be Held Responsible for Tobacco-Related Deaths? in Chapter 11.) In the movie, the issue is gun-related deaths. (See Debating Law, Courts, and Politics: Should Gun Manufacturers Be Sued? in Chapter 7.)

Runaway Jury dramatizes the importance of trials as balancing wheels. Lawyers for both parties present their case in ways to appeal to popular standards of justice. The plaintiff stresses that the husband was the victim of a mass slaying, "gunned down in the prime of his life." The defense stresses the lawful use of guns in hunting and stresses the Second Amendment's right to bear arms.

Runaway Jury provides glimpses of contrasting types of lawyers (discussed in Chapter 5). Dustin Hoffman plays the role of a classic plaintiff lawyer motivated primarily by the prospect of a large jury award. By contrast, the defense attorney works for a large law firm that regularly represents corporate interests and frames the issues in terms of the client's bottom line on the financial statement.

Runaway Jury offers contrasting images of jury consultants. The plaintiff's lawyer shows disdain for jury consultants, hiring one only after he agrees to a lower-than-normal fee. The defense lawyer, on the other hand, is, in essence, ruled by the jury consultant. And, most certainly, the defendants are under the impression that the consultant can buy the verdict they want. But, in the end, one is not sure if the jury consultant provides anything more than stereotypes. At one point, for example, Rankin opines, "I hate Baptists almost as much as I hate environmentalists."

As we have stressed throughout this book, popular culture often distorts legal realities to fit the plot line. But few works of fiction go as far as *Runaway Jury*. The jury selection process is intended to result in a fair and impartial jury; the movie proceeds as if none of those steps even exist, suggesting that prospective jurors can talk their way onto a jury.

After watching *Runaway Jury*, be prepared to discuss the following questions:

1. In what ways does the movie distort the jury selection process? In what ways does it represent the realities of jury selection?
2. Describe three positive and three negative attributes of the jury system portrayed in *Runaway Jury*.
3. What images of legal ethics does this movie project? Are plaintiffs' lawyers any more or less likely to engage in unethical conduct than lawyers who work for large firms?
4. What themes in this movie would advocates of tort reform stress? What themes in this movie would opponents of tort reform emphasize?

hardship, because not all employers pay for the time lost from work; and some jurors are apprehensive about courts in general and criminal courthouses in particular.

In spite of those hardships, most citizens express an overall satisfaction with jury duty. Of 3,000 jurors surveyed, almost 90 percent stated that they were favorably impressed with jury duty and did not consider it an onerous obligation (Pabst 1973). Just as important, there is every indication that jurors take their jobs seriously. Studies suggest

that jury duty can be stressful; for a handful of jurors, the trial continues long after the verdict (Hafemeister and Ventis 1992).

Considerable attention has been devoted to reducing the inconvenience of jury duty. Courts in all states use a call-in system; jurors dial a number to learn whether their attendance is needed on a particular day. An increasing number of courts are also reducing the number of days a person remains in the jury pool. Traditionally, jurors were asked to serve for a full month. Although only a few jurors were needed for a particular day, the entire pool had to be present in the courthouse every working day. A new approach is the one-day/one-trial jury system, wherein jurors are required to serve either for one day or for the duration of one trial and are then exempt from jury duty for a year or more. One-day/one-trial jury systems are successful in meeting their goals of creating more favorable juror attitudes, providing a more representative cross section of the community, saving money, and increasing the public's exposure to the courts (Kasunic 1983).

THE MOVING PARTY PRESENTS ITS CASE

Once the jury has been selected and sworn in, the trial begins with a brief **opening statement** to the jury. Lawyers for each side explain the version of the facts that best supports their side of the case, how those facts will be proved, and how they think the law applies to the case.

The Burden of Proof

After the opening statements, the moving party (the prosecutor in a criminal case and the plaintiff in a civil matter) presents its case in chief, which is the main evidence offered to support its position. The moving party has the **burden of proof**, which is the duty of affirmatively proving the facts in dispute in the case. If the burden of proof is not met, the judge can grant the defense motion for acquittal before the defense even presents its case. In civil cases, the burden of proof is the **preponderance of evidence**, which is evidence that is of greater weight or is more convincing than the evidence offered in opposition. In criminal cases, however, the state must meet a more demanding standard. One of the most fundamental protections recognized in the U.S. criminal justice process is the right to be presumed innocent.

A defendant is cloaked with the legal shield of innocence. The state has the burden of proving the defendant guilty of the alleged crime; the defendant is not required to prove himself or herself innocent. Thus, the prosecution is required to prove the defendant guilty **beyond a reasonable doubt**, which is a legal yardstick measuring the sufficiency of the evidence. This burden of proof does not require the state to establish absolute certainty by eliminating all doubt—just reasonable doubt.

Rules of Evidence

Evidence refers to all types of information presented at trial. **Real evidence** includes objects of any kind—guns, documents, and business records, for example. The bulk of the evidence during trial consists of **testimony**, statements by witnesses. Normally,