

# Adjudicative Facts, Non-Evidence Facts, and Permissible Jury Background Information†

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## INTRODUCTION

“Nuth’n walks itself into evidence,” a certain Mr. Dooley once observed.<sup>1</sup> Everything that a jury ultimately considers within the circumscribed world of the adjudicatory process is either produced by the parties’ evidence and arguments; certified by the judge via judicial notice, comments on the evidence, or instructions to the jury; or brought into the jury room in the form of the jurors’ background knowledge and beliefs. Of these three sources through which information comes to affect a jury’s determinations, the first two are explicitly governed by the rules of evidence. Standards of relevance, efficiency, and fairness permit the judge to control any potential abuses that might arise as counsel for contending parties attempt to sway the jury.<sup>2</sup> The judge, meanwhile, can introduce factual information or opinion only under the relatively strict standards for judicial notice in Rule 201,<sup>3</sup> or under a more general, but still limited, empowerment to comment upon the evidence that has been introduced by the parties.<sup>4</sup> The Federal Rules are silent, however, and the case law and leading authorities are uncharacteristically sparse on the subject of the third source through which information can reach the jury room: the jurors’ background knowledge.<sup>5</sup> At the outset of

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1. *Quoted in* United States v. Dior, 671 F.2d 351, 358 n.11 (9th Cir. 1982).

2. FED. R. EVID. 402, 403.

3. FED. R. EVID. 201(b) requires that “a judicially noticed fact must be one not subject to reasonable dispute . . . .”

4. *Quercia v. United States*, 289 U.S. 466, 469 (1933): “[He] may express an opinion upon the facts, provided he makes it clear to the jury that all matters of fact are [subject] to their determination.” See also *United States v. Kravitz*, 281 F.2d 581 (3d Cir. 1960); *United States v. Gaines*, 450 F.2d 186 (3d Cir. 1971); *United States v. Anton*, 597 F.2d 371 (3d Cir. 1979).

5. The Advisory Committee’s Note to FED. R. EVID. 201(a) points out that “every case involves the use of hundreds or thousands of non-evidence facts” which, according to the committee, cannot possibly be introduced into evidence or made the subject for any formalized treatment of judicial notice of facts. The Advisory Committee clearly included jurors’ background knowledge in this category of “non-evidence facts” as distinguished from the category of “adjudicative facts” developed via the formal processes of presenting evidence or taking judicial notice. Although the term “adjudicative facts” is borrowed from Professor Kenneth Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942), the Committee seems to have altered the meaning of the term slightly. While Professor Davis defined “adjudicative facts” in terms of their opposition to “legislative facts,” the Advisory Committee distinguished “adjudicative facts” from “non-evidence facts,” suggesting that the “adjudicative facts” are only those data explicitly developed within the

the trial process, potential jurors can be excluded for cause if they possess background knowledge or belief that is particularly relevant to the issues or parties in a case, and a civil verdict or criminal conviction can be overturned if a juror employs background information in an impermissible manner, but there is no very clear rule defining what is or is not permissible background information or belief.

In a recent article in the *Georgetown Law Journal*, Professor John Mansfield expresses surprise at the scarcity of case law and commentary on the topic of permissible juror background knowledge.<sup>6</sup> Mansfield argues that there should be, and that the existing legal precedent would support, a single legal standard, which he calls the standard for "jury notice," to govern all situations in which the jury's background knowledge becomes an issue.<sup>7</sup> The apparent analogy to judicial notice is slightly misleading, since judicial notice applies to information expressly read into the trial record as being conclusive, while Professor Mansfield's proposed "jury notice" would govern what the jurors could know or believe on the basis of their experience *outside* the evidentiary record of the trial. In the language of the Advisory Committee on Rules of Evidence, judicial notice applies to "adjudicative facts;" "jury notice" would apply to "non-evidence facts."<sup>8</sup> The proposed standard for jury notice would not only govern the jurors' express reliance on their extrajudicially derived information and beliefs, for example, their discussion of background information in the course of jury deliberations, but would also define what non-evidentiary information the "jury may use as background information for the purpose of drawing inferences,"<sup>9</sup> and hence would determine questions of relevancy and probative value. A legal standard that dictates what jurors may and may not "notice" would have very broad impact indeed, since the jurors' pre-existing knowledge and beliefs affect their qualifications to serve as jurors, their estimation of what evidence will be persuasive, and their inclinations in applying legal standards to the facts as developed at trial.<sup>10</sup>

The proposed standard for jury notice admittedly has slender foundations in case law. Still, Professor Mansfield professes to have found in the existing jurisprudence four considerations that relate to the legal standard governing

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judicial process and formally submitted to the fact-finder. The residual category of "non-evidence facts" did not much concern the Committee, since they believed along with Thayer (PRELIMINARY TREATISE ON EVIDENCE 279-80 (1898)) that in the judicial process "not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit." Professor Mansfield's article, *see infra* note 6, challenges the imputation of such competence to juries, and suggests that "non-evidence facts" play so significant a role that the law does and must impose some formal restraints upon their use.

6. Mansfield, *Jury Notice*, 74 GEO. L.J. 395 (1985).

7. *Id.*

8. *See supra* note 5.

9. Mansfield, *supra* note 6, at 395.

10. *Id.*

jurors' "notice" of non-evidentiary background information. These considerations are: (1) the increased costs of introducing information through a formal process rather than permitting jurors to rely on background knowledge and belief;<sup>11</sup> (2) the difficulty of providing fair notice to counsel concerning jurors' possession and use of information and beliefs acquired outside the adjudicative process; (3) the presumably increased reliability of information subject to testing in the adversarial process of formal proof, as opposed to the presumed unreliability of untested beliefs; and (4) a notion of "political entitlement" under which the beliefs of members of certain social groups might be imported into, or not excluded from, the jury box as a matter of right.<sup>12</sup> The interplay of these factors, Professor Mansfield argues, supports his proposal for a legal standard of "jury notice" requiring "that a substantial number of people in the community have the information or hold the belief in question" before the jury could use the belief or information as background knowledge.<sup>13</sup> Professor Mansfield sees applications for this standard in at least four stages of the trial process: at jury selection; in making rulings on relevancy, probative value, and sufficiency of evidence; in instructing the jury; and in ruling on motions for new trials due to juror misconduct.<sup>14</sup>

At first glance, Professor Mansfield's proposal possesses a certain intuitive appeal. Non-evidence facts and beliefs clearly can exercise a decisive influence on the jury's response to issues presented at trial, and some restraints upon jurors' possession and use of extraneously derived information and belief clearly do and must exist, for example, in restraints upon exposure to prejudicial pre-trial publicity. A single standard governing all the situations in which jurors' background knowledge comes into play would be a very useful legal principle. The defendant in a criminal case obviously has a critical interest in knowing what factual basis the jury will use when it determines the ultimate question of innocence or guilt. Parties in civil actions may find, similarly, that crucial determinations turn on non-evidence facts that the jurors know or think that they know. It is equally obvious that the jurors cannot enter the jury box as twelve "blank slates." Some states even require that jurors be well-informed, and idiocy is hardly a *desideratum*, so the law in this area must try to fashion fairness out of intractable social realities and conflicting aspirations. Professor Mansfield suggests that his proposed standard, requiring that a substantial number of people share the

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11. In addition to the transaction costs of preparing and presenting additional information at trial, a more stringent standard, if strictly enforced, would produce an increased burden of new trials due to jurors' misuse of non-evidentiary information.

12. Professor Mansfield's discussion omits what is arguably the most important factor that shapes the law concerning jurors' background knowledge and belief: the sensibility about fair process that requires that a finder of fact not possess pre-existing information or belief that prevents her from hearing the trial of the case with an open mind.

13. Mansfield, *supra* note 6, at 406.

14. *Id.* at 402-06, 409-19.

information or belief before a jury could "notice" it, successfully balances the need for notice to the parties, the goal of excluding unreliable information, the practical limitations imposed by the cost of introducing information formally, and the constitutional entitlements of parties and potential jurors.

The problem of the fact-finder's background knowledge is hardly a new one. It has received more attention, however, in the continental legal tradition, where the fact-finder was a judge who came to the case ignorant of the parties and the facts, than in the common law tradition, where the jury was drawn from the neighborhood of the dispute precisely because of its members' familiarity with the parties and the facts. There was little question of improper background knowledge so long as the function of the jurors was to tell the judge the facts of the case, so the common law cases centered instead on the problem of improper bias or influence.<sup>15</sup> In the continental legal tradition, the problem of the fact-finder's background knowledge has roots in Roman law and has attracted a continuous tradition of scholarly comment dating back to the twelfth century. As long ago as 1140, Gratian, the "father of canon law," tried to come to grips with this issue in his monumental collection of the canons, the *Decretum*.<sup>16</sup> Gratian taught that an inquisitorial judge in a homicide case could employ only that knowledge which he acquired while acting in his official capacity as judge, and he could not use any information that he received outside the performance of his official functions in the case at hand. Therefore, according to Gratian, if the defendant had murdered his victim in cold blood in the plain sight of the judge and a multitude of witnesses, but the accused denied his guilt, the judge could not condemn him for the killing unless a formal trial were held and the requisite eyewitnesses other than the judge proved the charge.<sup>17</sup> Gratian's formulation, effectively, required the judge to develop the "adjudicative facts" within the formal adjudicatory process, rather than importing highly relevant information as "non-evidentiary" background knowledge or belief. This conception, embodied in a Roman-canon law maxim, was handed down from Justinian's *Digest* all the way to the German *Bürgerliches Gesetzbuch*: "the magistrate must judge according to the laws and the evidence, not according to his own conscience."<sup>18</sup> The continental

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15. J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 63-66 (2d ed. 1979).

16. 1 DECRETUM GRATIANI, CORPUS IURI CANONICI, (E. Friedberg ed., reprint Graz, 1956).

17. *Id.* at C.2 q.1 dictum ante c.21. Because there was patristic authority that supported the proposition that "manifest crimes do not require [a formal] accusation," Gratian did concede that if the accused committed a crime so publically and so protractedly that "the very evidence of the deed testified to his guilt," and if the perpetrator proved incorrigible after three warnings, then he could be condemned without a hearing. This exception to the general rule did put the judge in the position of using information that had not been subjected to testing in a confrontational procedure.

18. K. NÖRR, ZUR STELLUNG DES RICHTERS IM GELEHRTEN PROZEß DER FRUEHZEIT: IUDEX SECUNDUM ALLEGATA NON SECUNDUM CONSCIENTIAM IUDICAT (1967).

lawyers' suspicion of judges' tendencies to rely upon impermissible background information even led them to look unfavorably upon the value of legal precedent. The thirteenth-century French jurist Beaumanoir argued that a judge who had presided over a case similar to the one before the bench should be disqualified, because his knowledge of the previous case might predispose him to repeat his decision in the present case.<sup>19</sup>

In contrast to the continental procedures, which emphasized trial to a judge, the common law institution of trial by jury complicated the background information problem in two ways. First it created an uneasy frontier between the functions of the judge as law-giver and the jury as fact-finder, and secondly it empowered the jury, at least in criminal trials after *Bushell's case*,<sup>20</sup> to render verdicts "contrary to the law as given by the judge and contrary to the evidence."<sup>21</sup> Because of the complexities of the jury trial, and particularly because of the role that background information and belief play in jury nullification, the law must strike a delicate and flexible balance between the powers of the judge and those of the jury. A single standard for "jury notice" is too blunt and inflexible an instrument to determine who should control the operation of law, fact, and value in the adjudicative process.

Questions that relate to judicial control over the information that reaches the jury room have profound implications because of the inherent tension between the role of the judge in controlling the trial process and the role of the jury in coming to an independent determination. In the criminal context, these questions can easily touch constitutional issues. For example, even judicial notice, which extends only to facts "not subject to reasonable dispute,"<sup>22</sup> is specifically restricted in criminal cases, insofar as the judge must instruct the jury that it is not required to "accept as conclusive any fact judicially noticed."<sup>23</sup> This provision marked a departure from the Uniform Rules of Evidence (1974) that made any judicially noticed fact conclusive for the jury. The House Committee on the Judiciary believed that the Uniform Rule provision was "inappropriate because [it is] contrary to the Sixth Amendment right to a jury trial."<sup>24</sup>

Professor Mansfield's proposal for a judicially controlled standard for

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19. P. DE BEAUMANOIR, *COUTUMES DE BEAUVAISIS* § 1880 (A. Salmon ed. 1970).

20. *Bushell's Case*, 6 Howell's 999 (1670). *Bushell* and his fellow jurors were held for contempt of court when they insisted, contrary to the court's express instructions, on acquitting William Penn from a charge of preaching to an unlawful assembly. Upon a writ of habeas corpus, *Bushell* and the other jurors were released, and since that time, juries have enjoyed the power of nullification without fear of judicial reprisal.

21. *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); *Horning v. District of Columbia*, 254 U.S. 135, 139 (1920), in which Justice Holmes stated that the jury has "the technical right . . . to decide against the law and the facts." See also T. GREEN, *VERDICT ACCORDING TO CONSCIENCE* (1985).

22. FED. R. EVID. 201(b).

23. FED. R. EVID. 201(g).

24. J. WEINSTEIN & J. MANSFIELD, *EVIDENCE: RULES AND STATUTE SUPPLEMENT* 21 (1984).

“jury notice” therefore forces one to confront difficult, perhaps even intractable, theoretical and practical questions regarding the roles of the judge and the jury within the traditional common law concept of the jury trial. This paper will argue that Professor Mansfield’s suggested “jury notice” standard does not resolve the theoretical questions from which it arises. It will argue further that there is no economically feasible, yet reliable, mechanism for applying the standard in practice. The paper will contend, finally, that Professor Mansfield’s proposed “jury notice” standard, if it were rigorously applied in criminal cases, would threaten to subvert one of the jury’s essential functions in the criminal process, that of the inscrutable, apparently unanimous, voice of the community. The law does apply, and ought to apply, different standards in determining what constitutes permissible juror background knowledge or belief at three different stages of the adjudicative process: during jury selection, during the trial, and after the case has gone to the jury.

## I. PROBLEMS OF SUBSTANCE AND STRUCTURE

### A. *The Problematic Distinction Among Types of Belief*

Professor Mansfield has tried to define the scope of his inquiry as a narrow one, and has suggested accordingly that his proposed legal standard applies, not to all background information or beliefs, but only to background information or beliefs employed at a preliminary stage in the cognitive process. At this preliminary stage, Mansfield suggests the jurors are moving from known facts to inferences about unknown facts, prior to moving to conclusions involving the application of law to fact. He stated:

[T]he only thing we are discussing is the use of background information as a basis for drawing inferences regarding issues of fact . . . . We are not considering the use of factual information by a jury to determine within some general standard the law to be applied to a particular case . . . . Also, different considerations may be relevant when what is in question is jury beliefs about the good as distinguished from jury beliefs about the true.<sup>25</sup>

Mansfield argues that the proposed jury notice standard, thus limited, “brings into the open a conflict regarding the purpose of jury trial: is it to give effect to beliefs held by the public . . . or is it to determine the truth of disputed issues . . . .?”<sup>26</sup> The conflict about the function of the jury trial is, however, assuredly more complex than merely a clash between the potentially mistaken factual beliefs of the public and some higher standard of factual truth. The jurors’ beliefs about the good may conflict with the facts as they know them, with the facts as known to some higher science, or with ideas

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25. Mansfield, *supra* note 6, at 401-02.

26. *Id.* at 395.

about the good as prescribed by law or public policy. Worse still, jurors' beliefs concerning the good and the true might be so intertwined that there might be no discernible line between the two categories of information or belief, and no boundary between a jury's cognition of the facts and its application of law to fact.

If it were possible to draw a meaningful line between beliefs as to the true and beliefs as to the good, the proposed jury notice standard might be a defensible assertion of the position that beliefs held by substantial numbers of people within the community are more important than objectively true determinations of disputed issues. If, on the other hand, the distinction between these two kinds of beliefs is not discernible, a judicially controlled standard of jury notice would require the judge to intrude into the operation of the jurors' values as they related to the evidence and the legal issues in the case. Such an intrusion would inevitably raise sixth amendment questions and would multiply the problems of defining the purposes of the jury trial. Is it to give effect to beliefs as to truth, held either by the court as the representative of a higher science or by members of the public, or is it to give effect to values, again as held by members of the public, or by the judge as the representative of law or public policy? Or, finally, does the genius of the institution lie in the very indeterminacy of this issue?

Theoretically, of course, one can distinguish belief as to facts from belief as to values. At least in the context of a criminal trial, however, neither the law nor the very extensive social scientific literature on jury beliefs and jury behavior supports the notion that jurors do, or even ought to, distinguish factual beliefs as to preliminary issues from beliefs as to ultimate legal issues, or factual beliefs from normative beliefs or values. Professor Mansfield is asking the judge to do the impossible, if the "jury notice" standard is supposed to apply when background information is used to build factual inferences, but not when the background information involves beliefs as to the good or the application of law to fact. Mock jury studies, such as those by McGlynn, Megas, and Benson,<sup>27</sup> Ugwuegbu,<sup>28</sup> Bernard,<sup>29</sup> and Klein and Creech,<sup>30</sup> suggest that jurors' pre-existing beliefs regarding racial and gender characteristics affected their determinations of guilt or innocence most markedly where the evidence presented to them was equivocal rather than very weak or very strong.<sup>31</sup> Where the only variable was the Anglo or Latino identity of the defendant, Anglo jurors not only leapt to the conclusion that

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27. McGlynn, Megas & Benson, *Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J. PSYCHOLOGY 93 (1976).

28. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOLOGY 133 (1979).

29. Bernard, *Interaction Between the Race of the Defendant and that of the Jurors in Determining Verdicts*, 5 LAW PSYCHOLOGY REV. 103 (1979).

30. Klein & Creech, *Race, Rape, and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOCIAL PSYCHOLOGY 21 (1982).

31. Ugwuegbu, *supra* note 28, at 139-41.

Hispanic defendants were guilty more often than Anglo defendants were, but also came to the intermediate factual determination that Chicano defendants were less likeable, less intelligent, and more dishonest than white defendants.<sup>32</sup> Sunnafrank and Fontes<sup>33</sup> found that racial stereotypes concerning criminal behavior run to specific kinds of crime, so that blacks were associated with mugging, soliciting, and auto theft, while whites were associated with fraud, embezzling, counterfeiting, child molestation, and rape; and finally, vehicular manslaughter appeared to be racially neutral.<sup>34</sup> It is clear from these studies that jurors do use background knowledge and beliefs, sometimes despite the strength or weakness of intermediate factual inferences, to formulate their applications of legal standards to facts. It is not at all clear that there is any functional distinction between a preliminary building of inferences as to the true and a conclusory application of the relevant legal standard. Professor Mansfield's proposed standard for "jury notice" seems to rest upon an untenable psychological assumption.

A recent major study of jury behavior indicates how little is actually known about precisely how jurors use background information and beliefs in coming to verdicts.<sup>35</sup> The experimental studies demonstrate to a high probability, however, that any judicial meddling that affects the jurors' permissible use of pre-existing beliefs as to the true will necessarily have a measurable impact upon their determinations as to the application of law to fact. Such meddling hence raises fundamental questions about the jury's right and power, independent of the judiciary, to import the community's values into the jury room. Functionally, there appears to be no such thing as a preliminary weighing of purely factual matters, discrete from the conclusory application of law to fact. Purely "factual" matters such as race directly affect legal conclusions such as the determination of guilt or innocence, the presence or absence of malice or criminal intent, or the classification of a defendant's behavior as negligent. A standard of jury notice that operates as a principle of inclusion by requiring the judge to give weight to the pre-existing beliefs held by all substantial groups within society will encounter serious sixth amendment, equal protection, and due process prob-

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32. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAVIORAL SCI. 275 (1983).

33. Sunnafrank & Fontes, *General and Crime Related Racial Stereotypes and Influence on Juridic Decisions*, 17 CORNELL J. SOC. REL. 1 (1983).

34. *Id.* at 5-7. For a more general discussion of blacks' and whites' courtroom perceptions of one another, see Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985).

35. HASTIE, PENROD & PENNINGTON, *INSIDE THE JURY* 121-50 (1983). Significantly, the jurors in this study made almost no express statements concerning their background values, knowledge, or beliefs. They conducted their discussions entirely in the highly formal, stylized language of the law, so that any analysis of the jurors' reliance on personal values or beliefs lies beneath a coded language concerning the degrees of murder and manslaughter. *Id.* at 151-74.



lems if, as these studies suggest, jurors tend very strongly to favor members of their own social groups and to disfavor others according to group identity. Professor Mansfield's jury notice standard will, moreover, probably not work as a principle for determining exclusions of potential jurors because members of discrete minorities can no longer be excluded from juries on the basis of background information and beliefs that would make them predictably sympathetic to defendants from their own groups.<sup>36</sup> The *Batson* decision seems to protect groups whose representation in society falls short of the "substantial number" that Professor Mansfield would require before a jury could "notice" a given belief. Hence it suggests that a "substantial number" test is out of touch with the political entitlements of minorities, at least in the context of jury selection.

While the mock jury studies and the *Batson* decision suggest that one cannot easily distinguish between background information used as a basis for drawing inferences of fact and background information used to determine the application of law, Kalven and Zeisel's monumental study<sup>37</sup> of jury behavior in 3,576 criminal trials goes further. The study powerfully suggests that the very nature of the jury trial in criminal cases is an appeal to the undifferentiated knowledge and values of the jurors. Kalven and Zeisel made a series of points that are important in the context of the present discussion. First, criminal defendants choose trial by jury purposefully in precisely those kinds of cases in which the jury is likely to be more lenient than the judge; the defendant's choice of jury trial is result-oriented.<sup>38</sup> Second, the jury, under the so-called "liberation hypothesis," most often resorts to nullification and applies its own values in spite of the law when the evidence presented in the case is equivocal rather than clear.<sup>39</sup> Third, there is virtually no real knowledge about how the jury makes intermediate determinations of fact, such as credibility judgments.<sup>40</sup> Finally, the fact that the jury decides cases as a group, under a unanimity requirement, means that even if jurors and judges have exactly the same background knowledge and values, juries will always produce more lenient determinations than judges will in any statistically significant series of cases, when applying legal thresholds to questions such as reasonable doubt, duty, negligence, or criminal responsibility.<sup>41</sup> These factors, taken together, help to explain what happens when a criminal defendant appeals to the "conscience of the community" rather than opting for trial to a judge. Since Professor Mansfield's proposed standard for jury notice would require the judge to inquire repeatedly into the beliefs of the community with the express purpose of weeding out minori-

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36. *Batson v. Kentucky*, 106 S. Ct. 1712, 1723 (1986).

37. KALVEN & ZEISEL, *THE AMERICAN JURY* (1966).

38. *Id.* at 29, Table 5.

39. *Id.* at 164.

40. *Id.* at 167.

41. *Id.* at 189.

tarian beliefs not shared by a substantial number of people within the community, and since one cannot functionally distinguish patterns of factual beliefs from patterns of values, it is difficult to imagine what could prevent the judge from consciously or unconsciously imposing on the outcomes, a set of beliefs that correspond with the judge's. Mansfield's standard for jury notice would affect the pattern of outcomes in criminal cases by reducing the spectrum of pre-existing beliefs and values from which jurors move toward unanimous verdicts. The criminal defendant would be appealing to the judicially approved beliefs of a judicially selected cross-section of the community, rather than to a truly independent, representative cross-section of the community. Procedures that restrict the cross-section of the community represented on criminal juries threaten the sixth amendment rights of defendants,<sup>42</sup> and Professor Mansfield's proposal would multiply the occasions when judges would be called upon to exclude the voices of minorities.

Professor Mansfield's proposed standard for jury notice therefore stumbles over the fact that its author intended it to apply only to a single, supposedly distinct category of background knowledge or belief as to the true applied exclusively to drawing inferences regarding issues of fact. Because knowledge and belief as to the true do not seem to operate independently of one another, and because it is by no means clear that juries go through a distinct phase of drawing factual inferences before applying law to fact, the standard for jury notice causes problems beyond those foreseen by its proponent and threatens to undermine the distinctive function of trial by jury.

### *B. Substantial Number Equals Common Knowledge?*

Professor Mansfield creates additional difficulties, both theoretical and practical, by deciding that the crucial question concerning permissible "jury notice" is whether a belief or piece of information is held by a substantial number of people. It is unclear where Professor Mansfield discovered the notion that a substantial number would work some legal magic, especially because he intimates that he derived this suggestion from McCormick and Wigmore.<sup>43</sup> In fact, neither McCormick nor Wigmore, nor any other authority that I could discover, based the legitimacy of permissible jury background knowledge upon belief by a *portion* of any population. The constant refrain, in treatises, case law, and statutes alike, refers to unanimity of belief, common knowledge, knowledge shared by the community, a common fund of knowledge, data notoriously accepted by all, information generally known, facts beyond reasonable dispute, or information whose accuracy cannot

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42. *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979) cert. denied, 444 U.S. 881 (1979); *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

43. Mansfield, *supra* note 6, at 395-96.

reasonably be questioned.<sup>44</sup> These sources suggest that the basis for letting information get to the jury without the test of the adversarial process is either the high reliability of the information or the lack of disagreement in the community. Mansfield's suggestion glides blithely past the problematical point that knowledge or beliefs held by significant numbers of people, but not shared by the community at large, are almost by definition likely to be contentious.<sup>45</sup>

As substantive support for his "substantial number" standard, Mansfield observes rather tentatively that "sufficient reliability might be found in the number of people who hold a belief."<sup>46</sup> Yet in a world in which it is possible to fool all the people some of the time and some of the people all the time, reliability rests upon a very slender reed if the sole foundation for a proposition is the number of its adherents. Even "common knowledge" is not infrequently wrong, because "our every day experience of the world comes in crude, unrepresentative chunks, with causal relations hopelessly obscured, and with prejudice, superstition, and self-interest inextricably intertwined in perception."<sup>47</sup> It is not to the objective truth-value or scientific reliability of widespread belief that the criminal defendant appeals by choosing jury trial, but to the conscience of the community.<sup>48</sup>

Arguably, the law permits the jury to consider items of common background knowledge or belief, first because it would be absurdly costly, even if it were possible, to introduce the entire contextual universe surrounding a case via the evidentiary process, and partly because certain matters of perception and belief cannot be resolved by any amount of debate or demonstration. The adversarial procedure, by its very selectivity, imposes on the litigating parties through their counsel the responsibility of identifying the issues in the case and developing the "adjudicative facts" by producing relevant evidence. Permissible jury background knowledge, as a functional matter, should consist of information and beliefs not identified by the adversarial process as being particularly relevant and in dispute. The bound-

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44. 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2570 (1981); C. McCORMICK, EVIDENCE 691 (1954); *Winstead v. Commonwealth*, 195 Ky. 484, 494, 243 S.W. 40, 45 (1922); FED. R. EVID. 201(b).

45. Neither Mansfield nor the standard authorities seem to acknowledge the existence of another class of information and belief that is imported into the jury box without being presented at trial or excluded by law. This is the realm of knowledge or belief that is conventionally treated as being a matter of diverse perception or belief. Religious, ethical, political, and philosophical tenets, whether descriptive of how the world is, or prescriptive of how the world ought to be, fall within this category of background information and belief.

46. Mansfield, *supra* note 6, at 398.

47. Levin & Levy, *Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum*, 105 U. PA. L. REV. 139, 141 (1956) (quoting Bitterman, *The Evaluation of Psychological Propositions*, in A. LEVIN, EVIDENCE AND THE BEHAVIORAL SCIENCES A-16 (mimeo 1956)).

48. See discussion of KALVEN & ZEISEL, *supra* text accompanying notes 37-40.

ary, therefore, between the "non-evidence" facts that the jury may permissibly use and the background information that would impinge upon the realm of the "adjudicative facts" will vary case by case. This distinction will depend not on how many people know or believe the given information, but on whether a juror's background information predisposes her as to the truth or falsity of one or more of the "adjudicative facts" that the parties must develop to prove their respective arguments. Impermissible jury background knowledge appears, functionally, to consist of information or beliefs highly relevant to issues defined by the parties but acquired through means other than the adversarial process. This conception seems to be the key to *Harris v. Pounds*,<sup>49</sup> in which the court found that without expert testimony a jury in a logging community could not estimate the weight of a hardwood log that had injured an employee, because this was not a matter of common knowledge.

The traditional formulations regarding "common knowledge," which suggest that it consists of what is "notoriously true," are thus a code that refers not simply or even primarily to the number of adherents, but rather, to the lack of contention concerning particular knowledge or belief in the context of a particular case. Even where a substantial number of people in a community do know or believe a given proposition, that proposition would not be a proper subject for the jurors to "notice" if the parties' presentation of their claims makes that proposition a relevant and disputed factual issue. If the parties did not make the proposition a relevant matter of dispute, then the jurors could permissibly make use of the proposition as background knowledge, no matter how few members of the community accepted the proposition as true.

This distinction casts light on the terminology employed in the Advisory Committee notes to the Federal Rules of Evidence.<sup>50</sup> The Committee suggests that non-evidence facts "are not appropriate subjects for any formalized treatment," and that formalized treatment should extend only to "adjudicative facts."<sup>51</sup> The Committee struggles to define adjudicative facts, labelling them as "those which relate to the parties," or "those to which the law is applied in the process of adjudication," or "the facts that normally go to the jury in a jury case."<sup>52</sup> The crucial distinction is functional. It is the parties and the court who make facts "adjudicative" by identifying the contentious issues and presenting all the information they regard as relevant to those issues in an effort to convince the jury. Once the case has gone to the jury, though, facts that the parties and the court have failed to identify as "adjudicative" remain in the broad residual class of non-evidentiary

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49. 185 Miss. 688, 187 So. 891 (1939).

50. See *supra* note 5.

51. FED. R. EVID. 201(a) Advisory Committee's notes.

52. *Id.*

information and belief that jurors may permissibly employ. This functional distinction, if it is valid, does not depend on the number of people who share a particular piece of information or belief, since a fact could be non-evidentiary whether it were known to a multitude or held only in the heart of an individual juror.<sup>53</sup>

By focusing exclusively on the issue of numbers of believers who support a given proposition, Professor Mansfield has missed an important criterion concerning the operation of jury knowledge and beliefs. The "substantial number" standard could conceivably be useful in the jury selection process, insofar as it could be used to screen out potential jurors who have strong a priori beliefs regarding data whose likely relevance and disputedness make them "adjudicative facts" in the context of a particular case and insofar as those beliefs were not shared by the requisite substantial number of people in the community. The "substantial number" standard would be over-inclusive, however, in that it would dictate an obviously incorrect principle for including veniremen on juries if they held a misconception or bias also held by a substantial portion of the community. Professor Mansfield's proposal runs counter to both of the values that govern the rules of jury selection. The first is the principle of political entitlement that dictates that the jury pool should constitute a genuinely representative cross-section of the community and that veniremen cannot be disqualified simply for holding minority opinions or beliefs. The second is the sense of fairness that requires that veniremen be excluded from a given case if their preexisting knowledge or beliefs, no matter how widely shared, prevent them from hearing the case with an open mind. These aspirations of representing the whole spectrum of local beliefs on the jury and of not including jurors whose minds are closed may of course conflict. A "substantial number" standard will not resolve this difficulty. In controlling jurors' background knowledge and beliefs, a legal standard that explicitly requires open-mindedness regarding the facts and the issues involved in the case does more service and creates fewer conceptual problems than Mansfield's "substantial number" standard.

Once the trial begins, and the judge must rule on the evidence and fashion instructions to the jury, there is little justification for believing that Mansfield's "jury notice" standard reflects the existing rules or improves upon them. Since the judge cannot accurately determine what the various groups and sub-groups within the community do or do not know or believe,<sup>54</sup> she should determine what is relevant, what has significant probative value, and what requires clarification or instruction, in light of her estimate of the background knowledge and beliefs of a reasonable juror, and insofar as

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53. The highly relevant fact known only to the individual juror would replicate Gratian's problem. See *supra* text accompanying note 17. Under the traditional view of the jury, however, the juror could vote her conscience without misconduct, so long as she did not explicitly use her secret knowledge to convince the other jurors.

54. See *infra* text accompanying notes 60-63.

possible with an eye to the characteristics of the actual jurors. If the opposing counsel have done an adequate job at voir dire, the jury should not include members whose pre-existing knowledge or belief creates prejudice with regard to the issues involved in the case. Hence, the rules governing the jury's acquisition of information during the course of the trial ought to concern the jurors actually hearing the case, rather than referring to the community at large and its knowledge or beliefs. The relationships among the courtroom actors suggests that the jurors are sufficiently governed by a simple rule of passivity. Contending counsel actively present the evidence and arguments about its meaning, while the judge prevents the attorneys from employing extraneous or inflammatory information to confuse or prejudice the jury. With regard to "adjudicative facts" developed by the trial process and formally presented to the jury, the jurors are bound to use only the evidence admitted at trial, and hence may not seek or use additional information acquired once the jury has been empaneled. With regard to non-evidentiary facts each juror is entitled, as a matter of right, to understand and evaluate the case in light of the juror's individual beliefs and perceptions. For example, a member of the Flat Earth Society might be entitled to determine a murder case within the framework of a highly eccentric view of the universe so long as the curvature of the earth played no role in the disputed facts of the case. In the same murder trial, however, since the cause of death is an adjudicative fact, a former Marine should be excluded from the jury rather than being permitted to employ his specialized knowledge about strangulation to convince his fellow jurors to come to a given verdict.<sup>55</sup> In a case involving an electrical accident, a juror could not supplement his knowledge of volts and amps by reading a book about electricity during a recess in the trial.<sup>56</sup>

By the time a case goes to the jury, the realm of permissible jury background knowledge must embrace, for all practical purposes, the entire universe of information and beliefs lying outside the ambit of the "adjudicative facts" identified in the course of the trial. If the judge were presented with an allegation of jury misconduct consisting of use of impermissible background information, Professor Mansfield's standard would require the judge to inquire into the jury's deliberative process to find out what the information was, then to determine whether a substantial portion of the community shared the knowledge, and finally to establish whether the information had been used solely for building intermediate factual inferences, or for applying law to fact. Such a rule would license judicial meddling and public airing of the purposefully secret operations of the jury, and would require the judge to make distinctions about jurors' cognitive and deliberative processes that professional social scientists have been unable to make. A workable standard for jury misconduct should prevent a juror from introducing into

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55. *Hunt v. State*, 603 S.W.2d 865 (Tex. Crim. App. 1980).

56. *Thomas v. Kansas Power & Light*, 185 Kan. 6, 340 P.2d 379 (1959).

the deliberative process information not presented at the trial and yet sufficiently relevant to the issues involved in the case that the information fits within the "adjudicative facts" of the case. In order to protect the secrecy and integrity of the jury's function, however, the rule must be carefully limited to apply only to the act of using impermissible knowledge or belief to persuade other members of the jury. The scope of impermissible knowledge or belief should be restricted to data or opinions that are highly relevant to the issues being contested, are clearly in dispute, and are subject to determination to a reasonable certainty or matters conventionally recognized as not being subject to factual determination.<sup>57</sup> Justice Marshall's dissent in *Johnson v. Louisiana*<sup>58</sup> and *Apodaca v. Oregon*<sup>59</sup> is emphatic on the point that a single dissenting juror's voice is valid whether he speaks for a minority viewpoint or only for himself. Professor Mansfield's "substantial number" standard would exclude from jury deliberations the marginal voices that Justice Marshall was trying to protect, but it would not exclude erroneous beliefs, no matter how central to the case or how patently incorrect they might be, so long as a substantial number of people believed them.

### C. *The Problem of Enforcement*

My final criticism of the structure of Professor Mansfield's proposed standard for jury notice is that he offers no practical mechanism for determining whether information or belief is shared by the requisite "substantial number" of people. He addresses the problem of how the courts should apply the "jury notice" standard only in the context of a ruling on relevance or probative value.<sup>60</sup> Within that context, Mansfield suggests that "usually the judge will proceed simply on the basis of what he already knows about the community."<sup>61</sup> Such an informal determination by the judge would obviously be the quickest, least costly way of deciding whether a substantial number of people within the community possess given information or beliefs. In light of Kalven and Zeisel's impressive evidence, however, that judges and juries disagree with one another's determinations of *outcomes* in 33.8% of all criminal cases studied<sup>62</sup> and in 22% of all civil cases studied,<sup>63</sup> Mansfield's proposed enforcement mechanism inevitably raises the classic dilemma

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57. Because juries function as an ethical voice for society, and because it is precisely this function that distinguishes the jury trial as an institution, jurors' discussions of ethical considerations should lie outside the scope of judicial inquiry. The time to screen jurors for religious, political, ethical, or philosophical convictions that might subvert the role of the even-handed, open-minded fact-finder is at the jury venire, not after the case has gone to the jury.

58. 406 U.S. 356 (1972).

59. 406 U.S. 404 (1972).

60. Mansfield, *supra* note 6, at 412 n.65.

61. *Id.*

62. KALVEN & ZEISEL, *supra* note 37, at 62, Table 15.

63. *Id.* at 63, Table 16.

concerning judicial control over the jury, namely, *quis custodiet ipsos custodes?* Even if one concedes that judges necessarily impose their own patterns of knowledge and belief when they decide whether a reasonable juror could know or believe something, one is still left with the inescapable result that permitting the judge to decide under the Mansfield proposal, what information is or is not shared by a substantial number of people in the community will not produce better results than the reasonable juror standard does. If the "jury notice" standard will require a more accurate determination in order to work better than the existing legal standard, then every ruling on relevance or probative value will require some objective measurement of public opinion. The same is true of every jury instruction, every jury voir dire, and every ruling on a motion for new trial whenever a jury has used information allegedly not shared by the required "substantial number." The courts are not equipped, in time, money, or expertise, to undertake the kind of objective determinations that would be required in order to make the proposed "jury notice" standard operate more accurately than the existing reasonable juror standard. Given the enormous costs of enforcing the proposed standard in any meaningful way, the existing standard works well enough to be left in place, despite its flaws.

## II. THE CRIMINAL JURY AS A "BLACK BOX"

One of the ironies of fashioning rational legal principles to govern the operation of the criminal jury is that the values traditionally associated with trial by jury are closely involved with non-rational criteria. As Justice Holmes once observed, nobody doubts that "the jury has the power to bring in a verdict in the teeth of both law and facts."<sup>64</sup> He might have added that the jury can acquit in the teeth of all human logic or decent human values. Under the double jeopardy doctrine, no matter how eccentric a rendition of law, fact, and reason an acquittal may be, it is a final determination. Sometimes the jury can do justice where a judge, constrained by fact and law, could not.<sup>65</sup> The cases and the legal literature are replete with paeans to the jury, even in its lawlessness, as a repository of "common-sense equities,"<sup>66</sup> as "the great corrective of law in its actual administration,"<sup>67</sup>

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64. *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920).

65. Kalven and Zeisel tell about a church rector charged with statutory rape. He had confessed, and the evidence of guilt was uncontested, but the jury acquitted. The victim of the crime was a promiscuous niece who lived with the rector's family, and who had promised to get even with her uncle for trying to discipline her wayward behavior. The judge explained: "In this case of carnal knowledge, if I were called upon to make the decision I would have been compelled to hold him guilty. . . . Maybe the jury could look past the confession; the court could not. The jury . . . could conscientiously bring in this verdict." KALVEN & ZEISEL, *supra* note 37, at 278-79.

66. KALVEN & ZEISEL, *supra* note 37, at 87.

67. Pound, *Law in Books and in Action*, 44 AM. L. REV. 12, 18 (1910).



as “the mollifying influence of current ethical conventions,”<sup>68</sup> as a “safety valve,”<sup>69</sup> and as “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”<sup>70</sup> The jury’s eccentricities, inequities, and incapacities also give rise to periodic calls for its abolition in civil cases,<sup>71</sup> or for severe restraint upon all juries.

There are, of course, limits on the jury’s power, and its right, to impose its common-sense equities (or inequities) in spite of the law. In civil cases, the judge may order a new trial if the jury’s verdict is contrary to the evidence. In the criminal context, in order to protect criminal defendants from the bias, compliance, or eccentricity of lawless juries, the law has erected an asymmetrical rule, under which a judge can render a judgment of innocence despite a jury verdict of guilt, but not vice-versa.<sup>72</sup> In the overwhelming majority of jurisdictions the jury’s unreviewable power of nullification via acquittal has “co-existed with legal practice and precedent upholding instructions to the jury that they are required to follow the instructions of the court on all matters of law.”<sup>73</sup> The federal rules require judges to determine what evidence is relevant, confusing, or prejudicial,<sup>74</sup> and permit them to comment upon the evidence that is presented to the jury.<sup>75</sup> Kalven and Zeisel have demonstrated persuasively that when judges employ this power, “the momentum of the jury’s revolt is never enough to carry the jury beyond both the evidence and the judge.”<sup>76</sup> Every legal standard that permits the judge to control the jury’s knowledge, beliefs, or behavior steers the jury away from the risk of “the ultimate logic of anarchy”<sup>77</sup> that results from the jury’s sovereign power to nullify the law. Yet every measure that the law employs in an attempt to avoid the potential evils lurking behind the “extravagant powers” of the jury<sup>78</sup> trenches directly upon the jury’s role as a democratic bulwark against the arbitrary power of the state.<sup>79</sup>

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68. United States *ex rel.* McCann v. Adams, 126 F.2d 774, 776 (2d Cir. 1942) (*order set aside by* 317 U.S. 269 (1942)).

69. United States v. Dougherty, 473 F.2d 1113, 1134 (D.C. Cir. 1972).

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

71. V. HANS & N. VIDMAR, *JUDGING THE JURY* 19 (1986), quotes Judge Jerome Frank’s complaint that “juries apply law that they don’t understand to facts that they can’t get straight.” The authors also refer to Chief Justice Burger’s public comment that he would favor the elimination of trial to a jury in civil cases. For Judge Frank’s views, see *Skidmore v. Baltimore & Ohio R.R.*, 167 F.2d 54 (2d Cir. 1948).

72. FED. R. CRIM. P. 29(c).

73. *Dougherty*, 473 F.2d at 1132. The exceptional jurisdictions are Maryland and Indiana. See Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 201-04 (1972).

74. FED. R. EVID. 104, 401-03.

75. *Quercia v. United States*, 289 U.S. 466 (1933).

76. KALVEN & ZEISEL, *supra* note 37, at 427.

77. *Dougherty*, 473 F.2d at 1133.

78. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ABA REPORTS 395, 401 (1906). The most notorious of such cases in recent years arose from the unwillingness of southern juries to convict whites of crimes against blacks and civil rights activists.

79. Schefflin, *supra* note 73, at 185-88.

Clearly this is an important "fault line" in the law, where competing values and ideologies rub against one another and generate friction. The ideological claims in favor of democratic justice or against mob law should not, however, mask the fact that trial by jury operates in the interstices, asking a panel of twelve lay people to assume a task that the legislature and the courts fear to take upon themselves. The task is to create the appearance of justice so finely tuned in each case, both civil and criminal, as to do right to each and every litigant, while enforcing the moral and legal standards of the community. This function is particularly important in the context of criminal justice. Indeed, H.L.A. Hart<sup>80</sup> and J.B. White<sup>81</sup> have argued that the essential function of the criminal law is to punish offenders when, and only when, the morals of the community demand retribution or blame. The Supreme Court has made a similar point, that "[t]he public conscience must be satisfied that fairness dominates the administration of justice."<sup>82</sup> Kalven and Zeisel have made it clear that the criminal jury, by its very nature, responds more effectively to the community's sense of equity than the institutional role of the judge permits the judiciary to do.<sup>83</sup>

The price for this equitable fine-tuning on a case-by-case basis is a measure of irrationality, incoherence in the rules governing relations between judge and jury, and secrecy in the final stages of the trial process, after the case goes to the jury room. When the law asks the jurors to represent a cross-section of the community, to mollify the rigor of the law in light of their knowledge of the world and their sense of fairness, and finally to speak in a single, unequivocal voice, the rules of the game must incorporate some means of covering up the diversities and inconsistencies lurking behind the outcome. Jurors themselves appear to be unaware of the mechanisms through which evidence, background knowledge, and values become the ingredients for the verdict.<sup>84</sup> An attempt to make the jury more accountable to the court by requiring the judge to probe the jurors' use of background information and beliefs must inevitably collide not only with the jurors' inability to articulate the bases for their decisions, but also with a deeply rooted common law sensibility that "the jury, and the secrecy of the jury room, are the indispensable elements in popular justice."<sup>85</sup> Mansfield's proposal therefore risks two dangers, namely, the appearance of arbitrary judicial interference in popular justice, and the loss of the secrecy that permits the jury to pronounce inscrutable moral judgments for the community.

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80. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); H. HART, PUNISHMENT AND RESPONSIBILITY (1968).

81. White, *Making Sense of the Criminal Law*, 50 U. COLO. L. REV. 1 (1978).

82. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

83. KALVEN & ZEISEL, *supra* note 37, at 87.

84. *Id.* at 486.

85. Wigmore, *A Program for the Trial of a Jury*, 12 J. AM. JUDICATURE SOC'Y. 166, 170 (1929).

The considerations in favor of casting the jury as a "black box" are powerful ones, particularly in criminal cases, and they argue against the adoption of Professor Mansfield's proposed "jury notice" standard. Certainly after a jury has received a case, the traditional model of trial by jury leaves no room for judicial intrusion into the mental processes of the jurors.<sup>86</sup> Assuming that a legal standard for jury misconduct based on use of impermissible information is desirable, there is a more reasonable requirement than Mansfield's proposed "jury notice" standard. The better rule would be a combination of the Texas rule that jurors may testify concerning overt acts involving the use of impermissible background information that occur in the course of deliberations<sup>87</sup> and a definition of impermissible background information that refers to the "adjudicative facts" of the case. The definition of adjudicative facts is admittedly slippery, but the language at least has the sanction of the Advisory Committee on the Rules of Evidence, and would permit judges to define impermissible background knowledge within a familiar analytical framework. This formulation would prohibit jurors from introducing untested information highly relevant to the issues of the case, and would forbid jurors to try to expand upon the evidence by such dubious expedients as uncontrolled experiments purporting to test the validity of testimony presented at trial.<sup>88</sup> Restricting the inquiry to overt acts would avoid the practical and theoretical difficulties involved in probing the consciousness of the jurors and the community at large.

If the jury selection process and the adversarial presentation of the issues and the evidence are handled adequately, however, there should be little reason to worry about the jurors' post-trial use of background knowledge or beliefs. *Voir dire*, if conducted under standards requiring both full representation of the spectrum of knowledge and belief in the community and open-mindedness on the part of the jurors actually selected, should screen out potential jurors whose *a priori* beliefs would close their minds to the development of the adjudicative issues in the course of the trial. Pre-existing expertise regarding a relevant factual issue should disqualify a potential juror under a test that requires jurors to be open-minded to the arguments and evidence likely to be presented by counsel. At trial, the judge and the adversarial counsel should define the issues and sculpt the jurors' knowledge of the "adjudicative facts" through the presentation of evidence. Before the case is handed over to the jury, the attorneys argue their interpretations of the case, and the judge instructs the jury, and has the opportunity to comment on the evidence. Given all of these protections that guarantee notice to the parties, the reliability of the information imparted to the jurors, and the litigants' political

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86. Comment, *Jury Misconduct and the Statement that an Issue is Immaterial*: Flores v. Doshier, 34 BAYLOR L. REV. 657 (1982); Comment, *Invasion of Jury Deliberations: Existing Rules and Suggested Changes*, 23 BAYLOR L. REV. 445 (1971).

87. TEX. CRIM. PROC. CODE ANN. § 40.03(8) (Vernon 1979).

88. See *People v. Brown*, 48 N.Y.2d 388, 399 N.E.2d 51, 423 N.Y.S.2d 461 (1979).

entitlement to a representative, unbiased jury,<sup>89</sup> there is a strong argument for letting the jurors take with them into the "black box" of the jury room whatever information or beliefs they have gathered from their own experience or from the trial itself. Nevertheless, a standard that forbids any juror to add to the adjudicative facts does provide the means to nullify the proceedings if the pre-trial screening and the prophylactic rules fail to prevent the jurors from importing highly relevant information that has not been tested for reliability via the trial process. For sixth amendment reasons, however, a standard governing the jury's use of background information in the course of deliberations should never apply in a criminal case if the jury has returned an innocent verdict.

Finally, there is the question of cost. It is a drastically expensive proposition to suggest that a completed trial should be scrapped and a motion for a new trial granted because a juror used impermissible background knowledge. Professor Mansfield equates cost with the "convenience" of saving time and expense.<sup>90</sup> In the context of criminal law, however, the conservation of judicial resources is not the only, or even the most important, consideration of costs. If, as Durkheim suggested, criminal trials are an appeal to the morality of the community and the imposition of criminal sanctions is a means of establishing and maintaining a community of shared values,<sup>91</sup> then the inscrutable determination of the jury serves two important functions. First, the verdict, as a monolithic statement of guilt or innocence, theatrically speaks as a single voice for a united community, even if the jurors themselves or the community at large are actually deeply divided over issues that arose in the case. Second, the inscrutable jury verdict sends a message to society indicating either that the consensual moral fabric of society has been mended where it had been torn by the defendant's commission of a crime, or that this defendant did not tear the fabric at all.<sup>92</sup> Insofar as the criminal process serves as a theater of social consensus, it is important to close cases as fairly and expeditiously as possible, and to question jurors' conduct only in the most egregious of circumstances, so that criminal justice can "satisfy the appearance of justice."<sup>93</sup>

In light of the enormous social and economic costs involved in granting repeated jury trials, only the most flagrant juror misuse of impermissible background information justifies granting a new trial for jury misconduct. Arguably, at least, the existing rules do an adequate job of restricting the jurors to their "black box" functions. The existing procedural controls upon

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89. Cf. Mansfield, *supra* note 6, at 396-402.

90. *Id.* at 397.

91. E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 108-09 (1933).

92. For a similar analysis of the message-sending function of verdicts, see Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

93. *Offutt v. United States*, 348 U.S. 11, 14 (1954).

the jury possess the additional merit of studiously avoiding any intrusion into the purposefully inscrutable operations of the criminal jury.

Professor Mansfield's proposed standard for "jury notice" does not offer a sufficient gain, in terms of reliability, notice to the parties, or political entitlements, to justify either its costs or its inescapable judicial intrusions into the jury's traditional and useful function as an inscrutable "black box."

### CONCLUSION

Trial by jury holds a distinctive place in the American system of justice. The right to a trial by a jury of one's peers is widely regarded as one of the most valuable and least controversial of a citizen's rights under the Constitution. Yet the jury trial is not a static phenomenon. The form and function of the common law trial by jury have evolved through the centuries, from the twelfth-century panel of local notables who brought to the trial their intimate knowledge of the parties and the facts, to the quite modern body of disinterested citizens who ideally come to the jury venire knowing nothing about the "adjudicative facts" in the case. Arguably, the single constant factor in the evolution of the common law jury has been the law's dependence upon the jury's pronouncement of the community's judgment as the necessary condition for setting in motion the state's retributive, prohibitory, or coercive mechanisms. Our constitutional jurisprudence takes very seriously, at least on a theoretical level, the notion that this "judgment of the community" must be pronounced by jurors drawn from a cross-section of society, without systematic discounting of minority voices. The Constitution also protects the criminal defendant against judicial attempts to infringe upon the jury's absolute power to acquit, despite the law and the facts. Even in civil cases, the traditional control upon the jury's waywardness has been the award of a new trial if the verdict has gone against the weight of the evidence, rather than an intrusion into the mental processes of the jurors. Both the appearance of justice and the substantive functions of the jury require the law to protect the operation of the jury against overreaching judicial intrusions. A standard for "jury notice" that empowers judges to peer into the hearts and minds of jurors and of the society as a whole, and to exclude minority beliefs as such, would violate constitutionally guaranteed rights and would tear away the veil of secrecy that protects the essential functions of the jury, especially in criminal cases. Contrary to Professor Mansfield's view, it is the particular genius, and not some peculiar oversight, of the law that has led judges and jurists to look with studied indifference upon the question of what non-evidence facts the jurors may bring to court with them.