

CHAPTER III

THE ADVERSARY SYSTEM AND JURY TRIALS

There will be later chapters on civil and criminal procedure in this book, so it may seem somewhat out of place to discuss adversary procedure and jury trials separately here, in the third chapter of the book. The topic is addressed here for two reasons.

First, the adversary trial and juries constitute more than just another step in civil or criminal procedure. These traditions occupy a fundamental place in the United States legal system that is difficult to understate. One reason for this is the high value placed on procedure in general. As Justice Frankfurter has stated, “[t]he history of American freedom is, in no small measure, the history of procedure.”¹ It is no coincidence that the overwhelming number of rights the Framers saw fit to include in the Bill of Rights were procedural rights. Moreover, even the more “substantive” freedoms of speech and the press set out in the 1st Amendment have a distinct adversary and procedural component. Thus, a prominent justification for protecting the freedom of expression is the “marketplace of ideas” theory: that “[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”² Even more broadly, an “adversary ethic” prevails in many non-legal contexts. Whether a business management meeting or a political debate, the notion that a particular idea or theory has been exposed to a head-to-head clash with opposing ideas or theories and has been chosen over them gives it real credibility.

Second, discussing the adversary system and jury trials here completes the picture of the tasks that lawyers and judges are called on to perform in the legal system. The last chapter outlined *legal* methodology, that is, how courts in the United States think about and resolve *legal* issues. However, resolving issues of law is only part of the task involved in adjudicating disputes — and it is often the least important part. The facts must also be determined and the law must then be applied to those facts. The process of fact adjudication has particular significance for lawyers who engage in litigation in the United States, since it is the lawyers for the parties who must shoulder the burden of investigating, developing and presenting evidence at trial. The adversary trial process is the core of what might be called the *factual* methodology of the legal system.³

We will start with a brief description of adversary theory — the overall characteristics and rationale for an adversary system of adjudication. Then we will examine the institution of the jury in general terms. This will be followed by a relatively detailed description of an adversary jury trial and the lawyer’s role in it, including a cursory review of some of the more important limitations on evidence. Thereafter, various criticisms of the adversary system and juries will be considered.

A. The Characteristics and Rationale of the Adversary System

All legal systems strive for decision-making that is impartial and fully-informed. Proponents of an adversary system believe that this is best achieved (1) where the decision-maker is neutral and passive, and is charged solely with the responsibility of

¹ *Malinski v. New York*, 324 U.S. 401, 414 (1945).

² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J.).

³ Although it is essential that practicing lawyers know how to develop the facts in a case, legal education in the United States has tended to emphasize legal analysis and knowledge and traditionally has downplayed the importance of how facts are investigated and adjudicated. As a result, new lawyers may be quite skilled at the legal methodology set out in Chapter II, but may have only a rudimentary understanding of how to investigate and present facts. See Chapter IV, pp. 137-138.

deciding the case; (2) the parties themselves develop and present the evidence and arguments on which the decision will be based; (3) the proceeding is concentrated, uninterrupted and otherwise designed to emphasize the clash of opposing evidence and arguments presented by the parties; and (4) the parties have equal opportunities to present and argue their cases to the decision-maker.

1. The Need for a Passive Decision-Maker

The most fundamental principle of the adversary system is its insistence upon strictly separating the active function of investigating and gathering evidence from the more passive function of considering the evidence and deciding the case. The theory behind the need for this separation is the belief that performance of the former function necessarily taints the latter: decision-makers who gather the evidence lose their impartiality by reason of their active investigatory role in the case.

The root of the problem, in the words of an often-quoted American Bar Association (ABA) Committee Report on the adversary system, is the “natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.”⁴ We all have a natural urge to impose order on chaos by evaluating and categorizing information as we hear it. But decision-makers are under special pressure to do so, since they must decide the case. The result is a strong inclination in the decision-maker early on — while the information is still being gathered — to start theorizing about what the evidence means. Even passive decision-makers may engage in preliminary theorizing. But decision-makers who actively investigate cannot avoid doing so. An investigator cannot possibly determine what questions to ask or what direction to take the investigation next without first assessing the meaning of the information that is already known.⁵

The main danger of preliminary theorizing is that preliminary theories will become fixed, permanent theories long before they should. As the ABA Committee Report explains, “what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.” The biasing effects of preliminary theorizing are magnified when the investigator controls *what further* evidence will be investigated — as would be the case if the investigator is also the judge. Ego investment in a preliminary theory provides a strong unconscious motivation to nudge the investigation in the direction of information that confirms that theory, and away from information that conflicts with it.⁶

⁴ *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958), quoted in Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382-85 (1978) (emphasis added). See also Lon Fuller, “The Adversary System” (Chapter III), in HAROLD BERMAN, ED. *TALKS ON AMERICAN LAW*, 2D ED. 43-44 (Vintage Books 1971). For further discussion of the theory of the adversary system, see STEVEN LANDSMAN, *READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION* (American Bar Association Section on Litigation) (West 1988); MONROE FREEDMAN, *UNDERSTANDING LAWYERS’ ETHICS*, 2D ED. 13-42 (Matthew Bender 1998).

⁵ As Professor Damaska has observed, “You cannot decide which facts matter unless you have already selected, at least tentatively, applicable decisional standards. But most of the time you cannot properly understand these legal standards without relating them to the factual situation of the case.” Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U.P.A. L.REV. 1083, 1087 (1975).

⁶ Some decision-maker bias is counteracted by a system in which an investigator (usually also a member of the judiciary) investigates the case and delivers the evidence produced to judges who will decide the case. However, if the effect just related is correct, the dossier compiled by the investigator for the judges, while not a final decision, is likely to similarly skewed.

2. Party Presentation of Evidence and Arguments

Proponents of an adversary system believe that the only way to avoid the skewing effects of the investigative role is to take the responsibility for investigation away from the decision-maker and give it to the parties themselves. Doing so relieves the decision-maker of any need for preliminary theorizing. The decision-maker can relax and simply follow the parties' presentations of the evidence.

But giving the responsibility of investigation to the parties has another beneficial effect: it improves the quality of the decision-making. It does so in two important ways.

First, party investigation increases the amount of information available to the decision-maker. It gives the responsibility of gathering it to those who have the greatest incentive to develop the evidence in their favor. Moreover, the parties have only half the total job a single investigator would have, since they need only concentrate on the evidence in their favor. Second, party presentation assures that the *full potential weight and value* of the evidence will be explored. It is simply impossible for a single investigator to develop in his or her mind, simultaneously and with equal force, completely contradictory theories of a case, and then to maintain those theories in balance until the end of the investigation. While some people are better at this than others, no single person can hold the opposing positions on an issue as well as the opposing parties themselves. Similarly, the weight and value a decision-maker gives to evidence are often affected by *how* the decision-maker first became acquainted with that evidence. Evidence stumbled across in random pieces is not likely to have as strong an impression on the mind as evidence that is presented forthrightly as a logical and coherent whole. Allowing the parties to prepare and present all the evidence in its best light neutralizes the random factor of how the investigator-decision-maker might have encountered that evidence when it first came to light.

The second benefit of placing the burden of investigation and presentation of evidence on the parties is that it promotes the *appearance* of fairness. This is a crucial factor if the stage at which evidence is officially gathered is to be public, as all trials are in the United States. In a public trial, the active involvement of a decision-maker in the investigation and presentation of the evidence can create the appearance that the decision-maker has prejudged the case. An example of this, which often arises in the trial of cases, is where a witness's testimony at trial contradicts an earlier statement given by the witness. There are several different theories about what this could mean. It could be anything from a simple misunderstanding or lapse in thought to a deliberate lie. One has difficulty imagining a series of questions adequately exploring the issue with the witness that would not communicate a preliminary judgment about the contradiction. The investigating official might "bear down" on the witness, pressing the witness for an explanation, but this would convey the impression that the judge doubts the truth of the witness's testimony. Or, more likely, the interrogating judge might *not* "bear down" on the witness in an effort to maintain the appearance of impartiality. But this would convey the impression of a judgment that the contradiction is not important. It is one thing for the parties, the jury or the public to see a *party's lawyer* take one or the other approach and thus convey one or the other impression. But if the *judge* does it, such action communicates the appearance of prejudging the evidence even if no such prejudgment is meant to be communicated.⁷

⁷ This final point shows why active judicial development of evidence is problematic even when the important decision-maker, the jury, remains passive. Juries generally want to do the right thing. Since they cannot depend on the parties before them to give them unbiased advice, they are particularly sensitive to any indications from the judge as to what is the right way for them to decide the case. A "solution" to the

3. Structuring the Trial to Induce and Sustain a Clash of Opposing Partisan Views of the Case

The Function of the Adversarial Clash The simple fact of party presentation of opposing versions and interpretations of the evidence results in a clash before the passive decision-maker. But the clash is more than a by-product of partisan presentations. It is an essential element of adversary procedure. Partisan presentation of opposing viewpoints serves to counteract the tendency toward premature decision-making noted earlier. As the ABA Report notes:

The [presentations and] arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.

Structuring the Adversarial Clash This “suspending” effect is emphasized by the structure of the adversary trial, which requires that the parties’ presentations of evidence and arguments alternate. As will be described shortly, each segment of the trial has its plaintiff’s part and its defendant’s part and the presentations follow shortly after each other.⁸ Within a single segment of the trial, “direct examination” of a witness by the proponent of that evidence is followed immediately by “cross examination” by the opponent. The result of this alternating structure is that any proffered analysis of evidence from one side that seems appealing will be followed shortly by a competing view. The clash of competing views of the case is sustained up to the point of jury deliberation, when jury instructions include party-provided summaries of each side’s principal contentions, first the plaintiff’s and then the defendant’s.

“Immediacy” of the Clash of Evidence and Argument Another important feature of the adversary trial serves to heighten and sustain the clash of evidence. This is the general preference for “immediate” oral evidence and argument rather than “mediate” written evidence and argument. Rules of evidence generally exclude written and other secondary versions of witness observations as “hearsay,” thus requiring that the original source of the evidence come to court and testify personally at the trial.⁹ Although hearsay is excluded in large part because it is not as reliable as first-hand oral evidence, it is no coincidence that conflicting “immediate” oral first-hand evidence also presents a sharper clash than conflicting written or other secondary evidence.¹⁰ Moreover, the unreliability of hearsay is directly linked to the need for a first-hand adversarial clash. It is mistrusted precisely because the person who uttered it was not subject to a first-hand confrontation in the form of cross examination.¹¹

The fact that the parties themselves present and examine the evidence heightens the immediacy of the clash of opposing viewpoints as well. Questions to the witness are not filtered through a judge or other state official, but are put to the witness directly

appearance-of-bias problem might be to exclude the public from the stage of proceedings at which the “raw” facts are gathered and present publicly only a “sanitized” version of the facts. That is not an option in the U.S. system, which generally requires that all judicial proceedings be public. Moreover, it does not eliminate the effect that the appearance of unfairness would have on the parties, lawyers, witnesses or anyone else involved in the closed proceeding.

⁸ See *infra* pp. 91-109.

⁹ See discussion of evidence law *infra*, pp. 109-115.

¹⁰ JOHN MERRYMAN, *THE CIVIL LAW TRADITION*, 2D ED. 114 (Stanford U. Press 1985). It should be noted that a large part of the original reason for orality of evidence in the common law trial was that juries were often illiterate and would be unable to read written evidence.

¹¹ See *infra* p. 111.

by the lawyers for the parties. In most cases, the most dramatic first-hand clash of competing views of the evidence comes when direct examination of a party by the party's own lawyer is followed by cross examination of that party by the opposing party's lawyer.

The adversary trial's emphasis on immediacy is not restricted to the *content* of oral testimony, but also takes into account the *manner* in which the witnesses testify. It is acceptable and even expected that a fact-finder (judge or jury) will consider nonverbal clues to credibility that a witness's demeanor on the stand might disclose. This cannot be done with written evidence. This point is emphasized constantly by appellate courts. Even with the aid of verbatim transcripts on appeal, appellate courts will defer to the trial court's evaluation of the evidence in recognition of the trial judge's first-hand opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a "cold paper record."¹²

Concentrated Hearing The clash of opposing views is also heightened by the use of a continuous and concentrated trial. All the evidence is ready and the persons needed to present it and finally decide the case (judge, parties, jury, lawyers and witnesses) are gathered together in one place. The trial continues uninterrupted until final decision of the case. If the trial were scheduled discontinuously with hearings spread out over several weeks or months, the clash would be greatly reduced. Scheduling the trial as one continuous hearing is also necessary to accommodate the jury, which would likely forget what it had heard if called back for a few hours on scattered days over a span of several weeks. But even trials before the judge alone without a jury are often scheduled continuously. Judges often comment on how the trial's continuous nature and other adversarial features assist them in keeping an open mind throughout the trial. Indeed, consistent with adversary theory, many judges, upon hearing that the case will be tried to them without a jury, make a point of learning as little as possible about the case so as not to prejudge it and to gain the maximum benefits from the clash of adversary presentations of the parties.¹³

4. Structuring the Trial to Assure Equality of Adversarial Opportunities

Equality of "Forensic Arms" It is inherent in the notion of party presentation that the parties' opportunities to present evidence and persuade the decision-maker should be equal. Such "equality of forensic arms," as it is sometimes called, is fundamental to adversary theory. It applies in both civil and criminal cases in the Anglo-American tradition. Thus, the prosecution and defense in a criminal case face identical limitations on presentation of evidence and argument. The prosecution sits at the same kind of table on the same level as the defense and wears the same ordinary clothes as the defense attorney. Whatever prerogatives the prosecutor may enjoy outside the courtroom, they disappear when the prosecutor appears in court in a criminal trial.¹⁴

¹² *Gasperini v. Center for the Humanities*, 518 U.S. 415, 421 (1996). The narrow scope of appellate review of facts in the U.S. is discussed in Chapter V, pp. 168-169.

¹³ In a system of concentrated and continuous trials, the lawyers must prepare their cases thoroughly and completely before the trial starts, since they will be able to make only limited mid-trial corrections.

¹⁴ In a civil case, both parties have equal access to the means to investigate and prepare the case for trial. In a criminal case, the prosecution has the investigative resources of the police at its disposal in preparing its case, which the defendant does not have. However, other factors compensate for the imbalance somewhat. First, the defense has the right of compulsory process to subpoena any witness it wants who has relevant testimony (including the victim, a member of the police force or someone else in the prosecution "camp"), but the prosecutor may not compel the defendant to testify or even to answer questions informally because of the privilege against "self-incrimination" guaranteed by the Constitution.

Detailed Procedural Rules Administered in an Insular Way We have already discussed how evidence and trial procedure rules serve to create, heighten and sustain a clash of opposing evidence and arguments. Here we should note how the *nature* of these rules and the *manner in which they are administered* serve to promote equality of adversarial opportunity. First, the procedural and evidence rules applicable to an adversary trial are detailed and relatively rigid.¹⁵ The more detailed and rigid such rules are, the less judicial discretion there is to limit what evidence the parties are allowed to present and how they present it. Second, these procedural and evidence rules are administered in an insular and episodic fashion unrelated to the overall context of the case. This is in part because the rules are detailed and specific and in part because of traditional understandings of the judicial role. It is also a matter of necessity. Given that the parties are responsible for developing the facts at trial, trial judges will usually have only the sketchiest idea of what the facts of the case are. Such a “veil of ignorance” also makes it a virtual necessity that the judge rule in an insular fashion.¹⁶

This final point on reducing judicial discretion to control what evidence is presented brings us full circle to the first point made with regard to adversary theory. The reason for seeking to limit judicial discretion is to lessen the likelihood of the judge using a premature theory about the merits of the case to control what further evidence is presented, thus skewing the entire direction of the search for evidence. As discussed earlier, this is the most serious danger of judges actively investigating the evidence.¹⁷

Consistent with this theory, the best trial judges in the U.S. are not those who have the fullest understanding of the facts of the case. The best judges are those who are most knowledgeable about the *rules governing evidence and procedure*, and who administer those rules in an evenhanded fashion *regardless of which side seems to have the better case on the merits*. Trial lawyers in the United States often comment with favor on judges whose ruling on each objection in a trial is made independently of the relative balance of the evidence in the case. Thus, the judge’s job in a jury trial might be likened to the job of the referee at a football game, whose job it is to enforce the rules to assure that the sides compete fairly and — to return again to the first point on adversary theory — certainly *not* to kick the ball.¹⁸

B. Juries

It is possible to have an adversary system without juries and to have juries in a non-adversary system. However, the jury fits well in an adversary system because it is the quintessential passive decision-maker. All the jury does is take in the evidence and decide the case. It has no knowledge of the facts of the case and no right to ask questions, to call witnesses, or otherwise direct the examination of the evidence. Before proceeding in the next section to a detailed description of the adversary jury

Second, the Constitution requires the prosecutor to disclose all exculpatory evidence to the defense that the police might uncover. Finally, the defendant is free to use the services of a private detective and many public defender offices (which represent indigent defendants) have private investigators on their staff. See generally Chapter VIII (criminal procedure rights of defendants).

¹⁵ The content of evidence rules is discussed *infra* pp. 109-115.

¹⁶ Neither the judge nor the jury has any comprehensive summary or dossier of all the facts in the case before the trial starts.

¹⁷ See *supra* p. 81. See also *People v. Retamozzo*, 802 N.Y.S.2d 426 (App.Div. 2005) (judge asked too many questions of defendant and prosecution witnesses; conviction reversed).

¹⁸ For a work that explores connections between adversarial litigation and more general attitudes about the purposes and functions of a legal system. See MIRJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* (Yale U. Press 1997).

trial, we should examine the institution of the jury more generally.

1. Some History and Comparative Comments

History The historical origins of the jury are obscure and, in any event, a complete history is not needed to understand the modern institution.¹⁹ The jury's origins are considered by many to have been in France, where some form of jury trial was in evidence during the reign of Louis the Pious, circa 829 A.D. It was imported to England by the Normans after the invasion of 1066 and was firmly established as a part of English legal procedure by the twelfth century, probably in reaction to the decline of the medieval forms of procedure, such as trial by battle, ordeal and wager.²⁰ By the 1400s, the modern characteristic of the jury as a passive and impartial decider of the facts was well established. By 1670, the jury was established as an institution independent of the king and the king's judges, when in *Bushel's Case*²¹ it was held that a juror could not be fined or imprisoned for acquitting a defendant. The last characteristic of the modern jury — the need to decide the case based solely on the evidence produced at trial and not on extrajudicial knowledge — was established by the 1700s. The institution of the jury was exported to the United States by English colonists and has been a fundamental part of our jurisprudence ever since despite its decline in recent years England. Right to trial by jury is guaranteed by the 7th Amendment for civil cases and by Article III and the 6th Amendment for criminal cases.²²

A Comparative Perspective At one point in Europe, inspired by the French Revolution, juries existed in many civil law countries. Today, they have largely disappeared in those countries, except for a recent resurgence in Russia and Spain.²³ But even in civil law countries, the participation of lay persons in deciding cases in court is quite common. In France and Austria, a jury trial of sorts is allowed in some criminal cases and in Germany, there are mixed courts consisting of both law and lay judges. Somewhat parallel to the policies behind juries in the Anglo-American tradition, use of lay judges in these countries is designed to increase the diversity of viewpoints on the proper resolution of cases, to spread the awesome responsibility for decision-making, and to bring a common sense of justice to the legal system.

However, in few systems do lay decision-makers have the degree of independence enjoyed by juries in the Anglo-American tradition. Continental lay judges are fewer in number and are semi-professional, in that they are usually screened for suitability (often being chosen or nominated by a local legislative body) to sit for terms of a year or more. Almost as important, they deliberate together with the legally educated judge and must, together with the professional judge, justify their decision in writing.²⁴ By contrast, the

¹⁹ See Stephen Yeazell, *The New Jury and Ancient Jury Conflict*, 1990 U. CHI. LEGAL FORUM 87 and THOMAS GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL JURY TRIAL, 1200-1800* (U. Chicago Press 1985) (histories of the jury). See also JOHN GUINTEHER, *THE JURY IN AMERICA* 1-35 (Facts on File, N.Y. 1988).

²⁰ See generally THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (1956) and WILLIAM S. HOLDSWORTH, *I A HISTORY OF ENGLISH LAW* (1956). See also Stephen A. Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 582-587 (1993).

²¹ 124 Eng. Rep. 1006 (1670). The facts behind the decision in *Bushel's Case* are recounted in GUINTEHER, *supra* note 19, at 24-27.

²² The precise scope of the constitutional right to trial by jury is set on in Chapter VII, pp. 239-240, for civil cases and in Chapter VIII, p. 304, for criminal cases.

²³ Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 32 STANFORD J. INT'L. LAW 61 (1995) and Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241 (1998).

²⁴ For example, German lay judges are elected for one-year terms by local legislatures and are supposed to be the "most suitable" in terms of "proven judgment and honorableness." They also deliberate with the professional judges. Not surprisingly, their rate of disagreement with the professional

Anglo-American jury numbers up to 12, is chosen from a randomly selected pool drawn from the citizenry at large to decide a single case, deliberates separately from the judge in secret, and usually does not need to justify its decision.²⁵

2. The Division of Labor Between Judge and Jury

Fact vs. Law Division Despite their considerable independence, the common law jury does not have the right to decide all the issues in a case. In general, the judge decides issues of law and the jury decides issues of fact. Even on issues of fact, a jury is not free to come to any conclusion it wants. Except for a verdict of acquittal (not guilty) in a criminal case, the trial judge or an appellate court has the power to set aside the verdict if there is no substantial evidence to support it.²⁶ This power of the trial judge is not an exception to the general rule that judges determine only issues of law. Whether there is any substantial evidence to support a jury's fact-finding is considered to be an issue of law. Stated another way, the question of whether there is enough evidence *for the jury to decide* a fact question is a question of law for the judge.

It is sometimes difficult to tell what is an issue of fact and what is an issue of law. So-called "mixed fact-law" questions arise. In jury trials, the most common mixed questions are issues of "law application" — where a legal standard must be applied to the facts of the case. For example, the question of how fast the defendant was driving at the time of an automobile accident is a pure fact issue clearly appropriate for the jury to decide. It is a mixed fact-law question whether the defendant's driving that speed under the road and weather conditions the jury finds existed constitutes "negligence," thereby entitling the plaintiff to recover. Juries are usually allowed to decide law application questions and would certainly be permitted to decide the negligence question posed. If the law application question is of a type that requires uniform application, such as applying a standard provision of a contract to determine whether there has been a breach of that contract, it is more likely to be deemed an issue of law. On the other hand, if the contract provision is one that laypersons are capable of applying, the jury will be allowed to decide the question.²⁷

Jury Nullification Modern juries are told that they must accept the law as given to them by the judge, determine what the relevant facts are, apply the law to those facts and in that manner decide the case. Generally, a verdict at odds with the law will be set aside by the trial judge. However, a jury acquittal in a criminal case is not reviewable on appeal or otherwise. This means that in this one situation juries have the power of "nullification" — the power to acquit a criminal defendant despite clear evidence of guilt. Sometimes jurors may acquit in such circumstances because they do not believe

judges is low, around 1.4%. See Gerhard Casper and Hans Zeisel, *Lay Judges in German Criminal Courts*, 1 J. LEGAL STUDIES 138 (1972).

²⁵ Modern-day juries of comparable independence are the Russian and Spanish juries. See *supra* note 23.

²⁶ See discussion *infra*, p. 107.

²⁷ See *Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978) (discussing the fact-law distinction and allowing a jury to decide whether a contract provision excusing failure to pay royalties if that failure was "justified" would include a mistake in paperwork); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (question whether the city's decision to reject a particular development plan bore a reasonable relationship to its proffered justifications was properly submitted to jury since question was essentially fact-bound in nature). There may be constitutional restraints on what mixed issues are given to a jury. See *United States v. Gaudin*, 515 U.S. 506 (1995) (reversing a conviction for making false statements on a loan application on the ground that it deprived the defendant of his right to trial by jury when the judge rather than the jury decided whether the statements were "material"). But see *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) (meaning of the word "inventory" in patent claim held an issue of law for the judge in part because of the need for consistency).

the evidence. But sometimes a jury acquits in the face of compelling evidence of guilt because it disagrees with the law or with its particular application in that case. When a jury does this, it is judging the law as well as the facts and, by refusing to apply the law, the jury is to that extent “nullifying” it.

There is considerable evidence that the 18th century jury that the Framers of the Constitution had in mind had the right to judge, not only the facts, but the law as well.²⁸ But the modern view is that they do not have that right.²⁹ Consequently, neither the judge nor the defendant’s attorney may inform the jury of this power. Instead, jurors are instructed by the judge (1) that it would be a violation of their oath as jurors to ignore the court’s instructions on the law and (2) that, if the evidence demonstrates beyond a reasonable doubt that the defendant committed the offense charged, they must convict regardless of their personal feelings. However, an acquittal is final and cannot be appealed or otherwise set aside. This is because it would entail ordering a new trial, and the Constitution’s double jeopardy clause prevents the defendant from being tried twice for the same offense.³⁰ So, even if the jury violates the judge’s instruction and acquits, the acquittal stands. Because of this, juries have the *de facto* power to nullify. However, they do *not* have the *legal right* to do so.

There are no statistics on how often jury nullification occurs, nor could there be, since the jury is not required to give any reason for its verdict and the question whether the evidence for conviction was compelling is a matter of judgment. When what appears to be nullification takes place, it often attracts great attention from the press, and this makes its frequency seem greater than it probably is. Moreover, the traditional instructions juries are given emphasizing their duty to follow the law as given to them by the judge tend to assure that nullification will take place only in a few extreme cases.³¹

In civil cases, the jury is subject to greater control by the judge and must often give reasons for its verdict through the use of “special verdict” forms or by answering questions about the reasons for its decision.³² Yet juries can still express their resentment of a legal rule by using their broad power to determine contested issues of *fact*. Indeed, juries can have an effect on the development of the law by consistently and over a long period of time by finding disputed facts a particular way to avoid an unjust legal rule. For example, in *Hoffman v. Jones*, the Florida case changing state law from contributory to comparative negligence, the court supported its decision in part by noting one scholar’s observation that there is “something basically wrong with a rule of law that is so contrary to the settled convictions of the lay community that laymen will almost always refuse to enforce it, even when solemnly told to do so by a judge

²⁸ See Chief Justice John Jay’s charge to the jury in *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) and the dissent in *Sparf v. United States*, 156 U.S. 51 (1895). See generally Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51 (1980).

²⁹ *Sparf*, *supra*.

³⁰ For more detail on double jeopardy, see Chapter VII, pp. 310-313.

³¹ In *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988), jurors specifically asked the trial judge to explain nullification to them. The trial judge’s decision to be less than candid in answer was upheld on appeal. For different views on whether to tell the jury of its nullification power, see David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89 (1995) and Jack. B. Weinstein, *Considering Jury “Nullification”*: *When May or Should a Jury Reject the Law and Do Justice*, 30 AM. CRIM. L. REV. 239 (1993). See also Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433 (1998) and Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997).

³² See *infra* p. 107.

whose instructions they have sworn to follow.”³³

3. Characteristics of the Modern Jury

Jury Pools and Exemptions from Jury Service The traditional source for jury pools or the “jury venire” — the group of prospective jurors from which jurors are selected — has been voter registration lists.³⁴ However, not everyone registers to vote — usually fewer than 50% of the population in the United States votes in elections — so most jurisdictions use both voter lists and driver’s license lists. In a country that relies so heavily on the automobile, driver’s license lists will likely include over 95% of all adults. Whatever list is used for the pool, jurors are selected for the pool at random.

Traditionally, important professionals and others whose services are thought valuable to society, such as physicians, have been exempt from jury duty. Federal law exempts from federal jury service employees of police and fire departments as well as public officials.³⁵ Lawyers are often exempt from jury service on the theory that their legal knowledge would have a disruptive effect on jury deliberations. However, the trend in recent years has been to abolish all exemptions from jury duty, including any exemption for lawyers or even judges. At the present time, 27 states have no exemptions based on the prospective juror’s profession and seven more have only limited exemptions.³⁶ The idea has emerged that the right of a citizen to a representative jury for decision of court cases overrides any other societal interest and that the burdens and the civic education benefits of jury service should be as widely shared as possible. The concern that lawyers on juries would create problems is thought to be overstated, since the most important work of juries is in resolving factual issues, a task for which legal training is largely irrelevant and, some argue, a detriment.³⁷

Avoiding Jury Service Jury duty is mandatory on all those called to serve, but it does not arise very often for the average person. Frequency of service varies with the area of the country, but for a registered voter, serving more than once in ten years is unusual in most areas and many people go their whole life without ever being called. For the average case, jury duty is not that onerous and many people say that they find performance of their “civic duty” to be interesting. Also, a system of “one day, one trial,” used in 40% of the states, has made service much easier. Under this system, jurors are in the jury venire for only one day. If they are chosen for a trial, they serve in that trial to conclusion, but if not, they need not return. But some people for one reason or another try to avoid being placed on a jury. Failure to comply with a jury subpoena is contempt of court and is punishable by fine or imprisonment. A prospective juror’s statements of an inability to be impartial will be probed by the judge with some disbelief if no concrete reason can be offered. Obvious non-cooperation by a juror may lead one or the other counsel to dismiss the juror from service through a peremptory challenge. Jurors may be excused for “undue hardship or extreme inconvenience.”³⁸

³³ See *Hoffman v. Jones*, Appendix, p. A7.

³⁴ “Venire” comes from the original name of the writ used to command the sheriff to summon jurors. Called a *venire facias*, it meant literally “that you cause to come.” In federal court, the jury pool is called the “jury wheel.”

³⁵ 28 U.S.C.A. §1863(b)(5).

³⁶ Source: Center for Jury Studies, National Center for State Courts (1993). Conviction for a felony is still a universal disqualification. See ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT, Part A, Standard 4.

³⁷ In one case with which the author is familiar, a sitting Circuit Court judge of the state of Michigan served as a juror in a criminal case. No problems were reported.

³⁸ 28 U.S.C.A. §1863(b)(5) (applicable to federal jury service).

Diversity of Jury Pools Inclusive methods for creating jury pools are designed to increase the diversity of juries selected from it. As discussed later, diversity of viewpoints is a key to the success of the group dynamic of jury decision-making.³⁹ In addition, racial and ethnic, as well as economic and social diversity, are essential in promoting fairness and the appearance of it in trials. Thus, federal law requires “procedures designed to ensure random selection of a fair cross-section of the persons residing in the community” where the court convenes for all federal court juries, and states have similar requirements as well.⁴⁰ But sometimes fair procedures do not produce representative pools. In a recent murder case involving the death penalty, a federal court found that higher non-response and undeliverable rates for jury summonses sent to prospective jurors in minority communities had resulted in a yield of black prospective jurors (3%) that was less than half that of the black population of the district (7%). To remedy the problem, the court ordered that, for every jury summons that was undeliverable or otherwise did not produce a response, the clerk was to send a new summons to a different prospective juror in the same postal zip code as that of the undeliverable or not-responded-to summons. However, this plan was disapproved by the appellate court.⁴¹

Educational Levels of Jurors Beyond the ability to read and write the English language, there are no educational requirements for being a juror. It is not uncommon for a professor with a Ph.D. to be seated next to a high-school dropout. Each of their votes on the jury counts the same, though the professor may perhaps be more persuasive with other jurors during deliberations.

Because of the lack of any educational requirements, concern has been voiced about juries not understanding complex cases. It is claimed that some cases are impossible for *any* jury to understand, and the federal Courts of Appeal are split on the issue of whether there is a “complexity exception” to the constitutional right to a civil jury trial in federal court.⁴² “Blue ribbon” juries, juries made up solely of college graduates, for example, are a possibility, but they are controversial and constitutional doubts have been raised about them.⁴³ Another suggestion is to increase the amount of juror pay (and charge it to the litigants) so as to attract the better-educated juror.

But many believe the jury’s true capacity for accurate fact-finding has not yet been fully tapped. They point out that many traditional jury trial procedures are inconsistent with modern learning theory. One example is the procedure for jury instruction. Jurors traditionally have been given instructions on the law they must apply to the case only

³⁹ See *infra* p. 121.

⁴⁰ 28 U.S.C.A. §1863(b)(3).

⁴¹ The non-deliverable rate was 5.8% in wealthier towns, compared to 18.4% in towns with substantial minority populations, and the non-response rate was 23% in minority communities and only 7.6% in more wealthy areas. *United States v. Green*, 389 F.Supp.2d 29 (E.D. Mass. 2005), *rev'd sub nom. In re United States*, 426 F.3d 1 (1st Cir. 2005). See also *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998) (disapproving remedy for under-representation of minorities of removing one in five whites from the pool).

⁴² Compare *United States Financial Securities Litigation*, 609 F.2d 411 (9th Cir. 1979) (there is no complexity exception to jury trial right in complex securities case) with *In Re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1073-74 (3d Cir. 1980) (jury trial request denied in complicated antitrust case where there were millions of documents and jury would be required to analyze Japanese market conditions and business practices over a 30-year period and make price comparisons of many electronic products). These cases and the general problem of jurors’ abilities to understand truly complex cases are discussed in SAUL M. KASSIN AND LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* (Hemisphere Publishing, N.Y. 1988).

⁴³ A review of proposals and a general discussion of some of the potential constitutional and other objections is found in Rita Sutton, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U.CHI.LEGAL FORUM 575.

at the very end of the trial. The result is that they listen to the evidence throughout the trial without knowing which parts of it are important for deciding the case and which parts are not. And then, when the instructions are finally given, it has been traditional for the judge to read them to the jury rather than to give jurors a written copy. A major effort in recent years has been made to conduct psychological research on the effects of particular jury trial procedures and to seek to change those procedures that interfere with comprehension.⁴⁴

Juror Pay Jurors receive pay from the court for their service, but it is not an amount that would make them rich. At the present time in the federal court system, jurors are paid \$40 per day, but in some states, they are paid as little as \$5 per day. Whether jurors continue to receive pay from their employers varies. All government employees continue to receive their normal pay. Some states require private employers to continue to pay regular wages or a portion of regular wages to jurors for a certain number of days of jury service.⁴⁵ In states without this requirement, the issue of employee pay depends on the agreement between employer and employee. Where employees are unionized, collective bargaining agreements commonly require continuation of employee pay during jury service at least for a limited period. For employees without any of these protections or for people who run their own businesses, jury duty in a trial that goes on for weeks or months can be financially costly. However, statistics indicate that only 25% of all trials in federal court last more than one week and only 0.6% last more than 30 days. Moreover, the prospect of serious financial consequences constitutes “undue hardship” that can excuse the juror from service.

Avoiding Prejudicial Influences When involved in a case, jurors are usually not sequestered (segregated from the public) except while in attendance at trial. They are usually allowed to go home at the end of the day with the admonition that they are not to talk with anyone about the case. But trial judges have the discretion to order any procedures necessary to shelter them from the effect of publicity. In a notorious case, jurors may be sequestered in a hotel during the trial (or at least during deliberations), their access to television or newspapers may be censored and they may be transported to and from court in a van with its windows taped over to prevent them from seeing newspapers on newsstands or signs of protesters. Pre-trial publicity can also make it difficult to find a jury that has not already heard about the facts of the case and formed an opinion. It is not a disqualification that the juror has heard or read about the case. It is only if they have formed an opinion about it that would make it impossible for them to be impartial that they will be rejected.⁴⁶

C. The Adversary Jury Trial and the Lawyer’s Role in It

We will now move into a relatively detailed description of the stages of the typical adversary jury trial, with special attention paid to the responsibilities of the lawyers for

⁴⁴ For an excellent collection of such changes and proposed changes, the arguments pro and con and citations to the relevant literature, see G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD AND G. MARC WHITEHEAD, EDS, *JURY TRIAL INNOVATIONS* (Nat’l Center for State Courts, Washington, D.C. 1997).

⁴⁵ See, e.g., Conn. Gen. Stat. §51-247 (requiring employers to pay regular wages for the first 5 days of jury service) and Mass. Gen. Laws Ann. ch. 234A §48 (1986) (first 3 days). See also *Dean v. Gadsden Times*, 412 U.S. 543 (1973) (holding such statutes constitutional). There are also penalties against employers who discharge employees because of jury service. See 28 U.S.C.A. §1875 and ROTHSTEIN ET AL., *HORNBOOK ON EMPLOYMENT LAW* §4.31 (West 2004) (similar laws in every state but Montana).

⁴⁶ See generally THOMAS R. MURPHY, GENEVA KAY LOVELAND AND G. THOMAS MUNSTERMAN, *A MANUAL FOR MANAGING NOTORIOUS CASES* (Nat’l Center for State Courts, Washington, D.C. 1993).

the parties in presenting and arguing the case.⁴⁷

Civil vs. Criminal Jury Trials Most of the examples used for illustration in the description that follows are from a criminal case. However, there is little difference between criminal trial procedure and civil trial procedure that would strike the casual observer. The only obvious difference would be that in the criminal trial, the plaintiff's side is referred to as "the prosecution" (or "the government") and the lawyer appearing on that side is employed by the government rather than by a private party. Other differences between civil and criminal trials that would not be immediately obvious are: (1) in a criminal case the standard of proof is stricter, (2) criminal defendants cannot be compelled to take the stand or otherwise testify against themselves, and (3) there can be no appeal from a jury verdict of acquittal in a criminal case.⁴⁸

Bench Trial Procedure A non-jury trial, called a "bench trial" or "court trial," follows essentially the procedure outlined here for a jury trial. The main differences are that the steps that concern only the jury would be missing and that the lawyers would modify their arguments to suit a professional decision-maker.

Trial Courtroom Setting A diagram of a typical trial courtroom designed for jury trials is set out in the Appendix.⁴⁹ The judge's dais or bench is at the highest level and the witness stand is usually at the next highest level. The judge wears a robe, but no wig. The lawyers do not wear any special dress to distinguish them from others in the courtroom. They usually wear business suits. The parties sit at counsel table next to their lawyers, the better to consult with them during the course of the trial. This is even true of the defendant in a criminal case.⁵⁰

1. Jury Selection

Size of the Jury In criminal felony cases in federal court, a jury of 12 is required by court rule.⁵¹ States usually require 12 jurors in criminal cases as well, though as few as 6 is constitutional.⁵² Alternate jurors are chosen in case one of the original jurors cannot serve throughout the trial and deliberations. In civil cases, there is more variation in the required size of juries among states, but most states permit 6-person juries. In federal civil cases and in some states, the court must seat between 6 and 12 jurors, but chooses no alternates. The result is that many cases are decided by 8 or 9-person juries.⁵³

The Jury Selection Process The purpose of jury selection, sometimes called "voir

⁴⁷ For more information on this and other trial techniques of lawyers, see STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE*, 3D ED. (Nat'l. Inst. for Trial Advocacy 2004); RONALD CARLSON AND EDWARD IMWINKELREID, *DYNAMICS OF TRIAL PRACTICE*, 2D ED. (West 1995, 1997); THOMAS MAUET, *TRIAL TECHNIQUES*, 6TH ED. (Aspen 2002); and ROGER HAYDOCK AND JOHN SONSTENG, *TRIAL: THEORIES, TACTICS AND TECHNIQUES* (West 1991). For an overview of English trial techniques, see KEITH EVANS, *ADVOCACY AT THE BAR* (Blackstone Press Ltd. 1992). On juries, see NANCY MARDER, *THE JURY PROCESS* (Foundation 2005); JEFFREY ABRAMSON, *WE, THE JURY* (Basic Books 1994) and D. GRAHAM BURNETT, *A TRIAL BY JURY* (Vintage 2001).

⁴⁸ There are major differences between *pre-trial* procedures in civil and criminal cases. See Chapter VII, pp. 226-239 (civil cases) and Chapter VIII, pp. 266-273 (criminal cases).

⁴⁹ See p. A33.

⁵⁰ For a description of the other aspects of trial court procedure, see Chapter V, pp. 165-167.

⁵¹ Federal Rule of Criminal Procedure 23(b)(1). The parties can agree to fewer and the judge has the power to permit 11 to decide if there is good cause to excuse one of them (illness, etc.) even without such agreement. Whether 12 in the federal system is required as a constitutional matter has never been decided, since a 12-person jury has always been required by statute or court rule.

⁵² See Chapter VIII, p. 304.

⁵³ Federal Rules of Civil Procedure 47-48. As the Advisory Committee Notes to Rule 47 indicate, alternates were abolished because of complaints that they were "required to listen to the evidence but denied the satisfaction of participating in its evaluation." See Chapter VII, p. 240.

dire,⁵⁴ is to determine the qualifications of potential members of the jury and to select an impartial jury to try the case. The format used for jury selection varies from jurisdiction to jurisdiction.⁵⁵ In almost all jury selections, by the time of trial the jurors have completed and the lawyers have read questionnaires containing basic information about each juror. The panel of prospective jurors or jury venire is usually given some brief introduction to the case for which they are being selected. This is then followed by questions to members of the panel about their qualifications to serve.

In some jurisdictions, only the judge is allowed to address questions to the jurors directly. In such jurisdictions, the lawyers must submit any questions in writing to the judge, who may or may not choose to ask the question. In other jurisdictions, the lawyers are allowed to address the jury venire directly and, after a few general questions from the judge, to ask questions of prospective jurors, either as a group or individually. Ultimately the extent of lawyer participation is up to the discretion of the individual judge in a given case. But as a general rule, federal courts tend to have judge-conducted jury selection, while state courts allow lawyer-conducted selection. However, several states have limited lawyer questioning.

By whatever method information is obtained, indications that a juror is unable or unwilling to hear and decide the case fairly can be the basis for a “challenge for cause” on which the judge must rule. In addition, the lawyers can make “peremptory challenges,” which allow them to exclude a certain number of jurors for no reason at all. The number of peremptory challenges allowed varies from one jurisdiction to another, but federal law is typical. For a 12-person jury in federal court in felonies not involving the death penalty, the prosecution has 6 challenges and the defense has 10. In death penalty cases, the prosecution and defense each has 20 challenges.⁵⁶

Trial Lawyer Techniques in Jury Selection The primary aim of the lawyers for the parties is to select a jury that is as sympathetic to their side as possible. The ability of the lawyers to influence the composition of the jury is limited at best: by invoking challenges for cause (which are rarely granted) and a set number of peremptory challenges. The pool of jurors that one begins with, however, is randomly determined and beyond the lawyer’s ability to influence. Though lawyers often say they are going to court to “select a jury,” jury selection is really “juror exclusion” and only a limited number can be excluded in most cases.

Lawyers question jurors to discover their likely predisposition toward the case to be tried. This is most often explored by asking them about experiences they or their close friends and relatives have had that are similar to the facts in the case to be tried. Any questions on sensitive private issues are handled at a bench conference, out of the hearing of the public and other jurors.⁵⁷ However, peremptory challenges are often

⁵⁴ “Voir dire” comes from the Law French and means “to speak the truth.” For an explanation of the Law French, see http://en.wikipedia.org/wiki/Law_French.

⁵⁵ “Jurisdiction” as used here means the judicial systems of the states and the federal government.

⁵⁶ Federal Rule of Criminal Procedure 24(b). England abolished peremptory challenges for prosecutors in 1305 and for the defense in 1988. Although challenges for cause are permitted, they are made in only 1% of cases. See Buston, *Challenging and Discharging Jurors*, [1990] CRIM.L.REV. 225. The exercise of peremptory challenges in the United States was essentially unlimited until the Supreme Court prohibited their use to exclude jurors based on their race, ethnic origin or sex. See Chapter VIII, p. 304 (criminal cases) and *Edmondson v Leesville Concrete Co.*, 500 U.S. 614 (1991) (civil cases).

⁵⁷ A recent issue of concern is the juror’s right to privacy. In one case, a juror objected to a questionnaire that asked such things as her religious preference, her political party affiliation, television shows she watched, whether she classified herself as a political conservative, liberal or moderate, her typical reading material and whether she belonged to the National Rifle Association. See David Weinstein, *Protecting A Juror’s Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMPLE L. REV. 1 (1997)

made without regard to the answers given by jurors during *voir dire* and may even be decided before questioning begins. Often the decision is based on assumptions about the person's likely predisposition toward the case based on age, address, education, employment and other basic characteristics disclosed on written juror questionnaires — a socio-economic "portrait" of a juror.

Just what assumptions are drawn from basic information varies from one lawyer to another. In general, however, civil plaintiffs and criminal defendants will represent "anti-establishment" points of view and will lean toward younger, lower class, and ethnically diverse jurors while civil defendants and the prosecution in criminal cases will represent the "establishment" and will usually want the opposite kind of juror.⁵⁸

More sophisticated analysis of potential jurors is available from a growing number of professional jury selection consultants, many of them trained in psychology and other social sciences. They will, for a fee, analyze the lawyer's case and construct a profile of the kinds of jurors to retain or strike, often based on community surveys or the use of focus groups. Use of jury consultants has been touted as very successful in some high-profile cases. One was the 1992 Rodney King case where, despite a videotape showing what appeared to be a rather savage beating, state court jurors acquitted Los Angeles policemen of using excessive force on King. Some research indicates limited effectiveness of such "scientific" jury selection techniques.⁵⁹

Following jury selection, the jury is sworn to decide the case impartially and is given some preliminary instructions on the format of the trial.⁶⁰ Jurors are told something about the format of the trial and their duties. Most important, they are admonished to keep an open mind and not to discuss the case with anyone (even among themselves) until the evidence, arguments and final instructions have been completed and they have retired to deliberate. Generally, except in the most complex of cases, the jury is not given any instruction at this point on the law of the claim made or offense charged, because of the belief that such instruction would be confusing or incomplete at this point and might interfere with the jury's listening to all the facts.⁶¹

2. Opening Statements

The Form and Role of Opening Statements After the jury is selected, sworn and seated, the lawyers are permitted to make "opening statements" to the jury. The purpose of the opening statements is to allow the parties to outline the facts in the case and to introduce the jury to their claims or defenses. The evidence in the case will not come before the jury in a clear chronological order, but in a disjointed way dictated by the order in which witnesses testify. Thus, the opening statement is an opportunity to give jurors a clear exposition of the entire "story" of the case. Each side, of course, will have a different "story" to tell. The task facing the lawyers in opening is to set out the

(exploring how to protect juror privacy while safeguarding a defendant's right to a fair trial and the public's right of access to court proceedings). In 1998, the American Bar Association added a "Standard on Jury Privacy" to its Standards Relating to Juror Use and Management.

58 As noted earlier, peremptory challenges that appear to be based on race, sex or national origin can be contested and will be allowed only if the judge is convinced that the lawyer has a non-discriminatory reason for excluding the juror. See *supra* note 56 and Chapter VIII, p. 304.

59 See GUNTHER, *supra* note 19, at 55-58; KASSIN & WRIGHTSMAN, *supra* note 42, at 57-62.

60 A typical form of the oath taken is as follows: "Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God."

61 This is changing somewhat, however. See *supra* p. 90.

story of their case without argument in a way that will appeal to the jury.

Jurors are told that an opening statement is not evidence, only “a guide to the evidence,” but studies show just how important a “guide” it is. Research on the decision-making process of jurors shows that they decide cases by constructing a “story” of how the case happened and testing it for accuracy against similar true “stories” from their own lives or experience. Since the opening statement is the opportunity for the lawyers to present their side’s “story” in a coherent manner, it is a particularly powerful tool of persuasion.⁶²

Lawyer’s Approach to Opening Statement The best opening statement will usually present the facts in chronological order. In whatever order presented, the lawyer is supposed to be limited largely to reciting the *facts* the lawyer plans to prove rather than arguing the case. Indeed, one of the few objections allowed during an opening statement is that “counsel is arguing.” Nonetheless, each side is permitted to outline its contentions with regard to the evidence so that the jury clearly understands the basic positions of the parties. This may involve some discussion of the applicable law as well. In a criminal case, for example, defense counsel will usually want to spend some time introducing the notion of “reasonable doubt.” Clearly, the line between impermissible “argument” and “introducing” one’s “contentions” or “position” to the jury is not a clear one.

Because what lawyers say in opening statements is not evidence, but only a guide to the evidence, it has been traditional for lawyers to preface each description of the evidence with the phrase “the evidence will show” or “the prosecution intends to prove that . . .,” instead of just telling the story. Indeed, some judges believe that this is legally required. The modern trend is that it is permissible and much more effective for lawyers to simply tell the story as it will come out. For example an excerpt from an opening in a criminal case might sound like this:

On Tuesday, May 9th, the defendant John Smith had been drinking beer with his buddies for about four hours at the Dew Drop Inn. At around 10PM, he left his friends at the bar and drove up to the Grand Hotel. He stopped his car in the loading zone and left the motor running. Then, with a loaded pistol in his belt, he walked into the lobby of the hotel and went directly to the hotel night clerk’s desk. He passed a note he had written to the night clerk. In the note, he said “I’ve got a gun. Give me all your 10s and 20s.”

3. Presentation of Evidence (Proofs)

Following the opening statements the most important part of the trial starts with the lawyers for the parties presenting their “cases” — the evidence for their side. The plaintiff (or the prosecution in a criminal case) goes first and presents the “plaintiff’s case,” called the “government’s case” or “state’s case” in a criminal action. Then the defendant’s lawyers present the “defendant’s case.” Following that, the plaintiff or prosecution has the opportunity to present a “rebuttal case.”

It is the responsibility of the lawyers for the parties to assure the attendance of witnesses they need and obtain the appropriate documents for trial. This is generally done by the lawyer simply requesting the court clerk to provide an order requiring the

⁶² Nancy Pennington and Reid Hastie, *The Story Model of Juror Decision Making* in REID HASTIE, ED., *INSIDE THE JUROR* 192-221 (Cambridge U. Press 1993). Judges probably do the same thing.

witness to appear, called a “subpoena.”⁶³ The lawyers know what witnesses and other evidence to use at trial because they have investigated the case both through informal means (*e.g.*, talking to witnesses, using private investigators) and through a formal pre-trial process called “discovery.” In a civil case, either side in the dispute can compel any member of the public who has knowledge of the case to give “depositions” at the lawyer’s office and otherwise to disclose any relevant information or documents. Discovery applies to compel even the opposing party and the opposing party’s witnesses to disclose what they know long before trial. In the process of discovery, lawyers will generally hear testimony from all the witnesses who will be called to testify at trial.⁶⁴

In a criminal case, discovery is more limited. Because of their right against self-incrimination, defendants are generally not required to testify or otherwise provide exculpatory evidence to the defense, but the defendant in the United States does not have full access to the prosecution’s investigatory file. However, much of the prosecution’s file consists of notes and reports of police personnel who will be witnesses in the case. The prosecution is required to produce for the defendant’s inspection any writings used by a witness to prepare for testifying.⁶⁵

The lawyers presenting their evidence have three principal tasks: presenting witness testimony, presenting documents or other tangible evidence, and making and defending against objections to evidence. The law and techniques for these activities are outlined next.

a. Witness Testimony

Witness testimony forms the bulk of the proofs offered at most trial. Witnesses may testify based only on personal knowledge and generally witnesses may not testify to “hearsay” — what someone else told the witness.⁶⁷ A court stenographer takes down verbatim all the testimony and everything else said in the proceedings.

How Witness Testimony Is Presented The witness is first “called to the witness stand” by one of the lawyers and takes an oath to tell “the whole truth and nothing but the truth.”⁶⁸ Despite it being called the witness “stand,” the place from which witnesses give evidence is really a chair next to the judge’s dais in which the witness sits while testifying. All witnesses testify while seated unless asked to demonstrate something or point something out on a demonstrative aid. This includes the defendant giving testimony in a criminal case.

The side that calls the witness questions the witness first on “direct examination.” The opposing side is then given the right to conduct a “cross examination” of the witness. Following the cross examination, the side that called the witness then has the opportunity to conduct a “redirect examination.” A “recross examination” and even possibly a second redirect examination may follow, but these are discretionary with the

⁶³ Generally, the court clerk gives the lawyers the requisite subpoenas in blank. However, in some jurisdictions, lawyers in civil cases have the power to issue the subpoenas themselves without any need to go through the court clerk. See FRCP 45(a)(3).

⁶⁴ See Chapter VII, pp. 232-236.

⁶⁵ However, some defenses require special prosecutorial investigation to rebut, such as alibi or insanity, and are required to be disclosed beforehand. Also, criminal defendants must provide the prosecution with samples for testing, such as handwriting or blood. See Chapter VIII, p. 273 and note 37.

⁶⁶ See *supra* note 14. See FRE 612 and FRCrP 26.2.

⁶⁷ Evidence law is discussed *infra* pp. 109-115.

⁶⁸ If religious scruples prevent swearing an oath, an alternative “affirmation” may be used.

judge. In general, the purpose of direct examination is to get before the jury information that supports the proponent's case; the purpose of cross examination is to bring out contrary facts and to cast doubt on the direct examination.⁶⁹

Witnesses are generally not permitted to testify in a narrative form on either direct or cross examination. They may testify only in response to questions. One reason for this has been discussed: it is thought desirable for lawyers to be able to control and "shape" the witness's testimony by the questions they ask so that the lawyer can present the testimony to the fact-finder in the best (or worst) possible light. Another reason is efficiency. To have a witness simply state everything the witness thinks is relevant to the case will generally result in much that is not really essential. Finally, question-and-answer format is essential to administer limitations on admissibility of evidence. Requiring that witnesses testify only in response to questions gives opposing counsel time to determine from the question asked whether inadmissible evidence is called for, so that an objection can be interposed before the jury hears the answer.⁷⁰

(1) Direct Examination

A direct examination usually has three parts: (1) *background* of the witness (who the witness is, where the witness works, etc.) (2) *setting the scene* by describing the place where the incident occurred, (3) *action*, that is, description of the incident itself. In getting the witness's story out, the witness will usually be answering the five essential "W" questions that any good newspaper story answers — who, what, where, when and why — and most of the lawyer's direct examination questions will begin with one of these five words or with an imperative like "tell me" or "explain."

Form of Questions on Direct Examination In general, the lawyer conducting direct examination will want to ask "open" questions that give the witness the opportunity to talk. An example of an "open" question is "What did you see in the lobby of the Grand Hotel around 10PM on Tuesday, May 9th, of last year?" This is in contrast to "closed" questions that contemplate a limited response from the witness. An example of a closed question would be "How far from the night clerk's desk were you when the robbery was taking place?" or any question that can be answered "yes" or "no." Open questions are in general more efficient in that they ask for more information and allow the witness to answer in several sentences at a time. But there is an additional reason why the lawyer will want to use open questions on direct examination — longer answers give the jury more of a chance to get to know and to get a "feel" for the witness. This is important, since the jury must decide to what extent to believe the witness and what weight to give the witness's testimony.

Closed questions are appropriate on direct and they are essential to probe matters of detail. For example, in answer to the open question of what happened in the hotel lobby, the witness may start telling about how he was in the lobby waiting for a friend

⁶⁹ In general, jurors cannot ask questions, but some judges have permitted them to do so on a limited basis. The questions are submitted to the judge in writing and then are asked by the judge unless it is not a proper question from the standpoint of the law of evidence or if the judge is sure the lawyers will ask it at a later time. Reactions to the practice during a 1984 study in a federal court were positive on the part of judges and jurors, and even some of the lawyers (plaintiffs' lawyers favored the practice more than defendants' lawyers). GUNTHER, *supra* note 19, at 68. See also KASSIN & WRIGHTSMAN, *supra* note 42, at 129-131.

⁷⁰ The Federal Rules of Evidence contain no blanket prohibition against narrative answers. However, the judge has the general power to "exercise reasonable control over the mode . . . of interrogating witnesses and presenting evidence." FRE 611. Consequently, judges will usually sustain an objection to narrative testimony if it is argued that the witness could well blurt out inadmissible evidence before an objection can be interposed.

to arrive; how he was leaning against a table reading a newspaper; and that he noticed a person approach the night clerk's desk and hand the clerk a piece of paper. At that point the direct examiner will wish to ask some closed questions, including the example just given about how close the witness was to the clerk's desk. Other closed questions would probably be "How much of man's body could you see: his entire body or just his face?"; "How tall did he appear to be?"; "How was he dressed?"; "What were his facial features like?"; and so on, going into a detailed description that obviously matches the defendant, thus showing in the process that the witness was a careful enough observer to notice details.

"Pacing" a Direct Examination The mark of a good direct examiner is knowing when to move forward with open questions, thus allowing the witness to get through the story more quickly, and when to slow down the action and focus on details by way of closed questions. This is called the "pace" of the examination. If there are too many narrow questions, important parts of the story will get buried under a mass of unnecessary detail and the slow pace will bore the jury. If there are too many open questions, the story will go by too quickly for the jury to remember or will be described in such a general way that the jury will conclude that the witness did not see much or did not pay much attention to what was there to be seen.

Leading Questions There is one kind of closed question that is objectionable on direct examination. This is the "leading" question. A leading question is one that suggests to the witness what the answer should be. "Weren't you standing only 10 feet from the night clerk's desk when the defendant walked up?" is a leading question. On direct examination, leading questions are prohibited because it is thought to be unfair to permit the lawyer to "feed" answers to witnesses that support the lawyer's own side. Moreover, the lawyers are permitted and even expected to interview witnesses and review their testimony with them before trial, so leading questions should not be necessary to get the witness's testimony out.⁷¹

(2) Cross Examination

Purpose of Cross Examination The purpose of cross examination may in some cases be to seek out information, but more often its main purpose is to undermine the credibility of the witness's direct examination testimony. Such "impeachment" of the witness's testimony may include casting doubt on the witness's ability and opportunity to observe (*e.g.*, it was dark and stormy), exposing any bias or prejudice the witness might have (*e.g.*, the witness dislikes one of the parties), pointing out any interest the witness has in the outcome of the case (*e.g.*, the witness has "cut a deal" with the prosecution allowing the witness to avoid prosecution if he testifies in this case), and showing bad character for truth-telling (*e.g.*, the witness has been convicted of perjury). Another form of impeachment is to show that the witness made a prior statement that is inconsistent with the witness's testimony at trial.

Form of Questions Not only are leading questions permitted on cross examination; most lawyers believe that proper technique requires that *all* questions on cross examination be leading and answerable by only by "yes" or "no." Assuming the question can fairly be answered "yes" or "no," if the witness tries to go beyond that

⁷¹ Leading questions *are* permitted on direct examination for uncontested material, for foundation material for introducing exhibits into evidence (*see infra* pp. 101-102) and to draw the witness's attention to a particular part of her testimony. They are also permitted in examining a hostile witness, the adverse party or a child or adult witness with impaired communication skills. FRE 611 states a softened version of the rule against leading questions: "Leading questions *should not* be used on direct examination of a witness except as may be necessary to develop his testimony." (emphasis added).

answer to explain — for example, by answering “yes, but . . .” — the questioner can object that the answer is non-responsive.⁷²

The idea behind using leading questions is that they allow the cross examiner to bring out only those items of information that are of value to the cross-examiner’s case. Effective cross-examiners will generally ask only questions to which they know the answer and will never ask the witness “why” questions or other questions that give the witness a chance to explain. A cross-examining lawyer, however, is not permitted to argue with the witness or to “badger” the witness. What amounts to argument or badgering is not always clear, but asking the same question over and over or insisting that the answer the witness has given is false will in most circumstances fall into this category.

Effective Cross Examination Techniques A mistake that many beginning lawyers make is to try to accomplish too much on cross examination, expecting that they will be able to get the witness to completely agree with their position.⁷³ For example, after a direct examination in which the witness identifies the defendant as the robber, the defense lawyer might be tempted to ask “Isn’t it true that it was so dark in the lobby that you were really unable to get a good look at the robber?” If the issue in the case is eyewitness identification of the defendant by this witness, this is a valid point to make. However, as a *question*, it is of limited use, since the witness will answer “no” or, worse yet, will feel challenged and thus will repeat once again for the jury just how well he or she could see. The point that it was so dark the witness could not see is a *conclusion* that the lawyer should *argue* in the final arguments in the case (when the witness cannot answer the argument). On *cross examination*, the lawyer is generally only looking for the *facts needed* to make the argument later. Thus, the lawyer, having done the appropriate investigation to determine that affirmative answers will be given, will ask instead: “This took place at 10:00 at night, didn’t it?” “So, it was dark outside, correct?” “The only source of light in that lobby was a single light fixture, correct?” “And that single light fixture was hanging from the ceiling *behind* the robber’s head, wasn’t it?” “And isn’t it true that, when you described the assailant to police when they arrived just 10 minutes after the robber left, you told them that it was ‘pretty dark’ in the hotel lobby?”

(3) Redirect Examination

Redirect examination is the opportunity for the direct examiner to return to “repair” any “damage” done on cross examination. Redirect examination, like direct examination, must be conducted by way of non-leading questions. This makes it difficult to “repair damage” done on cross unless the direct examiner has anticipated the damage and has prepared the witness for redirect examination. For example, if the redirect examiner wishes to elicit testimony that a prior inconsistent statement the witness signed was signed under time pressure, the most specific question the examiner can properly ask without leading is: “Why did you sign that statement?”

It is in part because of the difficulty of doing an effective redirect with non-leading question that it is said by some experts in trial advocacy that the “first rule” of redirect

⁷² As a control tactic, lawyers sometimes begin their cross examination by instructing the witness that all questions will be answerable only with “yes” or “no” and that the witness should not go beyond that answer. This is generally frowned upon and many judges will sustain objections to it on the ground that it is not counsel’s place to instruct the witness, but to simply ask the questions.

⁷³ This unrealistic attitude is undoubtedly influenced by trials in movies and television in which the real murderer is a witness for the prosecution, is exposed by defense counsel during cross examination, and confesses to the crime in open court.

examination is “Don’t!” Unless there has been damage on cross and that damage can be repaired by way of redirect, redirect will be a waste of time or, worse yet, will serve only to emphasize the damage done on cross.

b. Objections

A jury need not explain the reasons for its verdict. Consequently, the best way to assure that it does not rely on improper evidence in deciding a case is to keep it from hearing that evidence at all.⁷⁴ The most common method for doing so in trials is to have the lawyers interpose objections to improper evidence as it is being presented.⁷⁵

Form of Objections Objections are stated orally in open court during the trial. The objecting lawyer is required to state his or her objection and the ground for it, such as “Objection, your honor, hearsay.” If in the judge’s opinion the objection is clearly well taken or is clearly incorrect, the judge will rule immediately without considering any response from the other side. An objection that is correct will be “sustained” by the judge and one that is not correct will be “overruled.”

The judge may choose to hear a brief response to the objection and possibly a brief rejoinder from the objecting lawyer. In the course of argument, an “offer of proof” may need to be made since the judge, in order to rule on the objection, may need to know what answer the witness would give if allowed to answer. Any such offer of proof or extended argument will have to be heard outside the hearing of the jury at a “bench conference” with the judge. When such a conference is needed, the lawyers may ask to “approach the bench.” The lawyers then stand close to the judge’s bench and may need to speak in whispers if the courtroom is small. If the argument is extensive because the item of evidence is very important and the question of admissibility is a close one, the jury may need to be temporarily removed from the courtroom instead.⁷⁶

Effect of Objections on the Jury Lawyers will seek to avoid unnecessary objections and, when they feel the need to object, will keep in mind that they may be trying the jury’s patience. Witness examinations that are constantly interrupted by objections and bench conferences irritate jurors. Not only is the testimony difficult to follow, the jury will think the objecting lawyer is trying to hide something from them.

Motions to Strike Testimony Most objections will be made after a question is asked, but before the witness has a chance to answer. However, sometimes objectionable evidence comes out before an objection can be interposed. If the jury has already heard the evidence, the lawyer should make a motion to “strike the evidence from the record” and ask that the judge give an “instruction to disregard” the “stricken” evidence.⁷⁷ Clearly, it is very difficult for jurors to disregard something they have already heard, so some have characterized such instructions to disregard as attempts “to unring a bell.” When the evidence is truly crucial and an instruction to disregard it would be inadequate, it may be necessary to order a new trial.

Motions in Liminé Because objections cannot always be interposed in time and instructions to disregard testimony are imperfect, a better means of assuring that

⁷⁴ See FRCP 52; FRCrP 23(c).

⁷⁵ The grounds for objecting to evidence are discussed later in this chapter. See pp. 109-115.

⁷⁶ This is also called a “sidebar” conference if the judge has to go to the side of the bench to confer with the lawyers.

⁷⁷ Testimony that is “stricken from the record” still appears in the verbatim transcript of the trial. Striking testimony from the record simply means that the court formally declares that it is not proper evidence and must be disregarded by the jury in reaching a decision.

evidence is not disclosed is the “motion in limine.” This motion, literally a motion made “at the threshold,” seeks to obtain a ruling on the admissibility of evidence before the trial starts or at any other point before the witness takes the stand.

c. Exhibits: Real, Demonstrative and Documentary Evidence

Importance of Exhibits Exhibits are items of tangible evidence that must be formally authenticated and “admitted into evidence” during the trial. Exhibits are important because juries tend to give them greater weight than testimonial evidence. Tangible evidence cannot forget or exaggerate as witnesses can. Moreover, the jury can read or examine them over and over again in the jury room during their deliberation, while witness testimony lingers only in the memory of the jury.

Types of Exhibits Exhibits are generally of three types: “real” evidence, “demonstrative” evidence and documents. Real evidence comprises actual tangible items involved in the occurrence in dispute, such as the gun or the blood-soaked clothes in a murder case, or the clamp left in the patient during surgery in a medical malpractice case. Demonstrative evidence is anything that is used to represent or demonstrate something that cannot be brought into the courtroom, such as a diagram of the floor plan of a house that was the scene of the crime or a diagram of an intersection where an accident occurred. Documentary evidence comprises any writings relevant to the case. The overall goal for a lawyer seeking to use an exhibit at trial is to get it “admitted into evidence” — formally declared to be part of the official record of the case and thus appropriate for the jury to consider as evidence and take into the jury room at the end of the trial.

Procedures for Exhibits The overall procedural steps that must be followed are that the lawyer must (1) have the court reporter “mark the exhibit for identification” by giving it a number or letter for easy reference, (2) show the exhibit to opposing counsel, (3) “lay a foundation” for its admission and (4) “move the exhibit into evidence.” The need to lay a foundation for its admission requires that the lawyer satisfy the judge that the legal prerequisites for its admission into evidence exist. Laying a foundation is usually done by way of witness testimony. After the foundation has been established, to move the exhibit into evidence the attorney simply turns to the judge and says “I move that State’s Exhibit No. 34 be admitted into evidence.” The judge will then hear any objections to the motion from the other side and will rule.

More than one witness may be necessary to complete the foundation for an exhibit. Thus, for example, if drugs were seized during an arrest, a “chain of custody” must be established to show that the evidence is authentic and was not tampered with from the point that it was seized to the point it is introduced as evidence at the trial. This may involve calling everyone who handled the exhibit as a foundation witness, e.g., the arresting officer, the police courier who delivered the evidence to the police chemist, the chemist, and any custodian of evidence at the police station. As a result, counsel may not be able to complete the last step of moving the exhibit into evidence until after several witnesses are called. Since some of these witnesses will be testifying to matters other than things relating to the particular exhibit, foundation laying can sometimes stretch out over several days of trial.

Effectively Dealing With Exhibits The key to effectively laying foundations for exhibits is to do it as efficiently and unobtrusively as possible. The point of the foundation-laying — and what the jury is looking forward to — is the *content* of the exhibit. Anything seen by the jury as delaying getting to that content will be resented. One way to make the process more efficient is to mark the exhibits for identification

and to show them to opposing counsel before the trial starts, thereby eliminating two of the four steps in the process outlined above. The lawyer can then fit the foundation into the normal direct examination. For example, in seeking to introduce the note the robber passed to the night clerk demanding money, the prosecutor can simply go through the night clerk's description of the robbery, including reference to the note (something that the prosecutor would do in any event). Then all that need be done further is to draw the witness's attention to the exhibit and to ask the witness whether the exhibit is the note to which he has been referring in his description of the robbery. Having thus laid the foundation, the prosecutor can simply move its admission into evidence.

In civil cases, the availability of extensive discovery opportunities means that almost all issues of the admissibility of exhibits will be determined well in advance of trial. This will be done by way of "stipulation" — an agreement between the parties — or by pre-trial rulings of the trial judge.⁷⁸ In criminal cases, discovery is more limited, so pretrial resolution of exhibit issues is less likely.

4. Motions for a Directed Verdict

Following the plaintiff's or prosecution's presentation of evidence, the defense may move for a "directed verdict" on the basis of the plaintiff's evidence, even before presenting the defense case.⁷⁹ In a criminal case, a similar motion is made after presentation of the prosecution's evidence and it is often called a "motion for judgment of acquittal."⁸⁰ The motion seeks dismissal of the case on the ground that the plaintiff or prosecution has failed to produce sufficient evidence for rational jurors to return a verdict in its favor. The defendant has the right to make a second motion for a directed verdict or judgment of acquittal after all the evidence has been presented. This assures that the case that goes to the jury has been screened one final time to assure that there is sufficient for the jury to decide the case.⁸¹

5. Closing Arguments

The Nature of Closing Argument After both the plaintiff and defendant have "rested their cases" — meaning that they have presented all their evidence — it is time for "closing arguments."⁸² Closing arguments are the opportunity given to the lawyers in the case to address the jury directly and seek to persuade the jury to decide the case in their side's favor. Closing is certainly the most "flashy" of all the things that trial lawyers do in trials, but it is not necessarily the most important. If the evidence has not been presented effectively, a brilliant closing argument will not save the case.

Despite how it might sometimes appear to the casual observer, there are in fact limits on what a lawyer can do and say in argument. Generally not allowed are appeals to passion or prejudice, such as arguing or implying that the defendant in a criminal case is guilty because he is black or that a particular verdict will "clean up the drug problem in this city." Counsel may not misstate evidence or "argue off the record." This means that counsel cannot rely on facts that were not introduced into evidence at the trial. Similarly, when evidence is admitted for a limited purpose, the lawyer may

⁷⁸ See Chapter VII, pp. 226-239 (civil pre-trial procedures).

⁷⁹ In federal court, this motion is called a Motion for Judgment as a Matter of Law (JML). Federal Rule of Civil Procedure (FRCP) 50(a).

⁸⁰ See Federal Rule of Criminal Procedure (FRCrP) 29(a).

⁸¹ A similar motion can be made after a verdict is rendered. See *infra* p. 107.

⁸² As noted earlier, a motion for a directed verdict may be renewed at this time, and the case will be dismissed by the judge at this point if the plaintiff or prosecutor has not presented evidence sufficient for a rational verdict in its favor.

not argue a broader use of the evidence. For example, the lawyer may not argue that a prior conviction shows general bad character when it was admitted only to impeach credibility.⁸³ Finally, a lawyer is not permitted to state the lawyer's personal opinion as to the believability of witnesses or of the correctness of his client's case or of the guilt or innocence of the accused. Generally lawyers will not object even if the other side is transgressing some of these limitations during final argument, but this is not a legal restriction, only a traditional courtesy. Objections should be made if violations of the stated limitations are hurting one's case.

Trial Lawyer Techniques in Closing Argument The form of closing argument is not specified and there are a wide variety of styles among lawyers. Some are cool and analytical, while others are emotional and intuitive. However, most effective closing arguments will (1) focus the case by setting aside uncontested or less important issues and pointing out the *real* issues in the case; (2) argue the issues that have been brought into focus by carefully organizing the evidence that supports each of them and, where there is a conflict, explaining to the jury why it should accept the arguing party's version over the opposing party's version; and (3) relate the evidence the jury has just heard to the principles of law the jury must apply as set out in the jury instructions.

Closing argument is sometimes referred to as "summation," but that is misleading. A good closing argument will not just summarize the evidence; it will organize it and argue it. In all but the longest and most complicated trials, lawyers who start out their closing argument by announcing that they will now summarize all the evidence the jury has heard will be greeted by anguished facial expressions and then bored looks from jurors who already know the evidence well. What most jurors want and need is some guidance on what the evidence *means*. That is the primary purpose of closing argument.

Trial lawyers will usually try to construct a "theme" for their case. A theme is a shorthand characterization of the case or a "story" of the case that will be easily accepted by the jury as a valid archetype. It may serve to explain the entire case or only important parts of it. A common theme in a medical malpractice case defense would cast the plaintiff as "the ungrateful patient," who makes unreasonable demands and expects miracles. The Bible, Shakespeare, and proverbs provide material for many case themes, but themes can be found in all kinds of everyday experiences as well. A version of the Biblical saying, "only the wicked flee when no man pursueth," can be used to get the greatest effect out of evidence that the defendant tried to flee. In a similar vein, when a party has overreacted to something the opposing party did, the opposing party may quote Shakespeare: "methinks she doth protest too much." Prosecutors are often faced with trying to prove intent of the defendant circumstantially in the face of believable testimony from the defendant denying that he had such intent. The prosecutor might remind the jury, several times if need be, that "actions speak louder than words."

For a theme to work, it must be anchored in strong evidence, such as an unimpeachable witness or a document.⁸⁴ If the evidence on which it is based is weak, the theme will suffer accordingly. For example, the "wicked flee" approach will not work well if there is some doubt that the party *was* in fact fleeing. Moreover, the theme must be one with which the jury can readily identify. For example, a trial lawyer who uses stories about or quotations from famous male sports figures is not likely to get far

⁸³ Examples are hearsay statements admitted for a purpose other than their truth. *See infra* p. 112.

⁸⁴ Other guides for constructing themes are suggested in LUBET, *supra* note 47, at 1-14.

with a jury of all women. Finally, trial lawyers must always check their case theories to see if their theme can be turned around and used against them.

Analogies, sometimes presented in the form of a “personal anecdote” with which the jury can readily identify, are an extension of this form of theme construction. For example, a prosecutor who wants to encourage the jury to use a relatively small amount of circumstantial evidence to tie the defendant to the crime, can use some variant of the “sugar barrel” story:

We grew up poor in the south. We didn’t have much, but one treat that me and my brother had was that, once a week after supper on Saturday, Mama would give us each a spoonful of sugar from a big barrel where she kept it. That sugar sure tasted good! But we’d sometimes have a yearning for it before Saturday and we’d sneak into the kitchen and take some. Every time we did that, no matter how much we denied it, no matter whether we would sneak down there at midnight when my mama was asleep or when she was gone from the house — she would *always* know we’d done it and we would get a whipping. We began to think she could read our minds!

But later on, when we were grown up, we found out the reason: each time we would take some sugar, no matter *how careful* we were, we would spill the tiniest bit of it — just a few crystals — on the floor. Since Mama kept the floors real clean, she’d see it and would know we’d been somewhere we shouldn’t have been.

Now, the defendant here thought he had been *really careful* in covering up his crime, but he dropped some sugar crystals, too. Like my Mama, we can learn a lot from looking at those tiny crystals.

At this point the lawyer can go into the small clues left by the defendant and how they connect him with the crime.⁸⁵

6. Jury Instructions

Content of Instructions At the end of all the proofs and usually after closing argument,⁸⁶ the judge will provide jury instructions on the law applicable to the case. This is sometimes referred to as the “charge” to the jury. This will include the substantive law related to the claim made or offense charged, such as the requirements for a binding contract or the elements of murder. Many jurisdictions have standard or “pattern” jury instructions that are officially approved by the highest court of that state and which must be given in any case where they are applicable. However, not all points of law that arise in a case are covered by standard instructions and it becomes the task of the lawyers to write and submit proposed instructions to the court.

Instructions will also cover the law governing how the jury is to assess the evidence and decide the case. These instructions are generally not very detailed. The

⁸⁵ Some observers have noted that there is often an inverse relationship between the strength of one’s case and the amount of theatrics and story-telling that a lawyer engages in. As one trial lawyer confessed, “If the facts of my case are weak, I stand on the law. If the law in my case is weak, I stand on the facts. If both the facts and law of my case are weak, I stand on the *table*.” A lawyer facing an entertaining opponent can counter such efforts by arguing that the lawyer is “showing off” to avoid dealing with the serious problems with his case. This can be succinctly illustrated to the jury by using the story of the trial lawyer’s confession just related in this footnote.

⁸⁶ In some jurisdictions, jury instructions may precede the closing arguments. See, e.g., FRCP 51; FRCrP 30. The reason for this is to allow the lawyers to refer to the instructions during their argument. However, even in jurisdictions where argument comes before the instructions, the lawyer may freely refer to them because the judge will have gone over the instructions with the lawyers prior to closing argument.

jury is told to elect a “foreperson,” who will preside over deliberations and allow everyone a chance to speak. They are also reminded that they are the sole judges of the credibility and weight of the evidence. But no more specific instructions on how to assess particular types of evidence is provided.

Standards of Proof The jury is told what standard of proof it is to apply in deciding the case. In a criminal case, the standard is “proof beyond a reasonable doubt.” Thus, the jury is told that it may find the defendant guilty only if it finds beyond a reasonable doubt that the defendant committed the crime and that it must acquit the defendant if it has a reasonable doubt as to the defendant’s guilt. In a civil case, the standard of proof is the “preponderance of the evidence,” sometimes referred to as the “greater weight of the evidence.” There is also an intermediate standard of “clear and convincing evidence” that is used in some civil cases that have very serious consequences, such as terminations of parental rights and involuntary commitments to mental hospitals. According to some, if the criminal and normal civil standards were expressed as percentages, they would be 95% and 51% respectively, with “clear and convincing” weighing in somewhere around 75-80%.

A typical instruction explaining reasonable doubt tells the jury:

Reasonable doubt means a doubt based upon reason and common sense that arises from a fair and rational consideration of all the evidence or lack of evidence in the case. It is a doubt that is not a vague, speculative or imaginary doubt, but such a doubt as would cause reasonable persons to hesitate to act in matters of serious importance to themselves.

A typical instruction explaining the civil standard is:

When I use the expression “by a preponderance of the evidence,” I mean that you must be persuaded from a consideration of all the evidence in the case that the issue in question is more probably true than not true. Any findings of fact you make must be based on probabilities, not possibilities. It may not be based on surmise, speculation, or conjecture.

Jury instructions are read to the jury and, until recently, the jury was usually not given a copy of them. Given the inherent weaknesses of reading 15 minutes or more of legal instructions, more and more jurisdictions are allowing or requiring that judges give the jury a copy. Studies show that, while juries are good fact-finders, they do less well in getting legal standards straight.⁸⁷ There is no direct judicial check on jury misunderstanding of the law, unless the jury asks the judge for assistance. However, the judge can set aside any verdict (other than a criminal acquittal) that is not warranted by the facts or the law.⁸⁸

Judicial Comments on the Evidence Generally, judges in the United States do not summarize the evidence for the jury or comment on it. While federal judges at least theoretically have this power, and commenting on the evidence was at one time an accepted custom, the practice has fallen into disuse today as judges are more con-

⁸⁷ HARRY KALVEN, JR. AND HANS ZEISEL, *THE AMERICAN JURY* 149-50 (Little, Brown 1966). See also R. P. Charrow and V. R. Charrow, *A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) and KASSIN & WRIGHTSMAN, *supra* note 42, at 144-167. One study shows that jurors’ understanding of instructions is increased significantly when they take the opportunity to ask the judge questions. Alan Reifman, Spencer M. Gusick, and Phoebe Ellsworth, *Real Jurors’ Understanding of the Law in Real Cases*, 16 Law & Human Behavior 539 (1992).

⁸⁸ See *infra*, p. 107. See also Chapter VII, p. 237, where pre-trial screening devices are discussed. Another standard of proof applied in civil cases with serious consequences (e.g., termination of parental rights, involuntary commitment to a psychiatric hospital) is proof “by clear and convincing evidence.”

cerned lest they improperly influence the jury.⁸⁹ The only vestige of the judicial summary and comment that remains is that the judge may read to the jury at the parties' request a brief "theory of the case" instruction written by the parties that outlines each side's principal contentions in summary form.

7. Deliberation and Verdict

Because jury deliberations are undertaken in secret and every jury is unique, little of a general nature can be said about what happens in deliberations. However, there are composite descriptions based on observations of mock juries and some jurors have written about their experiences.⁹⁰ At some point, often at the very beginning, a tentative vote is taken to determine the extent of disagreement. This is followed by discussion and more votes until the jury either agrees or is "deadlocked."

Deadlocked and Hung Juries If the jury reports that it is deadlocked, the judge will usually send the jurors back to deliberate with the admonition to try to see if they can work out their differences. Sometimes, an additional instruction is given to them that is designed to motivate jurors to reconsider their positions. Called an *Allen* charge or a "dynamite charge," it tells the jurors in essence to think seriously about their position and listen carefully to the arguments of the other jurors.⁹¹

In criminal cases in federal court and all but 5 states, jury verdicts — whether for conviction or acquittal — must be unanimous.⁹² In civil cases, unanimity is required in federal court, but the parties can agree to less. And in many states require only a simple or a two-thirds majority. A jury vote that does not meet the applicable standard for decision results in a "hung jury." If the jury is truly deadlocked, the judge has no choice but to "declare a mistrial."⁹³ As soon as the jury has reached a verdict, it communicates that to the judge. Everyone assembles in the courtroom, the foreperson of the jury hands the verdict to the judge, who checks it for proper form and then hands it back to the foreperson to read aloud.

Requests for Evidence or Instructions Sometimes the jury will request that certain testimony be read to them or, if written jury instructions are not provided, that certain portions of the instructions be reread. Jurors may request exhibits that have not already been taken into the jury room. Judges are somewhat reluctant to read only the portion of the testimony or instructions that the jury requests for fear that doing so would overemphasize the requested part to the exclusion of other parts. Consequently, to the extent possible, the judge will try to give them the entire testimony of the witness they asked about or the entire instructions, adding the admonition to consider the material

⁸⁹ See *Quercia v. United States*, 289 U.S. 466 (1933) conviction because of trial judge's comment to the jury: "I think that every single word that man [the defendant] said, except when he agreed with the Government's testimony, was a lie"). Not all judges agree that judges should be reticent to summarize and comment on the evidence. Detailed proposals for a broader role for the judge are discussed by a federal judge in Jack Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Jurors*, 118 F.R.D. 161 (1988).

⁹⁰ See Phoebe Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROB. 205 (1989) (describing a composite picture based on observing mock juries). Two juror accounts are MELVYN ZERMAN, CALL THE FINAL WITNESS 122-42 (Harper & Row 1977), reprinted in part in LANDSMAN, *supra* note 4; VICTOR VILLASENOR, JURY — THE PEOPLE VS. JUAN CORONA (Little, Brown 1977).

⁹¹ The *Allen* charge is named for the case in which the Supreme Court approved its use, *Allen v. United States*, 164 U.S. 492 (1896). "Dynamite charge" is a play on words. "Charge" can mean both a jury instruction and an explosive device.

⁹² Constitutional requirements regarding unanimity are discussed in Chapter VIII, p. 304.

⁹³ Mistrials may also be granted whenever continuation of a trial is impossible or unfair for other reasons, such as misconduct of the lawyers, parties, witnesses or jurors that cannot be "cured" by an instruction to the jury.

they requested in the context of all the evidence and instructions.

Polling the Jury There is little that the lawyers can do during deliberations except appear and argue about any supplemental instructions or other problems that arise in deliberations. However, the losing side has the right to “poll the jury.” The judge will then require that each juror answer individually whether in fact the verdict read was the one he or she agreed to. Occasionally a juror who is polled blurts out that it was not his or her verdict. The problem must be ironed out by more deliberation and, if necessary, a mistrial will be declared, resulting in a new trial before a new jury.⁹⁴

Form of the Verdict In all criminal cases and in most civil cases, a “general verdict” stating the bare conclusion of the jury is rendered. In a criminal case, the form for a general verdict will allow the jury to check either guilty or not guilty on each of the charges tried. In a civil case, there will similarly be two choices, either “We find for the plaintiff and award damages of \$ _____” or “We find for the defendant.”

In civil cases, the judge may use a “special verdict” or “general verdict with interrogatories.”⁹⁵ Special verdict forms direct the jury to answer the component questions that are necessary for a general verdict and, based on those answers, the judge determines what the final resolution of the case is. Thus, in a libel case, the jury may be asked such questions as “Did the Defendant accuse the Plaintiff of taking a bribe in the article published in *Smithton Observer* on January 10, 1997?” “Did this statement defame the Plaintiff?” “Was the statement privileged?” and so on. Components of damages may similarly be subject to a special verdict. The jury would then state separate amounts for each economic loss suffered, such as lost wages, hospital and medical expenses, impairment of future earning capacity, and for non-economic losses, including fear, shock and pain at the time of the injury, pain and suffering thereafter, loss of companionship or consortium, and whatever other components of non-economic harm are allowed in that jurisdiction.

General verdicts with interrogatories are like ordinary general verdicts in that the jury determines the final conclusion of the verdict itself, but the final conclusion is then followed by questions designed to check whether the jury had the correct reasons for that conclusion. Thus, questions similar to those mentioned above for the special verdict might appear.

It is usually the job of the lawyers to draft a special verdict or a general verdict with interrogatories. To the extent that such verdict forms serve to “rationalize” the jury’s decision-making process, they are favored by defendants in civil tort cases to counteract feelings of sympathy for the injured plaintiff. The problem with these devices lies in the difficulty of framing precise, yet understandable, questions for the jury. These verdict forms increase the danger that a verdict that is warranted by the evidence would have to be thrown out just because the jury made mistakes in answering the questions.

8. Post-Trial Motions

Judgment NOV Motions The defense may make a motion *after* a verdict is rendered on this same grounds that a motion for a directed verdict is made earlier in

⁹⁴ A mistrial is declared not just when jurors cannot agree, but whenever the trial process aborts. A mistrial can be declared where there is misconduct of the jury or of counsel that cannot be cured. Mistrials also take place when the trial cannot continue because illness or other disaster has reduced the number of jury members to less than the minimum needed or has otherwise made it impossible to continue the trial. Lawyers may move for a mistrial or the judge may declare one on his or her own initiative.

⁹⁵ See FRCP 49.

the proceeding.⁹⁶ In civil cases, this is called a motion for “judgment notwithstanding the verdict” or “judgment NOV” for the Latin *non obstante verdicto*.⁹⁷ However, a directed verdict or judgment NOV may be granted only if there is a “no legally sufficient evidentiary basis for a reasonable jury” to decide for the plaintiff.⁹⁸

New Trial Motions The judge in a civil case may also “set aside” the verdict and grant a new trial if it is “against the great weight of the evidence” or if liability is correct, but the verdict is grossly excessive or inadequate. If it is only the amount of the verdict that is improper, the judge may grant a “remitter” or an “additur” — ordering a new trial on grounds of excessiveness or inadequacy of the verdict conditioned on the parties consenting to either a reduction of or addition to the amount awarded by the jury. However, the judge may not order a new trial simply because the judge disagrees with it. Thus, it is said that the judge may not sit as a “thirteenth juror.”

Post-Trial Motions in Criminal Cases In criminal cases, the defense may also make a motion after a guilty verdict that corresponds to the directed verdict motion or motion for judgment of acquittal made earlier in the trial. It may be called a motion for judgment notwithstanding the verdict or sometimes a renewed motion for judgment of acquittal.⁹⁹ The ground for granting such a motion is that the evidence presented at trial was insufficient for the jury to find the defendant guilty beyond a reasonable doubt. The prosecution is not permitted to move to set aside an acquittal.¹⁰⁰

Impeaching the Verdict A party may also seek to set aside the verdict on the ground that the jury acted improperly during deliberations or trial. This is called “impeaching a verdict.” However, motions to impeach the verdict are looked upon with disfavor. Such a rule serves to preserve the secrecy of the jury room and to prevent lawyers from hounding jurors, trying to discover evidence of irregularities.¹⁰¹ A typical modern rule on the ability of a juror to impeach a verdict is Federal Rule of Evidence 606. It makes an intrinsic-extrinsic distinction: a court may not receive any evidence as to any matter or statement occurring during the course of the jury’s deliberations or the effect of anything on deliberations unless it concerns “extraneous prejudicial information” brought to the juror’s attention or some “outside influence” on the jury.¹⁰² Thus, testimony would be allowed as to such things as bribery, comments to a juror during deliberation by anyone other than another juror (such as a lawyer, party or court personnel), or exposure of a juror to a newspaper article on the case. The result of this rule is that, so long as there is substantial evidence in the record to

⁹⁶ See *supra* p. 102.

⁹⁷ In civil cases in federal court, this motion is called a Renewed Motion for Judgment as a Matter of Law (JML). See FRCP 50. This emphasizes the fact that the motion is not a separate motion, but simply delayed consideration of the earlier Motion for JML made before the case was submitted to the jury.

⁹⁸ FRCP 50(a). As explained by the court in *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969), in considering a motion for judgment NOV, a judge must consider all the evidence “in a light and with all reasonable inferences most favorable to the [plaintiff],” and may reverse the verdict only if the judge “believes that reasonable men could not arrive at a . . . verdict” for the plaintiff. “[I]f there is substantial evidence [for the plaintiff], that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach” a verdict for the plaintiff, it must be affirmed. The opinion goes on to admonish that “it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.”

⁹⁹ See FRCrP 29(c).

¹⁰⁰ Doing so would violate the right against being tried twice for the same offense secured the so-called “double jeopardy” clause of the 5th Amendment. See *infra* Chapter VIII, pp. 310-313.

¹⁰¹ *Vaise v. Delaval*, I.T.R. 11 (1785) (Mansfield, L.J.); *McDonald v. Pless*, 238 U.S. 264 (1915).

¹⁰² FRE 606(b). See *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982) (new trial ordered because juror performed his own experiment to test whether the fire could have started as the plaintiff’s expert testified and then told other jurors).

support the verdict, it will not be set aside based on misunderstanding of the evidence or the law or on anything else that took place in the jury room.¹⁰³

D. Evidence Law

As already alluded to, the law of evidence is relatively complex. In addition, trial lawyers must be sufficiently familiar with evidence rules to be able to interpose timely objections in the lightening quick pace of the adversary trial. Presented here is a simplified overview of the major evidentiary limitations that apply in jury trials.¹⁰⁴

1. The Requirement of Personal Knowledge for Testimony

Witnesses may testify only to matters about which they have personal knowledge.¹⁰⁵ In other words, they must have experienced first-hand through one of their senses the events they describe. Personal knowledge may not be assumed. It must be established *by testimony*. Thus, a lawyer who calls a witness to testify to seeing a robber in a hotel lobby will first have to ask questions that show that the *witness* was in the lobby of the hotel and was able to see what was going on there. While all this seems simple in the abstract, it is a problem for many lawyers, because of the natural tendency of people who know the facts of a case well to forget that other people do not share that knowledge. As a result, they often start in the middle of the witness's story without first laying a foundation establishing that the witness has personal knowledge.

2. Opinion Evidence

Lay Opinions Generally layperson (non-expert) witnesses may testify only to facts and may not testify to conclusions. The reason for this is that it is up to the *jury* to decide what conclusions to draw from the facts. Thus, it is improper for a witness to testify that the defendant "was driving too fast for the existing road conditions" because that is for the jury to decide. But it is hard to tell the difference between facts and conclusions since almost any label language places on an event is a conclusion of sorts.

For example, assume a witness testifies, "the defendant threw a brick." Taking only one word in the sentence as an example, "throwing" is a conclusion based on the fact of the defendant's having the brick in his hand, holding his arm extended behind his head, moving his arm over his head swiftly in a forward direction, and letting go of the brick at some point when his hand came in front of his body. Also, calling the object "a brick" is a conclusion based on the facts that it was square, red and about the size of other things that qualify as bricks, appeared to be made of clay, and appeared to be heavy. Clearly, if people were not allowed to use *any* conclusions, their speech would be very strange indeed. These kinds of "everyday" conclusions must be allowed.

Consequently, the rule against conclusions provides an exception for conclusions

¹⁰³ After the trial is over, jurors may freely talk with whomever they please about what went on in the jury room. Sometimes, lawyers in the case make a point of asking the jurors questions, both to see if there were any extrinsic influences that could lead to impeachment of the verdict and in order to learn from the experience by getting the jurors' impressions of their presentation.

¹⁰⁴ For more detailed analysis of the law of evidence, see ROGER C. PARK, DAVID P. LEONARD, STEVEN H. GOLDBERG, *HORNBOOK ON EVIDENCE LAW*, 2D ED. (West 2004); JOHN W. STRONG, ET AL., *MCCORMICK'S HORNBOOK ON EVIDENCE*, 5TH ED. (West 1999); MICHAEL H. GRAHAM, *FEDERAL RULES OF EVIDENCE IN A NUTSHELL*, 6TH ED. (West 2003); ARTHUR BEST, *EVIDENCE: EXAMPLES AND EXPLANATIONS*, 5TH ED. (Aspen 2004). For a book exploring the stories behind famous evidence cases, see RICHARD O. LEMPERT, *EVIDENCE STORIES* (Foundation 2006).

¹⁰⁵ See Federal Rule of Evidence (FRE) 602, reprinted in *FEDERAL RULES OF EVIDENCE WITH EVIDENCE MAP* (West 2006). Trials in federal court are governed by the FRE, first promulgated in 1975. Before 1975, evidence law in federal courts was governed by case law, with a few isolated issues governed by statute. Most state courts have followed the lead of federal courts and have evidence rules very similar to the FRE.

that are (1) based on the perception of the witness and (2) “helpful to a clear understanding of the witness’s testimony.”¹⁰⁶ The first condition is simply a restatement of the personal knowledge requirement. The second requirement of “helpfulness” simply means that using the conclusion would avoid cumbersome and abnormal speech. This second requirement is certainly satisfied in the brick-throwing example above. Other lay conclusions that are permitted are statements such as that a person was “drunk” or that a car was going “thirty-five miles per hour.”

Expert Opinions If scientific, technical or other specialized knowledge would be useful to understand a case, an expert witness may testify. Experts have special skills, education, training or experience that permit them to testify to conclusions in their field of expertise that laypersons could not.¹⁰⁷ Physicians testifying in personal injury cases, psychiatrists testifying in criminal cases or child custody cases, and engineers testifying in product liability cases are perhaps the most commonly encountered experts. However, more exotic forms of experts, such as accident reconstruction experts, exist as well.¹⁰⁸

Court-appointed experts are possible.¹⁰⁹ However, they are not often used. Consistent with adversary principles, each side finds, prepares and presents its own expert testimony. This is a recognition that in specialized and scientific fields, just as when “ordinary” facts are involved, there is often more than one perspective on the issue. To the extent possible, it is appropriate that all sides of the question should be explored.

3. Relevance and Character Evidence

General Relevance Standard The federal rules and many state evidence rules set a low threshold of probative value, deeming relevant “evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹¹⁰ But this lax standard of factual relevance must be weighed against other factors, primarily the danger of undue prejudice. The rule states that evidence that is otherwise relevant “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”¹¹¹ For example, gruesome, close-up color photographs of the victim in a murder case probably pass the threshold test of relevancy. However, they are often excluded from evidence in jury cases if their probative value is low, such as where the issue of how the victim died is uncontroverted, and there is great danger that they could inflame the jury

106 FRE 701.

107 See FRE 702-706.

108 The Supreme Court recently expanded the possibility of a wider variety of experts being permitted to testify by holding that FRE 702 overruled the earlier common law test of expert evidence: whether given evidence meets “general acceptance” in the scientific community. In its place, FRE 702 establishes to a more flexible test of whether the evidence “rests on a reliable foundation and is relevant to the task at hand.” Relevant factors as to the reliability of a particular scientific theory or technique are testing, peer review, error rates, and “acceptability” in the relevant scientific community. *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (admitting testimony of experts that countered published scientific literature that drug Bendectin did not cause birth defects). See also *Kumho Tire, Ltd. v. Carmichael*, 526 U.S. 137 (1999) (*Daubert* applies not just to “scientific” expertise, but also to experts who are not scientists, such as engineers; affirming trial court’s rejection of engineers testimony as to the caused of failure of a tire).

109 See FRE 706.

110 FRE 401 (emphasis added).

111 FRE 403.

and interfere with their ability to be fair to the defendant.

Evidence of Character The general rule on character evidence is that “[e]vidence of a person’s character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.”¹¹² Thus, in a suit for damages for injuries in an automobile collision, evidence of prior accidents the defendant was involved in will not be admissible to prove he was a “bad driver.” Similarly, the prosecution in a criminal case generally cannot introduce evidence of the defendant’s bad character.¹¹³ The rationale for excluding bad character evidence is that juries may use it to convict criminal defendants or hold civil defendants liable simply for being “bad” people and not because they in fact did what they are accused of doing in a given case.

The prohibition is not complete, however. The prosecution in a criminal case is allowed to present evidence of the defendant’s *bad* character to rebut any evidence the *defendant* has chosen to present that shows his *good* character.¹¹⁴ Also, witnesses who take the stand to testify — including a criminal defendant who chooses to do so — are subject to the possibility that some of their prior felony convictions and perhaps some other prior bad actions will be admitted into evidence to the extent that they bear on the witness’s ability to tell the truth (e.g., a prior conviction for perjury or fraud). However, the court is required to weigh carefully evidence of a witness’s or party’s criminal record to determine whether its probative value is outweighed by its prejudicial effect.¹¹⁵

4. The Rule Against Hearsay and Its Major Exceptions

Hearsay testimony, roughly speaking, is testimony about something someone else said. A more complete definition is that hearsay is evidence of a statement, made earlier out-of-court, that is now being offered to prove the truth of what it asserts.¹¹⁶ The problem with hearsay is its unreliability based on the lack of opportunity for the party against whom it is offered to confront and to cross-examine the person who made the statement at the time it was made. The rule has ancient beginnings in English law. A common example of hearsay occurs whenever there is an automobile accident, and a witness to the accident describes it to a police officer, but then, in the confusion of the accident, disappears. The police officer generally cannot testify at a later trial as to what the person said. It does not matter that we know the person’s name or that what

¹¹² See FRE 404(a).

¹¹³ See FRE 404(a). If character is an element of the offense or claim or defense, then it is fully admissible. Thus, in the example given in the text of proving the character of a “bad driver,” such evidence is not admissible in a suit to prove the *driver’s* negligence. However, it may be admissible in a suit against the *owner of the car* for negligently entrusting the car to a poor driver if the owner knew of the bad driving history. Character evidence in any event may properly be considered in determining the sentence for a criminal defendant. However, sentencing hearings are proceedings separate from the trial of the case, where only the question of guilt is determined. See Chapter VIII, pp. 274-275.

¹¹⁴ FRE 404(a)(1).

¹¹⁵ See FRE 608, 609 and 403. Evidence of prior bad acts may be admissible to prove something *other than* the character of the person, such as to show motive, absence of intent, mistake, identity or common scheme or plan. FRE 404(b). Once a witness learns through a pretrial ruling by the judge that the prosecution will be permitted to bring up his or her prior bad conduct on cross examination, it is a common tactic for the conduct to be brought out first on direct examination in a preemptive effort to “take the sting out” of the jury hearing it for the first time on cross examination. This is risky as it constitutes a waiver of the right to appeal the trial judge’s ruling that the evidence is proper. See *Ohler v. United States*, 529 U.S. 753 (2000) (defendant herself brought up her prior convictions; held a waiver of right to appeal the trial judge’s pretrial ruling).

¹¹⁶ FRE 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Note that this includes prior out-of-court statements made by the witness as well, *i.e.*, where the “declarant” and the witness at trial are the same person.

the person told the police officer is consistent with other admissible evidence.¹¹⁷

There are two general categories of out-of-court utterances that are admissible despite the hearsay rule. Since hearsay is defined as an out-of-court statement that is offered to prove the *truth of what it asserts*, the first category of admissible statements consists of those that are *not* hearsay because they are offered for some purpose other than their truth. The second category of admissible statements comprises those that meet the definition of hearsay, but fall within some exception to the rule against hearsay.

a. Statements Not Offered for Their Truth

When a statement is offered for a purpose other than that of proving what the speaker intended to assert in it, then it is not subject to the danger that the speaker is lying. This is so because we are ignoring what the speaker asserts and are instead looking at an *unintended* meaning. For example, assume that George Jones seeks to testify that John Smith called him on the telephone on a particular day and in the course of the conversation Smith said “It is raining in Peoria today.” This is hearsay *if* it is offered to prove that it was raining in Peoria at that time. However, if the statement is offered in evidence for *any other* purpose, it is not hearsay. It would be admissible, for example, if it were offered to show that the phone line was working, that John Smith spoke the English language, that John Smith was alive that day, that John Smith had not lost his voice, that John Smith knew George Jones’s telephone number, or for some other purpose. The three most common instances of using out-of-court statements indirectly for non-hearsay purposes follow.

Statements Offered to Show an Effect on Hearer Assume Barney is arrested in a building for burglary (breaking into a building with intent to commit a crime therein). He offers evidence that the reason he broke into the building was that a little girl told him that there was a fire in the building and that her mother was trapped inside. Normally what the little girl said would be hearsay.¹¹⁸ However, Barney is permitted to testify to what she said to him because Barney is *not* offering the statement to prove that there was a fire and that the girl’s mother needed to be rescued. He is offering it only to show the *reason* why he broke into the building.

Statements Offered to Attack Credibility Out-of-court statements that are inconsistent with in-court testimony do not violate the rule against hearsay. In the telephone example above, assume John Smith, the person who said on the telephone that it was raining in Peoria, testifies at a later trial that it was *not* raining in Peoria on the day in question. Evidence of his inconsistent statement over the telephone (testified to by anyone who heard it) is not hearsay. The theory is that the out-of-court statement is offered *not* to prove that it was in fact raining, but to impeach Smith’s credibility — to show that Smith made a statement contrary to his trial testimony and therefore should not be believed.¹¹⁹

Legally Operative Language This includes any out-of-court utterance that has overriding legal significance beyond anything asserted in it. For example, one might wonder why the contents of a contract, which are out-of-court statements, are

¹¹⁷ *But see infra* p. 115, where the “catch-all” exceptions to hearsay are discussed.

¹¹⁸ This would be true even if the little girl was available to testify at the trial. *See supra* note 116.

¹¹⁹ It follows that it would not be proper for the jury to use the inconsistent telephone statement as substantive proof that it *was* raining in Peoria. Jurors are often puzzled by an instruction from the judge explaining that, because the prior inconsistent statement was introduced solely for its relevance to Smith’s credibility as a witness, they may use it only for that purpose and not for its substantive content.

admissible in evidence. Those contents and any words of offer or acceptance are not hearsay because they are said to have *legal significance without regard to what they assert*. It is the fact that the statements were made that is crucial, not any factual assertions they make. In fact, it is likely that the contract sets out only promises, which do not assert any facts. Other examples of legally operative language are the defamatory statement made by the defendant in a defamation case and the words urging the commission of a crime in a conspiracy or incitement case.

b. Exceptions to the Rule Against Hearsay

There are many exceptions to the rule against hearsay. There are twenty-nine in the Federal Rules of Evidence, including an open-ended exception, discussed below.¹²⁰ Because the rule against hearsay contains so many exceptions, some have argued that it should be abolished.¹²¹ However, much to the consternation of law students who have to learn its intricacies, the rule remains. The exceptions discussed here are only some of the major ones.

The exceptions discussed below apply to statements that are clearly hearsay, *i.e.*, statements that are offered to prove what the speaker intended to assert and therefore their reliability depends on the credibility of the speaker. Nonetheless, they are admissible in evidence to prove what they assert, generally because (1) there is something about the nature of the statement or the circumstances in which the speaker utters it that provides some *collateral guarantee of reliability* or (2) there is some *necessity for hearing the statement* in view of the difficulty of proving the matter asserted in any other way.

(1) Party Admissions

Any statement made by a party that *the opposing party* seeks to introduce at trial will be allowed.¹²² For example, Dan's dog bites Peter. After the attack, Dan states to Wilma: "My dog bit Peter." In a suit by Peter against Dan for damages suffered as a result, Wilma will be allowed to testify to Dan's statement because it is a statement of a party (the defendant) and it is being offered by the plaintiff Peter, an opposing party. Though there are many reasons to allow one party to freely use pre-litigation statements made by the other party, the main one is this. If an *opposing party* is seeking to use the statement, then it must be against the interests of the speaker-party. Therefore, it is likely to be true, since people do not normally say things that are to their detriment unless they are true.¹²³

(2) Business Records

Business records potentially include any routinely kept records of any person or organization that keeps such records in the ordinary course of its business activities. Common examples are medical records from doctors' offices or hospitals, records of governmental agencies and accounts and other records of private businesses.¹²⁴ The

¹²⁰ See FRE 803, 804 and 807.

¹²¹ This was actually proposed, but quickly dropped when the Federal Rules of Evidence were adopted in 1975.

¹²² See FRE 801(d)(2).

¹²³ The Federal Rules of Evidence treat party admissions, not as exceptions to hearsay, but as not being hearsay at all. However, admissions are commonly referred to as an exception and that status makes sense, so that is the way they are classified here.

¹²⁴ See FRE 803(6). The definition requires that the entry in the records must be made (1) at or near the time the recorded event took place, (2) by, or from information provided by, a person with knowledge of the event recorded, (3) in records kept in the ordinary course of business (4) by an organization which makes it a regular practice to keep such records. *But see* FRE 803(8) (police reports are not admissible

collateral guarantee of reliability for this exception is the *regularity* with which business records are kept. If every time a payment is made, an entry is made in a ledger, then using the ledger to prove payment would seem to be reliable. Necessity is also a consideration, given that it is extremely doubtful a clerk who took the payment would actually remember the amount, when it was made or who made it. However, to protect against falsification or self-serving records, the rule provides that the court can refuse to admit such records if “the source of information or the method or circumstances of preparation indicate lack of trustworthiness.”¹²⁵

(3) Excited Utterances

The behavioral assumption behind this exception is that persons who are startled by a sudden event will correctly report that event, since they will not have the time or presence of mind to make up a lie about it. For example, a bomb explodes and Willy, hysterical, screams, “It’s a bomb and it was thrown from that car over there!” Willy’s statement is an exception to hearsay and a witness who heard it may testify about it to prove that there was a bomb and that it came from a particular car.¹²⁶

(4) Present Sense Impression

The rationale for this exception is similar to the excited utterance, except that there is no requirement of excitement, only a requirement that the description of the event take place while it is going on or shortly thereafter.¹²⁷ For example, X and W are standing on the street corner talking to each other with X looking toward the intersection and W facing X. Over W’s shoulder, X sees an accident happen and says “That furniture truck just ran the red light.” W will be permitted to testify to what X said. Related to present sense impression is the matter of identification of a person after perceiving him, such as a policeman testifying after a lineup that the victim said “that’s the man who did it.” However, an extra safeguard is provided for identification testimony by the rules, which require that the victim who made the statement be available for cross examination about the circumstances of the statement.¹²⁸

(5) State of Mind

Examples of statements regarding one’s state of mind are where the witness reports that the person said at some prior time “my leg hurts,” “I feel bad,” “I’m going to New York tomorrow.” Usually people who make such statements do not think about their possible significance in later litigation, although it is always possible that the statement is staged for that purpose. An additional overriding reason they are permitted is the difficulty of proving state of mind by any other method.¹²⁹

(6) Other Exceptions

Merely naming some of the other exceptions to the hearsay rule will suggest what collateral guarantees of reliability exist that make them admissible: statements made for purposes of medical diagnosis, records of vital statistics, marriage and baptismal certificates, market reports, reputation concerning family history and boundaries of land, dying declarations, and statements against pecuniary or penal interest.¹³⁰ The

in criminal cases).

¹²⁵ Police reports of criminal investigations are within the business record exception, but in criminal cases they are excluded from the exception and are thus inadmissible hearsay. See FRE 803(8).

¹²⁶ See FRE 803(2).

¹²⁷ See FRE 803(1).

¹²⁸ See FRE 801(d)(1)(C).

¹²⁹ See FRE 803(3).

¹³⁰ These are set out in other sections of FRE 803 and FRE 804.

Federal Rules of Evidence also provide a residual “catch-all” hearsay exception that allows a court to admit hearsay that is not covered by any existing exception. The residual exception reflects the two bases underlying rationale of the specific exceptions. It provides that a hearsay statement not covered by the specific exceptions that has “equivalent circumstantial guarantees of trustworthiness” and “is more probative . . . than any other evidence which the proponent can procure” is admissible.¹³¹

E. Criticisms of the Adversary System

There have been and continue to be debates about the assumptions underlying the adversary system. Both the justifications and the criticisms are largely based on untested behavioral assumptions and anecdotal evidence. In addition, proposals for radical change are somewhat pointless given that at least some aspects of the adversary system are enshrined in the Constitution.¹³² Nevertheless, we should review some of the major criticisms that have been raised and debated.¹³³

1. Abuse of Party-Control

Witness Preparation and Abuse Critics point to all the opportunities for abuse that exist when the parties are in control of investigating and presenting the case. One target is the accepted practice of lawyers preparing “their” witnesses to testify. There are advantages to proper witness preparation: it makes the testimony more to the point. But it is argued that witness preparation allows for the possibility of lawyers prompting the witness to testify to things that are not true. And, critics point out, cross examination by the other side is hardly a match for a well-prepared witness. The result, they argue, is likely to be that the other side will feel it necessary to attack the witness in any way possible to undermine their credibility, thus turning the witness stand into a “slaughterhouse of reputations” with courts unable to restrain “bullying” of witnesses by lawyers who “forget that they are officers of the court.”¹³⁴

Supporters point out that lawyers are prohibited by both professional ethics and the criminal law from suborning perjury or otherwise perpetrating a fraud upon the court. But beyond that, the supposed invincibility of lawyer-prepared witnesses to impeachment ignores the scope and power of cross examination, aided by discovery, to uncover fraud. Moreover, juries are particularly prone to be suspicious of evidence that sounds “too good.” Indeed, many lawyers are careful not to “over-prepare” witnesses for this reason. And the amount of preparation the witness has been through can be explored on cross-examination. As for abusive cross-examination tactics, lawyers who conduct themselves in this manner will be admonished by a good trial judge. But the most effective restraint on lawyers is the fact that such tactics are usually counterproductive in front of a jury, which is far more likely to identify with the hapless witness than with the bullying lawyer.

¹³¹ FRE 807. Another important part of evidence law is the law of “privileges” covered by FRE 501. Information communicated in the course of certain special relationships, such as lawyer-client, doctor-patient, priest-penitent and between spouses is said to be “privileged” and may not be divulged under compulsion at any time. See also *infra* Chapter VII, p. 234 (exemption from discovery) and Chapter IV, p. 161 (attorney-client privilege).

¹³² See *Herring v. New York*, 422 U.S. 853 (1975) (the constitutional right to counsel “has been understood to mean that there can be no restriction on the function of counsel in defending a prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments”).

¹³³ For a more complete, but somewhat partisan account of criticisms of the adversary system and responses to those criticisms, see LANDSMAN, *supra* note 4, at 24-76 and FREEDMAN, *infra* note 151, at 26-42.

¹³⁴ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ABA REPORTS 395, 405 (1906).

Benefits of Party Control Supporters of the adversary system emphasize that, even if party control may have its risks, it has important benefits. When the parties have extensive and direct input into the process by which their case is decided, they are more likely to feel that their point of view was fully aired and was understood as well as it could be — even if it was ultimately rejected. In this way, party control does two things. First, it promotes the legitimacy of judicial decisions, which depend first and foremost on voluntary acceptance by society as legitimate and only secondarily on state coercion. Second, a system that gives individuals direct participation in and control over litigation affecting their lives affirms human dignity and value. Even if one loses a hearing, active party participation at that hearing “express[es] the elementary idea that to be a *person*, rather than a *thing*, is at least to be consulted about what is done with one.”¹³⁵ The greater the opportunity to be heard fully in the manner that one wishes to be heard, the greater the respect that is paid to human dignity and worth. Given the threat to individuality posed by expanding governmental power and the pressures of “efficiency” in modern society, supporters of party control argue that there is a greater need today than ever before for individuality-reinforcing institutions.¹³⁶

The Government as Partisan Litigant Special difficulties can arise in an adversary system when the *government* is involved as a party. In many countries, the prosecutor is a quasi-judicial official who is above the partisan fray and “sleeps well even after an acquittal.”¹³⁷ The prosecutor in the United States is supposed to have a duty “to seek justice, not merely to convict.”¹³⁸ But a realist would have to recognize that once the case reaches the trial stage and even before, prosecutors in the United States see their role as that of a partisan advocate for their client and it is a matter of mere coincidence that that “client” is a powerful government. Thus, prosecutors will in the overwhelming majority of cases do everything in their power to win the case for their client, *i.e.*, to secure the defendant’s conviction to the highest possible charge. Sometimes this “win-at-all-costs” attitude has resulted in improper convictions.¹³⁹

The ABA Model Rules of Professional Conduct, which have been adopted in three-fourths of the states, have something to say on the subject, but they equivocate somewhat. Rule 3.8 provides that a prosecutor must refrain from pressing groundless charges, must assure that defendants are advised of their right to counsel, may not take advantage of unrepresented defendants, and must disclose exculpatory information they have to defendants. The official “comment” to this rule explains in general terms that a “prosecutor has a responsibility as a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” However, it concludes unhelpfully, “[p]recisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different

¹³⁵ LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 2D ED. 666 (Foundation Press 1988).

¹³⁶ In an interesting study in JOHN THIBAUT AND LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 77-80, 94-96 (John Wiley & Sons 1975), the authors found that a majority of the subjects of multinational studies thought that adversary procedures were fairer than investigatory procedures for resolving disputes.

¹³⁷ See William J. Pizzi and Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 *YALE J.INT'L L.* 1, 31 (1992).

¹³⁸ ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 3-1.1 (ABA 1991). These standards are supposed to be “guidelines that have long been adhered to by the best prosecutors and best defense counsel.” Federal prosecutors are admonished to “see that justice is done.” DEPARTMENT OF JUSTICE MANUAL, Title 9, Chapter 27, §9-27.000 et seq., “Federal Principles of Criminal Prosecution,” pp. 9-495-9-559.

¹³⁹ See case examples in Chapter VIII, p. 272, note 34

jurisdictions.”¹⁴⁰

2. Inadequate Focus on the Truth

This criticism is related to concerns about abuse of party control. It asserts that, contrary to adversary theory, party control of litigation is not likely to result in a fully-informed decision-maker because not all the relevant information will be uncovered. As Judge Frankel, a long-standing critic of the adversary system, has observed, it is a rare case in which either side yearns to have the witness, or anyone, give the *whole truth*.¹⁴¹ To the extent that incomplete information is supplied, the court will be making a decision based on something other than the real truth about a case. A slightly different version of this critique has it that our “sporting theory of justice” never asks what the truth is; it only asks “have the rules of the game been carried out strictly?”¹⁴² Two responses are usually given to these points.

The Misconceived Quest for “The Truth” The first response admits that the adversary system has a relativistic attitude toward truth, but argues that this is more consistent with reality than any search for “*the truth*.” For all the talk in some systems that the “objective truth” must be discovered in legal proceedings, an event cannot be reproduced in court. After it has taken place, unless there is a videotape of it, all that we can rely on are *perceptions* of the event and then only to the extent that those perceptions can be *remembered by people* and then *communicated* by them. Given the weaknesses of perception, memory and communication, there are often as many “truths” about an event as there are witnesses to it. The idea is not to find “*the truth*” of an event, but to find *which communicated perception* of an event is the *most plausible account* of that event. A system that gives full leeway to competing perceptions of an event throughout the trial and right up until the time for decision is one that accurately reflects reality. By contrast, pursuit of “*the truth*” is not only naive, but ultimately impossible. Defenders of the adversary system would point out that the cause of truth is routinely *better* served in an adversary system since in every case at least two versions of the truth get presented — one more version than would routinely be unearthed in a less adversarial system.¹⁴³ In fact, the adversary system *is* concerned with determining the truth, at least as just defined. One has difficulty imagining a case in which the parties collectively would not have the incentive to discover and present all information that is truly relevant to a decision in the matter.

Allocating the Power to Declare Truth Given that there can be competing versions of the truth, it is *equally* important in finding the truth to be concerned about *who has the power to investigate and declare truth*. Given the often elusive nature of truth, the adversary system sees serious dangers if one entity — the state — has a monopoly on the power to discover and declare it. Borrowing from the concept of separation of powers in constitutional theory, proponents of the adversary system believe that the cause of truth is better served if the responsibility for discovering and declaring it is

¹⁴⁰ Rule 3.8 of the ABA MODEL RULES OF PROFESSIONAL CONDUCT and comment (ABA 1991).

¹⁴¹ See MARVIN FRANKEL, *PARTISAN JUSTICE* 10-20 (Hill & Wang 1980). This book is a succinct, but thorough critique of most all aspects of the adversary system. It is interesting to note that many of the critics of the adversary system and juries are judges with extensive experience with the intricacies of adversary trials. As discussed *infra*, Judge Jerome Frank was also a vigorous critic of the jury system. See JEROME FRANK, *COURTS ON TRIAL* (Princeton 1949).

¹⁴² Pound, *supra* note 64, p.406.

¹⁴³ Some support for the adversary system's more relativistic view of truth can be found in the psychological literature which shows that much of what people perceive is a particular interpretation of the events, rather than a true reflection. See DAVID J. SCHNEIDER, ALBERT H. HASDORF, PHOEBE ELLSWORTH, *PERSON PERCEPTION* (Addison-Wesley Pub. Co., Reading, Mass. 1979).

spread between the state, the parties and, where applicable, the jury. While one might doubt how often governments fail their citizens and abuse their power in this respect, mistrust of government is a strong theme in American political history. And one could point to several instances just in the 20th century where governments, unrestrained by countervailing forces, have declared rather monstrous versions of “the truth.”

3. The Inefficiency of Adversary Litigation

Complexity, Speed and Values Beyond Efficiency A major criticism of the adversary system, which relates in part to problems with party control, is its slow pace. While some things go quickly, the trial is a slow and complicated process. Presentation of first-hand oral and other “immediate” evidence in a question-and-answer format can take a long time to develop, objections based on complex rules of evidence arise and must be decided, and the judge must remain passive throughout and assure that both sides are heard fully.¹⁴⁴ Even before trial, there must be time for the parties’ lawyers to discover and analyze evidence, and then to plan on how to present it in the most persuasive way possible.

It is no secret that all this takes time. However, it does increase the amount of information available to the decision-maker. Moreover, efficiency is not everything. As the Supreme Court has observed:

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.¹⁴⁵

Some Efficiencies of Adversary Procedure Adversary systems have efficiencies absent from some other systems. Party control over litigation confers the right to litigate vigorously, but it also permits parties to choose not to litigate. Many civil law systems, at least in criminal cases, require that a trial be held regardless of whether the affected parties want one. In an adversary system, when defendants plead guilty and waive their right to further proceedings, there is no need for a trial. All that is necessary is that they understand that they are waiving their right to a trial and that they admit on the record facts showing that they in fact committed the offense charged.¹⁴⁶ In civil cases, settlements are even easier. Unless a minor or other person in need of special protection is affected, parties have the absolute right to settle whenever and on whatever terms they wish. In the 75 largest counties in the U.S. in 1992, 75% of all civil tort cases were disposed of through an agreed settlement or voluntary dismissal. In

¹⁴⁴ Of course, much of the extra time it takes to try a case is not caused by the adversary system as much as by the right to a jury trial. Criticisms of juries are discussed in the next section of this chapter.

¹⁴⁵ *Stanley v. Illinois*, 405 U.S. 645 (1972). In *Stanley*, the Court held unconstitutional an Illinois law that provided that unwed fathers need not be given a hearing before their parental rights were terminated. For more on the issue of custody of children of unwed parents, see Chapter XIII, p. 514, note 49, and Chapter IX, p. 355.

¹⁴⁶ See Chapter VIII, pp. 277-278, for a description of guilty pleas. The efficiencies gained by guilty pleas were part of what caused Italy to introduce a more adversarial style criminal procedure in 1989. See Pizzi & Marafioti, *supra* note 137. Serious limitations on plea bargaining and legal cultural differences have made implementation of the summary guilty plea procedures difficult. Spain and Denmark have enacted similar procedures and informal practices approximating plea bargaining have grown up in France and Germany. See *id.* at 35-37.

criminal cases, 92% of convictions obtained were the result of a guilty plea.¹⁴⁷ There have also been major efforts to urge alternatives to judicial resolution of disputes.¹⁴⁸

The ability of parties to waive their rights not only disposes of entire cases, it can also dispense with the need for parts of trials. Parties or counsel routinely enter into “stipulations” — agreements about particular facts — or agree to waive objections to particular evidence or procedural requirements. Indeed, a large part of the job of the judge in preparing a civil case at the final pre-trial conference is to explore “the possibility of obtaining admissions of fact and of documents, which will avoid unnecessary proof.”¹⁴⁹ It is not uncommon in a civil case that the parties and their lawyers will have stipulated to the admission of almost all documents or tangible evidence in a case, thus removing entirely the need to lay foundations for receipt of those items in evidence at the trial. While stipulations of this type are not as common in criminal cases, their use is increasing.

Recent Anti-Adversarial Reforms There have been efforts in recent years to limit some “adversarial excesses” and to make litigation more efficient. There have been changes in federal and some state civil procedure rules requiring that the parties automatically disclose basic evidence in support of their claims or defenses to the other side and imposing limits on the extent of discovery. Rules on federal pre-trial proceedings before judges now empower and encourages judges to more actively manage their cases. The use of lower-level “magistrate judges” to keep closer track of litigation in its pretrial stages has increased. Many of these measures are part of a general trend in recent years toward more “managerial judging.”¹⁵⁰ Serious sanctions can also be imposed on lawyers who assert groundless positions in litigation.¹⁵¹

4. The Costs of Litigation and Inequality of Financial Resources

A Special Problem for Adversary Systems Inequality in litigation because one side has superior resources is undoubtedly a problem in all legal systems. But inequality of resources is a special problem in an adversary system where the parties have so many responsibilities for gathering evidence and presenting the case. Though parties have the right to represent themselves, a party without a lawyer is much more likely to be completely lost in an adversary system than in a system in which the judge is responsible for developing the evidence and legal points. Consequently, it is perhaps much more likely in an adversary system that the party with the more skilled lawyer and more resources for litigation support, such as investigators and experts, will have an advantage. This is exacerbated as well by the “American rule” with regard to litigation costs, under which winning parties may not recover their attorneys fees if they win.¹⁵²

Mitigating Factors The practical need for a lawyer has been met to a certain extent. The 6th Amendment to the Constitution requires that the government provide lawyers and other assistance for the unrepresented in all criminal cases where jail is

¹⁴⁷ Source: Bureau of Justice Statistics, U.S. Dept. of Justice. See Chapter VII, p. 247 (settlements in civil cases) and Chapter VIII, p. 277 (guilty pleas in criminal cases).

¹⁴⁸ See Chapter VII, pp. 247-249 (arbitration, mediation and settlement in civil cases).

¹⁴⁹ Federal Rule of Civil Procedure 16(c)(3). See also Chapter VII, pp.238, 239 (pretrial conferences).

¹⁵⁰ See Chapter VII, pp. 236, 238. For an account of the move toward greater judicial control over fact-finding, see John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L.REV. 823, 866 (1988) and Judith Resnick, *Managerial Judges*, 96 HARV.L.REV. 374 (1982). This trend is, to say the least, controversial in the United States. See LANDSMAN, *supra* note 4, at 77-121.

¹⁵¹ Some of these measures are discussed in Chapter VII, pp. 226-239.

¹⁵² The “American rule” regarding attorney fees is so called to distinguish it from the “English rule,” which normally shifts the burden to the losing side. See Chapter VII, p. 244.

a possibility.¹⁵³ In civil cases, there is no such constitutional right, but efforts have been made since 1964 to provide federal funding for legal services for the poor, and prepaid legal insurance and other plans have grown in recent years.¹⁵⁴ Moreover, the availability of the contingent fee serves as a powerful incentive for good lawyers to handle personal injury civil cases of clients otherwise unable to afford an attorney.¹⁵⁵ In addition, some statutes have changed the “American rule” on litigation costs to one that allows a winning party to recover attorneys fees and court costs from the losing party in some kinds of cases.¹⁵⁶

In civil cases, many procedural devices are designed to make the outcome in a case less dependent on the skills of the lawyer at trial. The discovery process in civil litigation allows parties to obtain most of the opposing party’s evidence well before trial, thereby making it easier for the less well-equipped or less expert lawyer to respond to what greater financial resources or talent may have amassed on the other side of a case. To the extent that a more powerful opponent can use discovery and other procedural devices to “wear down” or increase the litigation costs of a party with fewer resources, changes in recent years imposing limits on discovery and sanctions for misuse of the courts for these purposes, mentioned earlier, are specifically designed to prevent this.¹⁵⁷

Built-In Safeguards There are also built-in features of the adversary system in the United States that equalize parties with disparate amounts of resources. The presence of a jury makes the trial somewhat more equal since jury members are much more likely to identify with the poor litigant than with the rich corporation or the powerful state. Less well-off parties’ lawyers regularly take advantage of the “underdog” status of their client to considerable effect.

But even with all these factors at work, candor requires the admission that inequality based on wealth remains a problem in courts in the United States. It is probably true that, to a certain extent, “what kind of justice a person gets depends on how much money he has.”¹⁵⁸ How much more of a problem this is in the United States than anywhere else is hard to say.

F. Criticisms of the Jury System

Most of the criticisms of the jury system are of two types. Critics either point to the relative inefficiency and high cost of jury trials or they question the ability of juries to decide cases properly.¹⁵⁹

¹⁵³ See Chapter VIII, p. 307. See also Chapter IV, p. 154, for a discussion of public defenders. The criminal defendant also has the right to any necessary experts or investigators at government expense. See *Ake v. Oklahoma*, 470 U.S. 68 (1988) (Defendant has right to a psychiatric evaluation and expert witness assistance where his sanity is at issue in case) and Criminal Justice Act, 18 U.S.C.A. §3006A(c)(1) (providing for payment for defense experts).

¹⁵⁴ See Chapter IV, pp. 153-154, for a discussion of civil legal services for the poor.

¹⁵⁵ In a contingent fee arrangement, the lawyer will not charge the client a fee unless the client wins, in which case the lawyer will take the fee out of the recovery, usually to one-third of the recovery. For a lawyer to be attracted to such a case, of course, there must be a good chance of winning a large enough verdict. Consequently, it is only in personal injury cases where several thousands of dollars or more are at stake that a lawyer will agree to such an arrangement. See Chapter IV, p. 143.

¹⁵⁶ See Chapter VII, p. 244.

¹⁵⁷ See Chapter VII, p. 236.

¹⁵⁸ *Griffin v. Illinois*, 351 U.S. 12, 18 n.16 (1956).

¹⁵⁹ Among the severest critics of juries was Judge Jerome Frank. See JEROME FRANK, *COURTS ON TRIAL* (Princeton 1949). There has been much interest in and criticism of the jury system in recent years. Two books are JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (Basic Books 1994) and STEPHEN J. ADLER, *THE JURY: DISORDER IN THE COURTS* (Doubleday 1994).

The Expense and Inefficiency of Juries Trials with juries take about 40% longer than bench trials. Enforcing the rules of evidence strictly takes time and the lawyers are more deliberate in presenting their cases. Jurors, not being the “professional listeners” judges are, get tired and need more frequent breaks. And it goes without saying that the decision making process of juries is more protracted. While this may seem like a great loss of efficiency, it should be remembered that around 90% of cases filed do not go to trial at all, and only some of the trials in the 10% of cases that do go to trial are jury trials.

In addition, some of the “anti-adversarial” reforms mentioned earlier have served to make jury trials more efficient. More vigorous pre-trial judicial supervision has the effect of forcing the parties to agree on more facts, thus leaving less for the jury to decide. The use of special verdicts, as discussed earlier in this chapter, can improve efficiency. Such verdicts, instead of just “dumping” the entire case on jurors with no direction other than instructions, can spell out the issues for them by way of specific questions and thus streamline their decision making process.¹⁶⁰ Moreover, the trial judge has always had the power to limit unnecessary proof and to exclude even relevant evidence to prevent “undue delay, waste of time, and needless presentation of cumulative evidence.”¹⁶¹ Many trial judges are exercising this power to a greater degree than before and the result has been improved efficiency.

The Abilities of Juries as Decision-Makers Critics often argue that only legal specialists, not laypeople, should be involved in decision-making in the legal system. However, it must be remembered that the *legal* issues in a case *are* decided by a judge. The division of labor between judge and jury involves juries in deciding only disputed issues of fact — a task for which a legal education is not necessarily an advantage.¹⁶²

Lawyers who try cases before juries often remark how impressed they are with the abilities of juries at determining fact issues. Though individual jurors may know very little and as *individuals* may not even be particularly good decision-makers, many comment on how the jury, when it sits as a group, is far more than the sum of its parts — how the entire jury seems to acquire abilities that would not be expected from looking at its members individually.

Psychological research on the dynamics of group decision-making tends to support this intuitive observation. One particularly telling study is by Barnlund, who tested the effect of group dynamics on reasoning ability.¹⁶³ College students were tested on their syllogistic reasoning ability. Then researchers pitted the *best individual* reasoners against *groups* of the *poorest* reasoners. When it came to dealing with syllogisms whose premises and conclusions were statements that awakened strong emotions and value preferences, such as assertions about Communism, college rule systems, and the like, the *best individual* reasoners did *worse* at solving them than the *groups of poor* reasoners. The explanation was that the individual good reasoners were misled by their emotional responses. Members of the groups of *poor* reasoners were

¹⁶⁰ See *supra* p. 107. Some of these reforms are addressed in William W. Schwarzer, *Reforming Jury Trials*, 1990 U.CHI.LEGAL FORUM 119, 121-125. See also MUNSTERMAN ET AL., *supra* note 44.

¹⁶¹ FRE 403; FRCP 16. The wide-spread use of smaller juries in civil cases makes jury trial somewhat easier. Civil juries of between 6 and 12 may be used in federal court since 1991 and attempts to restore the 12-person jury were defeated in 1996. Close to 40 states provide for juries of fewer than 12 in civil cases.

¹⁶² See *supra* pp. 87, 89.

¹⁶³ Dean C. Barnlund, *A Comparative Study of Individual, Majority and Group Judgment*, 58 J. AB. & SOC. PSYCH. 55 (1959). Similar studies are cited in Richard Lempert, *Uncovering “Nondiscernable” Differences: Empirical Research and the Jury-Size Cases*, 73 Mich.L.Rev. 643-708 (1975).

also misled initially, but in different directions. As a result, the group was able to set them straight. Those misled in one direction were corrected or balanced out by others who had a different reaction. The operation of this group dynamic is supported by other studies that indicate that accuracy in jury deliberations is improved more by increasing the *social diversity* of jurors than by increasing their average educational level.¹⁶⁴

Comparing the Alternatives In evaluating the abilities of the jury, we must remember exactly what fact-finding institutions we are comparing. In all situations other than a criminal acquittal, the judge has the power to set aside lawless or arbitrary jury verdicts. Even if it is reasonable to assume that the average judge would be superior to the average juror, that is not what is being compared. The appropriate comparison is between the judge alone on the one hand and the *entire* jury with the *judge's assistance and control* on the other.

It is interesting to compare the level of judge and jury disagreement in decision-making, especially since the alternative to juries deciding cases is to have judges decide them. In a now-classic study, Kalven and Zeisel found that judges agreed with jury verdicts in 78% of civil and criminal cases.¹⁶⁵ Perhaps more important than the rate of agreement is the fact that many of the 22% of cases where there was disagreement related to a probable different perception of what "justice" required.¹⁶⁶ Among the examples of cases where the jury acquitted, but the judge would have convicted were the case of a larceny defendant who had stolen \$2.50 worth of lumber and who had been in jail for two months awaiting trial and the case of a drunk driving defendant charged with manslaughter in an accident that killed his wife and left him paralyzed for life. And it is possible, given the psychological studies by Barnlund discussed above, that at least in some of the remaining cases where there was disagreement, the jury could have reached the more accurate conclusion.¹⁶⁷

Juries in Civil Damages Cases There have been special concerns raised about the abilities of juries in civil cases. It has been argued vigorously by defense attorneys and insurance companies that "run-away" juries have been awarding outrageous amounts to undeserving plaintiffs in personal injury cases.¹⁶⁸ However, the reality is quite different. Though the juries in their study tended to side with the defense more than the prosecution in criminal cases, in the 22% of civil cases where judge and jury disagreed, they were almost evenly split. A more recent study examining products liability cases between 1979 and 1988 showed that in nine of the ten years examined, plaintiffs won as many as 58% of all federal products liability cases tried before *judges* and only 29% of federal products liability cases tried before *juries*.¹⁶⁹ Clearly the media

¹⁶⁴ See Fred L. Strodbeck, Rita M. James and Charles Hawkins, *Social Status in Jury Deliberations*, 22 Am. Sociological Rev. 713 (1957).

¹⁶⁵ KALVEN & ZEISEL, *supra* note 148, at 55-65.

¹⁶⁶ *Id.*, p. 116.

¹⁶⁷ The American Judicature Society has collected materials on juries: www.ajs.org/jc/index.asp.

¹⁶⁸ Similar reasons were given for effectively abolishing the right to a civil jury in England. See *Ward v. James*, [1965] 1 Q.B. 273, 1 All Eng. Rep. 563. Civil cases are triable to a jury only if provided for by statute or if in the judge's discretion there are "in exceptional circumstances" that warrant it. Currently, only twelve or so civil jury trials a year take place in England.

¹⁶⁹ Theodore Eisenberg & James A. Henderson, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 U.C.L.A. L.Rev. 479 (1990). But see Kevin Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998) (advising caution in relying on raw win statistics, since cases that go to trial are a small and skewed sample of all cases). Supposed difficulties with civil juries in tort cases, particularly those with punitive damages, are discussed in Chapter XI, pp. 452-437. The Saks article, *infra* note 172,

have a strong influence on public perceptions of civil juries. A recent study compared federal jury trials described in media accounts with actual figures. In the cases reported by the media, plaintiffs won 98% of jury trials, while in reality only 41% of plaintiffs prevailed. And the median amount jury verdicts reported by the media was \$1,100,000, while the actual median amount was \$150,000.¹⁷⁰

Jury awards in civil cases do tend to be higher than judge awards, but the difference is not as striking as one might think. In Kalven & Zeisel's study, judges would have given less than the jury awarded in 52% of cases, about the same in 10%, and more in 38%. And the average dollar amount of disagreement in cases where juries gave more money was only 10%. It should be borne in mind as well that when the amount awarded by a jury is clearly out of line with the damages proven, the fault is not so much with the jury as it is with the judge, who has the power to reduce such awards or to order a new trial.¹⁷¹ Of course, it is impossible to say whether it is the judge or the jury that is more correct in any objective sense. At least some issues that arise in civil litigation — for example, the value of a human life — are arguably issues that judges' legal educations and experience give them no particular superior ability to decide.¹⁷²

Benefits of Juries Beyond Factual Accuracy Some supporters of juries believe that one of the benefits of juries is their very "erroneous" ways in that their decision reflects something more than cold logic and strict law application. As one federal judge explained:

The law can become rigid. Rules that made sense when adopted may be foolish and unjust in particular cases. The jury can give flexibility to the law, ensuring that it is applied in a way that is consistent with the standards of the community. Because it does not have to explain its reasons, it is able to arrive at appropriate decisions that avoid irrational results but may be difficult for a judge to explain.¹⁷³

Sometimes juries' consistent "tempering" of a legal rule can point the way for law reform. An example of this is *Hoffman v. Jones*, the Florida case changing from contributory negligence to comparative negligence, which was discussed in Chapter II. The Florida Supreme Court relied in part on the fact that it was apparent that juries consistently judged plaintiffs' conduct by a less harsh comparative negligence standard even when told to apply the more strict contributory negligence standard.¹⁷⁴

Many heroes of American political history have been saved by "erroneous" jury verdicts. Peter Zenger, the publisher of criticism against the British Crown who was

reviews the major empirical data on the subject. A concern voiced by foreigners doing business in the U.S. has been that they are at a disadvantage before U.S. courts, in part because juries are biased against them. A recent article dispels this myth. Kevin Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996) (foreigners, whether as plaintiff or defendant, win 63% of the cases, whereas natives win only 37%).

170 Source: American Bar Foundation, as reported in 16 RESEARCHING LAW 3 (2005).

171 See *supra* p. 108.

172 GUNTHER, *supra* note 19, at 170. In considering increased amounts of jury awards, it is relevant that medical costs constitute the bulk of personal injury damages awards and that medical costs rose by 600% from 1955 to 1985 at a time when per capita income only doubled. Some studies suggest that juries may not be awarding enough damages. In one state, contrary to expectations, where professional decision-makers with medical knowledge were substituted for the jury trial system, the average award increased by one-third. See Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System — and Why Not?* 140 U.P.A.L.REV. 1147, 1273-1274 (1992).

173 William W. Schwarzer, "Some Observations on the Values of the Jury System" (address at Federal Judicial Center Seminar for Russian Judges and Court Administrators, July 1993).

174 See discussion *supra* p. 88.

acquitted by a New York colonial jury in 1734, was probably factually guilty of seditious libel.¹⁷⁵ Later, Northern abolitionists who hid escaped slaves before the Civil War would benefit from jury “inaccuracy.” More recently, protesters against the Vietnam War, draft resisters and citizens who hid illegal asylum seekers from El Salvador, whom juries acquitted, were probably factually guilty. Of course, the vast majority of cases are not ones that demand that “the truth” be slighted in favor of justice. But in those cases where truth *and* justice both point toward conviction, the government has ample resources and good lawyers of its own who can make the case for conviction before the jury, if there is one to be made.¹⁷⁶

Consistent with this, the Supreme Court observed in a 1970 case that the Founders “knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.” The right to trial by a jury gives the citizen:

an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. [It] reflect[s] a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.¹⁷⁷

This role of the jury was eloquently stated by a Maryland farmer in the debates over the constitutional right to a jury trial. He agreed that all the structural controls on the federal government contained in the Constitution, such as separation of power and federalism, were needed to keep it from passing unjust legislation infringing on civil liberties of citizens. But he saw a greater threat to freedom in the *misuse* of otherwise *just* laws on the *local* level, from which the structural protections of the constitution gave no protection. “[T]hose usurpations, which silently undermine the spirit of liberty, under the sanctions of law, are more dangerous than direct and open legislative attack.” He argued that the only effective protection from this threat was the jury.¹⁷⁸

The Value of Civic Participation Aside from standing as a protection against arbitrary government action, juries also promote democratic values and principles of self-government by enlisting ordinary citizens in the business of government. This popular participation has an indirect benefit similar to one mentioned for party-control over litigation: if citizens have more of a stake in their system, they are more likely to support the decisions of courts, which rely first and foremost on voluntary compliance with their decisions. This consideration played a major role in Russia’s 1993 reintroduction of the jury system in that country. It was said to be needed to restore public confidence in a judicial system discredited by 70 years of state and Communist Party control.

¹⁷⁵ An account of the Zenger case is set out in GUNTHER, *supra* note 19, at 28-30.

¹⁷⁶ Juries have also nullified based on racist attitudes, as when southern juries in the past acquitted whites accused of murdering blacks. However, blacks were at that time systematically excluded from jury service. Further, the federal government has often later prosecuted the acquitted defendants for violation of the victim’s civil rights. This is allowed under the “dual sovereignty” exception to the ban on multiple prosecutions for the same offense, discussed in Chapter VIII, p. 312.

¹⁷⁷ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

¹⁷⁸ HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* 18-19 (U. Chicago 1981), quoting Federal Farmer (XV, 2, 8, 90).

The Jury's Effect on Judicial Independence Some point out that juries help to protect the independence of judges. As explained by the federal judge quoted earlier:

Even under the best of circumstances, a single judge making an unpopular decision comes under public and sometimes official criticism that may have adverse effects on his person, his family and his career. Juries, being anonymous and out of the public eye as soon as the case is over, are well suited to decide controversial cases that could be difficult for judges to decide. And because they hold no office, have no other continuing connection with the government and have no political ambition, they are genuinely independent.¹⁷⁹

This last point is particularly important for those state courts in the United States whose judges must face reelection, though even federal judges and other appointed judges are not unaffected by these kinds of pressures.¹⁸⁰

As these last few points suggest, juries may have been retained in the United States long after they had been abolished elsewhere precisely because they reflect peculiarly American values. A jury system could well not work in other systems or might work only with major modifications in attitudes and laws.¹⁸¹

¹⁷⁹ Schwarzer, *supra* note 173. Clearly, there is room for improvement in the jury system. An article by the author of the quotation in the text and director of the Federal Judicial Center, a research arm of the federal courts, surveys various points where improvement have been made and suggested. See Schwarzer, *supra* note 160. See also MUNSTERMAN ET AL., *supra* note 44.

¹⁸⁰ Modes of judicial selection are discussed in Chapter V, pp. 178-181.

¹⁸¹ There have also been discussions about resurrecting the right to a jury in some criminal cases in Japan. Some have expressed doubts, however, that jury trials would be consistent with Japanese culture and temperament, Richard O. Lempert, *A Jury for Japan?*, 40 AM. J. COMP. L. 37 (1992), and Japan has opted for more of a modified mixed court system.