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JUROR DELINQUENCY IN CRIMINAL TRIALS IN AMERICA, 1796-1996

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This article examines two aspects of the jury system that have attracted far less attention from scholars than from the popular press: avoidance of jury duty by some citizens, and misconduct while serving by others. Contemporary reports of juror shortages and jury dodging portray a system in crisis.¹ Coverage of recent high-profile cases suggests that misconduct by jurors who do serve is common. In the trial of Damian Williams and Henry Watson for the beating of Reginald Denny, a juror was kicked off for failing to deliberate;² Exxon, Charles Keating, and the man accused of murdering Michael Jordan's father all complained of juror misconduct;³ and, of course, several jurors in the trial of O.J. Simpson were replaced after allegations that they had lied, concealed intentions to profit from the case, or otherwise misbehaved.⁴ In

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1. See, e.g., Andrea Gerlin, *Jury-Duty Scofflaws Try Patience of Courts*, WALL ST. J., Aug. 9, 1995, at B1, B8; Arleen Jacobius, *California Three-Strikes Law Gobbling Up Jurors*, A.B.A. J., Dec. 1995, at 29 (noting that "the juror shortage is almost a crisis in Los Angeles County"). Other news stories consider efforts to avoid jury service amusing — good top-ten list material. See Gary Taylor, *Want to Duck Jury Duty? They've Heard Them All*, NATL. L.J., Nov. 27, 1995, at A24 (reporting the Harris County, Texas, District Court Clerk's top ten excuses offered by folks eager to avoid serving as jurors, including an astronaut who said he'd be in space that day, someone who said "I shot holes in my daughter's boyfriend's car," and another who insisted that she "had to feed [the] bird during the day").

2. See Henry Weinstein, *ACLU Asks Ito to Release Juror Hearing Transcripts*, L.A. TIMES, Apr. 12, 1995, at A16.

3. See *Request for New Trial for Exxon Is Denied*, WALL ST. J., Feb. 22, 1996, at B2; James S. Granelli, *Spotlight Shifts to Keating's Federal Case*, L.A. TIMES, Apr. 5, 1996, at D1; *Teen: Jordan Suspect Said to Stay Quiet*, GREENSBORO NEWS & REC. (N.C.), Jan. 23, 1996, at B2.

4. See, e.g., Kenneth B. Noble, *District Attorney Looks into Accusations of Jury Tampering in Simpson Case*, N.Y. TIMES, Apr. 2, 1996, at A12; Barry Tarlow, *Perspec-*

the past year, newspaper reports have described less well-known cases in which jurors refused to answer personal questions, stole jewels introduced as evidence, had sex with courthouse deputies, visited the crime scene, bit another juror's arm to examine tooth marks, read forbidden newspaper articles, got drunk, made racist comments, used drugs, and discussed the case before the end of the trial.⁵

The research reported here is an effort to place these defects in the jury system into perspective, to learn how widespread these problems are, whether they are new (or, if not, how they differ from similar problems in earlier years), and what courts have done and should do now about them. The article incorporates a historical overview of jury dodging and misconduct since 1796⁶ and the results of an original survey completed in December, 1995, by 562 trial judges across the country. The survey is the first to collect empirical information about jury avoidance and misconduct nationwide.

The story of jury delinquency that unfolds holds useful insights for those who struggle to improve a jury system that today faces criticism from all sides. First, the rules that govern juror enlistment and oversight

tive on the Simpson Trial; Juror Misconduct Isn't a License to Fish; What Jeanette Harris Claims Isn't Highly Unusual; Investigating Jurors During a Trial Is — or Should Be, L.A. TIMES, Apr. 7, 1995, at B7 (claiming "serious jury misconduct is often a part of high-profile cases").

5. See *Appeal Filed in Jewel Heist — Evidence Still Missing*, S.F. CHRON., Mar. 19, 1996, at A15; Paul Elias, *Alleged Misconduct Delays Rape-Murder Case*, L.A. TIMES, Sept. 7, 1995, at B4; Ken Ellingwood, *Henley Says He Didn't Know of Jury-Bribing Plan*; Paul Gustafson, *Jurors take law into own hands; Sometimes, they test the trial evidence themselves*, STAR TRIB. (Minneapolis), Mar. 19, 1995, at A1; Michael Perlstein, *Ex-Exec: I Killed My Wife in 1986; Bathtub Murder Mystery Solved*, TIMES-PICAYUNE (New Orleans), Dec. 28, 1995, at A1; John Steenson, *Attorney: Jury Erred on Murder, Defense Lawyer Seeks to Toss Out Conviction in '94 Fatal Shooting*, HERALD-SUN (Durham, N.C.), Dec. 6, 1995, at C1; Nita Thurman, *Woman Wins Battle Over Juror's Right to Privacy, She Was Ordered Jailed Last Year For Refusing to Answer Questions*, DALLAS MORN. NEWS, June 18, 1995, at A37; *Misconduct by Jurors Hurts Justice*, THE MORNING CALL (Allentown, Pa.), Apr. 4, 1996, at A24; *Hearing: The Ex-Ram Player, in a Bid To Win a New Trial, Also Testified that Panelists Discussed the Case While Under Order Not To*, L.A. TIMES, Jan. 19, 1996, at B12 (reporting allegations of premature deliberations, racist comments, drug use, and bribery in a single trial). Jury misconduct is even featured in movies and television exposés. See, e.g., *THE JUROR* (Columbia-TriStar 1996); *Prime Time Live* (ABC television broadcast, Jan. 10, 1996).

6. As is true of many aspects of the American jury, little information has been compiled concerning the history of jury misconduct or truancy. This article draws heavily upon general histories of courts in the nineteenth century, histories of other aspects of the jury, and nineteenth-century treatises and cases. For an excellent overview of the history of the criminal jury and a description of the need for more research into jury history, see Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994).

have been influenced over the decades by changing conceptions of the jury's function. Jurors have assumed many roles — group representatives to a lawmaking body, democracy's students, symbols of fairness, accurate fact finders. Future attempts to regulate the behavior of those who are called for jury service must respond to the continuing shifts in sentiment regarding the jury's proper function. Second, both the avoidance of jury duty and the existence of juror misconduct are old problems that in earlier times seem to have caused even more trouble for courts than they do today. According to a majority of the judges in most of the cities surveyed, few cases today are plagued by misconduct and most people answer the call to jury duty. Over the years efforts to prevent culpable behavior rather than punish it have proved their value, a useful lesson for those hoping to improve further juror compliance in jurisdictions where jury avoidance or juror misconduct affect a significant portion of trials.

The first half of this article is devoted to a study of the avoidance of jury service and the law's response. After introducing theoretical and practical constraints on the administration of compulsory jury service in section I.A, I review in section I.B the experience of courts in recruiting jurors for the past two centuries. Section I.C describes the situation today using the responses of trial judges surveyed. The discussion of jury avoidance concludes in section I.D with a brief analysis of several proposed reforms. The second half of the article addresses misconduct by jurors once they have appeared for jury duty. Following an exposition of historical trends concerning misconduct in section II.A, section II.B reports the responses of judges surveyed about jury misconduct in their courts over the past three years. Section II.C concludes with some observations about the future regulation of juror misconduct.

I. PERFECTING JURY COMPLIANCE IN AMERICA: A CONSTANT STRUGGLE

A. *Why (Not) Force Jurors To Serve?*

Competing views of the role of the criminal jury have influenced the enforcement of compulsory jury service in America. Some consider the jury an educational institution that teaches jurors and trial observers lessons about democratic self-governance. For them, citizens who avoid service deprive themselves of important knowledge and undermine the political order.⁷ For those who believe that jury service is a civic duty

7. Empirical support for the claim that forced jury service enhances jury legitimacy is mixed. Some studies show that even unwilling jurors come away with a good

that every American owes to his community and his country, exemptions from service and other manifestations of lax enforcement appear pernicious.⁸ For others, the jury is a special kind of law-making body, one that must fairly represent racial, ethnic, religious, gender, and other demographic groups in the community which it serves so that it may arrive at acceptable standards of reasonableness and accountability. Vigorous enforcement efforts would appeal to those holding this view of the jury especially if those efforts would help to alleviate the underrepresentation of minority groups on juries.⁹ Finally, others may con-

attitude about the jury system, while others seem to suggest that reluctant jurors may instead spread ill will about the system long after they have completed service they feel was extorted from them. For a helpful discussion of several studies, see Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 284-88 (Robert E. Litan ed., 1993); see also JANICE T. MUNSTERMAN ET AL., THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE § 4.3, at 34 [hereinafter J. MUNSTERMAN ET AL.] (National Ctr. for St. Cts. ed., 1991) (finding that jurors who had unsuccessfully sought an excuse tended to be less satisfied with jury service than those who had not, and that a person's willingness to serve had a stronger effect on satisfaction than fees, term length, and court facilities, but less of an effect than the method by which the jurors were processed, and how long they waited); Leigh B. Bienen et al., *Conference Survey: Attitudes Toward Jury Service and Reactions to the Experience in the State of New Jersey*, in THE FINAL REPORT OF THE POLICY CONFERENCE ON THE AMERICAN JURY: PROTECTOR OF FUNDAMENTAL CONSTITUTIONAL RIGHTS OR ANACHRONISM? app. C, at 9 (Woodrow Wilson Sch. Poly. Conf. ed., 1994) (reporting recent study finding that of those citizens who reported that they were "displeased" to receive their jury summons, 43% rated their jury service experience negatively, compared to the overwhelmingly positive reactions to jury service by those who were pleased to receive a jury summons).

8. The debate about whether and how to recruit the unwilling juror resembles to some extent the debate between those who support the draft and those who prefer volunteer armed forces. On one side are the arguments of civic duty, shared burden, equality, and learned patriotism, ideals that draft supporters claim are undermined by a voluntary system because it allows those who are in the most need of such education, and those who already wield the most influence, to decline to serve. Opponents of the draft have responded by claiming that love of country is destroyed, not enhanced, by forced service, and that volunteers make better soldiers. See generally THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION (Martin Anderson & Barbara Honegger eds., 1982).

9. Courts have considered oversampling particular areas with the highest rates of nonresponding jurors in jurisdictions in which areas containing higher proportions of minority residents also have higher nonresponse rates to jury summonses. Because this means that a person may be summoned for jury service more frequently depending on his or her neighbor's behavior, this type of structured sampling puts the goal of representation before the goal of equalizing the burden of jury service. See Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section By Design*, 79 JUDICATURE 273, 275-76 (1996); see also *United States v. Gometz*, 730 F.2d 475, 483-85 (7th Cir.) (Cuhady, J., dissenting) (arguing that failing to take follow-up action to improve response rate to questionnaires of only 30% denies defendant his statutory right to a jury drawn from a cross-section of the community), *cert. denied*, 469 U.S. 845

sider these various roles unimportant compared to the mission of the criminal jury to determine, accurately, the facts of a case. This idea of jurors as fact finders, not lawmakers, has prompted adherents to look favorably upon measures that promise to increase compliance rates of prospective jurors with the most education and less favorably upon measures that would increase the compliance rates of those with less education. The concern for accuracy also may prompt some judges to routinely excuse reluctant veniremembers who grudgingly appear on the theory that an unwilling decisionmaker may choose an early exit over reasoned deliberation, may take out his resentments on one of the litigants, or may simply lack that sense of responsibility that accurate judgment requires.¹⁰

In addition to recruitment philosophy, political and financial concerns have influenced judicial responses to jury avoiders. Courts that may prefer to accept whoever shows up have sometimes been forced into action when sinking juror yields drive the cost of procuring each juror to troubling levels or delay court business. On the other hand, courts that may prefer to coerce each and every eligible person into service have encountered their own set of barriers. One problem courts have yet to surmount is futility. Even if judges could drag every resisting citizen into a venire, peremptory challenges have left judges powerless to prevent litigants from excluding unwilling jurors during voir dire. Judges also lack the means to deter or prevent veniremembers from misrepresenting their beliefs on voir dire in order to escape service. Moreover, even if judges agree that simply getting reluctant jurors to come to the courthouse is worth the effort, the cost of processing contempt citations has steadily increased as dockets have mushroomed. The following brief exposition of the history of jury duty avoidance il-

(1984); Matthew Kauffman, *Race Mix of Jury at Issue: Pool of Jurors is Unbalanced*, HARTFORD COURANT, Oct. 30, 1995, at A1 (reporting defense counsel concerns that failure to follow up on or enforce jury summonses results in a less representative jury, and citing a 1993 study from Washington, D.C. which revealed that 70% of jury summonses sent to predominately minority areas were returned as undeliverable, compared to 30% of those sent to areas with more whites).

10. See, e.g., *Gomez*, 730 F.2d at 480 (“[A]nyone with experience as a trial judge knows that a person forced against his will to serve on a jury is apt to be an angry juror and that an angry juror is a bad juror.”); G. Thomas Munsterman, *Jury News: What Should a Modern Juror Assembly Room Look Like?*, CT. MANAGER, Summer 1995, at 6, 44 [hereinafter G.T. Munsterman, *Jury News*] (stating that courts justify their failure to do anything about jury avoidance with claims that “these people wouldn’t make good jurors”); Richard A. Posner, *Juries on Trial*, 99 COMMENTARY, Mar. 1995, at 49, 50-51 (praising those jurors who “make it through [the] gauntlet” of registering to vote, completing and returning the questionnaire, responding to summonses, and voir dire as “above average in competence, civic-mindedness, and sense of responsibility”).

illustrates how concerns like these have influenced compulsory jury service during the past two centuries.

B. *Compelling Service on Juries: The Past 200 Years*

1. *Filling the Box — 1796-1870*

Early in the nineteenth century, jury avoidance was a continual nuisance for courts. Many of the reasons for avoiding jury service before the Civil War seem quaint or surprising to us now, made obsolete by the evolution of social and economic conditions and by specific improvements in the conditions of jury service. For example, finding a place to sleep while serving one's term as a juror typically poses no problem today — one simply sleeps at home and travels daily to the courthouse. But in the early nineteenth century, when travel to the county seat often entailed a significant journey by horse, wagon, or even on foot, jury service meant finding and paying for lodgings for weeks while on duty. Other disincentives facing prospective jurors before the Civil War continue to deter prospective jurors today, such as the inconvenience of being kept from one's daily affairs and one's family for the duration of service.

Just as some of the disincentives to serve in the early nineteenth century have disappeared today, so too has a popular method of coping with juror delinquency during the first half of the nineteenth century — the use of bystanders or *talesmen*. The other response to jury dodging employed by courts of the period — the fine — survives, but may have been imposed more regularly in earlier years. Judges who served developing communities during the first half of the nineteenth century focused on the simple, yet at times extraordinarily difficult, task of securing enough jurors to complete the court's docket. They had yet to face the complexity of balancing this task with concerns about widespread corruption, racially discriminatory selection procedures, or overburdened criminal justice agencies.

Working conditions for jurors were miserable in many places, even by standards of the time. Courtrooms were often crude, particularly in less populated communities.¹¹ If there was a separate room available for

11. Some communities lacked courthouses, so trials were held in log houses or barrooms. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 237 (1993) (noting this practice in Illinois). Others made do with courthouses with leaky roofs and no heat. See John A. Hall, *That Onerous Task: Jury Service in South Carolina During the Early 1790s*, 87 S.C. HIST. MAG. 1, 8 (1986). Some of the earliest tribunals even met under trees. RICHARD D. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941*, at 73 (1963). In more populated centers, crowded courtrooms were so intolerable in the summer heat that

deliberation,¹² it was sometimes sparsely furnished or lacking heat or ventilation, yet jurors were locked in together, even overnight, until they reached a verdict. Some judges deprived jurors of food during deliberations; for their jurors, holding out meant staying hungry.¹³ By mid-century, however, most courts had abandoned the “ancient barbarity” of starving jurors into agreement.¹⁴

During the court’s term, overnight accommodations for jurors in the evenings when they were not actively hearing cases were often crowded or difficult to obtain, at least in rural areas.¹⁵ When several judges and attorneys, eighteen or so grand jurors, two dozen petit jurors, as well as parties and witnesses descended upon a county seat, accommodations at the local taverns filled up fast. Some jurors had to sleep in haymows or on dirt floors, others found themselves rooming with attorneys, with the parties in the cases they would hear, or even with the sheriff.¹⁶ The term could keep jurors away from home, family, farm or business, for weeks.¹⁷

spectators and jurors became ill, requiring the court to adjourn until temperatures cooled. New Hampshire’s own chief justice considered “confinement in the bad atmosphere” of the courtroom to be a “severe trial” to jurors’ health. HON. IRA PERLEY, TRIAL BY JURY: A CHARGE TO THE GRAND JURY 17-18 (1867). As late as 1848 in Philadelphia, ventilation was so poor that people became ill even in winter. See ALLEN R. STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880, at 23 (1989).

12. Sometimes jurors had to deliberate at the other end of the same room in which witnesses and parties had presented evidence. See YOUNGER, *supra* note 11, at 73.

13. For example, one South Carolina jury, locked up on a very cold and disagreeable night without food or heat, was supplied through a back window with supper from some sympathetic citizens. See JACK KENNY WILLIAMS, VOGUES IN VILLAINY: CRIME AND RETRIBUTION IN ANTE-BELLUM SOUTH CAROLINA 82 (1959).

14. See *Ohio v. Engles*, 13 Ohio 490 (1844).

15. See Hall, *supra* note 11, at 5 (noting that at the end of the eighteenth century, jurors in South Carolina had to sleep outside, unable to find lodging, and could not obtain provender for their horses).

16. See *Martin v. Mitchell*, 28 Ga. 382 (1859) (upholding civil judgment when juror slept in same bed with the sheriff and in the same room with counsel for the prevailing party); *Hardy v. Spoule*, 32 Me. 594, 596 (1851) (upholding verdict after jury and defendant lodged in same room, noting “[s]ituated as we are, during the trials of causes, boarding promiscuously, as juror and parties inevitably do, it is impossible to interdict all intercourse whatever, however much we may regret it”); Donald O. Dewey, *Hoosier Justice: The Journal of David McDonald, 1864-68*, 62 IND. MAG. OF HIST. 175, 175 (1966) (noting that lawyers and clients lodged four to a room in Indiana in the late 1860s).

17. The situation in 1796 in South Carolina was vividly described by one judge:

Some of those poor men come to Court and return on foot from ten to fifty miles often without a shilling in their pockets. . . . The hardships that those poor jurors suffer are such that men who enjoy plentiful meals and warm beds can form no idea of, in frosty weather they sit in Court from morning until night thinly clad and shivering with cold, and discharged at night, their patience is put to new tri-

Even though caseloads were very low compared to modern standards,¹⁸ all pending matters had to be resolved before the end of each session so that the judges and trial attorneys would be free to travel to the next jurisdiction. Terms were held only once or twice a year in many communities.¹⁹ This inflexible schedule created pressure on juries to decide cases quickly.²⁰ In some jurisdictions judges and juries completed several trials every day, each lasting no more than a few hours. For example, in one twelve-day session in the early 1800s, an Illinois

als. The town where the Court sits denies them its comforts and hospitality, they are obliged to quit it, and retiring into the woods to the brink of some spring or water course, draw forth out of their wallet a bit of cold victuals if they have it, and whether the weather freezes or pours down rain or not they pass the night under the open sky on the cold earth. Coming into court in the morning, their sal-low sickly and dejected countenances, their apparel wet or frozen or soiled, speak of what sort of night they had of it. It happens sometimes in Court that they sink under the double pressure of cold and hunger. This was the case in two instances at Camden Court on my present circuit, growing too faint to sit longer, they gave intimattion [sic] of it, and they were discharged, one of them declared that he had not tasted food for two days, the Gentlemen of the bar were so kind as to raise a few dollars for him. Reduced and feeble as he was he had then to go home fifty miles on foot.

Hall, *supra* note 11, at 5, 8 (quoting letter from Judge Aedanus Burke to Governor A. Vander Horst, Columbia, South Carolina (Dec. 8, 1796) (General Assembly Papers: 006-674, S.C. Archives)).

18. For example, there were only 15 criminal jury trials in seven years in one district in Minnesota. See Jane Lamm Carroll, *Criminal Justice on the Minnesota Frontier, 1820-1857*, at 135 (1991) (unpublished Ph.D. dissertation, University of Minnesota); see also Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 LAW & HIST. REV. 53, 71-72 (1983) (reporting that in the most populated judicial district in Virginia for which court records exist for the period between 1789 and 1800, the court heard only 63 felonies over ten years).

19. See, e.g., David J. Bodenhamer, *The Efficiency of Criminal Justice in the Antebellum South*, 3 CRIM. J. HIST. 81, 89 (1983) [hereinafter Bodenhamer, *Antebellum*] (reporting that courts in antebellum Georgia met only twice each year with terms limited to two weeks or less).

20. For example, during the 1790s in Davidson County, Tennessee, where the courts had significant legislative and administrative functions, jury trials took up only a part of the court's six-day term. See Note, *The Tennessee County Courts Under the North Carolina and Territorial Governments: The Davidson County Court of Pleas and Quarter Sessions, 1783-1796, as a Case Study*, 32 VAND. L. REV. 349, 373 (1979) [hereinafter Note, *Tennessee County Courts*]. In antebellum Indiana, prosecutors spent the first few days of each term with the grand jury, securing indictments while the judge and petit jury tried civil cases. Then the judge, the petit jury, and the prosecutor would try those indicted with crimes for the remainder of the session. See DAVID J. BODENHAMER, *FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* 63 (1992) [hereinafter BODENHAMER, *FAIR TRIAL*]; see also EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 112-13 (1984) ("as many cases as possible had to be tried in the one or two weeks allotted; t]he haste and confusion that necessarily grew out of such a system did not foster careful construction of the state's cases").

court, sitting in the front room of a large house with judges lined up against one wall, disposed of twenty-eight civil cases, two murders, five assaults, a charge of unlawful assembly, and a burglary.²¹ In Frederick County, Maryland, in 1817 and 1818, the court attacked the criminal docket the first week of its two-week session, devoting an average of forty to forty-five minutes to each trial.²² Barely half of those Maryland juries left the box to deliberate before returning a verdict.²³ This pattern of many short trials daily has been documented in several other states as well, including Tennessee, Indiana, and Pennsylvania.²⁴ One can appreciate why a judge from this period might joke after one of these sessions, "I have just come from Union[, South Carolina] where I held court for twelve days and ten nights and only four of the jurors died from fatigue."²⁵

The compensation that jurors received for all of this trouble was meager. Juror fees were about a dollar or two per day, with a few cents a mile for travel. This did not begin to compensate jurors for the expenses they incurred, much less for the inconvenience they often suffered by being away from home for the entire term. For example, in Montana, where jurors earned two dollars per day, a juror had to spend three times that amount each day for lodging and meals and feed for his horse.²⁶ It is possible that some looked forward to jury service out of a

21. See William F. Zacharias, *Illinois Courts Prior to Statehood*, 56 ILL. B.J. 556, 563-64 & n.29 (1968).

22. See James D. Rice, *Crime and Punishment in Frederick County and Maryland, 1748-1837: A Study in Culture, Society, and Law* 225-30, 270 (1994) (unpublished Ph.D. dissertation, Univ. of Md.).

23. See *id.* at 270-73 & n.20.

24. See BODENHAMER, *FAIR TRIAL*, *supra* note 20, at 64; Note, *Tennessee County Courts*, *supra* note 20, at 373. In antebellum Philadelphia, in a typical larceny trial "[e]ach side presented a few witnesses, attorneys made brief remarks, and the jury often rendered a verdict without leaving their box." STEINBERG, *supra* note 11, at 72.

25. WILLIAMS, *supra* note 13, at 81-82 (quoting Judge Thomas J. Mackey and describing one term in which two juries were impaneled to keep up with the caseload, each working twelve hours a day for over a week).

Jury duty was also dangerous in some communities. After the leader of one western gang was indicted for embezzlement in Boise in 1865, its members swore revenge on the grand jury panel that dared to indict him. Men who served on frontier juries were prepared, it appears, for this type of thing. They frequently were members of "vigilant committees" themselves and came to court armed. YOUNGER, *supra* note 11, at 164. One judge of the period described jurors of early Indiana as "a hardy, heavy-bearded set of men, with side-knives in their belts, and not a pair of shoes among the whole of them; all wore moccasins." HON. O.H. SMITH, *EARLY INDIANA TRIALS AND SKETCHES* 177 (1857).

26. See JOHN D.W. GUICE, *THE ROCKY MOUNTAIN BENCH: THE TERRITORIAL SUPREME COURTS OF COLORADO, MONTANA, AND WYOMING, 1861-1890*, at 45 (1972). In the mid 1820s federal jurors in the District of Massachusetts logged over 10,000 miles per year traveling to and from court. Those in the Western District of Vir-

sense of civic duty or perhaps as an adventure but one can understand why so many dreaded jury service during these times. One account of a South Carolina session in 1807 illustrates the problem:

[O]n the first day jurors John Cave and John Hall failed to answer roll call and were indicted for non-attendance. Three additional jurors absented themselves the following morning. On the third day another pair of jurors managed to obtain permission to return to their homes. On the fifth day jurors William Weathersbe and Shadrack Stalling failed to appear. During the afternoon of the sixth day John Nelson was discovered to be too drunk to sit. His relief, Henry Ford, had apparently slipped out of court. Another drunk juror was removed from the box on the seventh day, and two more were missing the following morning. Juror Robert Bradley blandly refused to serve on the ninth day; and by the close of court the next afternoon six others had followed his lead. To sum up, in ten days twenty-one jurors had either failed to appear, left with or without permission, refused to serve, or incapacitated themselves.²⁷

Just how many potential jurors defied the court's summons is also revealed by the extent to which courts used bystanders rather than summoned jurors. When too few veniremen showed up, judges, sheriffs, or bailiffs relied upon bystanders to fill the jury box.²⁸ Bystanders were heavily used in several different regions of the country. In antebellum Kentucky, sheriffs apparently "rounded up as many candidates as [they] could find."²⁹ In Georgia and Minnesota, no-shows delayed court business and judges had to turn to bystanders in order to proceed with dockets.³⁰ In most places plenty of bystanders were available — jury trials attracted the whole town. Trials were one of the few sources of public entertainment in many communities.³¹

ginia traveled over 17,000 miles per year in 1824 and 1825. In the densely populated Southern District of New York, jurors traveled only about 200 miles annually. See H.R. Doc. No. 164, 20th Cong., 1st Sess. (1828).

27. WILLIAMS, *supra* note 13, at 84-85.

28. See, e.g., PETER OXENBRIDGE THACHER, OBSERVATIONS ON SOME OF THE METHODS KNOWN IN THE LAW OF MASSACHUSETTS TO SECURE THE SELECTION AND APPOINTMENT OF AN IMPARTIAL JURY, IN CASES CIVIL AND CRIMINAL 9 (1834) (noting Act of 1807 authorizing up to five bystanders on Massachusetts' juries); David J. Bodenhamer, *The Democratic Impulse and Legal Change in the Age of Jackson: The Example of Criminal Juries in Antebellum Indiana*, 45 HISTORIAN 206, 214-17 (1983).

29. See Robert M. Ireland, *Law and Disorder in Nineteenth-Century Kentucky*, 32 VAND. L. REV. 281, 291 (1979) (also characterizing some of these bystander jurors as "courthouse bums who served on juries in order to collect a little wine money").

30. See Bodenhamer, *Antebellum*, *supra* note 19, at 89 (noting that this was a practice decried by Georgia grand juries); Carroll, *supra* note 18, at 142.

31. See I.P. CALLISON, COURTS OF INJUSTICE 401 (1956) (noting that during the pioneer period the jury trial was one of few sources of entertainment). Trials in the 1820s in South Carolina resembled county fairs. For the four to ten days each spring

Where volunteers or bystanders were scarce or ineligible, shortages of qualified jurors sometimes threatened the very functioning of the courts.³² Without jurors, the show could not go on. The options of charging criminals through information rather than indictment, and disposing of charges through bench trials or plea bargains were not authorized until much later in the nineteenth century.³³ Until then, a grand jury was required to bring felony charges, and petit jurors were required to resolve them. This practical necessity may account for the frequent fines for non-compliance in some courts of the period.

Fining those who failed to obey summonses appeared to be a universal response to jury dodging throughout the colonial period,³⁴ and in the early 1800s statutes in most states authorized fines ranging from one dollar to \$250.³⁵ Enforcement efforts were quite vigorous in some jurisdictions. For example, court records from the Michigan Territory reveal that contempt proceedings against delinquent jurors occupied much of the circuit court's caseload — the court considered twenty-nine indictments for assault and battery, forty-three indictments for theft-related crimes, and fifty-eight contempt proceedings against men who

and fall that court was held, much of the county's population gathered and there was rarely enough room for everyone to watch. See SMITH, *supra* note 25, at 7 (noting that in early Indiana, before 1857, trials were public events filling the courtroom "to suffocation") WILLIAMS, *supra* note 13, at 13, 76-77.

32. See William Davis, Jr., *Western Justice: The Court at Fort Bridger, Utah Territory*, 23 UTAH HIST. Q. 99, 111 (1955) (noting that the judge at Fort Bridger "found the impaneling of a [even a six-man] jury an extremely difficult matter at times [and had] to call in some of his farm hands at Fort Supply a dozen miles to the south"); see also Preyer, *supra* note 18, at 71 n.69 (reporting that in Accomac District in Virginia, no grand jury was impanelled in three terms between 1789 and 1801, maybe "because the required 24 members had not turned up in obedience to process; repeatedly individuals were summoned to answer and pay fines for this offense").

33. See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884) (upholding charge by information rather than grand jury); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5 (1979) [hereinafter Alschuler, *Plea Bargaining*]. In 1852 Maryland became the first state to allow for jury waiver for *all* criminal cases; New York was the last, changing its constitution over a century later in 1957. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 22 & n.18 (1966); Susan C. Towne, *The Historical Origins of Bench Trial for Serious Crime*, 26 AM. J. LEGAL HIST. 123, 145-59 (1982).

34. For example, one scholar studying the courts of North Carolina of the 1700s concluded based upon the steady increase in the statutory fine and complaints of absenteeism that "no more galling problem presented itself to the Carolina court than that of insufficient juries." DONNA J. SPINDEL, *CRIME AND SOCIETY IN NORTH CAROLINA, 1663-1776*, at 24, 95 (1989).

35. See, e.g., CHARLES EDWARDS, *THE JURYMAN'S GUIDE* 65-66 (1831) (in New York jurors were subject to fine of \$25 for each day they neglected to attend); WILLIAMS, *supra* note 13, at 84 (in South Carolina fines ranged from 50¢ to \$20); YOUNGER, *supra* note 11, at 75 (listing 10 states and noting that fines for failure to appear ranged from \$3 to \$50).

had failed to attend as grand or petit jurors.³⁶ In Williamson County, Tennessee, "the fining or excusing of jurors was an initial docket matter at each term of court between 1810-1820."³⁷

Many less wealthy veniremen complied in order to avoid the fine.³⁸ For those with means, however, contempt citations appeared to have operated not as a burden, but as a privilege. Exemption from jury duty was a perquisite that money could buy.³⁹ A careful investigation of fines for nonattendance of jurors in South Carolina during the 1790s revealed that fines were sufficient only to assure the attendance of the less wealthy. Most of those fined for failing to report for jury duty were the community's most prominent citizens.⁴⁰ It is ironic, to say the least, that many of the men who fought for independence and its resulting charter, the Constitution with its Bill of Rights, may have undermined the spirit of that document by avoiding jury service.⁴¹

36. All but 13 of the 42 contempt prosecutions in the Michigan Supreme Court, and all of the 58 contempt proceedings in circuit court between 1805 and 1824 were against jurors. See William Wirt Blume, *Criminal Procedure on the American Frontier: A Study of the Statutes and Court Records of Michigan Territory 1805-1825*, 57 MICH. L. REV. 195, 250-56 (1958). In one district in South Carolina in 1803, 13 citizens were fined for failure to answer jury roll call. WILLIAMS, *supra* note 13, at 84. Another way that some early courts may have been able to function despite the profound reluctance of citizens to serve was by impaneling juries of less than twelve, but this was an option in only a few jurisdictions for felony cases.

37. See Note, *Justice on the Tennessee Frontier: The Williamson County Circuit Court 1810-1820*, 32 VAND. L. REV. 413, 418 n.38 (1979) [hereinafter Note, *Williamson County Court*].

38. See Hall, *supra* note 11, at 1-3. One citizen complained in a diary entry, "This evening the Sheriff called with a notice to me to serve as juror. . . . This is a disagreeable duty and if it were possible for me to avoid its performance without being fined I certainly should do so." WILLIAMS, *supra* note 13, at 83-84. Not surprisingly, once at the courthouse, many unwilling veniremen tried to get out of serving by lying about their capacity to serve, just as they do today. "The most popular excuse [in Philadelphia in the 1850s and 60s]," Steinberg notes, "was deafness, which led to curious scenes of people explaining to the judge why they could converse with him but could not serve as a juror." Allen R. Steinberg, *The Criminal Courts and the Transformation of Criminal Justice in Philadelphia, 1815-1874*, at 447 (1983) (unpublished Ph.D. dissertation, Columbia University).

39. See 2 THE WORKS OF JAMES WILSON 205 (James DeWitt Andrews ed., 1896) (writing around 1800 that the only people serving as jurors were those who lacked either the influence not to be called in the first place or the means to pay the fine).

40. See Hall, *supra* note 11, at 9 (reporting that in one term, all but one of the 35 men paying fines owned slaves, half were Revolutionary War veterans, and nine had been or were later elected to public office).

41. During roughly the same period in Marion County, Indiana, "[i]t may have been cheaper to pay the small fine for contempt than to lose more money because of court attendance." DAVID J. BODENHAMER, *THE PURSUIT OF JUSTICE: CRIME AND LAW IN ANTEBELLUM INDIANA* 54 (1986) [hereinafter BODENHAMER, *PURSUIT OF*

Lawmakers of the time manifested little interest in ensuring that different demographic groups in the community served on juries. Jury service, like the vote, was reserved for white men of property. And although some critics complained about the competency of jurors,⁴² early nineteenth century lawmakers did not seem concerned that their wealthier and more educated citizens avoided jury duty. Not until mid-century did concerns about the caliber of jurors begin to translate into procedural reform, with the adoption of measures to combat corruption in the selection and recruitment of jurors.⁴³

2. *The Quest for "Better" Jurors: From "Corruption" to "Competence" — 1870-1940*

As populations grew during the nineteenth century and into the twentieth, securing jurors remained troublesome. More populous communities brought higher crime rates, more efficient policing, and an ever-growing number of criminal cases requiring an increasing number of jurors. The crush of cases continued despite the advent of plea bargaining and bench trials.⁴⁴ In the decades between the Civil War and World War II, inconvenience and financial loss still topped the list of reasons for avoiding jury service, and courts and legislatures took their

JUSTICE]; cf. WILLIAMS, *supra* note 13, at 84 (despite rigid enforcement, fines "failed to halt non-attendance" in South Carolina).

Another explanation for the frequency of these fines may be that in many courts of the time the prosecutor's pay depended upon the amount of fines collected — delinquent jurors were a handy source of income. See, e.g., Ayers, *supra* note 20, at 112 (noting that fines generated revenue to feed pretrial detainees); Ireland, *supra* note 29, at 283 (noting that in Kentucky "for most of the century, prosecutors were paid principally by fees, receiving a percentage of fines recovered"). But see MASS. GEN. CT. SENATE, REPORT OF THE COMMITTEE ON THE SUBJECT OF JURIES, 18 (1808), *microformed on* Early American Imprints, Second Series No. 15541 (noting Act that provided that juror nonattendance fees of \$20 to \$40 were "to be divided equally among the jurors who shall attend and serve").

42. See Alschuler & Deiss, *supra* note 6, at 880-81 (reporting discontent with jurors as early as 1800).

43. In antebellum Kentucky, for example, the provision of peremptory challenges to the prosecution and the use of out-of-county jurors in particularly divisive cases were designed to counter the opportunity for jury packing provided by dependence upon volunteer or bystander jurors. In some counties it was almost routine for defendants with means to hire jurors to hang the jury. See Ireland, *supra* note 29, at 291-92. In the late 1850s the Pennsylvania legislature passed a statute requiring the sheriff to choose the names of supplemental jurors, when needed, from the jury wheel. WILLIS REED BIERLY, JURIES AND JURY TRIALS, STATE AND FEDERAL, COMMON LAW AND STATUTORY 77 (1908); see also JOHN PROFFATT, A TREATISE ON TRIAL BY JURY § 131 n.2 (1877).

44. See *supra* note 33 (collecting sources tracing the development of plea bargaining and bench trials).

first steps to ease these burdens. The most defining feature of juror recruitment during this era was the widespread criticism that the wealthy and educated classes were escaping jury service, that their absence was harmful and unfair, and that reforms in jury selection and enforcement procedures were required to remedy this deficiency.

The complaint that those who were better educated were avoiding service was fueled by dissatisfaction with verdicts. Influential segments of society were losing faith in juries to reach the right results. The period was one in which the "values of uniformity and certainty took on paramount importance,"⁴⁵ and juries seemed to many to be standing in the way of progress. Critics accused jurors in civil cases of undue sympathy toward plaintiffs suing corporations,⁴⁶ and accused jurors in criminal cases of lacking the sense to deliver justice (i.e., convictions).⁴⁷

45. Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 191 (1964).

46. See e.g., Note, *supra* note 45, at 190-92 (noting influential members of the bar evidently objected to the jury because it would be hostile to their clients and sympathetic to poor litigants); The Jury, An Address Delivered by John Dean, Justice of the Supreme Court of Pennsylvania, Before the Law Academy of Philadelphia, May 20, 1987, at 15-17 ("juries began to swerve from the truth since the multiplication of corporations, and their growth in power and capital . . . the root of the evil lies in laxity of enforcement of the law regulating the selection of jurymen").

47. See, e.g., MAXIMUS A. LESSER, *THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM* 207 (1894) (noting that the abolition of unanimity would be a "heroic[] remedy" to the "main complaint" about the jury, which is its failure to convict); Carl A. Ross, *The Jury System of Cook County, Illinois*, 5 ILL. L. REV. 283 (1910) (noting criticism of juries intensified after 1907 with repeated acquittals of saloon keepers for violating Sunday closing laws; and acquittal in 1909 of jury commissioner tried for corruption); *Report on Criminal Procedure*, in 2 NATIONAL COMM. ON LAW OBSERVANCE AND ENFORCEMENT REPORTS 28 (1931) [hereinafter WICKERSHAM REPORT] ("Repeated failure of juries to agree in recent conspicuous criminal trials has brought about agitation for majority verdicts in prosecutions. Many are now urging abolition of the criminal jury."); cf. Clarence Darrow, *Attorney for the Defense*, ESQUIRE MAG., May 1936, reprinted in CAL. TRIAL LAW. J., Winter 1974-75, at 17 (noting "the tendency of the wealthy man to want to convict, in order to preserve the institution of Capitalism and Civilization"). One historian has documented that this dissatisfaction with the caliber of jurors and their failure to convict in criminal cases began just prior to the Civil War. See AYERS, *supra* note 20, at 113.

By the turn of the century the lowered esteem in which juries were held had enabled two important shifts in the relationship between judge and jury: judges had removed questions of law from criminal as well as civil juries and began ordering new trials when they believed a jury verdict was contrary to the weight of the evidence. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 28-29 (1977); PROFFATT, *supra* note 43, at 440-45 (assessing, in 1877, the jury's power to decide the law in criminal cases in various states); Alschuler & Deiss, *supra* note 6, at 910-11 (reporting that between 1850 and 1931 the courts of at least 11 states and the U.S. Supreme Court had rejected the jury's right to judge law as well as fact); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939) (tracing shift in nineteenth century). Professor Stanton D. Krauss's careful study reveals

Disagreement with verdicts was not the only catalyst for charges of juror incompetence. The persistent complaint also coincided with the influx of immigrants and African-Americans into the pool of citizens eligible for jury service.⁴⁸

Whatever their motive, critics after the Civil War frequently complained that the "better" classes were opting out of jury service. These protests swelled to a chorus in the first few decades of the twentieth century.⁴⁹ By 1930, the Frankfurter-Pound Commission concluded that in Cleveland "most citizens of means or intelligence avoid service. This avoidance has become traditional, so that it is a kind of mild disgrace for a so-called 'respectable citizen' to allow himself to be caught for jury service — like being swindled, for instance."⁵⁰

that the jury's lawmaking power may have been removed much earlier in some jurisdictions. See Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America* (manuscript on file with author).

48. See LESSER, *supra* note 47, at 182 (protesting that in more than a dozen states where "unnaturalized foreigners are after a brief period of residence permitted to exercise the elective franchise . . . aliens may often be in a position to decide the right to property, and even to personal liberty, of citizens."); Alschuler & Deiss, *supra* note 6, at 916 (reporting dissatisfaction among Congressional Democrats in the late 1870s that integrated federal juries were corrupt, biased, or incompetent and noting that the decline in trust in jurors as legal advisers coincided with the increased diversity of the jury and increased complexity of legal issues); Hon. R.C. Pitman, *Juries and Jurymen*, 139 NO. AM. REV. 1 (1884), quoted in LESSER, *supra* note 47, at 182 ("[I]f [the juror qualification criterion of] 'good moral character' is as laxly interpreted as the same phrase practically is in the naturalization proceedings, it affords but little guaranty."); see also Laura Gaston Dooley, *Our Juries Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1995) (arguing that the decline in jury prestige coincided with the influx of women jurors).

49. See, e.g., FRIEDMAN, *supra* note 11, at 395-96 (complaints focused on professionals who were routinely excused or bought their way out); MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION: A SURVEY OF THE EXTENT TO WHICH THE STANDARDS OF THE AMERICAN BAR ASSOCIATION FOR IMPROVING THE ADMINISTRATION OF JUSTICE HAVE BEEN ACCEPTED THROUGHOUT THE COUNTRY 553 (Arthur T. Vanderbilt ed., 1949) [hereinafter MINIMUM STANDARDS] (in California, reformers complained that the juries were made up of "housewives, who had no experience in business or ordinary affairs of life outside of the home, and elderly men whose minds had become inactive"); Dean, *supra* note 46, at 20-21 ("The professional man, the boss mechanic, the city councilman, the thriving farmer, all want to be excused from jury service because of the pressing nature of their business affairs . . . with them there, unjust verdicts would be rare, and the growing dissatisfaction with the jury system would in a few years disappear."); Eric Fishman, *New York City's Criminal Justice System 1895-1932*, at 336-37 (1980) (unpublished Ph.D. dissertation, Columbia University) (noting that in New York, many believed jurors were uneducated and too sentimental, and that the best citizens were exempted).

50. RAYMOND FOSDICK ET AL., *CRIMINAL JUSTICE IN CLEVELAND: REPORTS OF THE CLEVELAND FOUNDATION SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO* 344 (Roscoe Pound & Felix Frankfurter eds., 1922) [hereinafter CLEVELAND REPORT].

There is some basis for this perception that the middle and upper classes were fleeing from jury service during the decades between 1870 and 1940. Because the administration of jury summonses remained a one-man operation in most jurisdictions, it was not difficult to use money or other influence to gain an exemption from jury service, and some of the well-to-do took advantage of the opportunity to avoid being summoned.⁵¹ Many others simply ignored their summonses⁵² or relied on the liberal granting of excuses, sometimes making illegal payments or lying for the privilege.⁵³ If one believed the assertions of jurors wishing to be excused from jury service in Cleveland in the mid-1920s, for example, illness affected the "better" residential districts more seriously than the more modest neighborhoods.⁵⁴ Those with means in Cleveland also purchased membership in military orders to avoid service.⁵⁵ In one county in Illinois in 1927 at least half of the jurors who

51. See, e.g., STANLEY F. BREWSTER, *TWELVE MEN IN A BOX* 19 (1934) (noting citizens who dodge jury duty by sending substitutes, or lying, but that the most common means of avoiding service is political — "getting men excused from jury duty has become one of the most valuable perquisites of the small politician"); ROBERT M. IRELAND, *LITTLE KINGDOMS: THE COUNTIES OF KENTUCKY, 1850-1891*, at 82 (1977) (reporting that in Kentucky many on the commissioners' lists were not summoned and sheriffs instead relied upon "'professional jurymen,' noted for their menial status and leniency"); Upton Close, *Twelve Good Men — and "Untrue,"* CHRISTIAN SCI. MONITOR WKLY. MAG., July 20, 1938, at 1 (in several Pennsylvania cities it was common for a man or woman summoned for jury service to call on a "friend with influence," who in turn secured the services of a "henchman" of the "boss" to answer to the name of the summoned citizen and serve out the term). The same circumstance facilitated jury stacking as well, whenever a litigant sought a particularly receptive jury. See MINIMUM STANDARDS, *supra* note 49, at 553 (noting that jury stacking had scandalized a number of metropolitan centers).

52. In Cleveland, 37% of those residing in the "better sections" of town simply ignored the summons to appear for examination before the commissioners compared to 28% overall and 26% for two other sections. CLEVELAND REPORT, *supra* note 50, at 346. Other communities had higher compliance rates. In Illinois in 1927, only about 8% did not appear when summoned. ILLINOIS ASSN. FOR CRIMINAL JUSTICE, *THE ILLINOIS CRIME SURVEY* 232 (John H. Wigmore ed., 1929) [hereinafter ILLINOIS CRIME SURVEY].

53. *The Desire to Avoid Jury Duty*, 11 WASH. L. REP., Feb. 17, 1883, at 91 (reporting that "persons eligible for jury service . . . have been enabled to escape from the performance of it, by illegally paying certain sums to those entrusted by law with the duty of preparing jury lists"). On the "corrupt atmosphere of urban criminal justice" at the time, see Alschuler, *Plea Bargaining*, *supra* note 33, at 26 & n.139.

54. CLEVELAND REPORT, *supra* note 50, at 346 (residents from exclusive suburbs claimed to be less healthy than those from poor districts, 12% claiming illness, compared to 9% in the poorer areas).

55. See *id.* at 347. The resentment against those who managed to escape jury service was reminiscent of anger about the ease with which those with means avoided the draft during the Civil War by purchasing exemptions or substitutes. See generally DAVID HERBERT DONALD, *LIBERTY AND UNION* 141-43 (1978) (describing draft avoidance in 1862-63).

showed up were excused, and 770 of the over 5000 jurors excused had been excused before — thirty-seven had been excused at least five times.⁵⁶ Other commentators of the time described how easy it was to get out of jury service by lying, noting the surprise of attorneys to “hear a juror whom they hardly knew speak of his friendship and acquaintance with them for no other reason obviously than to be excused from serving.”⁵⁷

If the well-educated and well-to-do were trying to avoid jury service,⁵⁸ it is easy to see why. Although most trials remained relatively short around the turn of the century, more were stretching on for days and weeks. Frustrating delays during trials were not uncommon.⁵⁹ Sequestered jurors found themselves parted from their families and livelihood for extended periods of time, confined in their uncomfortable juryrooms until they completed each case.⁶⁰ The practice of shuttling

56. See ILLINOIS CRIME SURVEY, *supra* note 52, at 234.

57. IRVIN STALMASTER, WHAT PRICE JURY TRIALS 74 (1931). Still other criticism centered on the exercise of peremptory challenges to excuse those who had heard of the case, leaving only “fools, rogues, or hermits.” NOBEL BUTLER, BUTLER’S MISCELLANIES: TRIAL BY JURY, THE PHILOSOPHY OF COMPOSITION, AND OTHER PIECES 21 (1880).

58. The rhetoric about juror incompetence probably overstated the problem. Contrary to the chorus of claims that the intelligence of the average juror was lower than that of the average citizen, two studies of petit jurors during this period found that juries in several cities reflected an economic status *higher* than that of the general population. Juries in many cities were not made up of the illiterate or feebleminded at all. Instead they were heavily middle class, with the very highest and lowest classes only lightly represented. See CLARENCE N. CALLENDER, THE SELECTION OF JURORS: A COMPARATIVE STUDY OF THE METHODS OF SELECTION AND THE PERSONNEL OF JURIES IN PHILADELPHIA AND OTHER CITIES 49, 56 (1924) (the occupational and economic profile of jurors in several cities was high, 25% or more occupying positions of responsibility or demanding a degree of education or intelligence higher than average, while Chicago’s juries were “of a somewhat lower occupational grade”). Callender’s work also revealed that the effect of excuses on the economic composition of the jury panel was not significant. *Id.* at 36-37; see also Eleanor S. Brussel, A Study of the Composition of Juries of the District Court 39 (1930) (unpublished Ph.D. dissertation, University of Minnesota) (concluding from statistical study in Hennepin County, Minnesota that venires in 1929 were drawn from the three highest categories of occupation and intelligence, and that challenges had no effect on the occupational composition of the jury).

59. For example, an observer describing one case in New York reported that the judges and attorneys dining together in one case lingered over their midday meal until the evening hours, two days in a row, although the jurors, eating separately, had returned by two o’clock p.m. as ordered. See HENRY LAUREN CLINTON, EXTRAORDINARY CASES 64-65 (1896).

60. Small, ill-ventilated jury rooms were “almost unendurable,” resulting frequently in sickness, especially for older jurors. See Willis B. Perkins, *Some Needed Reforms in the Methods of Selecting Juries*, 13 MICH. L. REV. 391, 399 (1915). Others contained only 11 chairs so the foreman would be forced to stand. Albert Walker, *Jury Room Sentiments and Diversions*, 13 THE GREEN BAG 196 (1901) (describing jury

them off to a hotel or, even more radically, sending them home for the night, had not yet caught on.⁶¹

Financial hardship also continued to be a deterrent for all but the poorest jurors.⁶² Pay for jurors remained static while income rose,⁶³ and the more money one lost during jury duty, the greater was the financial incentive to avoid it. What's more, fines for failing to appear did not increase with the income of prospective jurors either. Those who could afford the fine preferred to risk it rather than pay an even higher price in lost time and income.⁶⁴

rooms in Brooklyn, New York). One juror explained how a judge was finally persuaded to give jurors cots:

Once, the only comfortable spot I could find was the judge's high backed chair, tilted back seductively on springs, with my feet propped up on a pile of law books on his desk; we were not confined to one room during the night, but had the range of the courthouse, under guard. In the morning, after the jury was discharged, I told him he possessed the only berth in court suitable to a nap. He placidly replied . . . "I have several times told the county commissioners that they ought to provide cot-beds for jurors; I wish you would go to them and make complaint, and I will support it." Since that time they have been provided . . .

Joseph Hornor Coates, *Some Difficulties of a Jurymen*, SCRIBNERS, Jan. 1910, at 89, 90-91. Another juror summed up his opinion of the situation on the juror room wall:

The jury system
Is the guard
Of human liberty.
But when you lock one up all night
The truth one fails to see.

Walker, *supra*, at 196; *see also* State v. White, 26 So. 849 (La. 1899) (capital defendant appealed on the grounds that "the jur[ors] had reached their conclusion with undue haste, and without proper deliberation . . . due to the disagreeable and uncomfortable condition of the room which had been assigned to the jur[ors] for their deliberations").

61. *See* Perkins, *supra* note 60, at 399. In one case, jurors who had not brought clean clothes had to buy them on a supervised excursion. People v. Fisher, 172 N.E. 743, 754 (Ill. 1930). In another case, jurors slept in a vacant courtroom and bathed once a week at the YMCA. FRIEDMAN, *supra* note 11, at 395 (reporting trial from Dedham, Massachusetts in 1934). *But see* Harvey N. Shepard, *The Wrongs of the Jurymen*, ATLANTIC MONTHLY, Aug. 1895, at 258, 261 (noting that Connecticut jurors were allowed to return home each night and recommending that this practice be adopted elsewhere).

62. Juror fees were better than no income at all. For the unemployed, jury service was an attractive opportunity to earn a few dollars and enjoy a free meal or two. For example, in Cleveland during the winter of 1920-21 with the greatest unemployment since 1914, many jurors' names remained in venires. A total of 77 served 300 juror terms, 40 serving six two-week terms each. The study reporting these figures concluded that these jurors "were tiding over a period of unemployment by attempting to perform one of the most difficult tasks of democratic government at \$2 per day." CLEVELAND REPORT, *supra* note 50, at 352.

63. As late as the mid 1950s, only four states paid jurors as much as \$10 per day. *See* INSTITUTE OF JUDICIAL ADMIN., JURY COSTS (Bernard Kulik ed., 1955).

64. *See, e.g.* BREWSTER, *supra* note 51, at 21 (estimating the loss to tradesmen and skilled mechanics from jury service at about \$10 per day in 1934). During this pe-

The increasing criticism of the caliber of the jury, the growing number of cases, and the rise of court administration, all contributed to significant changes in the ways that jurors were selected and to enforcement of that selection process. In the late 1800s and the early 1900s, reformers set upon the jury system in earnest. The first task was eliminating corruption in the selection and enforcement system. After the Civil War, New York State enacted statutes punishing efforts to pay for the privilege of not serving, including a provision that made it a misdemeanor for a summoned juror to fail to report any offer to procure his discharge or excuse from jury duty.⁶⁵ Physicians issued so many false certificates of illness or disability to prospective jurors that the New York legislature made it a crime for them to do so.⁶⁶ In order to cease dependence upon bystanders whom many considered to be inferior specimens for the jury or tools of corrupt litigants, courts tried harder to predict the correct number of veniremembers who would be needed,⁶⁷ outlawed the use of bystanders entirely, or punished anyone seeking a place for himself or another in the jury box.⁶⁸ By the early 1900s, many

riod, the prosecution of those involved in organized crime raised juror fears of retaliation. See HARRY ELMER BARNES, *TRIAL BY JURY: THE GREAT BURLESQUE OF MODERN CRIMINAL JUSTICE* 14-15 (1929) ("The jury may even be covertly threatened with mob reprisal if it does not render a certain type of verdict."); FRIEDMAN, *supra* note 11, at 395 (noting two cases in 1926-27 in which urban jurors may have been intimidated); ILLINOIS CRIME SURVEY, *supra* note 52, at 234-36 (reporting jurors lied to escape service in case in which a witness's house was bombed); DAVID RAY PAPKE, *FRAMING THE CRIMINAL: CRIME, CULTURAL WORK AND THE LOSS OF CRITICAL PERSPECTIVE* (1830-1900) 13-14 (1987) (noting that organized and professional crime emerged in the late 1800s).

65. See HUGO HIRSH, *A PRACTICAL TREATISE ON JURIES, THEIR POWERS, DUTIES, AND USES, IN ALL ACTIONS AND PROCEEDINGS BOTH CIVIL AND CRIMINAL, UNDER THE COMMON LAW AND UNDER THE STATUTES OF THE UNITED STATES AND THE STATE OF NEW YORK* 61 (1879).

66. See N.Y. Code Civ. Proc. § 1120 (1899) (also making it a misdemeanor to make a misstatement to evade service); STALMASTER, *supra* note 57, at 81 (noting that "the practice of excusing jurors from service upon doctors' certificates grew so flagrant in New York that a special statute was enacted making it a misdemeanor for a physician to give a false affidavit or certificate 'for the purpose of enabling a person to be discharged, or excused, or exempted as a trial juror'"). This statute actually first was passed in the 1870s, as the complaints about the caliber of jurors were beginning to heat up.

67. See, e.g., *The Trouble With the Jury System*, 1 J. CRIM. L. & CRIMINOLOGY 959, 961 (1911) ("As a rule, the most dangerous juror is the talesman — the idle hanger-on in the Court House, hungry for the pitiful *per diem* of a juror, sometimes obtruding himself to be called by the sheriff in order to serve a friend, sometimes present by invitation for that purpose.").

68. See, e.g., SEYMOUR D. THOMPSON & EDWIN G. MERRIAM, *A TREATISE ON THE ORGANIZATION, CUSTODY AND CONDUCT OF JURIES, INCLUDING GRAND JURIES* 81-93 (1882).

jurisdictions had substituted professional jury commissioners for politically beholden officers.⁶⁹

Selection systems in several jurisdictions were overhauled in order to boost the education levels of jurors.⁷⁰ The prevailing view among the judges and attorneys who staffed reform commissions was aptly stated in a 1933 essay called "The Unfit Juror."⁷¹ The author argued that "America has long suffered from the false teaching that every citizen is the equal of every other citizen, and by right is entitled to perform any service or hold any office of the state." Better care had to be taken, the author said, to "screen out unfit jurors in order to improve the caliber of juries."⁷² As a result, stricter selection criteria were adopted⁷³ and reformers began to tackle those conditions of service that deterred businessmen from serving, shortening terms of service, and relaxing rules

69. See MINIMUM STANDARDS, *supra* note 49, at 547; Alfred C. Coxe, *The Trials of Jury Trials*, 1 COLUM. L. REV. 286, 296 (1901) (complaining that the supervisors, town clerks, and assessors were too influenced by favoritism and politics in their decisions to leave off or add some persons to the jury list, and that the work should be done by a jury commissioner). The Wickersham Commission's report of 1931 accused judges of playing political favorites, too, in their exercise of excuses. WICKERSHAM REPORT, *supra* note 47, at 24 ("[T]here is constant heavy pressure to be excused on the part of those best fitted for jury service. When elected judges, frequently holding for relatively short terms, are subjected to this pressure, often reinforced by political influence, it can not be expected that a high standard of competent juries may be maintained.").

70. See, e.g., CALLENDER, *supra* note 58, at 9.

71. The essay was published in the most influential publication in the new field of judicial administration, the *Journal of the American Judicature Society*. See Albert S. Osborn, *The Unfit Juror*, 17 J. AM. JUDICATURE SOC'Y. 113 (1933). For an excellent overview of the growth of judicial administration, see SHELDEN D. ELLIOTT, *IMPROVING OUR COURTS: COLLECTED STUDIES ON JUDICIAL ADMINISTRATION* 1-30 (1959).

72. Osborn, *supra* note 71, at 115.

73. Jury commissioners in Los Angeles, for example, required two written tests and a personal interview of every prospective juror. On the first test, "twenty five words ordinarily used during the trial of cases are set down next to three other words, one a synonym, which the juror is asked to circle. The second test asked the citizen to read several common jury instructions and mark statements appearing afterward as right or wrong." Admirers of the system noted, "No attempt has been made to raise the mental standard too high. The personal interview . . . permits the weeding out of persons who, though high in intelligence rating, appear to lack reason, or who have a wrong conception of government or law enforcement." MINIMUM STANDARDS, *supra* note 49, at 554. Of course, we know now that this sort of selection system also made it easier for officials to "weed out" minority racial and ethnic groups as well. See, e.g., S.W. Tucker, *Racial Discrimination in Jury Selection in Virginia*, 52 VA. L. REV. 736, 738-39 (1966) (describing Act of 1919 that placed the selection of jurors in the hands of nonjudicial officers who presumed that "Negroes were utterly unqualified to sit on juries").

against separation.⁷⁴ Exemptions that permitted entire professions to opt out of jury service were targeted for elimination, with mixed success.⁷⁵ One commentator promised that upon the repeal of the long list of professional exemptions in New York, “the average intelligence of juries will automatically rise 50%.”⁷⁶

Finally, there was considerable support for more vigorous enforcement of summonses through the use of fines for contempt.⁷⁷ Some judges throughout the period used their contempt powers, but not strictly enough to satisfy all critics. Said one, “A few fines for contempt of court for failing to respond to mailed summonses . . . would quickly put an end to the present wholesale ignoring of the court’s

74. See HIRSH, *supra* note 65, at 190; Coxe, *supra* note 69, at 297. By the 1940s, 11 jurisdictions limited jury service to three weeks or less, six others required a month. Others continued to have very long terms. In California jurors were on call for three months, in Arizona service lasted as long as four months, and several states required jurors to be on call for an entire year. Twenty-nine states permitted separation before deliberations, but 13 states still required sequestration in capital cases. See MINIMUM STANDARDS, *supra* note 49, at 195-96, 203-04; see also WILLIAM M. WHERRY, A STUDY OF THE ORGANIZATION OF LITIGATION AND OF THE JURY TRIAL IN THE SUPREME COURT OF NEW YORK COUNTY 53 (1931) (reporting that in New York, starting in 1929, jurors began to be called in pools for several courts, instead of calling separate panels for each court, reducing waiting time and resulting in savings of over \$63,000 in juror fees).

75. The elimination of exemptions from jury service started quite early in Massachusetts, in 1808. See Dierdre A. Harris, Note, *Jury Nullification in Historical Perspective: Massachusetts as a Case Study*, 12 SUFFOLK U. L. REV. 968, 993 (1978). In 1938, the American Bar Association issued its recommendations, which recognized that:

[I]f the qualifications and exemptions set by statute are so fanciful and numerous as to exclude the majority of otherwise available citizens, it will be almost impossible for the jury commissioners to select jurors who are honest, and bring to their task intelligence, sound judgment and courage that will enable them rightly to decide questions of fact, and to do so without fear or favor.

MINIMUM STANDARDS, *supra* note 49, at 162 (internal quotation marks omitted). It wasn’t until 1995 that the New York legislature scrapped its list of exempt occupations.

76. BREWSTER, *supra* note 51, at 15.

77. Fines for nonappearance ranged in 1882 from five dollars in Connecticut to \$500 in Nevada. See THOMPSON & MERRIAM, *supra* note 68, at 83. An elaborate procedure for fining delinquent jurors and the review of those fines was in place in New York at the end of the 1870s, including a board for the enforcement of jury fines, made up of several judges, the recorder, and the mayor, that met at least twice a year to decide whether to remit jury fines. See HIRSH, *supra* note 65, at 55-60. During 1904-05 in New York County, 33,500 jurors were summoned to serve, 60% tried to dodge service, and 1500 of these were ordered to pay fines. See Samuel R. Stern, *Men Not so Good and Not so True*, 13 UNPARTIZAN REV. 287, 288-89 (1920). In the 1920s in New York, court business was halted by the lack of jurors, and one judge reportedly imposed fines for the 70% of those summoned who did not show up, subject to remission if they proved to have valid excuses. See JULIA MARGARET HICKS, WOMEN JURORS 14 (1928).

call.”⁷⁸ The next era in jury enforcement would see an expansion of efforts to remove disincentives, but also a shift in the groups targeted by those efforts from wealthy and conventional-thinking businessmen⁷⁹ to groups historically underrepresented on juries: racial and ethnic minorities and women.

3. *Compulsory Jury Service Encounters the Rights Revolution — 1940-1995*

Beginning around the middle of this century, criminal prosecutions were transformed by judicial application of the Bill of Rights to all stages of the adjudicative process. Jury selection and its enforcement were recast as well. In the late nineteenth and early twentieth centuries court reformers had been concerned that verdicts in criminal cases be “truthful” and “accurate” and uninfluenced by sympathy or politics that might undermine business interests. This led them to remove disincentives that discouraged educated citizens from serving as jurors and to delegate considerable discretion to jury commissioners to qualify and summon only those jurors whom the commissioners considered “fit” to serve. In a few short decades, this approach was replaced by one based on distrust of those same commissioners. Discretion once considered vital to maintain the “caliber” of jurors became despised as a tool for discrimination that threatened the rights of criminal defendants.

The Court began its renovation of jury selection by prohibiting the exclusion of women and of wage earners in the federal courts in the 1940s. In the decades that followed, the Court continued by interpreting the Equal Protection Clause, the Due Process Clause, and the Sixth Amendment to prohibit state as well as federal officials from discriminating on the basis of race or gender in jury selection, and by requiring states to defend selection procedures when jury venires did not fairly represent the racial and ethnic diversity of the communities from which they were drawn.⁸⁰ In contrast to the late 1930s and 1940s, when courts carefully screened potential jurors for “character” or “intelligence,” by

78. CLEVELAND REPORT, *supra* note 50, at 353; *see also* ILLINOIS CRIME SURVEY, *supra* note 52, at 1929 (urging that judges cite those who ignore summons with contempt to improve turnout).

79. *See, e.g.*, JOSEPH H. CHOATE, AMERICAN ADDRESSES 235-36 (1911) (arguing “competent men, having been selected, must be compelled to serve. Too great exemptions are allowed, too paltry excuses accepted, and the very men who by their weight and character would leaven the whole lump escape altogether.”).

80. *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §§ 22.2(c)-(d), 22.3(d) (2d ed. 1992). Earlier regulation of racial discrimination in state jury selection under the Equal Protection Clause had not been effective. *See* Alschuler & Deiss, *supra* note 6, at 891-95.

1980 such screening had been replaced in most jurisdictions by random and race-blind procedures drawing jurors indiscriminately from voters lists.⁸¹

In addition to removing much of the discretion that judges and commissioners earlier had enjoyed, the modern approach to juror compliance has focused more aggressively on eliminating disincentives to serve. Conditions for jurors had improved considerably by the second half of the twentieth century, but working people still found it difficult to remove themselves from jobs and family for jury service. Average lost earnings for each juror from one term of service in 1975 in some counties was more than \$1000.⁸² Since 1950 several states have raised the amount that jurors receive as fees and adopted criminal or civil liability for employers that retaliate against employees called as jurors, and six have required employers to pay the salary of employees while on jury duty.⁸³ In 1978, the American Bar Association issued its Standards Relating to Juror Use and Management, in which it advocated several revisions in jury administration, such as the one day/one trial system designed to reduce burdens on all jurors who serve. States that adopted them⁸⁴ reported improved compliance.⁸⁵

81. See, e.g., 28 U.S.C. §§ 1861-1869 (1994) (setting separate qualifications for federal jurors); see generally Carl H. Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A. L. REV. 247 (1973); Lester B. Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 108-30 (1962). Selection procedures that allowed volunteers to serve as jurors were disapproved as violating the statutory rights of criminal defendants. See, e.g., *United States v. Kennedy*, 548 F.2d 608, 610-11 (5th Cir. 1977), cert. denied, 434 U.S. 865 (1977); *Gattis v. State*, 637 A.2d 808, 815 (Del. 1994) (collecting cases), cert. denied, 115 S. Ct. 132 (1994).

82. See William R. Pabst, Jr. & G. Thomas Munsterman, *The Economic Hardship of Jury Duty*, 58 JUDICATURE 494, 497-98 (1975) (reporting also that for about 75% of jurors, losses were borne by the employer). As of 1958, less than half of the country's factory workers were guaranteed compensation during jury service by their collective bargaining agreements. See CALIFORNIA ASSEMBLY INTERIM COMM. ON JUDICIARY, SUMMARY OF HEARINGS ON COMPENSATION OF JURORS 9 (1962) (statement of Thomas L. Pitts, Secretary-Treasurer, California Labor Federation, AFL-CIO).

83. See G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216, 217 & n.4 (1996) [hereinafter G.T. Munsterman, *A Brief History*] (noting that mandatory pay for jurors is required of at least some employers for a limited number of days of service in Alabama, Nebraska, Tennessee, Massachusetts, Colorado, Connecticut, and Louisiana). These mandatory pay statutes were upheld as constitutional in *Dean v. Gadsden Times Publishing Corp.*, 412 U.S. 543 (1973) (requiring employers to pay employees while on jury duty has "no less sturdy a footing" than requiring employers to pay employees while voting).

84. See G.T. Munsterman, *A Brief History*, *supra* note 83, at 217-18 (summarizing history of standards).

85. See, e.g., J. MUNSTERMAN ET AL., *supra* note 7, § 4.1, at 21-24 (noting that many courts have reported improved yields with reduced terms of service).

Despite great strides in reducing disincentives to serve, the shift from qualification interviews to qualification by mail in most jurisdictions during this period may actually have expanded opportunities to avoid jury service.⁸⁶ Many jurisdictions, following the lead of the federal act, adopted a procedure by which each randomly selected citizen received a mailed questionnaire, and later, only if he chose to fill out the questionnaire and mail it back, was summoned for service. Some courts continued to enforce summonses against qualified respondents who failed to appear, but very few did anything about those who never returned their qualification questionnaires.⁸⁷ Shirking jury duty became easier than ever, even though the duty itself had become less onerous. No longer did jury dodgers have to procure excuses through influence or deceit, pay fines, or avoid apprehension by sheriffs who knew perfectly well they had been summoned.⁸⁸ With the advent of the mailed qualification questionnaire, Americans could avoid being bothered with jury service simply by tossing their jury questionnaires in the trash along with other unwanted junk mail.

86. Studies during the late 1970s showed that citizens continued to resist jury service. James L. Allen, *Attitude Change Following Jury Duty*, 2 JUST. SYS. J. 246, 251 (1976) (concluding that most jurors who responded to their summons would still try to get out of jury service if summoned again, even those that had served as trial jurors); John P. Richert, *Jurors' Attitudes Toward Jury Service*, 2 JUSTICE SYS. J. 233, 236 (1976) (noting that more than half of the persons called for jury duty in his study wrote to get out (1443 of 2703), only 3.6% asked for deferment, and 49.8% asked for exemption).

87. See G. THOMAS MUNSTERMAN ET AL., A SUPPLEMENT TO THE METHODOLOGY MANUAL FOR JURY SYSTEMS: RELATIONSHIPS TO THE STANDARDS RELATING TO JUROR USE AND MANAGEMENT 42 (1987) (stating that "some courts will carefully follow up all 'no shows' to the summons, yet simply drop from the system those who do not respond to the qualification questionnaire").

88. In the nineteenth century, jury selection was not nearly as anonymous as it is today. In some states, the same names appeared on the jury rolls again and again. See AYERS, *supra* note 20, at 224 (reporting that in Greene County, Georgia, between 1890 and 1900, 11 families accounted for almost 20% of the grand jurors, and 25 men appeared in the grand jury four times or more); MICHAEL STEPHEN HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 154-55 & n.63 (1980); WILLIAMS, *supra* note 13, at 83. There was no intermediate qualification stage in jury selection. See LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910, at 55 (1981) (describing selection in Alameda County, California, in the late 1800s). In Fort Wayne in the early 1800s, the sheriff would yell for the jurors to appear when court began. SMITH, *supra* note 25, at 168-70.

C. Compulsory Jury Service Today

1. Jury Duty Avoidance — Its Extent

Today, high rates of jury avoidance seem to be a localized phenomenon, not a nationwide epidemic. Statistical studies of various jurisdictions reveal extremely low response rates to questionnaires or to summonses in some jurisdictions, and near-perfect compliance in others.⁸⁹ People who resist jury duty today are apprehensive about lost income, the inconvenience of being absent from work and family, unpleasant working conditions, and long waits.⁹⁰ In addition, some potential jurors may stay away to avoid attention from litigants or the press,⁹¹

89. Compare G. THOMAS MUNSTERMAN, THIRD JUDICIAL CIRCUIT COURT, WAYNE COUNTY, MICHIGAN, A TECHNICAL ASSISTANCE REPORT, JURY MANAGEMENT 9, 12 (National Ctr. for State Courts ed., 1995) (reporting that in Wayne County, Michigan, an average of 26% of those sent questionnaires did not return them, and of those who did respond and were qualified, 16% failed to appear when summoned) and Gerlin, *supra* note 1, at B1 (reporting that only 22-25% of those summoned in Dallas County responded at the beginning of August, 1995) with G. THOMAS MUNSTERMAN, THIRTY-SEVENTH JUDICIAL CIRCUIT COURT, CALHOUN COUNTY, MICHIGAN, TECHNICAL ASSISTANCE REPORT 2 (National Ctr. for State Courts ed., 1995) (Calhoun County manages a very low 6% nonresponse rate) and ERROL E. GIDDINGS, COLORADO JURY SYSTEM FAILURE TO APPEAR NOTICES 27-31 (1993) (reporting 4% failure to appear rate).

The judges in Los Angeles are among the most concerned about juror yields. Of all the citizens summoned to jury service in 1994, 52% ignored the qualification questionnaire; in 1995, after the adoption of follow-up procedures 36% of summoned citizens failed to respond. The problem has become acute recently because more defendants are going to trial due to the "three strikes" law, CAL. PENAL CODE § 667 (West Supp. 1996), and because the large number of peremptory challenges allowed in that state in criminal cases requires nearly twice the number of veniremembers per trial as in other states. See Jacobius, *supra* note 1; see also Bienen et al., *supra* note 7, app. C at 1-4 (reporting a study of 348 jurors summoned for jury service in 1994 in New Jersey that revealed that 31.5% of respondents had tried to avoid or postpone having to appear at the designated time, that 20.5% did not attend, that 27% asked to be excused once they got to court, and that 39% of the jurors summoned successfully avoided jury service in these ways).

90. See HENNEPIN COUNTY ATTORNEY'S TASK FORCE ON RACIAL COMPOSITION OF THE GRAND JURY 55 (1992) (noting that the most common reasons people seek excuse are economic and child care); REPORT OF THE BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT 26 (Judicial Council of California et al. eds., 1996) [hereinafter CALIFORNIA REPORT] (reporting that in some California counties, 60% of hardship excuses involve child care); Bienen et al., *supra* note 7, at app. C (78.1% of jurors surveyed disagreed or strongly disagreed with the statement "the money allowances I received were adequate" (54.5% reporting strong disagreement), 63.4% of those who sought excuses reported that the statement "I did not want to displease my employer" applied very much or somewhat, and 54.8% said that the statement "I could not afford to lose my pay from work" applied very much).

91. See CALIFORNIA REPORT, *supra* note 90, at 34 ("[M]any jurors are plainly worried about the threat of intimidation or retaliation."); Nancy J. King, *Nameless Jus-*

or to protest a system they feel is unjust.⁹²

Existing studies, however, do not reveal how, if, or when judges enforce jury summonses. Nor do they address why judges choose to spare or punish jury dodgers. To obtain additional information about jury avoidance and jury misconduct during trial, I mailed 970 surveys to state and federal trial judges in late November of 1995. The survey solicited answers to several questions about the behavior of jurors and prospective jurors in the recipient's court over the past three years, as well as the recipient's response to that behavior.⁹³ Well over half (562) of the 970 judges to whom I sent surveys completed and returned them.

tice: The Case for Routine Use of Anonymous Juries in Criminal Cases, 49 VAND. L. REV. 123, 126-30, 139 (1996).

92. See, e.g., *United States v. Grisham*, 841 F. Supp. 1138, 1149 n.22 (N.D. Ala. 1994) (noting an expert's testimony that blacks may return questionnaires at lower rates than whites because of "sociologically induced mistrust of government"), *affd.*, 63 F.3d 1074 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 798 (1996). One jury supervisor said in a phone conversation that an older man said he didn't want to participate because, "I don't believe in the system; all lawyers are weasels." Telephone Interview with Michael Devereaux, Jury Supervisor, 22d Judicial Circuit, St. Louis (Feb. 1996).

93. The names and addresses of 717 state judges and 253 federal judges were selected from BNA DIRECTORY OF STATE AND FEDERAL COURTS, JUDGES, AND CLERKS (Kamla J. King & Judith A. Miller, eds., 4th ed. 1996). The judges worked in both large and small cities in 17 states and 30 federal districts nationwide. Within those cities, only courts that were listed as having jurisdiction over major felony and civil cases were selected, and only those with three or more judges at the same address, to ensure anonymity. Within those courts, each or some (using a regular interval) of the listed judges' names were selected. Of the state judges sent surveys, 179 were in southern states, 132 in northeastern states, 179 in western states, and 227 in Midwestern states. Judges were requested to complete the survey and return it without identifying themselves.

Approximately the same proportion of federal and state judges responded. One hundred thirty-three of the returned surveys were from federal judges, 375 from state judges, and 54 from judges that did not identify themselves as state or federal judges, for a total of 562 responses. A handful of additional surveys were returned as undeliverable; several judges indicated by phone or in writing that they had not tried jury cases in the last three years and a few judges wrote explaining that they did not answer surveys.

The sample included judges predominately from courts in larger cities: Of the 549 judges specifying city size, 8% (N=44) worked in courts located in cities of under 100,000; 28.4% (N=156) in cities of between 100,000 and 500,000; 25% (N=137) in cities between 500,000 and 1,000,000; and 38.6% (N=212) in cities over 1,000,000. Most of the judges responding estimated that they had tried between 30 and 89 jury cases in the past three years. Seven and seven-tenths percent (N=43) reported trying less than 10 jury cases; 18.6% (N=104) reported 10-29 jury trials; 29% (N=162) reported 30-59 jury trials; 23.8% (N=133) reported 60-89 jury trials; 11.1% (N=62) reported 90-119 jury trials; and 9.8% (N=55) reported 120-150 jury trials over the past three years. State judges tried more cases on average than federal judges. Most judges had tried both civil and criminal cases: 19.0% (N=105) reported trying no civil cases; 18.7% (N=103) reported less than 25%; 27% (N=149) reported more than 25% but less than 50% civil cases; 16.7% (N=92) reported trying more than half civil cases; and 18.7% (N=103) re-

The survey results concerning jury duty enforcement must necessarily be considered as somewhat incomplete. Randomly sampled judicial impressions of the problem of jury dodging are less exact than statistics compiled by jury administrators or surveys of prospective jurors, particularly because in many urban courts, knowledge about jury administration prior to the voir dire stage is concentrated in a few judges and the jury staff.⁹⁴ Moreover, the results reflect the responses of only those judges who chose to complete and return the questionnaire. Also, because the survey requested that judges recall three years of litigation, some responses may be based on incomplete recollections. Finally, because the sample was limited to cities large enough to have three or more judges in the same court at the same address, the results do not necessarily represent the impressions of trial judges in the thousands of smaller communities across the nation. Nevertheless, the survey provides the first national snapshot of formal jury enforcement proceedings, judicial attitudes concerning jury dodging, the conduct of jurors during voir dire, and judicial responses to that conduct.

The survey suggests that most trial judges do not consider jury avoidance to be a serious problem. For example, when judges on the bench seven years or more were asked their opinions about whether compliance with jury summonses had become worse or better or had stayed the same compared to seven years ago, most judges answered that compliance was about the same. Of the judges that thought conditions had changed, however, more thought compliance had worsened than thought that it had improved. This was the case when considering the responses of all judges⁹⁵ and also after excluding the responses of those judges who suggested directly or indirectly that they had no re-

ported trying entirely civil cases. Judges were almost evenly divided three ways between those on the bench six years or less, those on the bench seven to fourteen years and those on the bench fifteen years or more (1-6 years: 30.2% (N=170); 7-14 years: 30.4% (N=171); 15+ years 27% (N=152); 12.3% of the respondents did not answer this question). A complete report of survey data is available from the author.

94. In addition, because the survey asked only about those aspects of juror recruitment likely to be known by trial judges (noncompliance with jury summonses and untruthfulness during voir dire) it provides no additional information about nonresponse to qualification questionnaires in those jurisdictions that continue to use a two-step system rather than a combined questionnaire/summons.

95. Eleven percent of those judges who responded to this question believed that a smaller percentage of those summoned for service were ignoring their summonses today as compared to seven years ago, 34% responded that a greater proportion of those summoned are ignoring their summonses today, and 55% thought that the proportion of recalcitrant jurors is about the same today as it was seven years ago. Notably, state judges were more likely than federal judges to respond that nonappearance was worse today than seven years ago. Of state judges answering this question, 50% thought compliance was the same, 38% thought it was worse, and 12% thought it was better. Of federal

sponsibility for enforcing jury summonses.⁹⁶ Of the nearly 200 judges who volunteered comments about the use of contempt to enforce jury summonses, only a dozen suggested that the rate of noncompliance was high or was a problem in their courts.⁹⁷ Nearly four dozen volunteered that enforcement was *not* necessary because all (or almost all) of those summoned complied.⁹⁸ Less than one-sixth of the responding judges indicated that they had issued a show cause order to a person who had failed to comply with a jury summons within the past three years.⁹⁹

2. Jury Duty Avoidance — Enforcement

a. Existing Information about Enforcement. Anecdotal information from judges and jury administrators suggests that courts that have addressed the problem of juror truancy have preferred to remove disincentives to serve rather than punish those who resist.¹⁰⁰ According to G.

judges, 70% thought it was the same, 23% though it was worse, and 7% thought it was better. These differences were statistically significant. ($p < .01$).

96. The responsibility for enforcing jury summonses in most cities is not shared equally among trial judges, but is delegated to particular judges or to a jury administrator. To create a sample of judges who were most likely to have responsibility for enforcing jury summonses, I removed the response of any judge who volunteered that someone else took responsibility for enforcing jury summonses, marked as a reason for not using contempt powers that the court had an alternative enforcement program, or indicated lack of knowledge of who was or was not complying. The remaining 206 judges were more likely to be actively involved in enforcement. Of the judges in this smaller sample who had expressed an opinion about the problem today as compared to seven years ago ($N=115$), 29% ($N=33$) thought that a greater proportion of people ignore jury summonses today than did seven years ago compared to 16.5% ($N=19$) who thought the situation had improved.

97. Those comments included the following: "In our 40-county district, transportation problems are severe," "This is an extremely serious problem for us. We are trying to formulate a plan, short of contempt proceedings, to address this issue." "I think more jurors should be held in contempt for not complying. I think about 1/3 do not show up in Harris County," "Over 1/3 of all summoned jurors fail to respond in our jurisdiction." "We don't have time to do this, FTA [failure to appear] rate is 40-50%," "we have many no-shows." "Fewer than 25% of Detroit residents respond to questionnaires." Two judges, one from New York City, and another from San Francisco, explained that the rate of response to summonses was 20% or less, one characterized the jury system as "in serious trouble." Another comment echoed a familiar theme: "Our largest problem with juror misconduct is that well educated and involved persons avoid jury service like the plague."

98. Forty-seven judges noted adequate or complete compliance in their volunteered comments.

99. See *infra* text accompanying note 108.

100. The story of one honest but conflicted citizen from Houston is an apt illustration. Reading on his questionnaire that by failing to respond he risked a \$100 fine, he slipped a check for \$100 in with his questionnaire along with an explanation that he simply couldn't serve. The judge called him in and learned that his employer wouldn't pay him while he was on jury duty and that this had prompted the juror to decide that it

Thomas Munsterman, Director of the Center for Jury Studies of the National Center for State Courts, very few courts follow up on those citizens who do not return their qualification questionnaires, and most do nothing even when summoned jurors do not respond.¹⁰¹ Some jurisdictions that have strengthened enforcement or follow-up procedures may have done so in part as a response to challenges that lax enforcement fails to secure jury panels that represent a fair cross section of the surrounding community.¹⁰²

This is not to say that contemporary courts are satisfied with volunteers and have abandoned enforcement efforts entirely. Rather, they seem to be using penalties such as contempt as a last resort when reforms such as employer-mandated pay and one-day/one-trial fail to attract sufficient numbers of qualified jurors.¹⁰³ More courts are replacing hardship excuses with a single chance to defer service to a more convenient time. Automated follow-up notices and well-coordinated systems for scheduling deferral dates have proven to be cost-effective ways to boost compliance in some jurisdictions.¹⁰⁴ Because many people who fail to respond to their jury questionnaires do not receive them, are dis-

was better to pay a fine than to miss work. The judge then called the employer, persuaded the employer to pay the employee while on jury duty, and sent the \$100 back to the employee. Telephone Interview with G. Thomas Munsterman, Apr., 1996.

101. See G.T. Munsterman, *Jury News*, *supra* note 10, at 6, 44-45 (noting the lack of enforcement efforts against summoned jurors); see also G. THOMAS MUNSTERMAN, TWENTY-SECOND JUDICIAL CIRCUIT COURT, WASHTENAW COUNTY, MICHIGAN, TECHNICAL ASSISTANCE REPORT 2 (National Ctr. for State Courts ed., 1996) (noting that Washtenaw County "is one of the few counties in Michigan and probably in the U.S. that follows up on persons who do not return their qualification questionnaire") (emphasis added).

102. See *supra* note 9.

103. See, e.g., THE ARIZONA SUPREME COURT COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, at 49 (Sept. 1994) [hereinafter ARIZONA REPORT] (recommending automated follow-up mailings, but declining to recommend further enforcement action, noting "public education efforts . . . coupled with considerate and efficient treatment and utilization of jurors called to service, will, in the long term, produce a higher level of compliance with the summons"); Jan Hoffman, *Jury-Duty Dodgers Tell It to the Judge*, N.Y. TIMES, Apr. 8, 1996, at B1 (reporting that in Manhattan, reducing term of service from two weeks to three days in 1996 has doubled the percentage of those who appeared).

104. See Joanna Sobol, *Hardship Excuses and Occupational Exemptions: The Impairment of the "Fair Cross-Section of the Community,"* 69 S. CAL. L. REV. 155, 170 (1995) (noting success of deferrals in Central District of California); G.T. Munsterman, *Jury News*, *supra* note 10, at 45 (noting that follow-up notices produced 29% of the nonresponding jurors in some counties of Colorado, reduced to less than 1% of those originally contacted the number of unexplained nonresponders in San Diego, reduced the nonresponse rate by 32% in Detroit and by half in Atlanta).

qualified, or have a legitimate excuse for not serving,¹⁰⁵ most courts tend to use contempt selectively, only after a prospective juror has not responded many times or has been found to have had no valid reason to avoid service.¹⁰⁶ In many jurisdictions those who are fined must still serve. In St. Louis, for example, the offer of one self-employed prospective juror to pay the fine instead of serving was refused by a somewhat annoyed judge. Instead, the juror was forced to sit in the courthouse for several hours until he agreed to serve at a later date. According to the jury supervisor, all steps are taken to assure the public that a person who can afford the fine cannot buy his way off.¹⁰⁷

b. Survey Results Concerning Enforcement. The survey responses reflect this preference for carrots over sticks. Although a small but significant percentage of judges use their contempt powers, many judges are reluctant to use contempt as a remedy for juror truancy. Of those judges who had issued an order to show cause in the past three years (only 17.5% of all judges responding), 43% used such orders sparingly, issuing only one or two. Fourteen percent reported that they had issued eleven or more such orders.¹⁰⁸ The percentage of judges issuing such or-

105. See G.T. Munsterman, *Jury News*, *supra* note 10, at 45 (noting that it is not accurate to presume that all those who fail to respond to their questionnaires are recalcitrant — many either never received them, or are unqualified or exempted).

106. See *id.* at 45-46 (noting this approach was adopted recently by some judges in Houston and Baltimore); Interview with Ms. Norma J. Wagoner, Jury Administrator, W.D. Tex. (Jan. 1996) (jury supervisor could recall only two hearings to show cause why prospective juror should not be held in contempt in the past 19 years in the Western District of Texas, both where the person refused service or failed to respond to earlier orders to appear. One was excused, the other deferred for service on a later date). Other courts continue to try regular punishment to send a message. In Washington, D.C., judges randomly select the unlucky “juror of the month” to punish, says G. Thomas Munsterman. See Munsterman, *supra* note 100. One judge from another city told me in a telephone conversation on Dec. 14, 1995, that “every six months or so we haul 10 people in here and try to get a lot of publicity.” See also *Federal Judges Warn Jurors to Show Up*, ANN ARBOR NEWS, May 2, 1996, at C6 (announcing “crack-down” in the United States District Court for the Eastern District of Michigan).

107. Conversation with Michael D. Devereaux, Jury Supervisor, 22d Judicial Circuit, St. Louis, Mo. (Feb. 1996); see also Hoffman, *supra* note 103, at B1 (reporting that jury shirkers in New York are scheduled for service as well as fined).

108. Over 82% of judges surveyed had not issued an order to show cause to a person failing to appear for jury service in the past three years. Of the smaller sample of judges referred to in note 96, about 40% had used their contempt powers in the past three years to issue orders to show cause to those who had failed to appear.

Forty-three percent (N=41) of the judges who had indicated that they had issued an order to show cause in the past three years had used an order only one or two times, 42% (N=40) had used an order 3-10 times, and 14% (N=14) had ordered 11 or more jurors to appear and explain why they hadn't obeyed their summonses. Most of these judges were from cities with a population over 500,000. The relationship between city size and frequency of show cause orders was statistically significant ($p < .01$).

ders is low, probably because most of the judges surveyed lacked responsibility for doing so,¹⁰⁹ but several judges offered other explanations as well: ninety judges noted that using contempt to enforce jury summons was too costly or inefficient,¹¹⁰ eighty-five judges responded that coerced jurors make bad jurors,¹¹¹ nearly fifty explained that compliance was adequate, and sixteen responded that most of those who fail to appear have a good reason for not appearing.¹¹² Particularly interesting were the candid responses of three judges that they have declined to hold delinquent jurors in contempt because they face election.¹¹³

Of those judges who have ordered recalcitrant jurors to come to court to explain their noncompliance, less than half had held a noncomplier in contempt, and, of these, less than a third held four or more jurors in contempt during the past three years.¹¹⁴ Over half of the judges who had held nonresponders in contempt noted that they had imposed a sentence for this offense, but most judges had done so only

109. Of the approximately 450 judges who in the past three years had not issued any order to show cause to a nonresponder, 182 stated they did not know which prospective jurors did not comply, 161 indicated that their court had an alternative enforcement mechanism, and 80 noted that the responsibility for enforcing jury summons belonged to another judge or jury commissioner. One judge reported that he or she used letters to jurors to appear in chambers to discuss their failure to appear rather than formal summonses, three others issued bench warrants or had sheriffs round up noncompliers, several simply scheduled no-shows for later service.

110. Typical of the volunteered comments on this point were, "the expense of a contempt is greater than the return benefit," "those who fail to show are such an insignificant number it is not worth my time or taxpayer dollars to pursue them," and "[t]here are far better methods to get a response short of contempt — which is like a significant sanction, we get a good response to our summonses — have one day one trial." See also Kauffman, *supra* note 9 (recounting that judges asked the states' attorneys to withdraw 400 cases filed in 1992 to collect fines from jury dodgers because of the strain it put on the courts).

111. One volunteered, "If they do not want to serve, the litigants should not be forced to take them."

112. Of the smaller sample of judges who were more likely to have had responsibility for enforcing jury summonses, see *supra* note 96, 33 responded that one of the reasons that they had not issued orders to show cause was that those who comply make better jurors than those who must be coerced into compliance, 42 responded that using contempt in this situation uses too much of the court's resources, and 8 indicated that they assume nonresponders have good reasons for not complying.

113. "We are elected!" "Judges are elected — reluctance to arrest people who vote; would expect publicity because so rarely enforced" "Not good p.r. for elected judges." Two additional responses contained references to public relations or the message contempt would send to prospective jurors. These responses project a certain paradox: by striving to increase the accountability of *judges* through judicial elections we may be indirectly undermining the ability of the *jury* to fulfill its democratic role.

114. Of the 95 judges, 42 indicated that they had cited at least one potential juror with contempt. Of these, 32 had held only one to three potential jurors in contempt. The remaining judges held 4, 5, 6, 10, 23, 24, 35, or 80 jurors in contempt.

once in the past three years.¹¹⁵ Like sentences, fines were unusual — twenty-five of the twenty-nine judges imposing fines during the past three years had fined three persons or less.¹¹⁶ Only two judges commented that they thought that more recalcitrant jurors should be held in contempt. The responses indicate that even those judges who perceive compliance with jury summons to be a problem would prefer not to secure attendance through contempt procedures, and that many judges who do issue orders to show cause often do not follow with a penalty.

The survey also produced information about veniremembers who avoid service as trial jurors by misrepresenting the truth during voir dire. The questionnaire asked judges about the proportion of cases in which they became convinced that a veniremember was untruthful. Although they were not asked to, several judges elaborated on the reasons that they thought veniremembers had lied. The most common reason for dishonesty, according to the comments, is to avoid service. Fifteen judges indicated concern about the number of veniremembers who lie to avoid serving. As one judge concluded, “intelligent panel members realize and use the obvious responses to avoid jury service.” Another reported that veniremembers falsely represent “that they do not believe in the presumption of innocence, cannot apply ‘beyond a reasonable doubt’ standard, will not follow the judge’s instructions, cannot be fair because they believe the Defendant is guilty . . . or don’t like lawyers or people who ask for damages.”¹¹⁷

Most of the judges who were convinced that a veniremember had been dishonest dismissed the untruthful veniremember. Doing nothing and allowing the attorneys to handle it was another popular response to veniremember deceit.¹¹⁸ Sixteen judges reported that they had threatened contempt and four reported imposing contempt for untruth-

115. Twenty-three of the 42 judges had imposed a sentence on an offending juror. Sixteen of those 23 reported imposing a sentence for nonappearance only once. Sentences ranged between one and 100 days. Three judges specifically noted that they had imposed sentences suspended upon service in another pool.

116. The remaining four judges reported fining 5, 24, 35, and 75 potential jurors. Fines ranged up to \$1500 (one judge), with the most popular amounts being \$100 or \$250 (eight and five judges each).

117. The second most common type of untruthfulness, according to the judges’ comments, is the failure to reveal prior criminal history or other relevant information. This kind of misconduct will be examined in Part II.

118. Two hundred thirty-eight judges responded that they had dismissed the veniremember from that trial in this situation, 184 said they had allowed attorneys to act if they chose, and 46 had dismissed the veniremember from service in any trial. One judge explained, “I have never interfered with the responses given by prospective jurors, assuming that a juror that didn’t want to be a juror could find a pretext for avoiding service.”

fulness during voir dire. Some judges, however, expressed frustration about how to control this behavior. One stated, "I have never come up with a good remedy for a well-coached veniremember who lied about his/her feelings or attitudes (as opposed to lying about verifiable facts)." Just as nonappearance has generated creative responses from courts that are concerned that all who are summoned appear, judges have employed a variety of punishments other than contempt for the veniremember who lies to stay off the jury. Four judges apparently refused to let deceitful veniremembers avoid service by demanding instead that they sit through the entire trial as observers. Others denied them their juror fee, ordered them resubpoenaed for service, or embarrassed them. Future responses to this behavior may depend in part upon what judges learn about who is fibbing to get off, and whether letting them go biases the outcome of criminal cases.

In sum, these responses suggest that jury dodging does not trouble most judges, but does pose a serious problem for some courts. Most judges do not use contempt to enforce appearance, and those that do generally do so infrequently and are often able to coerce compliance without requiring payment of a fine or incarceration. Finally, however, the survey suggests that veniremembers who are able to claim bias and other subjective disqualifying characteristics often can, and do, evade further service after appearing.

D. *Future Directions*

The foregoing discussion of jury avoidance past and present reveals a distinct trend: the remedies of fines and bystanders have given way to a very different, and for many courts more successful, prescription for recruiting jurors — targeting the causes of juror resistance. This shift has taken place for several reasons. Foremost has been the desire to increase jury participation by particular groups — first, businessmen, and more recently, all "cognizable" groups that the Court has proclaimed must not be systematically excluded from jury pools. Also prompting the change in emphasis has been the high cost of punitive as compared to preventive solutions, and the continuing futility of attempts to impanel veniremembers who have strong incentives not to serve. Contempt may deter overt defiance of a jury summons; it is practically useless against the person who shows up and then lies to avoid serving as a trial juror. Shorter terms of service, employer liability for juror wages, the use of deferred service instead of hardship excuses, together with the adoption of the combined summons and qualification questionnaire and automated tracking of those summoned for jury service, have provided most courts with an adequate supply of jurors.

In communities in which jury avoidance is high, lawmakers considering changing procedures for recruiting jurors are well advised to keep these past successes in mind. For example, calls for the routine imposition of criminal contempt penalties against jury shirkers may meet with skepticism from cost-conscious judges and resistance from overburdened police, prosecutors, and corrections officials who must arrest, prosecute, and house these offenders. More novel punishments are worth considering.

In a provocative recent article exploring ways to ensure that the jury remains a viable and effective institution of self-governance, Professor Akhil Amar suggested that courts withdraw the franchise from those who fail to report for jury service.¹¹⁹ The proposal, however, seems likely to promote less participation in democracy, not more, an objection Amar acknowledges.¹²⁰ Perhaps jury avoiders should forfeit a government privilege, not unlike the current federal law that conditions eligibility for student loans upon registration for the draft, but it is difficult to settle on which privilege would be appropriate, efficient, or effective to withhold. The California legislature is presently considering whether to bar jury dodgers from renewing their driver's licenses until after they can prove they have complied with their jury summonses.¹²¹ For an even sharper bite, a state might suspend driver's licenses or other government benefits when scofflaws fail to appear. At any rate, some citizens may feel that they cannot spare a day or two for jury service, even on dates convenient to them and with full pay. For them, conditional sentences, community service,¹²² or stiff monetary sanc-

119. See Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1179 (1995).

120. See *id.* at 1180. Rather than increasing the proportion of citizens involved in governance, the proposal restricts that number to only those who care so much about their right to vote that they will serve on juries against their will, and to those who already willingly serve on juries.

121. See CALIFORNIA REPORT, *supra* note 90, at 105-06. The shorter the renewal period, the more effective this proposal will be.

122. For example, one Manhattan stockbroker sent an impostor to court during voir dire instead of responding to the summons himself. After confessing that he was merely a substitute, the impostor bolted. Authorities easily located and promptly prosecuted the true venireman, who ended up performing 500 hours of particularly fitting community service: helping the Jury Supervisor with paperwork. The Jury Supervisor reported that he was "a very, very bright, likeable guy," one of the best workers he's ever had. This spring, months after completing his stint in the jury office, the stockbroker completed his service as a sworn juror. Telephone Interview with Vincent Hominick, Jury Supervisor, New York County, N.Y., June 19, 1996; *Busy Executive Finds Even Best Mechanic Can't Fix Jury Duty*, CHI. TRIB., Jan. 19, 1995, at A3.

tions¹²³ may always be necessary deterrents of last resort.

Because courts appear to prefer to make jury service more convenient for jurors rather than trying to police those who stay away, we can anticipate more experiments with new incentives to serve. Using jurors' social security numbers a state could offer jurors a tax credit or an income tax exemption for compensation while on jury duty.¹²⁴ An insurance plan to compensate self-employed jurors for lost wages and employers for the cost of supporting employees on jury duty may provide additional incentives to comply.¹²⁵ With creative scheduling, busy courts could offer potential jurors their choice of morning, afternoon, or full-day service.

Child care problems of potential jurors demand attention as well. A century ago, when responsibility for child care and jury service rarely overlapped, one judge in Seattle allowed a three-year-old boy to sit near the jury box, in a small rocker furnished by the sheriff, sucking his thumb and looking at a picture book, while his mother served as a juror.¹²⁶ One might expect that several decades of experience with jurors who are also parents would produce more systematic accommodations for child care, but the best that most courts offer is deferred service at a later date. Child care vouchers or facilities have yet to be seriously considered by most courts.¹²⁷

It is also possible that courts in which jury shirking persists as a serious problem may consider tackling some of the more intractable causes of reluctance to serve, including even those trial features that litigants have come to regard as constitutional entitlements. For example, judges could limit the length of time a litigant has to present evi-

123. Professor Amar also proposed a fine equal to two weeks of salary in order to address the avoidance-by-the-rich problem that lesser fines have posed for years. Amar, *supra* note 119, at 1179. If fine caps are high enough — some jurisdictions have recently raised the possible fine for jury dodging to \$1500 — judges may have the discretion to follow Amar's suggestion.

124. Precedent for such an exemption exists in the combat-pay exemption for those who serve in armed services. *See* I.R.C. § 112(a)(1) (1994) (excluding from wages and gross income certain compensation that members of the armed forces earn while in active service in combat zone); *see also* CALIFORNIA REPORT, *supra* note 90, at 45 (recommending tax credit for employers who compensate employees while on jury duty for more than three days).

125. *See* CALIFORNIA REPORT, *supra* note 90, at 45-47 (proposing that state unemployment benefits be extended to employees unable to work due to jury service); Sobol, *supra* note 104, at 222 (proposing insurance plan).

126. *See* Lelia J. Robinson, *Women Jurors*, 1 CHI. LEGAL TIMES 22, 28-29 (1887).

127. A variety of other "soft" rewards are possible as well, such as the "juror appreciation week" recently proposed by judges in Arizona. *See* ARIZONA REPORT, *supra* note 103, at 34.

dence,¹²⁸ identify jurors by number rather than name to alleviate apprehensions about serving,¹²⁹ or consider cutting back on peremptory challenges to prevent veniremembers from taking advantage of the voir dire process to avoid being selected to serve.¹³⁰ Certainly, courts and legislatures are well advised to be cautious whenever targeting well-established aspects of the trial process, just as they must be careful not to overreact to a perceived problem in criminal justice before verifying its existence on a local level or before comparing its severity to other problems in the criminal justice system that demand attention as well. Still, it is about time that lawmakers at least consider the effects on jurors, and on the jury system, of procedures originally designed with only litigants in mind.

II. JUROR MISCONDUCT DURING TRIAL

A. *Jury Misconduct in America — How It Has Evolved*

Just as changes in trial procedure and social attitudes over the past two centuries have affected the way that citizens regard and courts enforce compulsory jury service, they have left their mark on the rules governing the behavior of those jurors who do serve. First, the opportunities for juror misconduct have expanded due to longer trials and increasing demands on juror behavior. In addition, some forms of jury misconduct have become easier to discover or prove, although the law still severely limits access to and proof of the jury's work after it is complete. Finally, as jury misconduct has posed a greater threat to the finality and efficiency of the trial process, courts have adopted two strategies in response: (1) managed tolerance, in the form of trial procedures and review standards that obviate the need for new trials whenever misconduct is revealed and (2) prevention, in the form of efforts to assist jurors to behave properly. The discussion of jury misconduct that follows traces each of these developments.

128. See *infra* note 278.

129. See King, *supra* note 91 (recommending that states consider using anonymous juries in all criminal cases).

130. Cf. Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 485, 488 (1996) (reporting survey of published decisions addressing *Batson* challenges revealed that 14% of the "race-neutral" reasons offered by litigants for their challenges involve behavior during voir dire, and that in 14% of those cases, the litigant challenged the juror because the juror "wished to avoid jury service").

1. *Increasing Demands upon Juror Behavior, 1796-1996*

Much of the jury behavior that we consider misconduct today was also misconduct two hundred years ago, but jurors back then had fewer opportunities to engage in it.¹³¹ Trials of the nineteenth century were too short to provide much of a chance for shenanigans. Whenever a jury was not in the jury box or actively deliberating, a bailiff closely supervised its members, watching over the group to make sure it behaved. Today that picture has changed. Felony trials with one or two witnesses lasting a few hours or less, once commonplace, are now rare. Also unusual today, primarily because of the increased length of trials, is the routine sequestration of the jury. Changes in press coverage of criminal proceedings have also enlarged opportunities for inappropriate behavior by jurors during trials. Moreover, contemporary judges and litigants have different expectations for jurors, expectations that have shifted, and will continue to shift, as the boundary separating acceptable and unacceptable behavior by jurors changes with societal views of the jury's function.¹³²

a. The Lengthening of the Criminal Jury Trial. Today, most felony jury trials take three days or longer to complete; in some jurisdictions, jurors spend a week trying the average felony case.¹³³ A criminal case that lasts for several weeks is no longer the sensation it used to be — one in every twenty felony jury trials in three counties in California takes nearly a month to complete.¹³⁴ Jury deliberations across the coun-

131. Some forms of misconduct were probably more prevalent in years past than they are today. For example, there is less contact today between jurors and the parties or the public through open windows or in crowded accommodations in which in the past jurors, parties, and witnesses lodged during the court's term. *See, e.g., Louisville & Nashville Ry. Co. v. Turney*, 62 So. 885, 888-89 (Ala. 1913) (jurors shared bed, then room, at boarding house with plaintiff throughout the trial); *Farrer v. Ohio*, 2 Ohio St. 54 (1853) (new trial granted in part because of conversations held between jurors and various persons on the sidewalk below through the windows of the jury room).

132. Another potential catalyst for one type of juror misconduct — veniremembers' efforts to conceal criminal histories — is the expansion of the jury pool in many communities during the 1950s and 60s beyond hand-picked men whose reputations were well-known.

133. *See DALE ANNE SIPES ET AL., ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS* 17-18, 79 (1988) (computing hours per day that were devoted to trials in nine jurisdictions, revealing that median criminal trial length ranged from just over two to over seven days); *see also Sobol, supra* note 104, at 173 (jury trials average one week in two California jurisdictions).

134. *See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS* 12 (1995) [hereinafter *LONG RANGE PLAN*] (reporting that the number of criminal jury trials lasting between 6 and 20 days have increased 118% since 1973); *SIPES ET AL., supra* note 133, at 17-18.

try have grown from short conferences that took only minutes to discussions averaging well over two hours.¹³⁵

i. Causes. Longer trials have crept up on us gradually and for many reasons.¹³⁶ Some attribute the lengthening of trials to attorneys. Expanded provision of counsel for the defense during the nineteenth century meant longer voir dres, more objections, more arguments about evidentiary and procedural matters, and, of course, more orations to the jury, all of which increased even further the time required to try even simple felonies.¹³⁷ Others have blamed "the system of elective judges with short tenure which swept over the country after 1850" for trial delays, complaining that "elected judges can not afford to antagonize [counsel] and so take refuge in a passive attitude and tend to become mere umpires."¹³⁸

Another change during the nineteenth century which may have lengthened trials in some jurisdictions was the withdrawal of questions of law from the jury. When juries were no longer allowed to decide the law for themselves the trial judge was obligated to instruct them carefully. Former practice in some jurisdictions had been to submit cases without instructions.¹³⁹

135. SIPES ET AL., *supra* note 133, at 19.

136. See FRIEDMAN & PERCIVAL, *supra* note 88, at 185 (in Alameda County, California, felony trials lengthened from a median of 1.2 days in 1880, to 1.7 days in the 1890s, to two days during 1900-1910); KALVEN & ZEISEL, *supra* note 33, at 156 (most felony trials took less than two days in the 1950s); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 470 (1992) (noting that in 1922 Cleveland prosecutors were trying two to four cases per day and that felony trials in Los Angeles took about three days in 1954); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 10 & n.18 (1978) (half of felony trials in 1976 in New Jersey lasted one to three days and five percent over five days; Los Angeles felony trials averaged over a week of trial time); *supra* text accompanying notes 20-24.

137. See, e.g., Langbein, *supra* note 136, at 10-11 (attributing the lengthening of trials to the provision of counsel during the nineteenth century and to evidentiary rules). By 1887, felony defendants in Chicago were provided counsel if they were unable to afford their own, and at least one writer lamented the "unseemly wrangles and displays of wit and wisdom" that regularly extended for days the time required to select a jury. ELLIOTT ANTHONY, A TREATISE ON THE LAW OF SELF DEFENSE, TRIAL BY JURY IN CRIMINAL CASES, AND NEW TRIALS IN CRIMINAL CASES 207 (1887); see also Van Kessel, *supra* note 136. In some jurisdictions, defendants had counsel much earlier. See, e.g., Rice, *supra* note 22, at 256 (only eight percent of felony defendants lacked trial counsel in Frederick County, Maryland, between 1818 and 1825).

138. WICKERSHAM REPORT, *supra* note 47, at 41 ("Rather than imperil their positions, they tolerate continuances and postponements, evasions of jury service and long drawn out selections of juries, and the wranglings of counsel and ill treatment of witnesses, so unhappily characteristic of American criminal trials.").

139. See, e.g., HORWITZ, *supra* note 47, at 143 (noting that "until 1807 the practice of Connecticut judges was simply to submit both law and facts to the jury, without

The law of evidence also changed in ways that lengthened trials. In the late nineteenth century, shifting and increasingly formal evidence doctrine provided ammunition for argument during trial. And although some recent reforms, such as the exclusionary rule barring illegally obtained evidence, have narrowed the scope of admissible evidence, many more evidentiary modifications since 1800 have increased the volume of evidence available to both the prosecution and the defense in criminal trials. For example, many witnesses commonly heard in criminal trials today, including defendants, their spouses, and convicted criminals, were barred from testifying during at least part of the nineteenth century.¹⁴⁰ Hearsay rules were relaxed in the early decades of the twentieth century.¹⁴¹ Preliminary hearings and the testimonial evidence that such hearings produce did not begin to replace less-accessible grand jury testimony until late in the nineteenth century.¹⁴²

Other developments may help to explain lengthening trials. Proof of guilt has become more complex. Early nineteenth century prosecutors relied heavily upon eyewitnesses. By 1900, prosecutors were dependent upon evidence collected and presented by professional investigative agencies. By the late 1950s, one quarter of all felony trials included expert witness testimony.¹⁴³ In the 1980s, felony trials in some counties typically included the testimony of at least one expert and

expressing any opinion or giving them any direction on how to find their verdict," but after 1807 they were required to give instructions on every point of law involved); Ireland, *supra* note 29, at 286 (stating that until instructions were required by statute in 1854, most judges in Kentucky did not instruct the jury unless one or both parties requested instructions).

140. Until the mid-nineteenth century, criminal defendants (and parties to a civil case) were not competent to testify, nor were their spouses. Until 1917, and much later for some states, those convicted of a felony, or of a crime of deceit, could not testify as witnesses. See generally 1 MCCORMICK ON EVIDENCE 92-94 (John W. Strong ed., 4th ed. 1992). Defendants may have answered questions at trial, but not as witnesses. See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2647-60 (1996) [hereinafter Alschuler, *Peculiar Privilege*].

141. See 2 EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 293, 302, 306-07 (1961). Liberalization of the hearsay rules has continued. For example, statements against penal interest, now a routine part of many criminal prosecutions, were inadmissible in many jurisdictions until the 1970s. See MCCORMICK, *supra* note 140, at 340-43.

142. See *supra* note 33. Also contributing to longer trials in some courts is the rule requiring the government's disclosure of the prior statements of prosecution witnesses, after the trial has begun. In New York, trials frequently have been delayed or recessed for up to a day after the jury is sworn while the defense digests this material. See THE JURY PROJECT, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 85 (1994) [hereinafter NEW YORK REPORT] (recommending that New York instead require disclosure before jury selection begins).

143. See KALVEN & ZEISEL, *supra* note 33, at 136-40.

three officials, as well as fourteen or fifteen exhibits, in addition to lay witnesses.¹⁴⁴ In addition, as the percentage of criminal cases disposed of by guilty plea increased between 1850 and 1930, more of the simple cases may have been “pled out,” increasing the complexity of the average criminal jury trial.¹⁴⁵ With increasingly complex criminal conspiracies, the number of criminal jury trials with multiple defendants may have increased as well. Between 1990 and 1994, for example, the number of federal jury trials with four or more defendants went up thirty-five percent.¹⁴⁶ For all of these reasons, the contrast between the felony jury trial of 1996 and the felony jury trial of 1796 is stark — the framework is the same, but what rests upon it is a much more bloated and complicated version of the previous crude, but slim, form.

ii. Effects on Jury Misconduct. Certain forms of jury misconduct have been aggravated by lengthening trials. When trials were snappy affairs jurors had little or no opportunity to misbehave before a verdict was returned. They rarely left the jury box during the trial and reached verdicts in minutes. Longer trials, with their recesses and breaks, allowed jurors many more opportunities to expose themselves to outside influence, conduct experiments, visit the scene of the event, share liquor, or otherwise act improperly before the verdict was returned.

144. See SIPES ET AL., *supra* note 133, at 19, 34.

145. I am grateful to Professor Robert P. Mosteller of Duke University School of Law for suggesting these latter two points to me. The relationship between longer trials and plea bargaining has been noted before. See Alschuler, *Plea Bargaining*, *supra* note 33, at 34. Mosteller's insight is that bargaining may have been a cause as well as a consequence of increasingly complex trials.

146. LONG RANGE PLAN, *supra* note 134, at 12. In recent decades defense attorneys have received even more leeway to question veniremembers during voir dire, and appellate courts have insisted that some questions be permitted in order to preserve a defendant's constitutional right to a fair trial. Compare *Hill v. State*, 661 A.2d 1164 (Md. 1995) (holding that a judge's refusal to ask veniremembers about racial or ethnic bias in the trial of an African-American defendant charged with cocaine possession violated the Maryland Constitution) and *LAFAVE & ISRAEL*, *supra* note 80, § 26.2(d) with *THACHER*, *supra* note 28, at 12-15, 18 (describing the use of “triers” in Massachusetts as of 1834 and noting that in the early 1800s jurors were not even questioned except upon motion of one of the parties). A comparative examination of cross-examination practices from 1796 to 1996 may very well confirm Professor Albert Alschuler's suggestion to me that cross-examination, too, has expanded to the point at which attorneys “consider it their professional duty to force witnesses to repeat their stories at least two or three times.” Letter from Albert W. Alschuler, Wilson-Dickinson Professor & Arnold & Frieda Shure Scholar, University of Chicago Law School 2 (July 3, 1996) (on file with author). The Court has held that other aspects of trial strategy are constitutionally protected as well. See Peter Westen, *Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense*, 66 CAL. L. REV. 935 (1978) (describing the Court's holding that the defendant's right to control the timing and sequence of the presentation of evidence is constitutionally protected).

Eventually, the sluggish pace of trials prompted courts to abandon their first line of defense against jury misconduct: sequestration. By the second half of the nineteenth century many courts treated the failure to keep jurors sequestered ("juror separation") as harmless,¹⁴⁷ and by the 1940s most states had abandoned the rule barring separation prior to deliberations in noncapital cases.¹⁴⁸ Judges concerned about jury competence recognized that sequestration deterred many potential "reliable" jurors from serving as jurors.¹⁴⁹

The introduction of women as jurors in many jurisdictions during the 1920s also increased the sentiment against sequestration. Male jurors locked together in a small room overnight to sleep or argue were expected to bear up under whatever inconvenience and embarrassment such close quarters might cause. But women jurors were an entirely different matter. Few desired that women jurors endure the close company of male strangers under such circumstances.¹⁵⁰ Pending the amendment of statutory prohibitions against separation, judges and bailiffs took whatever means they could to assure female jurors some privacy while keeping the jury together, including using sheets to divide off separate

147. See *Owens v. Commonwealth*, 167 S.E. 377, 378-79 (Va. Ct. App. 1933) (discussing shift in law in Virginia between 1812 and 1868); 2 SEYMOUR D. THOMPSON, A TREATISE ON THE LAW OF TRIALS IN ACTIONS CIVIL AND CRIMINAL 1827-28 (Marion C. Early ed., 1912).

148. See MINIMUM STANDARDS, *supra* note 49, at 203-05 (by the 1940s, 29 jurisdictions permitted judges to allow separation during trial until deliberations, but thirteen states mandated jury sequestration throughout the trial during capital cases). As they relaxed their separation rules, some states adopted statutes requiring judges to admonish jurors not to talk among themselves or with others about the case during separations. See, e.g., CAL. PENAL CODE § 1122 (West 1985 & Supp. 1996) (enacted 1872).

149. See *Stephens v. People*, 19 N.Y. 549, 554 (1859) ("if the ancient rule forbidding the separation of jurors, during a trial, should be enforced, at the present day, the public would lose the services of the most reliable jurors, and a weary burden would fall exclusively upon those who are unable to pay their fines, and to whom and their families the entire loss of time is a serious evil"), *overruled*, *People v. Epps*, 334 N.E. 2d 566, 570 (N.Y. 1974), *cert. denied*, 423 U.S. 999 (1975).

150. See *How a "Mixed Jury" Passed an All-Night Session*, LITERARY DIG., Mar. 17, 1923, at 50 (relating how jury of men and women endured a night locked in a jury room equipped with a bathroom door that revealed the occupant's silhouette and during which the young female juror slept on the marble window-sill "wrapt . . . tenderly" in the other jurors' over-coats while "her lover from across the courtyard . . . kept vigil"); Imogen B. Oakley, *The Crime Wave and the Jury*, 132 OUTLOOK 376, 378 (1922) ("[T]he chief reason why cleanly and intelligent citizens evade jury duty in the criminal court is that a murder trial will consign them to the jury dormitory and compel them to bunk next to men of doubtful cleanliness and of any 'race, color, or previous condition of servitude.' . . . Modern sanitary science demands separate cubicles, and until they are provided women jurors will be justified in refusing to go into a dormitory and preferring a jail sentence for contempt of court, for in a jail one may at least have a cell to herself.").

areas for women jurors.¹⁵¹ Statutes were quickly passed providing for separate bailiffs for women and men and permitting the separation of male and female jurors.¹⁵² Eventually, even jurors in the midst of their deliberations were permitted to separate.¹⁵³

Lifting sequestration rules made misconduct more difficult to prevent and gave jurors the opportunity to misbehave individually and away from the watchful eyes and ears of the court officers. Consider, for example, the use of alcoholic beverages by jurors. In the early 1800s intoxicated jurors posed problems for judges of a different sort than they pose today. Alcohol consumption in many areas of the country was high, peaking in 1830 when, on average, every adult male drank a half pint of liquor daily.¹⁵⁴ Liquor was often sold near the courthouse, straining a court's ability to complete its term as veniremen showed up drunk for the day's trials.¹⁵⁵ Once jurors were screened for drunkenness and the trial was underway, the rules against separation and the dispatch with which trials were conducted meant that jurors could not easily obtain liquor before delivering their verdict. When liquor was discovered in the jury room, the judge's first concern was whether a party to the case had provided it, wary of the sympathy that a bit of refreshment could stimulate for a generous litigant.¹⁵⁶ After courts began to provide jurors with food and drink, and as intolerance of liquor consumption increased after 1830, apprehension about the effects of liquor on a juror's ability to fairly judge a case took the place of concerns about its

151. See R. Justin Miller, *The Woman Juror*, 2 OR. L. REV. 30, 42 (1922) (noting that a room partition between the sexes complies with statute barring separation); Elizabeth M. Sheridan, *Women and Jury Service*, 11 A.B.A. J. 792 (1925); *Women on Washington Juries*, THE INDEPENDENT, July 3, 1913, at 50-51 (noting bailiff coped with women jurors by installing cots in a small rented hall and hanging a curtain across the center of the room).

152. See, e.g., MATILDA FENBERG, *WOMEN JURORS AND JURY SERVICE IN ILLINOIS* 17 (1940); ROBERT VON MOSCHZISKER, *TRIAL BY JURY* § 413 (1922).

153. New York, however, clung to rules requiring sequestration during deliberations until 1995. See NEW YORK REPORT, *supra* note 142, at 112-13 (noting that as of 1994 New York was the only state to mandate sequestration of juries in felony cases). Many states still forbid separation in capital cases.

154. See W.J. RORABAUGH, *THE ALCOHOLIC REPUBLIC: AN AMERICAN TRADITION* 8-21 (1979) (citing statistics and documenting the lifestyle of the early nineteenth-century male as one involving frequent visits to taverns, consumption at home, while traveling, and at all times of the day).

155. See WILLIAMS, *supra* note 13, at 84; Hall, *supra* note 11, at 8.

156. See THOMPSON, *supra* note 147, at 1846-47 (noting cases in which verdict was attacked because of possible connections between parties and food or drink consumed by jurors).

source.¹⁵⁷ Many courts forbade court officers from supplying liquor to jurors, but alcoholic beverages sometimes accompanied meals supplied by the tavern or hotel in which the jury was lodged.¹⁵⁸ The longer the trial, the more opportunity — and, perhaps, incentive — to drink. By 1915, the use of intoxicants was termed “a common form of misconduct among jurors.”¹⁵⁹

One form of juror misconduct that surfaced only as the average trial stretched beyond one day’s work is the discussion of evidence before deliberations begin. The custom of instructing jurors not to make up their minds or discuss the case before the end of the trial was an offshoot of the rule barring expressions of opinion by jurors to nonjurors regarding the verdict before the end of the trial. The theory behind both prohibitions was that a juror might stick with his public statement and close his mind to further evidence.¹⁶⁰ Nineteenth-century courts conducting short trials rarely encountered predeliberation discussions between jurors. By the 1940s, however, most states had codified a ban against “preliminary deliberations.” In 1945, the duty of judges to give jurors this instruction assumed constitutional status. A divided panel of the Eighth Circuit Court of Appeals reversed a conviction, otherwise supported by the evidence, because the judge had not warned the jurors to stay mum.¹⁶¹ The majority felt that this situation denied the accused a fair trial as required by the due process guarantees in the Bill of Rights. The court reasoned that to allow jurors to discuss only part of the evidence, before the defense presents its case, shifts “the burden of proof and place[s] upon the defendants the burden of changing by evidence the opinion thus formed.”¹⁶² Judge Woodrough, dissenting, argued that there was no proof that the jurors had discussed the case before deliberations, and that in any event the instruction was not “practical” in a

157. See RORABAUGH, *supra* note 154, at 8-9 (reporting precipitous drop in consumption rates between 1830 and the Civil War); *Use of Intoxicating Liquor By Jurors: Criminal Cases*, 7 A.L.R.3D 1040 (1966).

158. See, e.g., *State v. Baber*, 74 Mo. 292 (1881); FRIEDMAN, *supra* note 11, at 250. *But see* MORRIS J. BLOOMSTEIN, VERDICT: THE JURY SYSTEM 28 (1968) (relating 1805 Pennsylvania trial in which the jury consumed five and one-half quarts of Madeira wine, two quarts of brandy, two quarts of beer, and one quart of cider, all at county expense during one day’s deliberation).

159. Howard H. Lehman, *A Critical Survey of Certain Phases of Trial Procedure in Criminal Cases*, 63 U. PA. L. REV. 754, 783 (1915).

160. See PROFFATT, *supra* note 43, § 389 (citing cases); James P. Thomas, *Recent Decisions, Constitutional Law — Sixth Amendment — Juror Misconduct — Premature Deliberations*, 32 DUQ. L. REV. 983 (1994) [hereinafter Thomas, *Recent Decisions*].

161. See *Winebrenner v. United States*, 147 F.2d 322 (8th Cir.), *cert. denied*, 325 U.S. 863 (1945).

162. 147 F.2d at 328.

trial that was seven weeks long. "No normal honest Americans ever worked together in a common inquiry for any length of time with their mouths sealed up like automatons or oysters," he argued.¹⁶³ Although some states agreed with Judge Woodrough, more followed the majority's reasoning — jurors who discussed the evidence before the end of the trial became jurors who threatened the due process rights of defendants.¹⁶⁴

b. Publicity's Perils. Longer trials and less control over jurors during trials were not the only developments over the past two centuries that provided more opportunities for jurors in criminal cases to stray. Publicity about criminal cases increased during the period, creating new pitfalls for jurors.

Beginning in the 1830s with the distribution of the "penny presses" in New York and other large cities, "news" of crime began reaching more people than it ever had before.¹⁶⁵ Short on truth and long on melodrama, these daily papers thrived on reporting crime at a price anyone could afford. Editors in smaller cities and towns at first continued to rely on the more traditional weeklies for the bulk of their stories, but the newer presses grew and soon set the trends.¹⁶⁶ In Indianapolis, for instance, the *Indiana State Journal* began its "crimes and accidents" column in the 1840s, covering minor crimes and supplementing its usual coverage of sensational murders.¹⁶⁷ Soon newspapers in New York banded together into the Associated Press to take advantage of the telegraph. News became more centralized, and local papers became

163. 147 F.2d at 330 (Woodrough, J., dissenting).

164. See, e.g., *United States v. Resko*, 3 F.3d 684, 689 (3d Cir. 1993) (collecting cases). In cases in which the jurors were given instructions not to talk but did, their misconduct did not require a new trial unless the defendant was prejudiced. See Thomas, *Recent Decisions*, *supra* note 160, at 990-91 (collecting cases).

165. Until the 1830s, crimes and those accused of committing them were the territory of the pamphleteer, whose sensational and often completely fictitious accounts were popular reading. See ANDIE TUCHER, *FROTH & SCUM: TRUTH, BEAUTY, GOODNESS, AND THE AX MURDER IN AMERICA'S FIRST MASS MEDIUM* 9-11 (1994) (reporting that crime "news" for those who did not indulge in pamphlets was "sporadic" due to the beliefs of most weekly editors that precious and expensive column space should not be wasted on information that readers were likely to know already and that the less readers knew about the criminal elements among them the better off their communities would be).

166. See PAPKE, *supra* note 64, at 34-35 (noting that new presses reached ten times as many people because of the low price, and that the new readers — mechanics, artisans, office workers, and small merchants — were different people from those who had read the traditional papers); *id.* at 44-45 (when advertising revolts led *The Herald* to cut back on crime sensationalism, the gap was quickly filled by other newspapers devoted extensively to crime); TUCHER, *supra* note 165, at 90-96.

167. See David Jackson Bodenhamer, *Law and Disorder on the Early Frontier: Marion County, Indiana, 1823-1850*, 10 W. HIST. Q. 323, 335 (1979).

more dependent on the urban-based wire services for crime reporting.¹⁶⁸ In the 1880s intense competition for subscribers in larger cities prompted a renewed increase in crime and scandal reporting.¹⁶⁹ By the 1920s, criminal cases were discussed on radio as well as on front pages,¹⁷⁰ and modern newsreels brought their images to theaters nationwide. By the 1960s, television again changed the way America received its news, and the Supreme Court observed in 1966 that “unfair and prejudicial news comment on pending trials has become increasingly prevalent.”¹⁷¹ This expansion of news and comment about prosecutions occurred at the same time that jurors were first permitted to leave the courtroom during trials, and at the same time that some of the most well-publicized information about criminal cases became off limits as evidence.¹⁷² As a result, it has become more difficult for jurors to follow instructions — if indeed such instructions have been given to them — not to read, listen to, or watch news about the criminal cases before them.

c. Misconduct, an Expanding Definition. Changing conceptions of the jury’s role have also affected what behavior has been considered misconduct. As the jury’s role shrank from law maker to fact-finder,¹⁷³

168. See TUCHER, *supra* note 165, at 194; *Disqualification of Jurors in Criminal Cases*, 1 ALB. L.J. 327-28 (1870).

There is not a murder committed in the remotest mining town of the west but finds its way speedily into the New York papers, and through these into every village. . . . A burglary committed in any little country store in New England finds its way in twenty-four hours into the note-book of a Chicago reporter.

Id.

169. See JOHN LOFTON, *JUSTICE AND THE PRESS* 80 (1966) (circulation war, combined with better printing technology, “broaden[ed] and quicken[ed] the impact of crime news on the public”); PAPKE, *supra* note 64, at 72-73 (noting that around the turn of the century, even higher class papers such as the *New York Times* were devoting up to five percent of their space to crime news).

170. See John R. Bender, *The Free Press-Fair Trial Issue and Journalistic Professionalism: Practices in News Coverage of Crime and Criminal Proceedings, 1891-1980*, at 219-29, 340, 379-89 (1991) (unpublished Ph.D. dissertation, University of Missouri (Columbia)).

171. *Sheppard v. Maxwell*, 384 U.S. 53, 333, 362 (1966); see also Bender, *supra* note 170, at 52-53 (noting that a study of the American Bar Association Advisory Committee on Free Trial and Fair Press in 1966, and a follow-up study in 1979, showed that news reports frequently contained prejudicial information such as confessions and opinion about the guilt of the accused).

172. See LAFAYE & ISRAEL, *supra* note 80, §§ 3.2(j), 6.8(a), 6.9(g) (describing the Court’s constitutional regulation of police conduct under the Fourth, Fifth, Sixth, and Fourteenth Amendments that removed several items of commonly publicized information from jurors’ review).

173. See *supra* note 47; see also Dooley, *supra* note 48, at 353, 354 & nn.143-46 (collecting theories about why this decline in jury power vis-à-vis judges in the late nineteenth century occurred, including the growing emphasis on uniform, predictable

some conduct appropriate to the jury's former function became prohibited. For example, jurors who were at one time allowed to consult dictionaries were forbidden to do so as the judge became the sole source of instruction for deliberating jurors.¹⁷⁴ States that once allowed jurors to sentence defendants have barred them from speculating upon what a defendant's sentence might be.¹⁷⁵ Early nineteenth-century juries routinely weighed a defendant's explanation, or lack of explanation, of the charges.¹⁷⁶ By 1965 jurors were not allowed to consider defendant's silence as evidence of his guilt.¹⁷⁷ The expression of racial bias by jurors has also been condemned by modern courts.¹⁷⁸ Much more recently, some judges have concluded that the failure to participate in deliberations is misconduct.¹⁷⁹ The characterization of obstinacy as misconduct is a modern extension of the impatience with hung juries that became

rules, a rise in the number of well-trained judges, and racist and sexist attitudes toward minority and women jurors).

174. *Compare* Denison v. State, 93 S.W. 731 (Tex. Crim. App. 1906) (holding that because the jury was authorized to examine a dictionary, it was not error for the judge to refer them to it) *with* Wilson v. State, 495 S.W.2d 927 (Tex. Crim. App. 1973) (error for judge to furnish jury with dictionary).

175. *Compare, e.g.,* Luker v. State, 105 So. 2d 834, 841 (Ala. Ct. App. 1958) (jury must be charged as to the permissible punishment in rape cases and fix the sentence), *cert. denied*, 105 So. 2d 845 (Ala. 1958) *and* AUSTIN ABBOT, ABBOT'S CRIMINAL TRIAL PRACTICE §§ 726, 768 (4th ed. 1939) (collecting jury sentencing cases from Texas, Indiana, Kentucky, Montana, Missouri, Oklahoma, and Arkansas) *with* ALA. R. CR. P. 26.6(a) (abolishing jury sentencing for noncapital offenses committed after 1980) *and* Pruitt v. State, 457 So. 2d 454, 456 (Ala. Crim. App. 1984) (when judge fixes punishment, jury instructions concerning punishment are misleading), *cert. denied*, 457 So. 2d 456 (Ala. 1984) *and* People v. Van Arsdale, 26 N.Y.S.2d 11, 14 (County Ct. N.Y. 1941) (upon request, judge must instruct jurors that they must not consider the punishment in determining guilt).

176. *See* Alschuler, *Peculiar Privilege*, *supra* note 140, at 2660-63.

177. *See id.* at 2663 (discussing Griffin v. California, 380 U.S. 609 (1965)). The effects of many of these expanding concepts of juror misconduct have been limited to peremptory challenges; since about 1810 most courts have not accepted after conviction a juror's word that he or another juror had relied upon forbidden inferences during deliberations. *See infra* text accompanying notes 186-95.

178. *See, e.g.,* Tobias v. Smith, 468 F. Supp. 1287 (W.D.N.Y. 1979) (permitting proof of racist statements in jury room by other jurors); State v. Jackson, 879 P.2d 307 (Wash. Ct. App. 1994) (ordering new trial due to juror's comments about "coloreds"); Derrick v. State, 187 S.W. 759 (Tex. Crim. App. 1916) (ordering a new trial after the foreman told other jurors that convicting the defendant would help to quell the frequent disturbances of Negroes near his home).

179. Such findings appeared in civil cases appealed by unsuccessful plaintiffs, and, more recently, in criminal cases. *See, e.g.,* People v. Thomas, 32 Cal. Rptr. 2d 177, 179 (Ct. App. 1994) (upholding trial judge's decision to discharge juror where the judge found that there was "good cause" to replace a juror who had "made up his mind before he went in there," did not answer the questions posed to him by other jurors, did not sit at the table with the other jurors during deliberations, did not look at the two victims in the courtroom, and did not cooperate with the other jurors).

prevalent in the late nineteenth century, impatience that led to the widespread adoption of the *Allen* or "dynamite" instruction for deadlocked jurors.¹⁸⁰

The more skeptical judges have become of jurors' competence and the more certain they have become of their own, the less leeway they have given jurors to conduct themselves. This growing distrust of the jury has influenced not only the very definition of misconduct, but its discovery, as the following section explains.

2. *Uncovering Juror Misconduct: Lowered Trust in Jurors, Growing Protection for Defendants*

Along with more opportunities for jurors to commit error came more opportunities for attorneys to learn of it. First, longer trials have meant more chances for jurors and others to come forward with their concerns about behavior *during* the trial. Many judges who have allowed jurors to separate have taken care to question returning jurors concerning exposure to outside influences before starting trial again. Moreover, even if some trial judges had been inclined to ignore or dismiss hints and allegations of jury misconduct which they received during trial, the Supreme Court by 1954 had limited that option. In *Remmer v. United States*,¹⁸¹ the Court held that upon learning that a juror may have been approached by an unnamed person offering a reward for a particular verdict, the trial judge was obligated by the Constitution to hold a hearing "with all interested parties" participating in order to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial."¹⁸²

Second, by the close of the nineteenth century, trial judges were less convinced that jurors were reaching their verdicts correctly. Their increased willingness to grant new trials probably provided a correspondingly greater incentive for defense counsel to seek proof of misconduct after conviction.¹⁸³ For defendants whose requests for a new trial due to jury misconduct were denied, appellate relief became availa-

180. See *Allen v. United States*, 164 U.S. 492 (1896); Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 VA. L. REV. 123, 123-24 (1967) (tracing history of this instruction).

181. 347 U.S. 227 (1954).

182. 347 U.S. at 229-30. Even prior to *Remmer*, some states, including California, strongly encouraged mid-trial questioning. See, e.g., *People v. Tinnin*, 28 P.2d 951 (1934).

183. See WICKERSHAM COMMISSION, *supra* note 47, at 30 ("In the heyday of technical procedure in the last half of the nineteenth century, a great mass of detail developed as to new trials, and for a time they were granted lavishly."). Today in some states trial judges are obligated to make some type of preliminary inquiry upon receiv-

ble only in the second half of the nineteenth century.¹⁸⁴ By the early 1900s, appellate courts regularly reviewed such decisions and other claims of jury misconduct.¹⁸⁵

The avenues for postconviction relief, however, were considerably narrower in some states than in others because of rules limiting defendants' use of the most accessible source of proof of jury misconduct — affidavits by the jurors themselves. American courts by about 1810¹⁸⁶ had embraced a rigid rule barring testimony of jurors to impeach their own verdicts.¹⁸⁷ In many of these early cases, the rule prohibiting the use of juror affidavits or testimony to impeach verdicts was interpreted to bar juror testimony about almost anything the jurors said, did, or experienced.¹⁸⁸ However, other courts during the mid-nineteenth century allowed juror testimony concerning certain types of misconduct to be offered as proof in support of a motion for new trial, particularly in

ing allegations of misconduct following a verdict. *See, e.g.*, *State v. Brown*, 668 A.2d 1288, 1303 (Conn. 1995).

184. *See, e.g.*, *Newcomb v. Wood*, 97 U.S. 581 (1878) (writ of error not available to review refusal of new trial); ANTHONY, *supra* note 137, at 340 (reporting that in Illinois, a trial judge's decision to deny a motion for new trial was unreviewable in criminal cases until the rule was changed by statute in 1857). The government argued this rule in *Mattox v. United States*, 146 U.S. 140, 145 (1892), but the Court reviewed the lower court's decision denying a new trial anyway, noting that the court "did not exercise any discretion." 146 U.S. at 147. Appellate courts in Texas continued to decline to second-guess trial courts on this score well into the twentieth century. Hubert Dee Johnson, Note, *New Trial — Misconduct of Jurors*, 15 TEXAS L. REV. 101, 107 & n.46 (1936) (citing cases from 1909-1916).

185. The Texas Courts of Appeals considered many such claims — jury misconduct was, along with variance between the charge and proof at trial, the fifth most frequent successful ground of appeal in the Texas Court of Criminal Appeals between 1900 and 1927, accounting for 2.2% of all cases reversed. *See* Keith Carter, *The Texas Court of Criminal Appeals: Section 4, Legislation*, 11 TEXAS L. REV. 185 (1933). A similar study of 206 criminal appeals from Cook County during 1924-28 suggested that the figures from Texas may be high for the period; not one of the 97 cases reversed from Cook County was reversed because of jury misconduct. *See* Joseph E. Green & Thomas J. Connors, *Causes for Reversals of Cook County Convictions 1924-28*, 27 ILL. L. REV. 100 (1932).

186. Before this time courts liberally received juror testimony concerning misconduct in the jury room. At common law, testimony or affidavits of jurors could be received on a motion for new trial based upon misconduct in the jury room. *See* 5 JOHN H. WIGMORE, EVIDENCE § 2352 (2d ed. 1923).

187. The rule was based on an English case that had been decided in 1785. *See* *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785).

188. *See, e.g.*, *Henry v. Ricketts*, 11 F. Cas. 1188 (C.C.D.C 1809) (No. 6385) (trial court refused to hear evidence from jurors regarding the intoxication of jurors, the presence of "spirituous liquors . . . sent to them in their blankets," and the departure of two jurors from the jury room); *Hulet v. Barnett*, 10 Ohio 459 (1841) (rejecting juror affidavit concerning policeman's conversation with jurors in jury room); *People v. Barker*, 2 Wheel. Cr. 19 (N.Y. 1822) (rejecting jurors' testimony that defendant's conviction for dueling was the result of chance); *see also* PROFFATT, *supra* note 43, §§ 408-09.

criminal cases.¹⁸⁹ In 1892 the Supreme Court held that federal courts deciding whether to grant a losing litigant a new trial due to jury error were free to consider juror affidavits as proof of the existence of an extraneous influence on the jury, but the Court continued to bar the use of such affidavits as proof of the decisionmaking process of one or more of the jurors.¹⁹⁰

In the decades that followed, the rule barring juror testimony eroded in some jurisdictions, tracking the growing concern among courts that juror misconduct can implicate not only verdict accuracy but the constitutionality of a conviction. In some states convicted defendants aired for the first time much of the jury's dirty linen that stricter rules in other states concealed.¹⁹¹ By the late 1940s and 1950s prominent judges — including future Justice Warren Burger and Judge Jerome Frank — proposed that all juror affidavits be admissible to impeach criminal convictions.¹⁹² By 1970, both state and federal courts recognized that some forms of jury misconduct threatened not only a defendant's right to an impartial jury, but also his right to confrontation, and allowed proof of such misconduct even from the mouths of the jurors themselves.¹⁹³ Presently, courts continue to accept juror affidavits selectively.¹⁹⁴ Efforts by lawyers to secure evidence of misconduct from

189. See, e.g., *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195 (1866) (allowing affidavit of jurors concerning quotient verdict); *United States v. Reid*, 53 U.S. (12 How.) 361 (1851) (considering affidavits of two jurors who had read newspaper accounts); Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 532 (1995) (noting willingness of judges in several states to accept juror affidavits in criminal cases).

190. See *Mattox v. United States*, 146 U.S. 140 (1892); see also *McDonald v. Pless*, 238 U.S. 264, 268 (1915).

191. Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360, 368 n.60 (1958). In Texas, where rules regarding the receipt of juror testimony were particularly liberal, appellate courts between 1905 and 1926 granted new trials in at least 30 criminal cases because of jurors' discussion of the failure of the accused to testify. Texas continued to allow such proof quite recently. See *Smith v. State*, 530 S.W.2d 827, 829-30 (Tex. Crim. App. 1975). Contrast Texas's unique position with *United States v. Friedland*, 660 F.2d 919 (3d Cir. 1981) (en banc) (upholding trial court's refusal to examine jurors concerning their alleged consideration of defendant's silence), cert. denied, 456 U.S. 989 (1982).

192. See *Klimes v. United States*, 263 F.2d 273 (D.C. Cir. 1959); JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 115, 144 (1949).

193. Compare *People v. Mullen*, 99 N.Y.S. 227 (County Ct. 1906) (barring juror testimony concerning external influence) with *Parker v. Gladden*, 385 U.S. 363 (1966) (bailiff's communications to juror denied defendant his right to cross-examine witnesses against him) and *People v. DeLucia*, 229 N.E.2d 211 (N.Y. 1967) (holding that defendant's right to confrontation mandated consideration of juror affidavits concerning external influence).

194. FED. R. EVID. 606, enacted in 1975, retained the prohibition barring jurors from impeaching their own verdicts, except in specific situations. The Rehnquist Court

jurors have been vigorous, prompting many conflicting statutes and rules of ethics encouraging or limiting attorney access to jurors after trial.¹⁹⁵

3. *When Misconduct is Discovered — Salvaging the Trial*

One might expect that all of this prying into jury behavior would have led to a significant number of mistrials and new trials due to jury misconduct, but there is reason to believe that the frequency with which jury misconduct has led to a mistrial or a new trial has actually fallen over the past two centuries. Judges and legislatures have coped with the threat that jury misconduct has posed to the efficiency and fairness of the jury system in two ways: they have attempted to salvage verdicts once misconduct has taken place, and they have adopted additional measures to deter and prevent juror misbehavior from occurring in the first place.

a. Postverdict Review: Avoiding New Trials. Even though convicted defendants today are probably more likely than defendants in the nineteenth century to raise jury misconduct as a basis for a new trial, they are probably less likely to succeed in securing relief. Many decisions from the first half of the nineteenth century reflected the attitude that jury misconduct destroyed the integrity of the trial and required relief regardless of its effect on the verdict.¹⁹⁶ This uncompromising stance, however, was never uniform, and eventually softened. By the first few decades of the 1900s, impatience with the fragility of verdicts

in 1987 interpreted the Rule strictly. *See Tanner v. United States*, 483 U.S. 107, 125 (1987) (barring juror affidavits as proof that jurors were intoxicated and using drugs during the trial). Prior to *Tanner*, many courts had permitted juror testimony to prove juror intoxication. *See* Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 NEB. L. REV. 920 (1978). Recent commentary continues to echo the recommendation of Judges Burger and Frank, calling for wider acceptance of juror testimony. *See, e.g.,* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 221-29 (1989) (criticizing the Court's "hear-no-evil" posture).

195. *See, e.g.,* Ronald L. Palmer, *Post-Trial Interview of Jurors in the Federal Courts — A Lawyer's Dilemma*, 6 HOUS. L. REV. 290 (1968).

196. *See, e.g.,* *Mattox v. United States*, 146 U.S. 140, 149 (1892) (noting that some jurisdictions continued to forbid separation entirely, and others allowed the government to rebut a presumption of prejudice to the defendant, and still others conditioned relief upon proof indicating that tampering really took place); *Johnson v. Root*, 13 F. Cas. 798 (C.C.D. Mass. 1862) (No. 7409) (" '[W]here there is an irregularity which may affect the impartiality of the proceedings . . . inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what is thus improperly and may have been corruptly done.' ") (emphasis added) (quoting *Commonwealth v. Roby*, 29 Mass. (12 Pick.) 496, 519 (1832)).

on appeal had ushered in harmless error review for evidentiary, instructional, and charging errors and reduced the number of courts willing to reverse convictions for juror misconduct without first considering whether that misconduct had affected the jury's decision.¹⁹⁷

Although several illustrations of the ascendancy of harmless error review for jury misconduct are available,¹⁹⁸ the story of judicial treatment of intoxicated jurors is particularly instructive. As the opportunities for jurors to drink during a trial rose with lengthening trials and more frequent separation, judicial reaction followed a familiar pattern of unyielding intolerance giving way to harmless error review. During much of the nineteenth century judges in many states provided a new trial merely upon proof that a juror had partaken.¹⁹⁹ But the cost of automatic reversal proved too high. Judges feared that too many convictions would be sabotaged if reversal could be had so easily.²⁰⁰ Some seemed to recognize that they could not prevent drinking by jurors accustomed to obtaining their "customary refreshment." One sympathetic court warned that depriving a man of all alcohol during a protracted trial would probably cause him to "fall into such a state of mental and physical depression and irritation as to seriously unfit him properly to discharge the duties of a juror."²⁰¹

Trying to be appropriately condemnatory while at the same time preserving the finality of the trial process, some courts tried at first to

197. See LAFAYE & ISRAEL, *supra* note 80, § 23.7(j).

198. Compare *People v. Knapp*, 42 Mich. 267 (1879) (presence of police officer during jury deliberations required new trial, without regard to whether any improper influence was actually exerted over jury) with *United States v. Olano*, 62 F.3d 1180 (9th Cir. 1995) (holding that continuation of trial in absence of sick juror was not "plain error" requiring relief when defendant failed to object to absence at trial). See also *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984) (not every knowingly false answer of a veniremember is grounds for a new trial) and *Lee v. Marshall*, 42 F.3d 1296 (9th Cir. 1994) (per curiam) (reversing trial court's finding that conversation between police officers and juror in deliberation room was "structural error" requiring reversal without a showing of prejudice and finding conversation innocuous).

199. See, e.g., *Jones v. State*, 13 Tex. 168, 182 (1854) (stating that the effect of drink "is so very different on different men The only safe rule is to exclude it entirely.").

200. See, e.g., *Jones v. People*, 6 Colo. 452, 462 (1882) (arguing that a per se reversal rule "would hold out an obvious temptation, and furnish an almost certain opportunity to secure a new trial in every case, by the surreptitious introduction of liquor into a jury room, and would tend to lessen the certainty of conviction in every criminal case"); *Perry v. Bailey*, 12 Kan. 539, 546-47 (1874) ("[W]ith the habit of drinking so common as it unfortunately is, to hold that, if a juror should during a protracted trial take a single drink of liquor, the verdict thereafter rendered must be set aside therefor, would be giving to verdicts of juries a dangerous and unnecessary instability.").

201. *State v. Taylor*, 35 S.W. 92 (Mo. 1896) (denying alcohol would be like denying coffee or tobacco).

minimize the destabilizing influence of rules requiring new trials whenever alcohol crossed a juror's lips by limiting automatic reversal to drinking committed in certain locations or at certain times during the trial. For instance, some courts would uphold verdicts if drinking occurred only during recesses, but not if jurors used liquor in the courthouse.²⁰² This is understandable from the point of view of maintaining appearances, which mattered quite a bit. It made little sense, however, to litigants who were not likely to be persuaded that the potency of intoxicants varied with the location of the imbiber. Other courts were particularly intolerant of the use of alcohol during deliberations, but would consider harmless its use at other times during the trial.²⁰³ The basis for this dubious distinction was the belief that as long as jurors were sober by the time they deliberated, their decisions could not be affected by any fuzzy-headedness they had experienced listening to the evidence and instructions during the trial.²⁰⁴ Such flimsy distinctions soon disappeared. In no state today does a juror's use of alcohol, where proven, raise an irrebuttable presumption of prejudice requiring a new trial.

It is not surprising that judges were relatively quick to find jury misconduct harmless. Unlike other errors in the trial process, the fault for jury misconduct often lies with the juror alone, a visiting participant in the justice system, and not with judges or prosecutors, its repeat players. The deterrence of future misconduct by courtroom regulars has always been a reason to grant relief to criminal defendants when those regulars overstep the law, even when relief may not be required to procure accurate results.²⁰⁵ But granting a new trial to a defendant when one juror misbehaves is unlikely to have any effect on the behavior of

202. See THOMPSON, *supra* note 147, at 1849 (citing cases); Morton John Stevenson, *Use of Intoxicating Liquors by Jurors*, 59 ALBANY L.J. 208 (1899) (discussing cases in which court did not object to jurors drinking during adjournments).

203. See, e.g., *Graybeal v. Gardner*, 48 Ill. App. 305 (1892), *aff'd.*, 34 N.E. 528 (Ill. 1893); *State v. Bruce*, 48 Iowa 530 (1878); Lehman, *supra* note 159, at 783 (noting the contention of some courts that the use of intoxicants "at any rate while the jury are deliberating on their verdict, is of itself error, without any inquiry at all into the question whether the defendant was prejudiced thereby").

204. See, e.g., *State v. Madigan*, 59 N.W. 490 (Minn. 1894). For exposition and criticism of this rule, see Charles C. Moore, *Use of Intoxicating Liquors by Jurors as Ground for New Trial*, 13 LAW NOTES 188 (1910). Of course, this idea that jurors only make up their minds once they shut the door to the deliberation room has been thoroughly discredited by jury decisionmaking research. Still, the different treatment could have had additional justifications. Misconduct by jurors who had retired to deliberate implicated the culpability of the officer guarding them, and was also more difficult for the parties to discover. They might otherwise be able to object before a verdict is returned, securing a mistrial or other relief.

205. See Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988).

future jurors. Indeed, courts have noted the availability of punishment against jurors themselves when choosing to let verdicts stand, implying that direct punishment of jurors for their transgressions would be more appropriate than allowing convicted felons a windfall.²⁰⁶

Any resolution to punish jurors themselves seems to have been spotty, however. Of the infrequent reported cases discussing formal punishment (contempt proceedings or other prosecutions) of jurors or former jurors for their misconduct, most involve jurors who served in criminal trials that ended in acquittal or mistrial.²⁰⁷ Some courts have seemed pleased that prosecutors focus on such jurors, suggesting that the punishment of jurors who prevent convictions is a fair substitute for the right to procure a new trial because of misconduct, a right defendants enjoy, but prosecutors are denied.²⁰⁸ The prosecution of jury misconduct, however, is no substitute for the ability to appeal an acquittal tainted by jury error. Neither is prosecuting only defendant-friendly misconduct particularly fair. A juror whose misbehavior leads to a

206. See, e.g., *Jones v. People*, 6 Colo. 452 (1882) (refusing to set aside verdict and noting that the jurors who drank liquor were fined); cf. *United States v. Olano*, 62 F.3d 1180, 1211 (9th Cir. 1995) (Reinhardt, J., dissenting) (arguing that the judge's decision to go on with the trial absent an ill juror "is a deliberate action on the part of court and counsel that infringes on the defendant's fifth and sixth amendment rights; it is not a shortcoming on the part of a juror").

207. See, e.g., *Blake v. Rupe*, 651 P.2d 1096 (Wyo. 1982) (holding that a prosecutor is entitled to immunity from liability for the malicious prosecution of juror who had served in trial ending without conviction).

208. See, e.g., *United States v. Hand*, 863 F.2d 1100 (3d Cir. 1988) (upholding, as part of former juror's contempt sentence, payment of nearly \$47,000 to the United States for Department of Justice and Drug Enforcement Agency costs associated with lost convictions — the "victims" of the juror's offense of receiving flowers and calls from the defendant and refusing to vote to convict); *In re Mossie*, 589 F. Supp. 1397 (W.D. Mo. 1984) (rejecting claim of vindictive prosecution by former juror who argued she was prosecuted only because she had held out for acquittal, but admitting that juror probably would not have been investigated had the jury returned a guilty verdict); *In re Bassett*, 15 N.Y.S.2d 737, 746 (S. Ct. 1939) (noting that the "misconduct of the contemnors is especially to be condemned. In a civil trial, or if the defendants had been convicted, the evil wrought could be remedied by the granting of a new trial. In the present situation, that remedy may not be applied [as the defendants have already been put in jeopardy]"); *In re May*, 1 F. 737 (E.D. Mich. 1880) (holding in contempt a former juror who held out for acquittal and noting that the court would have had to grant a new trial if the jury had convicted).

A few courts have been troubled by the targeting of hold-out jurors for prosecution. See, e.g., *In re Cochran*, 237 N.Y. 336 (1924) (contempt may not be used to punish juror for attitude in the jury room regarding the appropriate verdict); cf. *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989) (expressing dismay at government's failure to investigate and prosecute jurors for misconduct after trial in which jurors voted to convict defendant); *People v. Diefendorf*, 119 N.Y.S.2d 469 (1953) (reversing contempt conviction because trial judge took into account juror's action of holding out in the jury room in addition to his deliberate violation of the court's instructions during trial).

guilty verdict is no less culpable than a juror whose misbehavior leads to an acquittal or mistrial. If future jurors learn any lesson from such prosecutions, it is that they can misbehave freely so long as they convict.²⁰⁹

b. Preverdict Remedies: Avoiding Mistrials and Tainted Verdicts. When misconduct is revealed *before* trial's end, the rule barring jurors from impeaching their own verdicts has never provided an excuse to sweep misconduct under the rug. As more misconduct has surfaced during lengthening trials, judges have had to determine whether it necessitates a mistrial. Few alternatives to mistrial were available in the 1800s.²¹⁰ Even waiver was not always an option. Some courts were reluctant to allow defendants to waive their objections to jury misconduct because such waivers were not considered to be voluntary. For example, a convicted defendant who had assented to the illegal separation of the jury during trial could nevertheless demand a new trial on the basis that his assent was compelled by the need to prevent jury resentment.²¹¹ Not until the late nineteenth century, when harmless error was embraced to prevent new trials, did courts experiment with procedures that could prevent mistrials as well.

One of the most effective devices that courts discovered for avoiding mistrials was the alternate juror. Substituting jurors midstream was a very controversial concept when it first appeared around 1900. Until that time, if a juror had to be discharged during a trial, the accepted practice was to discharge the entire panel — a procedure then called “withdrawing a juror” — and begin a new trial with a new jury. The judge would discharge the juror in question, then administer the oath to a new juror together with the jurors who remained from the aborted trial, but witnesses would have to take the stand again and the trial be-

209. Even symmetry is lacking — unlike convicted defendants who seek new trials, prosecutors are not hampered by the rule barring the consideration of juror testimony to impeach verdicts. According to the Supreme Court, “A juror of integrity and reasonable firmness will not . . . expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor.” *Clark v. United States*, 289 U.S. 1, 16 (1933) (upholding conviction of juror who held out for acquittal against eleven men — literally pressing her hands over her ears in the jury room — after concealing on voir dire that defendant employed her husband).

210. If the juror was sick or inebriated, the court could simply adjourn and wait for the juror to feel better, but the jury could not separate while waiting. *See, e.g., State v. Tatlow*, 8 P. 267 (Kan. 1885).

211. *See* ALBERT W. BRICKWOOD, *BRICKWOOD'S SACKETT ON INSTRUCTIONS TO JURIES* 84 (3d ed. 1908); THOMPSON, *supra* note 147, at 1823; *see also* *People v. Deegan*, 26 P. 500, 502 (Cal. 1891) (DeHaven, J., concurring) (objecting to a rule that would deem a felony defendant to have waived any objection to a drunk juror if the defendant failed to object, and reasoning that the defendant should not be required to bring himself into antagonism with the juror).

gin anew.²¹² To avoid this cumbersome process some courts would take actions that today seem extreme. For example, in one murder trial around 1845, an Illinois judge ordered a juror who had taken ill to lie on a pallet next to the juror box.²¹³ In 1895 California's legislature was the first to provide that at the very beginning of any trial that was likely to be protracted, a judge could impanel one or two alternate jurors to sit near the other twelve throughout the trial and take the place of any juror who became incapacitated, even without the defendant's consent.²¹⁴ Other states, then Congress, followed California's lead,²¹⁵ and today alternates are routinely impaneled under similar provisions.

A second significant aid to efficient disposition of mid-trial misconduct was the approval of verdicts by fewer jurors than the number that started the case. By the late nineteenth century, at least one state authorized judges to dismiss incapacitated jurors and accept verdicts from the jurors who remained.²¹⁶ Not until 1900, however, did the United States Supreme Court hold that state criminal juries of fewer than twelve members survived the passage of the Fourteenth Amendment, and not until 1970 did the Court overrule an 1898 case barring juries of fewer than twelve under the Sixth Amendment.²¹⁷ In 1983, Federal Rule of Criminal Procedure 23 was amended to allow a court to

212. See, e.g., *Dennis v. State*, 50 So. 499 (Miss. 1909); *West v. State*, 28 So. 430 (Fla 1900); *State v. Davis*, 7 S.E. 24 (W. Va. 1888). See generally ANTHONY, *supra* note 137, at 306.

213. There, the juror fell asleep. See *Baxter v. People*, 8 Ill. (3 Gilm.) 368 (1846).

214. The California Supreme Court upheld this statute twenty-six years later, despite a defendant's challenge that the use of an alternate juror deprived him of his right to a jury trial under the California Constitution. See *People v. Peete*, 202 P. 51 (Cal. 1921). A similar statute passed in 1931 was upheld under the North Carolina Constitution. See *State v. Dalton*, 174 S.E. 422, 425 (N.C. 1934) (explaining that the act "was designed to cure [the] evil" of the prior practice which required courts to restart trials). Prior to such statutes, some states allowed the substitution of alternates providing all parties, including the defendant, first consented. See BIERLY, *supra* note 43, at 141, 167-68.

215. In 1934, one of the chief proposals of the ABA's Program on Criminal Law was the endorsement of the use of alternate jurors. See LESTER BERNHART ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 398 (1947). In upholding the federal statute, the Sixth Circuit Court of Appeals termed it a "forward looking statute and a needed reform in procedure." *Robinson v. United States*, 144 F.2d 392, 397 (1944) (considering 28 U.S.C. § 417a (1932)).

216. See, e.g., *Ray v. State*, 4 Tex. App. 450 (1878) (upholding verdict of 11 jurors (citing TEX. CONST., art. 5, § 13)).

217. See *Maxwell v. Dow*, 176 U.S. 581, 605 (1900); *Williams v. Florida*, 399 U.S. 78 (1970) (overruling *Thompson v. Utah*, 170 U.S. 343 (1898)). It wasn't until after jury waivers (bench trials) were allowed in felony cases that some courts upheld verdicts of juries with less than 12 members even when the defendant had consented. See *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (trial in any manner other than before a jury of twelve men is forbidden, even if the defendant consents);

continue with eleven jurors in felony cases, even without the defendant's consent.²¹⁸ Authorized juror attrition, like the provision of alternate jurors, was originally intended to provide an alternative to mistrial when jurors become ill or otherwise unavailable during protracted trials. Each has proved to be a useful device to assist courts to complete trials when jurors misbehave.²¹⁹

c. *Prevention.* All of this judicial maneuvering to minimize the consequences of juror misconduct may have been necessary because judges were not trying hard enough to prevent it. Calls for more explicit instructions to jurors to keep out of mischief appeared as early as 1893,²²⁰ and they have continued for a century.²²¹ Juror handbooks,

Camcemi v. People, 18 N.Y. 128 (1858) (reversing conviction returned by 11 jurors reasoning that defendant could no more waive one juror than he could waive them all).

218. See FED. R. CRIM. P. 23(b). The amendment was preferred to an amendment to Rule 24 that would have allowed for the substitution of alternate jurors after deliberations had begun. See *Amendments to Rules*, 97 F.R.D. 245, 297-98 (1983). In 1991, the federal courts opted to abandon alternates in civil cases and instead authorized judges to proceed with whatever jurors remained should it become necessary to discharge jurors during the trial, on the condition that at least six jurors remained.

The laws of some states may still prohibit this practice. See, e.g., S. 3820, 218th Assembly, Cal., 1st Sess. (1995) (proposing constitutional amendment that would allow for verdicts by eleven jurors if a juror is discharged after deliberations begin). Other states continue to require the consent of both parties. See *State v. Gorwell*, 661 A.2d 718 (Md. 1995) (reversing judge's decision to continue trial with 11 jurors over state's objection).

219. A third change in trial procedure in some states during the late nineteenth century may have tempered the effects of jury misconduct on jury verdicts — abolition of the requirement that jury verdicts be unanimous. Support for abolishing rules of unanimity gained ground the same time as harmless error rules. Critics blamed erroneous verdicts on incompetent or inexperienced jurors that made their way onto juries. See LESSER, *supra* note 47, at 188-201; Francis Lieber, *The Unanimity of Juries*, 6 AM. L. REG. 727 (1867) (criticizing the unanimity rule); *Reform Our Jury System*, 12 REV. REVIEWS 77 (1895) (reporting the introduction of a bill in California to eliminate unanimity in criminal cases and allow for the waiver of juries). Although several states have authorized majority verdicts in civil cases and misdemeanor cases, only two states ultimately adopted majority verdicts in felony cases. See LA. CONST. art. 7, § 41 (1921); OR. CONST. art. VI, § 5 (1929); OR. REV. STAT. § 17.355(1).

220. See LESSER, *supra* note 47, at 118 n.39 (“[O]ccasional lectures by courts to panels of jurymen upon the general proprieties of their position would not be thrown away.” (quoting N.Y.L.J., June 20, 1893)). Some states enacted statutes requiring such instructions towards the end of the nineteenth century. See, e.g., N.Y. CODE CRIM. PROC. § 415 (1811) (current version at N.Y. CRIM. PROC. LAW § 270.40 (McKinney 1993)). Some states’ statutes required judges not to instruct jurors not to talk to others, or each other, at each adjournment. See, e.g., KY. CRIM. CODE § 246, *quoted in* J.P. HOBSON ET AL., INSTRUCTIONS TO JURIES § 679, at 807 (1914).

221. See, e.g., *Suggestions For The Improvement of the Jury System*, 1 J. CRIM. L. & CRIMINOLOGY 630, 631 (1910) (calling for clearer admonitions to jurors); Edward T. Swaine, *Pre-Deliberation Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 YALE L.J. 187, 202 (1988) (asserting that the bulk of juror instruction occurs only after trial and that little attention is paid to instructing jurors about miscon-

some of which contained admonitions against exposure to publicity and warnings concerning other common forms of misconduct, did not become accepted until the rise of court administrative organizations in the 1920s and 1930s,²²² although many judges issued warnings to jurors about the conduct expected of them before then.²²³ Today some jurors are given elaborate and detailed instructions explaining what they can and cannot do or say.²²⁴ Simple innovations such as the identification buttons jurors sometimes wear have probably helped to reduce prohibited contacts and limit the opportunities for jurors to overhear prejudicial comments.

Despite these isolated improvements in preventing jury misconduct, the overwhelming response of courts seems to have been to contain its costs, not to diagnose and cure its causes. This may be because those causes are too difficult to identify, much less eliminate. Or perhaps this band-aid approach has persisted because judges have not considered jury misconduct to be a significant problem demanding additional preventive measures. The next section reveals judicial impressions of jury misconduct today that support this latter explanation.

duct and how to avoid it). Following the Supreme Court's reversal of a conviction tainted by prejudicial publicity in the 1960s, commentators called for more measures to prevent juror tainting, some of them urging that judges take more care in ordering jurors not to expose themselves to publicity during trials, and arguing that clearer instructions would probably have prevented mistrials or reversals in several cases. *See, e.g., ALFRED FRIENDLY & RONALD L. GOLDFARB, CRIME AND PUBLICITY: THE IMPACT OF NEWS ON THE ADMINISTRATION OF JUSTICE* 109 (1967).

222. *See, e.g., Comment, History and Criticism of Juror Handbooks as a Method of Orientation*, 8 DEPAUL L. REV. 393, 394 (1959) (noting that "jury primers" were first used in New York courts in 1925, a response to the variation in preliminary instructions); D.E. Buckner, Annotation, *Indoctrination by Court of Persons Summoned for Jury Service*, 89 A.L.R.2D 197, 201 n.5 (1963) (stating that 15 states used handbooks by 1958 (citing *Recent Case*, 107 U. PA. L. REV. 115, 115 (1958))).

223. *See, e.g., DEWITT C. BLASHFIELD, A TREATISE ON INSTRUCTIONS TO JURIES IN CIVIL AND CRIMINAL CASES* § 360 (1902) (recommending an instruction listing prohibited actions, which ended with the threat, "a violation of this injunction will be punished severely by the court").

224. In the Western District of Texas, for example, federal jurors are told, in great detail, who they can and cannot talk to, what they can and cannot say, and what to do if someone approaches them or they hear something they should not have heard. They are told that they cannot talk to each other about the case until deliberations, cannot use nonevidence of which they are aware in deliberations, cannot investigate or experiment with places or things, cannot relate any special expert knowledge to other jurors or seek out information in books, and more. *See Orientation for Prospective Jurors* 5-7 (on file with author). Some pattern instructions are considerably less detailed. *See, e.g., FEDERAL JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS* 4-5 (1988) (less than one page of instructions concerning misconduct).

B. *The Present: Jury Misconduct in Courts Today*

The survey results that follow provide a refreshing supplement to the typically anecdotal treatment of juror delinquency. Judges' answers to survey questions about the frequency and consequences of juror misconduct are useful not only to those interested in jury misconduct itself, but also to reformers considering several related issues. For example, the decision to expand or contract voir dire may take into account how often jurors conceal information or how successful judges are at deterring deceit during voir dire. Proposals to limit trial length, to abandon unanimity rules, to abolish sequestration, to allow for more juror testimony impeaching verdicts, or to allow more access to jurors by attorneys after trial may all be affected by perceptions about the prevalence of misconduct.

The judges who received surveys were asked to indicate whether or not they had in the past three years become convinced *before the verdict* that misconduct of various kinds had occurred, and, if so, in how many criminal and how many civil cases. Thirteen different types of misconduct were listed, with an additional question asking judges to specify any misconduct they had learned of during trial that was not on the list. Judges were also asked if they had questioned jurors about misconduct *after the verdict*, and if they had *ordered a new trial* because of misconduct during the last three years. Judges who had ordered a new trial in the past three years were asked to specify the type of case — civil or criminal — and the type of misconduct that had occurred.

At the outset it is important to note some additional limitations of the survey results concerning juror misconduct. First, since there are no means to observe jurors during their deliberations, only jurors themselves can really tell us what they do. Judges, however, have a pretty good idea of what trial jurors are up to.²²⁵ They are responsible for supervising the jury and for curing any misconduct that occurs, and many of them talk with jurors after trials are over about the jurors' experiences. Second, the total number of cases in which judges reported ei-

225. An up-to-date survey of jurors themselves would be an excellent supplement to this judicial survey. Few published juror surveys concern misconduct. One found that slightly over one in ten jurors talked about the case during trial. See Elizabeth F. Loftus & Douglas Leber, *Do Jurors Talk?*, TRIAL, Jan. 1986, at 59-60 (reporting survey of jurors about discussing evidence before deliberations with another juror, a family member, or a friend, and finding that 11% reported they had talked to someone). A 1991 survey of 190 jurors found that 39% failed to answer correctly voir dire questions about crime victimization and friends or relatives in law enforcement. See Richard Seltzer et al., *Juror Honesty During the Voir Dire*, 19 J. Crim. Just. 451, 456 (1991). An earlier study of about 250 New Mexico criminal jurors produced the following responses:

ther granting new trials or learning of misconduct before the verdict is probably lower than the total number of cases in which misconduct actually occurred in their courtrooms.²²⁶ Despite these limitations,²²⁷ the survey provides important information, previously unavailable, about the frequency with which judges nationwide have learned of misconduct during trials, the frequency of their responses to that misconduct, and the frequency of successful new trial motions due to jury misconduct.

	Always	Usually	Sometimes	Never
Do you feel that jurors are perfectly honest in answering questions during the voir dire?	17.8	70.3	11.9	0
At any time during the trial or deliberations, did you feel that any of the jurors considered evidence which was not presented or was withheld during the trial?	5.2	7.9	51.8	35.1
At any time during the trial itself did you feel that any of the jurors discussed the case among themselves or with others?	3.8	3.8	36.6	55.9

Thomas L. Grisham & Stephen F. Lawless, *Jurors Judge Justice: A Survey of Criminal Jurors*, 3 N. MEX. L. REV. 352, 354-58 (1973). Compared to the responses of these New Mexico jurors twenty-five years ago, the judges who responded to my survey were more likely to report dishonesty during voir dire (73% of judges reporting at least some dishonesty by veniremembers in the past three years, compared to 12% of the New Mexico jurors) and less likely to report consideration of nonevidence (20% of judges compared to 65% of New Mexico jurors). Of judges surveyed, 20% thought that jurors had talked to nonjurors in the past three years, 13% thought jurors had contact with parties, press, or witnesses, and 22% thought jurors had talked about the case with each other, 44% of New Mexico jurors who responded that at least one of these things had happened. An ongoing study of jurors in capital cases so far shows that a significant percentage of jurors in these unique cases do not follow their instructions. See William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220, 221 (1996) (reporting that 40% of capital-case jurors interviewed considered the defendant's sentence when determining guilt). An empirical analysis of case reports would also be a useful addition to the research reported here, although only a small portion of the misconduct that occurs in trials is reported in published opinions.

226. The survey did not ask about cases in which misconduct was revealed only after the verdict but which was never the subject of a new trial motion, or cases in which allegations of misconduct were raised after the verdict but in which no new trial was ordered.

227. There is another reason to regard the findings from the survey as an underestimate of actual jury misconduct in courts today. Trial judges may be likely to underreport, rather than overreport, how often misconduct occurs in their courtrooms, even in an anonymous survey such as this one, because the existence of at least some forms of jury misconduct could be attributed to deficiencies in supervision or instruction. Also, many judges have a great deal of affection and respect for their jurors, and may not recognize misconduct at the same rate that the jurors themselves or attorneys might.

1. Overall Incidence of Misconduct

a. Misconduct Discovered Before the Verdict. According to judges surveyed, most types of jury misconduct are not routine features of jury trials. Only a small proportion of judges reported that they had become convinced in the course of a trial during the past three years that any of ten forms of jury misconduct surveyed had occurred.²²⁸ In addition, most of the judges who did report learning of misconduct said that it occurred infrequently. By their own estimates, the 562 judges who returned surveys had together tried a total of between 26,060 and 40,426 jury trials during the past three years. Judges reported encountering most forms of misconduct during trial in only a small percentage of these cases.

There were three exceptions to this predominantly positive picture, each involving the kinds of misconduct that are easiest for judges to observe themselves without information from the jurors. First, seventy-three percent of all of the judges responding reported that veniremembers had not told the truth during voir dire in at least one of the cases they had tried during the last three years — eight percent of all judges responded that veniremembers were untruthful in many, most, or all cases. Second, sixty-nine percent of the judges reported cases in which jurors had fallen asleep; by judges' estimates, this had happened in more than 2300 cases. Finally, eighty percent of the judges responded that jurors, after being sworn in, had not reported to court or reported late, with the total trials in which this occurred exceeding 3000.²²⁹ In addition to the thirteen specific categories, judges were asked if they had learned of "other" misconduct before the verdict. These responses are compiled in Table 1.

b. Misconduct and New Trials. The judges responding to the survey also reported that misconduct is not often the basis for a new trial. Only seven percent reported that they had ordered even one new trial

228. For example, a tiny fraction of judges reported that they had presided over a case in the past three years in which a veniremember had refused to answer a question during voir dire, or in which they had learned that a juror had accepted a bribe. Twenty percent of responding judges (N=110) reported becoming convinced that jurors had considered material not admitted as evidence during at least one trial. Comments offered by judges noted that these incidents included dictionaries, unadmitted depositions, and a Bible. Twenty-two percent of responding judges (N=120) reported learning that jurors had discussed the case before deliberations, and at least 28 judges commented that they believe this happens quite frequently but cannot be sure.

229. Fifteen judges volunteered that this was either a minor problem or that jurors usually had a good excuse for being late. Other judges cited traffic or car trouble as a cause of lateness, or noted that they did not consider lateness misconduct.

because of misconduct during the past three years.²³⁰ Less than one quarter of the judges said that they had questioned a juror during the past three years about misconduct subsequent to the return of a verdict. The number of new trials granted due to misconduct was very low; only fifty-one cases out of over 26,000 cases tried.

c. General Comments and Trends. The survey also asked judges who had been on the bench seven years or more whether in their opinion jurors were more or less likely today to engage in various forms of misconduct than they were seven years ago. Most of the judges responding thought jury behavior had remained about the same. Of those judges who believed that the rate of jury misconduct had changed during the past seven years, most said juror behavior had improved, except for two categories — untruthfulness during voir dire and talking about the case before deliberations.²³¹

v

230. A few judges volunteered that they had learned, after a verdict, of misconduct that did not lead (or had not yet led) to a new trial. One reported that “two jurors during sequestered deliberation allegedly engaged in sexual (consensual) behavior with each other with the connivance of a deputy sheriff who supposedly was watching them. This occurred in the hotel after deliberations for the day”

231. The percentages of judges who responded that the proportion of jurors engaging in misconduct was the same, less, or greater now as it was seven years ago for each question were:

Type of misconduct	Same	Less	Greater
Refuse to answer questions during voir dire	85.7	11.4	2.9
Consider material not admitted as evidence	86.2	9.2	4.6
Initiate or fail to report contact with parties, press, counsel, or witnesses	88.9	9.1	2.0
Use drugs or alcohol during jury service	84.8	11.9	3.3
Conduct experiments or view sites contrary to instructions	89.5	8.1	2.4
Talk about the evidence before trial's end	84.6	7.1	8.3
Do not answer voir dire questions truthfully	80.3	8.0	11.7

TABLE I
 JUDICIAL REPORTS OF MISCONDUCT DISCOVERED BEFORE THE VERDICT

Type of Misconduct Reported	Percentage of Judges Reporting ^a	Number of Cases in Which Conduct Reported		
		Total	Civil	Criminal
<u>Survey Categories:</u>				
Late or absent	80% ^b	3026 ^c	1404	1618
Not truthful during voir dire	73	-- ^d	-- ^d	-- ^d
Sleeping	69	2344	1303	1041
Talked to other jurors about the evidence before trial's end	22	515 ^e	241	273
Talked with non-jurors	20	295 ^e	105	188
Considered material not admitted as evidence	20	200 ^e	83	114
Feigned illness	16	305	162	143
Initiated or failed to report contact with press parties, witnesses	13	158 ^e	63	94
Juror under the influence of drugs or alcohol	12	140	63	77
Visited scene of dispute/crime contrary to instructions	7	47	23	24
Refused to answer questions in voir dire despite chance to answer in camera	4	50	20	30
Conducted experiments	4	38	14	23
Accepted bribe from party	.5	3	3	0
<u>Other misconduct:^e</u>				
Failed or refused to deliberate	1 ^b	10+	not specified	
Confrontations or coercion ^f	1	not specified	not specified	
"Black jurors refuse to convict black defendants"	.4	not specified	not specified	

^a Percentage of judges reporting that in at least one trial during the past three years they had become convinced before a verdict had been returned that this conduct had occurred.

^b The percentage of judges reporting conduct under "survey categories" reflects the number of judges noting that they had become convinced before a verdict was returned that the specified conduct had occurred, divided by the number of judges answering that specific question (i.e., .5% judges reporting bribed jurors means that 3 out of the 550 judges responding to the question about bribed jurors marked yes). The percentage of judges reporting conduct under "other misconduct" reflects the number of judges indicating the specific conduct divided by the total number of judges responding to the survey (i.e., .4% judges reporting that "black jurors refuse to convict black defendants" means that 2 out of 562 judges reported this as misconduct).

^c Total includes responses that did not specify case type.

^d 65% of responding judges indicated veniremembers were untruthful in some cases, but less than 1/4; 5.3% indicated veniremembers were untruthful in many cases, but less than 1/2; 1.1% indicated veniremembers were untruthful in most cases; 1.3% indicated veniremembers were untruthful in all cases.

^e Includes only misconduct reported by two or more judges. Single reports of other misconduct discovered before the verdict included: juror was disruptive in court; juror arrested; juror frightened other jurors with report he had been threatened; juror replied to defendant's attorney during closing by saying "bh yes you did" when attorney denied belittling a witness; alternate juror went into deliberations after the juror had been excused; juror formed opinion on guilt before trial over. One judge reported that jurors often "vote by lot."

^f Judges' explanations include: "Five Black jurors gouged eye on a hold-out white juror and accused him of racism during deliberations," "loud, partially racially motivated argument bordering on physical during deliberations," "juror threatened another juror," "juror threatened physical violence," and "juror expressed racial bias to other juror in race discrimination trial."

TABLE 2a
JUDICIAL REPORTS OF NEW TRIALS GRANTED DUE TO MISCONDUCT

Type of Misconduct Causing New Trial	Number of Judges Who Reported Granting at Least One New Trial in the Past Three Years for This Reason
Considered non- or prejudicial evidence	12
Failure to disclose information on voir dire	8
Unauthorized visit to scene	5
Contact with non jurors	2
Recreating scene/experiment	2
Failed to follow damage instruction or arrived at verdict by lot or average	2
Juror would not vote because prayers had not been answered	1
Coercion	1
Type of misconduct causing new trial not specified	7

TABLE 2b
JUDICIAL REPORTS OF NEW TRIALS GRANTED DUE TO MISCONDUCT: TOTAL CASES

Civil cases	27
Criminal cases	<u>24</u>
Total	51

Judges were invited to add their own general comments to the survey and eighty-eight did. The most frequent comment was that misconduct never or rarely happened (forty-four judges), or that misconduct is easily controlled by judicial supervision and attention to instructions (ten judges).²³² Several wrote that lying during voir dire was a significant problem. Most of these judges mentioned that veniremembers lied to avoid service.²³³ Two noted that veniremembers often concealed prior criminal histories, one complained of jurors who hide religious limitations on their decisionmaking, and one judge stated that a juror often comes forward shortly after trial starts with information the juror should have revealed during voir dire but did not.²³⁴ Eight judges observed that jurors have been more disrespectful, confrontational, or cynical in recent years, and two of them linked this attitude to the trial of O.J. Simpson.²³⁵

Nine judges volunteered concerns about jury nullification. Five of these judges expressed concern about race-based nullification or racially split deliberations.²³⁶ Two were concerned about juries failing to convict

232. One judge stated that "Jury misconduct is so rare it is close to the point of being unheard of in this country."

233. See *supra* text accompanying notes 117-18.

234. This judge gave as an example a juror who was embarrassed to admit that the psychiatrist witness was treating him for an anxiety/disorder. There may be many other reasons veniremembers do not tell the truth during voir dire. A federal judge from Texas explained that veniremembers in his court are most likely to misrepresent that they have the ability to speak and understand English; bench conferences with prospective jurors sometimes reveal that they really do not.

235. Comments included "Angry confrontational attitude," "Jurors are not better or worse, just more cynical," "driver's license pool has brought in more prospective jurors with no interest in supporting the jury system[; panels include those who] I call 'rock throwers' who delay and lengthen the voir dire examination, and if one ends up on a jury, the other jurors usually pay the price having to deal with these people. This confrontational attitude by a very small minority can make jury service more difficult for other jurors." "We have noticed a change in jurors since the O.J. case — more demanding, assertive, and even aggressive. Complain that we offer only coffee daily and pizza during deliberations . . . Don't seem embarrassed [to tell people they discussed case before deliberations] or even realize that they violated court's instructions and orders." "Jurors are more anxious to ask questions of witnesses that they feel the attorneys have ignored." "Jurors since the O.J. Simpson trial appear bolder less respectful and more inclined to present juror problems." "Jurors recently seem more vocal re: what 'rights' they have as jurors. They are more vocal and articulate about what they perceived to be the failures of both criminal and civil law . . . they are evidencing a greater desire actively to participate in the trial process in an inappropriate manner. They are demonstrating greater awareness of the trial process itself, but are often mistaken in what they believe the law is. They also seem to be less intimidated and far less respectful of the process and judges and lawyers."

236. The comments were: "black jurors refuse to convict black defendants," "Blacks acquit black defendants," "consider Race, national origin, etc." "You have stayed away from juror misconduct due to racial attitudes — certainly there are circum-

in reaction to stiff mandatory sentences,²³⁷ one about jurors who use verdicts to protest police conduct,²³⁸ and one expressed concern about nullification in general, stating that “jury nullification may be the ‘wave of the future’ of jury misconduct.”²³⁹

d. Variation Between Courts. A comparison of the responses of different groups of responding judges reveals significant variations. Some judges may be eager to seek solutions to what they perceive as a problem, while others would oppose expending further resources to alter a situation they consider to be satisfactory.²⁴⁰ The differences in responses also suggest that there is much more to learn about *why* misconduct troubles some judges but not others.

State judges, for example, were much more likely than federal judges to report that they had encountered jury misconduct before the end of a trial. A higher proportion of state judges than federal judges reported misconduct for almost every category of misconduct, and the difference was statistically significant for jurors not telling the truth, feigning illness, and talking to nonjurors about the case during the trial.²⁴¹

stances that ‘we have to stick together’ — re: a defendant — re: ‘he is one of us’ — that would be more interesting.” “Juries are frequently dividing along racial lines and of course very little confidence in law enforcement. The only recourse I see is a limitation on jury trials in certain criminal cases, or very strictly controlled judicial voir dire.”

237. “Jurors have learned of mandatory minimum sentence required for some drug cases and for that reason have refused to convict.” “Only recent difficulty has been with some juror nullification over ‘three strike’ or other ‘strike’ cases.”

238. “In my general voir dire in criminal cases jurors are asked whether they had feelings one way or another concerning ‘police officers.’ Very few raise their hands. (Those that do have poignant stories about police mistreatment.) We know that a great many jurors have feelings but prefer to sit on a jury and vent their feelings in a verdict”

239. One judge from Montana sent along a copy of a recent decision in which he refused to dismiss jury tampering charges against a person who had sent veniremembers letters advising them of the right to nullify.

240. For example, 27.3% of all judges responded that *none* of their recent trials involved jurors who failed to tell the truth, but one percent of all judges believed that *most* trials involved less than truthful veniremembers, and another one percent believed that at least one veniremember had been untruthful in *every* case they had tried.

241. Ten percent of state judges reported that veniremembers had been untruthful in many, most, or all cases, compared to only three percent of federal judges. ($p < .05$). All of the judges who responded that jurors were untruthful in most or all cases were state judges. Twenty-nine percent of state judges, compared to 13% of federal judges, reported jurors feigning illness. ($p < .01$). Twenty-nine percent of state judges, compared to 18% of federal judges, reported misconduct by jurors who talked to nonjurors. ($p < .05$). There was, however, no statistically significant difference in the frequency with which state and federal judges reported *grants of new trials* due to misconduct.

There was a statistically significant relationship between the number of jury trials over which a judge estimated that he or she had presided during the past three years and the likelihood that the judge reported certain types of misconduct — sleeping, lateness, talking to nonjurors, and jury experiments. As one might expect, judges who tried more jury cases were more likely to encounter this misconduct. But this relationship existed only up to a point. Judges who estimated that they had presided over 120 to 150 jury trials or more in the past three years were actually *less* likely to report misconduct than judges who estimated that they had presided over 90 to 119 jury trials. Judges who try very large numbers of cases (primarily state judges) might try shorter cases in which this misconduct does not occur as frequently, they might take greater precautions that prevent misconduct from occurring, or they might simply be less alert to misconduct when it does occur.²⁴²

Judges who have served longer on the bench appear to have more confidence in the honesty of jurors than newer judges. There was a statistically significant relationship between the number of years a judge had been on the bench and that judge's assessment of the honesty of jurors during voir dire, with the newer judges responding more skeptically than judges with at least fifteen years on the bench.²⁴³

Judges in large cities seem to encounter some forms of misconduct more frequently than judges in smaller cities. The bigger the city, the more likely it was that a judge reported that jurors lied during voir dire, were late or absent for trial, or feigned illness.²⁴⁴ Lateness may be simply a reflection of how difficult it is to get around in a larger city or find parking, but all three behaviors may also reflect a greater reluctance on the part of residents of larger cities to serve as jurors.²⁴⁵

242. It is also possible that jurors in these busiest courts are better behaved than jurors who serve on juries in courts that are not as busy, but this seems unlikely. There was also no statistically significant correlation between a judge's estimated caseload and that judge's report of *new trials* due to misconduct.

243. ($p < .05$). For example, 14% of judges on the bench 15 years or more responded that veniremembers were untruthful in many trials, compared to about 40% of newer judges. For other types of misconduct, there was no statistically significant difference between the responses of senior judges and newer judges.

244. For untruthfulness during voir dire: ($p < .01$), for reporting late or not at all: ($p < .01$), for feigning illness: ($p < .05$). There was no statistically significant relationship between city size and reports of other forms of misconduct, or between city size and reports of new trials.

245. One judge suggested that lateness is a special problem in courts that rely on citizens from Indian reservations, both because many of these jurors lack transportation and because "of the cultural difference regarding the need to arrive at an appointed time."

A comparison of responses from California, New York, and Tennessee showed interesting differences in the frequency with which judges reported discovering misconduct before the verdict, but no differences in the proportion of judges reporting new trials for misconduct. For all but two of the categories surveyed, a greater proportion of the trial judges in California than in either New York or Tennessee responded that they had encountered misconduct during the trial, a finding that would be expected given California's longer trials.²⁴⁶ See Table 3.

Finally, the survey suggests that some forms of misconduct may be more of a problem in criminal cases than in civil cases. The 103 responding judges who tried only civil cases in the past three years were significantly less likely than the 105 judges who tried only criminal cases to report that jurors were dishonest during voir dire, were under the influence of drugs or alcohol, or viewed the scene of the dispute or event without permission.²⁴⁷

2. *Judicial Response to Jury Misconduct*

The survey results suggest that a large number of mistrials and new trials are obviated by a court's ability to accept verdicts from juries reduced in size by attrition or from juries that include alternates who have replaced original jurors. Also, judges do not often choose to punish jurors when misconduct is discovered before the verdict. Instead, they focus on providing a fair trial for the litigants.

a. Avoiding Mistrials and New Trials. According to the judges, jury misconduct discovered before the verdict seldom requires starting the trial over again. Only a small proportion of the judges who reported that they had encountered misconduct also reported that they had ordered a mistrial as a result. Dismissal, or replacement, or both, of the

246. Alternatively, California jurors may be less controlled by judges, or less well-behaved than jurors in the other two states, but these explanations are not reflected in the new trial rates, which are just as low as in the other two states. Nine percent (N=4) of judges in California reported granting new trials, for a total of five trials; 12% (N=6) of New York judges granted new trials, and 7% (N=2) of judges in Tennessee reported granting new trials.

247. Of the criminal judges, 14% reported that many, most, or all of their cases involved at least one veniremember who was untruthful, compared to only 5% of the civil trial judges. ($p < .05$). Nineteen percent of the criminal judges reported jurors under the influence of drugs or alcohol, compared to 8% of civil judges. ($p < .05$). Nine percent of criminal judges reported unauthorized visits to the scene, compared to 2% of civil judges. ($p < .05$).

TABLE 3
THREE-STATE COMPARISON OF JUDICIAL REPORTS OF MISCONDUCT DISCOVERED BEFORE THE VERDICT

	California	New York	Tennessee
Number of judges responding	49	50	31
Percentage of judges ^a			
Type of misconduct:	California	New York	Tennessee
Late/absent	88%	88%	77%
Not truthful during voir dire:			
• no cases	21	22	32
• some cases/less than 1/4	71	65	68
• many cases/less than 1/2	6	10	0
• most cases	2	2	0
• all cases	0	0	0
Sleeping	81	76	65
Talked with other jurors	32	24	23
Feigned illness	26	24	10
Talked to non-jurors	28	18	32
Considered non-evidence	33	20	16
Contact with press, parties, witnesses	23	12	3
Under influence	13	10	3
Visit scene	11	4	10
Experiments	9	6	0
Bribe accepted	0	0	0

^a Percentage of judges from each state reporting that they had become convinced before the verdict that this type of misconduct had occurred in at least one trial in the past three years.

juror with an alternate were much more popular options.²⁴⁸ See Table 4.

Although the number of judges who ordered mistrials for jury misconduct was small, the likelihood that misconduct resulted in mistrial varied greatly with the type of misconduct. Four out of the eight judges reporting that jurors had failed to deliberate noted that a mistrial was the result, as did three out of the seven judges reporting juror confrontations. Juror experiments, visits to the scene, and consideration of material not admitted as evidence also prompted significant rates of mistrials (4 of 22 judges reporting; 6 of 36, and 25 of 110 respectively). When these forms of misconduct occur, they tend to occur during deliberations, so their higher mistrial rates would be consistent with the rules in several jurisdictions that prohibit replacement or dismissal of jurors after deliberations begin.²⁴⁹

b. Letting Jurors off the Hook. Few judges reported that they cited or even threatened to cite offending jurors with contempt for most forms of misconduct.²⁵⁰ For behavior linked to avoiding service, however, judges appeared more interested in coercing compliance or setting an example for the other jurors. Of the eighty-seven judges reporting jurors who feigned illness, thirteen reported that they had threatened the juror with contempt and three reported imposing contempt. Of 444 judges reporting late or absent jurors, sixty-one (fourteen percent) threatened and twenty-three (five percent) imposed contempt.²⁵¹ Sleep-

248. These findings are consistent with a recent study in Los Angeles. See *California Group Shuns Lobbying Process, Defeats Verdict Proposal*, 10 Crim. Prac. Manual (BNA) 229, 230-31 (June 5, 1996) (two percent of criminal trials end in mistrial due to jury misconduct). The responses suggest that for many judges, alternate jurors, when authorized, are routine: 42% of the judges reported using one or more alternates in every case and another 20% had used one or more alternates in most of their jury trials. As one judge explained, the rule allowing the substitution of alternates meant "I had a situation during trial that I could fix at the time, on the spot, that could have created a serious problem post-trial." Alternates are not authorized in civil trials in federal court.

249. Mistrial rates may also vary by location. In Tennessee, four out of seven judges reporting preliminary deliberations and five out of ten judges reporting jurors talking with nonjurors also reported that they had ordered a mistrial. Judges in California and New York reported this misconduct just as frequently, but only one judge reported ordering a mistrial.

250. See Table 4. None of the six judges reporting juror confrontations or the eight judges reporting refusal to deliberate indicated that they had threatened or imposed contempt for this behavior.

251. Late jurors were sometimes required to forfeit juror pay as a penalty, according to two judges. Of the 24 judges who reported that a juror had refused to answer a question on voir dire, even after being offered the chance to answer in camera, 16 reported that they had dismissed the obstinate juror, 4 reported threatening contempt, 1 reported holding the juror in contempt, and 3 reported that they took no action and left it to the attorneys. Judicial response to deceit during voir dire was mentioned in Part I — most judges either dismissed the juror or left it up to attorneys to challenge the juror.

ing jurors were usually awakened and offered a break, or a chance to drink water, cola, or coffee, but not reprimanded. Many other judges stated that they left it up to the lawyers to take action when jurors dozed, some noting that after all it was the lawyers who had put them to sleep. The survey also inquired about whether jurors had been prosecuted for their behavior. Of the 539 judges who answered this question, only fourteen reported having *ever*, in their entire career, presided over a case in which a former juror was prosecuted for misconduct as a juror, and those judges who did report such cases reported twenty-nine separate prosecutions. Six judges reported that those prosecuted for misconduct as jurors served on juries that never reached a verdict, two judges reported jurors prosecuted for behavior on convicting juries, and one judge reported that the former juror had served on a jury that had acquitted a defendant. No judge reported a prosecution of a former juror who had served on a jury that had reached a verdict in a civil case. A larger sample would be helpful to determine whether or not prosecutors are more inclined to prosecute a juror for misconduct when that misconduct deprives the government of a conviction.

C. *A Look Ahead*

1. *Defining Jury Misconduct*

The preceding study suggests that changing trial procedures and social attitudes about juries will continue to prompt disagreement about what jury conduct *is* misconduct.²⁵² Efforts to define misconduct must focus on whether the behavior undermines or advances the jury's purposes. Such a focus will at least sharpen those debates over misconduct that it cannot resolve. For example, if one assumes that behavior that impairs the accuracy of verdicts and serves no other jury function is improper, the propriety of various types of juror behavior may turn upon whether they are accuracy-enhancing or accuracy-impairing. Consider the rule barring jurors from talking to other jurors during trial about the

See supra note 118. Many judges indicated in their comments that they questioned the juror further themselves before deciding whether to dismiss the juror. Two judges noted that when jurors had lied they had declared mistrials. Several judges noted that falsehoods were not verifiable or that the juror's dishonesty did not "rise to the level that could be prosecuted."

252. For example, the catalogue of misconduct listed in the survey was for some judges overinclusive (e.g., some judges stated that they did not consider talking before deliberations to be misconduct) and for others, underinclusive (e.g., some judges indicated that behavior not listed was misconduct, such as the failure to deliberate, coercion in the jury room, or nullification).

TABLE 4
 JUDICIAL RESPONSE TO MISCONDUCT DISCOVERED BEFORE THE VERDICT^a

Type of Misconduct Reported	Number of Judges Reporting ^b	Dismissed Juror(s)	Replaced Juror(s)	Declared Mistrial	Threatened Contempt	Imposed Contempt	Questioned Offending Juror(s)	Questioned Other Jurors	Instructed Other Jurors
Late or absent	444	91	177	9	61	23	286	14	90
Sleeping	381	85	123	5	--	--	225	--	52
Premature deliberation	120	27	42	12	13	2	77	64	60
Considered material not admitted as evidence	110	20	28	25	6	1	72	54	39
Talked with non-jurors	108	36	35	14	8	3	81	45	34
Feigned illness	87	33	45	3	13	3	38	4	9
Contact with press, parties, witnesses	71	20	25	6	8	1	60	30	20
Under the influence	65	39	31	0	5	2	25	2	8
Visited scene of dispute/crime contrary to instructions	36	9	8	6	2	0	23	12	10
Conducted experiments	22	3	3	4	2	0	14	7	8

Judges represent the number of judges who indicated that they had responded to the misconduct with the specified action. Judges were instructed to select all applicable responses. Number of judges reporting at least one case in the past three years in which they became convinced before the verdict that this type of misconduct had occurred.

evidence. This rule is said to protect the defendant from premature decisionmaking before the defense has had its chance to oppose the prosecutor's claims. If by discussing the evidence a juror tunes out what is to come, the verdict may be less accurate than it would have been had she kept an open mind. But the more common effect of the rule may instead be to undermine accuracy, either by causing a juror to forget much of the prosecutor's case, or by preventing a juror from pointing out flaws in another juror's thought processes early on in the case when opinions are forming. Without any opportunity to discuss the case during trial jurors may not discover until after they begin deliberations that they have questions or are confused about certain issues in the case, questions that they could have raised during the trial when the judge and counsel could have responded more effectively. As judicial views about the effects of this traditional prohibition against talking during the trial change, the rule is eroding, directly by repeal, and indirectly through neglect.²⁵³ Note-taking by jurors, and even questioning of witnesses by jurors, thought at one time to impair the accuracy of verdicts, are increasingly viewed as improving verdict accuracy.²⁵⁴ Similar changes have taken place regarding jury access during deliberations to the charge against the defendant and to written versions of the judge's instructions.²⁵⁵ Present debates about whether or not a juror commits misconduct when she anticipates telling her story for profit, will in part depend on whether or not such anticipation impairs verdict accuracy.²⁵⁶

253. Last year Arizona abandoned the rule in civil cases. See B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 281-83 (1996). Five judges commented in the survey that they or their colleagues did not consider this misconduct, and others noted that they did nothing to prevent this. See also William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, 142-43 (allowing jurors to talk could clear up confusion and help ease tension).

254. Note-taking is probably more widespread than juror questioning. By 1965, only one state completely forbade jurors from taking notes, and most state and federal jurisdictions allowed judges to decide whether or not to permit note-taking. See Dragan D. Petroff, *The Practice of Jury Note Taking — Misconduct, Right, or Privilege?*, 18 OKLA. L. REV. 125 (1965) (tracing history of note-taking rules); R.M. Wheddle, Annotation, *Taking and Use of Notes by Jury*, 14 A.L.R.3D 831 (1967 & 1994 Supp.).

Many courts continue to discourage juror-originated questioning. See, e.g., *United States v. Thompson*, 76 F.3d 442, 448-50 (2d Cir. 1996) (arguing that questioning tends to impair juror neutrality and to encourage premature deliberations). For the latest comprehensive empirical work on the effects of note-taking and juror questioning, see Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256 (1996).

255. See Lehman, *supra* note 159, at 771 (noting change).

256. See Marcy Strauss, *Juror Journalism*, 12 YALE L. & POLY. REV. 389 (1994) (claiming that there is no evidence that juror journalism negatively affects verdicts).

The criminal jury, however, continues to do more than find the facts. It educates citizens through their service, defines the reach of legal obligations, enforces community standards of reasonableness, and legitimates trial outcomes. If jurors are supposed to accomplish these goals as well as decide what happened, as I believe they must, then it is not enough to classify juror behavior as proper or improper by referring only to whether it has a tendency to impair or enhance the accuracy of the verdict. Allowing a juror to refuse to deliberate or allowing jurors to acquit defendants in the face of strong evidence of guilt may not enhance accuracy, but that does not settle whether either type of behavior should be considered misconduct. We must consider whether it is consistent with the jury's educative, lawmaking, or legitimating functions.

Race-based nullification and nullification in cases carrying mandatory penalties, decried by some of the judges surveyed, offer recent examples of this problem.²⁵⁷ Neither type of jury conduct is unprecedented.²⁵⁸ Although differences of opinion about whether jurors ought to exercise their discretion in these ways have been with us for a long time, nullification is presently under renewed attack. In the academic literature and the press, its constitutional roots are assailed, its wisdom questioned.²⁵⁹ It will take a more significant and sustained shift in beliefs concerning the jury's political role before courts seriously attempt to regulate nullification. Indeed, effective regulation may elude

257. See *supra* note 236. Compare Michael D. Weiss & Karl Zinsmeister, *When Race Trumps Truth in Court*, AM. ENTERPRISE, Jan. 1996, at 54 and Randall Kennedy, *The Angry Juror*, WALL ST. J., Sept. 30, 1994, at A12 with Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

258. White juries have refused to indict or convict white defendants in certain cases for various reasons for over a century, a phenomenon that in part has fueled efforts to integrate the jury box. See, e.g., Alschuler & Deiss, *supra* note 6, at 882-97. In the nineteenth century juries were accused of acquitting prisoners charged with crimes carrying a mandatory death penalty, which in turn led legislators to "forthrightly grant the juries the discretion which they had been exercising in fact." *McGautha v. California*, 402 U.S. 183, 199 (1971); see also 402 U.S. at 200 n.10 (noting that the practice of jury sentencing in noncapital crimes arose in the colonial period because of similar concerns by jurors that penalties were too harsh). For further discussion, see Albert W. Alschuler, *A Teetering Palladium?*, 79 JUDICATURE 200, 201 (1996) (book review) [hereinafter Alschuler, *Teetering Palladium*] (applauding jurors' efforts to negate the harshness of the Federal Sentencing Guidelines and mandatory minimum sentences).

259. See, e.g., David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REF. 861 (1995); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996); Chaya Weinberg-Brodth, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825 (1990); see also CALIFORNIA REPORT, *supra* note 90, at 92 ("The Commission is unanimously and emphatically opposed to jury nullification and proposals to inform the jury of this power.").

courts. Veniremembers determined to acquit for impermissible reasons could be excluded from juries if they were honest enough to admit it.²⁶⁰ It would be no easy task, however, to evaluate whether a juror was motivated to vote for acquittal by a reasonable doubt about guilt or a forbidden agenda.²⁶¹

Related to the concern of some judges that jurors are not participating fully or are engaging in improper nullification is the relatively modern suspicion of juries that agree too quickly.²⁶² Rapid deliberations taking only minutes, often in the jury box, were quite common, even welcomed, 150 years ago. As deliberation times lengthened, speedy verdicts attracted challenges from convicted defendants who alleged that such hasty decisionmaking was misconduct, even a denial of due process. All such challenges have been deflected by judges who reasoned that there is no minimum time for deliberations and who refused to presume that jurors had abandoned their duties.²⁶³ As deliberation times continue to lengthen, however, this tolerant stance may weaken. For example, in ordering a new trial earlier this year, a federal judge in Chicago concluded that a jury that had returned with a conviction for pos-

260. Just as prosecutors in capital cases are permitted to challenge for cause jurors who will not sentence a defendant to die because of their opposition to the death penalty, prosecutors could also be permitted to challenge jurors who insist that they are inclined to acquit under specified circumstances, assuming such behavior is prohibited. Cf. Lynne Bolduc, *Time for a Change: Problems With the American Jury System*, WOMEN L.J., Dec. 1995, at 13, 16 (noting that one of the goals of the Fully Informed Jury Association is "to educate jurors on how to be deceptive during voir dire, to avoid being tossed off the jury."). Screening of jurors who were predisposed to nullify was actually practiced at the turn of the century in New York. Prospective jurors were asked hypothetical questions about violations of "unpopular statutes which the average juror [would] not consent to enforce," including the question, "Would you, being a juror, and being charged by the court upon a point of law, and knowing this point of law to be unsound, decline to accept the ruling?" BENJ. R. TUCKER, A BLOW AT TRIAL BY JURY: AN EXAMINATION OF THE SPECIAL JURY LAW PASSED BY THE NEW YORK LEGISLATURE IN 1896, at 8, 10 (1898); see also Leipold, *supra* note 259, at 258, 313-16 (recommending instructing jurors that they are not allowed to acquit except for certain specified reasons).

261. See Leipold, *supra* note 259, at 322-23. But see *id.* at 321 (suggesting that special verdicts for criminal juries to specify the reason for their acquittals would assist in controlling nullification behavior).

262. The most recent example of this concern, of course, is that expressed by many after the verdict in the Simpson case. See Gail Diane Cox, *Speedy O.J. Jury Raises Doubts*, NATL. L.J., Oct. 16, 1995, at A6; Weiss & Zinsmeister, *supra* note 257, at 55 (quoting one commentator after the verdict, "The jury did not deliberate, it emoted.").

263. See generally B.K. Carpenter, Annotation, *Effect on Verdict in Criminal Case of Haste or Shortness of Time in Which Jury Reached It*, 91 A.L.R.2D 1238 (1963 & Supp. 1993) (reporting a fascinating collection of cases in which courts have considered and rejected "too hasty" claims).

session of stolen mail after meeting for only ten minutes had failed to follow his instruction to deliberate and consider all of the evidence.²⁶⁴ At least one court has granted a new trial in a civil case because it thought the jurors should have spent more time talking together.²⁶⁵ Like judges who believe that failure to deliberate is “good cause” for removing a juror, or that a veniremember’s intention to nullify should be the basis for a challenge for cause, judges who disapprove of some hasty verdicts may be unable to recognize, or at least unwilling to encourage, the independent political role that each juror fills when she joins a jury in a criminal case.

The renewed attention to such acts of juror independence could be explained by recognizing that judges are only beginning to be called upon by litigants to evaluate the propriety of this type of conduct. Until relatively recently, judges have not learned until after the jury announces a deadlock or an acquittal if its members refused to deliberate or acquitted for political reasons or bias. By then the litigants and the judge have no recourse. Those few jurors who can be proven to have disobeyed independent criminal prohibitions against perjury or obstruction of justice or bribery could be prosecuted,²⁶⁶ but the bulk of this behavior — as well as any resulting acquittal — has remained untouchable. Today, longer deliberations, more intense observation of jurors by courts and attorneys, and the duty to replace or dismiss deliberating jurors who misbehave are shifting debates about the propriety of this jury behavior from the editorial page into the courtroom.

2. *Responding to Misconduct*

Assuming courts can define misconduct, they should try harder to prevent it before it happens and to cure its effects prior to the verdict, rather than to rely primarily upon restrictive and expensive postverdict remedies. For just as gains in compliance with jury summonses have been achieved by diagnosing what keeps jurors away and targeting those aspects of service for elimination, courts should strive to diagnose what conditions facilitate juror misconduct and concentrate on remedying those conditions. We know remarkably little about what conditions

264. See *United States v. Cunningham*, 916 F. Supp. 817, 820 (N.D. Ill. 1996) (“It was not possible — especially in light of the relatively complicated nature of the evidence relating to constructive possession — that the jurors actually ‘deliberated’ the evidence, as they were instructed to do.”).

265. See *Kenan v. Moore*, 195 So. 167, 169 (Fla. 1940) (“[T]he record as a whole indicates that the jury could not in sixteen minutes have duly considered the evidence adduced and the charges of the court . . .”).

266. See *supra* text accompanying notes 207-09.

foster misconduct.²⁶⁷ For example, jurors may be dozing during trials because they have nothing to do for hours on end except to sit and absorb detail. Recognizing this, some forward-looking courts are trying to involve the jury more, allowing them to take notes, ask questions, and talk among themselves about the case as it proceeds. Jurors may conceal information during voir dire to spare themselves embarrassment or to avoid other negative consequences. Providing anonymity or more privacy during voir dire may help them comply with their oaths. Clearer instructions could reduce inadvertent mistakes by jurors. To the extent that such measures can prevent misconduct from occurring, they enhance the fairness, and the image of fairness, of jury trials.

Deterring misconduct by punishing jurors themselves seems to be a less desirable approach. The same considerations that discourage judges from gearing up contempt proceedings against recalcitrant jurors probably also dampen enthusiasm for contempt proceedings against jurors who disobey instructions during trial. Calibrating sanctions against jurors for misconduct is particularly tricky — too strict a penalty may deter jurors or other trial observers from reporting questionable conduct,²⁶⁸ too lenient a penalty may make misconduct an attractive, or at least a costless, option for escaping service.²⁶⁹ Leaving the regulation of juror behavior to prosecutors is no solution either, as it poses too great a risk of selective and vindictive enforcement.

In addition, remedies for misconduct that operate before a verdict is reached have significant advantages over postverdict remedies. Procedures that may help judges discover, assess, and cure the effects of misconduct before a verdict is reached avoid expensive postconviction proceedings. A failure to deliberate or a coercive exchange between one or more jurors may be impossible to prove or cure after the trial is over,

267. Why, for example, is misconduct more frequently reported by state judges? What steps could be taken to remove the incentives for jurors to lie about prior convictions?

268. As one commentator has noted, the sanctions for misconduct should not be so high that those who misbehave, their fellow jurors, and their friends and family members would be reluctant to report this activity. See Swaine, *supra* note 221, at 203-04.

269. "Punishing" misbehaving jurors with dismissal may result in more misconduct, not less, when one considers the jury avoidance behavior documented *supra* Part I. Denying the juror her fee upon proof of misconduct is a handy compromise proposed by one commentator (and adopted by at least one judge responding to the survey). See *id.* at 204 (recommending that judges withhold fees from jurors involved in misconduct). Unfortunately, research suggests that losing a nominal jury fee is not likely to make much of a difference to many jurors. See G.T. Munsterman, *supra* note 83, at 217 n.5 (noting that in Dallas's fee donation program, 30% of jurors donate their fees); William R. Pabst, Jr. et al., *The Myth of the Unwilling Juror*, 60 JUDICATURE 164, 164 (1976) (concluding that fees have no effect on juror satisfaction).

but it is both provable and curable before the verdict, when the rule against jurors impeaching their verdict and the double jeopardy bar against retrying an acquitted defendant do not operate. Moreover, unlike postverdict remedies, preverdict remedies are the courts' only present hope of preventing irreversible yet error-tainted *acquittals*. And unfortunately, it is the acquittals perceived to have resulted from error, not error-tainted convictions, that seem to do the most damage to the public image of the criminal jury today.²⁷⁰

One preverdict device for nipping misconduct in the bud that seems to have achieved some popularity in the last few decades is the practice of substituting alternates even after deliberations have begun. In 1933 California amended its already-pioneering alternate jury statute to authorize judges to substitute alternates for jurors who were discharged during deliberations, as long as all of the jurors were instructed to begin deliberations anew.²⁷¹ Since then, ten states have joined California, several of them only recently.²⁷² The federal courts have resisted such a change, preferring instead to give judges in criminal and civil cases the power to end a case with fewer jurors than the number that began rather than allow them to replace deliberating jurors.²⁷³

Of course, both substitution and dismissal of deliberating jurors carry the risk that holdouts — or jurors perceived as potential holdouts — will be accused of misconduct by observers or by other jurors in hopes that they will be dismissed. As is the case with many jury innovations, there is no empirical evidence in the form of surveys or other studies to refute or verify whether jurors in jurisdictions that allow attrition or substitution during deliberation are any more likely than jurors in other jurisdictions to be “framed” by other jurors or to invent excuses themselves to get dismissed when the going gets tough.

270. See GEORGE P. FLETCHER, WITH JUSTICE FOR SOME 178-81 (1995); Alschuler, *Teetering Palladium*, *supra* note 258, at 202-03.

271. See CAL. PEN. CODE § 1089 (West 1985) (first enacted 1933).

272. See GA. CODE ANN. § 15-12-171 (1994); IDAHO CRIM. R. 24(c)(3); IND. CODE ANN. § 34-1-20.5-2 (West Supp. 1995); KAN. STAT. ANN. § 22-3412(c) (1995); MASS. ANN. LAWS ch. 234A, § 68 (Law. Co-op. 1986); MONT. CODE ANN. § 46-16-118 (1995); N.H. REV. STAT. ANN. § 500-A:13 (1983 & Supp 1995) (first enacted 1993); N.J. R. GEN. APPL. 1:8-2(d) (enacted 1972); NEV. REV. STAT. § 175.061 (1991) (first enacted 1967); WASH. SUPER. CT. CRIM. R. 6.5 (enacted 1989).

273. See generally Joshua G. Grunat, Note, *Post-Submission Substitution of Alternate Jurors in Federal Criminal Cases: Effects of Violations of Federal Rules of Criminal Procedure 23(b) and 24(c)*, 55 FORDHAM L. REV. 861, 868-70 (1987); Lester B. Orfield, Annotation, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 46 (1962). Postsubmission substitution of jurors has been upheld as constitutional in federal and state courts. See *Claudio v. Snyder*, 68 F.3d 1573 (3d Cir. 1995) (collecting cases).

Another promising reform is enhancement of the dialogue between jurors and judges during the trial. Judges can take an active role in discovering and correcting misconceptions of the law, and, more importantly, the jurors can take a more active role in solving problems in their consideration of the case.²⁷⁴ This is, in some ways, a throwback to the control judges once exerted over juries, control which has been so circumscribed that any contact between judge and juror during deliberation is now viewed with suspicion.²⁷⁵ A range of contact is available — judges could actively poll the jurors in writing or orally, alone or in a group, about misconduct or misunderstandings,²⁷⁶ or simply emphasize their invitation to jurors to write notes to the judge if they have questions during deliberations. Either change would provide the judge with more opportunity to clear up jury problems before those problems affect the verdict. The survey suggests that judges already appear to be taking steps like these to discover and control harassment, coercion, and recalcitrance in the jury room before deliberations, and to cure it before a verdict is returned.²⁷⁷

The one preventive approach few have yet dared to consider is to examine those procedural features of the American jury trial that seem to foster misconduct. It may be that giving the judge much more control over the presentation and duration of proof,²⁷⁸ prohibiting publicity about criminal cases before and during trial, or simplifying some evidence rules, for instance, might help to prevent some forms of misconduct. Precedent has established so soundly the procedural facets of the trial process targeted by such changes, however, that each is practically impervious to change. Courts continue to develop more information about the costs to the public, jurors, and litigants of America's complex

274. See ARIZONA REPORT, *supra* note 103, at 115-21; Swaine, *supra* note 221, at 202 (advocating that judges be encouraged to instruct jurors to report misconduct prior to verdict).

275. Cf. Lettow, *supra* note 189, at 528 (noting the practice of many eighteenth-century judges of talking to jury about their verdict before discharging them).

276. See, e.g., Dann & Logan, *supra* note 253, at 283; Arthur D. Austin, *Why Jurors Don't Heed the Trial*, NATL. L.J., Aug. 12, 1985, at 15, 18 (arguing judges ought to be less reluctant to clear up juror questions about confusing instructions).

277. A return to sequestration however, may be one front-end solution to misconduct that causes more trouble than it prevents. See James P. Levine, *The Impact of Sequestration on Juries*, 79 JUDICATURE 266 (1996); Marcy Strauss, *Sequestration* (forthcoming, on file with author). After the Simpson trial, the judge in the Oklahoma City bombing case requested briefs detailing alternatives to sequestration. See *Sequestration Alternatives Offered in Oklahoma Bomb Case*, 10 Crim. Prac. Man. (BNA) No. 1, at 13-17 (Jan. 3, 1996).

278. Cf. *General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1504, 1508-09 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1017 (1996) (upholding trial court's decision in civil case to limit each side to 23 hours a piece, and to deny defendant extra time to present a rebuttal case, and only five minutes to cross-examine each remaining witness, and noting that due process was provided by giving defendant "time to conduct limited cross-examination" of the witnesses).

and ever-lengthening trial procedures. Perhaps lawmakers will decide someday that these costs warrant the reconsideration of some of these procedures.²⁷⁹ For now, however, there is little basis in the foregoing research to conclude that today's judges believe that the costs of jury misconduct have risen high enough to justify radical changes in procedure.

Undoubtedly many more steps can and should be taken to ease the trial burdens on jurors and reduce the likelihood of verdicts based on misunderstanding or foul play, steps that fall short of tossing aside respected, constitutionally based decisions of the past century. Most courts have yet to take steps to improve and clarify jury instructions, reduce trial time, or help the jury accomplish its task in other ways. Now, as before, jury misconduct cannot be ignored, but must be carefully managed, lest "[j]ury trial . . . degenerate into a farce, become a hiss and a byword, and the reproach of all good citizens."²⁸⁰

CONCLUSION

Our commitment to compulsory jury service by average citizens is one of the most fascinating and defining features of the American trial system. It has also proved to be both a blessing and a curse for efforts to control the behavior of jurors. Some conditions of jury service that might have facilitated juror misconduct have been curtailed because of their deterrent effect on prospective jurors. Because jury duty is a right of citizenship, however, we have not attempted to create a pool of professional juror volunteers with the training and experience to avoid misconduct. Nor do courts retain or dismiss jurors from further service based on how many mistakes they make. Instead, our present system enlists reluctant amateurs to perform a demanding and unfamiliar job, in secret, with little accountability. In such a scheme, some degree of misconduct is inevitable. The challenge for courts of the next two centuries is to settle upon acceptable definitions and tolerable levels of jury misconduct and to find ways to minimize both jury misconduct and avoidance that preserve the fundamental features of trial by lay jury. If history is any guide, an ounce of prevention may continue to be worth a pound of cure.

279. See, e.g., ARIZONA REPORT, *supra* note 103, at 71 (recommending that judges be given express authority to limit the amount and type of evidence each side is allowed and how much time each side has to present its case, make opening statements, etc.).

280. Alabama Great So. R.R. v. Bowen, 79 S.E. 1113 (Ga. 1913).

