nesses to suggest that the plaintiff's injuries are much less extensive than suggested by the other side and that the amount of money requested is way out of proportion to any injuries that might have been suffered.

Rebuttal

After the defense rests its case, the moving party may call **rebuttal** witnesses. For example, the prosecutor may call a rebuttal witness to show that the defendant's alibi witness could not have observed what she said she did because she was somewhere else at the time. Or the prosecutor may present evidence to show that the previous witnesses have dishonorable reputations. The rules of evidence regarding rebuttal witnesses are complex. In general, evidence may be presented in rebuttal that could not have been used during the prosecution's case in chief. For example, if the defendant has taken the stand, the prosecution may legitimately inform the jury of the previous convictions of the defendant in an attempt to impeach his or her credibility.

Closing Arguments

When both sides have rested (that is, completed the introduction of evidence), each party has the opportunity to make a **closing argument** to the jury. Like opening statements, closing arguments do not constitute evidence. Closing arguments allow each side to sum up the facts and indicate why it believes the jury should return a verdict in its favor. The moving party goes first, carefully summarizing the facts of the case and tying together into a coherent pattern what appeared during the trial to be isolated or unimportant matters. Next, the defense attorney highlights favorable evidence, criticizes the witnesses for the other side, and indicates why they should not be believed. Because the moving party bears the burden of proof, it is allowed the final closing argument, which is often used to rebut assertions made by the defense during its closing statements.

Closing arguments to the jury call for lawyers to muster all the art and craft, skill and guile of their profession. Closing arguments are often the most dramatic parts of the trial. There is a fine line, however, between persuasiveness and unnecessary emotionalism. Jury verdicts in criminal cases have been reversed on appeal because the prosecutor interjected prejudicial statements into the closing argument.

Jury Instructions

Although the jury is the sole judge of the facts of the case, the judge alone determines the law. Therefore, after closing arguments, the court instructs the jury in the meaning of the law that is applicable to the facts of the case. These **jury instructions** include discussions of general legal principles (proof beyond a reasonable doubt or the preponderance of the evidence), as well as specific instructions concerning the law governing the current case. In criminal cases, the judge instructs the jury in the meaning of the specific criminal law the defendant is charged with violating (for example, burglary). In civil cases, the judge instructs the jury in the meaning of the specific legal standards

the defendant is charged with violating (for example, negligence). Finally, the judge instructs the jury about possible verdicts in the case and provides a written form for each. In a trial for homicide, for instance, the jury is instructed that, under state law, the jury either may find the defendant guilty of murder in the first degree, murder in the second degree, or manslaughter, or may acquit on all charges.

The judge and the attorneys prepare the jury instructions during the charging conference. Each side drafts suggested instructions, and the judge chooses the ones that seem most appropriate. If the judge rejects a given instruction, the lawyer may enter an objection on the record, thus preserving the issue for later appeal. Jury instructions are written out, signed by the judge, and then read to the jury.

Jury instructions represent a formal, detailed lecture on the law. Because faulty jury instructions are a principal basis for appellate court reversal, judges are careful in their wordings. As a result, these instructions contain extensive amounts of legal jargon not readily understood by nonlawyers (Steele and Thornburg 1991). Some have made efforts to increase jurors' understandings of these vital matters (Ellwork, Sales, and Alfini 1982; Severance and Loftus 1982). One experiment found that clarifying the meaning of the judge's jury instructions did increase understanding but that jurors still did not have an accurate knowledge of the law. The jury instructions stressed that a defendant is presumed innocent until proven guilty by the evidence beyond any reasonable doubt; yet, after hearing and reading the modern instructions on this matter, only 50 percent of the jurors understood that the defendant did not have to present any evidence of innocence, 10 percent were uncertain as to what the presumption of innocence was, and a small but still-important 2 percent believed that the burden of proof of innocence rested with the defendant (Strawn and Buchanan 1976).

The Jury Decides

How juries decide has long fascinated lawyers and laypeople alike. There is a great deal of curiosity about what goes on behind the guarded jury room door. During trial, jurors are passive spectators who are not allowed to ask questions and are typically prohibited from taking notes. After the judge reads the instructions to the jury, however, the lawyers, the judge, and the litigants must wait passively, often in tense anticipation, for the jury to reach a verdict. The only hint of what is occurring during jury deliberations occurs on the rare occasions when the jurors request further instructions from the judge about the applicable law or ask to have portions of the testimony that was given in open court reread to them.

What Motivates a Jury?

Because jury deliberations are secret, research on what factors motivate a decision must be conducted indirectly. Much of what is known about how juries decide is based either on observing mock juries or on asking jurors to recall what occurred in the jury room. Researchers at the University of Chicago Law School conducted the major studies on jury deliberation. They found that rates of participation varied with social status: Men talked more than women, better-educated jurors participated more frequently, and persons with high-status occupations were more likely to be chosen as foreperson

(Simon 1967; Strodtbeck, James, and Hawkins 1957). Discussions among the jurors mostly concern opinions about the trial and personal reminiscences; far less discussion of the testimony or the judge's instructions to the jury occurs (James 1958).

Juries typically reach a verdict after short deliberations. Interviews of jurors in more than 200 criminal cases revealed that juries usually take a vote as soon as they retire to chambers. In 30 percent of the cases, only one vote was necessary to reach a unanimous verdict. In 90 percent of the rest of the cases, the majority on the first ballot eventually won out (Broeder 1959). Most important, a lone juror rarely produced a hung jury. The psychological pressures associated with small-group discussions are so great that a single juror can buck predominant sentiment only if he or she can find at least one ally. Thus, jury deliberations "do not so much decide the case as bring about a consensus" (Kalven and Zeisel 1966, 488). If the jury does become deadlocked and cannot reach a verdict, the trial ends with a **hung jury**. The moving party then has the option of trying the case again.

But what of jury bias? Do different groups of jurors decide differently? Although some evidence suggests that extralegal factors play a role, on the whole U.S. juries appear to perform remarkably well, deciding primarily on the basis of legal factors (Ford 1986; Reskin and Visher 1986). Some also question whether media coverage unduly influences juries.

The Verdict

After the foreperson announces the **verdict**, either party may request that the jury be polled individually, with each juror voicing his or her vote in open court.

Jury verdicts dramatically determine winners and losers in the judicial process. Given that the vast majority of cases have been disposed of by a negotiated settlement, one might expect that the defendant's chances of winning are roughly 50–50. But, in reality, they are not. In criminal trials, juries convict two-thirds of the time (Roper and Flango 1983). Reliable data on how often juries find civil defendants liable is much harder to come by but points in the same direction. Examination of jury verdicts in forty-three counties found the success rates for plaintiffs clustered within the 55 to 65 percent range (Roper and Martin 1986).

Do juries view cases differently than do judges? Harry Kalven and Hans Zeisel (1966) attempted to answer that question by comparing verdicts reached by juries with the decisions judges would have made in more than 3,500 criminal trials. Overall, they found that judges and juries agreed three out of four times, which suggests that the evidence is the primary factor shaping the jury's verdict. Judges and juries disagreed 22 percent of the time, however, with the juries voting acquittal when the judges would have convicted. But disagreements between judge and jury are tied to the seriousness of the offense. Juries convicted felons at a much higher rate than did judges, but judges convicted nonfelons at a much higher rate than did juries (Levine 1983; Roper and Flango 1983).

When juries acquit in high-profile cases such as the prosecution of Michael Jackson, there are usually calls for jury reform. But isolated jury decisions should not cloud the central fact that over the years conviction rates have been remarkably consistent. Although there are some differences between states in conviction rates in felony prosecutions, within states conviction rates have remained remarkably consistent for several decades (Vidmar et al. 1997).

Prejudicial Pretrial Publicity

One of the basic rights of a defendant accused of violating the criminal law is to be tried by an impartial jury that has not been influenced by **prejudicial pretrial publicity**. (See Case Close-Up: *Sheppard v. Maxwell* 1966.) Pretrial publicity does bias juries. In a research study, one set of "jurors" was provided with prejudicial news coverage of a case and a control group was provided with nonprejudicial information. After listening to an identical trial involving a case where the defendant's guilt was greatly in doubt, 78 percent of the prejudiced jurors voted to convict, compared with only 55 percent of the nonprejudiced jurors (Padawer-Singer and Barton 1975). Indeed, even modest pretrial publicity can prejudice potential jurors—whose self-reports of impartiality should not be taken at face value (Moran and Cutler 1991).

Very few criminal trials, however, involve prejudicial pretrial publicity; news reports seldom extend beyond police blotter coverage. Indeed, the conditions necessary for media coverage to prejudice jurors to the extent that they are unable to decide a case based on courtroom evidence are likely to occur in only 1 out of every 10,000 cases (Frasca 1988). But extensive pretrial publicity greatly strains the jury selection process. Voir dire is geared to ferreting out ordinary instances of unfairness or prejudice, not to correcting the possibility of a systematic pattern of bias. If, for example, an attorney excuses all jurors who have heard or read something about the case at hand, he or she runs the risk of selecting a jury solely from the least attentive, least literate members of the general public. If, on the other hand, an attorney accepts jurors who assert they will judge the case solely on the basis of testimony in open court, he or she cannot be certain that the juror—no matter how well intentioned—can hear the case with a truly open mind.

In trying to reconcile the conflicting principles of the First and Sixth Amendments, trial courts employ singly or in combination three techniques—limited gag orders, change of venue, and sequestering of the jury. Each of these methods, however, is a partial one and suffers from admitted drawbacks (Kramer, Kerr, and Carroll 1990).

Limited Gag Orders

In notorious cases in which it seems likely that selecting a jury will be difficult, judges routinely issue a limited **gag order** forbidding those involved in the case—police, prosecutor, defense attorney, and defendant—from talking to the press, with violations punishable as contempt of court. Given that these people know the most about the case, the net effect is to dry up news leaks. Enforcing limited gag orders, however, is somewhat problematic, because reporters refuse to disclose their sources of information.

Change of Venue

The local area where a case may be tried is referred to as **venue**. If the court is convinced a case has received such extensive local publicity that picking an impartial jury is impossible, the trial may be shifted to another part of the state. Defense attorneys face a difficult tactical decision in deciding whether to request a **change of venue**. They must weigh the effects of prejudicial publicity against the problem of having a trial in a

CASE CLOSE-UP

■ Sheppard v. Maxwell *(1966)*

Prejudicial Pretrial Publicity

On July 4, 1954, Marilyn Sheppard—the pregnant wife of Dr. Samuel Sheppard—was bludgeoned to death in the upstairs bedroom of the couple's home in a fashionable Cleveland suburb. The case produced some of the most sensational press coverage the country had witnessed.

It was not the crime of the century, but it was certainly the crime of the decade. Sheppard told the police that he was asleep on a sofa when he was awakened by the screams of his wife. Rushing upstairs, he grappled with the intruder, only to be struck unconscious by a blow to the head. Sheppard was taken to his family's medical clinic, where he was treated by his brother, also a doctor. From the outset, officials focused suspicion on Sheppard. They interrogated him while he was still at the clinic and continued for several weeks.

The official investigation was prodded by extensive media coverage, which was critical of how the police handled the case. Day after day, vivid headlines called for the arrest of Dr. Sheppard and implied that the police were going easy because he and his family were so socially prominent. To add fuel to the fire, the paper published a front-page editorial headlined "Why Don't Police Quiz Top Suspect?" claiming somebody "was getting away with murder." At the coroner's inquest, Sheppard's attorney was present but not allowed to participate. On live radio, Sheppard was questioned for six hours about his activities the night of the murder and his lovers before that night. Six weeks after the murder, Sheppard was indicted.

The case came to trial two weeks before a general election, in which the judge was seeking re-election and the prosecutor was running for municipal court judge. The names and addresses of potential jurors were published in the paper, resulting in their receiving letters and phone calls concerning the trial. The courtroom was so packed that reporters were allowed to sit behind the defense table, meaning that Sheppard could not converse privately with his lawyer. Indeed, the din was so great that the judge installed a loudspeaker in a vain effort to allow the spectators to hear the witnesses. A radio station carried a daily broadcast from the courtroom. Every day, newspapers printed trial testimony verbatim; no effort was made to prevent the jury from reading those accounts, even when evidence was ruled inadmissible. Not surprisingly, after a nine-week trial in which jurors were free to return home every night, Sheppard was convicted of second-degree murder.

Sheppard spent twelve years in prison. A string of appeals and habeas corpus petitions were denied. Eventually, the family hired a young Boston lawyer, F. Lee Bailey, who would go on to become one of the most famous and controversial lawyers in the United States. (Indeed, Bailey figured prominently in a trial that later received extensive media coverage—the murder trial of former football star and TV commentator O. J. Simpson.) Bailey persuaded the high court to hear the case and won a stunning victory. Justice Clark likened the trial to a "Roman holiday," holding that prejudicial pretrial publicity denied Sheppard the right to a fair and impartial trial (*Sheppard v. Maxwell* 1966).

Finding that pretrial publicity can be prejudicial is a far easier task than deciding how to control it. The essential problem is that two key protections of the Bill of Rights are on a collision course. The Sixth Amendment guarantees defendants the right to a trial before an impartial jury; decisions about guilt or innocence must be based on what jurors hear during the trial, not what they have heard or read outside the courtroom. At the same time, the First Amendment protects freedom of the press; what reporters print, say on radio, or broadcast on television is not subject to prior censorship. Without the First Amendment, there would be no problem; courts could simply forbid the press from reporting anything but the bare essentials of a crime. Although that is the practice in England, such prior restraints are not allowed in the United States (*Times-Picayune v. Schulingkamp* 1975). To Justice Clark, the answer to this dilemma lay in controlling the flow of information. In his words, "The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court." But five decades later, trial courts still struggle to strike a balance between freedom of the press and the rights of criminal defendants.

more rural and conservative area whose citizens are hostile to big-city defendants, particularly if they are racial minorities. Prosecutors generally oppose such moves, because they believe the chance of conviction is greater in the local community. To justify their position, prosecutors cite the expenses of moving witnesses, documents, and staff to a distant city for a long trial.

Sequestering the Jury

A prime defect in the trial of Dr. Sheppard was the failure to shield the jury from press coverage of the ongoing trial. Indeed, jurors even read detailed newspaper stories of the trial, which included inadmissible evidence. To remedy that problem, it is now common in trials involving extensive media coverage to **sequester** the jury. The jurors live in a hotel, and their activities are carefully monitored. Sequestering, however, affects the types of jurors who are willing to serve in cases that may last a month or more. The jury selected may represent only those citizens who are willing to be separated for long periods from friends, family, and relatives, who can afford to take off from work, who are unemployed, or who look forward to a spartan existence.

TRIALS AS BALANCING WHEELS

Juries are among the most democratic of U.S. institutions. Instead of the trained legal experts used in most other countries, ordinary citizens are impaneled to weigh evidence and render verdicts. The use of juries represents a deep commitment to the role of laypeople in the administration of justice. The views and actions of judges and lawyers are constrained by a group of average citizens who are amateurs in the ways of the law (Van Dyke 1977). "The direct and raw character of jury democracy makes it our most honored mirror, reflecting both the good and the bad that ordinary people are capable of when called upon to do justice" (Abramson 1994, 250). For those reasons, judges, lawyers, and law professors have expressed reservations about this intrusion through the years. Jerome Frank (1949, 132) offered one of the most trenchant criticisms: "Now I submit that the jury is the worst possible enemy of this ideal of the 'supremacy of law.' For 'jury-made law' is, par excellence, capricious and arbitrary, yielding the maximum in the way of lack of uniformity, of unknowability. . . ." This tension between the law of the amateur jury and the law of the legal professionals provides a dynamic quality to the U.S. judiciary that is absent in most other nations of the world.

Basically, juries resolve disputes that litigants are unable to settle themselves. The existence of the jury system, therefore, serves notice to all potential litigants that failure to resolve conflict will result in its ultimate resolution by others. This threat of a jury trial clearly shapes how lawyers negotiate settlements in civil cases and how they plea-bargain in criminal cases. Although only a handful of cases go to trial, those few cases exert a major influence on the operation of the entire court process.

A routine part of the negotiation process of civil lawsuits (Chapter 11) is an assessment of the way juries have decided certain kinds of cases. Not only is much information about jury verdicts passed by word of mouth among lawyers, but also special services, such as the national Jury Verdicts Research, report who wins, who loses, and the amount

of damage awards (Levine 1992). Thus, jury trials must be measured not only by their impact on specific cases but also by how those decisions affect similar cases in the future.

Popular Standards of Justice

Juries introduce the community's conscience and commonsense judgments into judicial decisions. The University of Chicago jury project found that popular standards of justice are by far the major reason for disagreement between judge and jury. The result is jury legislation, a jury's deliberate modification of the law to make it conform to community views of what the law ought to be (Kalven and Zeisel 1966). Over the years, federal jury conviction rates have been increasing across all types of cases. But there is some historical evidence that rural juries, for example, appear to be dubious about laws that restrict hunting privileges, and, for many years, southern juries (as well as some northern ones) have questioned federal laws proscribing racial discrimination. So federal defendants accused of those crimes have a good chance of finding friendly juries ready to come to their rescue (Levine 1983). Similarly, state juries are less likely to convict if they perceive that the potential sentence is too severe (as when a defendant who is charged with drunken driving but who caused no damage or injury stands to lose his or her driver's license for a long time). Jury verdicts thus establish boundaries on what actions the local community believes should (or should not) be punished. (See Debating Law, Courts, and Politics: Should Jurors Engage in Jury Nullification?)

Uncertainty

Jury trials also affect the legal system by introducing uncertainty into the process. During a trial, the legal professionals are at the mercy of the witnesses, whose behavior is somewhat unpredictable: What a witness says and how he or she says it often means the difference between conviction and acquittal (Eisenstein and Jacob 1977). The presence of juries adds another layer of unpredictability to the process. Stories about irrational jurors form part of the folklore of any courthouse. Here are two examples:

- During jury deliberations in a drug case, two women announced that "only God can judge" and hung the jury by refusing to vote.
- After an acquittal in a burglary case, a juror put her arm around the defendant and said, "Bob, we were sure happy to find you not guilty, but don't do it again" (Neubauer 1974, 228).

Legal professionals resent such intrusions into their otherwise ordered world; they seek to reduce such uncertainties by developing norms of cooperation. Viewed in that light, negotiating settlements serves to buffer the system against a great deal of the uncertainty that results when lay citizens are involved in deciding important legal matters.

Vanishing Juries

For all the public attention devoted to trials, some law professors and judges are concerned that jury trials are disappearing. In one recent year, for example, federal courts conducted 3,600 civil jury trials, down from 5,800 in 1962 (Liptak 2007). This does not appear to be an enormous drop until one considers that the volume of cases quintupled during that same time frame (Galanter 2004). Statistics like these lead U.S. District Judge William Young (2006) to equate vanishing juries to a vanishing constitution.

This trend is nothing new, however. Ninety years ago, Raymond Moley (1928) published an influential article titled "The Vanishing Jury." In many ways, the notion of the disappearing jury reflects important practices discussed earlier; lawyers and litigants prefer to settle cases on their own terms, not those of an unknown lay jury. Thus, the

DEBATING LAW, COURTS, AND POLITICS

Should Jurors Engage in Jury Nullification?

- Jurors in a dry county find the local bootlegger not guilty.
- A prosecutor refuses to file charges because jurors will not convict in possession-of-marijuana cases.
- The subway vigilante Bernhard Goetz is acquitted of serious charges in the shooting of four African-American youths.
- In a verdict many find stunning, O. J. Simpson is acquitted of murdering his wife.
- Dr. Jack Kevorkian is acquitted of violating Michigan's assisted suicide law.

These cases are often cited as examples of jury nullification. Raising the question "Was justice served in these cases?" highlights the difficulty of talking about this topic. Individually, each of these cases provokes disagreement over the correctness of the result. Collectively, the cases reveal competing definitions of the meaning of justice.

Jury nullification refers to the idea that juries have the right to refuse to apply the law in criminal cases, despite facts that leave no reasonable doubt that the law was violated. In the United States, a trial presumes a fundamental division of labor between judge and jury: The judge is the sole determiner of the law, and jurors are the sole judge of the facts of the case. Under this formulation, jurors are free to acquit if they find the evidence presented by the prosecution to be weak or unbelievable. They are not, however, allowed to vote not guilty because they do not like the law in question.

Jury research conclusively shows that juries introduce popular standards of justice into trials. By introducing community standards, lay jurors shape the law in ways that professionals sometimes find disagreeable. Thus, for centuries, some American legal thinkers have denounced juries as enemies of an ordered legal system. More recently, though, others have championed the cause of jury nullification from a variety of perspectives, ranging from protesters (who point to injustices in specific cases) to anarchists (who have no use for modern government). Alas, even with a scorecard, it is hard to tell who the players are.

The argument for jury nullification begins with the premise that jury nullification restrains a lawless government. Indeed, the right to trial by jury creates the right to jury nullification. Given that jury nullification provides "freedom's shield," advocates go even further and argue that jurors should be told that they have a right to disregard the judge's instructions on the law.

Critics counter that jury nullification undermines the rule of law. For that reason, jurors have no constitutional right to vote their conscience. Jury nullification is the anarchist's sword, and, therefore, telling jurors that they have a "right" to disregard the judge will produce only untold mischief.

The most provocative statement in favor of jury nullification comes from Paul Butler of George Washington Law School. In "Black Jurors: Right to Acquit," Butler argues that the huge numbers of African-American men in jail for drug crimes is the product of a white justice system. The author concludes that African-American jurors often have the moral justification to acquit guilty African-American defendants when the crime is victimless or nonviolent (Butler 1995).

What do you think? Should jurors engage in jury nullification, or should they follow the law as determined by the judge? Should jurors be told that they have the right to ignore the judge's instructions on the law, or would that only breed anarchy?

vast majority of criminal cases end in a voluntary plea of guilty (Chapter 9). Likewise, an even higher percentage of civil cases end with out-of-court settlements (Chapter 11). To these long-term factors, several more modern ones exist as well. Current thinking stresses efficient use of judicial resources, including allowing judges to enter a summary judgment if there are no disputes over facts in civil cases. Similarly, alternative dispute resolution (ADR) stresses that informal resolutions are often better than court-imposed ones (Chapter 10).

Although fewer cases are decided by a jury trial every year, juries nonetheless remain very important to the American legal system. Indeed, 90 percent of all jury trials in the world take place in the United States.

Conclusion

After twelve years in prison, Sheppard was retried in 1966. The prosecution put on essentially the same case, but they now faced one of the top defense attorneys in the nation. F. Lee Bailey tore into the prosecutor's witnesses and, in closing argument, likened the prosecution's case to "ten pounds of hogwash in a five-pound bag." After deliberating for less than twelve hours, the jury returned a verdict of not guilty. But for Sam Sheppard liberty proved short lived. He died in 1970, probably sent to an early grave by journalistic excess.

In many ways, highly publicized jury trials for defendants—whether well known like Sam Sheppard and Scott Peterson or hardly known at all—are the high point of the judicial process. Indeed, along with Lady Justice, jury trials stand as the primary symbol of justice. In turn, many Supreme Court decisions emphasize the importance of adversarial procedures at trial. Yet the realities of trial present two contradictory perspectives: Full-fledged trials are relatively rare, yet trials are an important dimension of the court process. Every year, a million jurors serve in civil and criminal cases. Although only a relative smattering of cases are ever tried, the possibility of trial shapes the entire process. Thus, long after trials have declined to minimal importance in other Western nations, the institution of the trial jury remains a vital part of the U.S. judicial process. Nowhere is this more apparent than in criminal justice. Given the availability of counsel, any defendant, no matter how poor and no matter how inflamed the public is about the crime allegedly committed, can require the state to prove its case.

Critical Thinking Questions

1. What if the United States did not have the right to trial by jury? How would the court system be different? Would the courts be more or less respected in the public eye?
2. Why are some jury verdicts popular with the public but others are not? To what extent do differences of opinion over the fairness of a jury verdict reinforce notions that equate justice with winning (Chapter 2)?
3. Examine several trials that have occurred over the last several months (either nationwide or in your own community). Do those trials suggest that justice would be better served if jury nullification were explained to the jury as a possible basis for their decision?

World Wide Web Resources

Search Terms

DNA testing
jury
jury nullification

Useful URLs

http://www.aafs.org
The American Academy of Forensic Sciences is a professional society dedicated to the application of science to the law.

http://www.jri-inc.com
The Jury Research Institute provides trial consulting services.

http://www.ajs.org/jc
The National Jury Center of the American Judicature Society

http://www.crfc.org/americanjury
"The American Jury: Bulwark of Democracy" is presented by the Constitutional Rights Foundation Chicago.

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