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## THE JURY IN THE TWENTY-FIRST CENTURY: AN INTERDISCIPLINARY CONFERENCE

### INTRODUCTION\*

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Lawyers are trained in a system where the governing principle is *stare decisis*, a backward-looking doctrine applied in what appears to be a closed universe of statutory and case law. With their gaze so directed, perhaps it should not be surprising that lawyers and judges are not frequently inclined to look ahead, or to look around at the work of scholars in other disciplines as a catalyst for changing the law.

This conference, held on October 6, 2000, and co-sponsored by the National Institute of Justice and Brooklyn Law School's Center for the Study of Law, Language, and Cognition,<sup>1</sup> has its roots in the recognition that many of the

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<sup>1</sup> This is the Center's third program. The first two, both published in the *Brooklyn Law Review*, were: P.N. Johnson-Laird, *Causation, Mental Models, and the*

legal system's bedrock assumptions underlying one key legal institution—the jury—are increasingly subject to challenge in light of significant advances in fields like linguistics and psychology. The law assumes, for example, that juries can and will follow judges' carefully drafted legal instructions and then apply the legal elements, as charged, to the facts they have gleaned from the evidence. But do juries actually understand legal instructions, with all their complexity, prolixity, and legalistic language? To the extent that they do not, is the problem a matter of linguistic clarity, or are legal concepts too complex for jurors to grasp through instructions however they are worded?<sup>2</sup> Do jurors actually decide cases by discussing the elements of the plaintiff's or prosecutor's case, or do they employ other means of decision making that the law disdains? The law also assumes that the jury selection process of voir dire and challenges will winnow out prospective jurors who are not "impartial." But is "impartiality," as the law defines it, an unachievable ideal? Are there better means of identifying and counteracting juror bias than the ones the law currently employs?

Drawing together a roster of experts, from practice as well as from academia, and from many different fields, this conference promoted a dialogue that is continued in the papers published in this volume. The central theme of the symposium, and of this collection of papers, is whether the law governing juries is based on outmoded assumptions that social scientists can help to identify, and if so, whether we can do better in selecting and communicating with jurors and prospective jurors, and in defining the role the jury is to play. In keeping with the goals of the National Institute of Justice in co-

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*Law*, 65 BROOK. L. REV. 67 (1999); *Roundtable: The Cognitive Bases of Gender Bias*, 65 BROOK. L. REV. 1037 (2000) (containing an article with that title by Virginia Valian, and contributions by Marianne LaFrance, Marc R. Poirier and Elizabeth M. Schneider).

<sup>2</sup> This distinction is not a mere abstraction. In *Gacy v. Welborn*, 994 F.2d 305 (7th Cir. 1993), Judge Easterbrook rejected empirical evidence that jurors were likely to have misunderstood the death penalty instructions, in part, because the study did not demonstrate that better drafted instructions would have made a difference. Serial killer John Wayne Gacy was subsequently executed. See also Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011 (2001); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081 (2001).

sponsoring the conference, another theme addressed by individual presenters and by audience members was what further studies social scientists might conduct that would provide information of significance to the law. Although there is considerable scholarly literature available on a subject like jury nullification, for example, panelists and other participants identified a number of unanswered questions that empirical studies could usefully address. Future studies, like the papers in this issue, can fuel renewed and more informed debate within the law on the wide variety of topics addressed.

The first and second panels in the symposium reflected a tension in the already existing scholarly literature. On the one hand, a growing body of work has shown that jurors do not think in terms of the legal categories upon which the system depends. On the other hand, fine tuning instructions and procedures as if jurors did think that way routinely produces positive results. Included in this volume are two articles from each of these panels.

The first panel, entitled, "Jurors and Cognition: How Do Jurors Really Make Decisions?" confronted a gap, reflected in the psychological and legal literature during the past two decades, between the ways in which the system is designed to help jurors make decisions and the ways in which jurors actually make decisions. In theory, jurors evaluate evidence and make decisions about the facts of a case based on a rational assessment of that evidence. Jurors then reach a verdict based on how well the facts that they found fit the elements of the crime or civil claim, as reflected in the jury charge that the judge reads.

In practice, however, this is not what jurors do. The seminal work challenging the law's traditional assumptions about juror cognition is Hastie, Pennington and Penrod's 1983 book, *Inside the Jury*.<sup>3</sup> Two of these three authors, psychologists Reid Hastie and Steven Penrod, presented papers in the first panel of the symposium. Professor Hastie has contributed an article to this volume. A second paper, by Ursula Bentele and William J. Bowers, also published here, deals with jurors in death penalty cases, presenting an analysis of interviews with jurors who had sat on panels that

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<sup>3</sup> REID HASTIE ET AL., *INSIDE THE JURY* (1983).

had voted for the death penalty. Professor Penrod's conference presentation focused largely on the psychological reasons for jurors' failure to make decisions according to legal formulas, especially in death penalty cases, elaborating on the themes of the two articles from the first panel that appear in this volume.

In previous publications, Hastie and his colleagues have espoused what they call the Story Model of juror decision making. According to this model, jurors form stories of the underlying events of a case, build their story as the evidence accumulates, and then match the story they have constructed against the crime or other legal breach that is the subject of the litigation. Experimentation has shown that jurors' decisions are in large part a function of the story that they have adopted. In the O.J. Simpson case, for example, jurors accepted the defense's tale of racism and police corruption, rejecting the prosecutor's story that Simpson murdered two innocent people.<sup>4</sup>

To the experienced trial lawyer, Hastie's approach no doubt rings true. Lawyers are generally aware that it is very difficult to win a case by cross-examining the opposing witnesses without an effort to construct for the jurors an independent story of one's own. Simpson's skilled counsel certainly knew that, and did not rely solely on the holes that they had punched in the government's case. Law reports are full of cases in which the defense failed to realize that jury persuasion is a matter of convincing the jurors that one side has told the more convincing tale. In the criminal context, it is not unusual for a defendant to choose not to testify, perhaps because he has prior convictions that would be brought to light only if he did. If that defendant cannot, through other witnesses, create a version of the facts at odds with the government's, he will be at a serious disadvantage during deliberations, if the Story Model is correct. In civil cases, defendants often do not put on their own damages cases, fearing that it will appear to the jury that they have conceded liability. For example, in a widely reported case, *Texaco v.*

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<sup>4</sup> See Reid Hastie & Nancy Pennington, *The O.J. Simpson Stories: Behavioral Scientists' Reflections on the People of the State of California v. Orenthal James Simpson*, 67 U. COLO. L. REV. 957 (1996).

*Pennzoil Co.*,<sup>5</sup> Pennzoil had used experts to argue that Texaco's tortious interference with its attempted takeover of Getty Oil resulted in damages of \$7.5 billion. The number was subject to attack, and Texaco's lawyers did a fine job demonstrating the theory's flaws. But Texaco did not put on experts to tell its own story. The result was that the jury accepted Pennzoil's story—damages and all.

To the extent that Hastie and his colleagues are correct, then, jurors do not simply keep a tally of the evidence and later use it to determine whether the government has proven every element of the crime beyond a reasonable doubt. Rather, jurors apply the law to the narratives that they have created. But these narratives do not contain all the evidence. To the contrary, they are constructed selectively to create a picture of the events. Moreover, once a narrative is formed, it is difficult to dislodge it, absent a competing, more compelling one. This creates an advantage for the side that presents its case first, as legal scholars have recognized.<sup>6</sup>

*Emotions in Jurors' Decisions*, Hastie's contribution to this volume, adds a set of issues to the study of juror decision making that have not yet been explored systematically in the literature on the jury system: the role of emotions. The role of emotions in legal reasoning has, however, begun to receive attention in other contexts. For example, a recent collection of essays edited by Susan Bandes explores ways in which both rationality and emotion are embedded in our notions of crime and punishment.<sup>7</sup> In this article, Hastie points out that emotions may play several roles in the process of jury deliberation. Only some of these roles can even arguably be in tune with the legal process as it is generally conceptualized. For example, Hastie discusses psychological studies that show people judging things differently depending on an emotional state of mind caused by factors completely independent of the decision-making process. Put simply, people are likely to judge things more harshly when they are in a bad mood. What might put jurors in a foul humor? Just about anything, from having

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<sup>5</sup> 729 S.W.2d 768 (Tex. App. 1987).

<sup>6</sup> See, e.g., BERNARD S. JACKSON, *MAKING SENSE IN LAW: LINGUISTIC, PSYCHOLOGICAL, AND SEMANTIC PERSPECTIVES* (1995).

<sup>7</sup> *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999).

to sit and wait for hours while on jury duty, to disappointment with a child's report card, to a depressing story on the news. The jury literature is devoid of any analysis of how such factors influence the process, and what might be done about it. Hastie's article suggests significant avenues for future research.

Hastie writes only briefly about the relationship between decision making and emotional reaction to the particular crimes and events that are the subject of the litigation. This issue has been the province of the legal literature on crime and punishment, with recent articles by such scholars as Dan Kahan<sup>8</sup> and Richard Posner.<sup>9</sup> Instead, Hastie focuses on what he calls "anticipatory emotions," the emotional state that a juror at the time of a decision believes that he or she will later experience as the result of having made that decision. Here again, Hastie's thinking raises serious issues concerning a potential gap between the way we conceptualize the jury system and the way it operates in reality. A principal purpose for this Symposium was to bring together legal theorists and thinkers in the social sciences and linguistics to attempt to identify avenues for future exploration. Hastie's article, especially when combined with the current interest in the role of emotion in the substantive law, does just that.

Ursula Bentele and William J. Bowers' article, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, reports on and analyzes interviews with jurors who had participated in capital cases in which the jury had voted to impose the death penalty. Bentele is a law professor, Bowers a criminologist. In death penalty cases, juries first vote on whether the defendant is guilty of a capital crime, and later, after a separate hearing called the "penalty phase," decide whether to impose death or a term of imprisonment. In most jurisdictions, the penalty phase involves a discrete decision based on the jury's balancing of aggravating and mitigating circumstances. The jury must find

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<sup>8</sup> Dan M. Kahan, *The Progressive Appropriation of Disgust*, in *THE PASSIONS OF LAW*, *supra* note 7, at 63.

<sup>9</sup> Richard A. Posner, *Emotion versus Emotionalism in Law*, in *THE PASSIONS OF LAW*, *supra* note 7, at 309.

aggravating circumstances in order to impose death, but need not impose death even if such circumstances are present. The jury is also required to consider mitigating circumstances, which often concern the defendant's own history and subjects not previously raised during the trial phase. A sentence of death requires unanimity, whereas a lack of unanimity automatically results in a sentence of life imprisonment.

Bentele and Bowers found that jurors' reports of their reasoning in death penalty deliberations do not correspond with the system's design. For one thing, many jurors believe, despite having been instructed to the contrary, that the defendant's guilt alone is a good enough reason to sentence him to death. They report one juror as having said "We reviewed the evidence. We looked at the evidence on the table. [Then] we all took a vote."<sup>10</sup> This perspective was not unusual among those who participated in the study. The authors also found that jurors took aggravating factors far more seriously than mitigating ones, and that a substantial number of jurors incorrectly believed that upon a finding that aggravating circumstances were present, the death penalty was actually required as a matter of law.

Bentele and Bowers employ Pennington and Hastie's Story Model of jury deliberation as a partial explanation of these facts.<sup>11</sup> Having just voted to convict the defendant of the crime, at the time that the penalty phase begins, jurors have in mind the defendant's conduct as presented at trial. It would be difficult, the authors argue, to dislodge this story of guilt in favor of a second story that focuses on such things as the defendant having been abused as a child.

Narrative theory further supports their position. For example, Bernard Jackson notes that in any legal case there are two stories: the story of the underlying events and the story of the trial.<sup>12</sup> Our legal system purports to keep these two stories separate. But that does not mean that jurors can do so. It may well be that the death penalty is not only a legal matter for the trial and penalty phase, but is also perceived by jurors

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<sup>10</sup> Bentele & Bowers, *supra* note 2, at 1021.

<sup>11</sup> See Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in *INSIDE THE JURY* 192 (Reid Hastie ed., 1993).

<sup>12</sup> See JACKSON, *supra* note 6.



to be the final chapter in the story of the crime. The defendant ruthlessly murdered someone, and then was put to death for having done so. If that is the case, then jurors look at themselves not only as decision makers in the story of the trial, but as participants in the very story that they are supposed to be judging dispassionately. By the same token, it makes sense that jurors would focus more on aggravating circumstances than on mitigating ones. Most aggravating circumstances involve the manner in which the crime was committed, or inferences about the defendant's likely dangerousness in the future, which are partly based on the way in which the crime was committed. Mitigating circumstances, in contrast, are often about the defendant's background. To focus on mitigation, a juror has to stop paying attention to the story of the crime, whose final chapter has not yet been written, and switch to the story of the defendant, whom the jurors have already decided is a murderer.

Bentele and Bowers also provide some support for Hastie's suggestions about the role of anticipatory emotions in decision making. As mentioned previously, juror interviews disclosed that many jurors believed that upon certain findings of aggravating circumstances, the death penalty followed automatically. To some extent, this reflects a mistake in their understanding of the law, a fact to which we will return. But it also reflects a desire to abrogate responsibility for a grizzly task. One juror said in part: "The judge did that sentencing; the jury only had to say [the defendant] was guilty of capital murder."<sup>13</sup> There are many other such remarks reported.

Bentele and Bowers also rely on other work in social psychology to explain their results.<sup>14</sup> Obviously, these issues are only beginning to receive the attention that they deserve. Thus, not only do Bentele and Bowers complement Hastie's work by instantiating it, but the two papers together suggest fruitful possible areas of future research.

What about the jurors' own reports that they frequently construed death penalty instructions as *requiring* a death sentence when aggravating factors are present, even though judges and lawyers have drafted instructions intended

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<sup>13</sup> Bentele & Bowers, *supra* note 2, at 1040.

<sup>14</sup> See, e.g., IRVING JANIS, DECISION MAKING (1977).

to tell the jurors that this is not the case? The jurors may have had emotional reactions leading them to construe the instructions incorrectly and to avoid taking responsibility for a difficult decision. But to what extent can the law respond by rewriting, clarifying, and strengthening the misunderstood instructions to try to eliminate or at least lessen the probability of misconstruction?

Such issues concerning the language of jury instructions were part of the subject of the second panel of the conference, "Jurors and Language: How Well Can We Expect Jurors to Understand Their Assignments?" Participating in this panel were Peter Tiersma, Shari Seidman Diamond, Neil Vidmar, and Phoebe Ellsworth. Professor Ellsworth, who teaches both law and psychology, has been a major contributor to the literature concerning many aspects of the jury system, including juror comprehension.<sup>15</sup> In her presentation at the symposium, she shared some preliminary thoughts about the possibility of having jurors in criminal cases participate in sentencing more extensively than they do now.

Peter Tiersma's article, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, addresses the comprehensibility of jury instructions. In fact, Tiersma writes in detail about some of the same death penalty cases mentioned by Bentele and Bowers.<sup>16</sup> Tiersma is a law professor with a background in linguistics,<sup>17</sup> and is a member of the subcommittee of the California task force appointed to make criminal jury instructions more comprehensible.

Among other things, Tiersma shows how the language of some death penalty instructions concerning aggravating and mitigating circumstances is easily misunderstood as requiring the imposition of a death sentence whenever aggravating factors are present.<sup>18</sup> What is especially important about

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<sup>15</sup> For recent work, see Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y. & L. 788 (2000).

<sup>16</sup> See, e.g., *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993), cert. denied, 513 U.S. 967 (1994).

<sup>17</sup> Perhaps a disclosure is appropriate here. Peter M. Tiersma is co-writing a book with one of the authors of this introduction, Lawrence Solan, who has a similar background. See LAWRENCE M. SOLAN & PETER TIERSMA, *LANGUAGE ON TRIAL* (forthcoming 2002-2003).

<sup>18</sup> See also Peter M. Tiersma, *Dictionaries and Death: Do Capital Jurors*

Tiersma's article, however, is his concern about what should be done to improve the system.

Much of Tiersma's article focuses on institutional barriers to reforming jury instructions. And there are many. Once a particular jury instruction becomes standardized, trial courts are reluctant to risk reversal by permitting innovation, even if the new instruction would improve on the old one. In fact, a New York appellate judge recently stated in a concurring opinion that trial courts should continue using the standard reasonable doubt instruction, despite the fact that it was poorly worded, on the rationale that uniformity in the criminal justice system is an important value in itself.<sup>19</sup> Moreover, as Tiersma points out, lawyers are frequently aware of the importance of jury instructions generally, but not of the nuances of their language. Thus, the issue of language is often waived at trial and only surfaces during an appeal — too late to be considered. One solution to this problem, adopted by many states including New York and California, is for the judiciary to appoint a commission to review jury instructions and to suggest improvements prospectively. But these commissions, too, are sometimes reluctant to recommend changes that are significant enough to effect substantial improvements.

Underlying Tiersma's article is the assumption that the system can be improved by writing better instructions. That is, to the extent that we would like to see jurors thinking about the issues in a particular manner, we should tell them just what we want them to do in ways that are most likely to accomplish the system's stated goals. In fact, Shari Seidman Diamond, a lawyer and psychologist, in collaboration with a linguist, Judith Levi, did just that with the Illinois death penalty instructions, with the result of substantially increased juror comprehension of the concepts of aggravation and mitigation.<sup>20</sup>

Yet, one might wonder why the instructions would make much difference at all, given Hastie's Story Model of

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*Understand Mitigation?*, 1994 Utah L. Rev. 1.

<sup>19</sup> *People v. Redd*, 266 A.D.2d 12, 12-13, 698 N.Y.S.2d 214, 215-17 (1st Dep't 1999) (Saxe, J., concurring).

<sup>20</sup> Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996).

decision making. Some psychologists believe that people think in two different ways—in an associative manner, of the sort that Hastie describes, and in a rule-like manner.<sup>21</sup> It might be argued that good instructions help jurors think in a rule-like fashion where appropriate, breaking down their stories into the various elements of an offense. Or alternatively, it might be argued that good jury instructions steer jurors toward relying upon legally relevant narratives. In either case, the empirical literature on jury instructions is so robust that it is very difficult to argue that improving the quality of jury instructions is not a project worth taking seriously.

The article by Neil Vidmar and Shari Seidman Diamond, *Juries and Expert Evidence*, picks up on some of these same themes. Vidmar and Diamond are both psychologists who are members of law school faculties. Their article cites research showing that people can be easily trained to engage in the type of thought processes most desirable during the jury deliberation process. Moreover, despite the current popular notions that jurors are sponges that uncritically absorb “junk science,” especially when that science assists plaintiffs suing doctors or corporations,<sup>22</sup> this article cites a variety of studies that suggest the contrary. Jurors actually pay attention to expert evidence, evaluate it more or less on the terms that the system expects, and take seriously both cross-examination of experts and disagreement among experts for the various parties. Among the kinds of considerations that jurors discuss in post-trial interviews are the credentials, impartiality, reasoning and factual familiarity of the expert.<sup>23</sup> However, the article also discusses other studies that show jurors to be less competent in evaluating expert evidence when a case gets very complicated. The authors

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<sup>21</sup> See, e.g., Steven A. Sloman, *The Empirical Case for Two Systems of Reasoning*, 119 PSYCHOL. BULL. 3 (1996). See, e.g., Joseph Sanders, *Complex Litigation at the Millennium: Kumho and How We Know*, 64 LAW & CONTEMP. PROBS. 373 (2001) (applying this observation to the legal system). For interesting work showing how hard it is to dislodge jurors' prior conceptions of particular offenses, see Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 LAW & HUM. BEHAV. 507 (1993).

<sup>22</sup> See, e.g., PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991).

<sup>23</sup> Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1145-46 (2001).

suggest tailoring the presentation of expert testimony to the types of analyses that jurors are most likely to grasp, based on a series of empirical studies that are discussed. This again identifies a rich area for future research.

Vidmar and Diamond present reasons for being optimistic about the future of the jury, while remaining realistic about its shortcomings, especially in complex cases. Their work suggests that the question is not whether the jury works or does not work. Their lesson is that the jury works best when it asks people to do those things that they do best. This is an important lesson, and should be a guiding principle of efforts to reform the jury system generally. It also creates an important transition to the third and fourth panels of the symposium, where most of the speakers, including a number of academics and two federal judges, expressed their respect for juries, and their confidence that the system is worth carrying into the twenty-first century.

The third panel was entitled "The Law's Quest for Impartiality: Juror Selection and Juror Nullification." Studies and analysis about how jurors make decisions, the subject addressed by the first and second panels, can also provide much needed information on what is likely to cause jurors to make biased decisions, or decisions that are simply inconsistent with the existing law as it has been explained to them in instructions. With such information, the law might be better able to identify in advance those prospective jurors whose decision making is likely to be distorted by bias. On this issue, as well as the issues of how to define bias and how to evaluate the quest for impartial jurors,<sup>24</sup> the law has much to learn, particularly from psychologists.

The self-proclaimed objective of jury selection is to cull what the law deems to be an "impartial" jury by posing questions that will weed out all prospective jurors who might be biased, unwilling, or unable to follow the dictates of the law. Many scholars have questioned whether the attempt to locate and eliminate biased jurors is futile.<sup>25</sup> The law itself has shown

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<sup>24</sup> See Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201 (1992).

<sup>25</sup> See, e.g., Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405 (1995) (arguing that our concept of juror "impartiality" is based on an outmoded

considerable ambivalence about whether the ideal of the impartial juror has much of a connection with real jurors' cognitive processes. In a series of cases requiring that jury pools represent a fair cross-section of the community, the Supreme Court has recognized that members of different communities will bring different perspectives to jury deliberations.<sup>26</sup> On the one hand, women, for example, represent a distinctive group in the community and must for that reason be fairly represented in jury pools.<sup>27</sup> But on the other hand, women may not be subjected to peremptory challenges based on an assumption that they may see the facts of a case differently because of their gender.<sup>28</sup> The Court has applied the same two-faced theory to race and ethnicity—it is an affirmative value to have jury pools comprising people of different races and ethnicities,<sup>29</sup> but no prospective juror may be challenged on the basis that these characteristics might affect their decision-making process.<sup>30</sup> Gender, race, and ethnicity both do and do not matter in legal terms.

A particularly intriguing example of the Supreme Court's attempt to apply its own concept of what "impartiality" means is the case of *Hernandez v. New York*.<sup>31</sup> In *Hernandez*, the prosecution was permitted to use peremptory challenges to eliminate prospective jurors who were bilingual in English and

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*Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing racism, or bias, as a deeper and more pervasive phenomenon than the meaning we would customarily assign the word "racist" would imply).

<sup>26</sup> See James H. Druff, Comment, *The Cross-Section Requirement and Jury Impartiality*, 73 CALIF. L. REV. 1555, 1559-69 (1985).

<sup>27</sup> See, e.g., *Duren v. Missouri*, 439 U.S. 357, 364 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *Ballard v. United States*, 329 U.S. 187, 194 (1946) (a "distinct quality is lost if either sex is excluded"); see generally Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59 (1986).

<sup>28</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). But see *id.* at 146, 148-51 (O'Connor, J., dissenting) (deploring the fact that after the Court's decision, a female defendant charged with killing her male abuser would not be permitted to favor selection of women jurors who, according to studies cited, would be more likely to be sympathetic to her plight). See also Nancy Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995).

<sup>29</sup> See *Castaneda v. Partida*, 430 U.S. 482 (1977) (stating that Mexican-Americans constitute a distinctive group in the community). As early as the case of *Strauder v. West Virginia*, 100 U.S. 303 (1879), the Supreme Court held that Strauder, a black man, was denied equal protection of the laws because his racial peers were excluded from service on the jury.

<sup>30</sup> See *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>31</sup> 500 U.S. 352 (1991).

Spanish on the ground that these jurors might have independently translated some trial exhibits and testimony from the original Spanish, instead of following the official court translation. These jurors, the Court thought, would have a special advantage that could properly be found to provide a race neutral explanation for the exercise of peremptory challenges against them, despite the fact that this holding could lead to the prospect of bilingual jurors generally being more subject to exclusion from juries.<sup>32</sup>

Law professor Marina Hsieh, in a paper she presented as part of this panel, "*Language-Qualifying*" *Juries to Exclude Bilingual Speakers*, examines the reality of the bi- or multi-lingual courtroom today. Addressing the problem the Court considered in *Hernandez*, whether a prospective juror's bilingualism could become a basis for exclusion from the jury, she concludes that the Court's law-bound opinion in *Hernandez* is irrational, does not serve truth-seeking functions, and certainly does not address the underlying problem of inaccuracy in official translation. If people who speak more than one language are likely to be deemed not "impartial" enough to serve as jurors in cases where testimony or documents must be translated from an additional language, then the legal concept of "impartiality" will correlate with jurors who speak only English, and will itself be partial. Yet, the Supreme Court has simply assumed that the ideal juror speaks English and only English.

The legal problem of exclusion of bilingual jurors was the center of legal attention in the Supreme Court. But other problems Hsieh describes concerning the conduct of bi- and multi-lingual trials go beyond the issue that found its way to the Supreme Court, and demonstrate how myopic the Court's view has been. Translation issues, not considered to be legal problems, also serve to limit or distort the role of people who

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<sup>32</sup> See Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761 (arguing that psycholinguistic evidence establishes a direct connection between bilingualism and the challenged jurors' responses, and predicting that permitting exclusion on the ground sanctioned in *Hernandez* will lead to a dramatic exclusion of Latino jurors. The jurors had initially acknowledged that they might have done their own translating, an admission that would have given rise to a challenge for cause. After further questioning and education, they agreed to follow the official translation.).

speak languages other than English who find themselves serving as jurors, or witnesses, or parties. If official translators do not accurately translate the testimony or documents presented to juries, then the notion of equal justice for all is a myth, regardless of what language the jurors themselves speak. The equality of the surviving jurors in *Hernandez* may have been an equality of misinformation. Linguistics studies of instructions and other communications with jurors are generally confined to analyzing the original English versions, and do not consider the changes that translation, even when it is accurate, brings to the meaning and context of what jurors are being told, and to what they understand. Hsieh also identifies avenues of additional research that would be necessary to evaluate both the viability of the *Hernandez* Court's fears of jurors abusing their linguistic ability and the consequences of refusing to accommodate bilingual jurors.

The law is also aware that even those "impartial" jurors who pass through the jury selection process will not always be wholly impartial in applying the law as instructed by the presiding judge (or, as members of the symposium's second panel might caution, what the jurors understand to be their instructions). The jury's ability to nullify the law has been, historically, one of the central arguments for the jury's existence. For example, it is considered double jeopardy to allow the government to appeal an acquittal in a criminal case<sup>33</sup> because the jury may decide to acquit even in the face of more than sufficient evidence of guilt.<sup>34</sup> Mythic tales of colonial juries refusing to apply unpopular laws to popular defendants include the jury that acquitted newsman John Peter Zenger on a charge of libeling a colonial governor, in the face of a very clear judicial instruction that the truth of what Zenger printed was not a defense in the action.<sup>35</sup> The jurors' power to nullify the law has been established ever since an attempt to punish a

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<sup>33</sup> United States v. Ball, 163 U.S. 662 (1896).

<sup>34</sup> See Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81; Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001 (1980) (arguing that one of the central purposes of the double jeopardy ban on retrials following acquittal is to protect the jury's prerogative to acquit against the evidence).

<sup>35</sup> See JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (1736).



juror who voted to acquit William Penn, for allegedly acting against the weight of the law and the evidence, was held to be improper.<sup>36</sup> Jurors cannot be punished for disobeying instructions and so, as a practical matter, they have the power to disregard instructions. But, according to the law, jurors do not have the "right" to nullify the law. In one well-known and frequently studied case, *United States v. Dougherty*,<sup>37</sup> the scholarly judges of the District of Columbia Circuit Court of Appeals concluded that instructing jurors of their power to nullify the law would lead to chaos and therefore should not be done.

But what does the law mean by chaos and what do we really know about how often jurors might use their power of nullification if they were instructed as to its existence? These questions are asked by psychologist Norbert L. Kerr, who presented a paper co-authored by Irwin A. Horowitz and Keith E. Niedermeier, entitled *Jury Nullification: Legal and Psychological Perspectives*. This paper first explores our definition of jury nullification and canvases briefly the history of jury nullification in this country, before going on to summarize the empirical research done by psychologists (including the authors) that could and should inform judicial decisions like that in *Dougherty*. These studies explore how frequently conventional jury nullification occurs, to what extent nullification is engendered by juror bias, and what the results might be if jurors were advised of their nullification power. The results of some of the studies—both studies of actual juries and of simulations—are dramatic and suggestive. A study in one jurisdiction, according to Kerr and his co-authors, showed that only five percent of jurors were independently aware of their power of nullification. Other studies suggested that jurors are more likely to nullify the law in order to bring law into harmony with their own (and their community's) idea of distributive justice. This might happen in a criminal case with particularly harsh penalties or in a civil case where jurors were asked to apply what they perceived to be unfair negligence laws. Like Hsieh, these authors conclude

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<sup>36</sup> Bushell's Case, 124 Eng. Rep. 1006 (1670).

<sup>37</sup> 473 F.2d 1113, 1134 (D.C. Cir. 1972) (quoting *United States v. Moylan*, 417 F.2d 1102, 1109 (4th Cir. 1969)).

by listing open empirical questions where further study could be a useful catalyst to the law.

Judge Andre M. Davis of the United States District Court in Maryland, adding a perspective from the federal bench, spoke as an advocate of the jury (and a former juror himself). His commentary discusses Justice Thurgood Marshall's recommendation that jury selection would be enhanced by the abolition of peremptory challenges. "Selection" of jurors inevitably introduces an element of partiality into what would otherwise be a more random process. Rather than attempting to refine the peremptory challenge process, Judge Davis agrees with Justice Marshall that abolition might be a better approach. He also adds some practical wisdom on the question of jurors' use of their nullification powers, and a welcome perspective on the extent to which juries, over the years, have earned his respect. Law professor Akhil Amar also spoke on this panel, elaborating on ideas set forth in his earlier published work. Amar has responded to calls for abolition of the jury, particularly the strident reactions following the O.J. Simpson verdict, by advocating instead some fairly dramatic reforms of the jury system.<sup>38</sup> Part of his campaign is designed to bring the jury of the twenty-first century back to the past—to what he argues was the framers' original robust conception of the jury's role.<sup>39</sup>

Amar's comments set the stage for the fourth panel, "The Jury in the Twenty-First Century," where panelists discussed how juries in the next century, or indeed the next millennium, might or should function. Nancy S. Marder, a law professor and frequent author on jury-related topics, agreed with Amar that the goal for the future should be to empower juries. Consistent with the theme of the conference, she also looked beyond the legal world for ideas that could reshape the role and functioning of the jury—to technology. Her paper, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, published in this issue, argues that the medieval jury was far more active than the modern jury, but that lawyers

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<sup>38</sup> Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169 (1995); Akhil Reed Amar & Vikram David Amar, *Unlocking the Jury Box*, 77 POLY REV. (May-June 1996).

<sup>39</sup> See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

and judges took control<sup>40</sup> and left the modern juror in the purely passive posture of a sponge.<sup>41</sup> She advocates the use of technology in many forms to restore jurors to a more active role. Her suggestions range from the very modest (paper and pencil to take notes) to the sophisticated and controversial (juror use of computers). Her paper examines ways in which technology might be useful before jurors ever arrive in the courthouse (using web sites for orientation, allowing prospective jurors to check in without appearing at the courthouse if an appearance is unnecessary), in the courtroom itself (using videotapes of expert testimony that jurors could review during their deliberations, for example), and post-verdict (use of a web site or even a simple postcard to inform the jurors of further results in a case on which they sat—like a criminal defendant's sentence).

Marder's proposals are followed by a discussion of the possible objections, including cost, tradition, and the impact these varying technologies might actually have on juries. As Marder anticipated, some of her proposals are controversial. Another panelist, law professor Nancy King, a frequent student of the jury,<sup>42</sup> demonstrated in her presentation how jurors could take an entire trial transcript with them into the jury room on computer and search it for particular references or pieces of testimony. This sparked a discussion of whether the disparate technical abilities of jurors would create an imbalance of power between the technically adept and those less adept. Technology may present reasons to abandon a tradition—jurors could not previously have obtained a trial transcript in time for deliberations, but this is now possible—and thereby require a more sophisticated analysis of whether the traditional procedure was grounded in reason or just in technical disability. In her paper, Marder also shares with Tiersma the

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<sup>40</sup> Jeffrey Abramson, in his book, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (1994), argues that the contraction of jury power in recent centuries has coincided with the increasing democratization of the jury.

<sup>41</sup> See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994).

<sup>42</sup> See, e.g., Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673 (1996); Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123 (1996); Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993).

perception that identifying desirable changes will not likely lead to adoption of those changes if there is no one to champion change, or if the courts fall prey to inertia and continue even those traditions that are demonstrably ineffective or outmoded.

Not all the panelists were persuaded that empowering the jury of the future and enhancing its role was the most desirable approach. On the one hand, constitutional scholar Erwin Chemerinsky spoke eloquently of the role of the jury as a symbol of democracy, and Judge Louis Pollak, of the United States District Court for the Eastern District of Pennsylvania, agreed with Judge Davis's favorable assessment of juries' competence. On the other hand, Professor Albert Alschuler, Professor of Law at the University of Chicago Law School and Visiting Professor of Law at Brooklyn Law School for the semester, ended the day by sounding a more skeptical note. Indeed, the acquittal of O.J. Simpson continues to reverberate and to raise questions about the efficacy of the jury system.

Reading the papers published in this symposium issue will give readers the flavor of the debates at the live portion of the symposium, and provide much grist for considering not only a multi-disciplinary view of the jury, but a challenging view of the law itself. How does law change? When can or will the law change in response to new thinking from outside the legal field? When are desirable changes blocked and why? When does law do well to simply follow its traditions, and when should it accept the invitation to look around, look ahead, and adapt to the future?

