Professor Jennifer Robbennolt (2002) asked judges and jury-eligible citizens to read a vignette about a patient who experienced harmful side effects of a medication prescribed for depression. The trial evidence included a memo demonstrating that employees of the defendant, an HMO (health maintenance organization), knew about the potential side effects of the drug but did not communicate them to the plaintiff. Research participants were told that the defendant's liability had already been determined and, if appropriate, they were to make awards of punitive damages.

The decision making of judges and of laypeople with regard to punitive damages was quite similar: their awards were of roughly the same magnitude and variability. Just as important, both groups used the evidence in appropriate ways. They based punitive damages on the nature of the defendant's conduct, rather than the extent of harm to the plaintiff.

Returning to the question we posed earlier—whether jurors perform as well as judges when deciding damage awards—we find little evidence that jurors' reasoning is much different from that of judges. Some studies suggest that jurors render erratic and unpredictable awards, in part because their decision-making processes are influenced by various cognitive biases (see, e.g., Sunstein, Hastie, Payne, Schkade, & Viscusi, 2002). But judges are also human, and apparently are affected by the same cognitive illusions as juries (Rachlinski, Johnson, Wistrich, & Guthrie, 2009). More generally, it is satisfying to know that Kalven and Zeisel's landmark study has withstood the test of time, even as the makeup of juries has changed in the intervening years.

When a lawsuit reaches the trial stage and the parties opt to have a jury, rather than judge, be the arbiter, specific procedures for selecting that jury come into play. We describe those procedures next, focusing on the psychological considerations and consequences of jury selection that begin not in the courtroom, but in the community.

JURY SELECTION BEGINS IN THE COMMUNITY: FORMING A PANEL, OR *VENIRE*

Jury selection begins before potential jurors arrive at the courthouse, as officials assemble a panel, or ***venire***, of prospective jurors. Although each state, as well as the federal government, has its own procedures for determining how the panel of prospective jurors will be chosen, the general rule is the same: jury selection must neither systematically eliminate nor underrepresent any subgroups of the population.

To encourage representativeness, U.S. Supreme Court cases going back to 1880 (*Strauder v. West Virginia*) have forbidden systematic or intentional exclusion of religious, racial, and other **cognizable groups** (members of which, because of certain shared characteristics, might also hold unique perspectives on selected issues) from jury panels. But as recently as 50 years ago, the composition of most *venires* was homogeneous, with middle-aged, well-educated White men generally overrepresented (Beiser, 1973; Kairys, 1972).

Judicial and Legislative Reforms

In a series of decisions and lawmaking, the U.S. Supreme Court and the Congress established the requirement that the pool from which a jury is selected must be a representative cross-section of the community. These decisions were driven by two policy concerns, each of which includes psychological assumptions (Vidmar & Hans, 2007).

First, the government believed that if the pools from which juries were drawn represented a broad cross-section of the community, the resulting juries would be more heterogeneous. That is, they would be composed of people who were more diverse with respect to age, gender, ethnic background, occupation, and education. The courts assumed that this diversity would produce various benefits—for example, that minority group members might discourage majority group members from expressing prejudice. This assumption seems logical; casting a wider net will yield members of smaller religious and ethnic groups whose presence might reduce outright prejudicial remarks.

Another assumed benefit was that heterogeneous juries would be better fact finders and problem solvers. Extensive research on the dynamics of groups shows that, other things being equal, groups composed of people with differing abilities, personalities, and experiences are better problem solvers than groups made up of people who share the same background and perspectives (Antonio et al., 2004). Heterogeneous groups are more likely than homogeneous groups to evaluate facts from different points of view and to have richer discussions.

Does this also happen in juries? Apparently so. Samuel Sommers (2006) used actual jury pool members to examine the effects of racial heterogeneity on jury deliberations in a rape trial. He asked the jurors to take part in simulated (mock) trials in which he varied the racial mix of jurors and recorded their deliberations. Sommers found that mixed-race groups had several advantages over juries composed of only White jurors. First, the mixed-race groups had longer, more thorough deliberations and were more likely to discuss racially charged topics such as racial profiling. Second, White jurors on racially mixed juries mentioned more factual information and were more aware of racial concerns than were their counterparts on all-White juries. A follow-up study suggested that White jurors in diverse groups may actually process information differently than those in all-White groups (Sommers, Warp, & Mahoney, 2008). White jurors who expected to discuss a race-relevant topic in diverse groups showed better comprehension of relevant background information than did White jurors in all-White juries. On the basis of these studies, we can conclude that representative and diverse *venires* do, indeed, result in juries who undertake better, more thorough and accurate fact-finding and discussion (Sommers, 2008).

The second policy reason for the Court and Congress's decisions on representativeness is related to the *appearance* of legitimacy, rather than to the jury's actual fact-finding and problem-solving skills (Vidmar & Hans, 2007). Juries should reflect the standards of the community. When certain components of the community are systematically excluded from jury service, the community is likely to reject both the legal process and its outcomes as invalid.

We now know that the racial composition of a jury *can* affect public perceptions of the fairness and legitimacy of a trial and of the resulting verdict. To examine this issue, Leslie Ellis and Shari Diamond (2003) approached 320 adults in airports, bus and train stations, and parks, and asked them to take a short survey. Participants read a description of a shoplifting trial in which the racial makeup of the jury and the verdict were varied. Half of the respondents read that there were 12 Whites on the jury (racially homogeneous), and half read that there were 8 Whites and 4 African Americans (racially heterogeneous). In half of the descriptions, the jury's verdict was guilty and in the other half, not guilty. The researchers measured observers' perceptions of the fairness and legitimacy of the trial procedures. As shown in

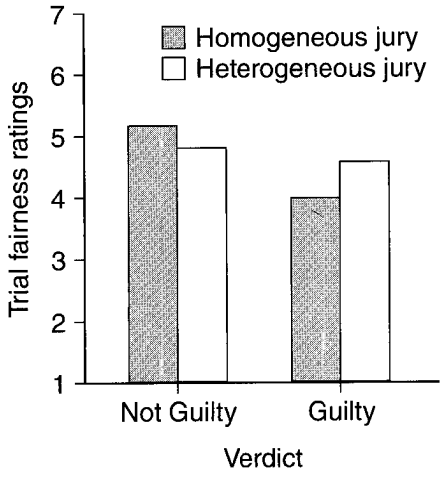


FIGURE 12.1 Effect of verdict and racial composition of jury on fairness ratings

Figure 12.1, when the verdict was not guilty, racial composition of the jury had no effect on fairness ratings. But when the verdict was guilty, the racial composition of the jury *was* important. Observers considered a trial with a homogeneous jury less fair than a trial with a heterogeneous jury (Ellis & Diamond, 2003). Different elements of the community must see that they are well represented among those entrusted with doing justice—that they have a voice in the process of resolving disputes (Hans, 1992).

The 1992 riots in Los Angeles that erupted after four White police officers were acquitted of assault in the beating of Black motorist Rodney King illustrate this problem dramatically. The jury eventually selected for the trial contained no Black jurors. After the jury found the police officers not guilty, the Black community rejected the verdict as invalid and angrily challenged the legitimacy of the entire criminal justice system. Shaken by the surprising verdicts and shocked by the ensuing riots, many Americans, regardless of their race, questioned the fairness of the jury's decision, in part because of the absence of Black citizens from its membership.

Defendants also reject the fairness of decisions made by juries whose members share few social or cultural experiences with them. Consider, for example, the probable reaction of a college sophomore, on trial for possession of marijuana, who is found guilty by a jury composed entirely of people in their fifties and sixties.

Representative juries not only preserve the legitimacy of the legal process but also solidify participants' positive feelings toward the process. If members of underrepresented groups—the poor, the elderly, racial minorities, youth—do not serve on juries, they are more likely to become angry and impatient with the legal process. For some participants, at least, the net result of serving on a jury is an increased appreciation for the jury as a worthwhile institution (Rose, 2005).

Representativeness of jury pools is a worthwhile goal. But how should courts go about forming the *venire* in order to reach this goal? For many years, voter registration lists were used as the primary source for jury pool selection. However, such lists underrepresent certain segments of the community because smaller percentages of young people, the poor, Latinos, and other minorities register to vote. Recently, other sources such as lists of licensed drivers, persons receiving public assistance, and unemployed people have supplemented voter lists as a source of prospective jurors (Mize, Hannaford-Agor, & Waters, 2007).

From those persons who are eligible for jury service, members of the *venire* are randomly selected and summoned to appear at the courthouse for jury service. But as many as half of qualified jurors ignore the jury summons, even though doing so constitutes a violation of law (Ellis & Diamond, 2003). Without doubt, people have concocted creative ways to escape jury service. Hemorrhoids are a frequently used excuse. Vincent Homenick, the chief jury clerk of the courthouse in Manhattan, once received a summons that someone had returned with the word "deceased" written on it, along with a plastic bag supposedly containing the ashes of the prospective juror (Green, 2004)! As Phoenix lawyer Patricia Lee Refo, chairwoman of the American Jury Project, put it aptly: "Everyone likes jury duty—just not this week."

Prospective jurors sometimes avoid jury service by claiming personal hardship. Some judges are sympathetic to claims of ill health, business necessity, vacation plans, and the like. But many other judges are unwilling to dismiss individual jurors because of perceived "hardships." During the jury selection for the O. J. Simpson civil trial, Judge Hiroshi Fujisaki responded to one prospective juror who had requested dismissal because she suffered from claustrophobia, "How big is your living room? Is it as big as this courtroom?" She remained in the pool. Another prospective juror complained of the likelihood of getting stiff from sitting too long. "That's why we take breaks," replied the unsympathetic judge.

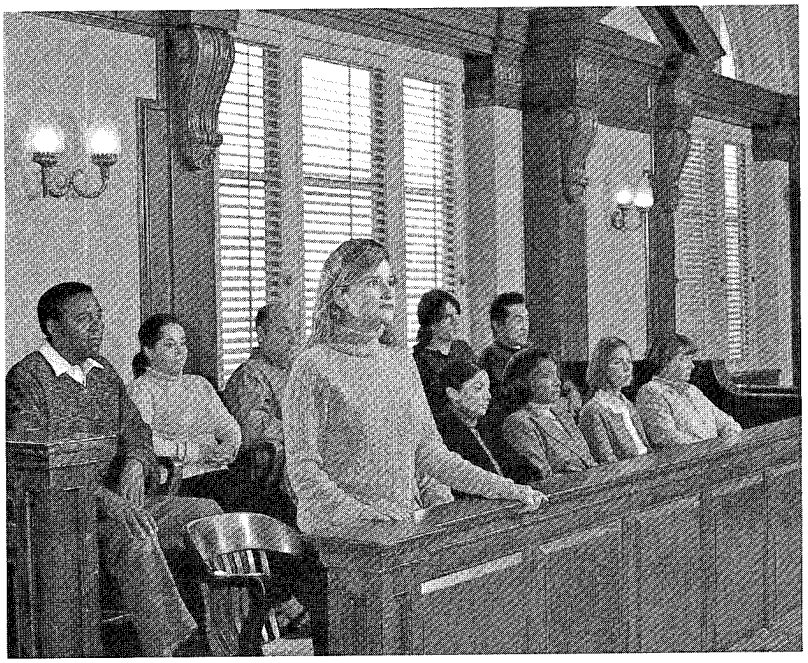
When some prospective jurors are excused for reasons of hardship, the result is a winnowing down of the pool. Thus, even before the formal jury selection begins in a courtroom—that is, before jurors are questioned by attorneys and the judge—some people have been removed from the panel of prospective jurors. These removals can distort the representativeness of juries.

JURY SELECTION CONTINUES IN THE COURTROOM: THE *VOIR DIRE* PROCESS

Once the panel of prospective jurors has been assembled and summoned to the courthouse, selection issues change. The focus shifts from concerns about the representativeness of prospective jurors to questions about a given juror's ability and willingness to be fair and impartial (Diamond & Rose, 2005).

As part of the constitutional right to be tried by an "impartial" jury, a defendant is afforded the opportunity to screen prospective jurors to determine whether any of them are prejudiced. The forum in which the judge and/or the attorneys question prospective jurors is called ***voir dire***, a French term that literally means "to see, to say" (i.e., to see what is said). *Voir dire* is conducted in a variety of ways, depending on a jurisdiction's rules and a judge's preferences. Who asks the questions, what questions are asked and how they are phrased, how long the questioning goes on, and whether the questions are posed to individual jurors or to a group are all matters left to judges' discretion.

The most limited form of *voir dire* involves a small number of questions asked in yes-or-no format only by the judge and features group rather than individual questioning of prospective jurors. An example: "Do any of you have an opinion at this time as to the defendant's guilt or innocence?" Yes-or-no questions are effective in controlling the answers of witnesses and reducing the time spent in *voir dire*, but they offer little insight into jurors' beliefs and attitudes. Also note that this form of questioning requires jurors to self-identify any biases and report them to the



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A juror being questioned during jury selection

judge. Many jurors may be unaware of their predispositions and/or hesitant to state them in public; thus, both of these obligations may be difficult for jurors to fulfill.

Several studies show that limited *voir dire* has drawbacks as a means of identifying biased jurors (Johnson & Haney, 1994). One of the most compelling demonstrations came from a project initiated by District of Columbia Superior Court Judge Gregory Mize (1999). Prior to this study, Judge Mize, like many judges, conducted limited *voir dire* during which he asked questions in open court to a group of prospective jurors. He and the attorneys would then pose follow-up questions to those who responded affirmatively to the initial question. Judge Mize revised his procedures for the study by interviewing all prospective jurors, regardless of whether they had responded affirmatively to the first question. In doing so, he determined that a number of jurors who were silent in response to a preliminary question actually had a great deal to say when prompted individually. Among the responses:

- "I was frightened to raise my hand. I have taken high blood pressure medications for twenty years. I am afraid I'll do what others tell me to do in the jury room."
- "My grandson was killed with a gun so the topic of guns makes my blood pressure go up."
- And remarkably, this one: "I'm the defendant's fiancée."

Why is limited *voir dire* so ineffective at uncovering juror bias? Obviously, some jurors will fail to disclose important information because of privacy concerns, embarrassment, or a failure to recognize their own biases. But an important psychological dynamic, termed the **social desirability effect**, is also a factor at this stage. Most people want to present themselves in a positive, socially desirable way. This desire to appear favorably, especially in the presence of a high-status person such as a judge, shapes how people answer questions and influences what they disclose about themselves.

At the other extreme is extended *voir dire*, in which both the judge and attorneys ask open-ended questions that require elaboration, cover a wide range of topics, and question jurors individually. Extended *voir dire* has several advantages in uncovering biases. Open-ended questions (e.g., "What experiences have you had in your life that caused you to believe that a person was being discriminated against because of the color of his skin?") encourage jurors to talk more about their feelings and experiences. Individual

questioning can result in disclosures that jurors might not otherwise offer. But extended *voir dire* can take a long time, so most courts tend not to favor it. Typical *voir dire* procedures involve a compromise between the limited and extended versions; both the attorneys and the judge pose questions to a group of prospective jurors, and then they ask brief follow-up questions of selected individuals.

Challenges for Cause and Peremptory Challenges. Technically, opposing attorneys do not select a jury; rather, the judge gives them the opportunity to exclude a number of potential jurors from the eventual jury. There are two mechanisms—challenges for cause and peremptory challenges—by which panelists are excluded from serving on a jury. We explain both in detail below. Here, we simply point out that after all the challenges have been made and ruled on, and some prospective jurors have been dismissed, the people who remain are sworn into service as the jury. Because attorneys strive to exclude those jurors who seem unfavorable to their client, the respective challenges tend to balance out and both extremes are eliminated, leaving a jury composed of people who are less biased and more open minded.

In any trial, each side can claim that particular jurors should be excluded because they are inflexibly biased or prejudiced or because they have a relationship to the parties or the issues that creates an appearance of bias. These exclusions are known as **challenges for cause**. For example, a relative or business associate of a defendant would be challenged, or excused, for cause. Additionally, the judge may excuse a panelist for cause without either attorney requesting it if the prospective juror is unfit to serve. In criminal cases, judges often inquire about whether prospective jurors have been crime victims and may excuse those who say that their own victimization experiences would affect their ability to be fair jurors. There is good reason to ask, because mock jurors who had been victims of the crime for which the defendant was being tried were more likely than nonvictims to convict (Culhane, Hosch, & Weaver, 2004).

One juror was deemed unfit to serve for a different reason: body odor. A Massachusetts judge dismissed the unsworn juror, saying "Given the strength of the body odor, I'm satisfied that the other jurors would be put at a distinct disadvantage in their efforts to concentrate." As one blogger put it, "Justice may be blind, but it retains a healthy sense of smell."

In most cases, judges are not quite so willing to dismiss jurors for cause. In fact, after a prospective juror has raised a concern about the ability to be fair and impartial (or after one of the attorneys has done so), the judge will typically ask the juror whether he or she can be impartial. Then, using the juror's assessment of those abilities and observing the juror's demeanor, the judge decides whether to dismiss that person for cause. But judges may have difficulty determining which jurors are truly impartial (Crocker & Kovera, 2010). In making that decision, judges may be overly reliant on the juror's expression of confidence. Small changes in the confidence that jurors express about their ability to be fair (e.g., "I would try" versus "Yes") can determine whether they will be excused for cause or remain on the jury. Unfortunately, jurors are not particularly insightful about their ability to be fair, and their confidence is not a reliable gauge of their bias (Rose & Diamond, 2008). So jurors who can be fair are sometimes dismissed, and those who cannot are sometimes retained—simply because of subtle variations in their responses to questions about impartiality.

In theory, each side has an unlimited number of challenges for cause. In reality, few prospective jurors are excused for reasons of bias. In a survey of New Mexico courts over a three-year period, only about 1 of every 20 jurors was dismissed for cause (Hans & Vidmar, 1986).

Each side may also exclude a designated number of prospective jurors "without a reason stated, without inquiry, and without being subject to the court's control" (*Swain v. Alabama*, 1965). This procedure is known as a **peremptory challenge**. The number of peremptory challenges allocated to each side varies from one jurisdiction to another and also by the type of case (civil or criminal) and seriousness of the charge.

Peremptory challenges have multiple purposes. First, they allow attorneys to challenge potential jurors whom they believe will be unsympathetic to their client, for whatever reason. The peremptory challenge has a second, largely symbolic function: When the parties in a lawsuit play a role in selecting the people who decide the outcome, they may be more satisfied with that outcome (Saks, 1997). The third function of peremptory challenges is to allow the attorney to begin to indoctrinate prospective jurors and influence those who ultimately will make up the jury. For example, Holdaway (cited in Blunk &

Sales, 1977, p. 44) explains how an attorney can ask a question that will acquaint the juror with relevant law but also phrase it to make a point consistent with the attorney's position. The question is "Do you agree with the rule of law that requires acquittal in the event there is reasonable doubt?" The real purpose of this question is to alert prospective jurors that reasonable doubt could exist in the case, and to make jurors aware of the rule so that they will look for reasonable doubt and then vote to acquit.

The Supreme Court has imposed more and more limits on the exercise of peremptory challenges. As a result, the overall status of this jury selection tool is in flux. Although opinions about the importance of the peremptory challenge remain divided—some experts favor its elimination altogether and others argue that it is crucial for fair trials—only a few researchers have examined the use of peremptory challenges in real trials. Among the questions asked: Are peremptory challenges used to remove minority jurors or other specific groups? Do the prosecution and defense repeatedly dismiss different types of jurors?

Answers come from a study that tracked the fate of 764 prospective jurors questioned during jury selection in 28 cases (Clark, Boccaccini, Caillouet, & Chaplin, 2007). Of this number, 234 were dismissed by the prosecution and 202 by the defense. More importantly, jurors' race seemed to factor into the exercise of peremptory challenges: only 10% of jurors excused by the defense were African American, compared to 48% of those excused by the prosecution.

Peremptory Challenges: No Exclusion on Account of Race or Gender. In a series of decisions, the Supreme Court has ruled that peremptory challenges may not be based *solely* on a juror's race or gender. Consequently, these challenges are "less peremptory" than they used to be. The decision regarding race was triggered by the case of James Batson, a Black man convicted of second-degree burglary by an all-White jury. During the *voir dire*, the prosecuting attorney used four of six peremptory challenges to dismiss all the Black persons from the *venire*. In *Batson v. Kentucky*, decided in 1986, the Court held that Batson was denied his Fourteenth Amendment right to equal protection by the prosecution's dismissal of Black members of the panel (Pizzi, 1987). In *Holland v. Illinois* (1990), the Court held that a White defendant could also complain about the exclusion of Blacks because the principle of representativeness was violated by the arbitrary exclusion of *any* racial group. These decisions also reflect the Court's stance that systematic efforts by attorneys to exclude members of cognizable groups violate the constitutional rights of members of those groups. Simply stated, all citizens—regardless of race, religion, or creed—have the right to serve on juries.

In the *Batson* case, the Supreme Court developed a procedure for determining whether a peremptory challenge was racially based. When a defense attorney believes that the prosecution's peremptory challenge was motivated by racial factors, he or she initiates a so-called "*Batson* challenge," and the judge then asks the prosecutor for an explanation. The prosecutor typically advances a race-neutral explanation for the challenge—for example, that the prospective juror has a brother in prison or has filed a lawsuit against the police. The judge then determines whether the explanation is genuine, taking into account the other jurors who were not challenged by the attorney. For example, if a prosecutor stated that she dismissed a Black juror because he had been robbed, the judge would want to know why she had not dismissed a White juror who also had been robbed.

It might appear that creative prosecutors can always find "race-neutral" reasons for excluding minorities from the jury. Indeed, attorneys are unlikely to cite a prospective juror's race as the reason for exclusion. In an exhaustive analysis of every published decision of federal and state courts in the seven years after the *Batson* decision, Melilli (1996) found 2,994 *Batson* challenges but in only 1.8% of the sample had the attorney cited race as a factor.

Does a prospective juror's race really not matter to prosecutors, or are they simply unwilling to admit that it does? That question led to an experimental study in which college students, law students, and practicing attorneys assumed the role of a prosecutor trying a Black defendant (Sommers & Norton, 2007). They were given profiles of two prospective jurors, one Black and the other White, and had to use one remaining peremptory challenge. Although participants were more likely to challenge a Black juror than a White juror, they rarely cited race as a factor in their decision. Moreover, it was relatively easy for them to generate an ostensibly neutral explanation to justify their choice.

Psychological research on **social judgments** can help us understand why. People infrequently admit (even to themselves) that social category information

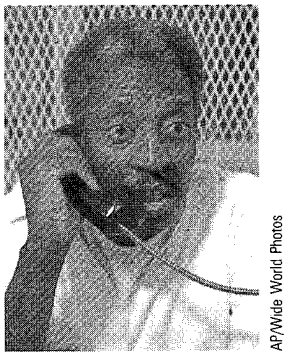
Box 12.1 THE CASE OF THOMAS MILLER-EL AND THE DIFFICULTY OF PROVING RACIAL BIAS IN JURY SELECTION

Texas death row inmate Thomas Miller-El must have felt like a yo-yo, given the number of times his case bounced back and forth between the Fifth Circuit Court of Appeals and the Supreme Court. The issue was whether prosecutors engaged in purposeful discrimination during Miller-El's 1986 trial on charges that he robbed and murdered a hotel clerk in Irving, Texas. Probably no *voir dire* has been scrutinized as thoroughly as the one that occurred in this case.

Prosecutors in that trial used peremptory strikes to exclude 10 of the 11 Blacks who were eligible to serve on the jury, and Miller-El was convicted and sentenced to death. For years he contended that prosecutors used peremptory challenges in a biased way to keep African-American jurors off his jury panel, but courts rejected this claim four times. He eventually appealed to the Supreme Court.

This time, with the support of some unusual allies (including numerous federal prosecutors, judges, and the former director of the FBI), he found a receptive audience. In an 8–1 ruling and a rare victory for Miller-El, the Supreme Court found that the lower courts had failed to fully consider the evidence he offered to show racial bias, and it ordered the Fifth Circuit to reconsider Miller-El's claim (*Miller-El v. Cockrell*, 2003). (That evidence included a history of discrimination by Dallas prosecutors and a training manual from the Dallas District Attorney's Office that instructed prosecutors to exercise their peremptory strikes against minorities.) But when the Fifth Circuit judges undertook such reconsideration and examined all the reasons prosecutors gave for striking *venire* members, they concluded that Black and White jurors had been treated the same by prosecutors (*Miller-El v. Dretke*, 2004).

Miller-El again appealed to the Supreme Court, and again the high court ruled in his favor, overturning his conviction because of racial bias in jury selection. According to Justice David Souter, Miller-El's evidence of bias "is too powerful to conclude anything but discrimination" (*Miller-El v. Dretke*, 2005). The case ended quietly in 2008 when Miller-El pled guilty to murder and aggravated robbery in exchange for a life sentence.



AP/Wide World Photos

Texas death row inmate Thomas Miller-El being told that he was granted a stay of execution in 2002.

Critical Thought Question

In examining attorneys' peremptory challenges during the *voir dire* in Miller-El's trial, appellate justices read the trial transcript that provided a verbatim account of everything that was said in the courtroom. Why would it have been difficult for them to find evidence of racial bias in attorneys' choices about which jurors to excuse? In particular, would prospective jurors tend to answer *voir dire* questions in a manner that gives hints about their racially motivated beliefs? Why or why not? What other information could appellate justices use to assess whether peremptory challenges were exercised in a discriminatory way?

such as race influences their decisions (Norton, Vandello, & Darley, 2004), often because they want to appear to be unprejudiced and to avoid the social consequences of showing racial bias (Norton, Sommers, Apfelbaum, Pura, & Ariely, 2006). These findings suggest that in their self-reports, attorneys are unlikely to acknowledge considering the race of prospective jurors, even when race has been a factor in jury selection.

Recall that the judge, after hearing the prosecutor's explanation, must ultimately decide whether the attorney dismissed a prospective juror because of race. Easily concocted, plausible, and (above all) race-neutral justifications leave judges with little reason to reject them, and archival analyses of actual *voir dire* proceedings show that judges are unlikely to find that peremptory challenges violate the *Batson* rule (Melilli, 1996). The case of Thomas Miller-El, detailed in Box 12.1, exemplifies the difficulty of proving racial bias in jury selection.

In 1994, the Supreme Court extended the logic of *Batson* to peremptory challenges based on another cognizable characteristic—gender. No longer could attorneys base their peremptory challenges solely on

Box 12.2 THE CASE OF *J. E. B. v. ALABAMA EX REL. T. B.*: WHOSE CHILD IS THIS AND WHO GETS TO DECIDE?

The facts of this case are relatively simple: Teresia Bible gave birth to a child in May 1989; she named the child Phillip Rhett Bowman Bible, claimed that James E. Bowman, Sr. was the father, and filed a paternity suit against him to obtain child support. Even though a blood test showed that there was a 99.92% probability that he was the father, Mr. Bowman refused to acknowledge paternity, so a trial was held.

The jury pool was composed of 24 women and 12 men. After three jurors were dismissed for cause, the plaintiff used 9 of her 10 peremptory challenges to remove males, the defendant used 10 of his 11 challenges to remove women, and the resulting jury was composed of 12 women. (Note that in this case, it was men who were systematically excluded from the jury.) The jury concluded that Mr. Bowman was the child's father and ordered him to pay child support of $415.71 per month.

Bowman appealed and the U.S. Supreme Court eventually ruled that peremptory challenges that were used to eliminate one gender were, like those used to exclude a race, unacceptable. The Court's decision acknowledged that peremptory strikes against women harken back to stereotypes about their competence and predispositions, traced from a long history of sex discrimination in the United States (Babcock, 1993).

Critical Thought Question

Given what you know about how attorneys support their exclusions in "Batson challenges," how might creative attorneys justify excluding jurors of a particular gender?

a jurors' gender. The leading case of *J. E. B. v. Alabama ex rel. T. B.* (1994) is described in Box 12.2.

How many different cognizable groups are there, and could limitations on peremptory challenges eventually be extended to cover all of them? In Houston, Texas, the attorney for accused murderer Jeffrey Leibengood asked to include only people less than five feet tall in the jury pool because his client's height was four feet six inches. The attorney told the judge, "We say a short person is subject to discrimination, and we hope to have two or three short people end up on the jury. *Batson* should be extended to include the little people" (quoted by Taylor, 1992, p. 43). The judge disagreed.

But a New York judge decided that Italian Americans were entitled to *Batson*-type protection (Alden, 1996), and a California law bans attorneys from removing jurors simply because they are homosexual. Still, attempts to apply the rule to obese jurors (*United States v. Santiago-Martinez*, 1995) and bilingual jurors (*Hernandez v. New York*, 1991; Restrepo, 1995) were denied.

Some courts have held that peremptory challenges based on religious affiliation violate state constitutions (e.g., *State v. Fuller*, 2004), but the Supreme Court has yet to rule that it is unconstitutional to base peremptory challenges on religious persuasion (or on any other classification, for that matter). Attorneys' discretion in jury selection remains relatively unfettered, except that jurors cannot be challenged because of their race or their gender.

Lawyers' Theories: Stereotypes in Search of Success. Do the jury selection strategies of attorneys conflict with the goal of having unbiased fact finders? Before we answer this question, we need to answer a more basic one: How do lawyers go about selecting or excluding jurors, and do their strategies work?

In everyday life, our impressions about others are governed largely by what psychologists have termed implicit personality theories. An **implicit personality theory** is a person's organized network of preconceptions about how certain attributes are related to one another and to behavior. Trial lawyers often apply their implicit personality theories to jury selection. For example, William J. Bryan (1971) advised prosecutors to "never accept a juror whose occupation begins with a P. This includes pimps, prostitutes, preachers, plumbers, procurers, psychologists, physicians, psychiatrists, printers, painters, philosophers, professors, phonies, parachutists, pipe-smokers, or part-time anythings" (p. 28). Another attorney vowed always to use a peremptory strike against any prospect who wore a hat indoors.

Implicit personality theories lead to stereotypes, when a person believes that all members of a distinguishable group (e.g., a religious, racial, sexual, age, or occupational group) have the same attributes. They also produce assumptions that two qualities are associated—for example, that slow-talking jurors are also unintelligent—when they actually may not be.

We tend to link qualities together and form our own implicit personality theories. Sometimes these

judgments are rationally based; we may have had sufficient experience to draw a valid conclusion about the relationship. Other theories, however, such as the examples just presented, are only intuitive or are based on limited experiences and purely coincidental relationships and ignore within-group variability. But the emergence of implicit personality theories is almost inevitable when people form impressions of others and make interpersonal decisions. After all, human behavior is very complex and one must simplify it in some way.

The jury selection decisions in the trial of *J. E. B. v. T. B.* reflect the use of implicit personality theories and stereotypes. Ms. Bible's attorney dismissed male jurors, assuming they would be sympathetic to the man alleged to be the baby's father, whereas the defense dismissed female jurors because of similar beliefs that women would be biased in favor of another woman. But the courts prohibit the use of such stereotypes. In his majority opinion in the *J. E. B.* case, Justice Harry Blackmun wrote, "Virtually no support [exists] for the conclusion that gender alone is an accurate predictor of [jurors'] attitudes," and if gender does not predict a juror's predisposition, then there is no legitimacy to dismissing jurors on this basis only (quoted by Greenhouse, 1994, p. A10).

Lawyers must choose which prospective jurors to challenge with their quota of peremptory challenges. Hence, their own implicit personality theories come into play. Richard "Racehorse" Haynes, a highly successful lawyer, once defended two White Houston police officers charged with beating a Black prisoner to death. Like all lawyers, Haynes had his ideas about the kind of juror who would be sympathetic to his police officer clients, but his candor was a surprise. After the trial was over, Haynes was quoted as saying, "I knew we had the case won when we seated the last bigot on the jury" (Phillips, 1979, p. 77).

Even if they are allowed to question jurors individually, lawyers cannot know for certain whether they are being told the truth. By necessity, they fall back on their own impressions. What attributes do lawyers find important? Textbooks and journal articles on trial advocacy provide a wealth of folklore about jurors' characteristics and their relation to beliefs. Not surprisingly, characteristics that are visible or easily determined—age, gender, race, religion, occupation, country of origin—receive special attention, and attorneys are naively "advised" about how jurors with certain attributes tend to think.

In addition to applying their own theories of personality to juror selection, some attorneys use their understanding of group structure. For example, they play hunches about which jurors will be the most dominant during the deliberations. Who will be selected as foreperson if, as in most jurisdictions, that choice is left up to the jury? Understanding group dynamics is more complicated than relying on simple stereotypes of individual jurors, so lawyers who try to forecast group behavior also make assumptions. Some lawyers maintain a simple "one-juror verdict" theory—that is, they believe that the final group decision is usually determined by the opinions of one strong-willed, verbal, and influential juror. Lawyers who adhere to this maxim look for one juror who is likely to be both sympathetic and influential and then, during the trial, concentrate their influence attempts on that individual. In pursuing this search for a "key juror," the typical attorney follows one basic rule of thumb: "In general, an individual's status and power within the jury group will mirror his status and power in the external world" (Christie, 1976, p. 270).

If jurors themselves are asked who among them was most influential during their deliberations, three characteristics tend to emerge: male gender, an extroverted personality style, and height greater than that of their fellow jurors (Marcus, Lyons, & Guyton, 2000). It should come as no surprise then that Massachusetts senator and former presidential candidate John Kerry was elected to serve as foreperson in a 2005 trial in Suffolk County Superior Court. Fellow jurors described him as a "natural leader."

Another common attorney strategy is based on the assumption that jurors who are demographically or socially similar to a litigant will be predisposed to favor that litigant, a belief known as the **similarity–leniency hypothesis**. Does this rule of thumb hold true? Are jurors more likely to favor litigants with whom they share certain characteristics? One could make the opposite prediction in some cases—that sharing similar qualities with another might make a juror more skeptical of that person's excuses or justifications for behavior that the juror dislikes. Here, the so-called **black sheep effect** may apply: Although people generally favor individuals who are part of their in-group, they may sometimes strongly sanction those fellow members who reflect negatively on and embarrass the in-group.

Although the strength of evidence against a defendant is the most powerful predictor of jurors' sentiments

(Devine, Buddenbaum, Houp, Studebaker, & Stolle, 2009), similarity between jurors and defendants may also have an influence. The strength of that influence may depend on offenders' prior records. When the offender has committed previous wrongdoings, jurors render harsher judgments against members of their in-group than members of an out-group. This supports the black sheep effect: people distance themselves from others like them who are deviant in some way. But for offenders without prior wrongdoings, the similarity–leniency hypothesis seems more apt: jurors tend to view law-abiding members of their in-group more positively than members of an out-group (Gollwitzer & Keller, 2010).

Do Jurors' Demographic Characteristics Predict the Verdicts? Trial attorneys must make informed guesses about which prospective jurors will be more favorable to their side. To do so, they often rely on demographic features of jurors because many of these characteristics (e.g., age, race, gender, socioeconomic status [SES]) are easily observable (Kovera, Dickinson, & Cutler, 2002). Indeed, many attorneys actively select (or, rather, deselect) jurors on the basis of demographic information. When researchers (Olczak, Kaplan, & Penrod, 1991) gave attorneys mock juror profiles that varied along demographic lines (jurors' gender, age, marital status, and nationality) and asked them to rate the extent to which each profiled juror would be biased toward the defense or prosecution, they found that attorneys could do this task easily, focusing on one or two characteristics to the exclusion of others.

But though demographic characteristics of jurors and juries are *sometimes* related to their verdicts, the correlations are weak and inconsistent from one type of trial to another (Baldus, Woodworth, Zuckerman, Weiner, & Broffit, 2001; Devine, Clayton, Dunford, Seying, & Pryce, 2001). The relationships that emerge are usually small and offer no guarantee of success to the attorney who deals with only a few individuals and one trial at a time.

The relationship between demographic characteristics and verdicts also depends on the type of case. For example, in trials that involve issues such as child sexual assault, domestic violence, and sexual harassment, women are more likely than men to convict the perpetrators (Golding, Bradshaw, Dunlap, & Hodell, 2007), and in civil trials, women are more inclined than men to perceive that sexual harassment has occurred in the workplace (Wiener, Hurt, Russell, Mannen, & Gasper, 1997). But gender is not a reliable predictor of verdicts or punitive damages in high-stakes civil litigation (Vinson, Costanzo, & Berger, 2008). The most consistent gender difference involves social influence rather than content; men are generally perceived by other jurors as more influential than women (Marcus et al., 2000).

Although few studies have examined the relationship between jurors' SES and their verdicts, the general consensus is that wealthy jurors are somewhat more likely than poorer jurors to assume that criminal defendants are guilty, particularly in trials involving theft, burglary, and fraud. Well-to-do jurors may have a desire to protect the social order and become wary of those who take what is not rightfully theirs (Devine, 2012). Laboratory research has shown that high-SES mock jurors are less harsh than low-SES jurors on civil defendants (Bornstein & Rajki, 1994). Perhaps the most powerful effect of SES occurs at the deliberation table, where jurors of higher status are regarded as more influential because of what others believe about their competence (York & Cornwell, 2006).

Using jurors' race to predict their verdicts is complicated because few studies have examined the decision making of non-White jurors (Sommers, 2007) and, as we described, the racial mix of the jury influences an individual juror's decision. Based on the existing data, we can tentatively conclude that Black jurors may be more lenient than Whites in the typical criminal case (Bothwell, 1999), but only if the defendant is also Black (Sommers & Ellsworth, 2000). In general, with regard to jurors' race as well as other demographic features, there is little evidence that these characteristics can consistently predict verdicts in criminal cases or damage awards in civil cases (Vinson et al., 2008).

Jurors' Personality and Attitudinal Characteristics as Predictors of Verdicts. Given that demographic variables have only a weak relationship to verdicts, one might wonder whether jurors' personality and attitudinal characteristics are better predictors. Personality characteristics are relatively stable patterns of behavior that describe "how people act in general" (Funder, 2004, p. 109). Attitudinal characteristics are evaluative reactions toward someone or something that are exhibited in feelings, beliefs, and intended actions (Olson & Zanna, 1993).

A number of studies concluded that enduring aspects of one's personality and attitudes may influence

courtroom decisions, though usually only to a modest degree. Using simulated and real juries, this research has indicated that certain personality attributes of mock jurors such as Authoritarianism, the Need for Cognition, and Extraversion may be related to jurors' verdicts. Personality and attitudinal variables are somewhat better predictors of verdict decisions than are demographic factors (Lieberman & Olson, 2009), though the relationships between personality and attitudinal factors on the one hand, and verdicts on the other hand, are, at best, only modest.

Authoritarianism is one personality characteristic of jurors that is modestly correlated with their verdicts in criminal cases (Devine, 2012). People with an authoritarian personality adhere rigidly to traditional values, identify with and submit to powerful figures, and are punitive toward those who violate established norms. In terms of the legal system, authoritarian jurors are more likely to vote for conviction in mock jury experiments (Narby, Cutler, & Moran, 1993).

Authoritarian beliefs may be more powerful determinants of decisions in death penalty trials than in noncapital trials. In one study, prospective jurors reporting for jury duty in Florida read a condensed version of a capital case and recommended an appropriate sentence (life without parole or death). They also rated the extent to which various aggravating factors (those aspects of a crime that support a death sentence) and mitigating factors (aspects that support a life sentence) were present in the evidence (Butler & Moran, 2007). Jurors who scored high on a measure of Authoritarianism endorsed more aggravating factors and fewer mitigating factors, and were more likely to select a death sentence than their counterparts lower in Authoritarianism.

Interestingly, when highly authoritarian jurors encounter a defendant who symbolizes authority, their usual tendency to punish the defendant is reversed (Nietzel & Dillehay, 1986). In fact, about the only time that authoritarian mock jurors are not more conviction-prone than nonauthoritarians is in trials in which the defendant is a police officer. In such cases, the more authoritarian jurors tend to identify with the powerful and punitive image of the officer.

Another personality variable—the **Need for Cognition**—may influence how jurors evaluate evidence in a trial. The Need for Cognition refers to a person's inclination to engage in and enjoy effortful cognitive work (Cacioppo, Petty, Feinstein, & Jarvis, 1996). The Need for Cognition explains why some people are motivated to think hard and analyze arguments thoroughly, and others are disinclined to do so. This concept is assessed by whether people agree with statements such as "I only think as hard as I have to" and "The notion of thinking abstractly is appealing to me." In a courtroom, the Need for Cognition can distinguish those jurors who scrutinize the evidence carefully and examine its weaknesses from jurors who accept trial testimony at face value and have little desire to pore over the evidence (DeWitt, Richardson, & Warner, 1997). Jurors with low Need for Cognition may pay more attention to witnesses' credentials than to the essence of their testimony.

The Need for Cognition influences how jurors process evidence presented by an expert witness. This evidence is often complicated, technical, or scientific, and may require effortful thinking on the part of jurors. When mock jurors read a summary of a sexual harassment trial in which an expert witness presented research that varied in terms of scientific rigor and quality, jurors high in Need for Cognition were attentive to the validity of the research. They evaluated the expert evidence more favorably when the research was valid, and tended to support the side that presented that evidence. On the other hand, jurors low in Need for Cognition were not attentive to flaws in the expert evidence and were less likely to support the side that presented the valid study (McAuliff & Kovera, 2008). One study showed that jurors who are low in Need for Cognition can be helped by a detailed cross-examination of an expert who presented flawed research during direct examination. These jurors are unlikely to process the expert testimony thoroughly themselves (Salerno & McCauley, 2009).

Psychologists have also examined the relationship between jurors' verdicts and other personality traits. For example, to test the impact of jurors' personality traits on verdicts in real cases and on attorneys' jury selection preferences, John Clark and his colleagues (2007) relied on the **Five-Factor Model of personality**, a generally accepted framework for describing personality characteristics (Costa & Widiger, 2002). The traits that form the model are (1) Openness to Experience, (2) Neuroticism, (3) Extraversion, (4) Conscientiousness, and (5) Agreeableness. According to this model, one's personality can be described by some combination of these traits.

Prior to *voir dire* in 28 real cases (11 criminal cases and 17 civil cases), the researchers asked prospective

jurors to complete a questionnaire that measured these five traits. Court clerks provided information about which jurors were dismissed by the attorneys, which jurors remained to decide the case, and what the juries' verdicts were. Analyses revealed no differences in personality traits among those who were excused by the defense, those excused by the prosecution, and those who ultimately ended up on the jury. In real life, attorneys may pay little heed to prospective jurors' personality attributes, probably because these traits are largely hidden from view.

The second question addressed by this study was whether jurors' verdicts were related to their personality traits as measured by the Five-Factor Model. The answer: slightly. Whereas four of the five personality traits were inconsequential, Extraversion emerged as a moderately important factor in understanding juror influence and jury decisions. Jurors who opted for acquittals in criminal cases scored higher on measures of Extraversion than jurors who voted to convict, though none of the other personality traits were related to verdicts. Not surprisingly, jurors who scored high in Extraversion were also more likely to be selected as jury foreperson, and juries led by people high on this trait tended to deliberate longer.

In general then, laboratory studies suggest that some personality and attitudinal variables may be modestly related to individual jurors' verdicts, at least in criminal cases. The relationships are less strong in civil cases and, in both contexts, probably depend upon the type of case (Vinson et al., 2008). But the trials used in these studies were "close calls." That is, the evidence for each side was manipulated to be about equally persuasive—in such cases, individual juror characteristics may have their greatest influence (Penrod, 1990). In the real world, trial evidence is often so conclusive for one side that the jurors' personality dispositions may have less impact.

Attorney Effectiveness in *Voir Dire*. Attorneys take pride in their skill in selecting a proper jury. For example, a president of the Association of Trial Lawyers in America wrote, "Trial attorneys are acutely attuned to the nuances of human behavior, which enables them to detect the minutest traces of bias or inability to reach an appropriate decision" (Begam, 1977, p. 3). But findings from the study by Clark et al. (2007) are less encouraging on this point. Attorneys may overvalue the importance of demographic variables and undervalue the importance of personality variables when making peremptory challenges.

As a result of research findings, social scientists are appropriately skeptical of how much lawyers can accomplish in *voir dire*. In a study of attorney effectiveness, experienced trial attorneys were observed to use juror selection strategies that were not different from or better than those used by inexperienced college and law students who were asked to evaluate mock jurors (Olczak et al., 1991). Trial attorneys did not appear to think any more accurately when making personality judgments than did nonprofessionals. Even when asked to perform a more realistic task—rating jurors from the videotapes of a previous *voir dire*—attorneys did no better than chance in detecting jurors who were biased against them (Kerr, Kramer, Carroll, & Alfini, 1991). In short, "attorneys cannot read jurors like open books" (Devine, 2012).

In another study evaluating the effectiveness of *voir dire*, Cathy Johnson and Craig Haney (1994) observed the full *voir dires* in four felony trials in Santa Cruz, California. They also collected information on the criminal justice attitudes of jurors by administering Boehm's (1968) Legal Attitudes Questionnaire. By comparing the attitudes of persons who were retained as jurors with those of persons who were challenged by the prosecutor or defense attorney, they were able to gauge the effectiveness of each side's peremptory challenge strategy. Jurors who were peremptorily excused by prosecutors held stronger pro-defense attitudes than jurors excused by the defense. Jurors excused by the defense were more pro-prosecution than jurors excused by the prosecution. This would imply that attorneys had some success in determining which jurors were more favorable to their side. However, the overall score of the retained jurors was not significantly different from the average score of the first 12 jurors questioned or of a group of prospective jurors sampled at random. So although each side succeeded in getting rid of jurors most biased against it, the final result was a jury that would not have differed appreciably from a jury obtained by just accepting the first 12 people called or empanelling 12 jurors at random. (One wonders, then, whether *voir dire* should be eliminated altogether! Undoubtedly, trial attorneys would object.)

Scientific Jury Selection: Does It Work Any Better? For years, trial lawyers have been "picking"

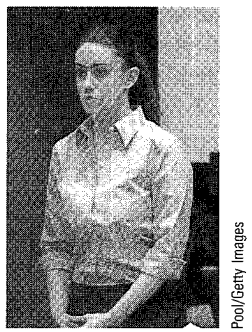
Box 12.3 THE CASE OF CASEY ANTHONY, HER "TWO TRIALS," AND HER TRIAL CONSULTANT

On July 15, 2008, 2-year-old Caylee Anthony's maternal grandmother called 911 to report her missing. Her body was discovered several months later in a wooded area near her Orlando, Florida home. By that time, Caylee's mother, Casey, had been arrested and charged with her disappearance and death. Casey offered multiple explanations of her whereabouts, Caylee's disappearance, and her attempts to find her daughter.

In the period between Caylee's disappearance and Casey's trial on charges of murder and aggravated child abuse (among other charges) in 2011, the media had a heyday with this case. Because Florida has very liberal media access laws, all of the evidence in the case, including documents, photographs, and witness lists, was accessible online. Even before the judge had ruled on the relevance of the evidence and the potential for prejudice, commentators and bloggers were feasting on the details. They hid little of their disdain for Casey Anthony or their certainty of her guilt. Cable television executives made conscious decisions to feature the case prominently, banking on the old news adage, "If it bleeds, it leads" (Gabriel, 2011). *Time* magazine dubbed it the "social media trial of the century." Therefore, well before she was tried in a court of law, Anthony was tried in the court of public opinion.

Working as a ***pro bono*** (without charge) trial consultant on behalf of Anthony's defense team, Richard Gabriel had his hands full. He conducted a community attitude survey to assess public beliefs about the case and to determine what type of juror might be open-minded enough to consider a different perspective on Anthony's guilt. He also conducted pretrial focus groups to assess the effects of such extensive media penetration on prospective jurors' opinions. His work revealed that the more the prospective jurors were exposed to media hype about the case, the more they became suspicious of the *actual* evidence.

Casey Anthony's defense team eventually assembled a team of trial consultants, some of whom monitored the televised *voir dire* and suggested follow-up questions and suggestions to aid the attorneys in exercising challenges for cause and peremptory challenges. Based on their pretrial research, consultants had determined that demographic factors of prospective jurors, such as gender, age, and race, would be largely irrelevant, and that ideal jurors for their side would be intelligent, skeptical, self-aware, and independent minded. They sought jurors who could set aside emotions and reason rationally, and who would conscientiously attend to the judge's instructions about the relevant rules and laws. One can never be certain what impact these choices had on the jury's composition, decision making, and eventual verdict, but they may have been critical: Casey Anthony was acquitted of the most serious charges (murder, aggravated child abuse) and convicted only on misdemeanor charges of lying to authorities.



Pool/Getty Images

Casey Anthony

Critical Thought Question
Based on what you have learned about effective jury selection strategies, how might the choices made by Casey Anthony's attorneys have led to her acquittal?

jurors on the basis of their own theories about how people behave. But recently, some attorneys (convinced of the importance of jury selection yet skeptical of their ability to do it well, or limited in the time they can devote to it) have hired social scientists as jury selection consultants. These consultants use empirically based procedures, such as small-group discussions called focus groups, shadow juries, systematic ratings of prospective jurors, and surveys of the community, to identify desirable and undesirable jurors (Lieberman, 2011). This collection of techniques is known as **scientific jury selection**. Although these techniques were first used to aid defendants in several highly publicized "political" trials of the Vietnam War era (McConahay, Mullin, & Frederick, 1977), they are now frequently practiced in the full range of criminal and civil trials. They have been used in high profile cases including those involving Martha Stewart, hedge fund manager Raj Rajaratnam, and Casey Anthony (described in Box 12.3). They have also been employed in lower-profile cases.

Scientific jury selection raises a number of complex issues and generates significant controversy. Some critics claim that it subverts the criminal justice

system because it favors the wealthy and well-heeled over individuals of modest means (Strier, 1999) and creates a perception among the public that the system is rigged (Brown, 2003). Others claim that it is ineffective (Kressel & Kressel, 2002; Saks, 1997). Not surprisingly, consultants (and some attorneys) dispute these claims, pointing out that public defenders have benefitted from their services and touting the value of professional training and experience: "We've collected a lot of research and we can spot things a lawyer wouldn't normally be paying attention to.... Most attorneys do just one or two trials a year, if they're lucky. But a good consultant has studied hundreds of juries and knows which behaviors and characteristics to look out for" (quote by consultant Dan Wolfe, cited by McCann, 2004). Moreover, because the American system of justice remains fundamentally adversarial, litigants are expected to present their version of the case as zealously as possible. So they should be able to use any legal means available to convince the jury to reach a favorable decision.

How effective *are* trial consultants at selecting juries? When attorneys in criminal trials first began to rely on empirically grounded scientific jury selection, they were often successful. Although the procedure seemed to work, the success rate may have been inflated by the following factors: (1) Many of the more widely discussed cases involved weak or controversial evidence against defendants. (2) Attorneys who made the extra effort to enlist jury consultation resources may also have been more diligent and thorough in other areas of their case preparation.

To assess the impact of trial consultants, ideally one would conduct an experiment in which two, identically composed juries would decide two identically tried cases, one that involved the services of a consultant and another that did not. By holding constant all aspects of the trial, including the nature of the evidence and the identities of the participants, and by varying only the involvement of a trial consultant, one might be able to reach some conclusion about that person's impact. Unfortunately, it is impossible to conduct such an experiment, so we may really never know with any precision or certainty whether and to what extent trial consultants are changing the outcomes of trials.

A few empirical studies have investigated the effectiveness of scientific jury selection, but their procedures were somewhat artificial. For example, Horowitz (1980) trained law students in either scientific jury selection or traditional selection methods and investigated their performance in four criminal cases. Traditional selection methods included relying on past experiences, interactions with similar jurors in prior trials, and conventional wisdom. Those trained in scientific jury selection received pretrial survey responses and profiles showing the desirability of prospective jurors. Horowitz determined that neither approach was superior for all four trials: traditional methods were superior in cases in which there were weak links between demographic, personality, and attitudinal factors (e.g., in a murder case), whereas scientific methods were superior when those associations were strong (e.g., in a drug sale case).

A study of scientific jury selection used in a series of actual capital murder trials provides somewhat more data on the effectiveness of trial consultants. Nietzel and Dillehay (1986) examined the outcomes of 31 capital trials, some of which used a trial consultant and others did not. Juries recommended the death sentence in 61% of the trials in which consultants were not employed by the defense but in only 33% of the trials in which they were used. Of course, these cases differed on many variables besides the use of consultants, so it is not possible to conclude that different outcomes were due to their presence alone. But the results are consistent with claims that trial consultants might be effective in cases in which jurors' attitudes are particularly important, as they are when a jury is asked to choose between life and death. Clearly though, there is limited evidence of the effectiveness of scientific jury selection, and higher-quality, more contemporary studies are sorely needed.

In addition, the effectiveness of scientific jury selection depends on a number of variables over which the consultant has no control. These include how many peremptory challenges are allowed; the extent to which questions delve into matters beyond superficial demographic details of prospective panel members; whether attorneys act on the guidance of the consultant; and, perhaps most importantly, the extent to which jurors' attitudes and beliefs will determine the outcome of the case (Greene, 2002). The more freedom and flexibility inherent in the jury selection procedures and the more the case hinges on jurors' belief systems, the more room for consultants to ply their trade and the greater the chances they can succeed.

Still, trial-watchers and social scientists of the jury agree that in most cases the evidence is more

important than jurors' attitudes or demographic characteristics (Jonakait, 2003; Kressel & Kressel, 2002) and that scientific jury selection may be of limited value in cases where the evidence is unambiguous. Richard Seltzer, a political scientist and trial consultant himself, acknowledged this indirectly: "Jurors cannot be predicted with the type of accuracy associated with experiments in physics" (2006).

Recognizing that jurors' demographic and personality characteristics do not correlate strongly with verdicts in general, many trial consultants have shifted their focus from advising lawyers about jury selection to providing services in realms other than jury selection (Lieberman, 2011). These include developing case themes and testing those themes and the demonstrative evidence in pretrial focus groups, preparing witnesses to testify in court, monitoring the effectiveness of evidence presentation during the trial, and interviewing jurors after the trial has ended. Consultants also assist attorneys during mediations.

PRETRIAL PUBLICITY

Legal cases have always attracted media attention, and the judicial system has struggled for centuries with the fallout of publicity that occurs prior to a trial. With the development of 24-hour news networks, thousands of cable and satellite channels, online news sources, social media, and blogs, trial-related information is more accessible to the public than ever before. As a result, the judicial system is experiencing new and growing concerns about the impact of this information on prospective jurors. A group of researchers estimates that the number of defendants who claim their case has been jeopardized by pretrial publicity has more than doubled in the past 20 years (Daftary-Kapur, Dumas, & Penrod, 2010).

One recent example involved the case of Michael Jackson's personal physician, Conrad Murray, who was charged with manslaughter in Jackson's death. Because Jackson's status as pop superstar seems to loom even larger in death than in life, the public was riveted by this case and by the question of whether Murray violated medical "standards of care" when he gave Jackson a lethal dose of the anesthetic propofol shortly before the singer's death.

Due to extensive publicity, it took two tries to select a jury for Murray's trial. In early 2011, after three days of juror screening, the trial was aborted when only one prospective juror professed to lack knowledge of the case, and that person did not speak English. Jury selection resumed a few months later with similar results: when the judge asked 370 prospective jurors whether any was unaware of the case against the doctor, no one raised a hand. At this point, the focus shifted from finding "unaware" jurors to finding jurors who could put aside any knowledge of Jackson's life, fame, and death, and base their decision on evidence presented in the courtroom. But law professor Stan Goldman was skeptical. He said, "If you've got a jury of 12 people who have never heard of Michael Jackson, I'm not sure they qualify for jury duty." Yet a jury of 12 people *was* eventually selected, and after a six-week trial, Murray was convicted and sentenced to four years in prison. This trial highlights some of the challenges to the legal system's goal of forming fair and impartial juries when the case has attracted a great deal of pretrial publicity.

Conflicting Rights

Pretrial publicity highlights tensions between two cherished rights protected by the U.S. Constitution: freedom of the press as guaranteed by the First Amendment, and the right to a speedy and public trial before an impartial jury, as guaranteed by the Sixth Amendment. In the majority of cases, the liberties ensured by the First and Sixth Amendments are compatible and even complementary. The press informs the public about criminal investigations and trials, and the public learns the outcomes of these proceedings and gains increased appreciation for both the justness and the foibles of our system of justice.

On occasion, however, the First and Sixth Amendments clash. The press publishes information that, when disseminated among the public, threatens a defendant's right to a trial by impartial jurors. This can occur in cases in which defendants and/or victims, because of their fame or infamous acts (like Conrad Murray), have gained national reputations. More commonly, it happens when local media, online postings, blogs, and press releases disseminate information about a crime or the parties involved that is inflammatory, biased, emotion-laden, or factually erroneous. Examples of this information include details about a person's prior criminal record, a confession made by the accused, unfavorable statements