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Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform

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STRUGGLING WITH DELIBERATIVE SECRECY, JURY INDEPENDENCE, AND JURY REFORM

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I. INTRODUCTION

For more than a decade, public criticism of juries has been on the increase.[1] In the criminal arena, many commentators point to controversial acquittals in highly publicized cases such as the O.J. Simpson trial and the Rodney King case[2] as fueling public distrust of juries and a concomitant movement to reform their functions.[3] Perhaps in response to such concerns, ABC presented a series called *In the Jury Room* in the summer of 2004.[4] Among other things, the series aired footage of actual jury deliberations in six murder trials from three states. Prior to the series,

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1. Although this Article is limited to issues arising with juries in criminal cases, the criticisms extend to both civil and criminal juries. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY 3–4 (2000) (noting the crisis of confidence in jury verdicts); Tom M. Dees, *Juries: On the Verge of Extinction? A Discussion of Jury Reform*, 54 SMU L. REV. 1755, 1756 (2001) (noting criticism arising from the O.J. Simpson trial); Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 200–04 (1990) (presenting recent jury reform proposals); Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 54 (2001) (discussing criticisms of criminal and civil juries, focusing on civil juries, and questioning whether proposed reforms are sufficient); Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 909, 909–14 (2003) [hereinafter *Jury at a Crossroad*] (discussing criticisms of criminal and civil juries); Eugene R. Sullivan & Akhil R. Amar, *Jury Reform in America—A Return to the Old Country*, 33 AM. CRIM. L. REV. 1141, 1141 (1996) (noting criticism of juries and recommending adoption of reforms implemented in England); Natasha K. Lakamp, Comment, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?*, 45 UCLA L. REV. 845, 847 (1998) (discussing public dissatisfaction with the jury system); *Dissatisfaction With the Jury System is Growing, and More Reform is Expected*, NAT'L L. J., Dec. 25, 1995–Jan. 1, 1996, at C12 (presenting jury reform proposals).

Controversial liability determinations and large civil damage awards have caused concern about civil juries; in addition, courts are asking civil juries to address and resolve more and more complex issues. *See, e.g.*, Albert W. Alschuler, *Explaining the Public Wariness of Juries*, 48 DEPAUL L. REV. 407, 411–12 (1997) (offering validation for public criticism of damage awards); William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1726–33 (2001) (discussing judicial review of compensatory and punitive damage awards); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 717 (1998) (discussing the public's belief that people sue indiscriminately and recover exorbitant rewards); Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DEPAUL L. REV. 221, 230–31 (1998) (comparing myths and known data relating to jury awards of compensatory and punitive damage awards); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 849 (1998) ("Juries have been said, variously, to be incompetent, capricious, unreliable, biased, sympathy-prone, confused, hostile to corporate defendants and doctors, gullible, excessively generous in awarding compensatory damages, and out of control when awarding punitive damages.").

2. The "Rodney King case" refers to the state criminal trial and acquittal of police officers Stacey Koon and Laurence Powell for the assault on Rodney King. Later, a federal court convicted Koon and Powell for violating King's civil rights. *See* Koon v. United States, 518 U.S. 81, 87–88 (1996).

3. *See, e.g.*, Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 U. MICH. J.L. REFORM 213, 216 (1999) (discussing role of high-profile trials in fueling public's calls for reform); Marder, *Jury at a Crossroad*, *supra* note 1, at 910–11 (noting the role of high-profile jury trials as a source of press criticism); Jere W. Morehead, *A "Modest" Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 U. KAN. L. REV. 933, 933–34 (1998) (noting that perceived failures in the jury system call into question the right to trial by jury); Andrew Blum, *Jury System Undergoes Patchwork Remodeling*, NAT'L L.J., Jan. 22, 1996, at A1 (suggesting that the O.J. Simpson trial is partially responsible for the public opinion that problems exist in the jury system).

4. *See Good Morning America: "In the Jury Room" Preview of New Reality Series* (ABC television broadcast Aug. 10, 2004).

little empirical evidence existed demonstrating how juries actually work. *In the Jury Room* took the audience, albeit for brief and edited periods, where few had gone before: into the deliberation room to watch and listen while jurors determined a defendant's fate.

Ostensibly, *In the Jury Room* sought to educate the public about the realities and importance of jury service.[5] However, the program may have instigated visits to the deliberation room to investigate the reasonableness of the recent waves of distrust and criticism of juries. A more cynical view—though perhaps more accurate—is that the series primarily exploited the criminal justice system to feed the current "reality" television craze. As in most reality television shows, *In the Jury Room* documents an individual's response to a challenge or ordeal. The series was to determine who among the defendants would survive the ordeal of the criminal justice system and who would be voted off to prison or death. Whether for education or entertainment, *In the Jury Room* was a dramatic departure from the traditional secrecy of jury deliberations.

Other entrées into the deliberative process have arisen from recent jury reforms, which increase opportunities for courts to both direct the manner of deliberations and interact with deliberating jurors. Many jury reforms invite more dialogue between the court and the jury about the deliberation process. For example, judges may give advice about how to deliberate, investigate claims of juror misconduct, and assist juries at an impasse. Increased dialogue is usually a good thing, but increasing the judge's dialogue with a deliberating jury may undermine the jury's independence.

This Article will address whether these forays into the deliberation room are beneficial. Do the insights gleaned from seeing juries at work offset the benefits of deliberative secrecy? Does scrutiny of a jury's decision-making process improve the quality of deliberations, encourage better verdicts, and enhance public confidence in the jury system? Similarly, when judges have more input in the deliberation process, does this improve the quality of deliberations or lead to better, more reliable verdicts?

A. Why Do We Distrust Juries?

This country has long had a love-hate relationship with juries. United States Supreme Court decisions in the last few terms reflect that schizophrenic approach to juries. On one hand, the Court has reaffirmed the requirement that the jury make factual determinations that are necessary to enhance punishment.[6] On the other, the Court's categorical prohibition of imposing the death penalty upon a person with

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5. *See id.*; *see also* Nancy deWolf Smith, *Judging the Jury*, WALL ST. J., Aug. 6, 2004, at W7.

6. *See, e.g.*, United States v. Booker, 125 S. Ct. 738, 746 (2005) (holding that mandatory application of the United States Sentencing Guidelines is incompatible with the Sixth Amendment right to a jury trial); Blakely v. Washington, 124 S. Ct. 2531, 2536 (2004) (acknowledging the right to jury determination of facts as a "longstanding tenet[] of common-law criminal jurisprudence"); Ring v. Arizona, 536 U.S. 584, 609 (2002) (requiring a jury to decide whether facts warrant capital punishment); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (requiring prosecutors to prove to a jury facts that increase the available penalty beyond the prescribed statutory maximum); *see also* Jones v. United States, 526 U.S. 227, 243 n.6 (1999) (stating "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt").

mental retardation is based, at least in part, on an apparent belief that courts cannot trust juries to properly evaluate evidence of an accused's mental retardation.[7]

Some of the sharpest criticism of juries arises from cases in which juries considered charges of police misconduct.[8] In one notable case, four Bronx policemen were prosecuted for killing an unarmed immigrant, Amadou Diallo, by shooting him forty-one times.[9] The jury's verdict acquitting the officers set off a wave of protest in New York City.[10] Several jurors came forward after the trial to explain their deliberative processes. By most accounts, the twelve citizens who decided the case were fully aware of the gravity of their task and performed it with diligence and integrity, without regard to whether their conclusion would comport with popular sentiment.[11] Historically, society has lauded such behavior from juries. Failure, if any, in the Diallo case did not lie with the jurors.[12]

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7. *See* Atkins v. Virginia, 536 U.S. 304, 318–21 (2002) (prohibiting the categorical execution of persons with mental retardation and suggesting that courts cannot trust juries to consider evidence of an accused's mental condition).

8. *See, e.g.*, Jay Weaver, *Scandal Brings Ex-Cops Prison Time: Three Former Miami Police Officers Receive 16 Months in Federal Prison for Their Roles in Covering up Two Fatal Shootings in 1995*, MIAMI HERALD, Nov. 17, 2004, at B1 (explaining that the first trial in this case ended with a deadlocked jury; in the re-trial "[a]fter several heated arguments in the jury room—and the controversial replacement of three original jurors with alternates—the reconstituted panel voted 11-0 to convict all three on the main count, conspiring to obstruct justice").

9. Chester L. Mirsky, *Diallo Jury Did Its Best, But . . .*, NAT'L L.J., Mar. 13, 2000, at A23; John Caher, *Racism, Prosecution's Performance Blamed for Diallo Verdict*, N.Y. L.J., Mar. 9, 2000, at 1.

10. Although the shooting took place in Bronx County, on the defendants' motion the court changed venue to upstate New York. *See* ABRAMSON, *supra* note 1, at xvii. "The trial, which was moved to Albany County, had four black jurors, a figure rarely seen in Albany County courts." Andrew Tilghman, *Minorities Still a Rarity on Juries at Criminal Trials*, ALBANY TIMES UNION, Oct. 5, 2003, at A1.

11. *See, e.g.*, Bill Hewitt et al., *Tough Call: Jurors Free the Four New York City Cops Who Killed Amadou Diallo, Stirring Rage and Protests*, PEOPLE MAG., Mar. 13, 2000, at 73 (stating the outcome surprised jurors themselves, but the jurors claimed that issues of race never came up during deliberations); Mirsky, *supra* note 9, at A23 (noting verdict was "seemingly arrived at through a sincere analysis of the evidence"). The high profile, racially charged nature of the case may have contributed to the jurors' careful assessment of the evidence. Recent studies suggest that "[w]hite jurors may be more likely to demonstrate bias when a trial is *not* racially charged and they are not reminded of race-related norms." Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1021 (2003) (emphasis added).

More often than not, a look into the deliberation room would probably result in a pleasant surprise. In many cases, post-verdict juror interviews reveal that juries engage in diligent, responsible deliberations. *See, e.g.*, VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 16–18 (1986) (describing deliberations of the jury that acquitted John DeLorean); *id.* at 98 (describing deliberations of the jury that convicted Jean Harris); Nicole B. Cásarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT. L.J. 499, 501 (2003) (describing comments about deliberations made by the jury in the *Arthur Andersen* case). Indeed, the juries appearing on *In the Jury Room*, though not all ideal deliberation models, all appeared to take their task seriously. *See infra* notes 140–42 and accompanying text.

12. Some attribute fault to the prosecution for failing adequately to challenge the defendants' evidence. *See, e.g.*, Caher, *supra* note 9, at 1; Lloyd Williams, Editorial, *Diallo Case Testifies to Legal System's Racist Taint*, STAR-LEDGER (Newark, N.J.), Mar. 9. 2000, at 018 (describing prosecution's efforts as "anemic"). Some attribute fault to the trial judge for over emphasizing the justification instructions. *See, e.g.*, Ellis Cose, *The Long Shadow of Amadou Diallo: The New York Cops on Trial for Murder Got Some Lucky Breaks—and Not Just From the Racially Mixed Jury that Acquitted Them*, NEWSWEEK, Mar. 13, 2000, at 54, 54 [hereinafter *Long Shadow*] (stating that the trial judge "repeatedly cites multiple grounds that justify the use of deadly force[, a]nd he does so not only for the

The blame for verdicts that breed distrust because of their unpopularity or because they appear to be the result of nullification[13] often lies with police, prosecutors, defense lawyers, and judges instead of jurors.[14] Notably, when wrongful *convictions* occur, the public is willing to accept that fault likely lies with the information presented to the jury rather than with the jury itself.[15] However, juries that return unpopular verdicts of *acquittal* or that cannot reach a verdict at all receive no similar understanding. When a jury returns an acquittal contrary to popular opinion or fails to reach a verdict, society automatically assumes that the jury was the part of the system that failed.

Unpopular jury decisions should not necessarily lead to a conclusion that juries are broken and need repair.[16] Indeed, deciphering what causes a jury to reach a particular decision is difficult. With jury verdicts, traditional democratic values of

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main three counts . . . but for each of the so-called lesser-included offenses. Over and over and at mind-numbing length, the jurors are told they must evaluate the situation from the cops' perspective."). Despite the acquittals, the City of New York reached a three million dollar settlement with Diallo's family in the civil case arising from the incident. *See* Alan Feuer, *$3 Million Deal in Police Killing of Diallo in '99*, N.Y. TIMES, Jan. 7, 2004, at A1.

13. For a description of jury nullification, see *infra* note 37 and accompanying text.

14. Two leading social science jury researchers suggest that "if our goal is to improve the legal system, the jury may not be an appropriate research priority. Research on prosecutorial decisions or the attorney-client relationship, for example, might yield bigger payoffs in terms of affecting larger numbers of cases." Richard O. Lempert, *Why Do Jury Research?*, *in* INSIDE THE JUROR 242, 248 (Reid Hastie ed., 1993) (citing Joseph B. Kadane, *Sausages and Law: Juror Decisions in the Much Larger Justice System*, *in* INSIDE THE JUROR 229, 229 (Reid Hastie ed., 1993)).

15. The discovery of multiple wrongly convicted defendants in capital cases, for example, fueled concerns about the death penalty and led the Governor of Illinois to issue a moratorium on executions. *See* Jonathan Alter, *The Death Penalty on Trial*, NEWSWEEK, Jun. 12, 2000, at 24, 32; Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, CHIC. TRIB., Nov. 14, 1999, at A1. Later, it also led the Governor to commute from death to life the sentence of every defendant remaining on Illinois's death row. Daniel C. Vock, *Courts, Lawmakers Left with Next Move*, CHIC. DAILY L. BULL., Jan. 13, 2003, at 1; *see also* Michael L. Radelet, *More Trends Toward Moratoria on Executions*, 33 CONN. L. REV. 845, 856–60 (2001) (discussing the false impression that DNA evidence ensures only the guilty are executed).

16. A disturbing aspect of the recent distrust in criminal juries is that it has arisen at the same time that juries are becoming more representative of the community. In 1975, the United States Supreme Court held that a jury drawn from a fair cross-section of the community is a critical component of the Sixth Amendment guarantee of a trial by a fair and impartial jury and that the exclusion of women from jury venires violates the fair cross-section requirement. *See* Taylor v. Louisiana, 419 U.S. 522, 537 (1975). *Batson v. Kentucky* and *J.E.B. v. Alabama* helped assure more diverse participation on petit juries by prohibiting peremptory exclusion of jurors solely on the basis of race or sex. *See Batson*, 476 U.S. 79, 84 (1986) (prohibiting racial discrimination); *J.E.B.*, 511 U.S. 127, 128–29 (1994) (prohibiting sex discrimination).

Some criticisms of verdicts from diverse juries imply that minority jurors cannot be trusted with the task of reaching fair and impartial verdicts. As one commentator noted, although neither jury was racially homogenous, those criticizing the jury that acquitted O.J. Simpson frequently described it as predominantly black—it included eight African-American women, one African-American male, two white females, and one Latino male—and those condemning the jury that acquitted Koon and Powell described it as predominantly white (it included ten white jurors, one Latina, and one Asian-American juror). *See* Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 285, 287, 316 n.46 (1999). In contrast, those seeking to support the verdict acquitting the officers who killed Amadou Diallo described the jury as "mixed" (it included four African-American women, seven white men, and one white woman). *Four White Officers Acquitted in New York's Diallo Shooting Case; Blacks Protest Verdicts*, JET, Mar. 13, 2000, at 14, 15–16; *see also Long Shadow*, *supra* note 12.

transparency in government yield to other values. Because juries arrive at verdicts in secret, criticism of their performance can only be based upon speculation about what the jurors were doing and thinking.[17]

B. Increasing Public Trust in Juries

Despite the inability to see clearly what goes into jury decision-making, in recent years courts and legislatures have become increasingly concerned with reforming the role and functioning of juries.[18] The ABA has joined the movement; its American Jury Project drafted the new *ABA Principles Relating to Juries and Jury Trials* [hereinafter *ABA Jury Principles*], which the ABA House of Delegates

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17. One commentator stated:

> The secrecy of jury deliberations . . . serves to cloud the nature of jury verdicts. Our legal system makes it difficult for parties or the general public to learn about jurors' thought processes. Verdicts are generally inarticulate—guilty or not guilty, liable or not liable—and thus give no indication of a juror's state of mind . . . . [T]he general public will rarely learn whether the jury regarded its judgment as a statement about the evidence or a statement about the event.

Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1365 (1985) (footnotes omitted).

This secrecy also makes research and analysis of the deliberative process difficult. In all but a few rare cases, researchers can only evaluate post-deliberation reflections of the participants or simulated deliberations—not actual deliberations of juries charged with the real task of reaching a verdict, aware of the serious consequences that attend it. Even post-deliberation reflections of actual jurors may not be particularly illuminating. *See* HANS & VIDMAR, *supra* note 11, at 99. "It is a well-documented psychological finding that people frequently lack the ability to identify the factors that influence their judgment and behavior." Sommers & Ellsworth, *supra* note 11, at 1000. *In the Jury Room* jurors may have had the same problem. The judge and ABC representatives interviewed the jurors after each trial, and the jurors claimed the presence of cameras did not influence them. *See supra* note 4. However, in each of the six cases profiled on *In the Jury Room*, the judge, the parties, and the jurors themselves all had to agree to be filmed. *See supra* note 4; *see also* Debra Rosenberg, *Cameras Report, the Jury Decides*, NEWSWEEK, Aug. 9, 2004, at 8, 8 (discussing the efforts taken to avoid affecting the juries). The jurors' willingness to agree to filming and broadcasting of deliberations to a national audience may have made those juries less than representative samples.

18. *See, e.g.*, Wyoming Commission on Jury System Improvement, *Re-Examining Wyoming's Jury Trial Procedures*, 1 WYO. L. REV. 91, 95 (2001) (discussing the Wyoming Supreme Court's role in jury reform); B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 280 (1996) (discussing the Arizona Supreme Court's role in jury reform); Valerie P. Hans, *U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 ST. LOUIS U. PUB. L. REV. 85, 86 (2002) (discussing the impetus for jury reform); Sara Hoffman Jarhad, *Court Considers Proposals to Improve Florida Jury System*, TRIAL, May 2002, at 85, 85 (discussing reform proposals of a state supreme court appointed committee); Gregory P. Joseph, *Innovative Comprehension Initiatives Have Enhanced Ability of Jurors to Make Fair Decisions*, N.Y. ST. B.J., Jun. 2001, at 14, 14 (stating that judges and the bar equally support jury reform); *Jury Improvement Pilot Project Will Study Ways to Help Service Be More User-Friendly*, TENN. B.J., Aug. 2001, at 6, 6 (discussing roles of the state bar association and the state supreme court in a jury reform project); Jesse R. Walters, *Jury Committee Report*, ADVOCATE (Idaho), Aug. 2001, at 7, 7 (discussing the Idaho Supreme Court's role in jury reform). In addition, the National Center for State Courts has created a Center for Jury Studies with the goal of helping states "expand juror participation and service, improve jury management operations, and improve juror comprehension." *See* John H. Pickering, *Reforming the Civil Judicial System . . . The National Center for State Courts*, MONT. LAW., Dec. 2002, at 20, 20.

adopted in February 2005.[19] Many other reforms have addressed the trappings of jury service by increasing juror pay, limiting the length of jury service, reducing the inconvenience associated with jury service, and improving the physical conditions in which juries serve.[20] For example, the American Legislative Exchange Council has created a model *Jury Patriotism Act*, designed to increase participation in jury service by decreasing some of the hardships associated with jury service.[21] However, other recent reforms have increased the participation of judges in the deliberative process, from instructing juries on how they should deliberate[22] to questioning deadlocked juries about the specific sources of disagreement.[23] Despite these reforms, complaints from deliberating jurors have become more frequent,[24] and judicial inquiry into juror complaints has become more intrusive.[25] While reforms can and should occur to better prepare jurors for the daunting task of deciding an accused person's fate,[26] any reform should not compromise the jury's

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19. ABA, PRINCIPLES FOR JURIES & JURY TRIALS (2005), *available at* http://www.abanet.org/juryprojectstandards/principles.pdf [hereinafter ABA JURY PRINCIPLES]; *see generally* ABA, American Jury Project, http://www.abanet.org/juryprojectstandards/ (last visited Oct. 5, 2005) (describing the ABA American Jury Project).

20. For example, the ABA principles include: "Principle 2—Citizens Have the Right to Participate in Jury Service and Their Service Should Be Facilitated," "Principle 7—Courts Should Protect Juror Privacy Insofar as Consistent With the Requirements of Justice and the Public Interest," "Principle 10—Courts Should Use Open, Fair and Flexible Procedures to Select a Representative Pool of Prospective Jurors," and "Principle 12—Courts Should Limit the Length of Jury Trials Insofar as Justice Allows and Jurors Should Be Fully Informed of the Trial Schedule Established." *See* ABA JURY PRINCIPLES, *supra* note 19, at 7, 35, 51, 87.

21. Am. Legis. Exch. Council, Model Jury Patriotism Act, http://www.alec.org (follow "Model Legislation" hyperlink, then follow "Civil Justice" hyperlink, then follow "Jury Patriotism Act" hyperlink) (last visited Aug. 30, 2005). Arizona, Louisiana, Oklahoma, and Utah have already passed laws based on this model. *See* Act of Apr. 23, 2004, 2004 Ariz. Sess. Laws 153; Act No. 678, 2003 La. Acts 2364; Act Relating to Jury Service Reform, ch. 525, 2004 Okla. Sess. Laws 2499; Act of March 5, 2003, ch. 194, 2003 Utah Laws 879.

22. *See, e.g.*, ARIZ. R. CRIM. P. 18.6(a) (dictating that "[p]rior to commencing service, each juror may be provided a juror's handbook, approved by the Supreme Court"). Although the rules did not specifically authorize the provision of handbooks until 1995, the Arizona Supreme Court approved handbooks in 1937. *See* Knight v. State, 69 P.2d 569, 572 (Ariz. 1937). *See also* WASH. ST. SUPER. CT. CRIM. P. R. 6.2 ("All jurors will be given a general orientation when they report for duty." Jurors are also provided with a handbook and juror information sheet). *Cf.* WYO. R. CRIM. P. 24.1(b) ("Typical contents of a juror notebook include blank paper for note taking, stipulations of the parties, lists or seating charts identifying counsel and their respective clients, general instructions for jurors, and pertinent case specific instructions."); WYO. R. CRIM. P. 30(b) (permitting only preliminary instructions to the jury).

23. *See* ARIZ. R. CRIM. P. 22.4; IND. JURY R. 28; *see also infra* notes 179–200 and accompanying text.

24. *See infra* note 179 and accompanying text.

25. One reason for the increased inquiries is Federal Rule of Criminal Procedure 23(b), which permits discharge of a deliberating juror—and a verdict from the remaining eleven—upon a showing of "good cause" for such discharge. In addition, Rule 24(c) contemplates substitution of an alternate for a deliberating juror. *See infra* notes 175 and 176. Most states have similar rules. *See infra* note 176. The rules may require a federal or state judge confronted with a juror problem during deliberations to engage in at least a limited inquiry of the jurors to determine if cause exists to discharge or replace a juror.

26. Arizona has been a leader in civil and criminal jury reform. Permitting jurors to take notes, allowing jurors to submit questions for witnesses, and providing substantive instructions at the beginning of trial are among some of the more common reforms that may contribute to better juror understanding. *See* ARIZ. R. CRIM. P. 18.6(c) (requiring preliminary instructions on "elementary legal principles that will govern the proceeding"); *id.* at 18.6(d) (permitting juror note-taking and the

role and independence when performing its essential function. This Article examines whether anything valuable is lost when jury reforms permit or encourage incursions into a once sacrosanct sphere—the jury deliberation room.

Part II of this Article will set out the history and importance of secret deliberations as part of the jury trial right and outline specific measures and procedures that have developed to protect deliberative secrecy. Part III will discuss what recorded deliberations—like those in *In the Jury Room*—have taught us about the deliberative group decision-making process. Finally, Part IV will address recent reforms and trends that may affect deliberative secrecy or jury independence.

II. THE HISTORY AND ROLE OF DELIBERATIVE SECRECY AS A MEANS TO PROMOTE JURY INDEPENDENCE

Recent United States Supreme Court decisions underscore the importance of the jury in the criminal justice system and reinforce the value of having a jury make the critical determinations in a criminal case.[27] The key element of the right to a jury trial is "the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'"[28] In other words, one of the jury's most valued features is its independence from the court.

The right to a trial by jury "was designed 'to guard against a spirit of oppression and tyranny on the part of the rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'"[29] That right was just as important to this country's founders. Preservation of the jury trial and its "proper operation as a protection against arbitrary rule were

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provision of juror notebooks); *id.* at 18.6(e) (permitting jurors to submit written questions for witnesses or the court); *see also* ARIZ. R. CIV. P. 39(f) (permitting jurors to engage in predeliberation discussions in civil cases). Several other states quickly followed Arizona's lead and adopted similar reforms. *See* IDAHO R. CIV. P. 47(o), (q) (permitting juror note-taking, notebooks, and, in the court's discretion, juror questioning of witnesses in civil cases); IDAHO R. CRIM. P. 24.1, 30.1 (permitting the same in criminal cases); UTAH R. CRIM. P. 17(i) (permitting juror questions and note-taking); WYO. R. CIV. P. 39.1, 39.3, 39.4 (permitting juror note-taking, notebooks, and questioning of witnesses in civil cases); WYO. R. CRIM. P. 24.1, 24.3 (permitting juror note-taking and notebooks in criminal cases); N.Y. COMP. CODES R. & REGS. tit. 22, §§ 220.10, 220.12 (2005) (permitting juror note-taking and notebooks in civil and criminal cases); N.Y. STATE UNIFIED CT. SYS., CONTINUING JURY REFORM IN NEW YORK STATE: JANUARY 2001 REPORT 34 (permitting juror questioning of witnesses). In addition, the American Bar Association's *Civil Trial Practice Standards* encourage such reforms. ABA, CIVIL TRIAL PRACTICE STANDARDS 1–24 (1998), *available at* http://www.abanet.org/litigation/civiltrialstandards/ctps.pdf (last visited Oct. 5, 2005). See Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask, That is the Question,"* 78 CHI.-KENT L. REV. 1099 (2003), for a discussion of arguments for and against jurors taking notes and asking questions of witnesses. Similarly, see Dees, *supra* note 1, at 1773–78.

Another, more controversial reform permits jurors to engage in deliberations before hearing all the evidence. *See* Valerie P. Hans et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J.L. REFORM 349, 350 (1999).

27. *See supra* note 6.

28. Sullivan v. Louisiana, 508 U.S. 275, 277 (1993). "[T]rial by jury has been understood to require that 'the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . .'" Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *343) (emphasis omitted).

29. United States v. Gaudin, 515 U.S. 506, 510–11 (1995) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1779–1780, at 540–41 (1873)).

among the major objectives of the revolutionary settlement."[30] Not surprisingly, the United States Constitution thus provides that "[t]he trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[31] Moreover, "the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights."[32]

Many have written about the value of jury trials in criminal cases as protection against arbitrary governmental power. For example, in determining that the right to a jury trial in felony cases is an essential component of due process, the United States Supreme Court noted:

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . Beyond this, the jury trial provisions in the Federal and State constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.[33]

Similarly, in *Williams v. Florida*, the Supreme Court explained that "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."[34] The absence of deliberative secrecy would hinder, if not prevent, juries from serving this important purpose. Deliberative secrecy is essential to guarantee the jury's independence, thereby guaranteeing that an accused actually receives a trial by jury and a verdict that comes from that jury alone.

The Second Circuit characterized the secrecy of jury deliberations as a "cardinal principle"[35] and the "cornerstone" of the modern jury system.[36] Deliberative secrecy serves several important functions. First, deliberative secrecy preserves the jury's independence by protecting jurors from outside influences. Second, deliberative secrecy enables jurors to engage in the open discussion and free exchange of ideas that can lead to more well-considered verdicts. Third, because juries cannot be asked to explain their deliberative processes or their verdicts, they have the power to render decisions that reflect the community's sense

30. Duncan v. Louisiana, 391 U.S. 145, 151 (1968).

31. U.S. CONST. art. III, § 2; *see also* U.S. CONST. amend. VI (providing in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

32. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

33. *Duncan*, 391 U.S. at 156.

34. Williams v. Florida, 399 U.S. 78, 100 (1970); *see also Gaudin*, 515 U.S. at 510–11 (stating that the right to jury trial was designed to guard against tyranny and oppression); United States v. Spock, 416 F.2d 165, 180 (1st Cir. 1969) ("[T]he right to be tried by a jury of one's peers finally exacted from the king would be meaningless if the king's judges could call the turn.").

35. United States v. Olano, 507 U.S. 725, 737 (1903) (quoting the advisory committee's note to Federal Rule of Civil Procedure 23(b)).

36. United States v. Thomas, 116 F.3d 606, 618 (2d Cir. 1997).

of justice. In other words, they can choose to return a verdict, at least of acquittal, that is contrary to the law.[37]

The ability to render verdicts that embody the community's sense of justice exposes a jury to criticism from those in the community who disagree with a particular verdict.[38] For that reason, distrust and criticism of the jury system is not a new phenomenon. Early in this country's history, juries served not only as finders of fact but also had the ability to interpret the law.[39] Over thirty years ago, Justice Harlan, dissenting in *Duncan v. Louisiana*, argued that the historical justifications for permitting juries to determine the law had outgrown their usefulness:

> [T]he principal original virtue of the jury trial—the limitations a jury imposes on a tyrannous judiciary—has largely disappeared. We no longer live in a medieval or colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat. They are elected by the people or appointed by the people's

37. This phenomenon is referred to as jury nullification. The jury's ability to acquit despite the law is rooted in double jeopardy principles. *See* Standefer v. United States, 447 U.S. 10, 22 (1980) (stating that the court may not grant the prosecution a directed verdict and, if a jury returns a verdict of acquittal, the prosecution may neither secure a new trial on grounds that the verdict is contrary to the evidence nor obtain appellate review); Green v. United States, 355 U.S. 184, 188 (1957) (stating that the Double Jeopardy Clause prohibits reversal of a jury's verdict of acquittal, regardless of the jury's reasons for its decision); *see also* United States v. Kerley, 838 F.2d 932, 938 (7th Cir. 1988) ("[The jury] has the *power* to acquit on bad grounds, because the government is not allowed to appeal from an acquittal by a jury."); United States v. Dougherty, 473 F.2d 1113, 1130 (D.C. Cir. 1972) (stating that the jury in a criminal case has the power to bring a verdict of not guilty "that is not reversible by the court"). Thus, a jury's verdict of acquittal must stand regardless of whether the verdict was based on the evidence, a mistaken understanding of the law, or jury nullification. *See, e.g.*, *Kerley*, 838 F.2d at 937 (stating that the jury in a criminal case has the power to acquit on bad grounds as well as good); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 260–63 (1996) (discussing the "unavailability of error-correcting devices" in criminal cases that result in acquittals).

Juries also have some power to convict despite the evidence and the law. The only limit on this power is the due process requirement that the jury base the conviction on legally sufficient evidence. *See In re* Winship, 397 U.S. 358, 364 (1970). Review of sufficiency claims, however, is extremely deferential, giving the prosecution the benefit of every favorable inference and deferring to the jury's factual determinations unless they are patently unreasonable. *See* Jackson v. Virginia, 443 U.S. 307, 318–19 (1979). Thus, defendants have no protection against a jury that chooses to convict on evidence it does not actually believe meets the beyond a reasonable doubt standard, so long as—given the benefit of every doubt—another reasonable jury could have found sufficient proof.

38. Indeed, juries that appear to have based their verdicts on the jurors' own sense of justice, regardless of the law, have sometimes created less than laudable results. In the 1960s, for example, the power of nullification permitted all-white Southern juries to refuse to convict white defendants tried for offenses committed against African-Americans or against white civil rights workers. *See* G. Frank Gormlie, *Jury Nullification: History, Practice, and Prospects*, 53 GUILD PRAC. 49, 55 (1996); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 889–91 (1994). An oft-cited example is the case of the white defendant accused of murdering NAACP Field Secretary Medgar Evers; notwithstanding overwhelming evidence of guilt, the case twice resulted in a hung jury. *See* Otto O. Obermaier, *Second Circuit Court of Appeals Tries to Nullify Jury Nullification*, N.Y.L.J. 7, 8 (July 7, 1997).

39. *See* Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 377–79, 386–93.

> elected officials, and are responsible not to a distant monarch alone but to reviewing courts, including this one.[40]

During the country's early history, judges often had little or no training in the law, so they were no more qualified to decide legal questions than the jurors.[41] According to one commentator, over time "a more responsive legislature and an increasing trust in the judiciary also diminished the need for juries that could decide for themselves how the law should be construed."[42] Thus, even if juries remain critical to the trial process as finders of fact, their role as democratic lawmaking institutions has diminished.

Contemporary jurisdictions have rejected the notion that the jury should have a role in deciding what the law is or should be.[43] Instead, those jurisdictions have reduced the jury's role to fact finding and applying those facts to the law as determined by the trial court. However, deliberative secrecy and the prohibition on special verdicts permit juries to engage in lawmaking through unreviewable verdicts of acquittal that defy the law and the evidence.[44] The perception that certain juries have taken advantage of this authority and engaged in nullification has fueled the fires of criminal jury reform. Nonetheless, the jury's independence in finding facts and applying law remains critical.

A. The History of Secret Jury Deliberations

Although many scholars have written about the history and development of the jury in England,[45] few have focused on the nature of the jury's deliberations. Even

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40. Duncan v. Louisiana, 391 U.S. 145, 188 (1968) (Harlan, J., dissenting); *see also* Alschuler & Deiss, *supra* note 38, at 917 (stating that "in the colonial era, American juries were the governmental bodies most representative of their communities. With independence, state legislatures and other agencies probably represented the whole society better. More democratic lawmaking left little legitimate role for the jury's law-intuiting (and law-defying) functions. The democratic purposes initially served by colonial juries came to be better served by other institutions." (citing FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 41 (1985))).

41. Leipold, *supra* note 37, at 288.

42. *Id.* at 291; *see also id.* at 311 ("Political legitimacy, coupled with simple notions of informed decisionmaking, suggests that the debate over the contours of a defense be carried on through the democratic process and not in a closed jury room.").

43. Only three states—Georgia, Indiana, and Maryland—still have constitutional provisions preserving the jury's right not only to decide the facts but also to decide the law. *See* GA. CONST. art. I, § 1, cl. 11; IND. CONST. art. I, § 19; MD. CONST. art. XXIII. However, in each of these states judicial decisions have rendered these provisions meaningless. *See* Conklin v. State, 331 S.E.2d 532, 543 (Ga. 1985); Carman v. State, 396 N.E.2d 344, 346 (Ind. 1979); Sparks v. State, 603 A.2d 1258, 1277 (Md. 1992). In November 2002, voters in South Dakota rejected an amendment that would have permitted a defendant to admit guilt but then argue to the jury that it nonetheless should acquit him because the law is unfair or draconian. Molly McDonough, *Ballot Initiatives Shot Down*, ABA J. eREPORT, Nov. 8, 2002, *available at* WL 1 No. 43 A.B.A. J. E-Report 3.

44. *See supra* note 37.

45. *See, e.g.*, WILLIAM BLACKSTONE, 3 COMMENTARIES *335–37 (discussing various archaic forms of the trial by jury); R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 71 (2d ed. 1988) (contrasting the jury to a system comprised only of judges or bodies of judges); PATRICK DEVLIN, TRIAL BY JURY 7–12 (1966) (discussing the development of the English jury system beginning with King Henry II and Pope Innocent III); MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 160–67 (John Clive & Charles M. Gray eds., Univ. of Chicago Press 1971) (1713)

fewer have addressed how the secrecy of the jury deliberation room became a critical component of the jury system. A brief recap of the historical development of the jury provides some insight into the closing of the jury room door.

While there are varying theories on the origins of the jury, there is little dispute that the jury emerged after the Norman conquest as a means of resolving civil or criminal disputes as other modes of proof, such as trial by ordeal, became disfavored.[46] Before the jury trial, medieval societies commonly used three ritualized methods to determine guilt or innocence: ordeal, compurgation, or trial by battle.[47] Ordeal, the most ancient form of criminal trial, proceeded upon the belief that God would save an innocent man from death or injury resulting from the ordeal.[48] Compurgation required a defendant to swear an oath of innocence and get a specified number of people in the community to give an oath supporting him.[49] Trial by battle put the defendant's guilt or innocence to the test of armed conflict, either by the defendant himself or on his behalf by a hired champion.[50]

In the Fourth Lateran Council in 1215, Pope Innocent III forbade the clergy from performing religious ceremonies in association with ordeals and the English crown rapidly recognized that decree.[51] Soon thereafter, something akin to the jury trial began to fill the void. One ancient way of initiating a criminal proceeding was an appeal brought by a private accuser, which generally resulted in a trial by battle.[52] To prevent abuses, Henry II invented the writ "*de odio et atia*," by which a person could avoid trial by battle by submitting the question of whether the accuser had brought the appeal "'from hatred and malice' to the verdict of recognitors."[53] The writ effectively substituted a sort of trial by jury for the trial by battle. The jury became a new form of ordeal—an ordeal that submitted the question of the justness of one's position to the essentially inscrutable judgment of a group

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(describing procedures governing juries); 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 298–350 (6th ed. 1938) (describing the origin and development of juries in England); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 106–38 (5th ed. 1956) (discussing various early juries and modes of trial); HANS & VIDMAR, *supra* note 11, at 21–44 (discussing the shift from trial by ordeal to trial by jury); Robert H. White, *Origin and Development of Trial by Jury*, 29 TENN. L. REV. 8, 13 (1961) (listing past incarnations of the jury trial).

46. *See, e.g.*, White, *supra* note 45, at 13 (discussing the failure of several methods of proof in England). Scholars have variously credited the English common law jury as a Norman invention, a later incarnation of the doomsmen of the Anglo-saxon communal courts, or an incarnation of the twelve thegns discussed in King Ethelred's Laws of Wantage (A.D. 997). *See* PLUCKNETT, *supra* note 45, at 108; Harrington, *supra* note 39, at 381 n.9.

47. HOLDSWORTH, *supra* note 45, at 305–11.

48. *Id.* at 310. Trials by ordeal included subjecting a defendant to submersion in cold water, scalding with hot water, bearing hot iron, or walking over hot plough shares. *See, e.g.*, BLACKSTONE, *supra* note 45, at *336–37 (discussing trial by witness and trial by wager of battle).

49. HOLDSWORTH, *supra* note 45, at 305.

50. *Id.* at 308.

51. PLUCKNETT, *supra* note 45, at 118–19. In 1219, Henry III issued a writ to the Justices in Eyre instructing them in the handling of suspected criminals until the Crown could establish an adequate substitute for the ordeal. Because there was no other mode of proof to take place of the ordeal at that time, the Justices were to imprison those suspected of the most serious crimes, banish those suspected of crimes of medium seriousness, and bind over and then release those suspected of the most minor crimes. *Id.*

52. HOLDSWORTH, *supra* note 45, at 57.

53. *Id.*; PLUCKNETT, *supra* note 45, at 120.

of fellow citizens.[54] Like the highly ritualilzed nature of the other modes of proof, submitting a case to the jury became a formalized process. Thus, the inscrutability of jury verdicts, whether reached in secret or not, has long been integral to the jury's function. The secrecy of the jury's decision-making process was apparently inherent to the inscrutability of the final decision.

Accounts suggesting that early juries deliberated in secret date at least to the mid-1300s.[55] For example, Holdsworth explained that

> it was a very ancient rule that the jurors could not separate till after they had given their verdict—the quasi-corporate character of this band of judges must be maintained till they had discharged their duty; and to hasten their deliberations it was the law that they could neither eat nor drink till they had given their verdict.[56]

Other early descriptions of the jury trial process reflect this "very ancient rule."[57] Bracton described the trial mode for property-related issues as including the jury's retiring "to some private place to consider the verdict, and no one was allowed to have access to them until it was delivered."[58]

Isolation of deliberating juries necessarily made their deliberations secret. Secret deliberations protected jurors from outside influences or bribes. In the early courts of the assizes, parties knew the jurors' names beforehand, thereby creating the temptation to use bribery to obtain a favorable verdict. As a result, during the reign of Edward III, England enacted at least three statutes prohibiting that conduct.[59] As Sir Patrick Devlin commented:

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54. The determination of the jury "was as binding, in fact, as the ordeals had been; the *vox polpuli* had simply taken the place of the final and inscrutable *vox Dei*." VAN CAENEGEM, *supra* note 45. Thus:

> The jury is regarded as a formal test to which the parties have submitted. The judgment follows . . . the result of that test. But to ask in what manner one of the old tests worked, to lay down rules for its working, would have been almost impious. . . . [W]hen the jury was first introduced the method by which it arrived at its verdict inherited the inscrutability of the judgments of God.

HOLDSWORTH, *supra* note 45, at 317; *see also* PLUCKNETT, *supra* note 45, at 125 (explaining that "the jury states a simple verdict of guilty or not guilty and the court accepts it").

55. HOLDSWORTH, *supra* note 45, at 318. The logistics of how early juries (or jury-like bodies) operated are harder to discern. In its earliest forms, the jurors operated not only as judges of the facts but also acted as witnesses. Indeed, courts expected juries "to render verdicts based upon [their] own knowledge of the facts." Harrington, *supra* note 39, at 382; *see also* White, *supra* note 45, at 15. By the mid-fifteenth century, however, juries no longer performed this witness function. *See* Harrington, *supra* note 39, at 382–83.

56. HOLDSWORTH, *supra* note 45, at 318–19.

57. WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 114 (James Appleton Morgan ed., 1857) (1853). During the reign of Henry IV, after the parties presented all the evidence in a jury trial,

> the jurors shall confer together, at their pleasure, as they shall think most convenient, upon the truth of the issue before them; with as much deliberation and leisure as they can well desire, being all the while in the keeping of an officer of the court, in a place assigned to them for that purpose, lest anyone should attempt by indirect means to influence them as to their opinion which they are to give in court.

Id. at 133–34.

58. *Id.* at 114.

59. *Id.* at 108.

> [W]hen it was established that the jury might no longer receive information privately or externally, it became necessary to see that its members were not laid open to improper influences from outside. The simplest method of ensuring that no one communicated with them while they were functioning as jurors was to keep them physically separate during their consideration of their verdict.[60]

In *The History of the Common Law of England*, Hale described the trial by jury as a process during which jurors deliberated in secret:

> When the evidence is fully given, the Jurors withdraw to a private Place, and are kept from all Speech with either of the Parties till their Verdict is delivered up, and from receiving any Evidence other than in open Court, where it may be search'd into, discuss'd and examin'd. In this Recess of the Jury they are to consider their Evidence, and if any Writings under Seal were given in Evidence, they are to have with them; they are to weigh the Credibility of Witnesses, and the Force and Efficacy of their Testimonies, wherein . . . they are not precisely bound to the Rules of the Civil Law . . . for the Trial is not simply by Witnesses, but by Jury . . . .
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> . . . .
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> . . . When the whole Twelve Men are agreed, then, and not until then, is their Verdict to be received.[61]

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60. DEVLIN, *supra* note 45, at 41–42.

61. HALE, *supra* note 45, at 165. Blackstone provided a similar description:

> The jury, after the proofs are summed up, . . . withdraw from the bar to consider of their verdict: and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. . . . Also if they speak with either of the parties or their agents, after they are gone from the bar; or if they receive any fresh evidence in private; or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart.

BLACKSTONE, *supra* note 45, at *375–76 (footnotes omitted); *see also* 4 BLACKSTONE, *supra* note 45, at 354 (stating that the process of jury deliberations and return of verdict is the same in civil and criminal cases). In 1832, a London magazine described a similar deliberative process when it decried the requirement of unanimous jury verdicts as absurd:

> [F]irst, that the members should bind themselves by oath to vote according to their consciences; secondly, that they should hear the arguments and evidence for and against each of the propositions brought before them; thirdly, that they should submit to be locked up without meat, drink, fire, or candle, till they were unanimous; fourthly, that in the case of an irreconcileable difference of opinion, this process of blockade and famine should continue till nature or conscience give way . . . .

White, *supra* note 45, at 16 (quoting 7 THE LAW MAGAZINE OR QUARTERLY REVIEW 44–45 (1832)).

The form of jury trial that reached the American colonies also included the type of jury isolation that facilitated secret deliberations. For example, early juries in the Virginia colony apparently conducted their deliberations in secret: "When the case was given to the jury, it was locked up without food or water until it reached a verdict. A juryman could not leave his fellows until a verdict was reached."[62] Although continuing to maintain the character of the deliberating jury as an isolated corporate body, courts in the mid-nineteenth century finally began to question the conditions under which juries deliberated. For example, a New York court in 1801 considered whether it was proper to discharge the original jury and permit a new trial when the original jury could not reach a verdict.[63] In deciding that such action was proper, the court explained:

> The doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict, in fact, be founded not on temperate discussion and clear conviction, but on strength of body, is a monstrous doctrine, that does not . . . stand with conscience, but is altogether repugnant to a sense of humanity and justice. A verdict of acquittal or conviction obtained under such circumstances, can never receive the sanction of public opinion. And the practice of former times, of sending the jury in carts, from one *assize* to another, is properly controlled by the improved manners and sentiments of the present day.[64]

Although the conditions in which juries deliberate have improved, the isolation has continued for deliberating juries throughout the history of the United States. That isolation fosters the secrecy and independence of the jury's deliberative process.

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62. RITA J. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 5 (1980) (quoting Emily S. Wahs, *Perspective on the Function and Value of the Jury from American Literature*, *in* THE JURY SYSTEM IN AMERICA 161, 161–77 (Rita J. Simon ed., 1975)); *see also* Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937, 946–47 (2003) (noting an early Virginia opinion that permitted a convicted defendant to go free because the court allowed a juror to visit with his family, unaccompanied, for five minutes during deliberations).

63. People v. Olcott, 2 Johns. Cas. 301 (N.Y. Sup. Ct. 1801).

64. *Id.* at 309–10 (footnote omitted). Fifty years later, a New York judge told a jury that if it did not return a verdict before he left town that day, the jurors would remain together through the weekend until he returned on Monday to receive their verdict. On appeal, the court held that the jury verdict—reached thirty minutes after the judge's pronouncement—was coerced. Green v. Telfair, 11 How. Pr. 260 (N.Y. Sup. Ct. 1853). The court explained:

> A judge may also keep the jury together as long as, in his judgment, there is any reasonable prospect of their being able to agree; but beyond this, I do not think he is at liberty to go. An attempt to influence the jury, by referring to the time they are to be kept together, or the inconvenience to which they are to be subjected, in case they shall be so pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified.

Id. at 262. *See also* Taylor v. Jones, 39 Tenn. (2 Head) 565, 567–68 (1859) ("The harsh and unreasonable, if not cruel, treatment of juries, once tolerated in England, to force their consciences and judgments, and coerce a concurrence in a verdict, has long since been condemned and repudiated there and here.").

B. *Contemporary Rules and Practices That Promote Jury Independence*

What began as a ritual, however, transformed into both an evidentiary device for determining critical factual questions and an important political institution. While over time jury service lost some of its privations,[65] the secrecy of deliberations remains an integral part of the jury trial. Currently, the predominant rationale for requiring deliberative secrecy is to foster the free exchange of ideas during the deliberative process:

> Juror privacy is a prerequisite of free debate, without which the decisionmaking process would be crippled. The precise value of throwing together in a jury room a representative cross-section of the community is that a just consensus is reached through a thoroughgoing exchange of ideas and impressions. For the process to work according to theory, the participants must feel completely free to dissect the credibility, motivations, and just deserts of other people. Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience.[66]

The Supreme Court also has remarked that "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."[67] The suppositions about juror behavior underlying this rationale long have gone unquestioned.[68]

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65. Such changes were slow in coming. At the end of the nineteenth century, another New York trial court kept deliberating jurors together for four days and nights without sleeping accommodations and instructed them to continue deliberating until they reached a verdict. *See* People v. Sheldon, 50 N.E. 840, 840 (N.Y. 1898). The New York Court of Appeals concluded that the trial court had coerced the verdict:

> If one or more members of the jury surrendered their convictions to put an end to the punishment they were undergoing, and with an indefinite continuance of which they were all threatened, it is not to be wondered at. Only very strong characters could have longer resisted the importunities of associates and the appeal of their own exhausted bodies for relief from the strain to which they had been so long subjected.

Id. at 846. Over time, however, the conditions of deliberations certainly have improved. *See, e.g.*, ARK. CODE ANN. §16-89-125(c) (1987) ("A suitable room must be provided for the use of the jury on their retirement for deliberation, with suitable furniture, fuel, lights, and stationery."); *id.* § 16-89-125(d)(2) (dictating that, if necessary, "[s]uitable food and lodging must be provided"). Much of the recent jury reform movement is aimed at improving the conditions of jury service.

66. Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 889 (1983) (footnotes omitted); *see also* Abraham Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 295–97 (1993) (noting the increased public scrutiny of jury verdicts).

67. Clark v. United States, 289 U.S. 1, 13 (1932).

68. Social science research has not conclusively established whether secrecy or transparency produces better judgments and actions. *See id.* ("[N]o attempt has been made either in treatise or in decisions to chart [the limits of the principle of protecting deliberative secrecy] with precision."). Indeed, freedom of information laws and open meeting laws are based on the notion that a democratic government is best served by a transparent process. Presumably, however, juries are called upon to represent the community in a manner somewhat different from elected officials. *See* ABRAMSON, *supra* note 1, at 192.

Moreover, as in the early days of the jury system, deliberative secrecy also safeguards the interest in protecting jurors from outside influences.[69]

As a result of these interests, several practices and procedures developed to help ensure the jury's independence and deliberative secrecy. While some have deep common law roots, others are of more recent vintage. However, all demonstrate the significant value placed on deliberative secrecy and the jury's independence during deliberations.

1. Jurors Cannot Impeach Their Verdicts

The desire to protect deliberative secrecy underlies the long-standing general rule that jurors may not impeach their verdicts.[70] This rule "originated in the eighteenth-century common-law rule barring a juror from testifying to overturn a verdict."[71] "As a general rule, no one—including the judge presiding at trial—has a 'right to know' how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror."[72] The rule reflects the determination that the value of deliberative secrecy outweighs the risk that some juror misconduct during deliberations will be beyond the court's power to remedy. For example, in *Tanner v. United States*, the Supreme Court refused to consider a juror's post-verdict representation that other jurors drank and used drugs during trial and deliberations.[73] As the Court noted in *Tanner*, "[F]ull and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct."[74] Thus, the rule places many forms of juror misconduct in deliberations beyond the court's power to remedy.

The same balancing is reflected in Federal Rule of Evidence 606(b), which prevents a juror from providing testimony to impeach a verdict except in certain

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69. *See* FORSYTH, *supra* note 57, at 133–34; HALE, *supra* note 45, at 165.

70. *See* Tanner v. United States, 483 U.S. 107, 117 (1987); McDonald v. Pless, 238 U.S. 264, 267–68 (1915). The taboo of interrogating jurors about their deliberations is not a recent innovation. Indeed, Mansfield explained that among the grounds for a new trial was "[m]isbehavior of the jury, as in casting lots for their verdict, *provided this can be proved without resorting to the affidavits of the jurors themselves, which can in no case be admitted.*" FORSYTH, *supra* note 57, at 158 (emphasis added). As Mansfield explained, "in every such case the court must derive its knowledge from some other sources: such as from some person having seen the transaction through a window, or by some such means." *Id.* (quoting Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785)). Similarly, Devlin commented that, after the jury has rendered and accepted the verdict in open court, "[t]he court will not listen to any juryman who has second thoughts or allow any of them to assert thereafter that he was not a consenting party to the verdict." DEVLIN, *supra* note 45, at 48. Kentucky has adopted a slightly different approach, providing that "[a] juror cannot be examined to establish a ground for a new trial, *except to establish that the verdict was made by lot.*" KY. R. CRIM. P. 10.04 (emphasis added).

71. Alison Markovitz, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1501 (2001) (citing *Vaise*, 99 Eng. Rep. at 944).

72. United States v. Thomas, 116 F.3d 606, 618 (2d Cir. 1987); *see also* FED. R. EVID. 606(b) (stating a juror may not testify as to any matter occurring during the jury's deliberations).

73. *Tanner*, 483 U.S. at 116. Had this misconduct come to the trial court's attention before the verdict, the court could have questioned the jurors. *See* Miller v. Stagner, 757 F.2d 988, 995 (9th Cir. 1985), *amended by* 768 F.2d 1090, 1091 (9th Cir. 1985) (dismissing a juror is appropriate on the fifth day of deliberations after a hearing in chambers revealed that the juror was intoxicated on the previous day of deliberations).

74. *Tanner*, 483 U.S. at 120–21.

narrowly drawn circumstances.[75] Pursuant to Federal Rule of Evidence 606(b), "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."[76] These exceptions are consistent with another important purpose of deliberative secrecy—protecting the jury from outside influences.[77] Both the rule and the common law restriction reflect a judgment that deliberative secrecy is critical to enabling the jury to perform its independent function and should be protected at virtually any cost. The primary cost is unassailable verdicts that result from juror misconduct during deliberations or a misunderstanding of the law.

2. *Protection of Inconsistent Verdicts*

The Supreme Court's decisions regarding inconsistent verdicts also reflect a desire to protect the secrecy of the deliberative process. The Court has recognized that juries do not always faithfully or accurately follow the law but permits those deviations in the name of deliberative secrecy. For example, in *Dunn v. United States*,[78] the Court held that a criminal defendant cannot attack a jury's conviction on one count merely because the conviction is inconsistent with the jury's verdict of acquittal on another count.[79] Thus, the power to render inconsistent verdicts includes the power to disregard the law on particular counts of an indictment or as to particular defendants. As the Court explained in *Dunn*:

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75. Federal Rule of Evidence 606(b) provides, in pertinent part:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

FED. R. EVID. 606(b). *See* Act of Dec. 18, 1974, Pub. L. No. 93-595, 1974 U.S.C.C.A.N. (4 Stat.) 7051, 7060 (providing, in the Senate Report on Rule 606(b), that "common fairness requires that absolute privacy be preserved for jurors to engage in full and free debate necessary to the attainment of just verdicts"). Many states have a similar evidence rule.

76. FED. R. EVID. 606(b).

77. *See id.* Courts have taken a restrictive approach in deciding what constitutes an outside influence. For example, in *Tanner* the Court held that drugs and alcohol are "no more an 'outside influence'" on deliberating jurors "than a virus, poorly prepared food, or a lack of sleep." *Tanner*, 483 U.S. at 122. Even when a juror has been exposed to an external influence, Rule 606(b) limits the court's ability to investigate the impact of that exposure. A juror may "testify about the impact of any extraneous prejudicial information," but the juror may not "testify about emotional reactions or mental impressions developed during deliberations." Alison T. Stanton, *Influences on the Jury*, 83 GEO. L.J. 1128, 1132 (1995).

78. 284 U.S. 390 (1932).

79. *Id.* at 393; *see also* United States v. Powell, 469 U.S. 57, 58, 64 (1984) (upholding "the *Dunn* rule"). In some jurisdictions, such as New York, inconsistent verdicts may provide grounds for reversal of a conviction in narrowly limited circumstances "where acquittal on one crime *as charged* to the jury is conclusive as to a necessary element of the other crime, *as charged*, for which the guilty verdict was rendered." People v. Tucker, 431 N.E.2d 617, 619 (N.Y. 1981) (emphasis added). Even this approach, however, precludes the court from intruding upon or speculating about the jury's deliberative process. *Id.*

> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."[80]

The Court acknowledged that such verdicts may result from compromise or mistake by the jury, but the Court insisted that "verdicts cannot be upset by speculation or inquiry into such matters."[81] Similarly, in *United States v. Moylan*,[82] the Fourth Circuit relied on these principles to conclude that the jury's power to nullify "must exist as long as we adhere to the general verdict in criminal cases, *for the courts cannot search the minds of the jurors to find the basis upon which they judge*."[83] By jealously guarding jurors' individual and group decision-making processes, courts have continued to uphold deliberative secrecy as critical to the jury's independence and legitimacy.

3. *Prohibitions on the Presence of Non-deliberating Alternates*

Because of the defendant's right to a jury free from outside influences,[84] no one other than those jurors charged with the responsibility to deliberate and to try to reach a verdict should be present during deliberations. Thus, Federal Rule of Criminal Procedure 24 prohibits the presence of a non-deliberating, non-voting alternate while the jury is deliberating,[85] and the Supreme Court has deemed the presence of such an alternate to infringe on deliberative secrecy.[86]

In *United States v. Olano*,[87] the trial court permitted alternate jurors in the jury room during deliberations in contravention of Federal Rule of Criminal Procedure 24(c).[88] The Supreme Court acknowledged that an alternate's presence during deliberations may prejudice "a defendant in two different ways: either because the alternates actually participated in the deliberations, verbally or through 'body language'; or because the alternates' presence exerted a 'chilling' effect on the regular jurors."[89] The Court also noted that "the presence of alternate jurors does

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80. *Dunn*, 284 U.S. at 393 (quoting Steckler v. United States, 7 F.2d 59, 60 (1925)).
81. *Id.* at 394.
82. 417 F.2d 1002 (4th Cir. 1969).
83. *Id.* at 1006 (emphasis added).
84. *See* Patterson v. Colorado, 205 U.S. 454, 462 (1907).
85. FED. R. CRIM. P. 24(c)(3). The rule provides:

> [T]he court may retain the alternate jurors during deliberations . . . . [The court] shall ensure that [a retained alternate] does not discuss the case with any other person unless and until they replace a regular juror during deliberations. If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.

Id. Prior to its amendments in 1999 and 2002, Rule 24(c) provided that any non-seated alternates had to be dismissed when the jury began to deliberate. *See infra* note 190.
86. *See infra* text accompanying note 89.
87. 507 U.S. 725 (1993).
88. At that time Rule 24(c) provided that "[a]n alternate juror . . . *shall be discharged* after the jury retires to consider its verdict." *Id.* at 730 (emphasis added).
89. *Id.* at 740.

contravene the 'cardinal principle that the deliberations of the jury shall remain private and secret,' the primary if not exclusive purpose of jury privacy and secrecy is to protect the jury's deliberations from improper influence."[90] However, constrained by plain error analysis, the Court held that, absent any evidence of actual prejudicial impact on the jury, this intrusion on deliberative secrecy did not affect the defendant's substantial rights, and it did not warrant reversal.[91]

In the wake of *Olano*, Federal Rule of Criminal Procedure 24 was amended to permit the substitution of alternates during deliberations and to provide guidance regarding the appropriate procedure for making that substitution. The advisory committee's notes to the 1999 amendment indicate that the previous version of Rule 24(c), which required the discharge of an alternate who had not already replaced another juror by the start of deliberations was "grounded on the concern that after the case has been submitted to the jury, its deliberations must be private and inviolate."[92] The advisory committee also noted that even as amended, "to protect the sanctity of the deliberative process, the rule requires the court to take appropriate steps to insulate the alternate jurors" once deliberations begin.[93] Such steps may include separating the alternates from the deliberating jurors and instructing them not to discuss the case, and, if alternates are substituted during deliberations, instructing the entire jury to begin deliberations anew.[94] Indeed, to avoid confusion, the rule specifically requires that if an alternate is substituted the court must instruct "the jury to begin its deliberations anew."[95]

Despite the Supreme Court's tolerance in *Olano* for some infringement on deliberative secrecy, many state courts have held that an alternate's unauthorized participation in the jury's deliberations necessitates *per se* reversal because the alternate's outside influence on the jury is presumptively prejudicial.[96] Based either on their state constitutions or criminal procedure rules, these courts have held that the alternate's participation in deliberations violates the criminal defendant's right to a fair trial. An alternate's participation requires automatic reversal because an alternate is "not really a juror" and is therefore a "stranger" in the deliberation room.[97] By presence alone, the alternate may convey subtle or unintended messages to the other jurors.[98] Thus, "any time an alternate is in the jury room *during*

90. *Id.* at 738 (quoting FED. R. CRIM. P. 23(b) advisory committee's notes).

91. *Id.* at 741. The trial court instructed both the regular jurors and the alternates that although the alternate jurors were present during deliberations they must not participate in deliberations. The Court presumed they followed this instruction. *Id.* at 737. The Court noted, however, that its decision might have been different if the alternates had actually participated in the deliberation. *Id.* at 739–40.

92. FED. R. CRIM. P. 24 advisory committee's notes (citing United States v. Houlihan, 92 F.3d 1271, 1285 (1st Cir. 1996)).

93. *Id.*

94. *Id.* (citations omitted).

95. FED. R. CRIM. P. 24(c)(3).

96. *See* State v. Rocco, 579 P.2d 65 (Ariz. Ct. App. 1979); People v. Adame, 111 Cal. Rptr. 462 (Cal. Ct. App. 1973); Bouey v. State, 762 So. 2d 537 (Fla. Dist. Ct. App. 2000); Ludaway v. State, 632 So. 2d 732 (Fla. Dist. Ct. App. 1994); People v. Babbington, 676 N.E.2d 1326 (Ill. App. Ct. 1997); Woods v. Commonwealth, 152 S.W.2d 997 (Ky. Ct. App. 1941); Commonwealth v. Smith, 531 N.E.2d 556 (Mass. 1988); State v. Godwin, 383 S.E.2d 234 (N.C. Ct. App. 1989); Yancey v. State, 640 P.2d 970 (Okla. 1982); Commonwealth v. Krick, 67 A.2d 746 (Pa. Super. Ct. 1949); State v. Nelson, 587 N.W.2d 439 (S.D. 1998); Patten v. State, 426 S.W.2d 503 (Tenn. 1968).

97. *Smith*, 531 N.E.2d at 559.

98. *Id.* at 560.

deliberations he participates by his presence and, whether he says little or nothing, his presence will void the trial."[99] The rationale underlying the rule is that

> [o]nce a jury retires to deliberate, it becomes a unique collegial body, and each jury is as different from every other as one person is from another. The impact of an extra person, or a missing person, on any individual jury is impossible to predict. It is not difficult to imagine how one person, through persuasion or otherwise, could sway the opinion and vote of all the other jurors, thus determining the outcome.[100]

Because of the importance of the jury trial right, some courts have held "the presence of an alternate juror in the jury room constitutes reversible error even absent proof of resulting prejudice to the appellant and absent an objection by defense counsel."[101] A minority of jurisdictions have held that the alternate's unauthorized presence during deliberations creates a presumption of prejudice that if unrebutted, requires reversal.[102]

Some federal courts also have continued to protect the secrecy of deliberations from intrusion by non-deliberating alternates. After *Olano* the Sixth Circuit observed that "several state and federal courts have held that the defendant may establish prejudice simply by showing that alternates actually participated in jury deliberations."[103] In another federal case, the trial court allowed the alternates to

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99. State v. Rowe, 226 S.E.2d 231, 232 (N.C. Ct. App. 1976); *see also* Berry v. State, 298 So. 2d 491, 493 (Fla. Dist. Ct. App. 1974) (stating that the alternate's presence could have restrained the jurors' freedom of expression because the alternate conveys attitudes through body language); State v. Bindyke, 220 S.E.2d 521, 534–35 (N.C. 1975) (stating an alternate's presence in deliberations is equivalent to participation).

100. Fischer v. State, 429 So. 2d 1309, 1311 (Fla. Dist. Ct. App. 1983). Even if the trial court dismisses the alternate upon discovering his presence in the deliberation room, it is "possible for this additional juror to have influenced the other members of the jury without his ever being required to face the moment of truth by casting a vote." Patten v. State, 426 S.W.2d 503, 506 (Tenn. 1968).

101. *Yancey*, 640 P.2d at 971; *see also Babbington*, 676 N.E.2d at 1333, 1334 (holding that the presence of an alternate constitutes reversible error, even absent proof of prejudice to the appellant or an objection); *Smith*, 531 N.E.2d at 559 ("[T]here is no inflexible rule, applicable in all instances, that defense counsel's agreement to a procedure involving the jury, or failure to object to it, operates as a waiver or otherwise prevents the defendant from asserting on appeal that the procedure constituted reversible error."); *Godwin*, 383 S.E.2d at 235, 238 (stating that an alternate's presence during deliberations is prejudicial error); Taylor v. State, 612 P.2d 851, 862 (Wyo. 1980) (declaring a waiver of the right to preclude alternates from deliberations void unless the defendant enters the waiver "voluntarily and understandingly").

102. *See* People v. Boulies, 690 P.2d 1253 (Colo. 1984), *rev'd on other grounds* 770 P.2d 1274, 1282 (Colo. 1989); People v. Burnett, 753 P.2d 773, 775 (Colo. Ct. App. 1987); Bowyer v. United States, 422 A.2d 973 (D.C. 1980); Johnson v. State, 220 S.E.2d 448 (Ga. 1975); State v. Crandall, 452 N.W.2d 708 (Minn. Ct. App. 1990); State v. Menuey, 476 N.W.2d 846 (Neb. 1991); Falcon v. State, 874 P.2d 772 (Nev. 1994); *see also* State v. Cuzick, 530 P.2d 288, 290 (Wash. 1975) (stating that the authorized number of jurors is non-waivable, but "[e]ven if waiver is allowed, the importance of jury secrecy principles affected is such that it can only be made informedly and affirmatively by the defendant himself, not implied from the silence of his counsel").

103. Manning v. Huffman, 269 F.3d 720, 725 (6th Cir. 2001). The Seventh Circuit has also noted that *Olano* "indicates that the substantive participation of the alternates, once established, is sufficient to establish prejudice." United States v. Ottersburg, 76 F.3d 137, 140 (7th Cir. 1996). Similarly, the Eleventh Circuit has said that *Olano* "implied that once the alternate participates in any way—whether

retire and deliberate with the jury. Presuming that jurors follow the court's instructions, the Seventh Circuit found that "[i]t is clear, then, that the twelve jurors permitted to decide the fate of [the defendant] had substantive communications during their deliberations with persons, the alternates, who were not supposed to participate in deliberations."[104] Thus, the defendant was entitled to a new trial.[105] Also, the defendant is entitled to a new trial if the judge initially allows the alternate to participate in deliberations but later discovers the error and discharges the alternate before the jury reaches a verdict because "the excused juror may have convinced the jury to convict when it otherwise would have acquitted."[106]

A court faces a delicate task when forced to inquire whether an alternate's presence during deliberations prejudiced the defendant. The Tenth Circuit implicitly recognized as much in *United States v. Beasley*, when, after an alternate participated in deliberations, the circuit court ordered a mistrial and concluded that remand for an evidentiary hearing would be inappropriate.[107] An evidentiary hearing would require that "the jurors, or some of them, are questioned to see how far their deliberations had progressed and how the alternate juror had participated therein. This is to see if the defendant was 'prejudiced.' In these circumstances it is difficult to see how a test of 'prejudice' can be applied."[108] Inquiry into the alternate's effect on the deliberations would necessarily require inquiry into the other jurors' thought processes; thus, such an inquiry is contrary to the notion of deliberative secrecy. Nonetheless, the *Olano* Court's willingness to uphold a conviction, despite the alternate's intrusion upon deliberative secrecy, may signal a minor shift from previous practices that jealously guarded deliberative secrecy.

4. Prohibition of Coercive Judicial Conduct and Instructions

Prohibitions on coercive judicial interference also help preserve the jury's independence. Consequently, such prohibitions limit the court's input in the deliberative process. Courts have long recognized both the influence a trial judge may have on jurors and the subtle ways in which that influence can become unduly coercive. "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'"[109] Thus, when the judge's comments or instructions become unduly coercive, they may impair the right to a jury trial. Because the jury trial right should provide a defendant with the independent decision of a jury instead of a judge, a judge is discouraged from commenting on the evidence or the

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through words or gestures—prejudice is manifest." United States v. Acevedo, 141 F.3d 1421, 1424 (11th Cir. 1998).

104. *Ottersburg*, 76 F.3d at 140.

105. *Id.*

106. *Acevedo*, 141 F.3d at 1425; *see also* State v. Bindyke, 220 S.E.2d 521, 531 (N.C. 1975) (requiring a new trial when an alternate remained in the jury room for three to four minutes after the jury retired to consider its verdict).

107. United States v. Beasley, 464 F.2d 468, 469–71 (10th Cir. 1972).

108. *Id.* at 469–70.

109. Quercia v. United States, 289 U.S. 466, 470 (1933) (quoting Starr v. United States, 153 U.S. 614, 626 (1894)).

deliberative process.[110] Coercive comments do not infringe upon deliberative secrecy because they do not require revelation of the jurors' thought processes, but such comments diminish the jury's independence as it engages in deliberations. In other words, coercive comments may not let the jury's thoughts out of the deliberation room, but they let the judge's influence in.

A heightened potential for coercion exists when a judge communicates with a jury that has indicated an impasse. When a deliberating jury indicates that it is deadlocked, most jurisdictions permit the judge to give an instruction to encourage the jurors to continue deliberating. Over one hundred years ago the Supreme Court approved the *Allen*[111] or "blasting" charge. The charge in *Allen* provided

> that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.[112]

Drafters of such charges, however, must carefully word them to avoid coercing the jury.[113] Many courts have expressed concern that an *Allen* charge unduly pressures

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110. *Id.* at 470. A trial court's comments on the evidence are "likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." *Id.* at 472 (citations omitted).

111. Allen v. United States, 164 U.S. 492 (1896). An *Allen* charge instructs the jurors to work toward unanimity and asks those jurors in the minority to reconsider their views. *See, e.g.*, Jiminez v. Myers, 40 F.3d 976, 980 (9th Cir. 1994) (reviewing the trial court's de facto *Allen* charge).

112. *Id.* at 501.

113. Several federal circuits courts uphold an *Allen* charge unless it is clear from the record that the charge had a "coercive effect" on the jury. *See* United States v. Ajiboye, 961 F.2d 892, 893 (9th Cir. 1992). Some courts have held that *Allen* charges must include the proviso that jurors should not surrender their conscientiously held convictions just to reach a verdict. *See* Smalls v. Batista, 191 F.3d 272, 279 (2d Cir. 1999). Other federal courts are critical of *Allen* charges and recommend against—or limit the circumstances of—their use. *See* Stanton, *supra* note 77, at 1138 n.1831.

In state cases, the due process right to an impartial jury and a fair trial prohibits judges' conduct or comments that, when viewed in the totality of the circumstances, are likely to coerce jurors. *See* Lowenfield v. Phelps, 484 U.S. 231, 237–38 (1988); Jenkins v. United States, 380 U.S. 445, 446 (1965); Jiminez v. Myers, 40 F.3d 976, 980–81 (9th Cir. 1993); Locks v. Sumner, 703 F.2d 403, 406 (9th Cir. 1983). Several states have rejected the *Allen* charge in favor of their own standard charges, the ABA recommended charge, or other charges that do not single out those jurors in the minority. *See, e.g.*, Fields v. State, 487 P.2d 831, 841–43 (Alaska 1971) (adopting a different charge), *overruled in part on other grounds by* State v. Patterson, 740 P.2d 944 (Alaska 1987); People v. Gainer, 566 P.2d 997, 1009 (Cal. 1979) (rejecting *Allen*-type charges). The ABA charge provides:

those jurors who find themselves in the minority.[114] As the Eleventh Circuit explained:

> In some cases, the duty of a juror is rigorous. Deliberations can be long, hard and heated. It is each juror's duty to stand by his honestly held views; this can require courage and stamina. A majority of jurors eager to go home can exert tremendous pressure on a minority juror who is seriously trying to do his duty. The last thing such a minority holdout juror needs is for the trial judge—cloaked with the full authority of his office—to even hint that holding out will be futile in the long run and that a verdict could be reached if the holdout would just reconsider.
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> . . . .
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> [T]he Allen charge interferes with the jurors when they are performing their most important role: determining guilt or innocence in a close case. It unjustifiably increases the risk that an *innocent* person will be convicted as a result of the juror abandoning his honestly-held beliefs.[115]

Thus, improperly coercive instructions give the trial judge undue influence over the deliberations and undermine the defendant's right to a trial by jury.

The independent judgment of a jury in a criminal case benefits from the diverse backgrounds and points of view that the jurors bring to the decision-making process. When a jury appears to be split, the desire to prevent coercion of jurors in the minority restricts the court's ability to explore the causes of the deadlock. Such exploration may produce revelations about the deliberative process that would otherwise remain secret. Moreover, the court's response after the inquiry can have an increased coercive effect. The Supreme Court has frowned upon even subtle interference with the jury's deliberative process. In *Brasfield v. United States*,[116] the Court reversed a conviction when the trial judge, after lengthy deliberations, asked

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> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

William C. Mathes, *Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39, 97–98 (1969); *see also* ABA JURY PRINCIPLES, *supra* note 19, at 121–22 ("The court's invitation following notice of jury impasse should not be coercive, suggestive or unduly intrusive. Specifically, the jury should not be made to feel that the court's actions are intended to force a verdict.").

114. United States v. Rey, 811 F.2d 1453, 1459 (11th Cir. 1987) (noting that after receiving an *Allen* charge, the pressure to change one's position falls most heavily on those jurors in the minority).

115. *Id.* at 1460.

116. 272 U.S. 448 (1926).

for the jury's numerical division and gave an *Allen* charge.[117] The Court condemned this practice as coercive, though the improper effect may not be "measurable" and "may vary widely in different situations."[118]

Comments that may tend to suggest the judge's belief about the proper outcome[119] or might press a deadlocked jury to reach a verdict also interfere with the deliberative process. Courts have been condemned for comments that belittle the jury for failing to agree[120] or encourage jurors to reach consensus for reasons other than their views on the merits.[121] Similarly, a judge's comment that "[w]hich way [the verdict] goes doesn't make any difference to me" may coerce the jury into foreclosing the possibility of a "no verdict" outcome.[122]

Not only do appellate courts condemn trial judges' coercive comments that interfere with the jury's independence, they have also condemned trial judges' intrusions into the process by which the jury reaches its verdict. In *United States v. Spock*, the First Circuit reversed a conviction because the trial court submitted special questions to the jury rather than asking for a general verdict.[123] The court

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117. *Id.* at 450. *But see Ajiboye*, 961 F.2d at 892–93 (upholding a jury conviction after an *Allen* charge where the judge knew the jury's numerical division but did not know how specific jurors voted).

118. *Brasfield*, 272 U.S. at 450; *see also* United States v. Rengifo, 789 F.2d 975, 985 (1st Cir. 1986) (prohibiting the practice in order "to prevent actual or inferred pressure from the judge towards one particular group to change its position"). The Court based its decision in *Brasfield* on its supervisory powers over the federal courts. *See Lowenfield*, 484 U.S. at 239 n.2.

A federal appellate court must reverse if the trial court inadvertently discovered the jurors' numerical division and the holdout jurors could have perceived the charge to be directed at them. *See* United States v. Sae-Chua, 725 F.2d 530, 532 (9th Cir. 1984). *But see* United States v. Hotz, 620 F.2d 5, 7 (1st Cir. 1980) (stating that a judge may not ask deliberating jurors their numerical division, but if the jury volunteers such information "the court may rely and act on the information to some extent").

If polling a deadlocked jury focuses only on whether the jurors believe more deliberations would still be helpful, revelation of their numerical division on that issue is not necessarily coercive. *Lowenfield*, 484 U.S. at 239–41. *But see Sae-Chua*, 725 F.2d at 532 (holding that where the jury sent a note indicating an 11-1 split on the verdict and a poll of the jurors indicated the same split on whether further deliberations would help, an *Allen* charge unduly coerced the lone holdout).

119. For example, one New York trial court instructed deadlocked jurors on the importance of avoiding emotions:

> And when you examine it logically, if you were 12 computers, you'd all reach the same results because you all have the same knowledge about the case. None of you knows anything about the case more than the others. If you have 12 computers and they're all identically programmed and *you push the verdict button, the verdict will be guilty.*

People v. Cook, 574 N.Y.S.2d 777, 778 (N.Y. App. Div. 1991) (emphasis added). The appellate court found these comments "may have had a significant coercive effect on the jury." *Id.*

120. *See, e.g.*, People v. Stokes, 527 N.Y.S.2d 19, 19 (N.Y. App. Div. 1988) ("Characterizing a case as 'a very simple case' can have the effect of embarrassing the jury for not having already reached a verdict . . . ."); People v. Mabry, 397 N.Y.S.2d 7, 8 (N.Y. App. Div. 1977) ("[The trial court] told the jury 'I'm at a total loss to understand the reason for the impasse. It's a relatively simple case.' Further on it said, 'and I don't know how in heaven's name twelve intelligent people are unable to agree on a simple state of facts.'").

121. *See, e.g.*, People v. King, 523 N.Y.S.2d 114, 115 (N.Y. App. Div. 1988) ("[T]he court's pride in its reputation for not having deadlocked juries is not an appropriate consideration to be presented to jurors in the discharge of their functions.").

122. United States v. U.S. Gypsum Co., 438 U.S. 422, 432 (1978); *see also* Jenkins v. United States, 380 U.S. 445, 446 (1965) (holding instruction that "[y]ou have got to reach a decision in this case" is unduly coercive).

123. 416 F.2d 165, 183 (1st Cir. 1969).

reasoned that the questions might have improperly influenced the deliberative process:

> There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. A juror, wishing to acquit, may be formally catechized. By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted. The result may be accomplished by a majority of the jury, but the course has been initiated by the judge, and directed by him through the frame of the questions.[124]

The court added that "[i]n the exercise of its functions not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneous and subsequent."[125] As courts have long recognized, the right to a jury trial contemplates "the free and independent judgment of twelve indifferent men, acting without constraint, and with sole regard to the obligation they had taken upon themselves to render a true verdict according to the evidence."[126]

Rules and practices protecting jurors from a court's undue influence serve similar purposes to the rules protecting deliberative secrecy: they maintain jury independence. Jurors may feel constrained to satisfy what they perceive to be the trial court's ideas about the proper results or the proper process by which they should reach a result. The intent of deliberative secrecy is to protect jurors from such constraints. The court's undue influence limits the full and free exchange of ideas and opinions. In the case of undue influence, the deliberations lose their character of being conducted in secret because the judge is effectively controlling the process, even though the judge is not physically present in the jury room.

Practices such as restricting post-verdict juror testimony, tolerating inconsistent verdicts, restricting the presence of non-deliberating alternates, and prohibiting

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124. *Id.* at 182.

125. *Id.* at 181. In *United States v. Acosta*, the district judge explained why courts favor general verdicts:

> As a general rule . . . special verdicts . . . in criminal cases are disfavored. The reason is that they are generally thought to harm the defendant. Special verdicts are thought to put pressure on the jury to report its deliberations or support its verdict; they are thought to "conflict with the basic tenet that juries must be free from judicial control and pressure in reaching their verdicts." Special interrogatories that lead the jury on a path through the elements are thought to push the jury in the direction of a guilty verdict. A general verdict, on the other hand, does not lead or fetter the jury and in addition allows for jury nullification.

149 F. Supp. 2d 1073, 1075–76 (E.D. Wisc. 2001) (quoting United States v. Sababu, 891 F.2d 1308, 1325 (7th Cir. 1989)) (citations omitted); *see also Sababu*, 891 F.2d at 1325–26 (holding that the trial court did not violate the unanimity requirement when it failed to submit special verdict forms to the jury); United States v. Coonan, 839 F.2d 886, 891 (2d Cir. 1988) (holding that the historical preference for general verdicts stems from the defendant's rights and the government has no legitimate interest in prohibiting the use of special interrogatories); United States v. Jackson, 542 F.2d 403, 412–13 (7th Cir. 1976) (holding that the trial court properly refused to give a special interrogatory to the jury); United States v. O'Looney, 544 F.2d 385, 392 (9th Cir. 1976) (holding that special verdicts in criminal cases are not favored, but also are not absolutely prohibited, and the trial court properly adopted a special verdict form).

126. Green v. Telfair, 11 How. Pr. 260 (N.Y. Sup. Ct. 1853).

coercive comments from the court are designed to protect the jury's deliberative independence. They help ensure that the jurors control the decision-making process that leads to the verdict, rather than the judge or any other external source. These practices thus reflect the critical roles deliberative secrecy and jury independence play in the right to a fair trial by jury.

III. WHAT OUR GLIMPSES INSIDE THE JURY ROOM HAVE TAUGHT US

Despite the strong preference for secrecy, recent events have allowed a peek into the jury deliberation room. When *In the Jury Room* aired, it showed glimpses of jury deliberations.[127] Does such scrutiny make juries perform any better during deliberations? The likely answer is no.

In many recent high profile cases, serious problems arose in the deliberation room. The trials of two former governors, Edwin Edwards of Louisiana and Fife Symington of Arizona, both had problems in the jury room,[128] and there were also jury problems in the trial of two Tyco executives[129] and in the guilt phase of the Scott Peterson trial.[130] Of course, news agencies are quick to turn jurors in these cases into instant short-term celebrities.[131] The knowledge that their conduct and decisions would be subject to scrutiny did not guarantee proper juror behavior.

On *In the Jury Room*, by the time the parts of the pretrial proceedings, trial, and deliberations were edited into a single episode, the deliberations usually comprised less than twenty minutes. Thus, *In the Jury Room* provided little more than a glimpse of the deliberation process, edited for maximum entertainment value. Nonetheless, the six juries profiled on *In the Jury Room* failed to prove that increased scrutiny improves juror decision-making. Even with the camera rolling, jurors compromised on verdicts, allowed personality conflicts to interfere with the deliberations, and oversimplified the judge's instructions. In addition, at least one juror expressed a sense of entitlement that the deliberations not make her emotionally uncomfortable. Indeed, when Carmela—a juror in the capital case of *State v. Ducic*—found herself the lone holdout for acquittal, she resented other jurors' efforts to sway her and informed them:

> I'm excusing myself, ladies and gentlemen, from this. I have never felt so much pressure. And I've had pressures, as I have felt in this

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127. In recent years there have been a few similar programs that also met with much criticism. For example, ABC previously aired a five-part series called *State v.* that followed five criminal cases in Maricopa County, Arizona. The cases played out in court, and ABC News gained broad access to the inner workings of the criminal justice system, including jury deliberations. *See* Eric Deggans, *"Docu-crime" Shows Feed an Addiction*, ST. PETERSBURG TIMES, June 16, 2000, at 10F. However, the general rule remains that no one may see, hear, or interfere with jury deliberations in any way.

128. *See infra* notes 187–201, 230, 240 and accompanying text.

129. *See infra* notes 181, 211.

130. The California trial of Scott Peterson for the murder of his pregnant wife became the subject of nationwide attention and news coverage. Deliberations during the trial were intense; the judge discharged two jurors, including the foreperson, and replaced them with alternates during deliberations. *See Judge Gives Peterson Jurors a Stern Talk*, NEWSDAY (Long Island, N.Y.), Nov. 9, 2004, at A23; Carolyn Marshall, *Judge Dismisses Foreman From Peterson Jury*, N.Y. TIMES, Nov. 11, 2004, at A20.

131. *See, e.g.*, Editorial, *Jurors' 15 Minutes of Fame*, DENVER POST, June 25, 2004, at B06 (arguing that celebrity jurors are "an all-too-common occurrence in high-profile courts cases" and that "the moth-to-a-candle syndrome of the celebrity juror holds the possibility of distorting justice").

> room, in such a short time, having to make a decision like this. I just really, I need for myself, I can't say anything. I need to know at night that I can sleep with, and I don't feel that I'll be able to do that.[132]

The judge, however, did not excuse Carmela. When she returned to deliberate, she was soon—at least in edited television time—convinced to change her position in reliance on one small portion of a taped statement by the defendant that she previously had rejected.[133]

After Carmela's return, the jury returned to one of the murder counts. The jurors re-read the judge's instruction that this count required proof that the defendant, Ducic, killed the victim purposefully and with prior calculation and design. Another juror suggested that Ducic's two comments that "[the victim] was going to rat on him" and that "[y]ou have to make sure that people know they're a user, so it looks like it should be an accidental" led her to believe "that's purpose and intent."[134] After hours of holding out, Carmela used those statements to join the others in the verdict:

> Based on just that sentence, that's prior calculation in my opinion. You know what? Let me just sign off on it. Because I'm hearing what you're saying now. And it's coming to a head. It's basically, the tape, we're listening to it. We hear that Mark says first, you've got to give them drugs a little bit. Get it in their system, that kind of thing. And then, you give them the hot shot. And then, they die. If I just took that segment of the tape I'm with you. I believe there's a lot of doubtful stuff with that tape. But if they want it just like that, then I can comply with that.[135]

She did not explain, however, why she was suddenly willing to credit that portion of the tape but found so much of the tape doubtful.

Of course, it is impossible to know whether Carmela's initial intransigence was posturing for the camera or whether she possessed a sincerely held belief about the evidence. Nor is it possible to know whether she shifted her position based on a sincere change of heart about the evidence, on a desire to put an end to the pressure she was feeling, or on a desire to appear reasonable to the national television audience.[136]

The public scrutiny of the deliberations does not seem to have contributed favorably to the deliberative process. In at least two of the *In the Jury Room* cases, the juries reached what were clearly compromise verdicts. For example, the jurors in *State v. Trujillo* found themselves firmly divided on whether Laura Trujillo, who

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132. *ABC News Special Report: In the Jury Room* (ABC television broadcast Aug. 11, 2004).
133. *Id.*
134. *Id.*
135. *Id.*
136. She has since indicated, however, that she intends to write a book about her jury experience. Jim Nichols, *A Fly on the Jury Room Wall: ABC Peers into Local Court*, PLAIN DEALER (Cleveland, Ohio), Aug. 8, 2004, at A1. Carmella also complained during the penalty phase deliberations that she had been "bullied" into her guilty verdict on the murder count. *See supra* text accompanying note 132.

had left her child with her abusive boyfriend, was guilty of reckless murder or criminally negligent homicide when the boyfriend ultimately killed the child.[137] The following discussion occurred:

> JUROR: I honestly think that none of us are going to come to a conclusion.
> JUROR: Do you want to quit?
> JUROR: I'm just saying from what I perceive.
> JUROR: They won't let us quit. I mean, they'll say, keep working on it, keep working on it.
> JUROR: That's what I'm saying. You didn't think anybody can convince anybody else.
> JUROR: Do you from where we're at now? I mean, we have somebody, using his example, said absolutely that she's not, she's not changing.
> JUROR: So you're saying we're at an impasse.
> JUROR: To me that's what it looks like right now is what I'm saying.
> JUROR: In order to avoid a hung jury, both sides are going to have to have to give some concessions because I don't think anybody in this room at this point is going to get what they want.
> JUROR: And I don't think three or four more days of jury is going to change anyone's mind.
> . . . .
> JUROR: I mean, we all just have different moral values, ethical values and legal values. And I'm in a room with people that have moral values that shock me, and we're never going to come to the same page. We just never will.
> JUROR: We're asking for the people who believe serious bodily injury to concede to recklessly with her actions causing any injury other than serious bodily injury, and those that feel that she acted with criminal negligence and asking them to concede to recklessness.[138]

The jurors agreed to compromise and reached a verdict.[139]

In *State v. Prickett*, the jury reached a slightly less obvious compromise. *Prickett* was another murder case with a variety of lesser included offenses, and after deliberating for parts of two days, the jurors were split with eight favoring some degree of criminal responsibility and four favoring acquittal.[140] The foreperson suggested sending the court a note indicating their deadlock. When another juror suggested that he was simply struggling, but not ready to give up, the foreperson jumped to the least serious charge rather than continue to struggle through any of the more serious offenses:

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137. *ABC News Special Report: In the Jury Room* (ABC television broadcast Aug. 17, 2004).
138. *Id.*
139. *Id.*
140. *ABC News Special Report: In the Jury Room* (ABC television broadcast Sept. 7, 2004).

> JOHN [Foreperson]: Now, how do you feel about a person who acts with criminal negligence? Because I don't think we're going to get reckless or murder. I don't agree with murder actually.
> BRAD [Juror]: Criminal negligence says that to a gross deviation from a standard of care that a reasonable person would exercise.
> DEB [Juror]: Meaning that he was unreasonable? I think that, too. So, I'm more open now to the third count.
> JOHN: Vanessa, you agree also? That he failed to perceive the substantial and unjustified risk? I need your help here.
> VANESSA [Juror]: Okay.[141]

The jury then reached a verdict on the least serious count.[142]

Certainly the possibility exists that the camera in the jury room prevented jurors from engaging in even more arbitrary decision-making or other forms of misconduct. In each case the jurors appeared to try to work through the evidence and do their jobs, however imperfectly. Indeed, the deliberations in *State v. Prickett* began with a juror announcing: "I'd like to say one thing. Everybody realizes the seriousness of this?"[143] But that comment arguably could have demonstrated an awareness that the deliberations would have an audience. Even without public scrutiny, twelve citizens spontaneously thrown together for jury service are unlikely to behave egregiously simply because no one is watching. In such a group, a few cooler heads are likely to be present who will prevail.

ABC insisted that it would discontinue filming if it thought its cameras were influencing the process in any way.[144] Of course its vested interest in the program made such a drastic measure unlikely. Moreover, the other participants in the project did not have full access to the same information as ABC. Only ABC could monitor the ongoing deliberations. Not only did the defendant have to waive any right to appeal based upon the recording of the proceedings, but the parties had to agree not to subpoena any footage ABC chose not to air.[145] Thus, no one could check ABC's assessment of whether the cameras affected deliberations. When *Newsweek* interviewed jurors, lawyers, and the judge in the *Ducic* case, most said "the filming had not affected their behavior or the case's outcome"; however, some jurors thought that others acted differently because they knew they would be on television.[146]

The presence of cameras and the knowledge that the parties and the public might later view their deliberations could have affected the jurors' behavior. Conventional wisdom indicates that people act differently when they know a camera is in the room. In some cases their levels of preparation and care exceed that of the ordinary case; in others their primary concern is performing for the camera rather

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141. *Id.*
142. *Id.*
143. *Id.*
144. Rosenberg, *supra* note 17.
145. Mike McDaniel, *Cameras Roll as Jury Deliberates/Documentary Shows Jurors Make Decisions of Life or Death*, HOUSTON CHRONICLE, Aug. 10, 2004, at 8.
146. Rosenberg, *supra* note 17. When the judge and ABC interviewed the *Ducic* jurors, they "said that they behaved exactly as they would have, they believed, if the camera hadn't been present." *Good Morning America: In the Jury Room Preview of a New Reality Series* (ABC television broadcast Aug. 10, 2004).

than fulfilling their functions. Indeed, when Court TV sought permission to televise the trial of one of the defendants accused of killing Matthew Shepard, the prosecutor argued that he feared that both sides might play to the cameras. Thus, he argued, prohibiting television cameras would save each side from itself.[147] The *In the Jury Room* participants may not have had similar self-awareness to the fact that the cameras could, consciously or unconsciously, influence their behavior.

It likely would do more harm than good to record all jury deliberations. Given courts' concerns about the subtle influence that may come from a non-deliberating alternate's presence in the jury room,[148] the presence of cameras, recording devices, or a court reporter should also raise concerns. Jurors might be far less likely to serve as a "bulwark" against oppressive government if the prosecution has access to comments that might be critical of the government. This apprehension would impair the jury's independence. Further, recording deliberations would jeopardize the finality of jury verdicts. Given an opportunity to review recordings or transcripts of deliberations, appellate lawyers would parse every phrase uttered by every lay juror during deliberations to find some way a juror may have misstated or misconstrued the evidence or instructions.

Ultimately, the *In the Jury Room* deliberations provided no better understanding of whether jury deliberations should be memorialized in order to preserve them for later review, or whether private deliberations are better. Knowing the factually correct result of a particular case is often impossible, so it is difficult to determine whether particular processes lead to more correct verdicts.[149] *In the Jury Room* has merely confirmed that most juries try to work hard and sometimes they make mistakes.

IV. CRITIQUE OF SOME RECENT JURY REFORMS

Some recent jury reforms permit more judicial and other external involvement in the deliberation process—a process that was traditionally the exclusive province of the jury. Increasing outside controls on—or even input in—the deliberative process may diminish the jury's independence.[150] Courts are using a variety of methods to extend their influence further and further into the deliberation room and the deliberative process, including instructing jurors about how to deliberate, assisting jurors at an impasse, and discharging contentious jurors.

147. The author attended arguments on the motion at University of Wyoming College of Law.
148. *See supra* notes 84–108 and accompanying text.
149. *See* Kadane, *supra* note 14, at 229.
150. One set of jury reforms that may serve the interests of jury independence is the improvement of jury instructions to make them easier for jurors to understand. Improved instructions may better equip juries to perform their critical functions, and to do so independently. *See, e.g.*, Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 802 (2000) (describing how simplification of jury instructions leads to greater comprehension and improved juror accuracy).

A. Controlling Deliberations Through Juror Handbooks & Videos

One way courts and legislatures inject themselves into the deliberation room is through the authorization of juror handbooks, orientation videos, and instructions that give guidance on how to conduct deliberations.[151] The new *ABA Jury Principles* also encourage courts to adopt juror orientation programs[152] and, in the courts' instructions, to give juries "appropriate suggestions regarding the process of selecting a presiding juror and the conduct of . . . deliberations."[153]

In New York, for example, courts show jurors a video in which Diane Sawyer advises them that one needs "an open mind, fairness, the ability to reconsider your opinions, and common sense" to be a good juror during deliberations. She also tells them, "[Y]our opinion is equal to anyone else's in the jury room."[154] In addition to the video, New York's juror handbook instructs:

> During the deliberations, jurors should keep an open mind, listen carefully to everyone and be prepared to tell the others what they think and why. It is generally easier to reach a swift and sound verdict when jurors remain courteous to and patient with one another and listen openly to the views of others.[155]

Similarly, California presents jurors with a slide show that advises jurors that during deliberations: "It will be your duty to give your opinion and also to listen to others. Everyone counts. It's important to speak your mind during deliberations. You are affecting other people's lives, and you need to have your say."[156] While such advice

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151. As early as 1958, federal courts approved the use of juror handbooks, which "seek[] to inform the juror of the nature of his duties and to familiarize him with trial procedure and legal terminology." Recent Case, *Use of Handbook in Federal Courts for Pre-trial Indoctrination of Jurors Approved*, 107 U. PA. L. REV. 115, 115 (1958). The widespread use of handbooks and other instructions, however, appears to be a more recent phenomenon. *See supra* note 19 and accompanying text.

152. ABA JURY PRINCIPLES, *supra* note 19, at 26.

153. *Id.* at 109.

154. New York State Unified Court System, Petit Juror Orientation Video, http://www.nyjuror.gov/general-information/juror_orientation_video.php (last visited Oct. 5, 2005). In addition to these guidelines, the video discusses the history of trials at length, including dramatic reenactments of ancient trials by ordeal. *Id.*

155. New York State Unified Court System, Juror Handbook 23, *available at* www.nyjuror.gov/general-information/jurorhandbook.pdf [hereinafter New York Juror Handbook].

156. Judicial Council of California, Ideals Made Real, http://www.courtinfo.ca.gov/jury/video10.htm (last visited Oct. 5, 2005) [hereinafter Ideals Made Real]. California also maintains an online guide to jury service. *See* Judicial Council of California, Guide to California Jury Service, http://www.courtinfo.ca.gov/jury. The guide encourages jurors to consider the American Judicature Society's booklet *Behind Closed Doors* for suggestions regarding their deliberative format. *See id.* at http://www.courtinfo.ca.gov/jury/step3.htm. The guide provides the following advice about deliberations:

> Quite often in the jury room the jurors may argue and have a difference of opinion. When this occurs, each juror should try to express his or her opinion and the reasoning supporting it. It would be wrong for a juror to refuse to listen to the arguments and opinions of the others or to deny another juror the right to express an opinion. Remember that jurors are not advocates, but impartial judges of the facts. By carefully considering each juror's opinion and the reasons behind it, it is usually possible for the jurors to reach a verdict. A juror should not hesitate to

seems innocuous and even sensible, increased external involvement in the deliberation process results in decreased jury independence. Even when the instruction's intent is to reinforce jurors' independence and remind them that they are making important decisions, the instructions still bear the imprimatur of the judge's authority. Further, such directions may invite juror complaints when some jurors perceive that a fellow juror is not following the court's "instructions."

The substance of the guidance that some of these handbooks, videos, and instructions provide is problematic. For example, the *New York Juror Handbook* advises that "[i]t is generally easier to reach a *swift and sound* verdict when jurors remain courteous and patient with one another and listen openly to the views of others."[157] While courtesy and respect for others' opinions are important, jurors may assume from this instruction that they should make reaching a quick verdict a high priority. Swift decision-making, however, often may be incompatible with sound decision-making, but New York jurors are not told what to do when these interests conflict.

The instruction to California jurors that "[i]t will be *your duty* to give your opinion"[158] may put unnecessary pressure on some jurors. Requiring jurors to give their opinions may disadvantage less articulate jurors. If a juror has difficulty expressing ideas, that juror may simply adopt the position of a more articulate juror. An instruction that places a premium on articulateness may lead some jurors to believe they should abandon their legitimate, though hard-to-explain, doubts as meritless.[159]

Some researchers note that race and gender diversity can create dynamics in the deliberation room that may frustrate the jury's ability to reach meaningful consensus.[160] Some suggest that courts should instruct jurors in advance to be aware that these dynamics can stymie deliberations so that a jury can try to prevent or compensate for them.[161] While helping juries reach verdicts free from bias or

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> change his or her mind when there is a good reason. But each juror should maintain his or her position unless conscientiously persuaded to change that opinion by the other jurors. Following a full and free discussion with fellow jurors, each juror should vote only according to his or her own honest convictions.

Id. In addition, the guide instructs jurors:

> If a jury cannot arrive at a verdict within a reasonable time and indicates to the judge that there is no possibility that they can reach a verdict, the judge, in his or her discretion, may dismiss the jury. This situation is a mistrial, sometimes referred to as a "hung jury," and may mean the case goes to trial again with a new jury.

Id.

157. New York Juror Handbook, *supra* note 155, at 23 (emphasis added).

158. Ideals Made Real, *supra* note 156 (emphasis added). The *New York Juror Handbook* contains a similar directive that jurors "should be prepared to tell the others what they think and why." New York Juror Handbook, *supra* note 155, at 23.

159. For example, credibility determinations are often based on common sense evaluations of a witness's demeanor and behavior on the stand. It may be hard to explain why a particular witness looked or sounded like he was lying although jurors routinely and accurately make these assessments in their daily lives.

160. *See generally* Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593 (1987) (arguing that race and gender dynamics lead to ineffective deliberation methods).

161. *See id.* at 607–08 (encouraging courts to use handbooks and videos to teach jurors about the effects of gender dynamics and to discuss "effective deliberation methods").

prejudice is a laudable goal, these instructions create additional outside controls on the deliberative process.

To the extent that courts find it necessary to give juries guidance about how to deliberate, judges should make absolutely clear that the court's suggestions are non-binding and that the jury maintains its independence to reach a decision in any way it sees fit. Judges should limit their instructions in this manner because no consensus exists as to what procedures result in the best deliberations.[162]

Even when instructions about how to deliberate take the form of suggestions, they invade the jury room or the deliberative process, and can undermine jury independence. When legislators or judges draft rules or instructions telling the jury how to do its job, they sacrifice a portion of the jury's independence. Indeed, the goal of the prohibition on coercive instructions is to prevent precisely this result.[163] Without independent juries, the criminal justice process may become vested in the hands of either elected officials, who must be concerned about public approval of their conduct, or appointed judges, who have been given increasing cause to fear interference with their functions if they take unpopular actions.[164] Juries do not face similar constraints; no one can make them suffer adverse consequences simply because they return unpopular results.[165] That lack of recourse is an important component of jury independence.

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162. Depending on the circumstances, the same processes can produce either positive or negative results. In a description of recent research on group decision-making, one theme identified was that

> single basic processes in groups can lead to both good versus poor performance, depending on the context in which that processes is enabled. . . . Whereas earlier work attempted to explain good vs[.] poor performance with different types of group processes, much of the more recent work has shown how the same processes can lead to both types of outcomes.

Norbert L. Kerr & R. Scott Tindale, *Group Performance and Decision Making*, 55 ANN. REV. PSYCHOL. 623, 641 (2004). For example, research attempting to predict juror behavior has shown that the jury's first poll at the beginning of deliberations is a strong indicator of its eventual verdict. Phoebe C. Ellsworth, *Some Steps Between Attitude and Verdicts*, *in* INSIDE THE JUROR 42, 42 (Reid Hastie ed., 1993). Thus, where there is agreement, an early poll can lead to the positive result of a quick verdict; where there is not strong agreement, one would suspect that jurors may become more wedded to their initially announced positions, leading to the arguably negative results of intransigence and drawn-out deliberations.

163. *See supra* notes 109–10 and accompanying text.

164. For example, the Feeney amendment to the PROTECT Act attempts to restrict federal judges' authority to depart from the federal sentencing guidelines and requires reports to Congress on any judge who exercises that authority. The Feeney Amendment has been criticized by the Judicial Conference of the United States as an unwarranted attack on the federal judiciary. *See* Mark Hamblett, *Federal Judges Attack Sentencing Restrictions*, N.Y.L.J., Sept. 24, 2003, at 1. However, the current status of the Feeney Amendment is in doubt after the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). *See* M.K.B. Darmer, *The Federal Sentencing Guidelines after* Blakely *and* Booker*: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533, 534–36 (2005); O. Dean Sanderford, Comment, *The Feeney Amendment*, United States v. Booker, *and New Opportunities for the Courts and Congress*, 83 N.C. L. REV. 736, 762–68 (2005).

165. Since *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670), ordering the release of a member of the jury who was arrested for voting to acquit William Penn, courts have been prohibited from punishing jurors for their verdicts, even when the verdicts appear to be the result of nullification. *See, e.g.*, United States v. Thomas, 116 F.3d 606, 615 (2d Cir. 1997) (recognizing rules protecting juries from punishment). *But see infra* note 209 (discussing a Colorado case where a juror faced prosecution for obstruction of justice when she failed to reveal a prior drug arrest during voir dire).

B. *"Assisting" Juries at Impasse*

Another reform that invites the judge into the deliberative process has taken the form of rules permitting judges to inquire of and assist juries at impasse. For example, Arizona Court Rules provide:

> If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the presence of counsel, inquire of the jurors to determine whether and how court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the judge may direct that further proceedings occur as appropriate.[166]

The comments to this rule indicate that among the "obvious options" for further proceedings are "giving additional instructions; clarifying earlier instructions; directing the attorneys to make additional closing argument; reopening the evidence for limited purposes; or a combination of these measures."[167]

This interferes with jury independence in at least two ways. First, the inquiry itself requires jurors to explain to the judge their thought processes and the differences of opinion that have arisen during their deliberations. Jurors may feel compelled to explain their views on the weight of various pieces of evidence and why they favor a particular decision, running contrary to the long history of jealously protecting the secrecy of deliberating jurors' communications and

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166. ARIZ. R. CRIM. P. 22.4. Indiana Jury Rule 28 provides:

> If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.

The District of Columbia's Jury Project recommended a similar reform: "that trial judges consider assisting deliberating juries in reaching a verdict in cases where a *Winters* [the D.C. term for an *Allen*] charge has already been given and the jury continues to report that they are deadlocked." D.C. JURY PROJECT, COUNCIL FOR CT. EXCELLENCE, JURIES FOR THE YEAR 2000 AND BEYOND, PROPOSALS TO IMPROVE THE JURY SYSTEM IN WASHINGTON, D.C. 30 (1998).

167. ARIZ. R. CRIM. P. 22.4 cmt. to 1995 amend. *See also* Dann & Logan, *supra* note 18, at 283 (discussing Arizona's suggested methods for resolving a jury impasse). Although not specifically authorized by California statute or rule, one Los Angeles Superior Court judge engaged in a similar practice. Judge Jacqueline O'Connor explained: "Anytime a jury indicated they were possibly hanging, I would inquire whether they needed help, and we reopened arguments." Kate Marquess, *Juries Hang Up on Close Calls, Study Says*, ABA J. eREPORT, Oct. 18, 2002, *available at* WL 1 No. 40 A.B.A. J. E-Report 3.

The *ABA Jury Principles* permit not only assistance, but also seem to allow the introduction of new evidence:

> If the jury advises the court that it has reached an impasse in its deliberations, the court may, after consultation with the parties, inquiry the jurors in writing to determine whether and how the court and the parties can assist them in their deliberative process. After receiving the jurors' response, if any, and consulting with the parties, the judge may direct that further proceedings occur as appropriate.

ABA JURY PRINCIPLES, *supra* note 19, at 121.

thoughts. Second, after the inquiry, how the court chooses to assist the jury may send signals to the jury about the court's view of the case.

The court's simple act of providing any sort of assistance to overcome jury deadlock is an implicit suggestion that a non-verdict is unacceptable. This suggestion belittles the process because it tends to value reaching a consensus over the quality of the consensus reached. Further, assistance given to a deadlocked jury may send a message that the court believes a guilty verdict is appropriate. If the jury is unable to reach a verdict, at least one juror believes the government failed to prove its case. Thus, if the court permits the government to take additional measures to overcome the doubts held by one or more jurors, it may imply to the jury that the judge thinks the defendant is guilty despite jurors' doubts.[168]

Finally, such reforms appear to be partially founded on the faulty assumption that the incidence of hung juries is dangerously high and must be remedied. A common assumption is that the more a jury represents a cross-section of a diverse community, the more likely it is to hang.[169] A recent study of jury verdicts in California did not find a conclusive relationship between juror diversity and the jury's ability to reach a verdict.[170] To the extent there is some correlation between diversity and the ability to reach consensus,[171] it may reaffirm the value of cross-

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168. In addition to infringing on deliberative secrecy and jury independence, this approach departs from traditional due process notions regarding the appropriate allocation of the burden of proof. The government has the burden of proving its case beyond a reasonable doubt. Sullivan v. Louisiana, 508 U.S. 275, 277–78 (1993); *In re* Winship, 397 U.S. 358, 364 (1969). Principles of double jeopardy ordinarily do not give the government a second chance to prove its case when it failed to meet its burden the first time. *See* Burks v. United States, 437 U.S. 1, 11 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."). Re-opening a case upon signs of deadlock would not only give the government a second chance but also provide the government specific input from the jury about what doubts it needs to overcome.

169. Much scholarship has focused on whether racially heterogenous juries are capable of reaching agreement. *See* Jeffrey Rosen, *After 'One Angry Woman'*, 1998 U. CHI. LEGAL F. 179, 179.

> False claims of nullification contribute to a sense that nullification happens frequently, and therefore is a problem that needs to be fixed. Judges and legislatures then feel the need to step in and figure out how to limit juries' opportunities to engage in nullification, which usually results in limitations on jury power.

Marder, *supra* note 16, at 286. Moreover, "[s]ince 1980, commensurate with the Court's protection of cross-sectionalism, there has been an increased clamor for eliminating unanimity." Kenneth S. Klein & Theodore D. Klastorin, *Do Diverse Juries Aid or Impede Justice?*, 1999 WISC. L. REV. 553, 556. Recent studies, however, suggest that these concerns may be misplaced; hung juries primarily result from disputes over the evidence, not nullification or failure to deliberate. *See* Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249, 1276–77 (2003); Marquess, *supra* note 167.

170. Klein & Klastorin, *supra* note 169, at 565. To the extent social science researchers determine there is some evidence that "juries with a 'viable' number of minority jurors may be more likely to hang than other juries," they also suggest that this may be a "preferred result . . . an indication that viable numbers of minority jurors increase the likelihood of not convicting in a true reasonable doubt case." *Id.* at 561.

171. The study found no significant correlation between gender diversity and ability to reach consensus and some correlation between general ethnic diversity and the ability to reach a verdict. Based on a study of 188 jury outcomes, juries comprised of a single ethnic group were significantly more likely to reach a verdict than juries comprised of equal numbers from all ethnic groups. For specific ethnic groups, only the number of white jurors had any significant impact on the likelihood of reaching a verdict. *Id.* at 565.

sectionalism. A diverse jury may be more protective of minority rights, minority opinions, and unpopular defendants than an entirely homogenous, majoritarian jury. Moreover, other studies indicate that when juries deadlock, the deadlock occurs because of legitimate differences about the evidence, leading researchers to conclude that most "juries deadlock when they ought to deadlock—when the evidence is evenly split between both sides."[172]

Quite apart from issues of diversity, little or no evidence exists confirming a decline in the ability of criminal juries to reach verdicts. Examinations of conviction rates in state and federal courts demonstrate that "conviction rates have been stable over the last ten years in state courts, while conviction rates have actually *increased* in Federal Courts over both the last ten years and the last fifty years."[173] Thus, there has been no significant diminution of juries' abilities to reach guilty verdicts. Permitting substantial input into the deliberative process to overcome jury deadlock is an overreaction; it is both unnecessary and contrary to the interest in having the jury's verdict represent the independently considered judgment of the community.

C. Discharging a Deliberating Juror

Two less recent jury reforms that have had a significant impact on trial courts' involvement with deliberations are the Federal Rules of Criminal Procedure that permit a verdict by less than twelve jurors[174] and the substitution of an alternate for a deliberating juror.[175] In 1983, Federal Rule of Criminal Procedure 23(b) incorporated changes that permit courts to unilaterally remove a deliberating juror and allow a verdict by the remaining jurors upon a finding of "good cause" for the removal.[176] The 1983 amendment was intended, in large part, to avoid the

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172. *See* Marquess, *supra* note 167. Other factors found to contribute to deadlock "include police credibility, case complexity, juror interaction and individual juror attitudes, and concerns about the fairness of the law, particularly in the context of a specific trial." *Id.* The National Center for State Courts conducted the final report on this study, entitled *Are Hung Juries a Problem*, which is available online at http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesPub.pdf (last visited Oct. 5, 2005). For additional articles discussing the study, see Valerie P. Hans et al., *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33 (2003) and Hannaford-Agor & Hans, *supra* note 169, at 1299.

173. Ellsworth, *supra* note 3, at 220.

174. FED. R. CRIM. P. 23(b).

175. FED. R. CRIM. P. 24(c).

176. FED. R. CRIM. P. 23(b). Prior to the 1983 amendment, this action was only permissible with the consent of the parties. In 2002, as part of a general overhaul of the Federal Rules of Criminal Procedure, the description of the required showing was changed from "just cause" to "good cause." The advisory committee's notes indicate, however, that they did not intend to make a substantive change to the law. *See* FED. R. CRIM. P. 23(b) advisory committee's note.

Numerous states have adopted rules resembling Federal Rule of Criminal Procedure 23(b). *See, e.g.*, ALA. CODE § 12-16-232(b) (1975) (permitting less than twelve jurors where the parties have stipulated in open court and a juror is discharged); COLO. REV. STAT. § 16-10-106 (1998) (permitting less than twelve jurors where the parties have stipulated in writing and a juror is excused); COLO. R. CRIM. P. 23(7) (permitting less than twelve jurors where the parties have stipulated in writing, a juror is excused, and the case does not involve a class 1 felony); WYO. R. CRIM. P. 23(b) (permitting less than twelve jurors where the parties have stipulated in writing and the court has excused a juror for any just cause). Many states have also adopted rules resembling Federal Rule of Criminal Procedure 24(c). *See, e.g.*, ARK. R. CRIM. P. 32.3(b) (permitting discharge of a juror and substitution of an alternate "upon good cause shown"); CAL. PENAL CODE § 1089 (2004) (permitting discharge of a juror and substitution of an alternate "before or after final submission of the case" upon a showing of "good cause"); IDAHO

requirement of expensive mistrials when one juror becomes "seriously incapacitated or otherwise found to be unable to continue service upon the jury."[177] The rule permitting substitution of an alternate during deliberations serves similar purposes. However, permitting dismissal of a deliberating juror creates opportunities for trial judges to ask questions of deliberating jurors. These opportunities provide a chance for trial judges to send juries messages—intended or not—about the judges' position on the merits of a case.

Whether, or to what extent, the same balance that prohibits most post-verdict inquiries of jurors[178] should prevent trial courts from inquiring of jurors during deliberations is an issue that commentators have raised with increasing frequency. The current cultural climate encourages a sense of entitlement that makes jurors believe they should not have to put up with any conditions that make their jury service unpleasant.[179] The number of juror complaints about fellow jurors or about difficulties and disagreements occurring in the deliberation room continue to increase.[180] Jurors complain about personality conflicts that arise in the jury room,

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R. CRIM. P. 24(d)(2) (permitting replacement of juror during deliberations "due to death, illness or otherwise as determined by the court"); KAN. STAT. ANN. § 22-3412(c) (Supp. 2004) (permitting substitution of alternate during deliberations); MASS. R. CRIM. P. 20(d) (permitting substitution of alternate during deliberations if "a juror dies, becomes ill, or is unable to perform his duty for any other cause"); *see also* State v. Cheek, 936 P.2d 749, 756 (Kan. 1997) (holding that under KAN. STAT. ANN. § 22-3412(c) a juror may be discharged during deliberations and replaced with an alternate upon a showing of "reasonable cause").

177. FED. R. CRIM. P. 23(b) advisory committee's note.

178. *See supra* notes 74–77 and accompanying text.

179. For example, the American Jury Institute/Fully Informed Jury Association (AJI/FIJA) is a public policy non-profit organization whose mission is "to inform all Americans about their rights, powers, and responsibilities when serving as trial jurors . . . [including] the option and the responsibility to render a verdict based on their conscience and on their sense of justice, as well as on the merits of the law." American Jury Institute/FIJA, http://www.fija.org (last visited Oct. 5, 2005).

Many recent jury reforms attempt to limit the inconvenience associated with jury service and improve the physical conditions in which jurors serve. Improving the trappings of jury service is a laudable goal, but more jurors are looking to courts to intervene and improve the difficult or unpleasant deliberative processes. *See infra* note 180.

180. *See, e.g.*, United States v. Nnaji, 70 Fed. App'x 217, 218 (5th Cir. 2003) (stating that jurors complained that one juror "read a book during deliberations, refused to review the evidence, refused to participate in discussions, and refused to vote on the ultimate question of guilt or innocence"); United States v. Lemmerer, 277 F.3d 579, 589–90 (1st Cir. 2002) (stating that a deliberating juror complained she was uncomfortable with what was going on in the jury room and threatened not to return); United States v. Edwards, 303 F.3d 606, 629–34 (5th Cir. 2002) (stating that the trial court received an anonymous call and other complaints about a juror's conduct); United States v. Long, 301 F.3d 1095, 1101 (9th Cir. 2002) (stating that two jurors accused each other of discussing the case with family and making up their minds before the end of deliberations); United States v. Baker, 262 F.3d 124, 128–30 (2d Cir. 2001) (stating that some jurors complained that a fellow juror refused to deliberate); United States v. Abbell, 271 F.3d 1286, 1290 (11th Cir. 2001) (stating that deliberating jurors complained that one juror "was behaving improperly and refusing to obey the law or to obey the court's jury instructions"); United States v. Reynolds, 189 F.3d 521, 527–28 (7th Cir. 1999) (stating that a juror complained that the presence of Louis Farrakhan at the trial was a distraction that could be "detrimental to these proceedings"); United States v. Running Horse, 175 F.3d 635, 638–39 (8th Cir. 1999) (stating that the court received a report that a juror's boyfriend instructed her to vote not guilty so deliberations would be quick); United States v. Symington, 195 F.3d 1080, 1084 (9th Cir. 1999) (stating that jurors complained that one juror was either unwilling or unable to deliberate); United States v. Reynolds, 161 F.3d 1190, 1193–94 (9th Cir. 1998) (stating that jurors complained about personality problems that created conflict between two members); United States v. Burrous, 147 F.3d 111, 117 (2d Cir. 1998) (stating that a juror objected during deliberations on religious grounds); United States v. Thomas, 116

other jurors not following the court's instructions, and personal circumstances that make it difficult to reach a verdict.

Several of the juries that took part in *In the Jury Room* experienced personality conflicts and other problems during deliberations that sent them running to the judge for help.[181] Similarly, jurors in the highly publicized trial of Tyco executives sent the court numerous notes complaining that the deliberation room had become full of hostility that impaired their deliberations[182] and complaining about the way some jurors were participating in deliberations.[183] After receiving those complaints, the judge suspended deliberations for the weekend to permit the jurors to cool off.[184] Although the jurors indicated that deliberations improved after the break and that they were close to reaching a verdict, the case ended in a mistrial when the court discovered that a juror had been threatened.[185]

A trial court cannot confirm or reject allegations of juror misconduct, confusion, or nullification without some inquiry into the jurors' deliberative thought processes—an inquiry that would otherwise be taboo. The more the inquiry reveals about the deliberative process and how jurors are leaning on the merits, however, the greater the potential for the inquiry and for subsequent court actions to improperly influence the deliberations. For example, dismissing a juror when the judge knows the juror is the lone holdout for acquittal—and the remaining jurors are aware that the judge acted with this knowledge—may send a message to the remaining jurors that the judge endorses their position.[186]

F.3d 606, 609–12 (2d Cir. 1997) (stating that deliberating jurors complained that one juror engaged in improper conduct and refused to deliberate); Perez v. Marshall, 119 F.3d 1422, 1427 (9th Cir. 1997) (stating that a juror complained that being the lone holdout caused emotional distress); United States v. Geffrard, 87 F.3d 448, 450–52 (stating that a juror notified the court during deliberations that her religious convictions and other concerns prevent her from judging); United States v. Brown, 823 F.2d 591, 594 (D.C. Cir. 1987) (stating that a juror complained that he was unable to discharge his duties); Booker v. Girdich, 262 F. Supp. 2d 264, 266–67 (S.D.N.Y. 2003) (stating that a juror complained that personal problems, including vandalism of her car, left her too upset to deliberate); United States v. Samet, 207 F. Supp. 2d 269, 271–76 (S.D.N.Y. 2002) (stating that a juror complained that another juror was verbally abusive toward her and the deliberation process left her physically and emotionally ill).

These cases are only a small sample of recently reported decisions in which trial courts have been forced to address complaints from deliberating jurors. Moreover, this list does not take into account instances that did not lead to claims of error on appeal.

181. For example, the jury in *State v. Ducic* asked the judge for assistance at least twice. The first instance occurred when Carmella sought to be excused during deliberations. *See supra* text accompanying note 132. The second instance occurred when the jurors reached an impasse during the penalty phase. *See ABC News Special Report: In the Jury Room* (ABC television broadcast Aug. 11, 2004).

182. Notes from the jury complained that "the atmosphere in the jury room has turned poisonous," that jurors were swapping "incendiary accusations," and that "[t]he disagreement has become so intense that it has resulted in very bad acrimony." Greg Farrell, *Tyco Jury May Have Reached an Impasse*, USA TODAY, Mar. 26, 2004, at 1B; Samuel Maull, *Jurors: Deliberations Have Turned "Poisonous,"* MIAMI HERALD, Mar. 26, 2004, at 3C.

183. Notes on this topic complained that one juror "had stopped deliberating in good faith" and that "[o]ne or more jurors . . . refuse to recognize the right of at least one juror to have a good faith belief that the prosecution had not proved its case." Farrell, *supra* note 182; Samuel Maull, *Squabbling Tyco Jurors Sent Home for Weekend*, SEATTLE TIMES, Mar. 27, 2004, at E1.

184. Maull, *supra* note 183.

185. *See* Christopher Bowe, *Judge Declares a Mistrial in Tyco Corruption Case*, FIN. TIMES (United Kingdom), Apr. 3, 2004, at 1.

186. *See* Perez v. Marshall, 119 F.3d 1422, 1429 (9th Cir. 1997) (Nelson, J., dissenting).

During the trial of former Louisiana governor Edwin Edwards, many jurors confronted the trial court with complaints about a particular juror, Juror 68.[187] Midway through the lengthy trial, the judge received an anonymous phone call, which listed a series of complaints about Juror 68. The complaints alleged that Juror 68 was talking about the case at church functions, was biased against Edwards, and was seeking counseling from his pastor about the verdict.[188] The court questioned Juror 68 and a United States Marshall conducted an investigation; both determined that the caller's allegations were baseless.[189] However, new problems arose during deliberations.[190] First, the court discovered that, contrary to its instructions, Juror 68 brought a dictionary and a thesaurus into the deliberation room; the court again instructed the jury not to consult outside materials but took no other action.[191] On the fourth day of deliberations, the court learned that Juror 68 left the deliberation room in tears. Juror 68 advised the court in a note that "he ha[d] 'doubts' and that he [was] being 'intimidated' by other jurors, and suggest[ed] that perhaps he should be dismissed." However, the court did no more than re-instruct the jury about its duty to deliberate.[192] A few days later, the tensions in the deliberation room had not ceased; the foreperson wrote a note to the judge stating:

> We feel a certain juror is biased and refuses to participate in deliberations. He has his mind made up, but will not discuss his reasoning. After many, many attempts by ALL jurors he still refuses. And he recently has gone as far as to tell a fellow juror to not speak to him at all. We do not know how to proceed with this juror's refusal to participate in deliberations.[193]

The trial court's interview of the foreperson indicated that the "certain juror" was Juror 68. In addition, the foreperson told the judge that Juror 68 brought a note into the deliberation room and took sheets from his juror notebook out of the jury room.[194] The trial judge again interviewed Juror 68, who denied bringing notes into or out of the jury room. Next, the court interviewed the remaining jurors and all but one testified contrary to Juror 68.[195] Juror 68 was re-interviewed and given an opportunity to explain the inconsistency.[196] He recanted in part, but his explanation remained materially different from the accounts given by the other jurors.[197] Ultimately, the trial judge discharged Juror 68:

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187. United States v. Edwards, 303 F.3d 606, 629–30 (5th Cir. 2002). An anonymous jury tried Edwards, in part to protect the jurors from outside influences. *Id.* at 612–17.
188. *Id.* at 629.
189. *Id.* at 629–30.
190. Even before deliberations began, Juror 68 again proved problematic. Contrary to the trial court's instructions, Juror 68 kept a piece of transcript distributed during trial and wrote his juror number on an evidence binder; the court, however, took no action regarding these matters. *Id.* at 630.
191. *Id.*
192. United States v. Edwards, 303 F.3d 606, 630 (5th Cir. 2002).
193. *Id.* at 630 n.11.
194. *Id.* at 630.
195. *Id.* at 630–31.
196. *Id.* at 631.
197. *Id.*

> The district court based its dismissal of Juror 68 on its findings that Juror 68 had displayed an inability to follow the court's instructions and that, in his dealings with the court, Juror 68 was lacking in candor.... Finally, the district court made clear that it was not basing the dismissal on Juror 68's view of the evidence.[198]

The remaining eleven resumed deliberations and later returned a verdict of guilty.[199]

While the Fifth Circuit upheld the district court's determination,[200] the court of appeals gave no consideration to the message the discharge of Juror 68 sent to other jurors. The other jurors knew they had complained to the judge about a variety of things, including how Juror 68 participated in deliberations, particularly his failure to explain the reasons for his opinions. The discharge of Juror 68 might have conveyed to the remaining jurors the message that they had an obligation fully to explain the reasons for their opinions to the satisfaction of the other jurors. Courts have been unwilling to impose such a burden.[201]

Recent years have seen numerous cases in which deliberating jurors advise the court that another juror refuses to follow the law. Once sworn, a juror has taken an oath to follow the law as instructed by the court. Refusal to follow the law, if proved, violates the juror's oath and is grounds for discharge. The proof, however, is problematic. When a sworn, empaneled juror begins deliberating, concerns of deliberative secrecy make it difficult to delve into the juror's motivations and thought processes. There are limits as to how a court may intervene to ensure that the jury reaches a verdict according to the law. Steps taken by the trial court in response to allegations of possible juror nullification, including interviewing deliberating jurors, potentially intrude on the secrecy of the jury's deliberations. Thus, it is particularly difficult for a trial court to resolve complaints that a deliberating juror refuses to apply the law. Moreover, empirical jury research suggests that jurors rarely refuse to follow the law.[202]

The jury's power to disregard to make mistakes about the law is in tension with the court's responsibility to ensue a fair trial. "Due process means a jury capable and willing to decide the case solely on the evidence before it, *and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.*"[203] Thus, when confronted with these problems, courts draw a firm distinction between the jury's power to nullify and the trial court's duty to uphold the law.[204] "The right of a jury, as a buffer between the accused and the state, to reach a verdict despite what may seem clear law must be kept distinct from the court's duty to uphold the law and to apply it impartially."[205]

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198. United States v. Edwards, 303 F.3d 606, 631 (5th Cir. 2002).
199. *Id.* at 631–32.
200. *Id.*
201. *See supra* notes 158–59 and accompanying text.
202. *See* Reid Hastie, *Introduction* to INSIDE THE JUROR 3, 29 (Reid Hastie ed., 1993).
203. Smith v. Phillips, 455 U.S. 209, 217 (1982) (emphasis added).
204. United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988).
205. *Id.*; *see also* Horning v. District of Columbia, 254 U.S. 125, 138 (1920) ("[T]he jury has the power to bring in a verdict in the teeth of both law and facts. But the judge always has the right and duty to tell them what the law is upon this or that state of facts . . . ."); United States v. Dreske, 707 F.2d 978, 982 (8th Cir. 1983) ("[F]ederal courts have uniformly recognized the right and duty of the judge to instruct the jury on the law . . . .").

The Supreme Court has recognized that the Sixth Amendment right to an impartial jury includes the right to a jury willing to apply the law as instructed by the trial court.[206] Indeed, if a voir dire establishes that a prospective juror is unwilling to apply the law, that juror may be excused for cause.[207] The parties have the right to insist "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court."[208] During voir dire, the court may allow extensive questioning of prospective jurors regarding their ability to follow the law; indeed, that is the appropriate time and place for a searching inquiry on those issues.[209]

The information that raises the court's concern about a potential problem with deliberations—whether from a jury note or some other source—may not always reveal whether the problem involves external influences on the jury, internal strife among the jurors, or a juror's view of the evidence or the law. External influences are well within the judge's power to address, even if the other problems are not. The judge's duty to uphold the law requires the judge to take some action when faced with evidence that a juror is disregarding the court's instructions.[210] However, the amount of evidence a trial judge should have before inquiring or discharging the juror presents difficult line drawing issues. Where the alleged juror misconduct "is a purposeful disregard of the law," the allegation is "particularly difficult . . . to

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206. *See, e.g.*, Adams v. Texas, 448 U.S. 38, 45 (1980) (stating that the state may insist that jurors impartially consider the facts and apply the law as charged by the court).

207. For example, in capital cases, "a prospective juror may be excluded for cause because of his or her views on capital punishment" if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting *Adams*, 448 U.S. at 45).

208. *Adams*, 448 U.S. at 45. Most standard jury instructions clearly instruct jurors that their duty is to follow the law as explained by the trial court. For example, one pattern jury instruction provides:

> It is your duty as jurors to follow the law as stated in all of the instructions of the Court and to apply these rules of law to the facts as you find them to be from the evidence received during the trial.
>
> . . . .
>
> Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base any part of your verdict upon any other view or opinion of the law than that given in these instructions of the court . . . .

1A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 12.01 (5th ed. 2000). The intent of these instructions may be to discourage juries from engaging in nullification, but a jury bent on doing so usually cannot be stopped.

209. In a Colorado case resulting in a mistrial, a juror admitted that her vote to acquit a defendant of drug possession was an act of nullification. After the trial court discharged the juror, she tried to present a fellow juror with a pamphlet discussing the jury's power to nullify. The discharged juror was prosecuted for obstruction of justice based on her failure to reveal during voir dire both her own prior drug arrest and deferred judgment and her participation in an organization that promoted drug legalization. *See* People v. Kriho, 996 P.2d 158, 163–64 (Colo. Ct. App. 1999).

210. However, courts have recognized that inquiry of jurors in these circumstances is not always required. *See* United States v. Stafford, 136 F.3d 1109, 1112–13 (7th Cir. 1998) (finding that a juror's note to the judge, at the close of evidence, asking if the alternate could "stay in the jury room to hear sentencing," was not a strong enough indicator of bias or irregularity to warrant inquiry; the court assumed the juror mistakenly phrased the request and meant to refer to "deliberations").

prove and one for which an effort to act in good faith may easily be mistaken."[211] The trial court's questioning must not intrude upon the jury's independence, but it may be essential to ensure that criminal trials are conducted in accordance with the rule of law. The judge must decide how far can he can go without violating the sanctity of the deliberation process.[212]

Cases like *United States v. Geffrard*[213] represent one end of the spectrum. Despite the trial court's instruction that entrapment was not an issue in the case, a deliberating juror sent the judge a letter indicating that her religious beliefs prevented her from convicting the defendant and that "[she] could not live with a verdict of guilty for any of the accused on any of the charges, as [she] believe[d] deep within [her] heart and soul and mind that [the defendants] were unjustly led into this so called transaction by a more intelligent and powerful figure."[214] The Eleventh Circuit upheld the trial court's decision to discharge the juror pursuant to Federal Rule of Criminal Procedure 23(b) without conducting any inquiry because "[t]he letter [made] it a certainty that this particular juror could not reach a verdict following the judge's instructions as applied to the facts."[215]

United States v. Brown[216] demonstrates more difficult line drawing issues. In *Brown*, the trial court received a note from a deliberating juror stating, "I Bernard Spriggs am not able to discharge my duties as a member of this jury."[217] Because the note contained no further explanation, the court had to interview Spriggs to determine why he felt he was unable to fulfill his duty. Spriggs expressed some

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211. United States v. Thomas, 116 F.3d 606, 618 (2d Cir. 1997). Again, the Tyco jurors illustrate the point. Initially, jurors expressed concern that one juror was not deliberating in good faith. However, after they returned from the court-imposed cooling off period, they resumed meaningful deliberations and nearly reached a verdict. In one juror's opinion, deliberations were breaking down because some felt that a particular juror was "stuck in her ways. It was hard to convince her." However, after their weekend break the "hard to convince" juror was willing to work towards a verdict. Carrie Johnson, *Judge Declares Mistrial in Tyco Case*, WASHINGTON POST, Apr. 3, 2004, at A01. Another juror's description of the former holdout juror indicated not that she refused to deliberate, but that she "seemed to be at war with herself. Whenever she reached the precipice of a guilty vote on any count, she recoiled as if she had touched a hot stove." Pete McEntegart, *One Angry Man: A Juror Gives an Inside Account of Why the Tyco Trial Fell Apart*, TIME, Apr. 12, 2004, at 47, 47.

212. Several courts have acknowledged the need to tread lightly when deciding whether, or to what extent, to interview seated or deliberating jurors. *See, e.g.*, United States v. Reynolds, 189 F.3d 521, 527–28 (7th Cir. 1999) (upholding the trial court's refusal to conduct mid-trial voir dire regarding whether Louis Farrakhan's presence as a courtroom spectator unduly prejudiced the jury, and stating that "[i]nterrupting the proceedings to quiz jurors about Farrakhan . . . could be distracting if not damaging"); United States v. Cantu, 167 F.3d 198, 202 (5th Cir. 1999) (upholding the trial court's decision to voir dire only the juror who came forward during deliberations to claim that he had been subject to an outside influence because he had not shared this information with other jurors; deciding that the trial court struck the proper balance given the "potential disruptive effect of questioning all remaining jurors"); United States v. Magana, 118 F.3d 1173, 1185 (7th Cir. 1997) (agreeing with the trial court's assertion that a judge's voir dire of deliberating jurors could cause them to focus disproportionately on the subject matter under inquiry); United States v. Ramos, 71 F.3d 1150, 1153 (5th Cir. 1995) ("In determining whether to conduct a hearing in a case such as this, the court must balance the probable harm resulting from the emphasis such action would place upon the misconduct and the disruption involved in conducting a hearing against the likely extent and gravity of the prejudice generated by the misconduct.").

213. 87 F.3d 448 (11th Cir. 1996).

214. *Id.* at 451.

215. *Id.* at 452.

216. 823 F.2d 591 (D.C. Cir. 1987).

217. *Id.* at 594.

reservations about the RICO statute under which the defendant was charged, but even after the interview the trial judge was uncertain whether Spriggs was unwilling to apply the law or had difficulty with the evidence. The district court, fearing that additional inquiry would violate the secrecy of the jury's deliberations, simply discharged Spriggs.[218] On appeal, the district court's level of inquiry was held to have been appropriate, but the discharge of Juror Spriggs improper: "We may not be able to say for a certainty that Spriggs' desire to leave the jury stemmed from his view of the adequacy of the government's evidence[; b]ut we cannot say with any conviction that Spriggs' request to be dismissed stemmed from something *other* than this view."[219] Because there was "any possibility" that Spriggs simply found the evidence lacking and was trying faithfully to apply the law, his discharge was improper.[220] The court acknowledged that this "any possibility" test may limit the efficacy of Federal Rule of Criminal Procedure 23(b), but it concluded that such a limit was necessary to protect the defendant's right to a unanimous verdict and to prevent a conviction when any juror thought the government failed to prove its case.[221]

United States v. Thomas[222] presented another ambiguous ground for considering discharge of a juror. The trial court received equivocal information regarding Juror 5's conduct during deliberations.[223] Before conducting an inquiry, the trial court had heard the following from various jurors: that deliberations were likely to continue beyond that day because of a "problem with an unnamed juror;" that "there was a problem . . . in the jury room [with] one of their number, and specifically . . . indicated [that] juror number five, had, at each time a vote was taken, voted not guilty and indicated verbally that he would not change his mind;"

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218. *Id.* at 592–95.

219. *Id.* at 597. Federal courts have conceded that the trial court is largely powerless to act in these cases:

> [I]n the rare case where a request for juror dismissal focuses on the quality of the juror's thoughts about the case and her ability to communicate those thoughts to the rest of the jury, "the court will likely prove unable to establish conclusively the reason underlying" the request for dismissal. In such cases a trial court lacks the investigative power that, in the typical case, puts it in the "best position to evaluate the jury's ability to deliberate."

United States v. Symington, 195 F.3d 1080, 1086 (9th Cir. 1999) (quoting *Brown*, 823 F.2d at 596; United States v. Beard, 161 F.3d 1190, 1194 (9th Cir. 1998)) (citations omitted).

220. United States v. Brown, 823 F.2d 591, 596 (D.C. Cir. 1987).

221. *Id.* at 596–97.

222. 116 F.3d 606 (2d Cir. 1997).

223. *Id.* at 611. Concerns about Juror 5 began much earlier. During jury selection, the government attempted to exclude Juror 5—the only remaining black potential juror in a case with all black defendants—with a peremptory challenge. *Id.* at 609. Misapplying *Batson v. Kentucky*, the trial court denied the challenge and required that Juror 5 be seated on the petit jury. *Id.* at 609 n.4 (citing Batson v. Kentucky, 476 U.S. 79, 97 (1986)). During the trial, Juror 5's behavior became a source of concern. A delegation of six jurors complained to the court clerk that Juror 5 distracted them by "squeaking his shoe against the floor, rustling cough drop wrappers in his pocket, and showing agreement with points made by defense counsel by slapping his leg and, occasionally during the defense summations, saying, 'Yeah, yes.'" *Id.* at 609–10. The trial judge conducted individual voir dire with each juror, and seven mentioned Juror 5's distracting behavior. However, almost all anticipated no problems in deliberating with Juror 5. Juror 5 assured the court of his willingness to refrain from distracting behavior and to apply the law. *Id.* at 610.

and Juror 5's "predisposed disposition" made the jury unable to reach a verdict.[224] None of this information necessarily indicated that Juror 5's behavior was nullification. A "predisposed disposition" could have meant nothing more than the juror's own personal experiences influenced his interpretation of the evidence presented and disposed him to view it differently from his fellow jurors. Thus, without more inquiry the trial court could not have determined whether Juror 5's behavior amounted to misconduct. After an inquiry, "the trial court discharged Juror 5. However, the Second Circuit condemned the decision to discharge and concluded that there was a reasonable possibility that the trial court discharged Juror 5 because of his view of the merits of the case, rather than for misconduct.[225]

Except for those rare cases like *Geffrard* where the juror's position is clear, trial courts will likely be unable to determine whether a juror is disregarding the law without intruding upon the sanctity of the jury deliberations. Unless the juror openly admits to disregarding the law, the trial court will have difficulty obtaining information about whether a juror is applying the law without learning about the deliberative process. For example, in *Thomas*, despite the trial court's efforts not to ask for the jurors' views of the evidence, the inquiry produced precisely that information. Other jurors revealed to the court that Juror 5 did not share their view on the issue of the defendants' guilt, and they discussed their various understandings of the basis for Juror 5's position.[226] Juror 5 also had to discuss his own thought process in evaluating the case; he explained to the judge that "he needed 'substantive evidence' establishing guilt 'beyond a reasonable doubt' in order to convict."[227] After such inquiry, Juror 5's discharge could have sent a message to the other jurors that the trial court, like the remaining jurors, did not share Juror 5's view of the evidence.

To preserve the secrecy of the jury's deliberations and prevent improper influence on those deliberations, most courts strictly limit inquiry of deliberating jurors regarding allegations that a juror or jurors are disregarding the law. *United States v. Brown* struck such a balance:

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224. United States v. Thomas, 116 F.3d 606, 611 (2d Cir. 1997). Though concerned with Juror 5's conduct, the fact that other jurors volunteered these complaints and disregarded instructions not to discuss the state of the jury's deliberations apparently did not disturb the court. *See* O'MALLEY ET AL., *supra* note 208, § 20.01 ("Bear in mind also that you are never to reveal to any person—not even to the Court—how the jury stands, numerically or otherwise, on the question of whether or not the government has sustained its burden of proof until after you have reached a unanimous verdict."); *see also* COMM. ON PATTERN JURY INSTRUCTIONS, FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS: CRIMINAL CASES 1.25 (1990 ed.) (using nearly identical language); COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, SIXTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS 8.01 (1991 ed.) (instructing jurors not to reveal where they stand to anyone); COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS, EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS 3.12 (1992 ed.) (instructing jurors not to reveal numeric vote to anyone); COMM. ON MODEL JURY INSTRUCTIONS, NINTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS 7.05 (1992 ed.) (instructing jurors never to tell anyone how the jury stands until the vote is unanimous); COMM. ON PATTERN JURY INSTRUCTIONS, ELEVENTH CIRCUIT, PATTERN JURY INSTRUCTIONS: CRIMINAL CASES 12 (1985 ed.) (stating that communication with the judge is acceptable so long as jurors do not reveal their positions).

225. *Thomas*, 116 F.3d at 623–24.

226. *Id.* at 611.

227. *Id.*

> [A] court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations. Thus, unless the initial request for [a juror's] dismissal is transparent, the court will likely prove unable to establish conclusively the reasons underlying it. Given these circumstances, we must hold that if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request.[228]

In the appeal arising from the trial of another former governor, Fife Symington of Arizona, the Ninth Circuit applied the *Brown* rule and reversed Symington's conviction.[229] The district court discharged a deliberating juror—based on the juror's refusal to deliberate—when "it was reasonably possible that the problems all stemmed from the other jurors' disagreement with her position on the merits."[230] The Ninth Circuit suggested, however, that trial courts can easily distinguish rare cases subject to the *Brown* rule from those in which more intrusive inquiry may be permissible:

> Cases subject to [*Brown*'s reasonable possibility] rule, we emphasize, are infrequent. In general, questions of juror bias or competence focus on "some event . . . that is both easily identifiable and subject to investigation and findings without intrusion into the deliberative process." In those cases, "the presiding judge can make appropriate findings and establish whether a juror is biased or otherwise unable to serve without delving into the reasons underlying the juror's views on the merits of the case." Since the district court's investigative authority is not constrained by the same jury secrecy concerns in those cases, the rule we announce here is not triggered. In cases where the allegations go to the quality and coherence of the juror's views on the merits, however, a trial judge may not be able to assess the juror's competence without exposing the content of the juror's views.[231]

These cases, however, are not as rare or infrequent as the Ninth Circuit suggests.[232]

However frequent these cases are, they all come to the court's attention mainly as a matter of chance. The fortuity of whether a juror complains during deliberations determines the trial court's ability to conduct inquiries that implicate deliberative secrecy. The court has a basis for making an inquiry only if deliberating jurors

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228. United States v. Brown, 823 F.2d 591, 596 (D.C. Cir. 1997). *See also Thomas*, 116 F.3d at 623 ("We adopt the *Brown* rule as an appropriate limitation on a juror's dismissal in any case where the juror allegedly refuses to follow the law . . . .").

229. United States v. Symington, 195 F.3d 1080, 1092 (9th Cir. 1999).

230. *Id.* at 1088 n.9. The other jurors complained that one juror, a woman in her mid-seventies, refused to deliberate, had difficulty following their discussions, and could not articulate the reasons for her decision. *Id.* at 1083–84.

231. *Id.* at 1087 n.6 (quoting *Thomas*, 116 F.3d at 621) (citations omitted).

232. *See supra* note 180 and accompanying text.

choose to complain. Given the difficulty of distinguishing between juror disagreement and juror nullification, a court should not undermine the defendant's right to a trial by the jurors whom he helped select simply because one or more jurors proves annoying to the others or because members of the jury happen to be particularly—and vocally—intolerant.[233] The court's power to discharge a juror who is the subject of complaint must be circumscribed to prevent the jury panel majority from having the power to "nullify" the votes of disagreeing or disagreeable minorities.

The Ninth Circuit's divided opinion in *Perez v. Marshall*[234] illustrates the difficulty of distinguishing between dissension caused by a holdout juror and proper grounds for discharge. In *Perez* one juror was the lone holdout for acquittal, and the heated discussions in the jury room, along with the stress of having no one who shared her evaluation of the evidence, caused her emotional distress. The majority acknowledged that the juror's emotional condition "could be related to her viewpoint on the merits of the Government's case."[235] Nonetheless, the majority held that the state trial court properly discharged the juror "because [her] emotional instability prevented her from continuing to perform the essential functions of a juror."[236] However, the dissent argued that the juror's distress was evidence that she was faithfully carrying out her duties as a juror and that "[t]o find good cause for dismissal here opens the door to finding good cause for removing any juror who is upset to find that she is the lone holdout but remains willing to participate in a discussion of the defendant's guilt."[237] The fortuity of a boisterous or forceful majority in the jury room should not grant a trial court leave to discharge a holdout, regardless of whether the juror is holding out because of her view of the evidence or in spite of it.

Courts have consistently held that a court cannot discharge jurors simply because their evaluation of the evidence happens to conflict with that of most of the other jurors.[238] Discharging such a juror would deprive the defendant of his right to

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233. In *United States v. Beard*, 161 F.3d 1190 (9th Cir. 1998), the court discharged two jurors who had serious personal disagreements during deliberations. The problems began during summations when Juror 8 sent the judge a note stating, in part, "[p]lease, prevent [Juror 1] from being foreman. She has been making statements about how ridiculous the case is and has said to me to make her foreman because she will take care of deliberations quickly." *Id.* at 1192. The court immediately voir dired both jurors—along with the rest of the panel—and concluded that the trial could continue with these jurors. After deliberations began the next day, Juror 8 sent another note complaining, "[Juror 1] is shaking her hand at me and calling me a bitch." *Id.* The court suspended deliberations and again interviewed Juror 1 and Juror 8. Juror 8 indicated she was willing to put these hostilities aside and deliberate but wanted Juror 1 to stop yelling and calling her names. Juror 1 claimed Juror 8's mischaracterization of her remarks and behavior embarrassed and humiliated her, but she was willing to concentrate on her responsibility as a juror to deliberate and decide the case based on the evidence. *Id.* The trial court concluded that Juror 1's level of emotional distress, and the major distraction caused by the dynamics between Jurors 1 and 8, provided good cause to discharge both. *Id.* at 1193. The Ninth Circuit upheld that determination on appeal. *Id.*

234. 119 F.3d 1422 (9th Cir. 1997).

235. *Id.* at 1427.

236. *Id.*

237. *Id.* at 1429 (Nelson, J., dissenting).

238. *See* United States v. Hernandez, 862 F.2d 17, 23 (2d Cir. 1988); United States v. Brown, 823 F.2d 591, 596 (D.C. Cir. 1987).

a unanimous verdict.[239] But courts also "have upheld the dismissal of a juror when the district court determined that the juror was unable to deliberate impartially."[240] Deliberations among jurors with sincerely-held, conflicting opinions about the case are often contentious and unpleasant. Periodically, sharp dissension can occur when twelve strangers of various backgrounds are thrown together and asked to come to a decision regarding difficult issues. However, the louder majority should not be able to have the dissenters discharged in order to make deliberations go more smoothly. Nor should the majority be able to intimidate and bully dissenting jurors off the jury. Indeed, studies of juries not required to reach a unanimous verdict indicate that most juries do not continue to deliberate after reaching the requisite number of votes for a verdict.[241] Thus, the thoroughness and overall quality of deliberations may suffer if the majority can chase dissenters off the jury.

The *Brown* rule requires that if there is "any possibility" that the juror's difficulties stem from a proper consideration—such as his views on the evidence—the trial court may not discharge the juror.[242] A contrary rule might require jurors to convince the trial court of the validity of their position on the merits in order to remain on the jury. The California Supreme Court has described a discharge for refusal to deliberate:

> A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies on faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge.[243]

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239. *See Brown*, 823 F.2d at 596; *see also* FED. R. CRIM. P. 31(a) (requiring a unanimous verdict). While unanimity is the rule in federal courts, the Constitution does not require unanimous verdicts to satisfy due process. *See* Apodaca v. Oregon, 406 U.S. 404, 410–13 (1972). Nonetheless, only Louisiana and Oregon allow non-unanimous verdicts in felony cases. *See* LA. CODE CRIM. PROC. ANN. art. 782 (1998); OR. REV. STAT. § 136.450 (2003).

240. United States v. Symington, 195 F.3d 1080, 1085 (9th Cir. 1999); *see also* United States v. Egbuniwe, 969 F.2d 757, 761 (9th Cir. 1992) (upholding the trial court's decision to excuse a juror who could not be fair and impartial).

241. *See* ABRAMSON, *supra* note 1, at 199.

242. *Brown*, 823 F.2d at 596 (emphasis added).

243. People v. Cleveland, 21 P.3d 1225, 1237–38 (Cal. 2001).

One drawback to California's formulation is that a juror's inability to articulate her position to the other jurors or the court could result in her discharge.[244]

"Any complicated *voir dire* calls upon lay persons to think and express themselves in unfamiliar terms."[245] Thus, a heightened possibility exists that less articulate or more self-conscious jurors may have difficulty explaining their views of the evidence or the law. Moreover, the court's own view of the evidence could color its determination regarding a juror's credibility. If a trial judge believes there is overwhelming evidence to support a conviction, she might tend to disbelieve a juror's insistence that he has genuine reservations about the evidence and is not disregarding the court's legal instructions. However, the trial judge's personal evaluation of the sufficiency of the evidence is usually irrelevant in a jury trial.[246]

Failing to require the trial court to accept jurors' representations that they are following the law places a premium on juror articulateness as a precondition for continued jury service. Courts have criticized reasonable doubt instructions that imply jurors should be able to articulate a reason for their doubts, calling them "not approved" or "perhaps unwise."[247] One concern with these instructions is their potential burden shifting effect.[248] Additionally, jurors with completely legitimate doubts may simply have difficulty expressing them.[249] "The ability to give sound reasons for their doubts or their beliefs is not given to many men, and . . . doubts for which [a person] can formulate no convincing reason often induce him to act or to

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244. *People v. Hightower* is another California case that illustrates the difficulty of distinguishing between refusal to deliberate and disagreement with other jurors. 114 Cal. Rptr. 2d 680 (Cal. Ct. App. 2001). The trial court received a note in which jurors complained that one juror was not discussing the evidence and was relying instead on his feelings and belief systems. After interviewing the jurors, the trial court discharged the questionable juror. *Id.* at 683–88. Though one's "belief systems" may be a proper part of the life experience he brings to deliberations, the appellate court upheld the trial court's decision to discharge the juror despite a strong dissent. *Id.* at 689–93. *But see id.* at 693–98 (Kay, J., dissenting) (suggesting that "the quality of a juror's thought process and deliberations has been confused with misconduct").

245. Patton v. Yount, 467 U.S. 1025, 1038 n.14 (1989).

246. The only exception occurs when the court finds the evidence insufficient to even present the case to the jury. In such an instance the court may direct a verdict of acquittal. After the court decides adequate evidence exists for the case to go to the jury, the court's opinion about the proper outcome is entirely without legal force.

247. Chalmers v. Mitchell, 73 F.3d 1262, 1268 (2d Cir. 1996) (citations omitted); *see infra* note 250. On the other hand, if jurors are told they need not even try to discuss or explain their reasons, they may be emboldened to reach or cling to arbitrary decisions. Courts should distinguish between encouraging jurors to discuss matters amongst themselves and requiring them to provide reasons for their decisions.

248. *Chalmers*, 73 F.2d at 1268. ("[T]he jury might believe it should look to the defendant to articulate the reason for the doubt, in essence requiring him to prove his innocence.").

249. "[I]nstructions tying 'reasonable doubt' to a doubt 'for which you can give a reason' . . . may well be unwise, because of the possibility that such an instruction will 'intimidate a juror by suggesting that he may be called upon to explain his doubts.'" Vargas v. Keane, 86 F.3d 1273, 1277 (2d Cir. 1996) (quoting United States v. Davis, 328 F.2d 864, 867 (2d Cir. 1964)); *see also* Fluellen v. Walker, 41 Fed. App'x 497, 500, 502 (2d Cir. 2002) (stating that the court could "not countenance" an instruction that included within the definition of reasonable doubt, "[[i]f one juror were to ask another about the reason for his or her doubt, then] that juror would *have to* articulate, give a reason or a rational[] explanation by pointing to items of evidence in the case or lack of evidence in the case." However, the appellate court also found the instruction, when considered as a whole and in context, did not violate the Constitution).

refuse to act."[250] The same concerns arise when a judge asks a juror to discuss the reasons for deadlock, the reasons why the juror is concerned about another juror's participation in deliberations, or other matters related to the content and context of the deliberations. A trial judge who discharges a juror whose strongly held views do not coincide with other jurors risks discharging the juror because the trial judge does not agree with that particular juror or find that juror's reasoning persuasive.

Also difficult to distinguish is whether a juror's personal, political, and moral perspectives cause the juror to disregard the law or simply color the manner in which the juror perceives and evaluates the evidence. Jurors do not deliberate in a vacuum. They bring to the deliberation room their commonsense and all sorts of unique perspectives and experiences that may affect the way they view both the world and the evidence. For example, in the O.J. Simpson trial, many accused the jury of engaging in race-based nullification; some argued that reasonable doubt existed because some jurors' personal experiences led them to be skeptical of testimony from demonstrably racist police officers; others concluded that the State of California simply failed to prove its case at trial.[251] Not only did the jurors' perspectives and experiences affect the way they decided the case, but different observers' perspectives and experiences affected the way those observers perceived the jury's verdict.

Requiring that a jury be drawn from a fair cross-section of the community takes into account that our communities are not homogeneous and that a diverse jury is more likely to come to a fair, commonsense evaluation of the case.[252] The Supreme Court has long acknowledged that the cross-section requirement is "essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions."[253] This statement seems to imply that juror diversity improves the quality—or at least the public perception of the quality—of justice. Just as "public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race,"[254] these values are likewise strengthened if jurors are not excluded based on their "cultural, economic, [or] social"[255] backgrounds. Thus, courts evaluating complaints about a juror's conduct in the deliberation room must be careful not to mistake a juror's unique perspective for misconduct.

Occasionally, the ability to discharge a single juror during deliberations has led to the discharge of mere holdout jurors whose strong opinions and convictions make deliberations uncomfortably contentious for other jurors. The result may be that a unanimous verdict of eleven is substituted for what might have been an appropriately hung jury. The impetus behind the rule—to prevent an unforeseen juror illness or other extraordinary circumstance from rendering a costly criminal proceeding a nullity—is laudable. The application of Federal Rule of Criminal Procedure 23 in cases like *Thomas*, *Brown*, and *Perez*, however, may produce a

250. Butler v. South Carolina, 459 U.S. 932, 935 (1982) (Marshall, J., dissenting from denial of *certiorari*) (quoting Pettine v. Territory of New Mexico, 201 F. 489, 496 (8th Cir. 1912)).

251. *See, e.g.*, ABRAMSON, *supra* note 1, at xi–xiv (recounting many opinions of the O.J. Simpson trial).

252. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

253. *Id.* at 526. A jury drawn from a fair cross-section makes "available the commonsense judgment of the community." *Id.* at 530.

254. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

255. United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997).

guilty verdict following a trial at which the prosecution has failed to convince all jurors of guilt beyond a reasonable doubt. Federal Rule of Criminal Procedure 24, which permits substitution of an alternate during deliberations, creates similar problems. Of course, there is no guarantee that the substituted alternate will share the views of the majority and thus make the renewed deliberations go smoothly. The judge's decision to discharge a dissenting juror and replace her with an alternate, however, may steel the remaining jurors' as to the correctness of their opinions. This judicial reinforcement can make it particularly hard for the newly substituted alternate to disagree. Whenever Rules 23 or 24 create a situation in which deliberating jurors must discuss their views of the evidence or of the deliberative process with the judge, the door is open for the judge to influence the continuation of that process. Thus, in some circumstances these rules pose significant threats to deliberative secrecy and jury independence.

Arguably, jury orientation videos, handbooks, and the trial court's instructions to jurors on how to conduct themselves during deliberations could minimize the incidence of these problems. However, the opposite may just as easily be true; these instructions may give jurors more reasons to complain when they believe another is not following the prescribed advice.

V. CONCLUSION

Methods of jury reform need not be constrained by a requirement that jury trials be conducted as they were in early common law England or at the time the Constitution was drafted. Reforms that improve the physical conditions and trappings of jury service have been long overdue. There is little dispute that many citizens dread jury service, which can be both inconvenient and financially taxing. Often jurors are not treated with a level of respect that is commensurate with their critical role in the judicial process. Courts and attorneys frequently disregard the impact of unnecessary—or even necessary—delays in the trial process on the jury. While the court and the parties discuss motions or objections, many of which could (and should) have been resolved pretrial, jurors are sent off to stew in the jury room with no explanation and no estimate of how long the delay might last. Jury reform has resulted in a number of improvements, including shorter terms of service, increased juror compensation, and an awareness among the court and the parties as to how their conduct may affect the jury.

There are some difficulties associated with jury service, however, that courts and legislatures are not in a position to fix. Peering inside the deliberation room does not seem to have provided any brilliant insights about how to go about the task of jury reform. Nor does public exposure appear to improve a jury's decision-making process.

Most of the reforms that generate cause for concern are those intended to smooth out the deliberative process: telling jurors how to deliberate, "assisting" jurors when they are unable to come to unanimous agreement, and discharging disagreeable jurors. However, there is no necessary connection between the ease with which the jury reaches a verdict and the quality of the verdict reached. The unfortunate reality is that, in close or high profile cases, deliberations, however conducted, are likely to become heated and contentious. In these cases, dissension in the jury room may be a sign that things are actually going right, not wrong, with the deliberations. It is particularly important in those close, highly controversial

cases that the jury's verdict be viewed as the considered judgment of the community; if it is not, the legitimacy of both the verdict and the process may be called into question. If the court "helps" the jury reach a verdict, or discharges a juror who disagrees with the others, the verdict may no longer be perceived as the verdict of an independent jury.

The greatest benefit of the jury trial—that which sets it apart from other modes of decision-making—is the jury's independent judgment. Those bent on improving the jury system must do so with an eye toward maintaining that critical aspect of the jury trial. To date, reforms directly related to the deliberative process have not demonstrated adequate concern with maintaining jury independence. Any state planning to jump on the jury reform bandwagon should carefully consider how far it plans to open the door to the jury room. The more the door is opened, the more the jury's independence is compromised.