

# THE TWENTY-FIRST CENTURY JURY: WORST OF TIMES OR BEST OF TIMES?

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I am pleased to be invited to reflect on the contemporary American jury for this issue of the *Criminal Law Brief*. In thinking about legal developments, new research findings, and the continuing swirl of controversy over this venerable American institution, I observe the same paradoxical condition that Charles Dickens found in 18<sup>th</sup> Century London: "It was the best of times; it was the worst of times." There is evidence of both the expansion of jury trial rights, yet contraction of jury trials. Research evidence indicates that juries perform well, yet the 21<sup>st</sup> Century jury confronts more complex decision making tasks and continuing doubts about its fairness and competence.<sup>1</sup>

## Is it the Worst of Times for the Criminal Jury?

Our starting point is the rapidly declining use of the criminal jury. Centuries ago, trial by jury was the primary method of resolving criminal charges; but it has been on a downward slide for some time, with judges and especially prosecutors taking over more and more of the jury's function.<sup>2</sup> Juries waned as the legal system became increasingly professionalized. Over the last few decades, a number of factors have conspired to reduce jury trial rates even further. One, of course, is the increasing cost of a trial. The introduction of sentencing guidelines and mandatory minimum sentences constitutes another important factor. Guidelines and mandatory minimum

sentences make the gamble of a jury trial less attractive to defendants and consequently bolster the power of prosecutors to settle cases through plea agreements.

More recent figures show that the jury trial rate has plummeted. Researchers at the National Center for State Courts examined the

prevalence of jury trials in state courts from 1976 to 2002.<sup>3</sup> (See table below). They found that although criminal filings skyrocketed during this time period, the absolute number of criminal jury trials decreased by 15%.<sup>4</sup>

The jury trial rate, as a result, dropped substantially. In 1976, for instance, there were 52 jury trials per 1,000 felony case dispositions. By 2002, the felony jury trial rate was just 22 per 1,000 cases.<sup>5</sup>

	Federal District Courts		State Courts of General Jurisdiction	
	Filings	Jury Trials	Filings	Jury Trials
Civil	260,271	4,000	7,171,842	33,125
Criminal	59,923	3,268	4,924,710	54,625
Total	320,194	7,268	12,096,552	87,750

Table 3: Federal and State Court Filings and Jury Trials, 1999.<sup>6</sup>

A decline in the proportion of cases resolved by jury is also apparent in federal trial courts, where juries now resolve fewer than 5% of criminal dispositions.<sup>6</sup> Indeed, one might argue rather convincingly that the criminal jury is becoming so rare that it will fade into oblivion before much of the 21<sup>st</sup> Century is gone.

Jury trials are fewer and they appear to include more challenging evidence for juries to evaluate. In the mid-1950s, when Kalven and Zeisel began their famous national study of jury trials, the majority (72%) of the criminal jury trials that they studied included no expert witnesses.<sup>7</sup> Trial judges are more likely to rate today's criminal jury trials as complex.<sup>8</sup> Today, it is also more common for the attorneys to offer experts at trial. These experts might include

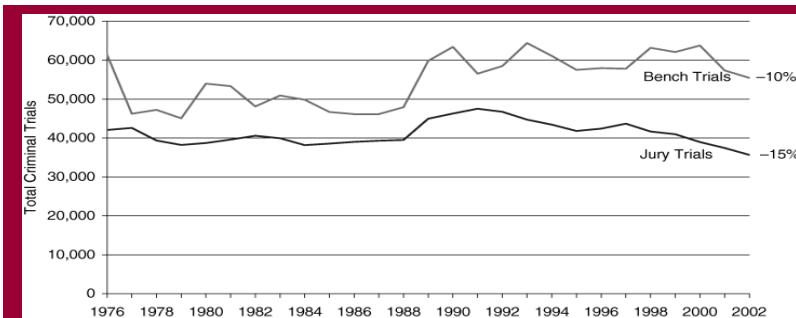


Table 1: Total criminal jury and bench trials in 23 states, 1976–2002.<sup>a</sup>

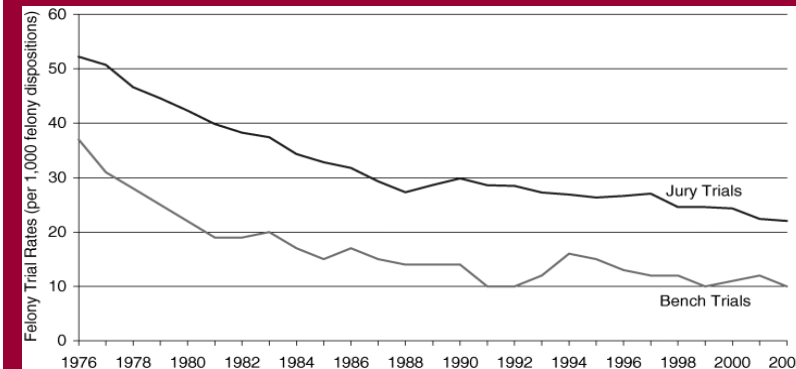


Table 2: Felony trial rates (per 1,000 dispositions) for 13 states, 1976–2002.<sup>b</sup>

medical examiners, doctors, psychologists, firearms and ballistic specialists, or DNA analysts. In a recent study of state criminal jury trials, 56% of the trials included at least one

Expert Witnesses. <sup>d</sup>	
Neither Side	72%
Defense Only	3%
Both Sides	3%
Prosecution Only	22%
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Total	100%
Total Defense:	6%
Total Prosecution:	25%

expert witness, most typically for the prosecution. Prosecutors called experts in just over half of the trials, while the defense employed experts in just one out of approximately every ten

trials.<sup>9</sup> Thus criminal juries must regularly evaluate expert testimony as they decide guilt and innocence. Even considering the larger gate-keeping role of judges under the *Daubert* standard, some research studies raise doubts about whether juries fully understand complicated scientific evidence such as DNA that purportedly links a defendant to a crime or medical testimony that addresses the defendant's culpability.<sup>10</sup>

Whether jury trials include more legally complex matters is an open question. Certainly, the legal instructions in capital jury trials have become formidable. The empirical work on how juries interpret and apply these instructions is not reassuring.<sup>11</sup> Research shows that revising judicial instructions in line with cognitive and linguistic knowledge can readily improve comprehension, but with some exceptions, jurisdictions have been slow to revise their criminal jury instructions.<sup>12</sup>

Jury trials have declined, yet public exposure to jury trials through the media remains substantial. Pretrial publicity has always been a problematic issue in high profile trials, but in today's high visibility trials it is at another order of magnitude. In addition to CourtTV's gavel-to-gavel coverage of jury trials nationwide, the media coverage of sensational trials like those of pop icon Michael Jackson and business and corporate executives such as Martha Stewart present major challenges for judges and worries about potential bias for attorneys.

Take the case of Scott Peterson, the California man accused of killing his pregnant wife Laci Peterson on Christmas Eve 2003 and dumping her body in the bay. News coverage of the police search, the discovery of Laci Peterson's decomposed body and that of her unborn child in the bay, police reports identifying Scott Peterson as a suspect, and nonstop news reports of Scott Peterson's affairs, arrest, and evidence against him surely skewed the jury pool.<sup>13</sup> Once the trial began, the saturation media coverage influenced the jury's composition and, some argued, even its decision to sentence Scott Peterson to death.<sup>14</sup> Research on the multiple effects of pretrial publicity on jury decision making finds that such publicity negatively affects jurors' initial impressions of the defendant, their evaluation of trial evidence, and the

### Pretrial Publicity and Its Influence on Juror Decision Making.<sup>e</sup>

- A study conducted in 1995 found that roughly one-fourth of all suspects in crimes covered by newspaper articles may be subject to prejudicial pretrial publicity.
- Jurors who have heard about prior bad acts by a party or who have reason to question the character of a party are more likely to convict or find fault with that party.

impact of prosecution versus defense arguments in the jury room.<sup>15</sup> These negative effects underscore the need to vigorously manage high profile criminal jury trials.<sup>16</sup>

New studies have also confirmed that despite substantial reforms in the jury selection process, jury service remains unequally distributed. Primarily because of a differential response to jury summons, the young, the poor, and racial and ethnic minorities continue to be underrepresented in many jury pools.<sup>17</sup>

Another problem is the enduring significance of race in jury selection. Because of substantial progress in jury summoning methods, American jury pools are much more diverse today than in previous times.<sup>18</sup> Furthermore, a line of Supreme Court decisions has been aimed at eradicating the adversaries' reliance on prospective jurors' race and ethnicity in their exercise of peremptory challenges.<sup>19</sup> Beginning with *Batson v. Kentucky*<sup>20</sup> in 1986 through the *Miller-El v. Dretke*<sup>21</sup> case in 2005, the Court continues to insist that peremptory challenges be free of racial considerations. Yet recent studies of prosecutor and defense peremptory challenges show that the juror's race and ethnicity continues to play a role.<sup>22</sup> Prosecutors are much more likely to challenge African-Americans, while defense attorneys are more apt to challenge Caucasians. Evidence of the persistent effect of race in peremptory challenges has led to demands that peremptory challenges be reduced drastically or eliminated altogether.<sup>23</sup>

### Or Is It the Best of Times?

Yes, it is a gloomy picture, but consider these developments. The United States Supreme Court surprised legal commentators with an important series of decisions that strongly reaffirmed the right to a jury trial. The Court, in *Apprendi v. New Jersey*,<sup>24</sup> held that a defendant's jury trial right extends to any contested sentencing-related fact that has to be proven in order for a judge to impose a sentence above the statutory maximum sentence that would otherwise apply. A subsequent decision in *Blakely v. Washington*<sup>25</sup> stated that the *Apprendi* rule governs even when the contested fact can be used to increase the sentence above an otherwise applicable sentencing guidelines-imposed maximum sentence. Thus, the Court extended the Sixth Amendment right to a jury trial to any fact determination that is required to increase the sentence above the maximum sentence that otherwise would be

available under a guidelines system.<sup>26</sup> In *United States v. Booker*, however, the Court declined to make jury fact-finding in sentencing mandatory in the federal context; instead, it made the federal sentencing guidelines advisory rather than binding, rendering the *Apprendi* rule inapplicable.<sup>27</sup>

The end result is that the jury is now destined to become a major player in the sentencing process in state—although perhaps not federal—courts. Since most criminal jury trials occur in state rather than federal court, we will see state courts and state legislatures experimenting with ways to present disputed sentencing facts to the jury.<sup>28</sup> Some commentators argue that jury sentencing will be more democratic,<sup>29</sup> while others express concern that juries will not be up to the task.<sup>30</sup> A new analysis of criminal trials and sentences just before and after the *Apprendi* decision finds that providing defendants the right to have sentencing facts determined by juries benefits criminal offenders.<sup>31</sup> Interestingly, the current Supreme Court docket includes cases that examine the scope of the Confrontation Clause as well as cases that explore the propriety of withholding evidence from the jury, underscoring the significance the Court appears to be attaching to fact-finding in the adversary jury trial.<sup>32</sup>

I am optimistic that if courts and legislatures properly structure the task of sentencing, juries can perform competently. Empirical studies are reassuring about the basic soundness of jury decision making. Systematic studies have repeatedly shown that the strength of the evidence presented at trial is the major determinant of jury verdicts.<sup>33</sup> When the evidence is strong for conviction, the jury (and judge) convicts, and when it is moderate to weak, the jury (and judge) acquits.<sup>34</sup> In research projects surveying judges, attorneys, and jurors who participated in criminal trials, judges are found to agree with the vast majority of jury verdicts, seeing them as based on the trial evidence rather than the jury's biases and prejudices.<sup>35</sup> Indeed, the jury's verdict overlaps with the verdict the judge would have reached in most cases.

But what about the greater complexity of contemporary trials? Kalven and Zeisel dealt with the evidence complexity question by assessing the agreement rate between the jury verdict and the judge's hypothetical verdict in easy and complex cases.<sup>36</sup> They found that juries and judges agreed just the same in easy and complex cases, suggesting that evidence complexity was not a major cause of judge-jury disagreement. The National Center for State Courts study of cases from 2000-2001 found similarly that judicial agreement with jury verdicts did not vary as a function of either evidentiary or legal complexity.<sup>37</sup> The NCSC project also found, however, that, compared to jurors in cases in which all of the criminal charges were resolved by verdicts, jurors in cases that hung on one or more charges were more likely to

describe their cases as complex.<sup>38</sup> Hung jurors reported that their juries had more difficulty understanding the evidence, expert testimony, and the law in the case.<sup>39</sup> Case complexity may not lead criminal juries to reach a different verdict from the judge, but it appears to make it more difficult to arrive at a verdict.

Jury trial reforms can remedy some of the problems jurors face in complicated trials.<sup>40</sup> Over the last two decades, a widespread movement for jury reform has swept through American courts. Many states have formed commissions to examine their jury selection and trial procedures, to review relevant studies, and to propose legal and procedural changes.<sup>41</sup> Substantial research on trial reforms has already been conducted and more is underway.<sup>42</sup> The American Bar Association drew on this body of work in revising its Principles for Juries and Jury Trials, which were adopted as

ABA policy in February of 2005.<sup>43</sup> For example, the commentary accompanying the Principles describes empirical work supporting a return to 12-person unanimous juries, showing that larger juries that must deliberate to a unanimous verdict are more representative of the community and more accurate in decision-making.<sup>44</sup> Similarly, the principles that jurors be permitted to take notes, ask questions of witnesses, and employ jury notebooks

are supported by research studies showing the benefits of these techniques.<sup>45</sup>

One project compared the value of different jury trial reforms for complex evidence comprehension.<sup>46</sup> Mock juries, composed of members of a state court jury pool, watched a one-hour videotape of a trial that included dueling expert testimony about mitochondrial DNA evidence.<sup>47</sup> Some mock juries solely watched the videotape and then deliberated to a verdict, while other groups were able to take notes, ask questions of experts, refer to jury notebooks, employ a checklist, or take advantage of multiple techniques.<sup>48</sup> The mock jurors overall showed relatively good comprehension of the complex scientific evidence. Furthermore, certain analyses showed improvement for jurors who were given jury notebooks or checklists.<sup>49</sup> However, even these reforms had modest impact, leading the authors to suggest that jury tutorials and court-appointed experts should be assessed for their use in complex trials.<sup>50</sup>

Despite the potential of these reforms for improving jury comprehension in criminal trials, commentators have expressed some concerns about particular techniques, especially permitting jurors to ask questions of witnesses. Jury questions have the potential to move the jury away from the strict passivity of the decision maker in the adversary system, to a more active participant.<sup>51</sup> Although there is no empirical

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evidence that an active jury is more likely to prejudge the case, we should be mindful of that possibility as we propose and test modifications to jury trials.

## Conclusion

Despite a drop in the proportion of criminal cases that are resolved by juries, the right to a jury trial in criminal cases as a constitutional matter is secure, and recent Supreme Court decisions have expanded its scope. What is more, in recent years, a number of other countries have adopted the jury or another form of lay participation into their legal systems.<sup>52</sup> Russia did so after the breakup of the Soviet Union and Spain incorporated the jury into its justice system following the dictatorial Franco regime.<sup>53</sup> Other countries such as Japan, Korea, and Argentina have debated or have incorporated lay participation into their legal systems.<sup>54</sup> These international developments suggest that even though incorporating lay citizens into the justice system can create some problems, it is seen as a valued method of promoting legitimacy and democracy.

On balance, weighing these multiple and competing developments, I cannot conclude that these are either the best or the worst of times for the jury system. For those of us who study the American criminal jury, however, these certainly qualify as interesting times!

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<sup>1</sup> Author's Note. I wish to thank John Blume, Steve Clymer, Paula Hannaford-Agor, and J.J. Prescott for their helpful suggestions on an earlier draft, and Julie Jones for her excellent research assistance.

<sup>2</sup> On the phenomenon of the vanishing trial, including the jury trial, see generally 1 J. EMPIRICAL LEGAL STUD. v, v-ii, 459-984 (2004). Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689 (2004), argues that even in earlier times, the full-blown adversary criminal jury trial was never the norm. Historically, many criminal trials were "quick, slapdash" proceedings. *Id.* at 692.

<sup>3</sup> Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004).

<sup>4</sup> *Id.* at 763-64, fig.2.

<sup>5</sup> *Id.* at 765-766; see fig.4 at 766.

<sup>6</sup> Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 492-493 (2004) (citing data from 2002).

<sup>7</sup> HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 139-140, tbls.37 & 38 (Little, Brown 1966).

<sup>8</sup> Michael Heise, *Criminal Case Complexity: An Empirical Perspective*, 1 J. EMPIRICAL LEGAL STUD. 331, 335 (2004).

<sup>9</sup> In the NCSC sample, drawn from four state jurisdictions, there was information about expert witnesses in 349 of the criminal jury trials. Prosecution experts testified in 54% of the criminal jury trials, and defense experts were called in 9% of the trials. The most frequent combination was a single prosecution expert and no defense expert, occurring in 109 (about a third) of the trials. There were just 7 cases in which the defense presented one or more experts and the prosecution presented none. PAULA L. HANNAFORD-AGOR, VALERIE P. HANS, NICOLE L. MOTT, & G. THOMAS MUNSTERMAN, NAT'L CTR. FOR STATE COURTS, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, *ARE HUNG JURIES A PROBLEM?* (2002). The data file is available at ICPSR.

<sup>10</sup> See, e.g., Jason Schklar & Shari Seidman Diamond, *Juror Reactions to DNA Evidence: Errors and Expectancies*, 23 LAW & HUM. BEHAV. 159 (1999) (finding that mock jurors had difficulty weighing and combining probabilities associated with DNA analysis results); Jonathan J. Koehler, *The Psychology of Numbers in the Courtroom: How to Make DNA Match Statistics Seem Impressive or Insufficient*, 74 So. Cal. L. Rev. 1275 (2001) (describing how different presentations of DNA match statistics may mislead jurors).

<sup>11</sup> See i.e. Stephen P. Garvey, Sheri Lynn Johnson, & Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 638 (2000) (finding 41% of mock jurors erroneously believed that they must sentence a defendant to death if they found his conduct was heinous). On the difficulties jurors have with legal instructions, and the need for wholesale revision, see generally PETER M. TIERSMA, *LEGAL LANGUAGE* 231-40 (1999).

<sup>12</sup> TIERSMA at 231-32.

<sup>13</sup> See, e.g., Valerie P. Hans, *Juror Bias is a Special Problem in High-Profile Trials*, 5.2 A.B.A. INSIGHTS ON L. & SOC'Y 14 (2005).

<sup>14</sup> The media coverage directly affected jury composition in that one of the jurors was dismissed because of improper contact with a media representative during the trial. Another problem, raised by Scott Peterson's lawyers, is that once the jury convicted Scott Peterson of murder, jurors were released until the start of the penalty phase, and left the courthouse into a public arena in which their guilty verdict was loudly and repeatedly praised. See *Petition for Review with Request for Stay, Peterson v. Superior Ct. of San Mateo County*, No. S129466 (Cal. Nov. 24, 2004), *denied* (Nov. 29, 2004). The defense petitioned for a new penalty phase jury, plausibly arguing that the bias created under these circumstances could not be undone, but the request was denied. *Id.*

<sup>15</sup> Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity and Its Influence on Juror Decision Making*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 254, 254-55 (Neil Brewer & Kipling D. Williams eds., 2005).

<sup>16</sup> TIMOTHY R. MURPHY, PAULA L. HANNAFORD, GENEVRA KAY LOVELAND, & G. THOMAS MUNSTERMAN, MANAGING NOTORIOUS CASES (1998).

<sup>17</sup> Mary R. Rose, Shari Seidman Diamond, & Mark A. Musick, Who Gets to be a Juror? An Analysis of Prevalence in the Multi-Stage Process of Jury Selection (October 22, 2005) (paper presented at the JELS Junior Empirical Scholars conference, Cornell Law School, Ithaca, NY).

<sup>18</sup> See, e.g., G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216, 218-19 (1996) (delineating state jury selection reforms, including the elimination of exemptions, improved automation, scanning of juror data, follow-up procedures to locate non-respondents, and other changes such as the introduction of a jury hotline and increased pay for jurors).

<sup>19</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Powers v. Ohio*, 499 U.S. 400 (1991); *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005).

<sup>20</sup> 476 U.S. 79 (1986).

<sup>21</sup> 125 S. Ct. 2317 (2005).

<sup>22</sup> David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999); Rose et al., *supra* note 16.

<sup>23</sup> Arthur Burnett, Sr., *Abolish Peremptory Challenges: Reform Juries to Promote Impartiality*, 20 CRIM. JUST. 26 (Fall 2005); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997); COUNCIL FOR COURT EXCELLENCE, DISTRICT OF COLUMBIA JURY PROJECT, JURIES FOR THE YEAR 2000 AND BEYOND (1998),

<http://www.courtexcellence.org/issuesadvocacy/juryreform/trialjuryref.html> (follow "Juries for the Year 2000 and Beyond" hyperlink) (last visited Nov. 18, 2005). Recommendation 19d suggests "...eliminating, or drastically reducing the number of, peremptory strikes" in an attempt to reduce discrimination.

*Id.*

<sup>24</sup> 530 U.S. 466 (2000).

<sup>25</sup> 542 U.S. 296 (2004).

<sup>26</sup> 542 U.S. 296 (2004).

<sup>27</sup> 543 U.S. 220, 125 S.Ct. 738, 767 (2005).

<sup>28</sup> See J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making After the Blakely Revolution* 5-6 (Feb. 28, 2005) (unpublished paper available at <http://www.law.umich.edu/centersandprograms/olin/papers.htm> (follow "2005 Papers" hyperlink; then follow "Improving Criminal Jury Decision Making After the Blakely Revolution" hyperlink))(drawing on empirical research to suggest procedures for jury sentencing).

<sup>29</sup> E.g., Jenia Inotcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 346-47 (2003) (claiming that juries embody democratic ideals because they are a product of random sampling, require unanimity but allow for a minority vote, and are small enough to encourage debate); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L. J. 951, 986-87 (2003) (arguing that because of juries' multi-

dimensional composition, they are better suited to make sentencing determinations).

<sup>30</sup> See generally, Prescott & Starr, *supra* note 23 (analyzing potential problems in jury sentencing).

<sup>31</sup> See, e.g., J.J. Prescott, *Measuring the Consequences of Criminal Jury Trial Protections 3* (Cornell Law School, Working Paper presented at Faculty Workshop, Oct. 26, 2005). Cited with permission.

<sup>32</sup> The Court reasserted the importance of the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004). The scope of the Confrontation Clause will be further explored in two cases now pending before the Supreme Court: *Davis v. Washington* (No. 05-5224, 111 P.3d 844 (Wash. 2005)) and *Hammon v. Indiana* (No. 05-5705, 829 N.E.2d 444 (Ind. 2005)). The Court is also considering two cases on the constitutionality of withholding evidence from the trial jury: *Oregon v. Guzek* (No. 04-928, 86 P.3d 1106 (Or. 2004)) and *Holmes v. South Carolina* (No. 04-1327, 605 S.E.2d 19 (S.C. 2004)). Whether the Court expands or contracts jury fact-finding in the pending cases, all of this activity suggests that the Court is paying close attention to the jury's fact-finding role.

<sup>33</sup> HANNAFORD ET AL., *supra* note 8, at 56 (finding that judges would have reached the same verdict as the jury in 70% of the cases); see Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab, & Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's THE AMERICAN JURY*, 2 J. EMPIRICAL LEGAL STUD. 171, 196-98 (2005) (finding that evidentiary strength is a strong and significant factor in jury verdicts in felony trials).

<sup>34</sup> Eisenberg et al., *supra* note 28, at 186-89 (showing the importance of evidence strength to judge and jury verdicts).

<sup>35</sup> HANNAFORD ET AL., *supra* note 8, at 56; KALVEN & ZEISEL, *supra* note 6, at 56-58.

<sup>36</sup> KALVEN & ZEISEL, *supra* note 6, at 157, tbl.50.

<sup>37</sup> See Eisenberg et al., *supra* note 27, at 190-192 (finding that judges agreed with jury verdicts at about the same rate in cases that were rated as low and higher in evidentiary and legal complexity).

<sup>38</sup> Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott, & G. Thomas Munsterman, *The Hung Jury: THE AMERICAN JURY'S Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33, 44-45 (2003); HANNAFORD-AGOR ET AL., *supra* note 8, at 45-46.

<sup>39</sup> HANNAFORD-AGOR ET AL., *supra* note 8, at 45-46.

Comparing juries that reached verdicts versus those that hung on any charge, the results were statistically significant. *Id.* at 45. When juries that reached verdicts were compared to juries that hung on all charges, there was no difference in the rated complexity of the trial, but the jurors still reported that their juries had significantly greater difficulty with the evidence and law. *Id.* at 46.

<sup>40</sup> See Vicki L. Smith, *How Jurors Make Decisions: The Value of Trial Innovations*, in JURY TRIAL INNOVATIONS 7-9 (G. Thomas Munsterman, Paula L. Hannaford, & G. Marc Whitehead eds., 1997) (identifying the usefulness of various trial reforms in light of psychological knowledge about the cognitive processes in juror decision making).

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<sup>41</sup> See Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 U. MICH. J. L. REFORM 213, 223-24 (1999) (finding that the majority of empirical research concludes that the problem stems from deficiencies within the system rather than from biased or unfit jurors); Gregory E. Mize & Christopher J. Connelly, *Jury Trial Innovations – Charting a Rising Tide*, 41 CT. REV. 4 (2004) (discussing current and future innovation efforts); see also Munsterman, *supra* note 17.

<sup>42</sup> B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, 41 CT. REV. 12, 12-13 (2004) (summarizing methodological approaches and empirical findings of research on jury reforms).

<sup>43</sup> AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES & JURY TRIALS (2005), <http://www.abanet.org/juryprojectstandards/principles.pdf>.

<sup>44</sup> See *Id.* at 15-19 (summarizing empirical research on jury size and unanimous decision rule).

<sup>45</sup> *Id.*, at 94-97 (discussing notetaking, notebooks and juror questions).

<sup>46</sup> B. MICHAEL DANN, VALERIE P. HANS, & DAVID H. KAYE, TESTING THE EFFECTS OF SELECTED JURY TRIAL INNOVATIONS ON JUROR COMPREHENSION OF CONTESTED MTDNA EVIDENCE, Final Technical Report to National Institute of Justice (Dec. 30, 2004); Valerie P. Hans, B. Michael Dann, David H. Kaye, Erin J. Farley, & Stephanie Albertson, *Testing Jury Reforms*, 23 DEL. LAW. 34, 36 (2005).

<sup>47</sup> DANN *ET AL.*, *supra* note 44, at 55-59.

<sup>48</sup> *Id.*

<sup>49</sup> See *id.* at 72-73 (examining the mock jurors' use of the innovative techniques and their impact on comprehension of the scientific evidence). The authors conclude that the impact of reforms – particularly the checklist and jury notebooks -- is real but modest. *Id.* at 72-73.

<sup>50</sup> *Id.* at 84; Hans *et al.*, *supra* note 44, at 36.

<sup>51</sup> Valerie P. Hans, *U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 ST. LOUIS U. PUB. L. REV. 85, 97 (2002).

<sup>52</sup> Valerie P. Hans, *Introduction: Lay Participation in Legal Decision Making*, 25 LAW & POL'Y 83 (2003).

<sup>53</sup> *Id.* at 87.

<sup>54</sup> *Id.*

<sup>a</sup> Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, fig. 2 (2004).

<sup>b</sup> *Id.*, fig. 4.

<sup>c</sup> Federal district courts: Judicial Business of the United States, *Annual Report of the Director, 1999*. State courts of general jurisdiction filings: *Examining the Work of State Courts, 1999-2000*, National Center for State Courts. State courts of general jurisdiction jury trials: *Examining the Work of State Courts, 2001*, National Center for State Courts.

<sup>d</sup> Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 139-140 (Little, Brown 1966).

<sup>e</sup> Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity and Its Influence on Juror Decision Making*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 254, 259, 262 (Neil Brewer & Kipling D. Williams eds., 2005).