The use of personal knowledge and belief by jurors and juries

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Abstract

This research aims to generate a theory of juror and jury decision making that adequately accommodates and explains the role of personal knowledge and personal belief in the jury process and trial outcomes. In over sixty years of jury research, there has been surprisingly little focus on this aspect of juror and jury decision making. The judiciary acknowledges that jurors’ use of their background knowledge and common sense is legitimate in most cases. However, actively investigating, and seeking out, new information is not. The distinction between the two may seem obscure or unimportant to jurors. The advent of the internet has made it much easier for individual jurors to conduct their own research and to thereby access and utilise information that comes from non-trial sources. The judiciary views this as a growing and disturbing trend that can lead to miscarriages of justice.

To understand the modern types of juror misbehaviour, it is useful to look at juror misbehaviour in its broader context. Doing this would enable researchers to seek to understand how, when and why jurors and juries use personal knowledge and belief in the decision making process. This understanding could then lead to the development of a theoretical framework of juror and jury decision making.

Using grounded theory methodology as advocated by Strauss and Corbin (1998), I used a qualitative approach in researching this problem. I analysed a large set of data comprising reminiscences created by, or in several cases with the assistance of, jurors. These jurors had participated in actual trials that took place in the United States of America and England over a period of more than four decades. The aim was to generate theory rather than to test it. However, the theory is derived from, and is consistent with, an extensive dataset of published juror memoirs that has largely been ignored by the academic community. The theory, grounded in that data, clearly possesses sufficient verisimilitude to warrant further consideration and testing.

The theory posits that jurors utilise a large toolkit of schemas and tools. Using these they make extensive use of personal knowledge and belief in the decision
making process. This knowledge and belief has numerous uses and comes from many sources—including investigations and experiments undertaken during the course of the trial. This is not a new phenomenon. What is new is the means of accessing information.

Jurors are sometimes subversive of the legal culture and, ironically, this is a byproduct of their diligence. To ascertain the truth, jurors have been willing to blatantly disobey judge’s instructions to not investigate. Driven by a powerful epistemic objective they are drawn to an active, investigative role—both individually and as a collaborative group. Such behavior is more likely when cases are difficult to decide—for example when a prosecution case is neither overwhelmingly strong nor patently weak.

This thesis presents the idea of the Jurors’ Toolkit as a large group of tools that jurors use—individually and in combination—to help them reach a decision in a case. These include mental schema, reasoning tools, heuristics and other internal mental mechanisms. Associations between the individual elements in the toolkit are explored—as are the relationships between those elements and external factors. Relying upon personal knowledge and belief—which is inescapable; and individual preferences for different schemas and tools—gives juror decision making a highly individual character. This thesis shows that no current model of juror and jury decision making can adequately account for all instances of it. However, the Narrative Construction Model, and Devine’s (2012) more recent Integrative Multi-Level Model, enjoy a fair measure of empirical support. Most such models are idealised. They erroneously assume that juror and jury decision making is a methodical, logical process applied to a clearly defined set of trial inputs that include evidence, judge’s instructions and attorney addresses. The analysis of data for this thesis shows that quite frequently jurors use other cognitive modes—including intuition and heuristics—and consciously or unconsciously make extensive use of personal knowledge and belief.

By explaining the important role of personal knowledge and belief, the theory developed in this thesis constitutes a significant step on the path to understanding how jurors and juries arrive at verdicts. The theory highlights some unresolved issues in the literature. Different demographic groups often
carry very different knowledge and belief into the jury room. The theory helps explain the weak correlations that exist between verdicts and jury demographics—such as race and gender composition. It better explains judge–jury verdict concordance—an accepted indicator of jury competence. Jury verdicts are generally sound. But juries can sometimes disagree with judges because they are using knowledge or belief entirely unknown to the judge.

Nothing in this thesis should be interpreted as a criticism of the jury system. Juror memoirs make it plain that most jurors are diligent and reliable, and strive to be accurate. That they sometimes stray from their proper role is evidence of the power of their drive to discover the truth.
Chapter One: Introduction and outline of the chapters

In Dallas, Texas in 1964 a jury was empanelled in the case of the State of Texas versus Jack Ruby. This was no ordinary trial. Ruby was the alleged murderer of Lee Harvey Oswald, the assassin of President Kennedy. Ruby pleaded not guilty by reason of insanity. The jury heard many days of complex medical evidence called by both the prosecution and defence on the issue of whether he had been suffering from a rare form of epileptic seizure when he shot Oswald. The shooting was admitted and was indeed televised live at the time. Thus, the question of insanity was the only significant issue that the jury had to decide when determining whether Ruby was guilty or not guilty. The expert witnesses on both sides were highly qualified neurologists and psychiatrists—some of the best in the country. When it came time to deliberate, the foreman, Max Causey, asked the jury whether they wanted to discuss the issue of insanity. Amazingly, no one did. Ruby's guilt was determined in an incredibly short time in a deliberation which bypassed the single issue relevant to guilt—an issue that had been the subject of intense forensic debate and scrutiny. Why did the jury do this? According to the foreman, jury members had seen epileptics and seizures and knew what they were like. One had grown up with an epileptic cousin (Causey and Dempsey 2000, p. 157).

Some thirty years later, a jury was empanelled in Los Angeles to decide the guilt or innocence of OJ Simpson, a famous athlete and actor. Like the jury in Dallas, this jury was sequestered for the entire period of the trial so as to ensure that there could be no external influence upon the jurors. Similarly, the trial featured extremely complex scientific evidence. In this case, there were many issues and an enormous amount of evidence—far too much to hear in a matter of weeks. The trial lasted for approximately nine months. When it came to deliberation, this jury—like its Dallas predecessor—adopted a style of deliberation that discouraged robust discussion of the evidence. It was verdict driven meaning that the jury voted very early and at intervals thereafter until it reached consensus. This jury deliberated for less than four hours—a remarkably short time given the volume of evidence heard and the number and complexity of the issues. Simpson was acquitted (Bugliosi 1997).
It is likely that in the OJ Simpson trial many of the jurors were very strongly influenced by pre-existing beliefs about the trustworthiness of police (Aranella 1996, p. 355) and indeed by beliefs about Simpson himself. According to one poll (Bugliosi 1997, p. 74) seventy-five per cent of African–Americans believed that Simpson was framed. Eight of twelve jurors were middle-aged African–American women. Contemporaneous polling showed that Simpson’s strongest supporters belonged to this sub-group. A very large proportion of them believed him to be innocent even though the evidence against him was strong (Thagard 2003, p. 362).

In both cases, it appears that the jurors’ personal knowledge and belief—the knowledge and belief that they carried into the court before the trial started—played a significant role in decision making. It may have been critical.

Were these cases atypical? Do jurors frequently use personal knowledge and belief in ways that are critical to the outcome of a trial? Researchers have looked at related but more limited issues such as the effect of exposure to pre-trial media publicity. But surprisingly, little systematic research has been undertaken into the use of personal knowledge and belief in juror and jury decision making.

The discussion below outlines the research question and includes a definition of personal knowledge and belief that underpins the research question, methodology and theory development.

**Research question**

This thesis explores the when, how and why of juror and jury use of personal knowledge and belief in decision making. It is an important question. In investigating it, the author posed the following research question: when, how, why and to what extend do jurors and juries use personal knowledge and belief in decision making? What are its sources? How important is it to the verdict? The author isn’t aiming to look for a simple descriptive answer. Rather, the aim is to find an answer that can accommodate juror and jury decision making into an appropriate theoretical framework.

**The concept of personal knowledge and belief**

It is important to define clearly what is intended in this thesis by representing knowledge and belief as personal. Personal knowledge and belief includes
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everything that jurors know or believe excluding the material provided to them through the trial process. The terms ‘extra-legal’, ‘extra-judicial’ and ‘non-trial knowledge and belief’ may also be used. They consist of things separate to what is said and shown in court by trial participants. Importantly, they incorporate both pre-existing knowledge and belief, and things that jurors learn during the trial in unconventional ways. These can include, for example, conducting their own research and undertaking their own investigations.

Personal knowledge and belief can take many forms and have many sources. A juror may, for example:

- conduct personal research or investigation in the course of the trial
- absorb information through exposure to media coverage before or during the trial
- use his or her personal expertise and erudite knowledge in some area to evaluate trial evidence or even to substitute for it
- consult a law book to gain a better understanding of critical legal terms
- research a defendant’s history on the internet.

And, in some rare cases, a juror may have some direct knowledge of a fact in issue.

The importance of the question

The judiciary has expectations and rules about the use of personal knowledge and belief. Existing models of juror and jury decision making also include assumptions about this use. Yet the how, when and why of jurors’ use of their own knowledge and belief has largely been overlooked as a research topic. So the expectations and assumptions have not been properly tested. The need to explore this area is now pressing if only because of the availability of new and powerful internet-based epistemic tools. Search engines, such as Google Search are making it much easier for jurors to augment trial evidence and materials with the results of their own research.

According to Brickman, Blackman et al (2008, p. 288), the very existence of the internet is antithetical to the controlled flow of information upon which the trial process depends. There is a cultural expectation that we can obtain significant
amounts of information on almost any topic. This expectation may be interfering with the workings of the courtroom (Brickman, Blackman et al. 2008, p. 288). Conducting online research and communicating about confidential matters appears to be increasing among jurors (Goldstein 2001, p. 589; Hoffmeister 2010). It may even be reaching epidemic proportions (Artigliere 2011, p. 637). Indeed, the term 'Google Mistrial' has become part of our language, and internet-enabled jurors have caused major concern among courts and legal scholars (McGee 2010, p. 310).

This concern is realistic; there is now a very large body of research showing that exposure to pre-trial media publicity can influence juror decision making (Steblay, Beserevic et al. 1999; Devine 2012, pp. 72–7; Ruva and McEvoy 2008). What is true of media publicity could surely be true also of extrinsic information from other sources—including modern digital media.

The dangers are obvious. Juror misuse of electronic media has resulted in mistrials, leading to delay and great expense in the administration of justice (McGee 2010, p. 302). Jurors may access material that is strictly inadmissible and highly prejudicial to one or more parties. Information on the internet can be inaccurate or incomplete and biased opinions can be presented as objective information (Ross 2009, p. 1). In doing their own research, jurors usurp the judge's role because the judge is supposed to decide what evidence is admissible and what is inadmissible. The exposure to extraneous information not presented as evidence—and not subject to testing by cross-examination—can, and does, contaminate verdicts (Gershman 2005, pp. 325–8). This is true irrespective of whether jurors use or do not use modern technology in their investigations and research.

There is no hard data about the prevalence of jurors accessing the internet to do their own research. But the frequency of news reports suggests that the behaviour is common (Brickman, Blackman et al. 2008, p. 292). Many judges warn jurors to ignore information that they have acquired from outside the courtroom (Ross 2009). Such admonitions may not have much effect. Some research suggests that jurors are inclined to deliberate using whatever information they regard as relevant and to evaluate and interpret evidence using previously acquired knowledge and belief (Diamond and Vidmar 2001, p. 1861).
Given that the phenomenon of jurors accessing extrinsic information has become a significant problem—and one that threatens proper and fair court process—efforts to better understand the behaviour are required. Without a better understanding, it is difficult to know how the tendency can be curbed—if indeed it can be curbed.

That is the problem. Juror misbehaviour, as outlined above, threatens the reputation and integrity of the justice system. But the problem must be put into proper perspective. This behaviour by jurors can be viewed as an instance of a more general phenomenon that is neither new nor necessarily improper. The examples about the Ruby and Simpson trials show that jurors and juries used personal knowledge and belief without the benefit of modern technology.

The proposition that jurors will use certain things that they know and believe cannot be doubted. All decision makers, including jurors, are influenced by their background and their experiences (Diamond et al. 2014, p. 891; Diamond and Vidmar 2001, p. 1861). Jurors do, and indeed must, use their knowledge of the social and physical worlds. Up to a certain point, that behaviour is regarded as entirely appropriate and indeed necessary. Jurors are sometimes instructed that they can use their everyday experience and knowledge (Mushlin 2007, p. 242).

According to one American Appeal Court:

> The law is well established that the jury has a right to consider the evidence in light of its own knowledge and observations in the affairs of life.¹

For instance, a juror hearing a criminal case is expected to have—and entitled to take into account—knowledge that:

- a gunshot can maim or kill
- a motor vehicle driven at speed can endanger road users; and
- alcohol consumption can cause anti-social behaviour.

Gershman (2005, p. 331) expressed the issue clearly when he said:

> Jurors do not live in capsules. It is not expected that jurors should leave their common sense and cognitive functions at the door before entering the jury room. Nor is it expected that jurors should not apply their own knowledge, experience, and perceptions acquired in the everyday affairs of life to reach a verdict. However, a juror’s procurement of new knowledge gained through

extra-judicial means may contaminate the deliberations and upset the verdict. The line between the two sources of information, needless to say, is not easily drawn.

What Gershman is saying is that, beyond a certain point, the use of personal knowledge and belief is deemed inappropriate under the norms of legal culture. Indeed, subject to some exceptions, it is a fundamental precept that a court decides the case on the evidence before it—not on extraneous material (McGee 2010, p. 303; Mushlin 2007, p. 241). Sometimes this principle is enshrined in statutory law. Section 68C of the Jury Act, 1977 (NSW) is an example. It provides:

68C Inquiries by juror about trial matters prohibited

(1) A juror for the trial of any criminal proceedings must not make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror.

A violation of this provision is a criminal offence. However, making an inquiry is not the same as using pre-existing personal knowledge and belief.

Clearly, the judiciary expects that jurors will base their decision on the evidence but that they will also use their everyday knowledge and common sense. Nonetheless, courts have struggled to draw the line between the permissible and impermissible use of personal knowledge and belief (Kirgis 2002, pp. 505–15; Gershman 2005, p. 331). This is particularly true when jurors rely upon their pre-existing special knowledge or expertise (Diamond et al. 2014, p. 893). Such behaviour is less likely to be viewed as misconduct than jurors seeking out new information during the trial. Courts are likely to view behavior as misconduct when there is reliable evidence of jurors actively seeking out information (Diamond et al. 2014, p. 892). There is really no evidence as to how, or even if, jurors attempt to distinguish permissible and impermissible uses of personal knowledge and belief. There is also abundant evidence, as stated above, that some wilfully cross that line.

To understand the modern types of juror misbehaviour discussed above, it is useful to look at the behaviour in its broader context. Such an examination potentially enables researchers to seek to understand how, when and why jurors and juries use personal knowledge and belief in the decision making process. The results then enable researchers to develop a theoretical framework of juror and jury decision making.
There are several additional reasons why this research is important. First the jury is a valued institution that is in some respects still poorly understood (New Zealand Law Commission pp. 32, 1998). Any research that enhances understanding of the workings of juries is valuable in itself. The judiciary is an important democratic organ so the research is important because of the jury’s importance as part of the judiciary. It is also important because of the:

- intense pressure that the criminal justice system is experiencing in many countries in the common law world
- complexity of modern trials and trial evidence
- increasing insistence that organs of government should improve their productivity and efficiency (Sackville 2003); and
- attempts to improve the jury system which are arguably hampered by an inadequate understanding of how juries function.

The jury system has been the subject of much criticism over many years (Dann and Logan 1995; Penrod 1997; Hans 2002, p. 86; Elrod 2011, p. 305). It is difficult to assess whether such criticism is justified in the absence of a detailed understanding of how juries work and what may make them work more efficiently. For some years there has been much interest in helping jurors and juries with their valuable task (Dann and Logan 1995; Chomos et al. 2010). Assisting the jury is very difficult without an adequate understanding of all aspects of jury decision making. Indeed, jury reform in the United States has at times followed on empirical studies of jury functioning (Hans 2002, p. 89). This study enhances our understanding of the jury and suggests that greater measures are needed to educate jurors about their role.

The next section of this chapter briefly discusses the current state of knowledge about this aspect of juror decision making.

**Current theory and knowledge about the use of personal knowledge and belief**

Existing models of jury decision making attribute a role to the use of personal knowledge and belief although that role is generally minor. A well-known and respected model is the Narrative Construction Model. According to this model, personal knowledge, and indeed belief, enable jurors to fill in gaps in stories that
they construct. This includes knowledge about the social and physical world and strategic knowledge about how to construct stories (Hastie, Penrod and Pennington 2002, p. 18; Diamond and Vidmar 2001, pp. 1858–62). Jurors use their shared common sense and personal experiences to help them complete narratives (Ellison and Munro 2014, p. 20).

The Director’s Cut Model recently developed by Devine (2012, pp. 186–201) is one part of a sophisticated two-stage model of juror and jury decision making. Building on research about human cognition, the model posits that a mental representation of what happened is built in the juror’s mind by interplay between the evidence and what the juror already knows. Two very important internal schemas are scripts and stereotypes that jurors take into the trial which help them to build a representation of real events from the evidence. The judiciary’s expectations about jurors’ use of personal knowledge and belief was summarised above. It appears that the theorised use of personal knowledge and belief in the respected Narrative Construction Model, and the recent and somewhat similar Director’s Cut Model, accord reasonably well with those expectations. But what does ongoing jury research reveal?

Much remains unknown about the use of personal knowledge and belief by jurors and juries. Jury research is fraught with difficulty at the best of times. However, this particular topic has been largely overlooked. Part of the problem is that undertaking jury research is made difficult because of the legal cultural norms and rules surrounding the jury. The common law jury is a highly valued but inadequately understood institution. The value attached to the jury, and the strong sense of mystery that surrounds its functioning are clearly connected. The process of jury decision making must remain secretive if its integrity is to be preserved. In its 1998 discussion paper on Juries in Criminal Trials, the New Zealand Justice Commission (NZLC pp32 1998 p. 17) reported:

At present we know very little about how juries operate in New Zealand. Jury deliberations are secret and no reasons are given for verdicts. This statement is perhaps overly pessimistic and, in any event, is less true in 2014 than when it was made. Much is known about some aspects of jury decision making. Furthermore there is no reason to think that Antipodean juries operate uniquely. Indirect research of trial variables and verdicts—and the study of
mock juries—have yielded some valuable knowledge (Devine, Clayton et al. 2001; Devine 2012; Darbyshire, Maughan et al. 2002). There has been research, particularly in the United States, of factors that can affect verdicts and of the influence of such things as jury size and decision rules. There has been ongoing research and controversy about the effect of juror variables—including race, gender and socioeconomic status and some correlations between these variables and verdict preferences have been shown (Darbyshire, Maughan et al. 2002; Devine 2012, pp. 91–121). Hans (2007, p. 581) says that we now have substantial knowledge about how juries function.

But gaping holes in our knowledge remain and jury deliberation in particular is very much like a black box (Moore 2000). To preserve the integrity of the jury system, there are laws in existence that frustrate attempts to study deliberation closely and directly (Cameron, Potter et al. 1999, p. 129). In the United States, early researchers who taped jury deliberations provoked public outrage and Government censure (Hans and Vidmar 1986, p. 99). There are now explicit laws in common law countries that prevent the kind of direct research in which those persons engaged.² An example of such a law is section 68A of the *Jury Act, 1977* of New South Wales.

It is possible to examine the inputs to, and outputs from, the black box and to thereby gain some understanding of it. But it is rare to be able to directly scrutinise what goes on inside the box. Attempts to study jury deliberation through the use of mock juries have undoubtedly yielded valuable insights. But such studies are often criticised on methodological grounds and their external validity is sometimes hard to demonstrate (Weiten and Diamond 1979; Bornstein 1999). Utilising other approaches to research may help to augment our knowledge of juries.

The impediments to jury research mean that some issues have been inadequately explored. The fundamental research topic of this thesis is the use of personal knowledge and belief by jurors and juries. It has received little attention in over fifty years of intensive study of juries. Certainly the role of prejudice has been studied (Mitchell, Haw et al. 2005; Darbyshire, Maughan et al.

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² There have been a very few instances in the United States where special permission has been given for monitoring of actual jury deliberations (Manzo and Maynard 1993; Diamond and Vidmar 2001).
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2002)—but that is only one kind of belief. The effect on jurors of exposure to pre-trial publicity has also been studied (Ruva, McEvoy et al. 2007)—but that is only one kind of knowledge.

As explained in the next chapter, jury research has consisted largely of academic studies, mostly in the United States, and large-scale surveys conducted by government and other institutions. Some things are known about jurors’ use of personal knowledge and belief. This knowledge has resulted from surveys of jurors that have occurred in different countries over many years. The New Zealand Justice Commission examined juries in criminal trials and took some interest in jurors using their own knowledge and even conducting their own research and investigations. Conducting personal research and investigation was regarded as a violation of the rules. However, the commission found that such behaviour was rare and that jurors who did it did not seem to appreciate that they were violating the rules. There was, however, a more innocent use of personal knowledge and belief that was not regarded as inappropriate. The commission referred to such knowledge as background knowledge although some of it would not be regarded as everyday knowledge. It included such things as the signs of schizophrenia and financial practices in the building industry (NZLC pp37 1999).

A useful source of knowledge about jurors’ use of personal knowledge and belief is the jurisprudence, in particular decisions of appeal courts—mainly in the United States—and academic commentaries on that jurisprudence. Occasionally, details of jury deliberation become known to the parties. If there is evidence that a juror has been guilty of misconduct, this can result in a successful challenge to the verdict. Numerous such challenges have been mounted in the United States. These have arisen out of:

- improper jury investigations, experiments and research; and
- the inappropriate use and sharing of expert knowledge by jurors (McGee 2010, p. 302; Gershman 2005, pp. 325-8).

Chapter Two examines the jurisprudence more closely. However, it is worth foreshadowing that the jurisprudence reveals little about the frequency of such
juror misconduct, the reasons for it, or even the effect of exposure to knowledge illicitly gained.

The discussion thus far in this thesis can be summarised in three main propositions. Firstly, the large increase in jurors conducting research online invites a close examination of the more general phenomenon of jurors utilising their personal knowledge and belief in decision making. Secondly, there has been surprisingly little research into this topic and such research is overdue. Thirdly, an improved understanding of how juries operate could help to strengthen this important democratic institution.

The first section of this chapter stated the research question, explained the importance and relevance of the research, and the state of existing knowledge. In the next part of the thesis the author outlines the contribution that the thesis makes to knowledge of the jury.

**Contribution to knowledge**

This thesis presents a theory about the use of personal knowledge and belief in juror and jury decision making. That theory is derived from a large dataset comprised of published juror memoirs. Being grounded in that data, the theory enjoys a large measure of verisimilitude. What are described as findings relate to the large dataset that was analysed. The application of the findings—and indeed theoretical postulates — to the universe of jury trials, will require further testing.

This thesis makes a significant contribution to knowledge about juries by developing a theory about juror and jury decision making that adequately accounts for the use of personal knowledge and belief. Indeed it shows that sometimes these things are nearly as important as trial evidence. The understanding of jury deliberation is expanded by showing that there is a very informal and unstructured style of deliberation. This style has not hitherto been acknowledged in the extensive jury literature. Juries adopting this approach are likely to become particularly creative and to discover new information not adduced at trial. This thesis demonstrates the surprising fact that jury disobedience—far from being rare—is very common and probably always has been. It is frequently a jury’s response to a judge’s decision— generally not properly explained—that frustrates the jury’s desire to ascertain the truth. Jury
disobedience is often a kind of misguided or misdirected diligence. Indeed, this study supports the view of Keene and Handrich (2009) that such behaviour can be driven by both curiosity and naiveté. It is not a new phenomenon although it is becoming highly problematical in the age of the internet and social media.

The author demonstrates that the extent of judge–jury disagreement over verdicts has not been fully explained because of researchers’ failure to consider the effect of jurors’ personal knowledge and belief. The explanation of disagreements is one of the most important topics in the field of jury studies because of its obvious relevance to the issue of jury competence. Indeed it was a major focus of one of the first and most frequently cited studies, the Chicago Jury Project (Kalven and Zeisel 1966). Current explanations of judge–jury disagreement completely overlook the possibility that jurors and juries supplement the evidence by making significant use of personal knowledge and belief. The thesis also posits an alternative theory on the relationship between juror demographic characteristics such as race and gender and the verdict. In this theory demographic groups frequently carry into the jury room, and use, personal knowledge and belief specific to their group. Demographic diversity is valuable to the jury not only because it counterbalances prejudices but also because it supplements the jury’s total knowledge.

This research illuminates enduring mysteries. These include the puzzling, but consistent, finding that juries are generally competent and render appropriate verdicts even though they have a poor understanding of the judge’s instructions about applying the law.

This thesis presents cogent reasons for thinking that some current models of jury decision making are wrongly premised on the assumption that juror and jury reasoning are purely rational. Such models propose that jurors make decisions using a methodical, logical and deliberative style of thinking that is applied to a clearly defined set of trial inputs. These include evidence, judges’ instructions and attorney addresses. Although most verdicts are overwhelmingly sound, the process of arriving at an individual decision can be characterised by a range of factors including strong emotion or passion and the frequent use of dual processing.
The decision-making of jurors can involve such things as:

- intuition
- heuristics
- flashes of insight; and
- visceral judgements

that counterbalance and complement the slower, more deliberative style of reasoning that they also use.

In this sense, juror thinking is much like other kinds of thinking. Much decision making in the real world involves a blend of these different styles of thinking (Sadler-Smith and Shefy 2004).

Jurors often endure very difficult conditions including:

- information overload
- time pressure
- extreme cognitive complexity; and
- emotional distress.

These conditions conduce to the use of heuristics and often foster an intuitive approach to decision making. These fast modes of cognition often rely heavily on personal knowledge and belief.

Most importantly, the thesis introduces the notion of the Jurors’ Toolkit. This is a large set of mental schemas and tools that are used individually, or in combination, by individual jurors and indeed juries. The discussion delineates the factors that influence the selection of different schemas and tools. Many of these schemas and tools rely on personal knowledge or belief to a greater or lesser extent. The schemas and tools are manifold and their use by jurors and juries suggests that decision making cannot be described by a single, simple model. Similarly, the thesis postulates that narrative construction, although frequently utilised, is better described as a meta schema or meta tool than as a model of universal application to juror decision making. Some trials do not lend themselves to that approach and some jurors favour other approaches.
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This research greatly assists the evaluation of different models and could further assist attempts to build better models. Most current models lack empirical support, are idealised, ignore recent findings about different modes of cognition, and attribute a fairly minor role to the use of personal knowledge and belief. The Jurors’ Toolkit is a unifying concept in jury research. It shows that different models are accurate in different circumstances. However, no model is universally applicable.

This research fills a significant gap in our current understanding of how jurors and juries operate.

**The domain—a description of the jury trial, its salient features and the legal culture surrounding it**

It is appropriate to define the domain of the study by explaining exactly what is meant by the terms ‘jury’ and a ‘jury trial’. Similarly, it is also necessary to say something about the legal culture surrounding a jury trial because it impacts on the way that the jury functions (Cornish 1968). The design and interpretation of jury studies also seem to have been influenced by the legal culture.

Many of the features of a jury trial are uniform across jurisdictions and have persisted for a long time. A jury is a body of laypersons summoned to assist a court to render a verdict (Hans 2008; Vidmar in Vidmar ed. 2000, p. 1). It can operate in both civil and criminal matters. In some places, for example, South Australia, it only functions as part of a criminal court hearing serious charges. It is subject to some variation from one jurisdiction to another. Such juries operate throughout the common law world which consists of the United Kingdom and those countries which inherited its legal system. These countries include the United States, Canada, New Zealand and Australia. There are different sorts of juries in other parts of the world, but this thesis focuses on the jury in common law countries (Vidmar in Vidmar ed. 2000, p. 3).

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3 The story model introduced by Hastie and Penrod (2002) is, on the researcher’s own admission, idealised. It does, however, enjoy significant empirical support, unlike mental meter models which view jurors as human calculators of various probabilities. Proponents of the narrative model, for example Bothwell (Abbott ed. 1999) acknowledge that pre-existing beliefs, attitudes and stereotypes are used by jurors to organise and evaluate information and to fill in gaps in narratives. The Director’s Cut Model developed by Devine (2012) is similar to the Narrative Construction Model and is notable for its more realistic acknowledgement of the use of personal knowledge.

The jury is subject to control by the judge (Marder 2005, pp. 118–20). It must deliberate in private and there must be no attempt to interfere with its deliberations (Marder 2005, p. 147). It hears evidence and then reasons to a verdict based upon its understanding of the relevant legal principles and instruction by the judge. The jury can hear and consider only the evidence that the judge rules to be admissible. It must invariably resolve factual issues (Marder 2005, p. 7; Abramson 1994, pp. 9, 88-90), accept the law as it is explained by the judge and apply it to its factual findings (Marder 2005, p. 8).

In most jurisdictions, there are two possible verdicts in a criminal trial— a verdict of guilty and a verdict of not guilty. In some states of the United States juries in capital cases also have the function of determining whether or not a death sentence will be imposed (Sundby 2007; Barner 2013, pp. 2–3). In a civil trial, it determines whether the defendant is liable, for example, to pay damages to the plaintiff and, if so what quantum of damages (Vidmar in Vidmar ed. 2000, p. 1).

The number of jurors varies from place to place (Marder 2005, pp. 29–30; Vidmar in Vidmar ed. 2000, p. 26). The size of the jury is generally between four and fifteen persons. In a criminal trial, a jury typically consists of twelve persons (Marder 2005, p. 29–30; Vidmar in Vidmar ed. 2000, p. 26; Vidmar 2011).

The jurors vote for a preferred verdict. There is no requirement that they use a secret ballot. Juries deliberate in private and must not discuss the case with non-jurors (Marder 2005, p. 147). There are variable rules about the size of the majority needed to support a verdict (Vidmar in Vidmar ed. 2000, p. 26) and about the level of satisfaction that a jury must feel before delivering a verdict (Marder 2005, p. 9). The civil standard of proof is based on the balance of probabilities and is patently lower than the criminal standard of proof which requires proof beyond reasonable doubt (Vidmar and Hans 2007, p. 129).

The jury is expected to be relatively passive during the evidence phase (Vidmar in Vidmar ed. 2000, p. 14; Diamond and Vidmar 2001, pp. 1859–62). Its task is to observe and not to make any judgement before the evidence has concluded. The jury is not allowed to conduct its own investigations (Marder 2005, pp. 31–3). In most jurisdictions, until quite recently, jurors were not allowed to take notes or

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5In Scotland, a verdict of not proven is a third possibility (Duff in Vidmar ed. 2000, p.272).
ask questions—although those rules have now been relaxed in some places (Miller-Stover 1999; Marder 2005, pp. 31–3). The members of the jury are not required, or indeed expected, to possess specialist knowledge relevant to the issues at trial (Marder 2005; Diamond and Vidmar 2001).

The jury is tightly controlled by a judge, other legal officials and by legal culture and tradition. During the deliberation phase of a trial, or even before that, it may be sequestered from the rest of the community to ensure its independence from outside influence (Marder 2005, p. 150).

In theory, a jury is representative of the local community in which the events giving rise to the trial occurred (Marder 2005, p. 47; Abramson 1994, p. 99; Vidmar 2011). To achieve this, jurors are selected at random—generally from electoral rolls or other public registers. However, parties to the dispute have certain rights to object to individual jurors or potential jurors. Nonetheless, the jury population is not quite representative of the adult population in any jurisdiction because certain groups are less likely to enroll to vote or are more likely to be excluded (Marder 2005, pp. 50–85; Dann and Logan 1995, p. 284). People can be excluded, for example, because of their profession or because they have been convicted of felonies (Simpson 1958; Marder 2005, pp. 50–85).

Not all of these features of a jury are true in all cases at all times. For example, lawyers and judges are traditionally excluded from jury service in most jurisdictions. However, in some parts of the United States, jury selection rules have been relaxed (Munsterman 1995, p. 217) and even judges have served on juries (Hans and Vidmar 1986, p. 54). But the above features are true of most juries in most jurisdictions.

**The legal culture**

The legal culture is important to the functioning of the jury. There has already been some discussion about the expectations of the judiciary. This is an aspect of the culture. Since the culture is referred to many times, it is appropriate to say a few introductory words about it. It is the source of some untenable assumptions about how juries work; embodies rules that greatly restrict jury research; and has influenced the design, and even the interpretation, of jury studies.
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The rules governing the jury are an expression of judicial culture (Cornish 1968). They reflect the assumptions and deeply held beliefs of judges and lawyers. Cornish (1968), noted that lawyers’ and judges’ assumptions and beliefs about juries, that is their cultural beliefs, are enshrined in exclusionary rules of evidence. This has created a direct link between legal culture and control of juries. An obvious example is the rule of evidence that generally excludes, in a criminal trial, any information about past offending by the defendant (McNamara 1985, pp. 356–8). This reflects an enduring belief that such material would unduly prejudice juries.

Schein (1997) identified three layers of culture in any organisation. The first consists of artifacts—that is, things that immediately meet the eye; the second consists of espoused values; and the third of tacit assumptions. According to Bennett (2009b, p. 367):

Schein’s model (1997) reflects three levels of organizational culture. The first level, artifacts, includes the physical surroundings, presentation of the company, daily behavior and processes. The second level, espoused values, is what the organization says is important, as in mission statements. The third level, shared tacit assumptions, reflects the very deep beliefs, values, and assumptions that are linked to the history of the organization and collective learning over time. When there is a differential between what an organisation says and what it does, it is often due to embedded assumptions that hold hidden control over decisions and actions.

The impact of its culture on the functioning of an organisation can be considerable. According to Schein, culture is to a group what personality is to an individual (1997, p. 8). It can guide and constrain the behavior of a group by providing shared norms. In this context it is reasonable to propose that legal culture affects the behavior of jurors and juries.

As noted above, a salient feature of the jury system is the requirement that jurors will base their decision on nothing but evidentiary and other material provided to them in the trial (McGee 2010, p. 303; Mushlin 2007, p. 241). In much earlier times, the culture was quite different; the juror’s qualification was local knowledge. Living in the area where the disputed matters occurred, and rubbing shoulders every day with the protagonists, the juror possessed pertinent knowledge (Vidmar and Hans 2007, p. 24). In its original conception, therefore, the jury was constituted of persons who had a knowledge qualification—possibly because they had witnessed matters in dispute. Furthermore, they were
expected to actively investigate matters of which they had no knowledge (Marder 2001, pp. 18–19).

However, the modern theory is that a court should recruit jurors with minds untainted by relevant knowledge. Mark Twain (1875) famously quipped:

> We have a criminal jury system which is superior to any in the world and its efficiency is only marred by the difficulty of finding twelve men every day who don't know anything and can't read.

In the United States, and to a lesser extent elsewhere, vigorous efforts are made to find jurors untainted by any prior exposure to the controversy. The same end is sometimes achieved by staying a trial until memories fade; or by moving a trial to a location far removed from the locality of the events that gave rise to it.

Such measures may be counterproductive. In the murder trial of OJ Simpson, the twelve jurors ultimately selected affirmed that in everyday life they got most of their information by watching tabloid news programs. Furthermore, ten of the twelve had not completed college (Alschuler 1996, p. 33). Is such a group, distinguished arguably by a lack of curiosity and literacy, well equipped to take in and apply complex scientific evidence of the kind tendered in that trial? The eminent prosecutor, Vince Bugliosi, described this jury as lacking in intellectual firepower (Bugliosi 2008). Irrespective of the truth and fairness of that, it is clear that there are two cultural beliefs or rules about the jury’s acquisition of knowledge. Firstly, it should ideally enter the trial without preconceived views and ideally without relevant knowledge of the matters in contention (Friedland 1990, p. 94). Secondly, it must be a passive recipient of information during the trial process rather than an active seeker of information (Vidmar in Vidmar ed. 2000, p. 14; Diamond and Vidmar 2001, pp. 1859–62; Marder 2001, pp. 31–3).

These cultural beliefs have been used to justify practices that deselect jurors who know too much—for example, through exposure to media accounts of relevant events (Friedland 1990, p. 196). Further, they have traditionally supported practices that keep jurors in their assigned passive role. Examples of how this is done include:

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6 That estimation may not be entirely fair. The jurors in that case were subjected to truly extraordinary pressures (Kennedy and Kennedy 1995).
The use of personal knowledge and belief by jurors and juries

- disallowing or discouraging questions
- instructing jurors not to talk about the trial prior to deliberation; and
- forbidding them to visit crime scenes or do their own research.

Some such aspects of the legal culture have been subject to much criticism that has led to innovative reforms in some jurisdictions (Dann and Logan 1995; Hans 2006).

As outlined in the next chapter, the legal culture has had a major impact on jury research both:

- by making certain kinds of research impossible; and by
- entrenching certain beliefs about juries that have strongly influenced both the design of research projects and the interpretation of research results.

This thesis will demonstrate that the former impact is widely acknowledged in the research literature while the impact of the latter has not been acknowledged and understood.

A final, important aspect of legal culture is the balancing of different aims. A trial is conducted with two objectives: an epistemic objective and a non-epistemic objective. The epistemic objective is to determine the truth of claims and counter claims made by the parties while the non-epistemic objective aims to produce acceptable outcomes by acceptable means (Walker 2006, pp. 1691–2; Walker 2007). These aims can conflict. In a criminal trial finding the truth can be frustrated by the non-epistemic aim of ensuring a fair trial and avoiding convicting and punishing an innocent person. This non-epistemic value underlines the legal culture surrounding a criminal jury trial. For example, rules of evidence require proof beyond reasonable doubt and exclude some relevant evidence because its effect could be prejudicial (McNamara 1985, pp. 356–9).

Friedland (1990, p. 196) pointed out that the United States Constitutional requirement that juries be impartial has at times resulted in the selection of juries of relatively uninformed people. In some cases these people may struggle with cognitive complexity. In such cases, the non-epistemic objective may triumph.

Chapter One
The use of personal knowledge and belief by jurors and juries

The court’s capacity to balance these aims demands proper control of the jury and the successful indoctrination of the jury into the legal culture. But jurors can, and at times do, disregard the rules of that culture—for example, by conducting their own investigations (Brickman, Blackman et al. 2008, pp. 287–9).

The dataset
A useful, largely overlooked dataset supports this study. There is a body of literature created by former jurors that chronicles their experiences on juries. In some cases, this sizeable, but not unmanageably large, body of literature provides a detailed description of the deliberation process and shows how juries deliberate in real cases. The literature emanates mainly from the United States and the United Kingdom. It covers trials from as early as the 1960s and as recent as the early years of the new millennium. Much of it is of high quality, written by people such as academics and journalists. The jurors sat on different sorts of trials, including trials for conspiracy, murder and kidnapping. The dataset is, therefore, not only large but diverse in several important ways. Clearly, with appropriate methodological safeguards, it can be analysed and utilised as an important source of information about jury knowledge processes.

For this research study, that large body of text was analysed using the technique of grounded theory. This theory was originally devised by Glaser and Strauss (1967) and further developed by Strauss and Corbin (1998). It involved open coding of the texts to derive important concepts–categories. Axial coding established order among categories and delineated relationships between them. The final stage was the development of a theory about how jurors, individually and collectively, make decisions and use personal knowledge and belief in the process. In essence, this thesis presents a theory from the voices of jurors.

Thesis outline
Chapter Two contains a review of relevant academic literature and explains the areas of jury functioning that are well understood and those that are poorly understood. There are several areas of focus, including:

- judge–jury agreement and disagreement
- the influence of juror demographic factors on the verdict; and
The use of personal knowledge and belief by jurors and juries

- existing models of juror decision making including the Narrative Construction Model and the Integrative Multi-Level Model.

The literature review also briefly discusses the potential relevance of knowledge management, bounded rationality and the literature dealing with different cognitive styles. Several limitations in the current research are discussed.

Chapter Three outlines the methodology. It includes a definition of knowledge and brief discussions of the epistemology and method used. The thesis uses a constructivist epistemology and the method of grounded theory. This chapter ends with a description of the dataset—that is, the published memoirs.

Chapter Four outlines the findings from the three stages of the analysis:

- open coding—finding and naming categories
- axial coding—finding relationships between categories; and
- the development of theory.

Over one-hundred-and-forty categories emerged during the analysis. Approximately ninety related directly to mental schemas and tools. In the open coding section, there are examples of the categories and their significance. The concept of the Jurors' Toolkit—which is the superset of all the schemas and tools that emerged—is explained in this section.

Chapter Five features a discussion of the findings and theory in the context of the academic literature. This helps to clarify where the theory developed in the thesis agrees with other findings and where it does not.

The final chapter discusses the author's conclusions and the contribution to knowledge that the thesis represents. Some directions for future research are suggested. Two appendixes and an extensive bibliography are included at the end.

**Chapter summary**

This thesis answers the question—when, how, to what extent and why do jurors and juries use personal knowledge and belief, what is its source and what is its effect on verdict? The conclusion is that jurors make significant use of personal knowledge and belief from many sources and in many ways. At times their use of personal knowledge and belief can be highly influential in reaching a verdict.
use is not entirely consistent with current theoretical models of juror and jury decision making. It is also not consistent with the judiciary’s expectations.

This topic has been overlooked, in part because of the obstacles that confront jury researchers—including the impossibility of directly studying jury deliberation. Answering the research question fills a significant gap in our current knowledge of how juries function and highlights some enduring issues about juries. One such issue, of fundamental importance, is the explanation for judge–jury disagreement over the verdict. The extent of such disagreement has long been viewed as an indicator of jury competence. The possible contribution of jurors’ personal knowledge and belief to verdict disagreement has hitherto been overlooked.

This study is also important because criticisms of the jury, which abound, are difficult to evaluate in the absence of a complete knowledge of how they operate. Similarly, knowing more about how jurors utilise personal knowledge and belief could help the legal system to help jurors with their task. This is viewed as highly desirable. The potential for jurors to do their own research—via the internet, social media and through other methods—has dramatically increased (Brickman, Blackman et al. 2008). Thus, it is timely to explore the extent to which this has happened already and its effect on decision making.

The study builds a theory of juror and jury decision making grounded in the data of published juror memoirs. The data was analysed using the methodology of grounded theory as espoused by Strauss and Corbin (1998). The central postulate emerging from the analysis is that jurors use a large set of schemas and tools in decision making. Many of these use personal knowledge and belief. This complexity suggests that any attempt to explain juror decision making by a simple model is unlikely to succeed. Jurors do construct narratives.7 But this schema is not universally employed—in part because some types of trial do not lend themselves readily to that approach.

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7 As postulated by certain researchers; for example, Pennington and Hastie (1991); Penrod and Pennington (2002).
Chapter Two: Literature review

Preface—why a literature review?

There is controversy surrounding the inclusion and timing of a literature review as part of a grounded theory study. Some theorists advise against undertaking a literature review before data sampling and analysis (Lincoln & Guba 1985; Stern 1994; Strauss & Corbin 1994). The objection is based on the importance of theory emerging from the data without being forced or guided with a specific objective in mind (Cutcliffe 2000). In their seminal work, Strauss and Glaser (1967) adopted the extreme position that there should not be an early review of literature directly relevant to the area of study. However, they did not object to a later reading as a way of developing theoretical sensitivity. Strauss, but not Glaser, later softened this approach (Dunne 2011). Glaser has no objection to reading literature that is in a different but related area. Hutchinson and Wilson (1993) advocate a literature review before data sampling and analysis. Traditionally, this has enabled researchers to identify a gap in knowledge and also to provide a rationale for the research. Others advise reading to foster theoretical sensitivity. It seems that the researcher must steer a course between Scylla and Charybdis. Too much familiarity with extant literature might induce forcing; too little might inhibit sensitivity.

The literature review is a compromise. The reading of the extant literature was progressive and overlapped constantly with data collection and analysis. In that way the author tried to avoid both forcing the data and inhibiting sensitivity. This review has two aims. Firstly, it is intended to show a gap in the current knowledge about juries. Secondly, it also outlines ideas in diverse areas of research that increased the author’s theoretical sensitivity. This, in turn, suggested ways in which jurors might use personal knowledge and belief and indeed suggested new ways of thinking about jurors and juries.

Chapter outline

A useful starting point is an outline of the chapter. Citations will be given in later sections that deal with individual topics.
Even though the jury has been studied intensively for over sixty years, there are still significant gaps in the knowledge of juries and how they function. There is minimal knowledge about the extent to which, and how, jurors and juries utilise personal knowledge and belief. Little is known about where it comes from, when and how often it is shared and its overall significance. That area has had little research attention. The situation is beginning to change with current interest in jurors’ use of internet resources and social media (McGee 2010; Hoffmeister 2010). Even in that area, there is much speculation but little research and hard knowledge (Hoffmeister 2011). Furthermore, internet research is only one source of personal knowledge and belief. Accordingly, it may be that this recent phenomenon is but one aspect of a much broader phenomenon of jurors seeking additional information to supplement trial information.

Common sense tells us that, to some extent, jurors must utilise what they already know. Making sense of trial evidence would appear to be impossible if the jury lacked knowledge of physical and social reality. Nonetheless, there is not much literature dealing directly with juror use of personal knowledge and belief. The areas of literature that do directly address this include:

- some reports of juror surveys
- academic discussions of certain areas of appellate case law
- discussions of common sense notions of the law and the effect of pretrial publicity; and
- literature outlining models of juror and jury decision making.

In addition, there are several areas where the jury literature touches obliquely on the issue. For instance, some of the studies that consider the effect of juror demographic variables, such as race and age, strongly confirm the influence of personal knowledge and belief. Demographic features of jurors could be markers for certain kinds of personal knowledge and belief.

This chapter also discusses several bodies of literature that are not jury literature but appear to be relevant to what jurors and juries do. After all, a jury can be regarded as a small group with a learning and decision-making task. The review discusses salient findings from the literature dealing with:
The use of personal knowledge and belief by jurors and juries

- tacit knowledge discovery
- different modes of cognition—including intuition and heuristics; and
- bounded rationality theory.

Once again, these bodies of literature are informative about how decision makers generally use personal knowledge and belief and the circumstances in which they do so. Propositions derived from those bodies of literature can be checked against the juror memoirs and can even help to guide the analysis by suggesting useful concepts. These bodies of literature could suggest new ways of examining juror and jury decision making and provide new and valuable insights into how jurors and juries utilise personal knowledge and belief.

This chapter starts with a workable definition of knowledge. It then considers the literature on legal culture that explains the rules and expectations affecting juries. It also illustrates why jurors act in the way that they do. This has a bearing on the interpretation of juror studies because cultural assumptions have clearly influenced the design of some juror studies. A striking example of this is found in the landmark Kalven and Zeisel (1966) study arising out of the Chicago jury project. The focus of their book, *The American Jury* (1966), was the extent, direction and explanation of judge–jury disagreement over the verdict in a large number of criminal trials. The authors did not consider a possible explanation for some disagreements—for example, that the jury was acting on knowledge or belief of which the judge was unaware. Furthermore, their study was not designed to elicit this factor.

This chapter presents a short overview of the field of jury studies and then turns to specific areas where findings provide some information about the use of personal knowledge and belief. A few surveys have directly explored this issue. The chapter also considers the jurisprudence—that is, the decided cases—from the United States. The jurisprudence examined arose out of challenges to jury verdicts where the challenges resulted from allegations that jurors conducted improper investigations or experiments of their own. These cases are a rich source of knowledge about the various ways in which jurors will sometimes seek to supplement trial information with non-trial information.
The chapter also considers the models that have been developed to explain juror and jury decision making. They generally assign a fairly limited, but specific, role to personal knowledge and belief. In that sense they provide useful hypotheses that can be checked against juror memoirs. For example, the Narrative Construction Model, also called the Story Model, and the Director’s Cut Model, posit that jurors construct stories to fit the preferred evidence and use background knowledge to select and complete stories (Pennington and Hastie 1991; Hastie, Penrod and Pennington 2002; Devine 2012).

This chapter shows that, despite the existence of a vast amount of literature on the jury, knowledge about the use of personal knowledge and belief by jurors and juries is limited. A proper investigation of this issue is long overdue.

The first part of this chapter commences by considering some literature dealing with the definition of knowledge.

**Defining knowledge**

Since this study is concerned with personal knowledge and belief, it is reasonable to ask what definition of the word ‘knowledge’ is being used. It is also important to distinguish between two different questions:

- What is knowledge?
- How is knowledge acquired?

Plato in the Theaetetus defined knowledge as justified true belief. This concept has endured and has dominated thinking amongst 20th century philosophers (Southerland, Sinatra et al. 2001, p. 328). Admittedly, Gettier (1963) demonstrated that this definition can be problematical in certain instances. His famous thought experiment depicted an individual holding a belief that was both justified and true. However, it seemed perverse to use the term ‘knowledge’ because the truth aspect was in a sense accidental. It is reasonable to propose that the expression ‘justified true belief’ defines a set of conditions that are necessary, but not always sufficient, for knowledge as that term is used by philosophers. It is clear that belief differs from knowledge in the sense that it is not necessarily true and not necessarily justified.

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8 The latter model is more elaborate than the former and posits the use of various schema—not just stories.
Given its broad acceptance, Plato’s definition of knowledge is entirely adequate for the purposes of this thesis. The thesis studies jurors’ use of personal knowledge and belief. Not everything that a juror believes will be true and even those things that are true may not be justified. It follows that juror knowledge is a subset of juror belief. The set of propositions that a juror believes can be envisaged as forming a continuum. At one end are those beliefs that have little or no justification. At the other end are those beliefs that are very strongly justified. At some point, belief turns into knowledge. This thesis is interested in the whole continuum. Thus, there is no need to give a precise definition of the point of demarcation that separates what is known from what is believed but not known. However, belief must have a certain pragmatic value, or a certain fit with reality, before it counts as knowledge. If a juror’s knowledge does not exhibit a fit with reality, of what value is the jury? Accordingly, for the purposes of this thesis, belief has the character of knowledge when it is justified and exhibits a fit with reality.

The law does not generally concern itself with sophisticated epistemological issues. However, it does concern itself with justification and, at least implicitly, recognises a criterion of truth. In a criminal trial, jurors are told that they are not to deliver a guilty verdict unless they are satisfied beyond reasonable doubt that the defendant is guilty as charged. They are also told that the prosecution bears the onus of proof. They are enjoined to carefully consider all the evidence that they have heard to determine whether they are satisfied beyond reasonable doubt of the guilt of the defendant. Combining all these elements, it is clear that, in order to convict, the jurors must have a belief in the guilt of the defendant. This belief must be justified by the evidence and held with sufficient strength to meet the high standard required by the criminal law. It is realistic to summarise this by saying that our legal system only allows findings of criminal guilt where allegations have been proven to the required standard. At that point, of course, the allegations are regarded as being true. The proof or justification consists of the tendering of evidence or, in some cases, by the accused person simply making admissions. The fact finder, being the jury in a jury trial, must believe the allegations. As explained by Justice Dixon of the High Court in the landmark
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Australian Case of *Briginshaw v Briginshaw* (1938), the fact finder must feel a sense of persuasion independent of the mechanical calculation of probabilities. In a civil trial, the fact finder has to be persuaded but not convinced beyond reasonable doubt. The relevant standard of proof is on the balance of probabilities. Thus, a jury can make a finding when they think an allegation is more likely to be true than not true. But this is not a very high level of persuasion. In such cases, we might hesitate to say that the jury knew certain allegations to be true. It would be more accurate to say, at least in some cases, that the jury believed that certain allegations were more likely to be true than not true. But from the perspective of the legal system, when a verdict of guilt or liability is delivered, then the system regards the underlying allegations as being true.

However, this thesis is more concerned with how jurors and juries acquire the knowledge that allows them to vote for and render a verdict. More particularly, the thesis examines how they use personal knowledge and belief in that process. It has been postulated that jurors interpret and evaluate evidence using internalised schema and mental representations of external reality. As eloquently expressed by Sherwin (1993, p. 717):

> ...human perception and cognition are never without some interpretive framework within which reality and meaning come into view.

This implies that jurors are constructivists in the sense that they build knowledge by active mental processes utilising their existing knowledge. That proposition is demonstrated in this thesis.

It is therefore appropriate to turn to the literature to explain briefly the central ideas of constructivism and to provide a constructivist theory of knowledge acquisition. The quintessential tenet of constructivism is that knowledge is constructed in the human mind (Bodner 1986, p. 4). There are numerous different constructivist theories (Geelan 1997; Phillips 1995). Geelan (1997, p. 17) identifies six without trying to be exhaustive and argues that different constructivist positions can be plotted on two orthogonal axes (Geelan 1997, p. 20). One axis describes on a continuum the extent to which the construction of knowledge is personal and the extent to which it is social. The other axis is a continuum running from objectivism to relativism.
Geelan (1997) makes the point that not all constructivists adopt relativist philosophies. The adoption of a constructivist position does not necessarily demand a denial that belief must be justified in some way before it can count as knowledge. Similarly, it does not necessarily require adopting the view that there is no absolute truth or external reality. The task of the jury is to deliver an accurate judgement about events in the real world. Someone studying jury trials would be presented with an extraordinary dilemma if confronted by an extreme relativist view that denied objective reality.

Bodner (1986, p. 6) makes the further point that construction is a process in which knowledge is both built and continually tested. An individual cannot construct just any knowledge. The knowledge must be viable or instrumentally useful. It must fit with external reality even if it cannot be regarded as an exact representation of such an external reality. Bodner (1986, p. 6) states:

> The concepts, ideas, theories, and models we construct in our minds are constantly being tested as a result of our experiences, and they survive in a pragmatic or instrumental sense only as long as they are useful.

Bodner’s notion of knowledge postulates its genesis in the mind of the learner. But it also requires a form of justification by which the knowledge is tested against things external to the learner. This thesis adopts this theory and contends that knowledge can be regarded as something believed to be true by the learner—that is, the juror—and constructed in their mind in a way that justifies it. That justification cannot be purely subjective; knowledge must exhibit some fit with reality. The level or degree of justification that is required, however, may vary.₉

**The legal culture and its effect on the design and interpretation of jury studies**

It is necessary to consider legal culture for several reasons. It helps to explain what research has and has not been done and explains the serious difficulties that jury researchers face. It alerts researchers to factors or safeguards that must be remembered when they interpret research findings.

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₉ Indeed, the legal culture, as explained in the previous chapter, has its own rules about justification or belief. The terms ‘on the balance of probabilities’ and ‘beyond reasonable doubt’ describe levels of justification required, respectively, for civil and criminal trials. But those standards apply to a case as presented. For example, a charge of murder must be proven beyond reasonable doubt.
Aspects of the legal culture and extant laws shield jury activities from study. Jurors and jury deliberation are, for sound policy reasons, shielded from direct scrutiny. In Australia, approaching and trying to interview a juror is an offence—even years after the trial.¹⁰ The English Contempt Act (1981) has presented an obstacle to jury researchers in that country (Lloyd–Bostock and Thomas 1999, p. 36). In the United States the law is somewhat more liberal but direct study of deliberation, and approaching jurors during a trial, are forbidden (Hans and Vidmar 1986; Marder 2005, pp. 147–50). Therefore the jury is a difficult research subject. MacCoun (1989, p. 223) notes that because juries deliberate in secrecy, legal debate and discussion about how they work have traditionally been based largely on anecdote and speculation. The rules in the United States are more relaxed about approaching jurors (Campbell 1985). It is in that country that most jury studies have occurred.

There is a cultural expectation or norm about the role of the jury. According to the traditional legal culture, the jury is, and should remain, a passive body until deliberation commences (NZLC pp. 37 1999, para 257; Marder 2005, p. 19). This attitude has begun to change to some extent (Hans and Vidmar 2007; Marder 2005, pp. 31–3). But it is still the case that the jury is given, and expected to obey, various rules and instructions intended to maintain its passivity. According to Clark (2008, p. 3), the reality could be very different:

> Once the process of jury selection is complete and the trial begins, a new dynamic begins. This dynamic is manifested by the inability to control jurors in and out of court. As for out of court, when jurors leave the confines of the court they are free to watch the evening news, read the morning newspaper, surf the internet, or even speak to another juror by telephone or email. While a judge may instruct jurors otherwise, the enforcement is next to impossible unless all jurors are sequestered, and even then, abuse is a very real possibility.

As noted by Devine, Clayton et al. (2001, p. 630), it is a fundamental assumption underlying the jury system that juries are willing and able to comply with the judge’s instructions. But the authors acknowledge that there is reason to believe that both parts of the assumption are incorrect. If jurors ignore the rules that are supposed to govern their conduct, it is pertinent to ask how frequently they take

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¹⁰ A fairly typical provision is section 68A of the *Jury Act 1977* (NSW) which makes it an offence to solicit information from a juror or former juror. The extent to which Australian common law also creates such an offence as distinct from a convention is less clear (Campbell 1985).
on an active investigative role, how they investigate and under what circumstances.

Prevalent beliefs within the legal system tend to undermine any focus on individual juror knowledge and belief. The belief that the jury is, and should be, a passive recipient of data and information has helped to divert researchers’ attention away from these things (Diamond and Vidmar 2001, pp. 1857–59; Marder 2005, p. 19). Why study individual knowledge and belief if these things have, and should have, no role or a very limited role at most?

**The current state of knowledge about juries**

There is considerable uncertainty about aspects of jury decision making (Gleeson 2011). The New Zealand Commission of Inquiry into Criminal Juries, in the quotation reproduced in Chapter One, acknowledged ignorance about the jury in that country. It stated that very little is known about how juries operate (NZLC pp. 32 1998). But sixty years of study have yielded considerable knowledge of some aspects of jury functioning.

**The history and types of jury studies**

Since the 1950s, governments in many parts of the world that inherited the British common law system have sponsored their own inquiries into the jury system. Academics, particularly in the United States, have also studied many aspects of the jury. This activity has produced a rich and voluminous literature (summarised in Darbyshire, Maughan et al. 2002; Devine, Clayton et al. 2001). Indeed, entering the terms ‘jury’, ‘research’ and ‘law’ into Google Scholar produced four-hundred-and-eighty thousand results in July 2014. Even entering the specific phrase ‘jury decision making’ produced six thousand three-hundred-and-ninety results and sixteen hundred results in publications since 2010. It is overly pessimistic to say that little is known about how juries function. Research activity has yielded knowledge in some areas (Devine, Clayton et al. 2001; Devine 2012). However, researchers remain relatively unenlightened about other areas.11

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11 Devine (2012) provides an excellent summary of current knowledge of the jury.
Many studies have used mock juries. The degree of realism has been variable (Bermant et al. 1974). There has been considerable interest in factors that can potentially affect jury verdicts (Devine, Clayton et al. 2001). There have been various kinds of jury studies including:

**Official government surveys or commissions of inquiry**

An example is the New Zealand Commission of Inquiry (NZLC R69 2001; NZLC pp 37 1999). This was a government-sponsored inquiry that commenced in 1989 and produced its first report on the jury in 1998. A scrutiny of the role and functioning of the jury was but one part of the total inquiry. The commission was asked to scrutinise the entire criminal justice system and to recommend reforms. Like most official inquiries of this kind, its modus operandi was to seek submissions and feedback from participants, interested groups and the public. In short, it surveyed opinions of major participants in jury trials but also commissioned a small amount of experimental work. This was conducted by the Victoria University in Wellington. The focus of that study was jury decision making. Its findings will be discussed under the heading of Jury Accuracy.

**Other large scale surveys**

Not all surveys have been government sponsored. The Chicago Jury Project was one of the earliest studies. It started in the 1950s and continued for some years (Cornish 1968). This large-scale, privately funded study was conducted by the University of Chicago Law School. It involved the collaboration of legal professionals and academics. Indeed, a large team of lawyers, psychologists and other social scientists contributed to the study. The project spawned an enormous amount of data and many offshoot studies (Devine, Clayton et al. 2001, p. 623). Hans and Vidmar (1991) emphasised the enduring influence and importance of this groundbreaking study to the issue of jury accuracy. Kalven and Zeisel (1966), two of the principal researchers, analysed a large body of data

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12 The terms ‘mock jury’ and ‘shadow jury’ need explanation. A mock jury hears a pretend case, not a real case; whereas a shadow jury sits in on a real trial, but does not function as a real jury. For example, members of a shadow jury will sit in the body of the court and listen to the evidence. Of course, the shadow jury has no official function in the court. It does not sit in the jury section and does not deliver an official verdict. Creating a shadow jury is a device sometimes used by parties or their consultants to help them understand what the real jury is thinking. Mock juries sometimes hear and deliberate on historic cases that are reenacted or represented in various ways. Nonetheless, it is recognised that mock jury studies are problematical. According to Shaffer and Wheatman (2000) the major limitation of mock jury studies is that they attempt to draw inferences from decisions of mock jurors not involved in attempts to deliberate.
from the project. Several investigative techniques were employed in their project including surveying judges’ and jurors’ attitudes. Several mock jury studies were also undertaken and actual court statistics were analysed. The project’s main conclusions were published by Kalven and Zeisel in their landmark 1966 book, *The American Jury*. But many other papers were also published in the decade or so following the project.

The Arizona Jury Project has been studying the effects of various reforms of the jury system introduced in that State. Many of the reforms recommended were highly innovative and clearly intended to empower the jury and help it in its learning task (Dann 1995; Marder 2005, pp. 31-3).

The Capital Jury Project scrutinised the functioning of juries in cases where the jury had to decide whether to recommend the death penalty (Sundby 2007). Jurors from fifteen States were involved. This was described as the most significant study of jury decision making since the Chicago Jury Project (Hans 1994, p.1233). One significant and chilling finding of the Capital Jury Project was that juries frequently misunderstand the judge’s instructions about how they should approach the task of determining sentence in capital cases (Hans 1994, p. 1238). The study of capital cases is relevant because value judgements are often prominent in juror reasoning in such cases.

*Academic studies*

Academic studies have also been conducted—in conjunction with large-scale surveys and sometimes independently. The academic studies have focused on real, shadow and mock juries.

Commission reports and official surveys involved surveying two main streams. Firstly they surveyed the attitudes and opinions of judges, lawyers and jurors.

The second stream involved surveying measures of the objective facts pertaining to criminal trials—including the length of trials and the length of jury deliberations. Conversely, many of the social science studies have attempted to isolate the factors affecting juror comprehension, opinion formation and the jury verdict. Many factors potentially affecting jury behaviour have been suggested. But many research findings are still hotly disputed or at least contentious within
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The academic community (Devine, Clayton et al. 2001; Darbyshire, Maughan et al. 2002).

The empirical academic studies in the last sixty years have focused variously on procedural, participant, case and deliberation characteristics (Devine, Clayton et al. 2001). The studies have involved mock juries and field studies of actual juries.

There are some enduring and intriguing puzzles arising from jury research that have not received much attention. One such puzzle is how to reconcile two generally accepted findings about juries. The first is that juries are generally accurate in their verdicts (Kalven and Zeisel 1966); the second is that they are poor at understanding the judge's instructions about the law (Hans 1994, p. 1238; Eisenberg and Wells 1993; Haney 1994). There is abundant support for both propositions. It is not immediately obvious how a jury—instructed or directed in terms that it generally fails to comprehend—can nonetheless render correct decisions. A clue perhaps lies in the finding that jurors, or some of them, utilise laymen's notions of what the law is. The suggestion is that these, more effectively than judge's instructions, guide them in their application of principle (Finkel 2000).

In some circumstances jurors find a just outcome different to the outcome that would be reached by strict application of legal principles. Manzo and Maynard (1993) in an enlightening analysis of a real jury deliberation demonstrated that jurors can develop a practical concept of justice in the course of deliberation. The just outcome that they choose may differ from the outcome that would result from a strict application of principles. Those same researchers treated justice not as an abstract concept but as something that exists in the talk and actions of ordinary people.

There is very little literature about how personal knowledge and belief interact with evidentiary material in the individual and collective decision making processes.

**Findings about the use of personal knowledge and belief**

There are at least two rich and useful sources that relate directly to jurors’ and juries’ use of personal knowledge and belief. The first is data from jurors who have been interviewed in surveys, field studies and other academic studies. The
second is the case law arising out of specific challenges to jury verdicts. But the data from those sources has not hitherto been combined and comprehensively analysed. Furthermore, both data sources have their limitations as will be explained.

Juror surveys have yielded knowledge of jury decision making. The New Zealand Law Commission dealt with two relevant issues in a matter-of-fact way. It examined the issue of jurors bringing into the jury room, and using, their own knowledge and the issue of jurors conducting their own investigations. The commission (NZLC pp 37 1999) reported:

7.42 Individual jurors commonly provided the jury as a whole with background information about issues relating to the case—such as the signs of schizophrenia, financial procedures in the construction industry, the street value of cannabis, and legal procedures for buying and selling property—which they knew from their own occupation or life experience. In a couple of cases, they also reported to the jury adverse information about the character of the accused which they had picked up from local knowledge or media publicity. Apart from this, there were only five cases in which the jury made any external inquiries about factual material. These inquiries included visiting the scene of the crime and bringing into the jury room explanatory brochures about legal and factual issues.

7.43 In none of these cases did the jury make any reference to the judge’s instructions not to take into account external information. They may have thought that the instruction did not apply to this sort of investigation; they may not have absorbed the instruction at the time; or they may simply have decided to disregard it. Whatever the reason, the instruction did not have the desired effect in these cases. In the other 43 cases, there was no evidence of external inquiries, but by the same token there was nothing to indicate that the jury was dissuaded from doing so by the judge’s instruction.

7.44 Apart from these five cases where the jury obtained additional information about factual issues, jurors not infrequently attempted to obtain additional information on the law, particularly during the trial itself—for example, by looking up definitions of key terminology in the dictionary or taking a legal textbook on fraud into the jury room. The jury gave no indication in any of these cases that they thought their investigations were improper.

7.45 Thus, while the directions not to conduct external inquiries were adhered to in a majority of cases, there was no evidence that the directions themselves made a difference to the actions of juries in this respect. By and large, juries simply did not seem to appreciate the importance, or did not understand the logic, of restricting themselves to the information presented by the parties and the judge.
In this segment of its report, the New Zealand Commission gave instances of jurors sharing personal knowledge. But it did not attempt to delimit the ways in which personal knowledge was used or its overall importance in decision making. The suggestion that jurors use background information about certain issues is consistent with academic opinion (Kirgis 2002, p. 2). However, the background information specified in the above excerpt is specialist in nature. Many average people would probably not know the signs of schizophrenia, the street price of cannabis, or financial procedures in the construction industry.

Other types of background information are more widespread and can be similar to a major premise in a simple syllogism (Kirgis 2002, p. 8). In a murder trial, for example, a witness may testify that D threatened to kill V. Jurors would use their background knowledge to add in the major premise, namely that persons who threaten to kill others sometimes follow up on their threats (Kirgis 2002, pp. 8–9). No evidence would need to be called to prove this major premise because it is common knowledge.

In any event, the conclusion expressed in paragraph 7.45 of the New Zealand Commission Report is of considerable importance. When jurors ignore the instruction not to conduct their own inquiries, they violate one of the fundamental cultural rules underlying the jury system. It is immediately obvious that the belief that the jury neatly fits the role of a purely passive recipient of information is far removed from reality.

Legal decisions regarding jurors’ use of personal knowledge

That jurors sometimes use personal knowledge and belief in highly significant ways is also apparent from the fact that in the United States and other places, there have been successful attempts to challenge guilty verdicts. These challenges were based on evidence from jurors who reported or admitted this behavior (Hawk 2004, p. 151; Kirgis 2002). Indeed, there is a body of jurisprudence in the United States arising from challenges to verdicts based on alleged juror misconduct consisting of improper investigations and experiments. If extraneous information reaches jurors it can give rise to a presumption of prejudice (Gleeson 2011, p. 53). Courts have struggled to distinguish appropriate from inappropriate uses of personal knowledge (Kirgis 2002, pp. 16–29).
times, the alleged misconduct has consisted of jurors conducting their own investigations and research and drawing on personal expertise.

However, the case law is relevant here because it demonstrates that jurors sometimes use personal knowledge in a way that has a direct bearing on the verdict. It also demonstrates that juries access such knowledge in a variety of ways. Relevant personal knowledge is at times far more than just background knowledge. For example, in the case of State v. Mann, the defendant, charged with stabbing his son, claimed that his son fell onto a screwdriver which caused the injury. A juror with engineering expertise did some calculations to test the credibility of expert evidence as to the probability of this happening. He told the other jurors that the probability had been overstated. The appellate court determined that the juror’s statements to his peers constituted proper deliberation based upon his professional and educational experience. The verdict stood.

There was, however, a different outcome in People v. Maragh. The defendant was accused of murdering his girlfriend by repeatedly punching her in the stomach causing blood loss. A defence medical expert said the girl died of ventricular fibrillation, that there were signs of this in the autopsy and that this would be inconsistent with blood loss. A juror who was a nurse told her peers that—contrary to what the expert had told the court—she had seen cases of ventricular fibrillation caused by blood loss. The appeal court ordered a new trial.

A third example arose in a criminal prosecution for the illegal manufacture of liquor where the defendant claimed he was making vinegar. A juror, who was a pharmacist, and possessed expert knowledge, told the other jurors that the defendant’s claim lacked credibility because alcohol could not be used to make vinegar in the way claimed.

In the case of Reynolds v. the City of Birmingham, the Court of Criminal Appeals of Alabama had to consider one of the more common forms of juror misconduct—the jury visiting an alleged crime scene. The court affirmed that this constituted

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13 State v. Mann, 2000–NMCA–088, 129 N.M. 600. There is a useful discussion of this case in Hawk (2004).
14 729 N.E.2d 701 (N.Y. 2000)
15 Rushnetsky v. State, 244 S.W. 372, 373 (Tex. Crim. App. 1922)
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juror misconduct because it is fundamental that jurors should consider only the evidence presented at trial. However, the court refused to order a new trial because there was no evidence that the visit impaired the deliberation process.\textsuperscript{16} In \textit{Satterwhite v. the State}, the Court of Appeals of Georgia also refused to overturn a guilty verdict. The defendant had been charged with rape, kidnapping and aggravated assault. Years after the verdict, a juror came forward and said that he was persuaded to vote for conviction after hearing two pieces of extraneous information gained inappropriately. A fellow juror had visited the crime scene and indicated that things could have happened as the victim had deposed. Another juror had admitted discussing the case with her husband who told her about the behavioural effects of crack cocaine.\textsuperscript{17}

In the case of \textit{Solis v. Cockrell}, a juror told his peers that he lived close to the defendant and had known his family for approximately twenty years. The defendant and his family were reputed to break into homes. This information was pertinent because the defendant was charged with burglary. But the appeal court refused to reverse the conviction.\textsuperscript{18}

There have been instances where verdicts have been challenged on the basis that jurors conducted book research. Gershman (2005, pp. 329–30) gives examples of jurors reading reference literature to determine the prevalence of blood types; downloading literature on the drug Paxil to investigate its uses; and consulting treatises to find legal definitions and to find out the penalties for certain crimes. This body of jurisprudence is therefore of great importance. It demonstrates quite clearly that jurors use much more than background information that is common knowledge. They use personal expertise concerning critical matters directly in issue in the case and in ways that potentially could influence other jurors.

The jurisprudence has revealed numerous instances of jurors conducting their own investigations, experiments and research (Gershman 2005). But it has its limitations. For example, the jurisprudence does not elaborate on the frequency of the conduct or the factors that conduce to it—and does not throw much light

\textsuperscript{16} CR–97–0459
\textsuperscript{17} No. A98A 1523
\textsuperscript{18} 342 F.3d 392
on the use and influence of knowledge inappropriately acquired. In the Satterwhite decision mentioned above, the appeal court cited a deeply entrenched rule preventing jurors from impeaching their own verdicts except in unusual cases. Very few cases ever get to court.

**Exposure to media publicity**

Some information that jurors bring into the courtroom undoubtedly comes from the media. In the context of the definition given earlier, this information is personal knowledge or belief because it is not part of the evidence. It is extra-judicial. There is a vast amount of literature dealing with the effects of exposure to pre-trial publicity.

It is clear that such exposure can affect verdicts (Devine 2012, p. 184). However, the mechanisms underlying this are not well understood (Studebaker and Penrod 1997, pp. 455–6). Strangely, results from jury simulations may overstate the effect. Indeed, there is some evidence that with real criminal trials, defendants given moderate publicity enjoy a higher acquittal rate than defendants given no publicity (Bruschke and Loges 1999). But a meta-analysis of forty-four studies involving more than 5,700 subjects produced clear evidence of an overall prejudicial effect in criminal trials (Steblay, Beserevic et al. 1999). Studies by Ruva, McEvoy et al. (2007, p. 46) found evidence that some jurors confuse pre-trial publicity with actual evidence. That is, they fail to accurately recall the source of prejudicial material that affects their viewpoint. As already stated, judges’ efforts to reduce any potential damage or prejudice resulting from publicity can backfire (Lieberman and Arndt 2000, p. 78). This pertains not only to exposure to media publicity, but also to exposure to inadmissible evidence—for example, when a witness says something that they should not have said.

These studies show that jurors’ exposure to pre-trial publicity can influence verdicts. It seems plausible then that other personal knowledge and belief carried into the courtroom could also affect trial outcomes.

**Juror decision-making models**

Various models of juror and jury decision making have been proposed. This section discusses whether these models postulate or acknowledge that jurors use personal knowledge and belief and if so, in what way?
As pointed out by Foss (1976, pp. 305–16):

> The juridical decision process is truly a social psychological one in that it involves (1) an individual judgment process and (2) a group discussion wherein various social influence processes bring the individual to a final agreement on the verdict.

A total account of juror and jury decision making must necessarily describe both processes—the individual and the collective. This section initially considers the models of individual decision making—that is, the process by which an individual juror arrives at a preferred verdict.

**Mental meter models**

Various jury scholars have proposed models of juror and jury decision making. These often incorporate assumptions about the role of personal knowledge and belief—and they are often based on findings from other areas of social science research.

As to juror decision making, there have been several approaches to modelling. The first approach was mathematical and assumed that jurors calculate various probabilities in the course of a trial and during deliberation (Lieberman and Krauss in Groscup and Tallon 2009; Hastie, Penrod and Pennington 2002). One such approach has been likened to keeping a single meter with a single reading. In a criminal trial, the reading would be a quantification of the likelihood of guilt. These approaches have been described as Bayesian, algebraic and stochastic (Hastie, Penrod and Pennington 2002). They propose different methods of calculation. New evidence in general will lead to belief revision as the internal meter changes its reading (Dragoni, Giorgini and Nissan 2001). With these approaches, it is clear that personal knowledge and belief must feature. It seems intuitively likely, for example, that different individuals would calculate probabilities differently based upon their personal experience of the world.

The approach of Dragoni, Giorgini and Nissan (2001) utilises concepts and symbols from formal logic. This allows for the dependency, in part, of belief revision on what is called the knowledge background—which is essentially a set of propositions constituting personal knowledge. But this model has not, according to the authors, been fine tuned to accommodate the phenomenon of jury decision making. In its current state of evolution, the model lacks any level
of detail about the contents of the set of background knowledge or the way in which that set is used in belief revision.

There is little empirical support for any of the mental meter models (Darbyshire, Maughan et al. 2002). These models are not consistent with the subjective experience of jurors (Devine, Clayton et al. 2001).

**Narrative Construction or Story Model**

A much respected model posits that jurors individually reach a preferred decision in three steps by:

- constructing a story
- defining verdict categories; and
- finding the best fit between the story and those categories.

An excellent synopsis of the Narrative Construction Model, that outlines its salient features, is given by Darbyshire (2002, p. 22):

> In plain language, this model suggests that the juror organises the information into a narrative story by using the trial evidence, personal knowledge of similar events, and personal knowledge of what makes a complete story. Having constructed the story, the juror then takes the judge’s instructions on the law, combined with their prior ideas of crime and forms verdict categories. A decision is reached by classifying the story into the best fitting verdict category.

This account clearly attributes a role to personal knowledge in the construction of narratives. The model posits three stages in the process whereby a juror hears evidence and selects a preferred verdict. First, jurors individually construct a narrative in their heads (Pennington and Hastie 1991; Hastie, Penrod and Pennington 2002; Lempert 1991; Bornstein and Greene 2011). The narrative that they construct is the one that best fits the evidence presented to them.


> The story model posits that jurors employ story-like accounts to organise and interpret trial evidence. Competing accounts are said to be evaluated by a juror for (a) their plausibility—in respect of trial evidence and the juror’s knowledge of related events, and (b) their completeness—which draws on jurors’ everyday experience with story forms, involving evaluative features such as internal consistency and overall coherence.
It is proposed that stories organise information by locating the pivotal events around which the story revolves. They do this by creating a context for interpreting the central actions and evaluating the interpretations against social frames. Thereby the juror assesses the internal consistency and descriptive adequacy of the story—a kind of evaluation for credibility (Hastie, Penrod and Pennington 2002, pp. 22–3). The construction task is to make a story of what happened, what the defendant did, and the range of possible events. All evidence items are assessed for admissibility. Those selected are compared to the story and tested for credibility and for their possible implications. The results of this analysis are then inserted into the story and once again re-evaluated for their credibility and implications. At the end of this procedure, the next evidence item is retrieved and the processes are repeated (Hastie, Penrod and Pennington 2002, p. 20).

Second is the verdict–category establishment stage. Each verdict alternative is internalised as a category. The judge's instructions provide the jurors with the verdict categories and related criteria.

Third, the story classification stage involves finding the best match between story and verdict category features. The jury applies the burden and standard of proof to determine if the evidence proves the charge (Hastie, Penrod and Pennington 2002, p. 22).

A key element of the model is the assumption that the narrative determines the juror's ultimate decision (Hastie 2008, p. 24).

Because the evidentiary picture is generally not complete, jurors fill in gaps in the narrative presented to them by using their personal knowledge and belief. Hastie, Penrod and Pennington (2002, p. 18) expressed it thus:

However, other types of knowledge are used in the juror’s task whose source is internal. The jury uses ‘factual’ knowledge of the social and physical world that appears relevant to the case. Factual knowledge includes the juror’s beliefs, although these beliefs are not necessarily true, such as beliefs about the effects of a certain weapon, motives and behaviour, eyewitness memory, alcohol and its effects on motor coordination, or opinions about social customs among ethnic groups. Another type of information that is not part of the trial data is the ‘strategic’ knowledge that the juror employs in the decision process. This knowledge comprises information–processing strategies that
could determine how the data is organised and combined to form a mental 'product' that can be transformed into a decision.

Hastie (1999) suggests that jurors bring with them, and use, background knowledge. This often takes the form of stories that they have learned from the media but also from their own experience. Hastie (2008) suggested that Caucasians and African-Americans viewed the OJ Simpson trial outcome very differently because of the different narratives that they created.

Jurors use stories as templates or analogies. Some stories are taken from television programs. According to Twining (1999), generalisations are needed to complete stories or to anchor aspects of stories unsupported by specific evidence. He also posits that generalisations can fill in gaps in stories and help formulate hypotheses. He describes such generalisations as being possibly vague, unarticulated, speculative or even biased. They can be value-laden. Generalisations, like stories, are based on a stock of knowledge.

Thus, this model assigns a definite role to personal knowledge and belief. It is mainly used to fill in gaps in the narrative. For example, a juror could use her knowledge of human ambitions and desires to supply a motive for murder when the prosecution has been unable to adduce any solid evidence of one. However, the model also assumes that knowledge of similar events is used to judge the credibility of evidence. Knowledge about story structures informs the process of narrative selection. Clearly such knowledge includes knowledge about the likelihood of certain things happening when other things have happened. The following diagram gives a graphic representation of the model.
It is possible to align this model with orthodox psychological theory. Hastie, Penrod and Pennington (2002 pp. 15–17) describe the trial as a psychological stimulus. They identify the processing demands of the juror’s decision task, and outline the sequence of cognitive processes performed by the juror. There are nine inputs to the jury. These are the:

- indictment
- defendant’s plea
- prosecution’s opening statement
- defence’s opening statement
- evidence of witnesses
- defence’s closing arguments
- prosecution’s closing arguments
- judge’s instructions on procedural matters; and
- the judge’s instructions on verdicts.
The procedural instructions include such things as the:

- presumption of innocence in a criminal trial
- admissibility of evidence
- standard of proof; and
- instructions about credibility.

The judge's instructions on verdicts tell jurors how to fit factual findings into separate verdict categories: (Hastie, Penrod and Pennington 2002, p. 17).

Although this sequence most clearly fits a criminal jury trial it also applies to a civil jury trial. The existence of multiple plaintiffs or defendants might call for some modification, of course. But this would not introduce a different category of input.

According to Pennington and Hastie (1981), the juror undertakes seven subtasks before the commencement of deliberation. The subtasks are to:

- encode trial contents
- learn verdict categories
- select admissible evidence
- construct a sequence of events
- evaluate evidence for credibility
- evaluate the evidence for implications; and
- arrive at a pre-deliberation judgement—that is, a personally preferred verdict.

Hastie, Penrod and Pennington acknowledge the imperfections in this idealised scheme. The tasks might not necessarily follow the prescribed order. Furthermore, not all jurors would necessarily complete all subtasks (Hastie, Penrod and Pennington 2002, p. 18). The authors state that this idealised information-processing analysis is closely related to their Narrative Construction or Story Model. They obviously eschew the traditional, but unrealistic, assumption that there are no important constructive and inferential processes before the evidence is completed.

Studies have found empirical support for the model. In one study, subjects taken from actual jury pools watched realistic filmed trials. They then talked aloud to
reach an individual verdict. This was followed by an interview. According to Pennington and Hastie (1981, p. 23):

...interview protocols exhibited story structures that can be characterized as causal event chains having a hierarchical episode structure.

Hastie, Penrod and Pennington (2002) assert that their model provides a complete psychological account of cognitive processing in juror decision-making and their claim is supported by several sources. These include:

- jury research
- political science analysis
- jurors’ accounts of their experiences and other work.

The authors state that none of the mental meter models have proven to be as comprehensive or realistic as the Story Model (Hastie, Penrod and Pennington 2002, p. 23).

Thus the Narrative Construction or Story Model acknowledges the use of personal knowledge and belief, and theorises about how they are used. But this is still theory. The use of personal knowledge and belief in the construction of stories needs far more attention. In short, there is some theory, but little empirical work on how jurors utilise, their own personal knowledge, beliefs and values in constructing narratives. An important question for future research is whether they do so in conjunction with the evidence or perhaps at times as a substitute for it.

The Integrative Multi-Level Model

The most recent, and in some ways most elaborate, theory of juror and jury decision making is the Integrative Multi-level theory of Dennis Devine. The theory is first explained in his book, *Jury Decision Making—The State of the Science*, published in 2012.\(^{19}\) The model purports to explain decision making at the level of the individual juror and the level of the jury. It is comprised of two theories. It is thus comprehensive. The Director’s Cut Theory explains juror decision making. It is similar to the Narrative Construction Model but in some respects richer and more elaborate. It emphasises the use of schema, principally

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\(^{19}\) This appears to be the only scholarly source to date that describes or even mentions the model. As I have said, it is very new. My account is derived from Chapter Eight of the book.
cognitive structures that are person-related categories such as stereotypes; and structures that are event-related categories such as scripts.

According to Devine, the theory builds upon recent findings in the area of cognitive science. Individual differences will affect how jurors perceive evidence. They will have dispositional tendencies to react to different situations in different ways. This theory also acknowledges the importance of personal knowledge without defining exactly where it comes from or how it is used. According to Devine, human cognition is largely subconscious, automatic and also associative. It follows that jurors may not have a very clear idea about where some of their ideas, beliefs or schemas actually come from. The implication is that acquired knowledge may be incorporated into schema and cognitive structures. This seems intuitively plausible in the case of stereotypes and scripts.

Like its ancestor, the Narrative Construction Model, the Director’s Cut Model emphasises the central role of stories in juror decision making. However, these are not invariably used. There are circumstances where jurors will be unable to create a compelling story. The metaphor of the director’s cut is apt. According to Devine (2012, p. 187):

As the trial proceeds, jurors will form mental pictures of the events leading up to the trial, ultimately crafting a ‘final cut’ representing their personal view of what happened. In the end, some of the footage (evidence) may not fit into the final cut and thus end up on the cutting room floor. Ambivalence regarding how everything fits together may trigger the consideration of alternate endings (alternative stories).

Devine further theorises that the juror will build a story from a mental representation of the jury trial and those events that led to it. Construction of a representation necessarily involves interplay between the evidence and what the juror already knows. Some of what the juror already knows is stored in the form of cognitive scripts and stereotypes.

The deliberation phase requires the cooperation of the entire jury. To explain this focus, Devine uses the story-sampling concept. In the process of deliberation individual jurors recall samples from their memory and share them with other jurors. This does not mean that all jurors contribute to the same extent. Once again, individual differences—including gender, temperament and socio-economic status—will influence the level of participation. Some samples will be
stories; others will be isolated statements. Jurors are subject to both informational influences and normative influences during deliberation. A normative influence would occur, for example, when a powerful faction was able to exert pressure on a minority to accept the faction view.

The theory acknowledges that pre-trial publicity is likely to have an effect on jurors. In the same way, after a jury or juror hears inadmissible evidence, it will be impossible to for them to ignore it. This is despite the fact that the judge may give a limiting instruction that it is to be disregarded. The pre-trial publicity will help to shape the ‘shooting script’ that the juror takes with him or her into the court at the beginning of the case.

Devine explains that a juror will assess the likelihood of a particular script or narrative by considering the scope, credibility and singularity of the evidence. The narrative with considerable scope—in the sense that it explains most of the evidence—will have an advantage over a narrative with less scope. In addition, a more credible narrative is preferred over one with less credibility. Singularity is a quality that describes the uniqueness of the narrative. Devine concedes, however, that the juror may not spend too much time considering alternatives when a narrative has been found that has sufficient or adequate scope, credibility and singularity. He suggests that jurors tend to satisfice. That is, they tend to adopt the first acceptable solution and then stop their search. However in the context of a jury trial, an acceptable solution must still satisfy the requirements of scope, credibility and singularity.

Devine theorises that the individual juror—at the end of the case and before deliberation starts—will be in one of four states of mind. Having regard to the case of the prosecutor in criminal matters or the plaintiff in civil matters, the juror will be a:

- believer
- muller—whose position might be described as agnostic or undecided between plausible alternative stories
- doubter who favours the other side; or
- a puzzler.
The puzzler is the person who is left in a state of confusion by the evidence and feels unable to accept any story.

At the level of jury decision making, the sampling theory postulates numerous factors that are likely to affect the verdict—at least in some cases. These include interactions between the race or gender of jurors and the race or gender of the defendant. Undoubtedly, in civil actions, the plaintiff's race or gender could also have some effect. In developing his theory, Devine incorporated key findings about jurors and juries.

The Integrative Multi-level Theory is impressively elaborate. Furthermore, Devine has developed numerous predictions from his theory that will facilitate its ultimate testing.

In short, the Integrative Multi-level Theory combines theories about juror and jury decision making. It is clearly the most sophisticated theory of juror and jury decision making yet proposed. The model also acknowledges that human cognition is largely an automatic, subconscious process. The theory is therefore not subject to the criticism that it posits a process that is unrealistically rational.

Devine’s theory shares some common features with dual process models which the author considers in the following sections.

**Dual process models**

There is reason to believe that dual process models of cognition apply to jurors (Bornstein and Greene 2011, p. 65). Dual process theories, which are not restricted to the area of jury studies, posit that there are two modes of thinking. One is quite rigorous but also ponderous and the other is faster but less obviously rational. The descriptions of the modes of reasoning vary between theories but the concepts are very similar. Kahneman (2011) labels the two modes System 1 and System 2. System 1 operates automatically, quickly and with little sense of voluntary control; System 2 requires concentration and the deliberate allocation of mental resources to mental activities such as complex computations (Kahneman 2011, pp. 20–1).

Honess and Charman (2002, p. 72) explain a dual-process model that is called the heuristic systematic model. Its applicability to the jury is clear; it was developed to explain the acceptance or rejection of argument. There are two
processing modes. Systematic processing involves effort and close scrutiny and analysis of information. The second mode is heuristic and involves rules and assumptions. An example of an assumption, given by the authors, is that experts can be trusted. There is no doubt that these modes equate to Kahneman’s System 1 and System 2 Thinking. It is also clear that the rules and assumptions that jurors can utilise are based on personal knowledge and belief.

Weinstock and Cronin (2003) characterise juror reasoning as a kind of informal argument—much like the kind of argument used in everyday life. They found that a person’s epistemological sophistication made certain kinds of verdicts more or less likely. Interestingly, they found that jurors with lower reasoning skills tended to be more certain or more doubt ridden about the verdict than those who were more articulate and skilled at arguing a view. The authors depict competent juror reasoning as having three components:

- understanding the criteria that differentiate one verdict from another
- facility in the use and evaluation of evidence; and
- the generation of arguments for and against verdicts.

Reasoning skills were found to be strongly related to a juror’s epistemological sophistication but only weakly related to educational level. The authors conclude that jurors would often not use an optimum mode of cognition. They suggest that, in some cases, their personal epistemology led them to curtail the intellectual endeavour required.

Weinstock (2011) contrasts two modes of reasoning, knowledge telling and knowledge transforming. The first is basically telling a story in chronological order with no real analysis of evidence. It is associated with a simplistic–absolutist epistemology. The second involves a logical, analytical approach, associated with a more sophisticated epistemology. In mock jury studies, Weinstock (2011) found that jurors preferred one type of reasoning and that this tendency was stable over multiple trial runs. He makes the point that the existence of two types of reasoning does not necessarily imply that jurors do not first construct a narrative in their own minds. The reasoning styles are apparent when it comes to knowledge justification—for example, trying to persuade
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others of the correctness of a verdict. He suggests that knowledge telling is related to unconscious processing and that knowledge transforming corresponds to the slow, deliberative type of cognition.

This discussion of dual-process models leads naturally to a discussion of heuristics and intuition which are part of fast, or System 1, processing. It is also relevant to the topic of bounded rationality, discussed later, which posits that problems in the real world are so complex that there will always be limits to the extent to which comprehensive analysis can be used to solve them. System 1 thinking does not involve comprehensive analysis.

**Heuristics and intuition**

Gigerenzer and Gassmaier (2011, p. 451) define heuristics as:

> ... efficient cognitive processes, conscious or unconscious, that ignore part of the information.

Use of heuristics in juror decision making has received some limited attention.20 Furthermore, it is clear that heuristics are based in part upon prior knowledge and belief—even though that may be beneath the level of conscious awareness. Clearly the use of a heuristic can be one kind of rapid reasoning in a dual-process model.

Heuristics are important in decision making. Indeed biases and heuristics are decision rules, cognitive mechanisms and even subjective opinions used in decision making (Busenitz and Barney 1997). Their use has been demonstrated in many individual and group decision making tasks. Furthermore, the extent to which individuals use heuristics—for example, in strategic decisions—can depend on their level of risk aversion. Entrepreneurs in large organisations are more inclined to use heuristics than are managers—possibly because they are more willing to accept a given level of risk of being incorrect (Busenitz and Barney 1997). Some researchers have argued that heuristics are useful as decision making tools that save effort and aid decision making in uncertain circumstances. That is, circumstances where fully rational decision making is not possible (Gigerenzer and Gassmaier 2011). But heuristics can also lead decision makers into error (Busenitz and Barney 1997).

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20 For example, Colwell (2005); Rachlinski (2000). The latter suggests that some legal rules were introduced to address the problems that heuristics might cause.
According to Kurze-Milcke and Gigerenzer (2007, p. 55):

Instead of trying to optimally integrate everything, good decisions in the real world need to know what information to ignore, and heuristic rules of search and stopping search provide models of this intuitive skill.

Sunstein (2003, p. 3) opined that the availability heuristic could lead the decision maker into error. That heuristic is used when there is a lack of statistical information about the likelihood of some event. It requires attempts to call up personal knowledge of a similar event. The decision maker tries to call an instance of the event in question to mind. The ease with which this can be done is used to assess likelihood. Thus, in determining the likelihood of a house catching fire and burning down, the decision maker will try recalling instances of this phenomenon. Sunstein (2003, p. 3) links the use of this heuristic to racial stereotyping. It is clear from Sunstein's explanation that this heuristic must be heavily reliant on personal knowledge and belief.

Sunstein (2003, p. 3) suggests that the use of such a heuristic may at times be rational, but at other times can lead the decision maker into systematic error. Certainly, in using such a heuristic, the decision maker necessarily relies upon personal experience and knowledge that substitute for statistical data. The same researcher suggested that the anchoring and representativeness heuristics have obvious appeal to those making factual findings in a legal context. For example, a jury asked to assess damages would be influenced, in some way, by an initial figure given to them. This would be an anchor that would restrain their ultimate decision.

When using the representativeness heuristic, a decision maker answers the question whether A belongs to class B by looking at the resemblance of A to B (Sunstein 2003, pp. 3–4). Thus, a man wearing glasses might be assumed to be a librarian rather than a farmer—even if there are more farmers than librarians.

Heuristics have been linked to the dual-process theory of cognitive function (Sunstein 2003, p. 14; Kahneman and Frederick 2005, p. 267). The first mode, to which heuristics are linked, is rapid, effortless and autonomous. The second mode is slower and deductive (Sunstein 2003, p. 14). Kahneman and Frederick (2005, p. 268) suggest that the two systems can work in tandem. The use of the second mode, being more logical, can correct errors arising from the first mode.
If mental processing falls into two such modes, then it seems plausible that jurors would use one or the other or both.

The role of intuition in judgement and decision making has been neglected. Betsch provides a very useful definition (Betsch 2008, p. 3 - 4):

Intuition is a process of thinking. The input to this process is mostly provided by knowledge stored in long-term memory that has been primarily acquired via associative learning. The input is processed automatically and without conscious awareness. The output of the process is a feeling that can serve as a basis for judgments and decisions.

According to this definition, intuition relies on knowledge stored in long-term memory. This is most unlikely to be knowledge recently acquired through the trial processes.

Hodgkinson, Langan–Fox and Sadler–Smith (2008, p. 4) define intuition similarly as a complex set of interrelated cognitive, affective and somatic processes—with no obvious intrusion of deliberate, rational thought. The end product can be a hunch or gut feeling—something that may be hard to articulate.

Another useful definition is that of Sadler–Smith and Shefy (2004, p. 77) that:

Intuition is a capacity for attaining direct knowledge or understanding without the apparent intrusion of rational thought or logical inference.

All of these definitions have in common that the processing occurs beneath the level of conscious awareness. Betsch (2008, p. 6) theorises that intuition involves a form of parallel processing that is unconscious. It therefore depends on deeply consolidated memories. Sadler–Smith (2008b) likens intuitions to gut feelings, describing them as rapid, affectively charged judgements. He argues that the intuitive process plays a role in collective as well as individual learning. Damasio (1994) contends that emotion and reason are inextricably linked in decision making. He posits that somatic markers, or bodily sensations, guide decision makers. In this way, many bad options can be avoided (Damasio 1994; Zimmerman 1996).

Hodgkinson, Langan–Fox and Sadler–Smith (2008) emphasise the importance of intuition in decision making. According to Dane and Pratt (2007), intuitions can be conceptualised as affectively charged judgements. These arise through rapid, non-conscious and holistic associations. The same authors found that managers
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in organisations used intuition in decision making. Furthermore, certain conditions conduced to its use. These included:

- uncertainty
- being under time pressure
- complexity; and
- the possibility of pattern recognition.

Sadler-Smith and Shefy (2004) point out that both information overload and the limitations of human intellect can require executives to utilise intuition in preference to rational analysis. They assert that intuition is as important as rational analysis in business processes. The same authors state that intuition and rational analysis can be used together in a balanced way. For example, the output of an intuitive process could be viewed as soft data that could then be subjected to testing like any hypothesis.

Dorfman, Shames and Kihlstrom (1996) argue that the unconscious mental representations that underlie our intuitions are implicit thoughts. They emerge into consciousness after a period of incubation. They are different to actual memories and actual percepts. According to these writers, there has not been much study of implicit thinking.

The use of intuition, like the use of heuristics, appears reliant on a storehouse of personal knowledge. However, the above discussion suggests that the knowledge can be deeply buried and beyond the conscious awareness of the intuitive.

Using common sense notions of the law

Commonsense notions of the law are a form of personal knowledge or belief. The influence of such notions is therefore of great interest. But to fully understand the importance of this, it is necessary to take a step backwards and to consider how jurors cope with understanding what the judge tells them about the law.

Most research suggests that juries deliver sound verdicts most of the time. Thus, it is reasonable to infer that the research would show that they are good at understanding judicial instruction—that is, what the judge tells them about the law. After all, a jury must, at least in theory, apply the law to the factual findings that it has made to arrive at a verdict. But a considerable body of research
findings point in the opposite direction. They give rise to one of the strangest paradoxes in the whole area of jury research. This area has been the focus of much empirical research over many decades, and the results of that research have been consistent and disturbing. Darbyshire, Maughan et al. (2002, p. 25) state that one area in which all commentators agree is that juries have problems in understanding and applying the judge’s instructions.

Some research suggests that jurors’ use of personal knowledge and belief about the law helps to remedy their misunderstanding of what the judge has said. The next section of this thesis considers the current state of knowledge about jurors’ understanding of judicial instructions.

To what extent is the juror’s understanding and application of the law conditioned by personal knowledge and belief and to what extent does it reflect trial inputs—most notably the judge’s instructions? As noted above, the New Zealand Commission commented on instances of jurors bringing law books into the deliberation room (NZLC R69 2001). Other instances of this are mentioned in the jurisprudence and academic literature (MacKenzie and Bromberg 2010, p. 632). There can be no doubt that jurors look for guidance on the law above and beyond that which the judge provides. They are prepared to, and do, research the law. But does this improve or impair their understanding? And why do they choose to do it?

Juries often do not grasp judicial instructions—particularly those regarding the law. This is readily apparent, and doubly disturbing, in capital punishment cases where jurors—when considering whether to recommend the death penalty—are instructed to balance aggravating and mitigating circumstances. They often fail to understand those instructions (Hans 1994; Eisenberg and Wells 1993; Haney 1994). This poor rate of comprehension does not vary with juror demographics, legal context or manner of testing (Smith and Haney 2011).

Haney (1994, pp. 1224–5) expressed the issue eloquently in the following way:

Jurors decide life-and-death questions laboring under numerous misconceptions about the utility and operation of capital punishment, sometimes unclear about the fundamental import of certain kinds of evidence (including something as basic as whether the evidence is aggravating or mitigating), almost always confused over the meaning of the all-important capital instructions, in some instances wrong about the decision rules by which
they are to reach a sentencing verdict, and unclear about (or highly skeptical of) the ultimate consequences of the very alternatives between which they must choose.

Diamond and Levi (1995) reported on a study of one-hundred-and-fifteen subjects who had reported for ordinary jury duty. The subjects were given facts and instructions from an actual trial, and then asked a series of questions to test their comprehension of the instructions that had been given to them. Comprehension was poor. Summarising the results of this survey, Levi (1993) reported that a majority of jurors misunderstood the judge’s instructions about central points of law including those about the death penalty.

Haney and Lynch (1994) using students as test subjects, found that their understanding of the concepts of mitigation and aggravation in the context of death penalty cases was very low. Indeed, only fifteen per cent of the students could give a correct definition of aggravation in that context. The results for the term mitigation were even worse. Less than half of the test subjects could provide a definition that was even partly correct. Mitigation and aggravation are key terms in death penalty instructions.

Lieberman and Sales (1997) reported that juror comprehension of judicial instructions was generally poor. Reifman et al. (1992) indicated that juror understanding of instructions overall was less than fifty per cent although procedural instructions were better comprehended than substantive instructions. The same authors noted that results from juror surveys were supported by laboratory experiments. They also observed that these experiments tended to use college students as subjects. Given their literacy, one might have expected a greater-than-average degree of understanding from that group.

Chorrow and Chorrow (1979) found even lower comprehension rates than some other researchers—for example, their research found that some potential jurors’ comprehension rates were as low as thirty-nine per cent. However, they also acknowledged that other aspects of the trial, for example attorney addresses, might help jurors understand features of the charges. All kinds of legal instructions can be misunderstood. However, limiting instructions are particularly hard to grasp (Severance and Loftus 1982, p. 180). These are
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instructions whereby judges limit the use of particular evidence. For example, the judge might tell the jury that a body of evidence can be used against one defendant but not against the other.

The modern trend is to use pattern instructions. These have been drafted for ease of understanding and repeated use. Charrow and Charrow (1979) rewrote certain civil jury instructions using psycholinguistic principles to increase understanding. Improvements in comprehension did occur—but they were modest. There is still much controversy over the effect of rewriting instructions in simpler language. There is some evidence that maximum comprehension occurs when instructions are rendered orally and in writing (Prager et al. 1989). Jurors also benefit when instructions are repeated at various points in the trial (Tanford 1990, pp. 84–5). Traditionally, instructions on the law were given just before deliberation and after the jury had actually heard the evidence. Arguably this is far too late. Making instructions more jury friendly is also worthwhile. This appears to lead to a modest improvement in juror comprehension of these instructions (Devine, Clayton et al. 2001, p. 667; Elwork et al. 1982). Using psycholinguistic principles to redraft capital instructions in California has improved comprehension to an encouraging degree. But the issue of juror comprehension of judges’ instructions remains problematic (Smith and Haney 2011, p. 349).

The presentation and structuring of instructions can affect comprehension. Semmler and Brewer (2002b) presented self-defence instructions to mock jurors in various ways—including flow charts. The subjects’ knowledge was tested in a variety of ways—for example, by describing the defence; giving a verdict; and applying their knowledge to a novel scenario. The presentation by flow chart improved understanding but the authors conceded that the effect was relatively modest. Audiovisual presentations using computer animations have also resulted in improved understanding of instructions—even to the point where legally naïve subjects achieved similar understanding to law students. (Brewer and Harvey 2004, p. 773).

Instructions to ignore certain evidence may backfire (Lieberman and Arndt 2000, p. 677). Similarly, instructions to ignore pre-trial publicity do not appear to be effective. That is true both of publicity containing incriminating factual
detail and publicity that has only an emotional impact (Kramer, Kerr and Carroll 1990, pp. 414, 430).

In some jurisdictions, courts are permitted to explain the concept of a reasonable doubt. Research by Kerr et al. (1976) suggests that the terms in which this is done will affect the verdict. In one scenario jurors were instructed that a reasonable doubt was any conceivable doubt. In the second scenario, they were instructed that a reasonable doubt was one that could be articulated and supported. Acquittal rates were higher with the first scenario. This verdict variability has been confirmed by other researchers including Horowitz and Kirkpatrick (1996) and Koch and Devine (1999) who showed that different definitions will produce different outcomes.

It is abundantly clear that juries struggle to understand and apply judicial instructions. Given this, how then can they frequently deliver the right result? Charrow and Charrow (1979) surmise that other features of the trial—such as attorney addresses—have a compensatory effect. Another possible reason is that they apply commonsense notions of the law and justice based upon their own personal knowledge and belief (Finkel 2000). Sometimes these notions are prototypes of crimes. They are mental constructs, a kind of personal knowledge or belief that jurors bring into the trial (Finkel 2000, p. 594). A third possibility is that they frequently conduct their own research—for example, by reading relevant parts of law books or legal materials.

A juror's understanding of the law before the trial represents a type of personal knowledge or belief. The use, by jurors, of common sense notions of the law has been widely studied and acknowledged (Lieberman and Sales 1997; Finkel and Sales 1997). One might surmise that if these notions are reasonably accurate they could be quite useful, taking the place of the judge's instructions that are poorly understood. Common sense notions of the law are a form of personal knowledge or belief and so this line of research is highly relevant.

In an early experiment, James (1959) showed that different insanity instructions did not seem to produce different verdicts. In a more elaborate variant of that early experiment Finkel et al. (1985) used students as mock jurors. They were presented with five different case studies involving five different mental or
psychiatric conditions—for example schizophrenia, alcoholism—and six different tests for insanity. Each of these, of course, required a different set of instructions from the judge. These instructions have been used by courts in the United Kingdom and the United States at various times. The facts of the hypothetical crime were otherwise the same; a female defendant was said to have shot her victim.

While the nature of the defendant’s disease influenced the preferred verdict, the set of instructions used did not. For example the schizophrenic defendant was generally found not guilty by reason of insanity and the alcoholic defendant was generally found guilty, but the types of instructions given did not influence the overall pattern. The authors called this latter aspect a remarkable finding. The earliest of the insanity instructions dated from 1723 and the latest from 1979. They are markedly different—reflecting in part advances in the understanding of mental illness and its effect on behaviour. The authors concluded that the mock jurors were clearly thinking in a discriminating way. This was demonstrated, for example, in the way they answered questions about consequences—jail, hospital; or being set free. This accords with the finding of Manzo (1993) that jurors can work out a just and practical outcome that need not follow the letter of the law.

Finkel and Handel (1988, p. 67) suggest that jurors are interpreting insanity instructions so that they accord with an intuitive common sense understanding. Further work reported by Finkel (2000, p. 594) suggested that the common sense notion of insanity was deeper, more complex and more sophisticated than the black letter law notion—that is, the legally accurate definition. Attempts to replace the jurors’ notions of insanity by legal instruction were futile. However, Finkel found that giving jurors a sequential framework of hierarchically ordered verdict options led to greater alignment between legal notions and juror notions.

Finkel (2000, p. 608) further argued that citizens have prototypes for specific crimes and that these can be powerfully determinative of their verdicts. This is not to say that the prototypes are necessarily legally accurate. Finkel and Groscup (1997, p. 211) found that in constructing prototypes for crimes, jurors balanced objective and subjective factors, especially motive, in a common sense way. They also found that jurors have prototypes for criminals.
There is evidence that juror notions of the law are not easy to dispel. Gordon (2012, pp. 673–4), calling these notions schemas, found that they persisted even when plain language instructions were given to jurors in an effort to correct misconceptions.

Clearly there is support in the literature for the view that jurors’ personal knowledge and belief can:

- extend to matters of law
- influence the way that they determine cases; and
- even help to remedy their lack of understanding of the judge’s instructions.

It is less clear where these notions come from. However, as noted above, the New Zealand Commission reported instances of jurors bringing legal materials into the deliberation room (NZLC p. 37 1999).

**Jury competence**

If jurors and juries make significant use of personal knowledge and belief in reaching legal decisions, one would expect that use to cause some disparity between jury verdicts and judge-preferred verdicts. Jury accuracy is therefore a topic that requires some consideration.

The accepted indicator of verdict accuracy is agreement with the verdict preferred by the judge (Kalven and Zeisel 1966; Vidmar 1989). Are personal knowledge and belief ever implicated when juries deliver the wrong verdict? What factors have led them into error when, in the opinion of presiding judges, juries reach the wrong conclusion?

Judge/jury discordance was a major area of inquiry in the landmark Chicago Jury Project. Kalven and Zeisel were two of the principal researchers and a major focus of their work was the accuracy of jury verdicts. Indeed, a major purpose of their study was to determine when and why judge and jury opinions differ in criminal trials (Kalven and Zeisel 1966, p. 9). There were two sub questions:

- what is the magnitude and direction of judge–jury differences; and
- what are the sources and explanations of such disagreements?

(Kalven and Zeisel 1966, p. 55).
The first task obviously was to determine the extent of disagreement. Kalven and Zeisel compared three thousand five-hundred-and-seventy-six criminal jury verdicts with verdicts favoured by the presiding judges—as determined by questionnaire. The writers found agreement in seventy-eight per cent of cases. In nineteen per cent of cases the juries had acquitted in circumstances where the judge would have found the defendant guilty. In three per cent of cases the judge would have acquitted where the jury convicted (Kalven and Zeisel 1966, p. 58). The Chicago Jury Project also studied approximately six thousand civil trials and found exactly the same level of judge–jury agreement—that is, seventy-eight per cent. There was no jury preference for plaintiff or defendant compared with the judge. However, jury awards were approximately twenty per cent higher than the judge thought appropriate (Vidmar 1989).

The underlying assumption that the judge was always right is, of course, tenuous in some circumstances. However, using a comparison with the judge is regarded as a reasonable approach to estimating jury error (Spencer 2007, p. 2; Bornstein and Greene 2011, p. 64).

The direction of the variation was clear enough; juries were more lenient in criminal trials than judges (Kalven and Zeisel 1966, p. 61). The authors, relying inter alia, upon feedback from judges, tried to isolate the major factors that explained the variance between judge and jury decisions. In ten per cent of cases, the judge could offer no reason (Kalven and Zeisel 1966, p. 96). Kalven and Zeisel grouped the explanatory factors into five categories (Kalven and Zeisel 1966, p. 106). Some such factors were straightforward, and their effect reasonably easy to comprehend. For example, some judges had prior knowledge of the defendant who might have had a history of prior offending. This explanation would fall into the category of facts only the judge knew. This is significant. If judges are influenced by personal knowledge or belief in this way, as they acknowledged in the surveys, would not the same be true of juries? The five categories were labelled:

- evidence factors
- facts only the judge knew
- disparity of counsel
- jury sentiments about the individual defendant

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- jury sentiments about the law.

There were also some laws that were not popular with juries; for example, taxation laws. The percentages explained by each of the five factors were:

- evidence factors—approximately fifty-four per cent
- facts only the judge knew—two per cent
- disparity of counsel—four per cent
- jury sentiments about the individual defendant—eleven per cent
- jury sentiments about the law—twenty-nine per cent [Kalven and Zeisel 1966, p. 115]  

The authors did not mention the possibility that jurors and juries could know facts or hold beliefs unknown to the judge. Such an explanation could not emerge from their study design that relied on the judges’ explanations for the difference. If jurors and juries make significant use of personal knowledge and belief, then it stands to reason that this will explain some cases where they disagree with the judge. But of course the judge will have no way of knowing what has happened.

Kalven and Zeisel (1966, p. 149) reported that juries seem to understand the facts of the case. They partially attributed this competence to the fact that the collective memory of the jury was likely to be superior to the individual memory of a single juror (Kalven and Zeisel 1966, p. 151). One of the more interesting findings in the study was that, although juries did not yield to sentiment generally, they were inclined to do so to resolve doubts about the evidence (Kalven and Zeisel 1966, p. 165).

Differences about the evidence were, as has been discussed, found to be an important cause of judge–jury divergence. The authors made the point that such differences would logically seem to arise in one of three ways. Firstly, doubts about evidence could liberate the jury to be guided by sentiment—a tendency avoided by the judge. Secondly, the judge and the jury could simply evaluate evidence differently—for example, by the judge rejecting a body of evidence that the jury accepted. It seems plausible to suppose that jurors’ personal knowledge and belief might affect their evaluation of evidence. Thirdly, the judge and jury might attach quite different meaning to the notion of a reasonable doubt (Kalven and Zeisel 1966, p. 166).
As stated above, Kalven and Zeisel did not report on one factor that could explain some of the disparity in preferred outcomes. This is the possibility that the jury could rely on material that the judge was not aware of. Clearly none of the judges surveyed advanced this as a factor. But how could they? Judges could not logically know that there were things that the jury knew or believed which they themselves did not know or believe. The study methodology relied heavily on the sampling of judicial opinion and was not designed to pick up this factor. However, the use of personal knowledge and belief could surely explain some cases where the judge and jury viewed evidence differently.

The New Zealand Justice Commission Inquiry in its 2001 report also commented favourably on the jury’s competence (NZLC R69 2001, p. xi). This finding was based upon opinions given by participants in the justice system—including judges and lawyers. The commission also sponsored some empirical research into jury performance. Like Kalven and Zeisel (1966) over thirty years before, it was impressed by the observed competence of the jury as an integral part of the criminal justice system. A summary of the empirical findings was published. The Commission (2001, p. xi) said:

> The empirical research...has shown that, in the great majority of cases, jurors are conscientious and their decisions are sound. The virtual absence of criticism of the conduct of juries, in even the most controversial cases, is striking. The essentially anonymous verdict of ordinary citizens chosen at random gives to the process the legitimacy of total independence; they are indeed the ‘little parliament’ to which community decision making is delegated. The major lesson of the research is the validity of the system of trial by jury.

Not everyone has taken a sanguine view of the jury’s competence. Baldwin and McConville (1979a) studied a series of criminal jury trials in Birmingham and London in the 1970s. They pointed out that there were frequent expressions of concern about verdicts. However, they could find no pattern to explain those verdicts giving rise to concerns. Furthermore, the judge–jury agreement rate was high, comparable to that shown by Kalven and Zeisel (1966). From their account it seems that many concerns were those of police unhappy about a perceived high rate of acquittals.

Darbyshire, Maughan et al. (2002, p. 31) point out that approximately seventy-nine defendants could have been wrongly convicted in the set of trials studied by
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Kalven and Zeisel (1966). But this seems to assume that when the judge entertains a reasonable doubt about the defendant’s guilt, the defendant was necessarily innocent and the conviction wrong. This is surely not tenable since it would represent an extraordinary coincidence. Darbyshire, Maughan et al. (2002, pp. 31–2) suggest that the Oxford Jury Project—a research project involving a small number of shadow juries—cast real doubt on jury competence. Interestingly, the writers suggested that a significant number of decisions could be based on such things as guesswork and intuition. Their lack of confidence in intuition is not universal as previously stated.

The shadow juries in the Oxford Jury Project voted to acquit fewer than twenty-three per cent of those who were found guilty by the real jury. But this study has been somewhat exceptional in the reported disagreement rate. Eisenberg et al. (2005, p. 204) confirmed the findings of Kalven and Zeisel (1966) in a study of jury accuracy that partly replicated the original. They found that judges were more inclined to convict but could not link this to either legal or evidentiary complexity. The jury leniency was clear-cut with well-educated juries.

Those who attack the competence of juries are not able to marshal significant empirical support (Dufrainmont 2008, pp. 231, 241–242). The weight of opinion still favours the view that juries are reliable decision makers in criminal trials. It also continues to support the view that judge–jury rates of agreement have not changed significantly in over fifty years. Indeed, thirty years after the original data was collected, Vidmar (1989, p. 4) described the Chicago Jury Project as the most authoritative study of jury accuracy.

Even in civil trials involving very complex issues of causation, there is substantial evidence that juries remain competent as fact finders. For example, in the contentious area of medical malpractice suits, jury judgements tend to conform to independent assessments of health care providers (Vidmar 1998, pp. 858–9). The more able jurors provide leadership and assist the jury to come to terms with complex evidence—including scientific evidence (Cecil, Hans and Wiggins 1990, p. 756). An example of such a complex case would be a product liability case involving a drug that had allegedly caused illness to a plaintiff or class of plaintiffs.
A verdict is subject to errors of the kind that mathematicians label type one and type two errors (Radford 1987, p. 844; Friedman 1972). In a criminal trial, a type one error would occur if the jury found an innocent defendant to be guilty; a type two error would occur if the jury found a guilty defendant to be not guilty. Out of fairness, common-law legal systems favour type two errors over type one errors. But errors reflect uncertainty. This can never be completely eradicated and so the possibility of error can never be eradicated. However, the relative frequency of the two types of error can be adjusted by manipulating the burden and standard of proof (Radford 1987, pp. 847–850). In this context, it seems plausible to suppose that the use of personal knowledge and belief could affect the error rate in some way and to some extent. But how and to what extent we do not know.

The point remains, however, that judges sometimes assess jury verdicts as being incorrect. That error rate is relatively low, has not been fully explained; and has remained fairly constant since it was first studied. The possibility that jurors and juries use personal knowledge and belief as an operative factor in reaching a verdict has hitherto been overlooked as a possible explanation for some judge-jury disagreement. It warrants investigation.

**Jury obedience**

Judges give juries rules or warnings about how to conduct themselves and what they can and cannot do. An obedient jury is one that complies with the judge’s rules. How often do jurors flout rules—in particular those prohibiting their own research, experiments and investigations? If jurors and juries tend to be disobedient, then that can take the form of conducting their own inquiries. Earlier discussion in this thesis demonstrated that the New Zealand Commission identified instances where jurors did exactly that (NZLC R 69 2001; para. 7.42–7.45).

Jury misconduct—particularly conducting online research and communicating about confidential matters—appears to be increasing (Goldstein 2011, p. 589). It may even be reaching epidemic proportions (Artigliere 2011, p. 637). The legal culture assumes that the judge’s instructions are comprehensible and effective in directing and controlling the jury (Tanford 1990, p. 111). Important instructions
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are given to the jury about how to apply the law to the facts, as discussed above. Judges also give directions governing the conduct of the jury during the trial. For example, they are admonished not to discuss the case, even among themselves, until deliberation begins (Hannaford, Hans and Munsterman 2000, p. 360). They are warned not to read, listen to, or watch media accounts of the trial (Ranney 1976). They are warned to refrain from doing research via the internet and, despite this, in some notable cases have persisted in doing so (Aaronson and Patterson 2013).

Judicial instructions about how to behave should be easy to comprehend. Although superior courts can overturn verdicts based on jury misconduct, legal rules often prevent evidence of such misconduct from being adduced (MacKenzie and Bromberg 2010, p. 624). Accordingly, most instances would not come to public notice.

Hannaford, Hans and Munsterman (2000, p. 379) reported substantial non-compliance with the instruction invariably given that jurors should not discuss the case with family and friends— that is persons other than fellow jurors. There are few studies on whether jurors obtain relevant knowledge from such illicit discussions. MacKenzie and Bromberg (2010) reported on cases in Alabama where the jury had conducted its own experiments and thereby made findings critical to the verdict. However, the researchers regarded such behavior as rare.

It is very clear that jurors have been prepared to both discover and share new knowledge and belief in ways that involve direct and conscious violation of the judge’s instructions.

Jury deliberation

A juror’s personal knowledge or belief may or may not influence their decision. But it could not influence other jurors’ decisions unless it was also their knowledge or belief or was shared with them. If such sharing occurred, it would probably be during deliberation. But it could also occur earlier if jurors ignore the common instruction not to discuss the case before deliberation. It is therefore appropriate to summarise what is known about deliberation. If jurors never, or rarely, change their view during deliberation, it would seem to follow
that personal knowledge and belief is not shared; or if shared, it rarely influences other jurors.

Many aspects of jury deliberation have been scrutinised in the literature. Indeed, the importance of deliberation has been questioned following the early findings that jurors were generally decided about their verdict when they entered deliberation. Kalven and Zeisel accessed some early votes of jurors. This produced a notable finding that the majority vote at first ballot generally predicts the final outcome (Kalven and Zeisel 1996, p. 488). Hung jury voting patterns generally demonstrated significant disagreement at the first ballot. Hans and Vidmar (1991) note that this led the authors to the conclusion that deliberation was not a particularly important process for the jury. Jurors had made up their minds before the deliberation phase started.

Other researchers did not generally accept this conclusion. Devine, Clayton et al. (2001) point out that in 10 per cent of cases, the ultimate verdict is the opposite of what the majority initially favoured. Moreover, the New Zealand Commission findings strongly reaffirmed the value of deliberation (NZLC R69 2001). As pointed out by Shaffer and Wheatman (2000, p. 657), deliberating jurors are accountable to other jurors for their views. Since they must justify their views, they are likely to think more deeply and critically about the issues than they would otherwise do. Having to account for one's views helps to overcome the biasing effect of first impressions. Accountability can promote vigilant information processing (Tetlock 1983, p. 291). Hastie, Penrod et al. (1983, p. 1848) point out that the majority effect in juries is replicated in other studies of decision making groups. The largest faction generally prevails.

One area of focus has been the approach to deliberation after the evidence has been heard and the matter submitted to the jury. Bodaken (in Abbott and Bett ed. (1999)) suggested that there are four phases in deliberation:

- orientation
- conflict
- emergent—when a verdict is reached; and
- reinforcement—when a verdict is cemented.
Two distinct styles were noted and well summarised by Hastie, Penrod and Pennington (2002). The verdict–driven style features an early vote. Assuming that it is not unanimous, different factions then advocate for their own point of view. Thereafter, the majority often asks the minority to explain its issues or problems. Manzo (1996) described a form of verdict-driven deliberation in which jurors express their preferred verdict and make a statement more or less like a position statement in a formal organisation. This obviously requires each juror having a turn to explain their view and is characteristic of the collaborative ordering of jury activity.

The evidence–driven style is more rigorous. Balloting occurs late in the process; indeed, there may only need to be one ballot. The evidence is reviewed and discussed without any necessary reference to verdict categories. Abbott (1999) indicates that in the evidence-driven style, juries deliberate for longer and more thoroughly. There is some evidence that the type of issue that needs to be decided influences deliberation style. Kaplan and Miller (1987) concluded that intellectual issues tend to lead to an evidence–driven style while normative issues conduce to a verdict–driven style. Evidence–driven deliberation is widely acclaimed as the preferred approach. Devine, Clayton et al. (2001) suggest that judges should instruct juries to adopt that approach so as to encourage thorough deliberation.

The New Zealand enquiry confirmed the line of research that indicated that juries deliberate in these different ways (NZLC R69 1999, para. 384). The Commission, however, suggested that there were variations in the evidence–driven style. One variant featured an early poll following very limited discussion—perhaps it could be considered a hybrid of the two styles. The enquiry also confirmed a problem often noted with the verdict-driven style of deliberation. Discussion of issues is very much abbreviated compared to the alternative style that features a fuller and richer discussion of evidence and issues. When deliberation commences with a vote, the focus often shifts to getting minority jurors to explain their doubts. Jurors tend to defend entrenched positions: (NZLC R69, 1999, para. 122.3). There is evidence that juries can adopt a mixed style combining an early vote and a robust discussion of evidence (Devine 2012, p. 67).
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The National Centre for State Courts in the United States conducted a very large survey involving approximately three thousand five hundred jurors. Those surveyed were asked to comment on opinion formation and the dynamics of jury deliberation (Waters and Hans 2009). Consistent with other studies, the authors found a strong correlation between the strength of the criminal case and the juror’s vote at first ballot. They also cite other studies—for example, Hannaford et al. (1999)—showing that in complex civil trials, a significant proportion of jurors do not make up their mind before deliberation. Waters and Hans (2009) focused on opinion formation in felony trials. Those surveyed were asked several questions including when they started to lean to one side or the other and what their decision would have been if they were the single decision maker. Very few jurors favoured one side or the other during the opening statements. Over half began to adopt a position as the evidence unfolded. Twenty per cent of jurors reported that they only started to favour one party or the other during the deliberation phase.

One of the more surprising findings was that sixty-two per cent of jurors changed their mind at least once. It seems very clear that jurors can change their minds when they exchange views and share opinions. Accordingly, it is entirely possible that one person’s personal knowledge or belief could influence other jurors’ votes.

A very useful feature of the study by Waters and Hans (2009) is an examination of dissenters’ positions. They conclude that thirty-eight per cent of juries included dissenters. These are jurors who disagree privately with a verdict even if they voted for it. This was said to be a conservative response, based on answers to the question about how the juror would have decided the case by themselves. The authors found that in such cases, the juror voted in line with the majority and against their very personal inclination. It is clear that in many cases there are pressures at work sufficiently strong to force jurors to change their voting preference. These pressures do not necessarily constitute informational influence.

The researchers noted that hung juries do not tend to result unless there is a minority of at least three. Waters and Hans (2009, p. 539) conclude:
What all of this suggests is that, contrary to Kalven and Zeisel’s sense that jury deliberations are unimportant, deliberations play a vital role in generating juror consensus, the consensus that comes from opinion change as well as from conformity to the majority view. These data also shed new light on the current debate over the requirement that juries be unanimous in their verdict. What seems clear is that unanimous jury decisions include not only those cases in which there is genuine agreement but also a significant number of cases in which jurors ‘agree to disagree’ and acquiesce.

Deliberation requires jurors to collaborate and to share views and knowledge. Do they collaborate in an effort to discover new knowledge? And, if so, in what ways? Do they often share their own personal knowledge? These topics have received scant attention. Overall, the research on deliberation is consistent with the jurisprudence. Both suggest that exchange of knowledge and belief during deliberation can influence outcomes.

**Demographic factors influencing jurors**

This area of research is relevant because of the possibility—occasionally expressed in the literature—that demographic factors can be markers for knowledge and belief shared by a demographic group (Hastie 2008, p. 24). It is important to remember that both jurors and parties in the case have demographic attributes. Either or both might in theory correlate with verdicts; or there could be interactions between the two—for example, white jurors might treat white defendants more favourably than black defendants. Some of these findings are long established. A 1956 paper from Strodtbeck and Mann suggested that male jurors tend to be more proactive and female jurors more reactive.

There is, however, evidence that gender differences in participation have diminished whereas social status differences have not (York and Cornwell 2006).

Correlations of gender with verdict are less clear. There is some evidence, from mock jury studies, that females are more likely than males to find a male defendant guilty in a rape trial. Devine (2012, p. 183) summarises the position by saying that—where the defendant is charged with a sexual offence or there is a child victim—a female juror is more likely than a male juror to favour conviction. However, there are few occurrences of this. Mazella and Feingold (2006) conducted a meta-analysis of data from prior studies and found that in criminal trials there is some advantage in a defendant being female, attractive and of high socioeconomic status. But this was only true for some crimes. There is some
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evidence that gender interacts with other factors, to influence verdicts or juror decisions. In particular, female jurors are more inclined to convict for charges of rape (Marder 1987).

Laboratory studies show that female jurors are more likely to convict on the basis of circumstantial evidence when the charge is for a sexual crime. But Sealy and Cornish (1973) showed that the effect was evident in only one of two mock jury rape trials studied.

Clearly conclusions about the influence of demographic factors upon verdicts are still somewhat tenuous. In their synopsis of jury research, Darbyshire, Maughan et al. (2002) note that almost all of the research emanates from the United States. However, even there, expert opinion is divided about the influence of many such demographic factors. They acknowledge that some research supports the view that juror demographic factors affect verdicts. Devine (2012, p.183) found considerable support in the literature for certain correlations between juror race, gender and preferred verdict. But the effect of these factors was not necessarily large.

Baldwin and McConville (1979b; 1980) also make the point that the assumed link between verdicts and juror demographic characteristics is supported by quite slender evidence—and some such evidence is contradictory. They could find no effect of juror characteristics upon verdicts in the juries they studied in Birmingham even though those juries were clearly not fully representative of the community. There appears to be slightly more evidence for interactive effects involving gender and other characteristics than for straightforward effects (Darbyshire, Maughan et al. 2002).


It is simplistic to treat characteristics such as race, gender or age of jurors as logically irrelevant and therefore simply indicative of bias when they correlate with the verdict. There has not been a thorough exploration of mechanisms by which the demographic factors may influence or correlate to outcome. Prejudice
is of course a possibility. The defendant leniency theory views race and gender effects as instances of a general predisposition on the part of jurors to favour a party who resembles them. The effect is stronger with mock juries than with real juries (Devine 2012, p. 162). Paradoxically, there is also evidence that in some cases jurors are harsher on those who resemble themselves (Kerr, Hymes et al. 1995, pp. 546–547).

It has been suggested that jurors of different races, genders and ages carry with them, into the trial, different sets of experiences—different storehouses of personal and tacit knowledge and belief. These validly and powerfully impact upon the way that they process the information made available to them (Devine 2012, p. 106).

Looking beyond the criminal justice system, there is considerable evidence that ethnic groups can harbour very strong and deeply entrenched beliefs about the trustworthiness of government and authority figures. This is nowhere more evident, and nowhere more problematical, than in the area of communicable disease—especially Acquired Immune Deficiency Syndrome (AIDS). Conspiracy theories are particularly prevalent in the African–American community (Neff 2006; Bogart and Thorburn 2005; Ross, Essien and Torres 2006). Bogart and Thorburn (2005) reported a survey in which twenty-seven per cent of African–American adults believed that the AIDS virus had been created by the Government to wipe out black people. Ross, Essien and Torres (2006) reported a similar belief among other ethnic minorities.

If this reflects a general distrust of government, jurors belonging to certain ethnic minorities are likely to be skeptical about prosecution cases. African–American jurors, by reason of their personal experience of police, may attach far less weight to police testimony and may be cynical about police investigations. Trial lawyers are known to make this sort of assumption when examining potential jurors for selection (Kerr, Hymes et al. 1995). Hastie (2008, p. 24) postulated that this could explain the very different perceptions of the OJ Simpson case among different racial groups.

The prevalent academic view is that demographic factors have no probative relevance and should not influence verdicts even though they appear to do so.
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(Devine, Clayton et al. 2001). But it seems possible that the full significance of the correlations that have been discovered is yet to be explained. Some correlations may not indicate prejudice. Instead, they might indicate the effect of shared experiences—including personal knowledge and belief that are powerful determinants in the assessment of evidence (Devine 2012, p. 106).

**Juror personality traits and attitudes**

There has been less academic focus on the personality traits of jurors than on demographic characteristics. However, studies have linked extroversion to outcome and process variables in both civil and criminal trials. Clark, Boccaccini et al. (2007, p. 654) found that extroverted jurors were more likely to favour the defendant in criminal trials. The same authors reported that extroverts were more likely to be elected as the foreperson than introverts. Furthermore, when they led deliberations as forepersons, the deliberations tended to last longer than average (2007, pp. 656–7). Boehm (1968) found a relationship between jurors with an authoritarian personality and a tendency to convict. Boyll (1991, p. 178) reported that authoritarian individuals are more likely to accept the prosecutor’s case than are persons who are less authoritarian. Shaffer and Wheatman (2000) have linked the personality trait of dogmatism with one process variable—the tendency to obey instructions from the judge.

Boyll (1991) acknowledged that the strength of the evidence is the most influential factor in determining the verdict. However, he also pointed out that psychological, cognitive, personality and interpersonal factors—all pertaining to jurors—also have an influence. He also cited evidence linking emotional factors to verdicts (Boyll 1991, p. 165). For example, depressed individuals seem more likely to award large amounts of damages in civil trials. There is evidence that sad jurors process evidence more carefully than those whose mood is neutral. Semmler and Brewer (2002a, p. 431), using mock jurors, showed that sad jurors were better able to detect testimonial inconsistency. In this study, juror mood was manipulated by the kind of evidence and the way that evidence was presented.

Once again, personality traits might be markers—if not for personal knowledge, then at least for personal belief. There is certainly evidence that moods such as
sadness and anger can affect social perception—including judgements about whether events are causally connected (Keltner, Ellsworth and Edwards 1993).

Clearly individual differences help explain verdict preferences given that jurors reaching different decisions are exposed to the same evidence (Devine, 2012 p. 182). Differences in juror gender, race and personality contribute to decision making.

**Other bodies of literature that suggest new ways of looking at juror decision making**

This review has uncovered two central though tacit assumptions that underlie much, although admittedly not all, jury research. The first is that the jury should be studied as a unique entity. The second is that juror decision making is a fundamentally rational process. This second assumption certainly underlies much of the theoretical modelling discussed above. However, developments and findings in areas such as collaborative learning, knowledge management and modes of cognition make these assumptions highly questionable.

In one sense, it is certainly true that the jury is a unique institution (Bornstein and Greene 2011, p. 63). But this is not to say that it necessarily operates unlike any other group. Demonstrably, the jury has been studied in an overly limited way. This has come about by researchers treating it as a unique phenomenon; something that exists in isolation from other institutions and that operates in its own idiosyncratic but nonetheless rational way. For this thesis, the jury is envisaged as an entity with some unique and some standard features and operational characteristics.

A jury is a small group engaged in a learning and information-processing task. Weinstock and Cronin (2003, p. 164) point out that juror reasoning involves informal argument of a type commonly used in everyday life. This thesis has already discussed how the Narrative Construction Model appears to receive some support from information-processing theory. The commonality of the juror task with other tasks is notable. According to Pennington and Hastie (1981, p. 246), citing Hammond, Stewart, Brehmer, & Steinmann (1975):

> The juror’s task involves the kind of uncertainty, ambiguity, and potential for situation/information interaction that is typical of our normal experience with the environment.
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The same point is made by Kaplan and Miller (1978). Jury behaviour may resemble the behaviour of other small groups engaged in decision making. Accordingly, the extensive research literature in areas such as group decision making and knowledge management could potentially expand knowledge about jury functioning. Additionally, to the extent that juror reasoning is similar to other kinds of reasoning, useful insights might be gleaned from the literature in such areas as heuristics and intuition, which I have already mentioned, and bounded rationality. This literature may clarify the ways in which jurors might be expected to use personal knowledge and belief.

In short, there may be some benefit in viewing a jury as a specialised small group or even a specialised working organisation. This approach could provide insights that might develop from using those approaches or frameworks. According to Thomas and Allen (2006, pp. 127–8):

The core diagnostic benefit of viewing organisations through the lens of differing metaphors or ways of thinking is to see and understand organisations in new ways.

Bornstein and Greene (2011) make the point that cognitive and social psychology concepts can be used to describe juror and jury activities. This includes the interpretation and memorising of evidence, judgement and decision making. The same authors contend that accepted psychological principles can explain how juries sometimes arrive at the wrong conclusion. They specifically mention heuristics and attribution errors.

There is a significant body of knowledge management and related literature outlining how small groups learn and use innovation and how they can be assisted in those tasks. There is undoubtedly a significant overlap between knowledge management, organisational learning and decision making literature. Some of this literature is potentially useful in explaining jury deliberation and decision making. The jury is a small group of knowledge workers engaged in a common task—that of deciding the case brought to the court. To do this, the jury must assimilate data and information; transform it into useful knowledge; and then make a decision—called a verdict. Because all jurors must ultimately vote on a verdict, all jurors are, or should be, individually involved in a learning task. The task is also collaborative because of rules governing jurors' roles that
require unanimity or, in some cases, a majority vote to support a verdict. Jurors, therefore, are required to learn and decide individually and collectively. To do this they can use their collective skills, knowledge and experiences. The extent to which, and the way they use and share personal knowledge and belief is, of course, explored in this thesis.

Of particular relevance are those aspects of the knowledge management literature that deal with the importance of leadership and the:

- use and importance of tacit knowledge
- innovation
- collaborative learning
- transfer of knowledge within an organisation or group.

Much of this would seem to be of obvious relevance to the jury. The fact that it has not been properly studied in this context is therefore surprising and its consideration overdue.

**Knowledge management**

A common topic of discussion in knowledge management literature is how organisations, and groups within organisations, acquire and share knowledge. In essence, a jury is a small group operating as part of a court. And there is no doubt that jurors are knowledge workers.

Certain key concepts appear with great regularity in the knowledge management literature. Knowledge is contrasted with information and both of these are contrasted with data.

Abell and Oxbrow (2001 pp. 71–83) express their view as follows:

> The most common of the many definitions of the difference between knowledge and information is the pyramid illustrating a progression from data, through information with knowledge at the apex. In some versions this is capped by wisdom...The difference is essentially that knowledge is about the ability to understand context, see connections and spot significance when dealing with information.

To contrast it with data and information, Tiwana (2002) provides numerous characteristics of knowledge. He describes knowledge as actionable information but asserts that it is deeper, richer and more expansive than information.
One of the better-known explanations of knowledge is that of Davenport and Prusak (2000, p. 5):

Knowledge is a fluid mix of framed experience, values, contextual information, expert insight and grounded intuition that provides an environment and framework for evaluating and incorporating new experiences and information. It originates and is applied in the minds of knowers. In organisations, it often becomes embedded not only in documents or repositories but also in organisational routines, processes, practices, and norms.

One might surmise that as a jury trial unfolds, data and information are adduced in evidence and in other ways and then transformed into working knowledge by jurors. What the jury clearly needs is actionable information—that is, the kind of knowledge that will enable it to render an accurate verdict. What Davenport and Prusak (2000) assume is that what we already know and believe constitutes an ‘environment and framework’ for assimilating and incorporating new information.

Following Polanyi (1958; 1966), a pioneer in the field, knowledge management theorists also make a distinction—of fundamental importance in the discipline—between tacit and explicit knowledge. Explicit knowledge is sometimes defined as that knowledge that has already been written down or codified in some way. Knowledge that has not been made explicit is tacit; it is stored in the minds of one or more individuals but cannot be accessed directly by others. Several writers have made the point that tacit knowledge can sometimes be communicated through story telling (Ambrosini and Bowman 2001, p. 821; Martin 1982).

Ambrosini and Bowman (2001) describe tacit knowledge as personal, practical and difficult to communicate. They also describe it as context specific and deeply rooted in individual action. Tacit knowledge is said to be of great value to organisations. It seems reasonable to inquire whether it could be of great use to jurors and whether jurors in fact use it. The same writers point out that there has been little research into tacit knowledge. Ambrosini and Bowman published their paper in 2001. But in this discussion, thirteen years later, it can still be confidently asserted that the use of tacit knowledge in organisations is imperfectly understood. Despite this lengthy passage of time, it has never been actively researched in the context of jury decision making.
Swap et al. (2001) have discussed the importance of storytelling as a mechanism for sharing knowledge in the workplace. They point out that memorable information is more likely to be acted upon than other less memorable information. Stories that are vivid and engaging—and thus more likely to be authoritative—are more likely to guide behaviour. The writers also note that stories are ideal carriers of tacit dimensions of knowledge. If stories can be used as a collaborative tool in organisations to transfer knowledge, could they not serve a similar purpose amongst jurors? Swap and Leonard (2004) use the term *deep smarts* in reference to the capacity of some experienced people in organizations to solve problems almost intuitively relying upon knowledge and experience built up over long periods of time. The capacity can be fostered in another by techniques that include storytelling, mentoring and a kind of guided experience.

Gabriel (2004) acknowledges the importance of stories in organizations, indicating that they have various roles. An important role is to make sense of experiences. Indeed, he says that personal stories can be so authoritative as to successfully challenge expert opinion. Is it conceivable that this could happen on a jury where jurors not only have to make sense out of often confusing and contradictory evidence but are often required to evaluate expert opinions?

The coding and sharing of tacit knowledge turns it into explicit knowledge. According to Nonaka and Takeuchi (1995, p. 64), it is this process of externalisation—facilitated by socialisation involving groups of employees—that constitutes most knowledge creation in successful Japanese companies. Nonaka and Toyama (2003), in a paper which would appear to have an obvious application to the jury process, view knowledge creation in organisations, as dialectical, leading to an ultimate synthesis. They claim that the process is not harmonious, but is likely to be characterised by contradiction and chaos. The jury deliberation process is obviously dialectical and often marked by individuals or groups challenging or contradicting each other. Knowledge management and organisational knowledge creation theory strongly emphasise the critical importance of individual knowledge in organisational knowledge creation. Thus, they clearly have the potential to explain the role of personal knowledge and
tacit knowledge in jury decision making. According to Nonaka and Von Krogh (2009, p. 635):

Organizational knowledge creation is the process of making available and amplifying knowledge created by individuals as well as crystallizing and connecting it to an organization’s knowledge system.

Egington (1998, p. 247) stresses the connection between tacit knowledge, intuition and personal experience:

In much discussion of knowledge management today, distinction is made between tacit and explicit knowledge. Explicit knowledge can be contained in a document, whereas tacit knowledge exists in a person’s mind, it can be intuitive and built up from experience.

Proper leadership is also recognised as an important contributor to organisational knowledge management (Greenberg 1999; Bass 1997; Bass and Steidlmeier 1999). The author of this thesis is unaware of any research into the effect of leadership upon the style of learning adopted by the jury.

**Bounded rationality**

Theories of bounded rationality developed, according to Simon (1972), as a result of attempts during World War Two to introduce simplified decision-making in highly complex real-world situations. Simon’s seminal contributions in this area still resonate in the literature. He uses the analogy of a game of chess in which he estimates the number of possible moves is $10^{120}$. Making decisions in situations of extreme complexity is fraught with three problems. These are:

- uncertainty regarding the consequences of different choices;
- incomplete information about the available alternatives; and
- complexity at a level that makes the necessary computations impossible (Simon 1972).

Simon describes two approaches to decision-making in these circumstances. The first is to operate with a radically simplified model of the real situation (“optimizing”); the second is to settle for a satisfactory rather than the best solution (“satisficing”).

According to Kerr and Tindale (2004), groups are satisficing entities that use reasonably accurate probabilistic estimates. These estimates are based on combined member judgements, rather than completely optimal strategies for
problem solving. Such optimal strategies are simply not worth the additional effort. Juries, like other groups, will not necessarily use the optimum or best means of making a decision. They are likely to stop looking when they find a satisfactory solution (Devine 2012).

Bounded rationality theory proposes that, when faced with limiting factors, humans will find satisfactory ways of reasoning that are clearly not optimal (Gigerenzer and Goldstein 1996; Forester 1984). Heuristic reasoning is one such way but there are others. Morgan and Mannheimer (2009, p. 1126) postulate that even capital juries, faced with information overload, will tend to satisfice. There are times when juries are under pressure that make optimal decision making impossible or impractical. In this context, we might surmise that they would adopt short cuts to reasoning. Some of these may incorporate, or be based upon, personal knowledge and belief.

Arthur (1994) stated that we simplify problems by using pattern recognition to build internal models or schemata. These form a complex and rich inner world where different models compete for acceptance. This approach is much better than logical thinking. Furthermore, this style of cognition is suited to situations that are complicated or ill defined (Arthur 1994).

Hong, Levy and Chieu (2001) have highlighted the importance of what they call lay theories in making sense of the social world. Although these theories may lack scientific rigour, individuals rely upon them to interpret the world and to make predictions about it. They facilitate people’s ability to make sense of what’s going on around them. Gigerenzer and Goldstein (1996), citing Herbert Simon (1956), postulate that any information-processing system needs to satisfice rather than optimise. Satisficing postulates the use of an algorithm that can cope with limitations of time, information or cognitive capacity. Following March and Simon (1958), Forester (1984) suggested that real-world decision making cannot always proceed along purely rational lines.

Decision making is fraught with difficulties. These include:

- ambiguous or poorly defined problems
- incomplete information about the background to the problem and the alternative solutions; and
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- incomplete information about the consequences of certain decisions.

In addition resources, including time and skills, are limited (Forester 1984).

Perrow (1972) outlines a likely strategy in such circumstances that involve the mental construction of a simplified model of the real situation. Such a definition of the situation is built from past experiences and will rely upon prejudices and stereotypes. Present stimuli are used selectively. The problem solver looks for solutions using well-worn paths and selects the first satisfactory one rather than the optimal one (Perrow 1972). Once again, mention of stereotypes and well-worn paths makes it seem likely that personal knowledge and belief are involved.

If, as seems certain, jurors face limitations—such as time pressure, cognitive complexity, limited information and imperfect memory—it seems plausible to suppose that they would satisfice in various ways. They could be expected to use personal knowledge or belief—possibly incorporated into heuristics and internalised models of the real situation.

There is a large body of literature suggesting that groups can respond to stress in positive ways up to a point after which their performance deteriorates. Kerr and Tindale (2004), reviewing the literature, suggest that this Yerkes–Dodson law applies to group performance. This law postulates that the relationship between arousal and performance takes the form of an inverted U. Kaufman (1999) as well as Karau and Kelly (1992; 2004) have demonstrated this with time pressure—time of course being a vital resource. If juries are subjected to pressure, then it is plausible to suppose that this could affect decision making at both the individual and group level.

Chapter summary

The role, source and importance of personal knowledge and belief in juror and jury decision making has been under-researched and is still poorly understood. There is a view that the jury is, and should be, a passive recipient of data and information. In any event, the shroud of secrecy covering jury decision making has impeded direct study of jury activity.

The limited literature that exists on the topic makes it very clear that jurors at times use personal knowledge and belief. Jurors filter the evidence through their
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own experiences and beliefs as well as through their values and expectations (Bornstein and Greene 2011). There is little in the literature to explain:

- its possible sources
- how, when and why it is used
- the extent of use
- its overall significance; and
- how often it is shared.

The Story Model posits that jurors use their background knowledge about story structures to build stories and fill in gaps. Dual Process Models and the Integrative Multi-Level Theory Model posit that, to some extent, acquired pre-existing knowledge is incorporated into cognitive structures and schema. Therefore, it may not necessarily be the subject of conscious awareness.

There are many examples in the jurisprudence of jury acquiring or using personal knowledge and belief. These include jurors:

- conducting their own investigations
- undertaking their own research; and
- making conscious use of expert knowledge in sophisticated ways to test expert testimony.

Various inquiries have acknowledged instances of jurors conducting improper investigations and have contrasted this with jurors using background knowledge that, of itself, is not regarded as improper. Such background knowledge can be quite specialised—such as knowledge of the signs of schizophrenia. The decision making models formulated to explain jury decisions also talk about jurors using background knowledge. In the case of the Narrative Construction or Story Model, this is used to fill in gaps in stories and to allow jurors to choose plausible stories.

The studies of jury accuracy have not fully explained jury inaccuracy. However, their findings are consistent with jurors using their own knowledge and belief in significant ways that can affect the verdict. Various studies have demonstrated correlations between verdicts and juror demographic variables. This might be explained, at least in part, if demographic characteristics—such as race and gender—are really markers for personal knowledge and belief shared by
demographic groups. This is a hypothesis that has been advanced—especially in the case of race—but never proved. Similarly, jurors can rely on personal knowledge and belief to fashion prototypes for crimes and verdict categories. This may help explain the strange finding that juries generally deliver sound verdicts even though their understanding of the judge’s instructions on the law is anything but sound.

Bodies of literature not directly related to juries may apply to jury decision making and could provide more understanding about how personal knowledge and belief are used. This discussion considers the jury to be a learning group or a group involved in decision making. In this context, literature on collaborative learning and knowledge management may provide useful insights. The underlying assumption that juror and jury decision making is a fundamentally conscious, deliberative process should be re-evaluated using insights derived from studies of modes of cognition.

Published juror memoirs represent a potentially rich and valuable resource for the researcher. Given the difficulties that confront jury researchers using traditional approaches, an analysis of this data is clearly warranted.

Chapter Three discusses the methodology employed to analyse juror memoirs.
Chapter Three: Methodology

Chapter outline
This chapter discusses the methodology and describes the dataset used in this thesis. The chapter starts with an introduction and discussion of relevant epistemological concepts. These helped to shape the author’s chosen methodology that, in turn, determined method. The chapter goes on to discuss these three important topics and to describe the dataset that was analysed—a large selection of juror memoirs.

Introduction
Asking and answering four different questions can determine an appropriate research process (Crotty 1998). These questions are:

- What methods do we propose to use?
- What methodology governs our choice and use of methods?
- What theoretical perspectives lie behind this methodology?
- What epistemology informs this theoretical perspective?

This chapter addresses all of these issues. It also describes the dataset. Mindful of the difficulty involved in studying juries, the author examined an extensive and largely overlooked body of juror memoirs and applied the methodology of grounded theory. This approach provided approximately one hundred-and-forty concepts of interest and enabled an exploration of the relationships between them. This process led to the construction of a theory about how jurors and juries utilise personal knowledge and belief.

The following diagram, taken from Carter and Little (2007), is a good graphic illustration of the dynamic relationship between epistemology—the theory of knowledge; methodology and the method pertaining to any study. Knowledge arises from the analysis of data. But epistemological criteria or tests are employed to distinguish what is, from what is not, knowledge. Furthermore, the researcher’s beliefs about epistemology modify methodology. Methodologies, according to Carter and Little (2007), are theories of, and justifications for, methods. A particular method, then, is an instance of a methodology in action.
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The method involves collecting and analysing data that leads back to knowledge. It is a simple but useful conceptualisation.

**Figure 2: Simple relationship between epistemology, methodology and method**

![Diagram](source: Diagram copied from Carter and Little (2007))

**Epistemology**

Epistemology explores the nature and sources of knowledge (Giaretta and Guarino 1995). It is, stated simply, the philosophical theory of knowledge. There is not a single theory. Rather, as in many realms of cognitive endeavour, there is a myriad of ideas on the topic. Following Feyerbend (1975), this thesis suggests that there are many ways of undertaking scientific discovery which can enhance scientific development. Researchers should not attempt to put any branch of science or other inquiry into a straitjacket since this is likely to stifle scientific progress. Feyerbend (1975, p. 160) stated: ‘...the belief in a unique set of standards that has always led to success and will always lead to success is nothing but a chimera.’

The literature review shows that in the area of jury research certain research paradigms dominate. These include inquiry by survey and questionnaire—as used by Kalven and Zeisel (1966); and mock jury studies in which a small number of dependent and independent variables are observed and measured. Since such approaches have their limitations (Pennington and Hastie 1990; Bornstein 1999; Bray and Kerr 1979), there are compelling reasons to explore new and different ways of studying jury behaviour.
Guba and Lincoln (1994) identify four common inquiry paradigms used in both the physical and the social sciences. These are:

- **Positivism.** This paradigm posits that the use of empirical scientific method—including observation, experiment and prediction—will yield knowledge in the social world of universal laws (Kincholoe and Tobin 2009, p. 515). They further contend that any of the paradigms can be implemented using qualitative or quantitative methods. Positivism assumes the existence of a reality quite independent of the researcher. The reality can be apprehended. Knowledge is built from propositions that have been verified against that reality.

- **Post positivism** acknowledges a reality with which the researcher interacts. Reality can only be apprehended imperfectly. Knowledge is built out of conjectures that are tested. According to Clark (1998), post positivism is associated with the work of philosophers such as Popper and Kuhn.

- **Critical theory**—and related ideologies—goes a step further and views reality as being mutable and value dependent; and finally,

- **Constructivism.** This is similar to critical theory in that knowledge is a construction of the mind and can be built out of social consensus (Guba and Lincoln 1994).

Guba and Lincoln (1994) define a research paradigm as a basic belief system that is based upon certain ontological, epistemological and methodological assumptions. They further state that justifying a paradigm is not a matter of proving that it is incontrovertibly right but rather a matter of demonstrating its utility in the circumstances.

The arguments presented in this thesis rely on the constructivist paradigm. As articulated by the theorist Piaget, constructivism posits that individuals generate knowledge by a process involving the interaction between experience and internal schema, mechanisms or mental patterns. Piaget studied and described the learning process in children of various ages and was able to depict different stages of cognitive development (Piaget 1980, p. 23). He stated:
Fifty years of experience have taught us that knowledge does not result from a mere recording of observations without a structuring activity on the part of the subject. Nor do any a priori or innate cognitive intelligence structures exist in man; the functioning of intelligence alone is hereditary and creates structures only through an organization of successive actions performed on objects. Consequently an epistemology conforming to the data of psychogenesis could be neither empiricist nor preformationist, but could consist only of a constructivism.

Constructivism is closely aligned to methods utilising textual analysis. According to Checkel (2004, p. 12): ‘Interpretative and critical constructivists focus on discourse, the mediation of meaning through language, speech acts and textual analysis.’

Kennedy (2006, p. 96) provides a useful link between Polanyi’s conception of knowledge and the epistemological stance of constructivism. Polanyi’s approach is aligned to constructivism with its emphasis on understanding and meaning rather than objective truth. Knowledge is embedded within human beings but does not consist of mere sense data impressed on the mind. It is actively constructed rather than only discovered (Kennedy 2006, p. 96; Schwandt 2003, p. 305).

Constructivism is often associated with a denial that there is an objective reality (Mills, Bonner and Francis 2006b; Guba & Lincoln 1989, p. 43). According to this view, realities are social constructions of the mind; but that does not preclude the sharing of constructions by individuals (Guba & Lincoln, 1989, p. 43). Moreover, as explained in Chapter Two, some constructivists insist that knowledge constructed in the human mind must have an instrumental value. That is, it must exhibit a fit with an outer reality—even if that reality cannot be fully comprehended (Geelan 1997; Bodner 1986). Indeed, according to Glaser and Strauss (1967 p. 158), most field researchers are seeking to produce a credible account of the empirical world.

The approach in this thesis can be described as constructivist in that sense. Listening to the voices of jurors, the author attempts to weave a tapestry in which the individual threads of those voices can be discerned but where the overall pattern is undoubtedly of the author’s making. It is the author’s
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construction. But it is intended to have a fit with external reality even though that reality may not be perfectly understood.

It is appropriate to give an example of that. As a trial lawyer the author has thought deeply about the importance of evidentiary consistency and the real implications of inconsistency. When reading juror memoirs, the author was clearly primed to notice jurors’ comments on evidentiary consistency. In this context, the concept of consistency was created quickly and used to code many passages in the texts where consistency was an issue. Thus, the candidate’s pre-existing knowledge and belief, and their internal schema, assisted the building of theory from data. The theory is clearly the author’s construction even though the data were the observations and memoirs of others. In the argot of grounded theorists, this thesis presents a theoretical sensitivity to the idea of evidentiary consistency.

In the context of this thesis, there is no suggestion or implication that the emergence of concepts or categories was forced or that data was forced into categories. There was a real fit between the concept of consistency and parts of the dataset. The coding can be justified and this thesis provides data that demonstrates that. Strauss and Corbin (1990, p. 420) affirm that concepts prove their relevance by repeatedly being present across a set of data sources—and sometimes by being conspicuously absent.

In his formulation of the laws of planetary motion, Kepler relied on the astronomical observations of Tycho Brahe (Field, 1982). Similarly, this thesis also relies on the observations of others. The data used in this thesis consists of the observations and reflections of jurists. The major point of a good theory is that it explains a large body of observations made by different people.

Using a grounded theory approach to theory construction does not commit a researcher to any particular epistemological view as to how theories are to be tested. This research aims to develop, rather than to test, theory. But, throughout the thesis, the author has remained aware of the importance of producing a theory that will be capable of being tested. In relation to theory testing, the author argues that Popper’s ideas are useful. The central idea in Popper’s work is
that science grows by the falsification of incorrect theories. He argues that a true theory can never be known to be true because of the problem of induction (Popper 1963). This is the problem—first noted by the philosopher David Hume—of trying to prove that future observed instances of a particular phenomenon will follow the pattern of past-observed instances (Stove 1965).

The best that can be done with a theory is to test it as rigorously as possible. If it survives all such tests, without being falsified by the facts, then it is a theory with a high degree of verisimilitude. A theory's verisimilitude is a measure of its consistency with data or observation. Popper talks about such theories being corroborated. But this is something less than being proven true. In this context, Popper asserts that a theory somehow increases in verisimilitude as it faces more and more tests, and as failed attempts to falsify it accrue (1963, pp. 36–7).

This can be summarised by saying that the criterion of the scientific status of a theory is its ability to be falsified, its refutability, or its ability to be tested. Thus, this theory aims to produce a theory that is able to be falsified and tested. In this context the author remembers Popper's assertion that a theory so constructed and formulated that it cannot be falsified cannot be scientific (Popper 1963, pp. 36–7).

These ideas may need some modification if a researcher has adopted a constructivist epistemology. Nonetheless, constructions can be tested and Popper’s ideas about testing theories do not have to be abandoned if a constructivist paradigm is used (Nola 1997). A theory can be tested to see how close a fit there is between the constructed reality and further observations. In that way, a poorly constructed theory might be shown to have a low instrumental value such that it should be rejected. However, a few falsifications will not necessarily be fatal since they might only point to the need for some minor adaptations to the theory. Constructivists contend that external reality cannot be known with certainty—but then so did Popper.

Construction or generation of a theory is quite distinct to testing of a theory or indeed validation of a theory. However, when a theory has been grounded in a particular dataset, it is consistent with that dataset. If not, there has been a
problem with the derivation or else the dataset itself comprises inconsistent data. If the dataset is considerable, then a properly derived theory, grounded in that set, will have a respectable degree of verisimilitude. A theory with a high degree of verisimilitude may not be a perfectly accurate view of some external reality, but there is no reason to abandon it while it maintains that status.

Conversely, a theory with a low degree of verisimilitude cannot be useful and ought to be revised or rejected. This thesis aims to generate a theory with a high degree of verisimilitude that can be tested. The degree of verisimilitude will depend upon the extent and richness of the dataset and the correct use of the methodology.

In summary, the approach in this thesis is constructivist as it involves interplay between observational data and the author’s own pre-existing knowledge and belief—including knowledge and belief about some aspects of the legal system. This thesis argues that it is possible to adopt a constructivist paradigm and still produce a theory that is capable of being rigorously tested. Annells (1996) suggests that grounded theory, to take one example, was originally sited within a post-positivist paradigm but has evolved and moved towards the constructivist inquiry paradigm. Mills, Bonner and Francis (2008a) identified constructivist elements in the work of Strauss and Corbin (1998), even though those researchers did not expressly embrace it.

Jurors are engaged in a search for knowledge and can also be viewed as constructivists. That is, if they are diligent, they are engaged in an active attempt to construct meaning out of evidence and other knowledge and belief. This attempt is undertaken in accordance with their internal schema and certain rules that are imposed by the legal culture. As stated in Chapter Two, a popular model posits that jurors attempt to construct narratives from the evidence (Pennington and Hastie 1991; Hastie, Penrod and Pennington 2002; Lempert 1991; Bornstein and Greene 2011).

Juries cannot always find unanimity. Accordingly, there is ample justification for the view that different individuals on a jury will construct and tenaciously cling to very different narratives and notions of reality. The jury's task, in essence, is to
reach a consensus or a shared view about some forensic dispute. Different jurors—and indeed different juries—given the same evidence may construct very different realities to resolve that dispute. But the objective is for a majority to find a shared construction or at least to have such closely related constructions that they can agree on the same verdict. In short, a constructivist analysis seems especially apt to describe the function of the jury.

It has been proposed that jurors enter the courtroom with a lifetime of experiences encoded as beliefs and schema (Devine 2012). These are internalised. They then experience or observe the trial evidence which interacts with those internal mechanisms or patterns producing new knowledge. If this is correct, then their learning paradigm is essentially constructivist. This study tests that proposition.

Researchers claim that reality is constructed by, and therefore relative to, the individual or group (Mills, Bonner and Francis 2006b). In the context of this thesis it is sufficient to note that a jury cannot be expected to ascertain an external reality—a set of objective facts—with absolute certainty. Its constructions of reality are constrained by individual differences and by rules imposed by the legal culture. The jury, at least in a criminal trial, is invariably shielded from certain disclosures. Exclusionary rules of evidence often prevent the prosecution from adducing factual material that is clearly relevant. An example of this is the law that usually prevents the prosecution from proving bad character or previous convictions. If a man is charged with assault, then common sense tells us that a history of having assaulted others makes it more likely that he is guilty. But that history, although relevant, will often be withheld from the jury. Exclusionary rules of evidence distort reality by removing some information from those whose job it is to assess the facts (Gross 1997, p. 843). The jury is not allowed to know all of the relevant facts, and cannot be expected to build a completely accurate picture of events.

A trial is conducted with both epistemic and non-epistemic aims (Walker 2006; 2007). Rules of fairness can, and do, entail that accurate and relevant information is withheld from the jury. In some cases, accurate information is not
just withheld; it is replaced by fiction. A good example of this occurred in the OJ Simpson trial. Before the jury entered and viewed Simpson’s home, certain alterations were made to it at the request of the defence and with the permission of the judge. In particular, nude paintings were replaced by less confronting images (Bugliosi 1997). Thus a false picture was presented to the jury in accordance with judicial edict. There are those who would contend that this change was trivial and insubstantial and did not involve the falsification of evidence in the strict sense. To those people, the obvious rejoinder is that the defence lawyers regarded it as important enough to warrant an application to the Court. The Court regarded it as important enough to grant the application. Considerations of fairness justified withholding certain facts from the jury. This is often the case. In a very real way, the legal culture can impact upon a jury’s constructions.

The next section of this chapter discusses methodology and grounded theory as the methodology of choice.

**Methodology**

Methodology can be defined as—the description, explanation and discussion—or justifications of methods (Kaplan 1964, p. 18; Carter and Little 2007, p. 1317). Grounded theory is a set of methodologies. Strauss and Corbin’s approach is a member of that set. Methodology is not method. It justifies, guides and evaluates a chosen method (Carter and Little 2007, p. 1317).

**Aligning methodology and epistemology**

It is important for researchers to align methodology and method with their epistemology and ontology. According to Mills, Bonner and Francis (2006b, p. 26):

> To ensure a strong research design, researchers must choose a research paradigm that is congruent with their beliefs about the nature of reality. Consciously subjecting such beliefs to an ontological interrogation in the first instance will illuminate the epistemological and methodological possibilities that are available.

What follows is a discussion of grounded theory and its variants. Grounded theory is a family of methodological approaches. This thesis adopts the specific
approach of Strauss and Corbin (1998) that aligns closely with a constructivist research paradigm (Annells 1997).

Different methodological approaches to the domain

The behaviour of jurors and juries has been studied in several different ways (Saks 1997). One such way involves the questioning of jurors individually or collectively after the conclusion of the trial. Unfortunately, in Australia, any approach to a juror, even after the trial, is deemed to be a contempt of court or otherwise illegal. Special permission is required. The second broad approach is to examine the behaviour of a mock jury or a shadow jury. The difference between the two is that a mock jury does not observe a real trial. It observes a pretend trial and the degree of realism can be quite variable (Bornstein 1999). Conversely, a shadow jury is a collection of persons who are asked to observe an actual trial and then to deliberate as if they were the real jury. This approach perhaps offers a greater degree of realism but suffers from other shortcomings—including a lack of statistical and experimental control (Saks 1997). The experimenter does not have full control of the variables of interest since the shadow jurors are observing a real trial conducted before a court of law controlled by a judge.

Mock trials have yielded useful insights. Nonetheless, this particular approach has its own limitations (Bornstein 1999; Sears 1986; Bornstein and McCabe 2004). Mock jurors are aware of the fact that their task is artificial or unreal. There are no real parties and no real defendant is on trial. Accordingly, no grave consequences can ensue from a verdict (Bornstein and McCabe 2004). Furthermore, the trial is often conducted in a way far removed from forensic reality. Instead of sitting in a jury box and watching the court process as it unfolds, the mock juror is often required to listen to a tape, watch a video, or even read a trial transcript.

There is also a restriction-of-range problem of a type well known in the social sciences (Linn 1968; Olson and Becker 1983)). Most mock juries are composed

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21 A typical legislative position is section 68A of the Jury Act, 1977 (NSW)) which makes it an offence to solicit information from, or harass, jurors or former jurors about deliberations et cetera.
of college students. Is it reasonable to suppose that a jury selected at random from the population of eligible jurors would behave in the same way as such a narrowly selected group? One obvious difference is the participants' level of education. Kessler (1975) reported that students were more prone to favour the defendant in criminal trials and more generous with monetary awards in civil trials. It is not always possible to generalise findings from such studies involving students to the general population of eligible jurors. This, of course, indicates limited external validity (Bornstein 1999; Sears 1986).

Some researchers have attempted to overcome this restriction-of-range problem by drawing their mock jurors from the population of eligible jurors in a particular community. But this sort of study is far less common because it is harder to arrange. There are also other problems associated with this approach. According to Weiten and Diamond (1979), inadequate sampling is but one of several problems that undermine external validity of jury simulations.

A fresh way of examining juror and jury behaviour is to utilise the body of literature created by jurors themselves—sometimes with the assistance of writers but often without. This body of literature is quite extensive. It is largely unexploited by academic researchers although its existence has been noted and it has been relied upon as a source of information about juror attitudes to the legal system (Darbyshire, Maughan et al. 2002). Researchers using qualitative methods, including grounded theorists, are quite prepared to consider and use multiple sources of data—including published materials (Goulding 1998).

Since all approaches to studying the jury have their limitations, it is important for researchers to utilise different methods (Saks 1997). A new method might yield new knowledge or confirm previous findings. According to Saks (1997, p. 5):

> Every type of study, and every individual study, inevitably will be imperfect. The basic solutions to those imperfections are replication and triangulation. Replication: If different studies produce similar results under varying circumstances, we gain increasing confidence in the basic tale the data tell. Triangulation: If studies employing different methodologies produce similar results, again we gain increasing confidence in the conclusions.
It is patent that the memoirs of jurors are potentially a valuable source of knowledge about how juries function. The knowledge gained from studying them could augment, verify or contradict knowledge gained in other way.

Having found what appeared to be a rich source of data, the author of this thesis needed to settle upon a research methodology. It was clear that the dataset should be examined qualitatively. Quantitative research demands counting or measuring of categories that are variable but also objective and visible. It is not well suited to the study of complex, dynamic, multi-layered phenomena (Conger 1998; Bryman 1988 and Kriflik 2002). It is particularly not suited to researching a process that—for legal and other reasons—cannot be directly observed or recorded. The author used this reasoning in adopting a qualitative approach.

The thesis uses a grounded theory methodology that utilises an accepted method of textual analysis (Lamp and Milton 2007). There is ample justification for applying a grounded theory approach to a body of writing or narrative that already exists (Strauss and Corbin 1998; Glaser and Strauss 1967; Goulding 1998). Although it is impossible to interrogate a book in the same way in which an interviewee can be interrogated, the scope and extent of the available dataset can compensate for that shortcoming. Glaser and Strauss (1967) in their original elaboration of grounded theory as a technique of qualitative research were appreciative of the richness of existing documentary materials as a source of data. In the course of noting the similarities between the fieldwork and library procedures, they stated (Glaser and Strauss 1967, p.163):

There are some striking similarities — sometimes obvious although often overlooked — between fieldwork and library research. When someone stands on the library stacks, he is, metaphorically, surrounded by voices begging to be heard. Every book, every magazine article, represents at least one person who is equivalent to the anthropologist’s informant or the sociologist’s interviewee. In those publications, people converse, announce positions, argue with a range of eloquence, and describe events or scenes in ways entirely comparable to what is seen and heard during fieldwork. The researcher needs only to discover the voices in the library to release them for his analytic use.
Being surrounded by voices, although expressed as a metaphor, can be taken literally in the sense that the authors advocated reliance on the voices for analysis use.

Grounded theory aligns neatly with a constructivist epistemology. This is especially true of the variant sometimes called evolved grounded theory that was developed by Strauss and Corbin (Mills, Bonner and Francis 2006; Annells 1997).

Central to grounded theory is the concept that theory grows out of an examination of the data (Glaser and Strauss 1967; Allan 2003). In that sense, it stands in direct contrast to those methodologies that require the formation of hypotheses or theories before data is collected and examined. Furthermore, the use of grounded theory and its methodology requires the iterative examination of data and the construction of concepts and theories (Glaser and Strauss 1967; Lingard et al. 2008). It is a very flexible research methodology, well suited to complex social phenomena. Although often used with interview data, there is no reason why it could not also be used with narrative data as argued above. Indeed its inventors encouraged researchers to work with any material bearing on the area of interest (Glaser and Strauss 1967, p. 169).

It seems that both data–first and hypothesis–first approaches to research have potential shortcomings. In a worst case scenario, a data-first researcher might find themselves bogged down in a quagmire of data with no useful notion of what to do with it. That is to say, no useful model or theory might be constructed. To safeguard against this possibility, it would seem prudent to use a widely used and acknowledged technique that is designed to generate theory from data. But the hypothesis–first methodology is also associated with risks. One risk is that the formation of the hypothesis might in some way bias the collection of the data or blind the researcher to the significance of important data. The hypothesis will inform the decision as to what data should be collected because observations are coloured by expectations (Lakatos 1978, p. 15). According to Johnson and Onwuegbuzie (2004), the theory–ladenness of perception is widely accepted by qualitative and quantitative researchers.
In summary, grounded theory is an appropriate qualitative research methodology that can be applied to textual data—including the memoirs of jurors. It aligns with the constructivist paradigm adopted for this study.

**A broad sketch of grounded theory, its philosophical underpinnings and its benefits**

Grounded theory, being a commonly used method of qualitative research, originated with the ground-breaking work of Strauss and Glaser (1967). Since then, the methodology has been developed, applied to many fields and used extensively. It has survived a major difference of opinion between the originators, who soon developed very different ideas about the methodology (Strauss and Corbin 1998). Leaving aside the differences that developed between Strauss and Corbin, there is a unifying, fundamental idea underlying grounded theory. When data is analysed with an open mind, labeled and sorted into categories—and constantly compared to other data—a theory will eventually emerge as relationships between categories are explored. The theory grows out of the data, as it were.

Since the genesis of the theory is in the data, which is analysed without reliance upon preconceived assumptions or hypotheses, one must be cautious about early use of existing academic literature. That could lead to *data forcing*. On the other hand, reading extant literature in advance can enhance theoretical sensitivity. In the Preface to Chapter Two, I fully justified the inclusion of a literature review, explaining that I had endeavoured to steer an appropriate course in my research, using literature to enhance theoretical sensitivity but avoiding the danger of data forcing.

Using grounded theory, the data is selected and analysed in accordance with certain tenets and a theory is constructed from it. The methodology developed in part as a reaction against the formulation of highly abstract theories in sociology. The idea is that grounding theory in data would counteract this tendency (Goulding 1998). It is also a reaction against the view that all the important sociological theories had been developed and that the remaining role for researchers was to test theory using quantitative scientific methods...
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(Charmaz 1983). The methodology has now been used in many areas other than sociology (Goulding 1998).

A substantial benefit of using grounded theory is its freedom from theoretical assumptions about the field of enquiry. For the researcher, having an open mind is essential. When researchers analyse data using grounded theory, they must not force it into any pre-established theoretical framework. This is not to say that the researcher must be devoid of any theoretical ideas at the outset (Kelle 2005). It is permissible, and indeed anticipated, that the researcher will have a theoretical sensitivity to the area (Strauss and Corbin 1998, pp. 42–48). This may come about because of wide reading or prior enquiry into the subject matter of interest. Theoretical sensitivity as such does not constitute a form of research bias so long as the researcher continues to maintain an open mind.

Strauss and Corbin (1998, p. 49) advocate the use of extant literature to enhance their sensitivity to the area of study. According to Mills, Bonner and Francis (2006, p. 5) reading the literature is a useful way of increasing theoretical sensitivity. It provides examples of similar phenomena to those being studied and stimulates thinking about properties or dimensions of the things being studied, thus assisting the examination of data.

In essence, grounded theory combines data analysis and theory development (Walker and Myrick 2006). In all variants of grounded theory, there is a specific defined order for data analysis. According to Walker and Myrick (2006), coding is the method by which data is analysed. The researcher is an actor in the process who manipulates and acts on data. These activities lead to conceptualisation and discovery of theory. It is a staged process whereby theory is constructed from raw data.

The approach to coding, and its link to theory development has been succinctly explained by Goulding (1998) as a process whereby data—chiefly from interviews and observations—is broken down into concepts which are distinct units of meaning. Initially these are clustered in descriptive categories. There is then a process of re-evaluation where interrelationships are identified. The
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development of higher order categories and a core category indicates the emergence of a theory.

This study utilised the evolved variant of grounded theory—the version espoused by Strauss and Corbin (1998).

**The Strauss and Corbin approach**

Evolved grounded theory—that variant of the theory associated with Strauss and Corbin—provides an ideal method for approaching the literature of interest in this case. That is, the published reminiscences of jurors. In most cases, the use of grounded theory and its methods requires the researcher to not only observe people in the context of interest but to conduct in-depth interviews with them. But the method can be used with material already reduced to text (Goulding 1998; Strauss and Corbin 1998; Glaser and Strauss 1967).

This thesis adopted the Strauss and Corbin approach so the following discussion also serves as an accurate and comprehensive outline of its method. That is to say, how the author adopted grounded theory for practical use or put it into action. However, the following section contains additional comments about the author's method.

**Data collection**

The first step is to determine how data is to be collected and from whom. Because of the difficulty associated with interviewing jurors, the author's main task was to find a large set of juror reminiscences. The author had actually discovered a large part of the dataset before contemplating methods of inquiry. But having settled upon grounded theory, the author broadened the search for literature of interest created by, or with the assistance of, jurors.

By undertaking general searches using the Google database, and in particular by searching various bibliographic indices, the author identified numerous books penned by jurors over the last fifty years. The author attempted to identify and examine as much of the body of literature published in the English language as was available but does not claim to have found it all. The complete dataset, running to over one million words, is described in the last part of this chapter.
Several sources could not be used. For example, *Secrets of the Jury Room* by Malcolm Knox, published in 2005, was based on actual experience. However, to stay within the bounds of Australian law, the writer altered the facts and did not disclose actual jury reasoning.

**Open coding and deriving properties**

According to Strauss and Corbin (1998, p.12), there are many different approaches to doing qualitative research of which their approach is just one. Central to the grounded approach to qualitative research is the building of theory out of data using various coding and analytical procedures. Strauss and Corbin (1998, p. 13) are clear that their method is designed to build, rather than test, theory. The coding techniques provide researchers with a means of analysing and comparing and making sense of large amounts of data. Although the grounded approach is systematic, it is also creative. Coding is the basis of the analytic process of grounded theory (Strauss and Corbin 1990, p. 423).

The Strauss and Corbin approach is iterative. The data is analysed until no new categories are identified. There are different kinds of coding, and these are employed iteratively. These have been termed open coding, axial coding and theoretical coding (Strauss and Corbin 1990, p. 423). The level of abstraction increases as the researcher creates concepts out of data, and categories out of concepts (Strauss and Corbin 1990, p. 421).

Open coding is the preliminary categorisation of data. Data is labeled, which is a way of abstracting it into a concept. Concepts are grouped together into categories (Strauss and Corbin 1990, p. 421). The categories are described in terms of their properties and the dimensions of those properties. To take the first step is to engage in conceptualising (Strauss and Corbin 1998, p.103). In their account, labeling a phenomenon is the essence of conceptualisation. The importance of the label, undoubtedly, is that it can facilitate the grouping of similar phenomena. Once phenomena are labeled as concepts, the next step is to look for higher levels of abstraction such that concepts can merge into categories (Strauss and Corbin 1998, p. 113). Undoubtedly, some concepts, given their
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generality and usefulness, will already be tantamount to categories. According to Strauss and Corbin (1998, p. 114):

Categories are concepts, derived from data, that stand for phenomena. Phenomena are important analytic ideas that emerged from our data. They answer the question ‘what is going on here?’

In short, categorisation is essentially a process of abstraction that furthers the objective of explaining the phenomena. The names of categories sometimes come from the literature itself (Strauss and Corbin 1998, p. 115). Researchers name the other categories.

An important aspect of open coding is to develop categories in terms of properties and dimensions. The purpose of this exercise is to give a category some precision and also to distinguish it from other categories (Strauss and Corbin 1998, p. 117). Properties are characteristics or attributes and dimensions represent their location on a continuum. According to the same writers, subcategories specify a category by indicating such things as when, where, why and how a phenomenon is likely to occur. Like categories themselves, subcategories also have properties and dimensions (Strauss and Corbin 1998, p. 119).

Properties are characteristics of a category the delineation of which defines it and gives it meaning. Categories are concepts that stand for phenomena. Sub categories are concepts pertaining to particular categories giving them further clarification and specification (Strauss and Corbin 1998, p. 101). Dimensions are the range within which properties can vary.

**Axial coding**

There are two aspects to axial coding. The first is finding relationships between categories. The second is defining those relationships in terms of hierarchies. Strauss and Corbin (1990, p. 423) describe this as finding relationships between categories and their subcategories.

Axial coding also requires the researcher to find relationships between existing categories and properties of categories. According to Strauss and Corbin, data is
ordered by being placed into discrete categories with properties and dimensions that describe and elucidate those categories (Strauss and Corbin 1998, p. 19).

Axial coding is a form of conceptual ordering and is described by the writers as a precursor to theorising (Strauss and Corbin 1998, p. 20). They regard a well-developed theory as having the characteristic that its concepts are properly defined (Strauss and Corbin 1998, p. 20). Part of the iterative character of grounded research requires the researcher to check and compare the emerging hypotheses and propositions against new data or incoming data (Strauss and Corbin 1998, p. 22).

**The theory stage**

Theory development starts with the selection of a central or core category. This is the central phenomenon of the study (Strauss and Corbin 1990, p. 424). Theory development begins where axial coding ends. This brings us to the issue of what we mean by theory. Strauss and Corbin explain that the term refers to a set of categories that are interrelated so as to form an explanatory framework. What is explained thereby is some phenomenon in the relevant domain of study. A theory is a statement of relationships between these well-developed categories. It explains the who, what, when, where, why and how of an event (Strauss and Corbin 1998, p. 22).

The authors make the point that a theory must be both explanatory and predictive. This approach to grounded theory involves first description—open coding; then conceptual ordering—axial coding; and finely theorising (Strauss and Corbin 1998, p. 25).

Certain qualities are demanded of the researcher. The writers attach great importance to researcher sensitivity. Sensitivity is, in their terminology, being open to the various potential meanings that data may hold. They state that having sensitivity enables the researcher to endow data and events with meaning. Engaging in the alternating processes of data collection and analysis—and being immersed in the process—the researcher comes to grasp meanings that may originally have been elusive. Sudden insights are a feature of qualitative research (Strauss and Corbin 1998, pp. 46–47).
However, Strauss and Corbin do not underrate the importance of the notions that researchers already carry in their heads. These inform research in multiple ways—even if the researcher is not fully conscious of this (Strauss and Corbin 1998, p. 47). Prior reading can clearly enhance one’s sensitivity to the data.

**Questioning and making comparisons**

Strauss and Corbin emphasise the fundamental importance of two operations in their method of analysis. The first operation involves asking questions and the second making comparisons (Strauss and Corbin 1998, p. 73).

**Memos**

Writing memos is also an important part of grounded theory. According to Strauss and Corbin (1998, p. 217), memos are written records of the analysis and they may vary in type and form. Coding notes, such as those used constantly in this thesis, are a form of memo. Memos contain the products of analysis or directions for the analyst (Strauss and Corbin 1998, p. 217).

**Iteration**

Grounded theory uses an iterative approach. The different stages of the overall process can overlap. Certainly, this was the author’s experience. For example, having apparently completed the stage of open coding, the author immersed himself in the task of axial coding. The insights gained in the course of axial coding caused the author to return to the phase of open coding and create some additional categories. The insight gained in the context of this thesis was that those new or additional categories were sitting in the data but, for some reason, the author did not notice them initially.

**Method**

Method is research in action (Carter and Little 2007). It is an instance of how a methodology is implemented in a particular case. The method in this thesis follows closely the standard procedure described by Strauss and Corbin (1998) and outlined above. It involved the collection and analysis of juror reminiscences. These reminiscences led to the development of a theory about how jurors think, process, analyse and reason—eventually arriving at agreement.
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on a verdict—and what use they make of personal knowledge and belief. The method involved sampling a large subset of juror reminiscences that were read closely, noted, described and analysed. The analysis comprised the:

- identification of concepts and categories
- coding and conceptual ordering of those concepts and categories
- delineation of relationships between categories; and
- the generation of a theory.

In this thesis, the approach to open coding was as follows: for each text in the dataset, brief notes were penciled in the margins of the text as it was read. Some, but not all, of these notes were, or contained, labels. The total dataset was extensive. It comprised approximately fifteen books and more than thirty individual reminiscences. At times, instead of making notes the author would mark a particular part of the text, if the significance of the passage was patent. After reading the entire text and marking it up in this way, the author would then return to it and record his own notes.

The memos noted in this thesis included concepts, brief summaries of the text and, at times, direct quotations from the text. The author typed or dictated these using the Dragon software. When the Nvivo software was made available, the author entered notes as internal documents. Open coding was a laborious process and occupied far more time than the author had originally planned to spend. The fundamental issue here was the sheer size of the dataset. It comprises over one million words. The author's own notes and memos on the data run to almost one hundred thousand words.

The author chose codes that appeared to describe important phenomena. However, there is also a list of topics that he had compiled, based in part upon their earlier reading. This is an accepted approach to coding (White and Weatherall 2000) and most of these were adopted in the course of open coding. However, the codes created while reading memoirs greatly outnumbered those on this early list. When the coding was completed, there were over one hundred-and-forty codes recorded. These are reproduced in the next chapter.
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An example of the noting, which includes a quotation from the text, is taken from the source *Members of the Jury* (Barber, Dulan and Giles Gordon (eds) 1976 p. 30):

…the fence sitter was a woman who believed that there was also a man charged with an offence although she couldn’t place him in his relationship to the defendant. It turns out that she was thinking of the accused in the previous case. He had briefly appeared in the dock when his jury returned to report their failure to reach a unanimous verdict.

Oh yes, our Lady juror said, when the mystery was unraveled, she quite understood that there were two trials going on, but she thought that we had to bring in a verdict on both of them.

My comment: ‘This is as scary as it is humorous and is one of the worst examples of a juror simply failing to understand what is happening.’

This note indicated the relevant page from the text, a brief summary of what was said, a quotation from the text and the candidate’s own comment. After the candidate started open coding, he quickly created the category of a juror failing to understand what was happening. Ultimately, this note was coded as such.

To illustrate the process of axial coding, there are examples in this thesis of two of the concepts that emerged in the course of open coding and their treatment during axial coding. These were labeled ‘credibility judgment’ and ‘consistency check’. A credibility judgment is a decision about whether a particular witness or body of evidence is believable. A consistency check is an assessment about whether two bodies of evidence can stand together. These concepts emerged in multiple data sources and are clearly important. The two concepts are closely related. An important aid to judging credibility is assessing consistency. In the subway gunman trial, for example, the writer was very conscious of consistency and rejected evidence from individual witnesses that was contradicted by a large body of other evidence. Thus, in axial coding, this thesis notes the clear relationship between the two concepts and further theorises that both could be subsumed under a broader category of reasoning tools or heuristics.

The analysis presented in this thesis shows that several questions were always foremost in the author’s mind although there were clearly different ways of asking them. The candidate continually asked questions such as:
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- What was going on in the juror’s mind?
- What was their emotional state?
- Were they fully grasping the implications of evidence that they were describing?
- How comfortable were they with the legal culture?
- Were they being influenced consciously or unconsciously by prejudices; and
- What internal processes, schema, reasoning tools or heuristics were they employing?

Juror memoirs lend themselves beautifully to comparisons—principally because of the parallels that are evident between one trial and another or between one juror and another. An interesting parallel that was given considerable thought in this thesis was the similarity of the deliberation phase in the trials of Jack Ruby and OJ Simpson. These trials were separated in time by almost three decades. Undoubtedly, American society had changed considerably in that period. Both trials were also very much in the public eye. OJ Simpson was a celebrity. Jack Ruby had shot the assassin of President Kennedy. In both cases, the jurors were sequestered for the entire period of the trial which is very unusual. Significantly, in light of the complex issues raised in both trials, the juries deliberated for surprisingly short periods of time. In the Jack Ruby trial, the deliberation lasted for two-and-a-half hours—most of which was spent deciding on a penalty. In the OJ Simpson trial, the deliberation lasted for four hours. Both deliberations were verdict-driven—that is, a poll was conducted at the outset.

These two famous trials presented many interesting points of comparison. For example, the disparity between the two juries in terms of the reported quality of relationships was marked. All of the Ruby jurors seemed to get on well; the OJ Simpson jury was schismatic. The former group did not deliberate to any extent on the issue of guilt because they had a common view about the issues. The latter group did not deliberate for long even though their views on some

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22 The data source for the Ruby trial was Causey and Dempsey (2000). For the OJ Simpson trial there were several; viz. Cooley, Bess et al. (1995); Kennedy and Kennedy (1995); and Knox and Walker (1995).
issues were quite disparate. This sort of comparison helped the candidate to construct a theory about the importance of jury harmony.

An example of iteration can be shown by examining the history of the category notions of the law that, after axial coding, became a subcategory of the Jurors’ Toolkit. The way that this occurred provides a good indication of the way that fundamental analysis can be informed by reading and understanding the broader literature. There has certainly been some academic interest in the tendency of jurors to rely upon their own, possibly very crude, notions of legality to the exclusion of any instructions that may come from the judge. Axial coding considers the interrelationship of different categories in the Jurors’ Toolkit. It was only when the author happened to re-read a passage from his notes on the text, *Members of the Jury* that he realised how easy it is to overlook examples. In that instance he had overlooked a perfectly good example of a juror relying upon his own very crude legal notions. In the case of an alleged theft of a motor vehicle, the judge had explained the elements of the offence. One of the jurors, in deliberation, summarised theft of a motor vehicle as any situation in which a person jumps into your car and drives off (Morris 1976, p. 87). Of course, this is a totally inadequate summary of the offence. The prosecution must prove an intention to permanently deprive the owner of possession.23 For example, if a man borrows a car to rush his partner to the labour ward, then he has not committed theft if he fully intended to return the vehicle. The juror was insistent that his summary was accurate; he believed that the writer of the memoir did not understand it because he did not personally own a motor vehicle.

As the analysis proceeded, diagrams were created and inserted into the text to assist with theory construction. Some of these, elaborated over time, are reproduced in the next chapter.

The author reiterates that the method in this thesis closely follows the methodological edicts of Strauss and Corbin outlined above.

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23 This requirement is reflected in the definition of theft in the *Theft Act*, 1968 (UK).
Dataset of memoirs

The following is a brief description of the juror reminiscences included in the dataset. In compiling the reminiscences used in this thesis the author was able to use an extensive body of literature. If it had been any bigger, it would probably have been too unwieldy to work with. A potentially valuable Australian resource was rejected because the author, mindful of contempt laws, had changed the details of the trial and the evidence (Knox 2005). The residual value of that resource lies in the extensive comments that the writer makes about the layperson’s perspective on the legal system. Three separate books on the OJ Simpson trial were used—although in a limited way. Jurors who left the case before the end and before deliberation commenced wrote two of them. The third was written by, or with the assistance of, the female chairperson and two peers. It is disappointingly short of detail about juror reasoning and the deliberation process, but useful in other ways. Admittedly, the entire deliberation in that case was surprisingly short given the length of the case. It may be that there was not a lot that the jurors could say about it. A brief description of the texts comprising the dataset follows.

Thornton, Hazel 1995: Hung Jury—the Diary of a Menendez Juror

The Menendez murder trial took place in California in 1993. Hazel Thornton, an engineer employed by a telecommunications company, was a juror. The case was unusual in that the court employed two juries—one for each of the two defendants. Lyle and Eric Menendez were brothers accused of having murdered their parents. The parents were shotgunned to death in August 1989 in their home in Beverly Hills. The prosecution case was that this was a cold-blooded murder and that the brothers had killed to obtain their inheritance—a considerable sum. The defence acknowledged that the brothers had shot their parents but claimed that this was in self defence. The brothers believed that their abusive parents were about to kill them.

The jury convened to hear and determine the case against Eric deliberated for one hundred-and-six hours but was deadlocked. The judge ultimately declared a mistrial. The jury was divided along gender lines—the females, unlike their male
counterparts, were prepared to accept the possibility that Eric had killed out of fear. They also accepted that his fear was a consequence of a lifetime of abuse. Lyle's jury was also deadlocked. Ultimately both brothers were put on trial again and both were convicted of murder but that second round of proceedings is not part of the subject matter of the book. The Menendez trial attracted considerable public interest. The text runs to approximately fifty thousand words.

Lesly, Mark, assisted by Charles Shuttleworth 1988: Subway Gunman—A Juror's Account of the Bernhard Goetz Trial

Goetz was charged with numerous offences arising out of an incident that occurred on 22 December 1984. Goetz was a passenger on a subway train when he was approached by four young African–American men. He later claimed that they had threatened him and demanded money and that he was extremely fearful. He drew a handgun and fired several shots hitting all four of the youths. One suffered serious injuries resulting in lifelong incapacity. The trial commenced in early 1987 and continued for some months with a verdict being returned in June 1987. Goetz was acquitted of all but the most minor charge. This account is very detailed and opens a window into the juror's mind. The issues deliberated were of considerable complexity—both legally and factually. In effect, the jury had to determine how Goetz had perceived the situation and how reasonable his actions were in those circumstances. The text runs to approximately one hundred thousand words.

Sundby, Scott 2005: A Life and Death Decision—A Jury Weighs the Death Penalty

The author was not a juror but wrote his book after interviewing jurors who served on two death penalty juries. The text clearly expresses the viewpoints of individual jurors and groups of jurors and quotes them verbatim throughout the text. This thesis relies upon these clear quotations as juror reminiscences—which they undoubtedly are. The first case arose out of a botched armed hold-up. The defendant, in the course of robbing a liquor store, shot the man at the till. Ultimately, the jury voted for the death penalty. The second case involved the brutal murder of a young homosexual man. It involved rape and torture apart
from the killing. In that case, the jury ultimately voted for a sentence of life imprisonment. The interviews of jurors were part of a much larger study called the Capital Jury Project. The writer states that he has changed some facts to protect the identity of jurors but the quotations are all the words of the jurors themselves. The thesis candidate relied upon the quotations. The text runs to approximately eighty thousand words.

Kennedy, Tracy and Judith assisted by Alan Abrahamson and Judith Spreckels 1995: Mistrial of the Century—a Private Diary of the Jury System on Trial

Tracy Kennedy was a juror in the OJ Simpson trial. The judge ultimately dismissed him as a juror because he had been keeping a personal journal to enable him to write a book after the trial concluded. Mister Kennedy obviously has nothing to say about the deliberation phase because he was not a part of the jury at that time. Nonetheless, he does have some interesting and pertinent observations on the course and conduct of the trial; the behaviour of fellow jurors; and the extreme efforts made by the judge to isolate and control the jury. After being dismissed from the jury, Mister Kennedy took an overdose of prescription drugs and was admitted to hospital. The text runs to approximately ninety thousand words.

Knox, Michael with the assistance of Mike Walker 1995: The Private Diary of an OJ Juror—Behind the Scenes of the Trial of the Century

Michael Knox was a juror in the famous OJ Simpson trial. He was dismissed from the jury when it came to the attention of the prosecution, and then the judge, that he had once been charged with spousal abuse. However, that charge did not proceed. Mister Knox’s undoing was that he did not disclose it at the time of jury selection. The text does not cover the deliberative phase of the trial. However, it is of interest principally because of that part of the content that deals with juror interactions, juror hardships, and the control exerted by the judge. There is also discussion of the mindset of African-Americans when serious allegations are levelled against other African-Americans. It provides an interesting contrast to
the other two books written by OJ Simpson jurors because it offers a different perspective on some issues. The text runs to approximately fifty thousand words.

*Cooley Armanda, Bess Carrie and Marsha Rubin–Jackson 1995: Madam Foreman—A Rush to Judgement*

The text incorporates the reminiscences of three female jurors in the OJ Simpson trial—Armanda Cooley, the chairperson; Carrie Bess; and Marsha Rubin–Jackson—two other members of the jury. All three were present throughout the entire trial and took part in the deliberation. The book is not particularly well written and is disappointingly lacking in detail. But it contains some useful material about what jurors were thinking; their reaction to conflict; and the hardship occasioned by their very long sequestration. The text runs to approximately sixty thousand words.

*Beratlis, Greg et al. assisted by Frank Swertlow and Lyndon Stambler 2007: We the Jury—Deciding the Scott Peterson Case*

Scott Peterson the defendant was charged with the murder of his pregnant wife and unborn son on or about Christmas Eve 2002. The evidence was circumstantial but nonetheless strong. Part of the wife’s body, and that of her unborn child, were found months after her disappearance. The prosecution claimed that the defendant dumped his wife’s body into San Francisco Bay. Important evidence against him included taped conversations with his mistress occurring after the disappearance of his wife. He was clearly intent on carrying on with the affair and, furthermore, appeared to be unconcerned about the disappearance of his pregnant wife. An interesting feature of this trial was the discharge of the first foreman after conflict emerged between himself and other jurors. Qualified in law and medicine, the first foreman was perhaps the best equipped of all to fully understand trial issues. Both prosecution and defence called medical experts to testify on the age of the unborn child at the time of his death; this was the best indicator of the time of death. It seems from the account that the first foreman had an obsessive and pedantic approach that irritated his peers and ultimately resulted in open conflict. The text runs to approximately seventy thousand words.
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Zerman, Melvyn 1977: Call the Final Witness—the People Versus Darrell R Mathes as Seen by the 11th Juror

Zerman was a juror in the murder trial of Ricky Mathes. He had allegedly murdered a deliveryman working for a potato chip company in October 1974. The death resulted from an attempted hold-up. The trial took place in late 1975. The only issue at trial was identity; there was no doubt that the deliveryman had been murdered by someone. Much of the evidence against the defendant consisted of testimony given by three other young people from the same neighbourhood. They claimed to have seen the defendant running away from the truck, where the shooting occurred, with a gun in his hand. However, their testimony was riddled with contradictions. Ultimately, the jury acquitted the defendant even though he could present no witness to support his alibi. The deliberation was marked by a high level of conflict between the majority who favoured a not guilty verdict and a couple of jurors who held out for a verdict of guilty. It seems clear that the use of racial stereotypes was at work influencing the thinking of at least some of the all-white jury. The text runs to approximately seventy thousand words.

Carter, Jonathan 2000: Johnny Nine—Capano Juror

The text outlines Carter's experiences as a juror in the murder trial of Thomas Capano. The defendant was an attorney and a member of a wealthy and prominent family from Delaware. The victim, Anne Marie Fahey, was a beautiful young woman who had been having an affair with Capano. The alleged murder occurred in 1996 and the trial commenced in late 1998. The writer was in his thirties and ordinarily worked in the construction industry.

The defence admitted that Capano had been present when the young woman was shot and further admitted that he had disposed of her body by loading it into a cooler that he later dumped into the ocean, after riddling it with bullets in an attempt to sink it. The defence claimed that the victim was shot by another woman who was also involved with Capano. Carter's account gives the reader a very clear picture of how he reasoned from the evidence to a logical conclusion. He spent considerable time in the early part of the deliberation examining the
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evidence and doing research. He read journals, therapists’ notes, emails and
transcript so that he could satisfy himself as to the true nature of the relationship
between Capano and the victim. He saw that as the key to determining what had
happened. It is perhaps the best example of a juror trying very hard to get inside
of the heads of the defendant and other persons. The jury convicted the
defendant of murder. The text runs to approximately one hundred-and-forty-
thousand words.

Kennebeck, Edwin 1973: Juror Number Four
Kennebeck served as a juror in the long-running trial of thirteen Black Panthers
accused of various serious conspiracies and attempted murders. The trial itself
ran from October 1970 until May 1971. At the time of the trial, the writer was a
professional editor. The writer was clearly underwhelmed by the prosecution
case and the prosecution evidence but nonetheless struggled to maintain an
open mind. However, in the end, he was unable to view the prosecution evidence
as having either the weight or the significance that the prosecution believed it
had. As evidence that the Panthers were planning revolution, the prosecution
showed the jury the film, *The Battle of Algiers*, that they tried to link to the
Panthers in some way. To the writer, the film was about self defence rather than
revolution. At one stage, the prosecution produced a Panthers’ weapon as an
item of evidence. It was a sword. The writer tested its sharpness by running it
over his forearm, only to discover that it was so blunt it could not have been used
to ‘skewer a shish kebab’. To prove a conspiracy to blow up a train track, the
prosecution produced a map of the locality. The writer observed that it did not
even show a train line. Needless to say, the jury returned an acquittal. The text
runs to about sixty thousand words.

Grove, Trevor 1998: The Juryman’s Tale
The book was written after English law was changed to better protect the
privacy and sanctity of jury deliberations. For that reason, the writer does not
give a detailed account of what occurred during deliberations. But he does
indicate the kinds of contributions made by different jurors who used personal,
specialised knowledge to assist the jury. The book is interesting and useful
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despite its limitations. The trial arose out of a kidnapping in 1996. The victim was an Anglo-Greek man from a very wealthy family. The alleged motive was the desire to obtain ransom money. A number of men were charged with the kidnapping after the victim had been located and rescued.

The defence case was that the defendants and the alleged victim had staged a false kidnapping and made ransom demands to get money from the victim’s family. In short, the defendants alleged that the victim was party to a conspiracy in which they were all participants. In these circumstances, the jury had to determine who it believed. It was particularly concerned with questions about whether the victim’s reported behaviour after his rescue was consistent or inconsistent with the kidnapping having been real. Trevor Grove’s account is interesting and useful in the emphasis that he places on the individual contribution of jurors and the use that they made of personal knowledge. It also gives an interesting example of a jury uniting in rebellion against a judge’s ruling denying them the opportunity to do some investigating of their own. The jury convicted the defendants. The text runs to approximately eighty thousand words.

**Burnett, D Graham 2002: A Trial by Jury**

At the relevant time, Burnett was an assistant professor in the history department at Princeton University. In the year 2000, he was foreman of a jury charged to decide the guilt or innocence of a man who had allegedly stabbed to death another man. The victim was a cross dresser and homosexual who was murdered in his own flat. In the author’s words, the jury struggled to understand two different things. Firstly, what happened in the dead man’s apartment on the night he died? And secondly, what responsibilities he and his peers had as both citizens and jurors. The defendant claimed that he had defended himself from a violent assault by a man intent on raping him. The victim lured him to the flat by pretending to be a woman. But there were significant problems with his account of what happened and the jury was clearly not fully satisfied as to his credibility. It felt that whether or not he had committed murder, he had probably engaged in antisocial and violent conduct. Apart from Burnett himself, there was another academic historian on the jury. The two engaged in a lively discussion and
debate about the role of the jury. Part of their debate focused on the controversial theory that a jury is entitled to deliver a verdict that ignores the strict legalities of the situation but accords with its own notions of justice. The jury ultimately acquitted the defendant. The text runs to approximately forty-eight thousand words.

*Roth, M Patricia 1986: The Juror and the General*

Roth was an artist and schoolteacher from New York. Her book described a libel trial arising out of the broadcast of a television documentary program by the CBS network in early 1982. The subject matter of the documentary was the publication, by army intelligence, of inaccurately low enemy numbers in the Vietnam War. General William Westmoreland, the Commander-in-Chief of ground forces in Vietnam, alleged that he had been defamed by the broadcast. The trial continued for some months in late 1984 and early 1985. Ultimately the General withdrew his lawsuit and so the case did not proceed to the stage of jury deliberation. However, it is an interesting, enlightening and highly detailed account of a juror’s observations, assumptions, inferences and conclusions reached in the course of hearing months of evidence. An artist by occupation, the writer gave very detailed descriptions of participants and relied heavily upon her reading of body language to inform herself about the character and state of mind of the parties, witnesses and other protagonists. The text runs to approximately one hundred-and-thirty thousand words.

*Timothy, Mary 1975: Jury Woman*

The book is in some respects similar to the Black Panther’s memoir. Angela Davis was charged with conspiracy. The prosecution alleged that she was a party to a conspiracy to release certain prisoners. Ms Davis, a young African–American woman, was a radical philosopher at Berkeley University and her trial in 1972 attracted international attention. A judge and various other persons were killed when a young African–American man took over a courtroom, freed prisoners and took the judge and the jury hostage. The issue was whether Ms Davis had conspired with that man and others to commit the crime to secure the release of other prisoners.
Ultimately, the jury acquitted Ms Davis. Mary Timothy was elected as chairperson. She came to the conclusion that Angela Davis was innocent. She did this largely by analysing her personality as revealed by personal letters. After that she had an epiphany and suddenly realised that Ms Davis was innocent. Thereafter, Ms Timothy took it upon herself to persuade her fellow jurors to acquit the defendant by pointing out the weaknesses in the prosecution case. Ms Timothy proved to be an effective and diligent leader. The text runs to approximately ninety-five thousand words.

*Barber, Dulan and Giles Gordon (eds) 1976: Members of the Jury*

The book includes twelve chapters contributed by twelve jurors involved in English trials up until approximately 1974. The book was published in 1976 by Wildwood House, London. The editors had solicited contributions through letters published in several English newspapers. Because they did not find twelve interested parties, they also sought contributions from the Council for Civil Liberties and a writer’s action group. As a consequence, there was a slight preponderance of writers amongst their contributors.

The jurors served on very different cases. Some involved charges of blackmail, larceny and rioting. None of the trials appear to have been sensational or notorious. They were pretty much run-of-the-mill English jury trials. The views and observations of the twelve jurors are a rich source of information on several things including the:

- importance of class difference among the jurors
- use of racial stereotypes by jurors; and
- the reliance upon personal knowledge and belief.

The text runs to approximately sixty thousand words.

*Causey, Max 2000: The Jack Ruby Trial Revisited: The Diary of Jury Foreman Max Causey*

Ruby was tried for allegedly murdering Lee Harvey Oswald, the assassin of President JF Kennedy. The only issue was Ruby’s state of mind when he pulled the trigger. The defence contended—and under the then-applicable rules of
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evidence had to prove—that Ruby was legally insane at the moment of shooting. Both prosecution and defence called medical evidence from eminent specialists in the areas of psychiatry and neurology. The defence theory was that Ruby suffered from an obscure form of epilepsy and that, in the grip of a seizure, he had become an automaton. The jury rejected the defence and convicted Ruby, recommending the death sentence. On appeal, Ruby was granted the right to a new trial, on the basis that he should not have been tried in Dallas, but died before that could happen. An interesting feature of the trial was the short deliberation during which the jury omitted to discuss the critical medical issue. They did not accept the defence theory and rejected it without discussion.

In total, the dataset comprises over one million words.

**Methodological assumptions**

Personal accounts of jury participation must be approached with a degree of caution. For the purposes of research for this thesis, the author assumed that the writers honestly attempted to describe their jury experiences and that they are competent historians. The thesis does not assume, however, that their interpretations of evidence and trial events are entirely realistic or accurate—they are individual constructions. The next section discusses the issue of accuracy of the reminiscences.

**Data accuracy**

The source documents were autobiographical in the sense that the jurors were writing about a significant episode in their lives. They contain rich descriptions of their observations, mental states and modes of reasoning. After reading the source memoirs, the author was confident that the jurors who had penned them were sincere in trying to recreate and relate what had happened. The author was also confident that the accounts were reasonably accurate. This confidence was supported by several grounds that will be explained later in this chapter. However, this section of the thesis is based on the premise, and acknowledges, that juror reconstructions will obviously not be entirely free of error.
Nonetheless, autobiographical materials and memoirs are respected data sources used by academics. A solid justification for using memoirs as a source for historical analysis is given by Wallach (2006, p. 459):

> A literary memoir is a particularly valuable historical resource, because unlike the novel, it is based in fact and refers to a real past rather than to a fictional world. Because of this, the memoir can give us facts, which are literally verifiable, as well as insights into the way the historical reality it recounts was structured. Novels like the works of Dickens might give us revealing glimpses of what life was like during the historical period they are set in, but they are not intended to be literally verifiable. Despite the myriad ways that memoirs might stretch, evade, or incorrectly portray the truth, they are grounded in real people, places, and things, and thus are better suited to tell us ‘what really happened’ than fictional texts.

There are many examples of personal accounts being used as a resource to study the phenomenon described. For example, in abnormal psychology, personal accounts by sufferers of mental illness have been used. This gives students an insider's view which can complement such things as case studies and epidemiological reports (Norcross, Sommer and Clifford 2001).

Autobiographical accounts are a kind of narrative. Mello (2002) viewed narratives as storied data that could be analysed in various ways. Following analysis, the data could be linked to an academic discourse on a particular topic stating that such data was amenable to textual analysis. Mello views narrative as being important to the work of the researcher and a key component in the construction of knowledge. According to Connelly and Clandinin (1990), biographical and autobiographical writing is a suitable data source for narrative inquiry.

Brewer (1994) explains that theories about the accuracy of autobiography have varied between two types. There are those who regard it as completely accurate—copy theories; and those who regard it as highly tainted by fiction, mistake or innovation—strong reconstructive theories. Juror memoirs are not exact recordings of deliberations, but ex post facto reconstructions of the trial and deliberation. It seems inevitable that they will contain some errors. These can be intentional or unintentional. Several kinds of intentional inaccuracy can exist in personal recollections. According to Ross and Buehler in Schwarz,
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Sudman et al. (1994), autobiographical accounts can be adjusted. The narrator can omit to mention events that they regard as irrelevant. Secondly, they can attach a meaning or interpretation to events that suits their purpose. Thirdly, they can embellish or even rewrite history to achieve some effect.

The same authors make the point that stories are told for different purposes and by different sorts of people. This seems obvious. An entertainer may add fictional elements to a personal story to make it more interesting or entertaining. A criminal may give a totally false and exculpatory account of an event to escape justice. Conversely, a survivor of a concentration camp—or a victim of domestic violence whose motive was to help others understand their experience—would be far less likely to engage in embellishment or falsification. That would simply defeat their purpose. Additionally, the horror and emotion associated with their experiences would implant an accurate memory in their minds. The motive of the narrator—in so far as it can be inferred—is obviously relevant to the assessment of accuracy.

However, memories can also have unintended inaccuracies. According to Hyman and Loftus (1998), personal memories are constructive in that people construct versions of their past. These versions are based on remaining memories, general schematic knowledge and the demands of the remembering context. Accordingly memories will include unintended errors. Tourangeau (1999) reports five kinds of problems with autobiographical memory:

- a problem with the encoding process
- a proper memory is not laid down
- memories become corrupted by the inclusion of elements from other memories
- retrieval failure
- a result of reconstruction—when details are filled in from knowledge of other events of that class—or from expectations.

There is no escaping the fact that certain kinds of memory errors are likely to be present in some of the data. However, what shines through a lot of the memoirs is a sincere desire on the part of jurors to share their often-harrowing
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experiences, and to make suggestions to improve the jury process. The memoirs were written, in the main, by clearly intelligent and lucid people, many of whom were professionals. Burnett is an academic historian. Mary Timothy was a medical researcher. Kennebeck was an editor for a large publisher. Grove was a journalist and newspaper editor. Max Causey and Hazel Thornton were engineers. Many of the contributors to the English memoirs were writers. Thus, there would be an expectation that such persons would understand the importance of truth and accuracy and strive to achieve it. Furthermore, many of the memoirs were based on journals or diaries maintained throughout the trials. That is, they were based on contemporaneous records.

The events that the jurors reported were often harrowing or highly emotional. Burnett wept as he left the court at the end of the case. One of the jurors quoted by Sundby had an emotional breakdown; as did Kennedy from the OJ Simpson jury and one of the jurors in the Scott Peterson case. Laney and Loftus (2008) reported that, on aggregate, true memories are associated with greater emotional intensity and with more negativity than false memories. Other researchers have noted, and reported on, this point about the greater emotional intensity of true memories (Heaps and Nash 2001; Porter and Reisberg 1998). According to Tourangeau (1999), the quality of the coding is affected by such things as the distinctiveness of the event and its emotional impact. Dramatic, drawn out or unusual events are likely to have a rich representation in long-term memory. Many juror experiences have all of those qualities.

The strength of autobiographical memory is also dependent on the event being recalled and its consequences (Porter and Reisberg 1998). Events that are less typical of most life events and highly consequential are likely to be recalled accurately. For many of the writers of the memoirs, the experience of being on a jury was emotionally charged, distinctive or different to other experiences, and consequential. A verdict has significant consequences for the defendant as well as for others.

Some of these reminiscences relate to trials that have attracted a lot of publicity or notoriety. Others are not like this. Most of the memoirs were written by jurors
whose individual experiences moved them to create an enduring record. Much of this literature is extremely enlightening—even on a superficial reading. More to the point, to a greater or lesser extent, it touches on:

- the course of deliberations
- juror reasoning; and
- the perceived factors that finally led to a particular outcome.

No record created by a single juror, or even a small group of jurors, can comprise a complete record of what everyone did and said, much less thought. But such data, although incomplete, can be valuable.

Observational errors, including errors of memory, are a problem in all areas of science. Even in areas such as physics and astronomy, observational error and uncertainty is present and data afflicted with this uncertainty can still be used to construct theoretical propositions (Laymon 1983). The problem does not render science impossible. Memory problems that may afflict jurors writing memoirs could also afflict former jurors answering survey questions. Yet, as outlined in Chapter Two, many research projects into jury behavior have relied on survey data.

In considering the issue of data accuracy, there are two other highly relevant factors. Firstly, there was the collection and analysis of a very large dataset. Secondly, some trials were well publicized and some of the data could be, and were, independently verified. The author sought to verify the parts of memoirs that were accessible and found no evidence of inaccuracy. This inspired great confidence that the unverifiable parts were also generally accurate.

**Chapter summary**

This chapter describes the method and methodology used and the author’s approach as a constructivist. The proposals put forward in this thesis accept, as a working assumption, following Piaget and others, that new knowledge is constructed in the human mind. It is based in part upon pre-existing knowledge, schema and assumptions. Nonetheless the author accepts that knowledge must
have instrumental value; it must have some fit with external reality—even if that reality cannot be determined absolutely.

The constructivist paradigm has also been applied to jurors themselves. According to one theory, they construct stories from the evidence, relying to some extent upon pre-existing knowledge. Since relevant facts are routinely withheld from them, it is not possible for them to build a completely accurate picture of external reality. This thesis describes itself as constructing a theory about how jurors construct knowledge to turn into verdicts.

The dataset of more than one million words was also summarised. The texts on which the dataset was based, were published in the last forty years by jurors in several trials—some of which were widely publicised.

The research method is qualitative and is based on an analysis of a large dataset of juror memoirs. A theory of juror and jury decision making was constructed by listening to the voices of jurors.

The author used a variant of grounded theory as espoused by Strauss and Corbin (1998) by analysing textual data, identifying categories and describing their properties and dimensions. The author’s choice of one-hundred-and-forty categories was influenced to some extent by his theoretical sensitivity to the area of jury study. That sensitivity arose out of extensive reading of the academic literature and professional experience. The stage of open coding, or defining categories, was followed by axial coding, whereby the author identified interrelationships between categories. The third and final stage was theory development.

The author stresses that using grounded theory, and aligning it with a constructivist viewpoint, does not commit him to any particular notion of how a theory should be tested. His task was to develop theory. That theory can be tested rigorously, as espoused by Popper (1963). But that was not an element of this thesis.

Chapter Four presents the author’s findings.
Chapter Four: Findings and theory development

Introduction and overview

In using grounded theory, the author proceeded from open coding, to axial coding, and finally to theory development. The process was to some extent iterative, and thus the different stages overlapped. As explained in the previous chapter, all of the texts in the dataset were read, passages highlighted and marginal notes inserted along the way. Many of the notes became, or suggested, concepts. In the course of open coding, over one-hundred-and-forty concepts were identified.

This long chapter outlines the author's findings and the theory that emerged from their analysis. It contains sections pertaining to the different stages of the analysis—that is, open coding, axial coding and theory development.

The chapter begins with a synopsis of key findings and an overview of the entire analytical process using a limited number of concepts. It then turns to open coding and presents a list of the concepts that emerged from the data. Some of these ultimately were collected into categories. A hierarchical ordering of categories is provided and the more interesting and important properties of categories and their dimensions are explained. The final part of the chapter describes the Jurors' Toolkit which is the core category.

Firstly, the findings from the axial coding stage of analysis are presented. The thesis identifies the factors, subjective and objective, that influence the selection of schemas and tools from the toolkit. The relationships or associations between different schemas and tools are examined before finally focusing on the relationships between schemas and tools themselves; and between them and categories external to the core category.

The final stage of analysis is selective coding and theory development. The discussion about theory development starts with the proposition that jurors are constructivists. This section explains what that means and how it works in the context of the jury trial. A juror's constructs will always have a personal or individual character because of the properties of schemas and tools. The discussion then turns to the issue of personal knowledge and belief. It suggests how the schemas and tools in the Jurors' Toolkit utilise, refine and, to some extent, even generate personal knowledge and belief. The sources and uses of
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such knowledge and belief are outlined and the circumstances are described in which their use can become critical to the trial outcome. The final part of this chapter presents a view about the influence of different styles of deliberation and the possible effect of juror demographic factors.

A synopsis of key findings

Jurors construct knowledge in their own minds. They use information that comes to them through the trial process. But they also rely heavily on personal knowledge and belief that has been internalised. In addition, they rely on other knowledge and belief that has been assimilated other than through the trial process.

Several factors make it inevitable that the constructions of different jurors will be highly individual. First, jurors use a large collection of schemas and tools throughout the course of the trial and the deliberation. The schemas and tools are often based upon, or permeated by, personal knowledge and belief. Furthermore, the tools that an individual juror will select depend upon numerous factors—including the skills and proclivities of the individual juror—as well as their experiences.

The fact that constructions are individual and built in very different ways is not detrimental to the trial process but greatly assists it. A consensus reached in twelve different ways is likely to be safe and justified. To reach agreement on a verdict it is not essential that jurors should have identical constructs about important aspects of the case. Obviously, there will be many instances where individual constructs exhibit significant similarity if not identity. For example, there will be cases where individual jurors will all use Narrative Construction and will succeed in constructing narratives that are very similar if not identical. The differences that may exist between the narratives will not be sufficient to jeopardise consensus. There will also be many instances when juror constructs are very different. For example, in a murder trial one juror may favour acquittal because of a strong intuitive feeling that the defendant could not have been the murderer. Another may acquit notwithstanding that she or he prefers a narrative in which the defendant is guilty but is unable to completely dismiss an inconsistent, although less likely, narrative. In this case, both jurors will favour acquittal but for very different reasons. Their constructs will be quite dissimilar but there will be agreement about the outcome.
The individual nature of constructs is also a consequence of the particular properties that a schema or tool will have when it is used. Seven useful or interesting properties were identified and many of these have a partly subjective character. For example, when in use, a schema or tool will vary as to the extent to which it is fact- or value-laden. In addition, the use of a tool can be accompanied by a lot of emotion or be completely dispassionate. These things will be subject to individual variation that will, to some extent, colour the construct.

The Jurors’ Toolkit is the core category that comprises the many schemas and tools that jurors can and do use—both individually and collectively. They can be used in association or chained together. The number of possible combinations is obviously astronomical. Once again this more or less guarantees that one juror’s constructions will not be the same as those of another and will be built in very different ways.

Jurors are collaborative learners who will become innovative if given the chance. They are driven by the epistemic objective to discover the truth. That objective is strong, and explains the jurors’ tendency to disobey the judge’s instructions. Such disobedience is surprisingly common—particularly in cases where judges try to be over controlling—or where the evidence is close to the threshold required to prove a case. In such instances, the temptation for jurors to conduct their own research and investigations may prove to be irresistible. Strangely, disobedience is a consequence of juror diligence and the desire to deliver an accurate verdict.

**A synoptic view of the process and the major categories**

This section of the thesis provides a synoptic overview of the entire process. It uses a small subset of actual concepts as examples and to show how findings emerged. The following are a few of the concepts that emerged during open coding. They described the operations going on in the juror’s mind which were later labeled schema and tools:

- stereotyping
- intuition
- acting on prejudicial matters
- analytical thinking
The use of personal knowledge and belief by jurors and juries

- credibility judgement
- consistency
- checking personal memory
- flash of insight.

The following concepts are examples of important participants in the trial:

- judge
- witness
- juror.

The concept *judge* had some important properties as did the concept *juror*. Judges exerted control over the jury to a varying extent. Therefore the property, *control of the jury* was created. The property was dimensional. Some judges were quite relaxed and moderate; others, like Judge Ito in the trial of OJ Simpson, adopted extreme measures to control the jury. The concept *juror* also had important properties. Jurors varied significantly in terms of intelligence, education, personality and other factors. These variations proved to be significant. For example, highly obsessive or aggressive jurors could have a detrimental impact on the functioning of the jury.

There are other important concepts that related to other features of the trial. These include:

- issues
- evidence
- outcome
- diligence
- case duration.

Where possible, concepts were grouped into categories. In addition, some concepts were turned into properties of other concepts or categories.

For example, in the above list, the concepts *stereotyping, intuition, acting on prejudicial matters, analytical thinking* and *credibility judgement*—together with numerous other concepts not listed above, were grouped into a category called the Jurors’ Toolkit. It was a grouping of approximately ninety schemas and tools.
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that jurors used in reaching decisions. Similarly, the concepts judge, witness, and juror—and several other concepts—were grouped together into a category called *participants*. The concept, *diligence*, was turned into a property of the juror and the jury. In a similar way, the concept, *case duration*, was turned into a property of *case*. These are but a few illustrations.

Several categories appeared as a result of the grouping process. Categories exist at a higher level of abstraction than the concepts grouped into them. As stated, many concepts were grouped into the Jurors’ Toolkit. This became the central or core category. It is the key to understanding the jurors’ use of personal knowledge and belief. Major categories, apart from the Jurors’ Toolkit, were the *case*, the *culture* and the *participants*. These all had subcategories. For example, the subcategories of *case* were *issues*, *evidence* and *outcome*.

The categories were ordered hierarchically. This gave a convenient graphic view of the overall conceptual arrangement. But, of course, it did not say anything about the dynamic relationships between categories and concepts. A depiction of the categories and their hierarchical arrangement appears diagrammatically below. Note that this view of the categories does not include all of the concepts that were grouped into categories—but it does include the categories themselves.

The dynamic relationships between the categories and concepts were then identified and described as the major exercise in the axial coding phase. These relationships were both internal—between concepts in the core category; and external—between concepts in the core category and categories external to it.

By way of illustration, the concepts, *consistency checking* and *credibility judgement*, were closely related. Jurors used them together because the former assists the latter. There were many instances of credibility judgements in the dataset so that comparisons were easy to make. It became clear that personal belief underlay many such judgements and that such beliefs could be idiosyncratic. The association between consistency checking and credibility judgement was a straightforward and unsurprising example of a relationship—but many others were identified. Personal memory and flash of insight were also related to each other.

Finally, by thoroughly analysing and describing relationships, a theory emerged. Exploring the properties of major categories, and the dimensions of such
properties, also facilitated theory development. For example, the category jury had several important properties including *harmony, socialisation, competence* and *obedience*. These had dimensions. Thus, in terms of harmony, a jury could vary from being extremely harmonious to extremely divided. The quality of deliberation varied considerably depending on jury harmony. The OJ Simpson jury was an example of an inharmonious jury whose deliberation was surprisingly short and clearly inadequate.

Important relationships were also shown through the examination of properties and comparisons of juries whose properties had different values. For example, a highly intelligent juror and a dull juror clearly vary in the value of the property, *intelligence*. The relative positioning of properties along their dimensions showed interesting effects. For example, a judge who had the property of being overcontrolling could foster disobedience in a jury. Such disobedience could take the form of the jury making illicit observations of its own or of its members communicating when they were not supposed to. In turn this could, and at times did, lead to the discovery of new knowledge.

The theory that emerged posits that jurors use a large collection of mental schema or tools. Many of these utilise personal knowledge and belief to a greater or lesser extent. The direct use of personal knowledge and belief were themselves classified as schemas or tools. Some other schemas and tools make conscious use of personal knowledge and belief. In other cases, that content almost certainly remains beneath the level of conscious awareness. The schema and tools are used in many combinations giving a tremendous diversity to juror and jury reasoning and decision making. This thesis will demonstrate that diversity. Anyone who postulates that all such decision making can be explained by a single, simple model would be presented with a formidable difficulty if confronted by this level of diversity.

**Findings**

*Open coding—a complete list of concepts*

This section outlines all of the concepts that emerged in the process of open coding. Note that as coding and analysis proceeded, some of these concepts became categories and some became properties of concepts or categories.
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However, the following table does not contain a full listing of properties or categories. These are covered later.

**Table 1: Concepts from Open Coding**

<table>
<thead>
<tr>
<th>Concept</th>
<th>Property/Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abiding by the rules</td>
<td>A property of the juror and the jury</td>
</tr>
<tr>
<td>Accepting evidence</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Adequacy of investigation–assessment of</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Agreeing/affirming</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Aids to learning</td>
<td>A property of culture</td>
</tr>
<tr>
<td>Analytical thinking</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Applying standard/onus of proof</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Arguing/contradiction</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Assumption–making</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Attentiveness</td>
<td>A property of the juror</td>
</tr>
<tr>
<td>Bargaining or compromising on verdict</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Bizarre belief–using</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Bizarre juror behaviour</td>
<td>A property of the juror</td>
</tr>
<tr>
<td>Bullying or applying pressure</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Burden and standard of proof–applying</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Case</td>
<td>Category containing subcategories, issues, evidence and outcome</td>
</tr>
<tr>
<td>Character evaluation</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Checking or clarifying evidence</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Common sense–using</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Competence</td>
<td>A property of the jury</td>
</tr>
<tr>
<td>Confession</td>
<td>A concept grouped as part of evidence</td>
</tr>
<tr>
<td>Conflict and harmony</td>
<td>A property of the jury</td>
</tr>
</tbody>
</table>
The use of personal knowledge and belief by jurors and juries

<table>
<thead>
<tr>
<th>Considering verdict consequences</th>
<th>Tool/Schema</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consistency check</td>
<td>Tool/Schema</td>
</tr>
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<td>Control of jury</td>
<td>A property of the judge</td>
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<tr>
<td>Construct—actionable</td>
<td>Entity</td>
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<tr>
<td>Corroboration—seeking</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Court</td>
<td>Category having subcategories, case, participants and culture</td>
</tr>
<tr>
<td>Creative or imaginative thinking</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Credibility judgement</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Culture</td>
<td>Category—itself a subcategory of court. It has its own subcategories including explicit rules and procedures; and implicit rules and assumptions</td>
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<tr>
<td>Decision—when made</td>
<td>A property of the juror</td>
</tr>
<tr>
<td>Deliberation</td>
<td>Category with important properties, effort and style</td>
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<td>Diligence</td>
<td>A property of the juror and jury</td>
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<td>Discussing</td>
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<tr>
<td>Distrust of authority—acting on</td>
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<tr>
<td>Done that—personal experience of fact in issue</td>
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</tr>
<tr>
<td>Drawing conclusions during the trial</td>
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</tr>
<tr>
<td>Duration</td>
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<tr>
<td>Education level of jurors</td>
<td>A property of the juror</td>
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<tr>
<td>Emotion—juror experiencing strong</td>
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<tr>
<td>Emotional reactions of participant— noting</td>
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<tr>
<td>Evidence</td>
<td>A concept underneath the category case</td>
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<tr>
<td>Exhibit—examination of</td>
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<td>Expert evidence—assessing</td>
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<td>Exposure to external information before and during trial</td>
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<td>Property/Category</td>
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<td>Finding holes in a case</td>
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<td>Fitting facts to verdict categories</td>
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<td>Flash of insight</td>
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</tr>
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<td>Focusing on major issues</td>
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<td>Frustration with the system</td>
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</tr>
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<td>Gender issues—using awareness of</td>
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<td>Grasp of trial issues</td>
<td>A property of the juror</td>
</tr>
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<td>Hardship and comfort factors</td>
<td>A property of the culture</td>
</tr>
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<td>Hardship experienced by jurors</td>
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<td>Heuristic—using</td>
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<td>Hypothetical—using</td>
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<td>Inference—drawing</td>
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<td>Inherent likelihood or probability assessment</td>
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<td>Intelligence level of juror</td>
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<td>Interpreting or clarifying instructions</td>
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<td>Intuition or gut feeling</td>
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<td>Identifying Issues</td>
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<td>Juror</td>
<td>A concept grouped under the category, participant</td>
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<td>Juror grasp of issues</td>
<td>A property of the juror</td>
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<td>Juror interaction</td>
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<td>Juror experiment</td>
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<td>Jury selection</td>
<td>A property of culture</td>
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<td>Justifying a position</td>
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<td>Knowledge of how a person might act—using</td>
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<td>Knowledge of legal issues—using</td>
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<td>Lack of awareness</td>
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<td>Lay notions of the law—using</td>
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<td>Leadership—providing</td>
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<td>Liking/disliking</td>
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<tr>
<td>Listening</td>
<td>Tool/Schema</td>
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<td>Making factual findings</td>
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<td>Media</td>
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<td>Media—watching, reading, listening to</td>
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<td>Memory—judging reliability of</td>
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<td>Memory of trial—using</td>
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<tr>
<td>Motive—identifying/exploring</td>
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<td>Nullifying</td>
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<td>Observing</td>
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<td>Open mindedness—maintaining</td>
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<td>Opting out or agreeing to agree</td>
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<td>Outcome</td>
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<td>Participant</td>
<td>Category</td>
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<td>Personal belief or knowledge—using directly</td>
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<td>Personal research—undertaking</td>
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<td>Personality of juror</td>
<td>A property of the juror</td>
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<td>Philosophising</td>
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<td>Picture building</td>
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<td>Playing devil’s advocate</td>
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<td>Post-trial attitude</td>
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<td>Pre-deliberation conferring</td>
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<td>Prejudicial matters—acting on</td>
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<td>Prior jury experience</td>
<td>A property of the juror</td>
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<td>Private reasoning—using</td>
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<td>Racial knowledge or belief—using</td>
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<td>Reading body language</td>
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<td>Reasoning to a decision</td>
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<td>Re-enactment</td>
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<td>Rejecting evidence</td>
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<td>Relevance judgement</td>
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<td>Request from jury</td>
<td>Tool/Schema</td>
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<tr>
<td>Satisficing</td>
<td>Tool/Schema</td>
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<tr>
<td>Seeking/using extraneous information</td>
<td>Tool/Schema</td>
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<td>Significant factor in decision</td>
<td>A concept grouped as part of the outcome</td>
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<td>Socialisation</td>
<td>A property of the jury</td>
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<tr>
<td>Special expertise of juror—using</td>
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<tr>
<td>Speculation</td>
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<td>Stereotyping</td>
<td>Tool/Schema</td>
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<tr>
<td>Story telling</td>
<td>Tool/Schema</td>
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<tr>
<td>Strength of the case—assessing</td>
<td>Tool/Schema</td>
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<tr>
<td>Sympathising/empathising / identifying with person</td>
<td>Tool/Schema</td>
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<tr>
<td>Tactics—understanding</td>
<td>Tool/Schema</td>
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<tr>
<td>Thinking about verdict consequences</td>
<td>Tool/Schema</td>
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<tr>
<td>Understanding of people</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Using/making notes</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Using particular evidence</td>
<td>Tool/Schema</td>
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<tr>
<td>Value judgement—making</td>
<td>Tool/Schema</td>
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<tr>
<td>Verdict—choosing preferred</td>
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<tr>
<td>Voting</td>
<td>Tool/Schema</td>
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<tr>
<td>Weighing evidence</td>
<td>Tool/Schema</td>
</tr>
<tr>
<td>Witness</td>
<td>A concept grouped under the category, participant</td>
</tr>
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</table>

Source: Author’s research

Appendix 3 presents the same data grouped by type.
Some examples of concepts and their derivation from the memoirs during open coding

This section contains a description of some of the more important and interesting concepts in the above list. It includes references to the juror memoirs and reasons justifying their creation. The examples are illustrative and a fuller version is appended to the thesis.

Character evaluation

The concept, character evaluation, is a tool or mental schema used by jurors in decision making. There are many instances of character evaluation in the dataset. It is one of the most important tools available to the juror and one that is used frequently. Character evaluation is often a critical part of decision making. Carter, in his memoir of the Capano trial, uses this tool extensively. Indeed, he claimed that his experience as a salesperson gave him confidence in predicting what kind of person a customer was when the customer walked through the door. He used this to argue that people break down into different types and can be recognised as such (Carter 2000, p. 154).

Character evaluation occurs constantly—both before and during deliberation. Jurors often make character assessments in quite surprising ways. Burnett described a police witness as an uncomplicated man from the way that he said ‘I do’ when swearing the oath. (Burnett 2002, p. 49). In the Black Panthers case memoir, the writer describes a witness as ‘...a strangely private man with an introverted confusion of soul.’ (Kennebeck 1973, p. 168). It is not clear what this assessment was based on.

Stereotype

Another concept of interest was stereotyping and sometimes character evaluations rest on stereotypes. Jurors can rely on stereotypes or can take notice of the fact that someone does not appear to conform to a stereotype. In the Scott Peterson trial a juror acknowledged that the defendant did not look like a murderer. In their book about this trial, Beratlis et al. (2007 p. 39) quote that juror as saying:

...he didn’t look like a criminal, let alone a killer. There were no tattoos, no pockmarked face, no sloppy clothes or dirty nails. The clean cut Peterson just
The use of personal knowledge and belief by jurors and juries

didn't look the part.

Quite clearly this juror had a stereotypical picture of a murderer in his mind. But the defendant did not conform to that stereotype. There are, of course, many instances where parties, such as defendants, appeared to conform to the stereotype sufficiently for it to be used.

*Abiding by the rules*

The concept *abiding by the rules* is interesting because the research showed that a jury that is inclined to break the rules may be inclined to conduct its own investigations or research. Indeed, this is often the whole point of such disobedience and examples of this will be provided later in the thesis. Juries are expected to behave in accordance with judicial directions and instructions. The degree of compliance is variable—a finding that emerged very early in the analysis of the categories and concepts. Surprisingly, juries almost always break the rules to some extent. Zerman (1977, p. 64) gives an example:

> In the jury room and as we leave the courthouse, we are starting to disregard the judge’s admonitions not to discuss the case. There are no discussions in which we all join, but there are conversations involving two or three jurors, one of which I am part of, others of which I overhear.

*Analytical thinking*

The concept *analytical thinking* contains instances of jurors using a highly logical form of reasoning. A good example of this sort of reasoning is found in Burnett’s memoir. An academic historian by profession, Burnett used a rigorous intellectual approach to decision making. An analytical bent is evident throughout his entire memoir and he understands the analytical nature of legal argument. At one point, he said: 'Once you tell your story into the law, it becomes the object of a precise semantic dissection.' (Burnett 2002, p. 45).

An analytical style is also characterised by a careful consideration of the exact implications of evidence. Kennebeck noted the difficulty of determining the exact relevance of printed material that was found in the possession of the Black Panthers. Kennebeck stated (1973, p. 64):

> I was not a court buff or a student of law, but I knew that when you found printed matter in someone’s home you didn't take it for granted that he had read it or read all of it. You also don't take it for granted that, if he had read it, he agreed with it. So I decided to go through the newspaper from front to back.
The use of personal knowledge and belief by jurors and juries

The point of his exercise was to look for signs that the paper had been read.

**Fitting facts to verdict categories**

A fourth example is the concept fitting facts to verdict categories. Once again, this was grouped as part of the toolkit. This is a vital jury task and the memoirs cast some light on how this can happen and on the difficulties that can be encountered on the way. The Menendez case presents a good example of a jury agreeing that the defendants had acted wrongly, and indeed illegally. But, despite agreeing that they had, in some way, acted illegally, the jurors were unable to find unanimity as to which category of illegality was relevant. Thornton (1995, p. vii) says:

> The fact is that every juror felt the defendants should be held accountable for the killings, and every juror made a decision as to which level of guilt they believed best fit the facts of the case: first degree murder, second-degree murder, voluntary manslaughter, or involuntary manslaughter. The problem was not that we could not all decide on a verdict; it was that we just could not all agree on one.

The difficulty of finding the appropriate verdict to fit the facts is nowhere more evident than in the death penalty phase of murder trial deliberations. In this phase, the jury does not have to deliver a verdict of guilty; it has already been rendered. Nonetheless, the jury has to determine the penalty and, to do that, it must decide whether the mitigating factors prevail over the exacerbating features of the crime or vice versa. So it still has to put the facts into an appropriate category. Not surprisingly, many jurors, although not all, seem to agonise over this decision. Yet in the first death penalty case, the focus of a group of jurors was unexpected. Instead of focusing on the relevant factors of exacerbation and mitigation, they focused more on the consequences of the corrections system not being able to control the defendant in jail. (Sundby 2007, p. 36). This is an example of one tool or schema—thinking about verdict consequences being used in the service of another—fitting facts to verdict categories. This approach is very common.

**Specialist knowledge**

Jurors often make claims to, and utilise, specialist knowledge. This emerged as a concept of some importance because, of course, specialist knowledge is a component of personal knowledge. In the subway gunman deliberation, the jury had to wrestle with several very complex issues. Firstly, the jury had to
determine the level of perceived threat. In doing so it is clear that jurors
discussed their own perceptions of the apprehension that the defendant Goetz
would have experienced when the four young men approached him on a train.
Did it justify his actions? The writer felt strongly that his extensive martial arts
experience gave him some advantage. He told the jury about points on the skull
that, if forcibly struck, can kill the victim. The writer clearly was of the view, from
the very outset, that his specialist martial arts knowledge would be an asset to
the jury. He was very excited when he realised he had been accepted on the jury,
saying (Lesly and Shuttleworth 1988, p. 11):

I had convinced myself that for several reasons the court could not have a
better juror. First, the whole case was centered around self defence, an issue
that I had thought a lot about in my 14 year involvement with martial arts. I
had to do a lot of soul-searching as I became capable of inflicting mortal
damage on a person through the skills I had learned. Besides having a
knowledge of self-defence techniques, I also felt I would understand better
than most people the nuances of the Goetz scenario and be able to judge more
precisely the nature and extent of the threat he faced.

In one of the London trials, a man and woman were jointly charged with
attempting to obtain money fraudulently by engaging in a betting scam. The
couple appeared to be very simple. This led to questions about their capacity to
be participants in a complex gambling scam as alleged. As fate would have it, the
writer of the memoir had written a book on gambling and professed to have
expert knowledge of it. When he wrote the book he concluded that persons of
modest or low intelligence were quite able to participate in complex gambling
schemes. According to him, the gambling mentality had little to do with IQ and
language difficulties would present no barrier to participation. He had found that
natural gamblers had a ‘strata of the mind’ that was ‘richly ordered’ for the
purpose of gambling to the ‘exclusion of any other endowment.’ (Wykes in
Barber &Gordon eds.1976, pp. 142–5).

Grove also gives examples of juries’ reliance on specialist knowledge in the
London Kidnapping Trial. One of his fellow jurors was a retired psychologist
whose field of expertise proved invaluable in the course of jury deliberation.
That case was ripe with psychological issues including how a kidnap victim
would be expected to behave and react—especially when liberated. The retired
psychologist was able to assist the jury with this issue. In the same case, a female
juror helped the jury to assess the credibility of the victim as against the main
defendant. She spoke about the closeness of family ties in Mediterranean families
and the implications of intrafamilial loyalty. The defendant claimed that the alleged victim had joined him and others in an attempt to extract ransom money from the victim's own family. The victim, of course, vigorously denied this allegation and the jury had to decide which party was telling the truth. The jury was partially helped in its deliberation by the female juror's contribution, and that of the juror who had the specialist knowledge of a psychologist. Their expertise enabled the jury to feel confident in accepting the victim's version of events (Grove 1998). The use of specialist knowledge in this case clearly assisted in making a credibility judgement which emerged as another concept.

Conflict/harmony

The concept conflict/harmony is a property of the jury. It was chosen because of the number of instances when jurors related well or badly to each other. The harmony of a jury is vital to the wellbeing of jurors and has a strong bearing on the quality of deliberation. A harmonious jury is inclined to engage in collaborative learning. An inharmonious jury is one where vituperation and abuse replace rational discussion. The data reveal many instances of both harmonious and inharmonious juries. In cases where juries were characterised by a high level of disharmony and abuse, the effect upon individual jurors could be devastating.

Burnett comments that one juror, identified as Pat, threw a tantrum because other jurors would not agree that they should sit through a reading of large parts of the evidence (Burnett 2002, p. 128). Pat was unable to articulate, to the satisfaction of her peers, why it was so important. It is clear, however, that she was not in good health and was running out of a prescription drug and that this may well have affected her mood. Zerman indicates that the majority of his fellow jurors became enraged when two would not agree with a majority verdict. (Zerman 1977, p. 130). When it became clear that the jury's inability to reach consensus would necessitate sequestration overnight some—who had been silent for hours—became vocally abusive.

The trial of OJ Simpson provides the best example of a jury fraught with conflict. Surprisingly, none of this appeared to have anything to do with the evidence or the trial issues. It was all purely personal and some of it apparently grew out of racial intolerance. Kennedy says that grudges grew out of the smallest things (Kennedy and Kennedy 1995, p. 213). He also says that the jury divided into
three racial cliques with considerable friction between them (Kennedy and Kennedy 1995, p. 215).

Perhaps the best example of a harmonious jury was the one empanelled for the Jack Ruby trial. It reached consensus quickly on the trial issues with no reported conflict or animosity of any kind (Causey and Dempsey 2000).

**Deliberation style**

Passages in the dataset were coded *deliberation style* when they indicated a particular approach to deliberation. One of the more significant findings during open coding was the existence of a style of deliberation that had not been the subject of comment in the academic literature. The existing research literature acknowledges two styles of deliberation. The first is verdict–driven and features an early vote. The second is evidence–driven (Devine, Clayton et al. 2001). Using this second approach, jurors discuss the evidence without committing themselves to any particular position on the verdict itself. This leaves them more open to persuasion.

Interestingly, the analysis of the concepts completed for this thesis showed a third deliberation style in which the jury splinters into subsets—individuals or groups who examine transcripts and items of evidence. The author noted that this often leads to significant knowledge discovery. It could be regarded as a prelude to more formal evidence–driven deliberation.

Burnett’s jury splintered in this way. Burnett (2002, p. 102) reported that by examining a video tendered in evidence, certain members of the jury realised that some evidence given to them was not credible:

> Those watching the video on the TV noticed that unless the door of the apartment was fully open, it was not possible to see the futon. This threw doubt on Nateesha’s testimony that she saw the defendant on the futon when she was in the hall and Cuffee was in the doorway. It did not seem possible.

When the same jury broke up into small groups, some jurors did fight re-enactments. Milcray had stabbed the victim during a fight. The issue was whether this was bona fide self-defence. A result of the re-enactments was that some jurors changed their minds about the credibility of the defendant. Afterwards, one juror conceded that nothing the defendant had said was strictly impossible (Burnett 2002, p. 112).

Carter also described this third style of deliberation. He indicated that the
Capano jury broke up into small groups (2000, p.304):

Mariah and Kate began with the diary and planner of Anne Marie Fahey, Henry and Hal were working with the Beretta pistol and would later ask some of the ladies to dry fire the weapon (once again understanding this was not the actual pistol allegedly used) and I sat with the jury book utilizing Connolly’s method of noting the page number and the amount of lines up and down to get to the part of the document that I wanted to discuss.

Apparently, this relaxed approach appealed to the jurors. Carter (2000, p. 304) states:

There was plenty of time and I was not going to discuss how I felt at this point, I wanted to read some things again and look at the other evidence again. It was easy to tell the other jurors felt the same way about examining the evidence. Still, we conducted ourselves fairly loosely that day, throwing out ideas and questions in a random manner, we began discussing the believability or lack thereof of Deborah McIntyre and Gerry Capano, and it went on like that for a while.

On the second day of deliberation, the foreman expressed the view that they should be more disciplined in their approach. However, this did not mean that they had to start deliberating as a single unit the whole time. Carter indicates that he continued to focus his attention on reading the victim’s diary (Carter 2000, pp. 308–9).

In the Scott Peterson trial, the jury deliberation commenced rather informally with a discussion of inconsequential things such as the way that the lawyers had dressed. When formal deliberation commenced it appears to have been quite methodical. A master list of issues to be discussed was created (Beratlis et al. 2007, p. 138). Individuals were given two minutes to talk about an issue. One juror, John Guinasso, monitored the deliberation to ensure that there was no breach of the rules. Beratlis et al. (2007, p. 139) observed:

Guinasso monitored the jury rule book. One of the most important elements of the guide, that he enforced strictly was only discussing trial evidence and not outside matters or thoughts. Eventually this caused conflict between him and Jackson.

In the subway gunman trial, the judge had gone to the trouble of speaking to the foreman and making suggestions as to how deliberation could proceed. As to the rules, the writer explains:

First, there was to be no speaking out of turn. Whenever someone had something to say, the person would have to raise a hand and wait to be recognised by the foreman. There also was to be no talking unless all were present. Discussion was suspended whenever someone had to visit the lavatory or for any other reason had to leave the room. We followed both of
The use of personal knowledge and belief by jurors and juries

these rules carefully throughout. (Lesly and Shuttleworth 1988, p. 271).

In short, the importance of the way that deliberation occurred justified the creation of the concept deliberation style. But the author already had a theoretical sensitivity to that concept through reading the academic literature.

**Emotional reactions—noting**

Another interesting category was called emotional reactions—noting. Jurors pay close attention to the emotional reactions of witnesses and parties. They constantly question whether the reaction, or lack of it, is consistent with the position that the witness or party wants them to believe. In the London kidnapping case, the prosecution presented the victim as a man who had endured a violent kidnapping. The defence case was that the alleged victim and the defendants had faked the kidnapping to get money from the victim’s wealthy family.24 The jury was shown a video of the victim at the time of his release and for obvious reasons showed interest in his emotional state. Grove (1998 p. 63) describes his thinking in the following terms:

And George: was his demeanour as shown in the video really that of the newly released kidnap victim? Shouldn’t he have been crying or breaking down or something, rather than smiling and composedly asking if someone had telephoned his mother? There was much uninformed speculation on this score.

In the trial of the subway gunman, Lesly appeared fascinated by video and audio recordings of interviews with the defendant. In some parts of the video the defendant appeared to display two contradictory or opposed sides of his personality. At times he appeared to be full of rage and at other times he was contrite and full of self-loathing. For example, the defendant’s demeanour deteriorated suddenly when confronted by a female district attorney (Lesly and Shuttleworth 1988, p. 153).

Sometimes, jurors are unable to decide what lies behind a particular reaction. In the Capano trial, Carter notes that a witness appears to be stunned when reading a letter while giving evidence. But he concedes the possibility that she is simply sluggish and having some difficulty reading cursive writing (Carter 2000, p. 169).

Jurors often query why a witness appears to be nervous or ill at ease. In the account of the subway gunman trial, Lesly and Shuttleworth (1988, p. 72) stated:

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24 Obviously, this line of defence would not be completely exculpatory. Undoubtedly the defendant believed that fraud would be punished less severely than violent kidnapping.
The use of personal knowledge and belief by jurors and juries

Smithern was so nervous and uncomfortable on the stand...I felt she was trying to cooperate and was doing her best to recall what she had seen. She really just seemed to have a lousy memory. She could not remember, for instance, from what station she had entered the subway that day.

Examining exhibits, conducting experiments and doing re-enactments

Jurors thirst after knowledge and, if given the opportunity, will discover knowledge on their own. When given exhibits to examine, they often experiment with them and conduct re-enactments. Examining exhibits, conducting experiments and doing re-enactments are all concepts that proved to be commonly used tools and schemas. When allowed to visit crime scenes, jurors often conduct personal experiments and re-enactments although there are times when the judge will prevent this from happening. Some, but certainly not all, juror experiments constitute misconduct.

Burnett reported that in the course of deliberation, a seminar–style discussion ended when the jury broke up into sub-units. This was prompted by the arrival of exhibits. Several interesting things emerged quite quickly. For instance, several jurors looking at photos had seen something white and diaphanous on the futon. They could not decide whether it was women’s underwear, or a hairnet left behind by an investigator. A request for a magnifying glass was refused (Burnett 2002, pp. 101–6).

In the Black Panthers trial, Kennebeck closely scrutinised an article on explosives tendered in evidence, that was supposed to corroborate the conspiracy charge. By scanning it closely, he ascertained that there was no underlining or marking that would indicate that it had even been read by the defendant from whose possession it was seized (Kennebeck 1973, p. 64). Such a close examination of exhibits is quite common and jurors often discover something overlooked by the prosecution and defence. These examinations can lead to knowledge discovery. Thus, the category examining exhibits was created.

Jurors are also known to conduct experiments. This concept emerged early in the analysis. Obviously a juror or jurors conducting experiments are likely to discover new knowledge or adopt a new belief. In one case, the defendant claimed to have visited his auntie on the day he allegedly murdered a salesman. However, he was unable to recall his auntie’s street address. Zerman indicates that the prosecution made an issue of this. In short, visiting his auntie was the defendant’s alibi or part of it. That night, Zerman asked his own son to give street
addresses for three of his aunties. The son was not able to give a full address for any of them. Thus, Zerman queried the significance of the defendant not being able to give this information (Zerman 1977, p. 111).

**Personal observations**

Jurors also make other kinds of personal observations. Lesly used an official viewing of a railway carriage to test ideas about what different witnesses might have seen in the subway shooting. He mused (Lesly and Shuttleworth 1988, p. 218):

> I was impressed, however, by the narrowness of the subway car and how little space there was between the rows of seats on either side of the aisle. Although I had for many years been a frequent subway rider, being in this old-style car while contemplating the testimony I've heard and imagining the situation that Goetz had faced did have a definite effect on me. I realised that even if only one or two of the youths had been standing in front of him with the intention of attacking him, Goetz had no real room to escape. But I also saw that while Goetz was firing at Canty, he was extremely vulnerable to attack if Cabey or Ramseur had tried to jump in. His back was turned and they couldn't have been more than a few feet away.

In our deliberations both of these factors proved to be extremely important considerations; and so, although it was awkward and the situation circus-like, being very much a media event, the subway car visit was in fact very valuable, winning some crucial points for the defence.

Grove (1998, p. 75) reported on a view taken during the London Kidnapping Trial:

> We timed the opening and closing of the garage doors and examined the other exhibits. We paced out the alleged length of the alleged gunman’s alleged run towards George, keenly aware of the difficulty of judging distance in such unscientific circumstances. Bob wanted to restage the attack among ourselves. The message was conveyed to the judge. The answer came back: no. Decorum was preserved.

**Understanding how people act**

An understanding of how people act and the application of that understanding is a constant feature of juror participation. This concept also emerged as a schema or tool that jurors often use. They often reflect on the likelihood that a person would have acted in the way that they said they acted. Clearly in so doing they rely upon personal knowledge or belief and personal experience married to their expectations of what average people would do in the same circumstances. In the first death penalty case, the jurors were shown a video recording of a shooting recorded on closed circuit television camera. The defendant Lane, also viewing
the video, was observed not to react in any way. A juror expresses surprise because she could not imagine not reacting if she viewed a video of her shooting someone (Sundby 2007, p. 32).

In the Scott Peterson trial, a juror reflected on the defendant’s nonchalant air after his wife was reported missing but before her body was found (Beratlis et al. 2007, p.140):

> The jurors viewed the taped interview that Peterson had with police. When he answered his cell phone and spoke to his sister-in-law, he did not appear to be concerned or in torment. He politely answered the phone. Beratlis said ‘Wait a minute, I’m going to be sitting in a chair with both my hands in my pockets. My phone rings and I am thinking to myself, it's my sister-in-law. If my sister-in-law is calling me at 12-30 in the morning and my wife is missing, I’m thinking she’s got some information. It wouldn't be, Hey how’s it going?’

In Angela Davis’s case, Mary Timothy’s belief about the defendant’s personality—and how she would and wouldn’t act—was seemingly more important to her than the bulk of the evidence led by the prosecution. From her observations of the defendant—and a reading of certain love letters that she had penned—Timothy inferred that Davis was highly intelligent, passionate and idealistic. Such a person would not, in Timothy’s view, have become involved in a rash, ill-considered and juvenile crime involving the kidnapping of court staff, including the judge (Timothy 1974, p. 90).

Juries can use knowledge of how people might act to explain an apparent lack of credibility. We can see an instance of this in Burnett’s account of the homosexual murder case. The jury acquitted Milcray, while acknowledging that it was unlikely that his account was fully truthful. Burnett surmised that if Milcray had homosexual tendencies and had been sexually involved with the deceased, he may well lie about that given that he was engaged to be married (Burnett 2002, p. 145). Thus, his mendacity did not necessarily point to guilt. This line of reasoning also involved *speculation*, a tool commonly used by jurors.

The above examples form a very limited subset of the concepts. They are nonetheless indicative of some of the more important concepts and the reasons for their creation. They emerged during the open coding process. Appendix Two contains a complete listing of the concepts and categories. It contains references to the dataset indicating parts of the memoirs that support them. That complete list was too long to include in the body of the thesis.
Collection of concepts into categories with properties and dimensions

Categories are formed by collecting concepts that share similar features or have something in common and seem to belong together. For example, grouped under the category court were the subcategories culture, case, and participants. These are aspects of the court that jurors become aware of. The arrangement into categories is demonstrated in the diagrams that follow. They present a graphic overview of the conceptual scheme. This is obviously the author’s construction based on the memoirs. It goes without saying that other constructions would be possible.

It needs to be emphasised that the ordering only produced a static, hierarchical arrangement. It was useful because it helped the visualisation of the overall scheme. But the task of showing dynamic relationships was separate.

Figure 3: Court and subcategories

The analysis showed that any juror or other person entering a court to observe a jury trial would quickly become aware of numerous things. In Figure 3 above, the court and its three subcategories are illustrated. First, there are the participants—these include the judge, jury, parties, lawyers, media, witnesses and others. Jurors pay a lot of attention to the participants. They can be very respectful and also highly critical of some of them. For example, they often
comment on the lawyers, their tactics and their effectiveness. In the Capano trial memoir, Carter is repeatedly critical of the defence lawyer’s insinuations that are never backed up by any concrete evidence. For example, the lawyer insinuates that the deceased had many lovers. However, he does not call any evidence to support this assertion (Carter 2000, p. 54).

In the courtroom, jurors also are aware of the case—which is what they are there to hear—and the culture. The culture is the most subtle of these three categories and has three subcategories—the artifacts and physical structures; explicit rules and procedures; and implicit rules and assumptions. Jurors often comment on these things critically and they can affect their decision making. This justified the creation of the category culture and its three subcategories identified above.25

As to the physical artifacts and structures, comments range from highly critical to highly complimentary. In her memoir of the Angela Davis trial, Mary Timothy described the jury room as homely saying that it had comfortable chairs and tables. The jurors improved it by bringing in coffee-making facilities and a fridge (Timothy 1974, pp. 47–8). In the Capano trial, Carter found the jury box uncomfortable. He suffered from shortness of breath and claustrophobia (2000 p. 74).

Culture encompasses not only physical things—like the structure of the courtroom and the placement of participants. It also includes the rules, conventions and assumptions that govern a trial and the way in which a jury is managed. Jurors are often confused or angry about the culture. Later in the thesis there will be examples of this. Figure 4 below depicts culture and three subcategories. The jury box is an example of a physical structure. The rules of evidence are examples of explicit rules. Jurors can be surprisingly au fait with these rules that determine what evidence juries are allowed to hear.

In the trial of the subway gunman, Lesly showed an impressive knowledge of the hearsay rule. He understood that a statement of one of the victims, Cabey—when he was being treated after the shooting—was admitted into evidence as an exception to the hearsay rule. He also understood the rationale underlying this exception; in his critical state, Cabey had no reason to lie or to fool around. Thus, evidence of his statement—that he and the others had been hassling the gunman—was allowed into evidence. (Lesly and Shuttleworth 1988, p. 41).

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25 What I describe as a category may, of course, also be a subcategory of another category.
An example of an implicit idea or assumption, as an aspect of the culture, is the traditional idea that jurors cannot be trusted to distinguish evidence from other information. They are, therefore, given repeated warnings to not read or watch media coverage. Mary Timothy (1947 p. 79) found the repeated warnings insulting. She said:

I was perfectly capable of deciding for myself what I should refrain from reading. The arbitrary assumption that I and my fellow jurors were not able to maintain our intellectual integrity if we were exposed to inflammatory statements in the press was almost insulting. Where did the courts think we had been for the first twenty, thirty or even fifty years of our lives?

An interesting finding is that jurors often have a very negative attitude towards many aspects of the culture as evidenced by Ms Timothy's comments. Indeed, there are instances of jurors rebelling and becoming subversive as will be shown later in the thesis.

Figure 4: Culture, its properties and subcategories

Figure 5 shows the concept of a case and its subcategories—issues, evidence and outcome. An interesting property of a case is its notoriety. Obviously, the OJ Simpson trial had considerable notoriety because of Simpson's celebrity. Issues have the properties of number and complexity. Often issues are very complex. Some trials have many issues and some have few. In the Jack Ruby trial, there was essentially a single disputed issue and that was whether Jack Ruby was having an epileptic seizure when he shot Lee Harvey Oswald (Causey and Dempsey 2000). In some criminal cases outcomes will feature a particular verdict.
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or judgement and a sentence; while in some civil cases an award of damages will be made. Obviously outcomes can be accurate or inaccurate. Guilty people are often acquitted and innocent people are sometimes convicted.

The subcategories of case also have properties. For example, significant properties of evidence are its type, strength and relevance. Thus a jury might hear strong, highly relevant, expert testimony. Alternatively, it might hear weak, slightly relevant, eyewitness testimony. There are many other possibilities.

Figure 6 shows the category participants mentioned earlier. Figure 7 depicts the concept judge and its properties. For example, judges vary in their behavior and control over the jury; the extent to which they are helpful to, and respected by, juries; and the clarity of their instructions to the jury. These properties of the concept judge are important because they can influence jury and juror decision making as will be demonstrated later in this chapter.

There are many negative comments in the memoirs about the lack of clarity, or the confusing nature of judges’ instructions. One example is found in Kennebeck’s account of the Black Panthers’ trial. He explains that the judge’s instructions about possessing explosive substances were baffling (Kennebeck 1973, p. 220):

... the law provides that this possession constitutes presumptive evidence that said possession was with the intent to use the same unlawfully against the personal property of another. He explained further: we can't find someone guilty of possessing explosives unless we decide that he intended to use them against someone; but, as Lewis Carroll might be fascinated to know, the fact that the culprit possessed the stuff allows us to presume that he intended to use it criminally. It seemed to me to be a sticky roundabout: a viscous circle. I wondered whether our presumption couldn't cover other possibilities, eg showing off, demolition.
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Figure 5: Case and case subcategories with properties

Source: Derived from author’s research
Figure 6: Participants and subcategories

Source: Derived from author’s research
The use of personal knowledge and belief by jurors and juries

Figure 7: Judge and properties

Source: Derived from author’s research
The use of personal knowledge and belief by jurors and juries

Figure 8: Lawyer, party, witness and properties

Source: Derived from author's research

Some other key participants are depicted in Figure 8 which shows some of the more interesting properties of those participants. Lawyers’ performance will vary and jurors often comment on this. Parties will have various identifying traits—including demographic traits such as race and gender—that are aspects of identity. They can invoke either sympathetic or unsympathetic reactions. Witnesses vary considerably in importance and credibility. Expert witnesses will vary in their perceived level of expertise.

The jury obviously has the subcategory juror since a jury is composed of jurors as shown in Figure 9. The Jurors' Toolkit is something accessed by, or available to, each juror and is shown as a subcategory under juror. This turned out to be the most significant of all categories.

Key properties of a jury include its diversity, competence, and the level of conflict or harmony between its members. From the memoirs, there is no reason to doubt the competence of most of the juries. Their capacity to grapple with complex matters was impressive. Some juries socialise a lot and others hardly at all. Juries also vary in the extent to which they obey the judge and conform to the rules of the culture. Jurors also have significant properties. They vary
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individually in terms of intelligence, education, diligence and personality. They also have demographic and other identifying traits.

These properties of a juror can be of great importance in decision making. An unintelligent or poorly educated juror may struggle with the cognitive complexity associated with trial evidence—as Felipe clearly did in the New York homosexual murder trial (Burnett 2002). Jurors with extreme personality traits—such as obsessiveness or aggression—can cause problems for themselves or others. In the first death penalty case, one of the jurors, Frank, bullied Peggy to the point that she supported a decision that she really did not agree with. This ultimately led to her having an emotional breakdown. (Sundby 2007, pp. 98–9).

Jurors can see issues differently depending on their gender or race. The female jurors in the Menendez Brothers trial saw issues very differently to the male jurors (Thornton 1995).
Figure 9: Jury and juror properties and the Jurors’ Toolkit

Source: Derived from author’s research
The use of personal knowledge and belief by jurors and juries

Table 2 below identifies the elements in the Jurors’ Toolkit. The toolkit is the core category. It is a superset of various and diverse elements and represents a grouping of those elements. All such elements can be regarded as mental tools or schemas. There are instances of the use of all of these tools in the dataset, thus justifying the creation of those concepts.

### Table 2: Schemas/Tools in the Jurors’ Toolkit

<table>
<thead>
<tr>
<th>Component</th>
<th>Relevance judgement</th>
<th>Hypothetical—using</th>
<th>Re-enactment</th>
<th>Exhibits—examination of</th>
</tr>
</thead>
<tbody>
<tr>
<td>Invoking a personal memory</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Done that—personal experience of fact in issue</td>
<td>Consistency check</td>
<td>Analytical thinking</td>
<td>Observing</td>
<td>Sympathising, empathising, identifying with person</td>
</tr>
<tr>
<td>Flash of insight</td>
<td>Understanding people</td>
<td>Reading body language</td>
<td>Emotion—experiencing strong</td>
<td>Thinking about verdict consequences</td>
</tr>
<tr>
<td>Credibility judgement</td>
<td>Storytelling</td>
<td>Stereotyping</td>
<td>Value judgement—making</td>
<td>Intuition or gut feeling</td>
</tr>
<tr>
<td>Tactics—understanding</td>
<td>Making/using notes</td>
<td>Commonsense—using</td>
<td>Bizarre belief—using</td>
<td>Personal expertise—using</td>
</tr>
<tr>
<td>Philosophising</td>
<td>Inherent likelihood or probability assessment</td>
<td>Creative or imaginative thinking</td>
<td>Focusing on major issues</td>
<td>Lay notions of the law—using</td>
</tr>
</tbody>
</table>
### The use of personal knowledge and belief by jurors and juries

<table>
<thead>
<tr>
<th>Playing devil’s advocate</th>
<th>Motive—identifying, exploring</th>
<th>Speculation</th>
<th>Personal belief or knowledge—using directly</th>
<th>Nullifying</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arguing/contradicting</td>
<td>Compromising &amp; bargaining on verdict</td>
<td>Opting out or agreeing to agree</td>
<td>Pre-deliberation conferring</td>
<td>Interpreting or clarifying instructions</td>
</tr>
<tr>
<td>Checking or clarifying evidence</td>
<td>Weighing evidence</td>
<td>Juror experiment</td>
<td>Making factual findings</td>
<td>Assumption—making</td>
</tr>
<tr>
<td>Justifying</td>
<td>Agreeing or affirming</td>
<td>Personal research—undertaking</td>
<td>Discussing</td>
<td>Narrative Construction</td>
</tr>
<tr>
<td>Character evaluation</td>
<td>Corroboration—seeking</td>
<td>Finding holes in case</td>
<td>Fitting facts to verdict categories</td>
<td>Heuristic—using</td>
</tr>
<tr>
<td>Private reasoning—using</td>
<td>Verdict—choosing preferred</td>
<td>Script building</td>
<td>Sharing belief or knowledge</td>
<td>Accepting evidence</td>
</tr>
<tr>
<td>Adequacy of investigation—assessing</td>
<td>Bullying or applying pressure</td>
<td>Distrust of authority—acting on</td>
<td>Drawing conclusions during the trial</td>
<td>Emotional reactions of participants—noting</td>
</tr>
<tr>
<td>Expert evidence—assessing</td>
<td>Eyewitness account—assessing</td>
<td>Gender issues—using awareness of</td>
<td>Inference—drawing</td>
<td>Identifying issues</td>
</tr>
<tr>
<td>Knowledge of how a person might act—using</td>
<td>Knowledge of legal issues—using</td>
<td>Liking/disliking</td>
<td>Media—watching, reading, listening</td>
<td>Memory—judging reliability of</td>
</tr>
</tbody>
</table>

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**Chapter Four**

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<table>
<thead>
<tr>
<th>Memory of trial—using</th>
<th>Open mindedness—maintaining</th>
<th>Listening</th>
<th>Leadership—providing</th>
<th>Picture building</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prejudicial matters—acting on</td>
<td>Racial knowledge or belief—using</td>
<td>Reasoning to a decision</td>
<td>Rejecting evidence</td>
<td>Seeking/using extraneous information</td>
</tr>
<tr>
<td>Strength of the case—assessing</td>
<td>Applying standard/onus of proof</td>
<td>Leadership—providing</td>
<td>Use of particular evidence</td>
<td>Voting</td>
</tr>
<tr>
<td>Satisficing</td>
<td>Narrative selection</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Derived from author’s research

Any particular tool or schema, when in use, will vary along eight dimensions.26 First, it will vary as to its type. The author has identified over ninety different types of tools and schemas. A heuristic is an example of a type. A tool in use can range from purely personal to interpersonal. For example, calling to mind a memory is purely personal; but a re-enactment involving a group of jurors is interpersonal. Some schemas are more value–laden and some more fact–laden. Making a value judgement is, ex hypothesi, heavily value–laden. Making a simple observation is generally not. Speed of processing is another dimension. Analytical thinking or weighing evidence involve slow processing; whereas a flash of insight involves fast processing. Tools and schemas can also vary from unemotional to highly emotional and from culturally illicit to culturally allowable. Thus, going to the scene of an alleged murder, unknown to the judge, and doing a re-enactment may involve much emotion. It would also be culturally illicit since it is against the rules. Schemas and tools can both be based on, and produce personal knowledge to varying degrees. Figure 11 shows how a hypothetical schema might be positioned along these dimensions.

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26 It may have many more, of course, but these ones seem to me to be particularly interesting and significant.
Figure 10: The inputs to the Schema/Tool selection mechanism

Source: Derived from author's research
The use of personal knowledge and belief by jurors and juries

Figure 11: Dimensions of a hypothetical schema or tool

Source: Derived from author’s research
The hierarchical ordering of categories
Figure 12 presents a graphic overview of the categories but obviously not all of the concepts. There were far too many concepts to fit into one diagram. The diagram is ordered hierarchically to make it easier to understand.

The Jurors’ Toolkit, the core category, is at the bottom right of the diagram. That category contains approximately ninety elements previously shown.

Factors that influence selection of schemas and tools
This section commences a discussion of axial coding by identifying certain factors that influence the use of schemas and tools. Figure 13 below delineates some of the key relationships discovered during axial coding. It shows the Jurors’ Toolkit as being comprised of two parts. One is the store of schemas/tools and the other is a selection mechanism. This should not be taken as implying that these things have exact psychological or neurological correlates. The diagram is intended to demonstrate graphically the inputs to the toolkit and the factors that influence the choice of schemas and tools. It also shows outputs from the toolkit.
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Figure 12: Overview of major categories

Source: Derived from author’s research
Axial coding
This is the process of understanding concepts in terms of their dynamic interrelationships. It provides a foundation from which theory can be developed (Moghaddam 2006). An important part of it is choosing a core category.

The Jurors' Toolkit as the core category
The Jurors’ Toolkit is a category consisting of all of the schemas and tools that jurors use. It is through the schemas and tools that personal knowledge and belief finds its, at times, critical use in decision making. Important relationships exist between the toolkit and other key categories including evidence, culture and judge. These other categories can strongly influence the use and selection of tools. The Jurors’ Toolkit is the key to understanding the use, sources and overall importance of personal knowledge and belief in juror and jury decision making.
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Figure 13: Overview of Toolbox and selection mechanism
In the trials studied for this thesis, various factors determined whether or not a schema or tool was used at any point by a juror. These included whether related tools or schemas—which act like promoters or inhibitors—had already been used and the:

- nature of the case and the evidence
- proclivities and skills of the jury and juror
- control exerted by the judge
- juror emotion
- influence of the culture and of other participants; and
- external chance factors.

In short, the selection of tools is influenced by many factors. They are discussed individually.

**The case and the evidence**

Both the case and the evidence influence the selection of tools. For example, where a trial featured a lot of exhibits, jurors were obviously far more likely to examine them and even experiment with them.

The trial of the Black Panthers clearly featured a lot of exhibits. Kennebeck mentions many including some that were quite exotic. They included the weapons and literature of alleged revolutionaries. Introduced into evidence by the prosecution, many exhibits actually undermined the prosecutor’s case. Kennebeck examined a sword, clearly wondering how lethal it could be (Kennebeck 1973, p. 62). He says:

> I pulled the sword out of its sheath and ran the edge carefully along my wrist. It was blunt; so was the tip of the blade. Couldn't have been used for tenderised shish kebab. Cripes, Mister Phillips -- this is a Black Panther revolutionary conspiratorial weapon? That's what I didn't say, didn't even let my face show.

The nature of that case and the evidence seems to have conduced to the examination of exhibits.

**Juror proclivities and skills**

Juror proclivities and their skills are also important as factors that lead to the use of particular schemas and tools. As previously stated, Burnett, the academic
historian, was highly analytical and also prone to philosophising. He repeatedly used both of these schemas or tools. In a philosophical vein, he stated that it is perverse to separate admissible and inadmissible facts about the characters involved in the trial. For example, he thought it would be very useful to know whether the defendant Milcray—on trial for the alleged murder of a gay man—had previously been arrested for shaking down homosexual men. He expressed frustration with the fact that this sort of evidence would only be made available to the jury in the event that the defendant chose to testify. In other jurisdictions, even that would not be sufficient to allow the evidence in. Burnett (2002 p. 71) stated very pithily: ‘I was being asked to decide if someone did something to someone else. How could the nature of either someone be off limits?’

Burnett also expressed frustration at some of the fine legal distinctions that he was asked to comprehend without even having a pencil to make notes. He stated:

...there was also a degree of scholastic hair splitting. The prosecution introduced two theories of second-degree murder. One was the standard intent theory and another was the depraved indifference theory. If Milcray had acted with depraved indifference to human life, then the jury could disregard intent and find him guilty of murder in the second degree. (Burnett 2002, p. 82)

He added: ‘These are fine distinctions, the sort that Thomistic quibblers love.’ (Burnett 2002, p. 82)

But it is significant that he was able to grasp those distinctions. In contrast, it is hard to imagine that Felipe—who was Burnett’s fellow juror—would be inclined to use, or capable of using, either highly analytical thinking or philosophical pondering. The description of him is quite disturbing. Burnett (2002, p. 141) reported:

Felipe wandered around reading passages from the bible. Then he dropped coins and bits of paper onto the table, saying that he could read the future and tell the past in this way. He said that Milcray was innocent and would be found not guilty.

Given his apparent lack of intellect, it is not surprising that Felipe was more inclined to use bizarre belief than more conventional reasoning tools.
Control of the judge

The control exerted by the judge can also influence the choice of schemas and tools—but probably only to a limited extent. The influence in such cases tends to be negative. Grove reports that the judge prevented his jury from conducting a re-enactment (1998, p. 185). But there is an interesting phenomenon whereby juries can rebel against the judge’s rulings or instructions. An interesting example of this is found in the subway gunman trial. The jurors were taken on a view of a train carriage, similar to the one where the shootings had taken place. They were left alone; but only after the judge instructed them not to talk. This was to prevent juror discussion prior to deliberation—and would also have stifled attempts to engage in re-enactments—of which some judges disapprove. The instruction did not prevent the jurors from either communicating or re-enacting. According to Lesly and Shuttleworth (1988, p. 217):

Even though no talking was allowed, there still was a certain amount of communication going on through our contact and even hand signals at times. We took turns playing the roles of the people who had been on the train; and I remember, for instance, sitting in the Cabey seat with another juror -- Bob Leach, I think -- came up and pointed his finger at me, portraying Goetz. I then demonstrated to him how I thought Cabey might have twisted in the seat to receive the bullet at the proper angle.

The influence of the culture

As has been stated on several occasions, the powerful epistemic objective strongly motivates jurors to find the truth. The stronger the objective, the greater the likelihood that jurors will use those schemas and tools that depend heavily on personal knowledge and belief. In this context they will also use those schemas and tools that are regarded as illicit. That objective is one part of the culture.

Chance factors

Chance factors also influence the choice of schemas and tools. There is a striking example of this in the first death penalty case. A juror’s son was involved in a serious motor vehicle accident while the trial was progressing and his survival was uncertain. The juror’s strong emotional response to this engendered powerful feelings of sympathy for the family of the victim in the case before him. He realised that the victim’s family did not get the chance to say goodbye to him.
whereas he had the opportunity to go to the hospital and say goodbye to his son—who fortunately did not die. This strong sympathy became a significant factor in his decision to vote for the death penalty. Indeed he consciously took on the role of champion for the victim’s family (Sundby 2007, p. 108).

The influence of other schemas and tools

As stated above, there is a tendency for certain schemas and tools to be used in combination or consecutively. Some can either promote or inhibit the use of certain others. The next section deals with this more fully. It will also discuss some of the interrelationships—to show how the use of one schema or tool may conduce to the use of another—or at times suppress another.

Relationships between schemas and tools

Schemas and tools are used in multifarious ways. Undoubtedly this ensures that in many juries, a multiplicity of viewpoints will be presented. That fact may be of great value to the jury system. The system has additional checks and balances because jurors are unlikely to reach a preferred verdict in exactly the same way even when they agree. Therefore it is a matter of some significance when jurors manage to reach a consensus.

Some schemas and tools tend to be used in close association with others. They can conflict, be used together or complement each other. Collectively they comprise the Jurors’ Toolkit. Admittedly, the tool metaphor is not entirely apt. Most of the items are like schemas or tools that the juror can choose. Others are things that just happen—for example, a flash of insight. They might equally be envisaged as software tools. Some of them are consciously selected; others just run. The schemas and tools can be used singly or in numerous combinations. Sometimes they are chained together—with the use of one leading to the use of another, as depicted graphically in Figure 14 below. But there are correlations. The use of certain schemas and tools tends to occur more often in combination with other schemas and tools—just as a carpenter's pencil and ruler will be used together.
The next section of this chapter deals with the magnum opus of axial coding. It presents findings on the interrelationships and correlations within the toolkit and between schemas and tools in the toolkit and other categories.

To take but one example, there is a clear and patent relationship between the category called emotion—experiencing strong and the category called sympathy. When a juror experiences strong emotion, that emotion can lead, not surprisingly, to an experience of empathy. It can be directed to a victim, a victim’s family or a party. The example previously given from the first death penalty case illustrates this. In the Scott Peterson trial, several jurors acknowledged feeling emotionally overwhelmed when seeing photographs of the pregnant victim and hearing emotionally charged testimony from the victim’s mother. Their perception of that evidence cannot really be separated from their emotional response and the feelings of sympathy for the mother and other members of the victim’s family that ensued. Furthermore, the emotional response occasioned by their viewing of photographs clearly led to strong feelings of sympathy for the dead woman’s family. This sympathy appeared to have significant effect when the jury reassembled to deliberate on the death penalty (Beratlis 2007).

The dataset suggests a close relationship between the categories personal memory, done that and flash of insight. The terms personal memory and flash of insight really need no explanation. Listening to evidence, jurors are often reminded of things that they have experienced. In the trial of Angela Davis, Mary Timothy (Timothy 1974, p. 119), hearing evidence of the effect of a shotgun blast upon the victim’s head and face, was reminded of a hunting incident:

> A very large question arose in my mind as to the accuracy of his memory. For example, his description of the judge’s face falling apart as though in slow motion seemed highly improbable, especially to anyone familiar with the effect of a short-range shotgun blast. I had hunted wild game birds with my husband. One day when I was still learning the use of a shotgun, we were walking through a fallow pumpkin field. Art raised his gun and fired at a medium-sized pumpkin about six feet away. The pumpkin disappeared instantly and totally! It happened so fast that I couldn’t see it happen. The pumpkin was sitting there ...and then it was gone. I observed no slow motion effect. That incident made me carefully consider the validity of Gary Thomas’ perception.
Some personal memories have a special character. This special character has been labeled as the category *done that*. It comprises examples of jurors who remembered doing or experiencing something exactly the same as, or very similar to, something related in the evidence or that is in issue in the trial. Sometimes the juror has personally done something which duplicates or approximates something that a party or witness claims to have done or something that is disputed between the parties.

In the Menendez Brothers’ trial the prosecutor tries to establish that one of the defendants used a credit card to pay for an inexpensive phone call. The prosecutor claimed that he did this to help establish an alibi at a particular time. Based on her personal experience, the juror (Thornton 1995, p. 32) rejects the suggestion:

> ...one thing Bozanich keeps insisting is that the reason Lyle used his Sprint card to call Gary Berman from the Santa Monica Civic Centre is so there would be a record of the call. He says he wasn't trying to establish an alibi that he always used his Sprint card even for local calls. This is a small, but not insignificant, detail which I am taking personally; I, too, use my calling card at payphones, even if it's only a $.20 local call! Sure it costs more -- I am paying for convenience.

A personal memory can open the mind to some possibility or lead to a sudden insight. To Mary Timothy, the sudden realisation that the prosecution evidence may not be reliable appears to be a watershed moment. Scepticism has displaced trust (Timothy 1974).

Credibility judgements, which are clearly at the heart of what jurors do, are manifestly related to several other categories. They have rich and close associations with:

- consistency judgements
- gut feelings
- personal beliefs
- personal observations
- assumptions; and
- assessments of likelihood.
For some people, a credibility judgement seems to be little more than—for example, a visceral judgement that a person is lying. This shows a relationship between personal belief and a credibility judgement. As stated above, gut reactions are often bare credibility judgements without any attached or supporting reasoning. Undoubtedly they are often intuitive, meaning that they are more like a perception than a reasoned judgement. This does not undermine their value, of course. Zerman reports that a fellow juror who was stubbornly holding out for a guilty verdict in a murder trial could give no better justification for his view than such a visceral judgement (Zerman 1977, p. 130). Zerman strongly suspected that this judgement had a racist basis. Clearly, intuitive or gut reactions are not necessarily correct. But they can, at least for some jurors, substitute for reasoned credibility judgements.

There are instances of this in the dataset. Jurors appear to be particularly interested in a witness’s eyes—both as indicators of veracity and as indicators of intelligence. Other jurors, however, reject the notion that body language is an infallible guide to anything. There are instances of credibility judgements being linked to personal observations of a juror as to how others are reacting to testimony. In *The Juror and the General*, Roth explains how she assessed the veracity of a witness. She expected that there would be key figures in the public gallery who would know whether the testimony was true or false. Roth believed that if she identified these figures, and monitored their reactions, she would know if the witness was being truthful (Roth 1986, p. 56).

Credibility judgements can also be greatly assisted by personal memories or by having done what the witness claims to have done. In the Capano trial, a tradesman’s evidence about installing a light in a particular place is challenged on the basis that he would hardly remember one job amongst so many. Carter has no difficulty accepting the tradesman’s assertion that he remembers that particular job among many hundreds of jobs. He knows from personal experience that when jobs present particular problems you tend to remember them. He relates this to his own experience of designing and testing hot-mix pavement products for customers with special requests. He has done that himself (Carter 2000, p. 278).
A credibility judgement can at times be based on an assumption. This was evident in Carter’s belief that a prison officer was likely to be telling the truth. He based this belief on his confidence that a person would not reach the level of staff lieutenant in the prisons system unless he had a lot of integrity (Carter 2000, p. 213). This was clearly an assumption and one that some would not be prepared to make.

Credibility judgements are often based upon, or strengthened by, perceptions that a body of evidence given by a witness is consistent within itself or consistent with independent evidence. Thus, credibility judgements and consistency judgements are strongly related. We see a lot of emphasis upon this in the memoir of the subway gunman trial. Numerous witnesses were accepted as witnesses of truth or discounted as unreliable based upon both the consistency of their own evidence internally and its consistency with a large body of other evidence. But the writer was quite prepared to overlook minor inconsistencies (Lesly and Shuttleworth 1988, p. 144). This particular strategy—that is, using consistency to determine credibility—is widespread and of considerable importance.

There is also a relationship between the category, credibility judgement, and the category, understanding people. The dataset shows numerous examples of jurors using their knowledge of, or belief about, ordinary people and how they might behave to assess the likely veracity of a witness or an account. One of the more unusual examples of this is found in the memoir of the Capano trial. In that trial there was a lot of evidence about the sexual conduct or misconduct of the defendant, the victim, and other parties. The prosecution depicted the defendant as an unprincipled Lothario who was having numerous affairs with women leading up to when he shot the victim who was trying to end their relationship. The defence, on the other hand, depicted the defendant as the victim of a manipulative woman who was shot by a jealous rival—another one of Capano’s mistresses. The juror, Carter, gave considerable thought to these two possibilities but ultimately determined that the evidence overwhelmingly favoured the prosecution view. In reaching this conclusion, he relied upon a set of beliefs about how a woman involved in discordant sexual relationships was...
likely to behave. He had an understanding about the behaviour of a female involved in a sexual relationship that she had not initiated and from which she was trying to escape. Carter gave considerable attention and weight to the deceased’s journal entries, to notes made by her therapist and to the proven behaviour of the defendant. This behaviour included sending emails, the text of which was made available (Carter 2000, p. 188). Based on the material that he was able to examine, Carter concluded that the deceased had been subservient to Capano in the relationship and that Capano had been the manipulator.

Credibility judgements can depend upon assessments of likelihood. If a juror believes that what a witness is saying is inherently unlikely, then the perceived credibility of the witness will be affected. We have already seen an example of this when Mary Timothy rejects a witness account of the effects of a shotgun blast. Thereafter, she reflects on the general credibility of that witness and entertains doubt about his evidence generally (Timothy 1974, p. 119). There are instances where determining the credibility of an account is assisted by the sheer improbability of what has been asserted. Kennebeck discusses evidence that the Panthers had tried to ambush police. The account was implausible. The jury could not understand how Panthers could miss police if, as alleged, they were shooting at them from a distance of three feet. The jury also could not understand why no cartridges had been found in the area (Kennebeck 1973, p. 143).

Making credibility judgements can be greatly assisted by use of notes because in this way a juror can determine the consistency between different bodies of evidence. Burnett reports that when his jury was trying collectively to assess Milcray’s credibility one of their number helped them by summarising his statements. She was able to highlight statements that were inconsistent with each other (Burnett 2002, p. 109). That other juror was an avid notetaker and relied on her notes to prepare the list. Quite clearly, making a list like this could well prove to be impossible unless the list maker had access to notes of high quality. Juries must have an accurate recollection of evidence or else access to high-quality notes or transcript if they are to make credibility judgements based substantially on consistency.
There is a clear relationship between the categories, *understanding people* and *assessing likelihood*. A juror frequently asks how likely it is that a person has acted in the way alleged in a trial. An understanding of people and the ordinary range of human behaviour guides them in making that judgement. In turn, that understanding is often informed by a personal memory or a personal experience. A personal memory comes to the mind of Carter in the Capano trial memoir. Evidence was given of Capano encouraging another lover to engage in a sexual act with a third person. Carter initially queried evidence that that person, an admitted philanderer, failed to become aroused by oral sex. That had never happened to Carter and he doubted, somewhat unrealistically, that it would happen to another man.

However, he recalls a personal experience when he was diffident about having sex as part of a threesome—so concludes that the witness might be telling the truth (Carter 2000, p. 125). In short, he revised that view after considering that the act involved a threesome—a scenario that he had personally found to inhibit his sexual performance (Carter 2000, p. 125). Thus, he has assessed and reassessed the likelihood of what the witness says based upon personal experiences. These have given him some understanding or belief about the normal range of behaviour. This illustrates a fairly complex entanglement of the tools personal memory, assessing likelihood and understanding people.

The Menendez trial is a clear example of how an assessment of likelihood depends upon an understanding, or at least a belief, about how people respond in different situations. All of the female jurors were prepared to accept the possibility that the two brothers were so terrorised by parental abuse and threats as to fear for their lives. However, none of the male jurors was able to accept this part of the brothers’ defence. Clearly this involved an assessment of likelihood. To say that something is possible is equivalent to saying that there is at least a small likelihood of it being true. The female jurors thought that such a likelihood—although not quantified precisely—could not be discounted. No male juror would acknowledge any likelihood of this. Clearly the male and female jurors held totally different beliefs about how people would respond to an extended period of serious abuse (Thornton, Wrightsman et al. 1995, pp. 82–6).
The author does not doubt that the females had a much more realistic understanding of the emotional reactions and fears felt by abused children.

This may point to the importance of personal experiences as providing an important set of data that are useful for building an understanding of people and the normal range of behaviour. In this context, the author believes that it is a notorious fact that females—more often than males—have been abused in situations where there has been a significant power imbalance. On this basis, it seems plausible that personal memories assist in understanding people. This, in turn, assists a juror to assess the likelihood of a particular scenario having occurred. The three categories can form a neat chain. The Capano example also illustrates this chain very clearly. The juror’s personal sexual experiences—based on his personal memories—are the basis for his beliefs about the sexual responsiveness of the human male. His understanding or beliefs about male responsiveness are being used to assess the likelihood that the witness is giving an honest account.

Occasionally the use of stereotypes is a manifestation of prejudice, including racism. This view is supported by Zerman’s account of the trial of the young African–American for the alleged murder of a salesman. Several jurors were strongly influenced by their internal stereotypes of African–Americans (Zerman 1977, p. 159). What this really means, of course, is that some stereotypes are inaccurate and prejudicial. Nonetheless, the point remains that jurors do utilise them. Jurors can deny being racist while at the same time professing and relying on stereotypes that clearly have a racist character. There was an amusing example of this cited by one of the writers who contributed to the memoirs of English jurors. A group of white men were charged with rioting arising out of an altercation between them and some black men. One white juror denied that he was a racist but then added, in relation to the black men: ‘…but you can’t believe a word they say, can you?’ (Cohen in Barber and Gordon 1976, p. 44).

In an English case, the juror described the defendant as an obvious prostitute. This judgement was based purely on her physical appearance—in particular her style of dress, wearing of a floppy hat and use of pale makeup. In that case the stereotype was accurate since the defendant admitted that she was a prostitute.
The use of personal knowledge and belief by jurors and juries

(Brooks 1976, pp. 27–8). Some jurors recognise and reject stereotypes presented, perhaps implicitly, as part of a case. Mary Timothy, whose memoir makes very clear her feminist perspective and values, believed that the prosecution of Angela Davis relied, in part, upon a sexist assumption or stereotype. The prosecution depicted Davis as a woman motivated by sexual or romantic passion rather than political belief (Timothy 1974, p. 88). Timothy rejected this form of stereotyping. Furthermore, she rejected the notion that a woman with the defendant's intellect would involve herself in an ill-considered, impulsive crime. Clearly analytical thinking—coupled with a sound understanding of people—can defeat a stereotype or assumption presented by one of the parties. Furthermore, a stereotype can be rejected when it conflicts with a juror's value system. It is likely that it will be accepted and utilised when it conforms to a juror's sense of values.

It seems that jurors will often share personal memories, personal knowledge or even specialist knowledge by telling a story. This seems to be an excellent vehicle for the sharing of knowledge. There are many examples in the literature of jurors telling personal stories as an aid to constructing a larger narrative about the trial that they are observing. There has been considerable interest in the Narrative Construction Model of juror deliberation. But story telling is not limited to narrative construction about disputed events. Stories convey useful knowledge of all kinds. Burnett relates that a fellow juror told the story of a nasty brawl that he had been involved in while serving in the navy. The narrative led to a re-enactment that showed that the juror's recall could not have been correct. It sparked a realisation that someone's recollection of a fight can be quite inaccurate (Burnett 2002, p. 113). This was an important insight because the accuracy of the defendant's account of the fatal struggle was a significant issue.

There are numerous instances in the literature of jurors recounting anecdotes. Zerman reports that a fellow juror told a rambling story about a black man who had stood by another black man. He claimed that in the particular circumstances, no white person would have stood by another white person. The point of the story was to bolster the juror's contention that four African–American youths
would not have turned against another African–American simply so that they could claim a reward (Zerman 1977, pp. 128–9).

Jurors also invent stories or depict hypothetical situations in the course of discussing issues. In the accounts of the subway gunman trial, the writer gives several examples. One of these was a hypothetical situation where a son shot his father hoping to benefit from an inheritance. However, he only managed to wound and not kill his father. This hypothetical story was discussed to explore the concept of intent in relation to the crime of attempted murder (Lesly and Shuttleworth 1988, p. 280). Thus, telling stories and hypotheticals are categories that tend to be allied.

In one of the English cases, the substantial issue was whether the defendant had been properly identified. An eyewitness had seen the perpetrator at night. Accordingly, the exact lighting conditions and the inherent difficulty in making observations were an issue. Interestingly, the jury included several retired miners. During deliberation, they began to tell stories about incidents in their careers demonstrating the problem of identification in the dark—that is, down a mine (Morris 1976, p. 87). Surprisingly, the writer was of the view that at least some of this was not particularly relevant. It goes without saying, however, that it was clearly relevant to the retired miners who undoubtedly had some expertise. They shared personal memories with their peers through the use of the story in which they displayed undoubted specialist knowledge.

Both storytelling and re-enactments can lead to a flash of insight. Capano denied that he had committed murder. But he admitted dumping the body of his former lover into the ocean using a cooler as a coffin or container. The jurors agreed to re-enact this to the extent of letting one of their number—whose height and weight corresponded approximately to the height and weight of the deceased—get into the container. Given that the dumping incident was not disputed, it is not entirely clear why the jury chose to experiment and re-enact in this way. However, it is a good example of the role of curiosity. The juror could only fit into the cooler with extreme difficulty. The jury concluded that the victim's leg had been broken to enable her body to fit (Carter 2000, p. 305). This insight produced great emotion—perhaps because it strengthened a view that Capano
was disrespectful and callous. But insights like this—arousing emotion or invoking sympathy—can add weight to the prosecution or defence side of the proverbial balance.

The category of bizarre belief refers to a mental schema tool or strategy that, fortunately, does not appear to be in common use. However, prejudice in general—and racism in particular—could be shoehorned into this category. Burnett reports on the disruptive and extremely annoying behaviour of a fellow juror, Felipe. At one point, he refused to continue deliberating in the usual way but instead utilised a form of divination (Burnett 2002, p. 141). This is the only instance that appeared in the dataset of reliance on a bizarre belief. However, in this context it is cautious to note that jurors would not necessarily announce what they were doing. There are other instances of jurors engaging in bizarre behaviour—for example, refusing to take part in deliberations.

The most interesting use of storytelling as a device was found in the subway gunman trial. The interesting aspect of this is that the story, although based on the evidence, was partly hypothetical. The storyteller, a graphic artist, created cutout figures and gave them names indicative of their personalities. Lesly reported that hearing the narrative forged an alliance between the jurors such that they were able to reach a unanimous verdict on one of the more difficult charges. The story showed how an entirely reasonable person, confronted by four aggressive young men, could act as Goetz did. The juror used his artistic skills to give one of the cutout figures a pleasant facial expression and to make the other four look menacing.

Lesly says that the strategy succeeded because the jury was able to consider the issues without having to consider also the personality of Goetz who was clearly disturbed (Lesly and Shuttleworth 1988, pp. 298–300). The story was an abstraction of some salient features of Goetz’s evidence. The use of the story helped the jury to make a credibility judgement. Useful stories do not necessarily have to be true. Even hypothetical stories can be helpful. Creativity and imagination have a role in deliberation—as does the use of hypotheticals.

Speculation is a schema of considerable interest. It is allied to creative thinking. Indeed it is an instance of creative thinking. Burnett noted the tendency of fellow
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jurors to speculate. He pithily stated that most people prefer Occam's knitting needles to Occam's razor (Burnett 2002, p. 61). The homosexual murder trial that Burnett wrote about lent itself to speculation because there were so many gaps in the evidence and possibly because the characters were so colourful. One of the prosecution witnesses referred to a white adult male being present at the unit where the killing occurred. The jury speculated about the part that person might have played (Burnett 2002, p. 60). The presence of another person could account for one of the minor puzzles. Milcra said the television was on when he left but police had found it off the next day. The case that Burnett observed had many sensational elements. Some of the witnesses for the prosecution were drag queens. The lifestyle of the victim must have seemed quite alien to many of the jurors. Burnett reports that possible scenarios that they imagined fascinated other jurors (Burnett 2002, p. 61).

Zerman reported that one of the jurors in his case came up with a theory that involved the defendant and the four major prosecution witnesses—all young adults. This juror theorised that the defendant and the four witnesses had jointly planned to rob the victim who was delivering potato chips to a shop. In the course of the robbery, the salesman had been killed. The four witnesses banded together to give evidence depicting the defendant as the sole malefactor. The juror surmised that the offer of a reward had motivated the four to scapegoat the defendant. This was all sheer speculation unsupported by any evidence since it is clear from Zerman's account that neither counsel raised any such theory in the course of the trial (Zerman 1977, p. 131).

In his account of the subway gunman trial, the writer, Lesly, reveals the extent of his own speculation and theorising about the shootings. A major issue was the position of the fourth victim, in relation to Goetz, when the victim was shot. The prosecution contended that the victim was seated. If that was true, then the case against Goetz was considerably strengthened. Lesly engaged in a very disciplined form of speculation. That speculation clearly relied upon personal knowledge. That was mundane knowledge about how people stand in subway carriages. Lesly outlines his speculation in the following passage (Lesly and Shuttleworth 1988, p. 255):
Goetz said in his taped statements that Cabey was holding onto the strap above his seat pretending he wasn’t with the others, like he wasn’t aware of what was going on. I believed it likely, therefore, that Cabey was standing facing the seat, as most strap hangers do, rather than facing the aisle as the defence had argued through Quirk’s demonstration. In either case, Cabey would have been standing in profile to Goetz but according to my theory, Cabey’s right side would have been exposed to Goetz rather than his left, rendering impossible the defence’s argument that the fourth shot crippled Cabey because the bullet entered his left side. I believed that the left flap of Cabey’s jacket could have been hanging out over the seat -- especially since the pocket was weighted with a screwdriver -- and the fourth bullet could have travelled through it inside and out and then struck the panel. Cabey then could have turned around and sat down, and, as the fifth shot was fired, flinched to his right, exposing his left side.

Reading body language is common, and of course it is allied to stereotyping. It can also help to build an understanding of people. Lesly recounts his observations of the subway gunman’s body language when being interviewed by police and the district attorney. The interview was videotaped and played back to the jury. Lesly and Shuttleworth (1988, p. 153) say:

Goetz’s animosity toward Braver was so profound he seemed like a different person during these exchanges. There was a marked change in the tone of his voice and particularly in his body language. Throughout much of the interview Goetz sat sideways in his seat with his left leg crossed over his right and his back hunched, as if he were withdrawing into himself and away from the camera and the people. Responding to Braver’s questions, though, his body would uncoil as he lashed out at her his back stiffening, his torso twisting in his seat as he turned to face her, the pointed finger thrusting at her emphatically. He used his arm as if it were a mallet (the forefingers pointed straight out and locked together, some), as when he told Braver and the detectives that he wanted to kill those guys. It was at such times during his videotapes that the dangerous nature of Goetz is apparent. Otherwise we would have never seen how the meek mild mannered individual in front of us in the courtroom had been capable of committing a violent act.

In this case, the gunman’s body language betrayed the duality in his nature, helping the juror to make sense of his actions.

Re-enactments, experiments and personal observations are related tools. The use of one, it seems, will often coincide with the use of one or both of the others. Many jurors have a heightened sense of curiosity and are very keen to acquire hands-on experience of matters related to them in the evidence. Lesly and Shuttleworth’s account, previously mentioned, of the jury’s viewing of a railway
carriage shows this. In collaboration, the jurors conducted re-enactments. Because exactly how the shootings had occurred was disputed, there was obviously no single way of conducting such a re-enactment. But it is clear from the written account that the jurors used the opportunity given to them by the judge to use all of the available resources and to consider various possibilities. (Lesly and Shuttleworth 1988, p. 218).

Obviously, experiments involve personal observations of one kind or another. In the trial of the Black Panthers, the writer tested the sharpness of a sword by running his forearm along the blade. His observation that the blade was quite blunt bolstered his growing view that the prosecution case had no substance. The same writer carefully read materials, said to be revolutionary, confiscated from the home of one of the defendants. He also looked closely for any marks or writing on the pages that would indicate handling or use by a person (Kennebeck 1973).

There are numerous examples in the dataset of the influence of personal values. Indeed, there are times when a juror's value system profoundly affects his or her perception of how to perform his or her duty. One of the English writers mixed with jurors whom he describes as coming from the east end of London. In discussions occurring between trials, they foreshadowed that they would not be prepared to shop, that is convict, anyone for a crime such as simple larceny. One juror was a lorry driver who spent considerable time in the dock areas of London. Clearly light-fingered himself, he said that a person would be a fool not to steal something if it seemed he could get away with it. This might suggest a possible relationship between the use of personal values and social class or socio-economic background. The same group of jurors viewed assaulting a police officer as being a less serious matter than assaulting a member of the public. It is interesting to note that this attitude conflicts directly with the traditional view of lawmakers and judiciaries. They maintain that assaulting a police officer is an aggravated assault calling for a harsher-than-normal penalty (Mellors 1976, p. 75).

Making value judgements and philosophising are closely related. Burnett and another academic historian found themselves on the same jury with different
views about the appropriate verdict. Their debate became philosophical and highly abstract at times. They discussed the supposed right of the jury to not follow the letter of the law but act on its own concept of justice. The colleague argued that if strict application of the law led to a verdict that offended her conscience, then she should follow her conscience. Another juror agreed as stated in Burnett (2002, p. 118):

Paige urged them to follow the spirit and not the letter of the law. She didn’t want Milcray to go entirely free. They could punish him for lying and abandoning a wounded man.

Burnett lectured the jury about the difference between law and justice. Shortly after this, the jury was able to reach agreement on a verdict of not guilty (Burnett 2002, pp. 136, 168).

A similar example is given in the account of the subway gunman trial. A juror identified by the name Brodie was adamant that she should not acquit Goetz on a technicality. For her, the verdict had to be right before God as well as the law. Ultimately, Lesly was able to persuade her not to take on such a heavy moral load (Lesly and Shuttleworth 1988, pp. 281–2).

The use of values is closely allied to a strong concern about verdict consequences. This can be seen clearly in the incident reported by Zerman of the holdout juror. He agreed to change his vote notwithstanding his conscience. But he asked rhetorically how many jurors agreed they were letting an animal loose on the streets (Zerman 1977, p. 138).

In the first death penalty cases, some of the jurors viewed with skepticism the assurance that a life sentence would be served without parole. Accordingly, they adopted the view that if Lane were not executed, he may in due course be released. Once in the community, he could offend again. One juror even expressed the fear that he might come looking for the jurors. A cohort felt inclined to impose the death sentence unless completely satisfied Lane could be controlled in prison (Sundby 2007, p. 36).

In the second death penalty case, a juror identified as Jerry was, like the victims, homosexual. The victims had hustled for sex to make ends meet. The juror was familiar with this aspect of the gay scene. He was very concerned that the
defendant, if allowed to live, would have access to young male prisoners. He was initially inclined to the death penalty because he identified with the gay victims and viewed the crime as an attack on the gay community. But he was also concerned about the defendant’s sexual conduct in prison if allowed to live (Sundby 2007, p. 153). In this example, we see the linking of a value judgement and a concern about verdict consequences.

It must also be said that some jurors strive to prevent personal values interfering with their application of legal principle. This comes across very clearly in the subway gunman trial where several of the jurors, the writer included, were clearly distressed and perplexed by the level of violence exhibited by Goetz. Those jurors did not regard the defendant’s actions as appropriate. However, they realised that they had to judge him not in accordance with any personal moral code but rather, in accordance with the body of law relating to the justified use of force (Lesly and Shuttleworth1988, p. 297).

In short, jurors sometimes rely upon their personal values and at other times try to liberate themselves from them to discharge their duty to apply the letter of the law.

The capacity to focus on major issues is of vital importance. This might seem like a trivial observation. Yet there are surprising examples in the literature of jurors with little or no comprehension of what had unfolded in the courtroom. Thus, they had almost no capacity to isolate significant and important issues from the dross of irrelevant or background material. One of the English writers (Cohen in Barber and Gordon 1976, p. 50) commented on his peers in the following way:

The men sitting beside me in the jury box showed, for the most part, the same lack of interest and concentration which one would normally see in boys of absolutely no academic inclination while attending an algebra lesson.

Not surprisingly, a lack of focus is closely related to a failure to grasp important issues. A judge in one of the English cases presided over different stages of two more or less concurrent trials. This entailed hearing evidence with one jury while a second jury was deliberating. Because of this overlap, one jury had seen the defendant from the other trial standing in the dock. However, they obviously had not heard any evidence from, or about him, and knew nothing of the charges.
A juror was insistent that she had to determine his guilt and was unsure of his relationship to the other defendant. Because of that, she could not decide on a verdict (Brooks 1976, p. 30).

Focusing seems to be closely related to analytical thinking. An analytical approach is needed to decide what issues must be the subject of focus. Very early on in the subway gunman trial, the writer realised that it would all come down to the shooting of Daryl Cabey, the last victim. He regarded everything else as window-dressing (Lesly and Shuttleworth 1988, p. 38). This early conclusion proved correct. Thinking analytically helps to isolate issues of critical importance.

An understanding of tactics, and the capacity to focus on major issues, complement each other and often appear together in the literature. Legal tactics can be obfuscatory and intentionally so. At times they are intended to distract attention from major issues. Recognising tactics for what they are clearly helps jurors to keep their mind on the major points. In the subway gunman trial, Lesly believes that one of the lawyers is repeatedly and intentionally asking objectionable questions. Although the objections are sustained, and the jury directed to disregard the questions, there is a danger that the point that the lawyer is trying to make will lodge in the juror's minds. Lesly understands the tactic—and while acknowledging how hard it is—reminds himself to disregard the question and its implications (Lesly and Shuttleworth 1988, p. 86). Zerman observes that the prosecutor himself drew attention to the unsavoury histories of some of the prosecution witnesses. He surmises that the reason for this is to weaken the impact of these disclosures. Zerman regards this as a naive tactic (Zerman 1977, p. 53).

Mary Timothy took offence when a lawyer showed a witness a photograph of a judge with a shotgun pointed at his neck. The photograph had actually been taken in the course of an armed siege of a courtroom where a mass kidnapping occurred. Viewing the photograph, the witness broke down. In Timothy's view, the incident was contrived by the lawyer to get the jury emotionally involved. She disapproved of the tactic (Timothy 1974, p. 106).
In the Scott Peterson trial, some jurors noted that there were several beautiful young women seated behind the defence lawyer. They were wearing miniskirts. Several jurors surmised that the defence tactic was to distract the jury at a time when key prosecution testimony was being given (Beratlis et al. 2007, p. 2).

Using hypotheticals and analytical thinking are often allied. This is hardly surprising since posing a hypothetical problem and attempting to solve it is one way of honing analytical skills. In the subway gunman trial, Lesly evinced high-level analytical skills. At several points the jury addressed, or considered, hypothetical scenarios in an attempt to clarify its thinking. The most notable, as already recounted, was the re-enactment using cutout figures with invented names and hypothetical personalities. At an earlier point, the jury had considered and analysed hypothetical situations in an attempt to clarify its thinking about intentional killing (Lesly and Shuttleworth 1988, p. 280).

There is no doubt that jurors have their own notions about the law including ideas about what sort of behaviour constitutes a particular offence. To some extent, these notions have some grounding in commonsense. Unfortunately, commonsense itself can be a poor guide to legal doctrine. Jurors’ notions about the law can stymie proper deliberation. Proper analytical thinking is hindered because the analysis proceeds from inaccurate or partly inaccurate legal premises. Notions about the law, including inaccurate notions, can be supported by hypotheticals or storytelling. Jurors in a London trial were insistent that driving off in someone’s car without permission constituted theft. This is not strictly true because a conviction for theft will also require a finding that the defendant intended to deprive the owner of possession permanently. The errant jurors tried to persuade the writer to adopt their view by asking him to consider a simple hypothetical. They asked him to consider his view if he owned the car and somebody came along and drove away without first obtaining his permission. The writer did not own a car. To other jurors, this explained his inability to understand the force of the hypothetical (Morris in Barber and Gordon 1976, pp. 87–8).

The above examples show the rich and multifarious relationships that exist between different schemas and tools in the toolkit. They also show how the use
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or occurrence of one schema or tool can promote the use or occurrence of another. Because schemas and tools can be chained together, the output from one can become the input to another. In the case of Mary Timothy, her largely intuitive judgement about the character of Angela Davis seems to have stayed in her mind. This ultimately prompted a flash of insight that Davis was innocent (Timothy 1974).

What goes on in jurors’ minds is a matter of some complexity and defies simple explanation. But it is clear that jurors’ minds are awash with personal knowledge and belief that interact with the evidence in ways that are complex, fascinating and hard to predict.

**Relationships between schemas and tools and other categories**

Analysis of the dataset also showed relationships between categories within the jurors’ Toolkit and categories outside of that grouping.

The restrictiveness of the legal culture and the authoritarian and controlling behaviour of the judge can, to some extent, stifle experimentation, personal observation, re-enactment et cetera. Some judges expressly forbid these things. The London kidnapping case demonstrates this. The jurors were expressly forbidden to do re-enactments. They were also not allowed to view the boot of the vehicle which was used to transport the alleged victim (Grove 1998, pp. 75, 152). But they became subversive. They managed to use binoculars, smuggled into the jury room, to view the dimensions of a car of the same model, parked in the street outside of the court. This disobedience was clearly preplanned rather than opportunistic.

But it is not only in cases where the culture is particularly restrictive that jurors are inclined to experiment or even do their own research. The memoirs contain many other examples where extraneous material has been used. In the Scott Peterson trial, the prosecution alleged that the defendant had dumped his wife’s body in San Francisco Bay. A juror improperly accessed an internet site to learn more about currents in the area. Peterson had, according to the evidence, used the same site (Beratlis et al. 2007, pp. 148–9). In another trial, a juror took into the jury room a psychological journal featuring an article on interrogation.
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The jurors thought that police investigators had used one of the techniques. Kennebeck (1973 p. 145) wrote:

Next day, Fred Hills brought into the jury room a collection of readings on psychology... that discussed the ‘Mutt and Jeff’ technique. When a mean cop, Mutt, fails to force a confession out of the suspect by violence or the threat of it, he is shooed away by nice cop, Jeff, who gives the suspect sympathy and comfort. According to the article, this sense of release often leads the captive to spill out a confession that may or may not be reliable.

Fred made no comment when he brought the book in and pointed the article out to me. We discussed it in general terms; Claudette Sullivan got into the conversation and read the piece. So did Joe Rainato, and some of the others. We took it for what it was worth -- an article which conceivably any one of us might have come across on our own.

Such instances of jurors conducting research might be seen as evidence of the dominance of the epistemic objective. Jurors are determined to discover the truth and are at times willing to bend the rules to do so.

Sometimes juries will request the judge to clarify their instructions. The jury’s ability to focus on major issues and to use analytical thinking can be heavily dependent on the judge’s instructions. The quality of the judge’s instructions and the judge’s willingness to respond positively and helpfully to requests from the jury for clarification are very important. A jury confused about the law that it must apply—as many juries appear to be—can be stymied at the outset. It may not properly isolate issues and may find it difficult to engage appropriately in analytical thinking. In one sense, this would seem to be blindingly obvious. But there are certainly aspects of the dataset that fully support and corroborate this contention. The importance of juries being given clear instructions rendered in simple terms is apparent from the documented tendency of some jurors to view legal issues simplistically and inaccurately. Burnett described the jury seriously debating whether to nullify the law. That means rendering a verdict that seems just while ignoring the law. It is perhaps no coincidence that in that trial the judge was a disagreeable man who was unhelpful in clarifying instructions (Burnett 2002 p. 57).

The strength of the case may bear a significant relationship to the jury’s tendency to be innovative and discover new knowledge as has already been mentioned. In this context, the strength of the case means its strength as
perceived by the jurors themselves. In the trial of Jack Ruby, the case against the defendant was undoubtedly very strong. The physical elements of the crime were established and not in issue. Furthermore, since a person was assumed to be sane, there was an onus on the defence to prove insanity. In 1964, in Dallas, that entailed proving that, at the relevant time, Ruby either did not know what he was doing or did not know that it was wrong. The jury was so unimpressed with the defence that it did not feel the need to discuss the medical evidence or the issue of insanity before voting (Causey and Dempsey 2000, p. 89). It is significant, in the author’s mind, that in this case, there is no evidence from the juror accounts that they engaged in any kind of speculative thinking or innovation. In truth, the case did not really lend itself to that because of its overwhelming strength and the frailty of the defence. Nonetheless, it is surprising that, after hearing weeks of it, the jury failed to even discuss the medical evidence when it had the opportunity.

A borderline case was the New York homosexual murder trial. There were some perceived inadequacies in the investigation but these were not major. There was simply not quite enough available evidence for the prosecution to prove convincingly that Milcray was guilty of murder. In this case the jury engaged in numerous innovative activities involving the close examination of photographs and videos, re-enactments et cetera (Burnett 2002). The author surmises that in cases that are overwhelmingly strong—and in cases that are manifestly weak—there is far less motivation for the jury to be active, imaginative or creative. The jury is less likely to seek out new sources of information.

It is also patent that a jury equipped with aids to learning and assisted in its task is far more likely to take on an active or innovative role. The longer and more complex the case becomes, the greater the need for such things as notes and free access to the transcript. These days, most judges have an enlightened attitude to note taking. But based on the memoirs, they certainly do not have, as a general rule, an enlightened attitude to the use of transcript. Many of the juror accounts talk about the jury having to go back into the courtroom to have long passages of evidence read to them.
The author also contends that there is at times a relationship between the degree of harmony and conflict in the jury and its tendency to be innovative. The harmonious jury is, by its nature, more capable of cooperative action. It is unified in its aims. An example of this can be seen in the London Kidnapping Trial where the jury collectively disobeyed the judge, as mentioned above. One of the jury members was an amateur ornithologist who smuggled a pair of binoculars into the jury room. In violation of the rules, all of the jurors used the binoculars to view a motor vehicle through the jury room window. The jury had previously asked to view the motor vehicle used in the alleged kidnapping and also expressed an interest in being able to view the size of the boot. The judge's refusal to accommodate the jury undoubtedly frustrated its members. This was clearly a harmonious jury—albeit one inclined to disobedience. They cooperated in conducting their own investigation that took them outside of the ordinary bounds of what a jury should do (Grove 1998).

The jury in the OJ Simpson trial was divided by conflict and animosity. It was also subject to draconian controls (Kennedy and Kennedy 1995, pp. 62–4, 96). Interestingly, it seemingly had no desire to be innovative or to discover anything that might have helped with deliberation. At least there is no evidence of that to be found in the principal memoir (Cooley, Bess et al. 1995). Perhaps there was not enough cohesion in the jury for it to do that.

At times, individual personality traits may stand in the way of innovative jury activity. For example, an obsessive character in the Scott Peterson trial made sure that, in its deliberation, the jury stuck within the rules as he interpreted them. He disagreed with the first chairman, also obsessive, who was minded to supplement the medical evidence with his own medical knowledge (Beratlis et al. 2007, p. 139). It is interesting to compare this jury deliberation with the one in the London kidnapping case. The London jury was very happy to use the expertise of a psychologist who was on the jury.

If an obsessive, rule-bound individual finds him or herself in a leadership position they may well restrain the jury from following its inclinations and engaging in innovative forms of knowledge discovery. If jurors feel bullied or harassed by one or more peers, then it is reasonable to surmise that they also
could be stymied in their attempts to use their own schema, reasoning tools et cetera. Peggy, the bullied juror in the first death penalty case was pushed to the point where she was prepared to compromise on some of her most fundamental values and beliefs. As a consequence of this, she suffered an emotional breakdown (Sundby, 2007 p. 98 et seq.).

If the jury is to be active and innovative, it seems that it must be generally harmonious. A certain amount of friction, however, is certainly not a bad thing. That friction may well be the spark that lights the fire of innovation. Provided that the conflict does not become overly personal or constitute bullying, then its effect will not undermine the fundamental harmony of the jury or its capacity to act as a cooperative unit.

One of the interesting features of the London Kidnapping Trial was the enormous diversity of the jury. This diversity was not only in terms of occupation but also in terms of social class and gender. There was also some ethnic diversity. According to Grove, the ethnicity of one juror and the knowledge that she brought to the jury on account of her ethnicity was of great value. He also mentions the usefulness of the specialised knowledge contributed by jurors with very different occupations (Grove, 1998).

There is abundant evidence in the dataset that gender diversity is important in the jury. In the Menendez trial, the jury divided along gender lines. There is no doubt that this division was not a matter of chance or coincidence. The female jurors—unlike their male counterparts—acknowledged the possibility that the Menendez Brothers had been driven by fear to kill their parents (Thornton et al. 1995). In the trial of Angela Davis, the female chairperson clearly brought a female perspective to the task. This was manifest in her challenging the tacit sexist assumption that the prosecution presented. That is, that a female in love would act out of romantic or sexual passion rather than political conviction to defend her lover (Timothy 1974, p. 88).

Equally, there is abundant evidence in the dataset of the importance of racial diversity. In the second death penalty case, the African–American jurors helped their peers to understand what the defendant’s early life had been like and how it had distorted his character (Sundby 2007, p. 151). It is commonly stated that
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The use of personal knowledge and belief by jurors and juries can offset the different prejudices that individuals possess and bring to the jury. The author contends, however, that jurors bring very different types of knowledge that are of equal significance and importance. For example, people from different backgrounds, of different genders and generations, bring very different knowledge to the jury as clearly occurred in the second death penalty case.

The author does not doubt that there are many other possible relationships between external categories and schemas. This thesis lists a few to show contextual influences on the schemas and tools that jurors use. The examples also show to what extent the use of personal knowledge and belief by jurors is influenced by other factors as mentioned earlier.

Comparative examples of decision making

This section contains two extended examples of decision making that demonstrate how the same schema or tool can be used in very different ways. Mary Timothy, in the Angela Davis trial, appeared to be highly intuitive in her approach to decision making. In contrast to her approach, Carter in the Capano trial used a more obviously logical and analytical approach and utilised more evidence. However, there was no case in the dataset of a juror using all of the evidence; they all satisficed to some extent. But interestingly, both Carter and Timothy used character evaluation as a significant tool.

Carter’s highly logical and reasoned approach in the Capano trial deliberation perhaps represents one extreme. In an unhurried and methodical way, he examined various documents tendered in evidence. While he was doing this he asked himself whether Capano had been an unprincipled manipulator or whether he was himself an innocent victim. To him, this was a critical question. He is focused on character evaluation which he clearly sees as an important key to a verdict. As an aid or prelude to character evaluation, he contemplated the consistency of evidence and the inherent likelihood of various scenarios. He finds clear and convincing evidence that Capano was manipulative and overbearing and that his dead former lover had been a victim. This analysis has a logical,
Carter's approach is not entirely focused on character. He also finds clear evidence of pre-planning. But whatever the focus, he appears to be hard-headed and analytical. Considering the believability of a witness who claimed to have seen an incident from her own home, Carter (pp. 279–80) tries to assess the likelihood of that:

From the end of Johnson’s driveway, to MacIntyre’s garage was two hundred and five feet, by contrast, from the witness stand to the main entrance of the courtroom was sixty feet...So it would seem that the distance from the driveway of the Johnson home to where she claimed to see a sobbing MacIntyre would have been three-and-a-fraction times the distance from the witness stand to the main entrance of the court. Add to that the large tree in front of the window and it is hard to believe that anything could be seen from that vantage point.

Further evidence of Carter’s hard-headed and logical approach is his refusal to attach any weight to medical evidence about matters of which the practitioner took no notes (Carter 2000, p. 299).

It is interesting to contrast this approach to that of Mary Timothy who chaired the jury in the trial of Angela Davis. Like Carter, she utilises character evaluation as a major schema or tool. Using this enabled her to decide upon a preferred verdict—just as it enabled Carter to arrive at a preferred verdict. There is no doubt that Timothy followed much of the evidence. But at a certain point—just before the commencement of formal deliberation—she decided to think independently and focus on personalities rather than other details of the evidence. Timothy (1974, p. 189) states: I didn’t think about the details of the testimony, but rather how I felt about the people involved in the events that had occurred.

Her assessment of character is heavily reliant on her general knowledge of people. Timothy (1974, p. 189) says:

Probably no other group in the world is as idealistic as high school seniors. They volunteer for all the wars and join all the marches. They carelessly sacrifice their lives for ideals which their elders treat with casual intellectual scepticism. Very little suggestion is required to cause them to become involved in a righteous cause. The greatest problem in dealing with 17-year-olds is
containing their energy and directing it toward a goal which can be reached by less extreme measures than martyrdom.

In what seems like an epiphany, Timothy suddenly reaches a personal decision (Timothy 1974, p. 190):

I suddenly realised that I didn’t believe that Angela Davis was involved in the conspiracy. I felt this very strongly. I wasn’t absolutely sure just why, but right then I knew that the escape was the action of a 17-year-old youth acting in concert with men who had been imprisoned since they were about that age -- men who were desperate, who could no longer believe that they could ever achieve freedom within the mechanics of the system. I didn't believe that Angela Davis was guilty.

A great feeling of relief and joy came over me. I had reached my own personal decision. I still had to do a lot of thinking and organising to be able to justify my beliefs to others. And I had to be careful not to block out other ideas that might be in conflict. I must be reasonable and logical, but I need no longer be in this limbo of indecision and uncertainty. I had found her not guilty.

The academic literature on cognitive modes and dual processing helps elucidate this passage. The assertion by Timothy that she had a sudden realisation—and that she had reached a conclusion without being sure why—is a strong indication that fast processing was involved. Intuition is a process allowing one to reach a conclusion without understanding why or how. This exactly describes Timothy's experience. Her use of intuition seems to correspond exactly to Betsch’s (2008) description that part of the input is knowledge acquired by associative learning and stored in long-term memory. Intuitive processing is automatic—it is conducted without conscious awareness (Betsch 2008; Dorfman, Shames and Kihlstrom 1996). It is the direct attainment of knowledge without logical inference (Sadler-Smith and Shefy 2004). The output of such processing is a feeling that serves as a basis for judgments and decisions. (Betsch, 2008).

All of these elements appear in Timothy's account. Her sudden epiphany about Davis was preceded by a period when she felt great empathy for her, based on what she had already learned. She had clearly been thinking about the defendant and her character. She admired her passion, idealism and high intelligence. This constituted knowledge, or at least belief, stored in long-term memory because Timothy incorporates them into her memoir. It is clear that Timothy relied upon internalised schemas, indeed stereotypes, of different sorts of people and how
they behave. She describes the expected disposition of a 17-year-old. This stereotype seemed to have acted as an input in the fast processing. It is notable that her insight that Davis was not guilty was accompanied by a conviction that the escape was the action of a 17-year-old acting in concert with desperate, imprisoned men.

Intuitions are like gut feelings—they are rapid but also affectively charged (Dane and Pratt 2007; Sadler-Smith 2008b; Bechara & Damasio 2005; Damasio 1994). Timothy's insight accords with this because it seemed very rapid and was accompanied, or immediately followed, by a strong sense of relief and indeed joy. It was clearly not an unemotional or clinical judgement but one imbued with emotion. Her indication that she was going to concentrate on how she felt about people was perhaps an indication that her conclusions would have an emotional content.

The two cases also illustrate the sheer variety of ways that schemas can be used together and how they can benefit each other in a master–servant relationship. In both cases, the dominant schema was initially character evaluation; although Carter also makes significant use of consistency and indeed ultimately selects a narrative—the prosecution narrative. He does not need to construct it because it has been served up to him.

Carter’s slow logical, analytical approach to evaluating character used a body of documentary evidence. Timothy clearly used a faster intuitive approach that neatly sidestepped most of the evidence—at least in the sense that she did not consciously focus on the testimony.

There are two other very interesting features of Timothy’s account that should be mentioned in association with a brief discussion of dual mode processing and bounded rationality theory. As we saw in the literature review, the dual mode theory of cognitive processing proposes that the two styles of processing or thinking can be used in tandem. Having reached her own conclusion, Timothy adopted a more clearly rational approach with her peers. Although she reached a personal decision using the fast mode of processing, she justified that decision in formal deliberation using a more analytical approach and by picking holes in the prosecution case (Timothy1974, pp. 231–40). System 1 thinking was
supplemented by System 2 thinking. This is a very clear example of dual processing.

Timothy’s initial approach had the advantage, at least to her, of ignoring a considerable part of the evidence. It is perhaps notable that she reported feeling quite overwhelmed by the amount of information that she was expected to assimilate and had nightmares for at least a week ((Timothy 1974, p. 100). In that sense, her approach was consistent with the theory of bounded rationality. According to Kurze-Milcke and Gigerenzer (2007):

Instead of trying to optimally integrate everything, good decisions in the real world need to know what information to ignore, and heuristic rules of search and stopping search provide models of this intuitive skill.

This thesis does not suggest that Carter’s approach was better than Timothy’s—or that one verdict was correct and the other incorrect. Both Carter and Timothy arrived at a private verdict. They then adopted a leadership position in their respective juries, convincing the others of the correctness of their preferred verdict. Both were very diligent jurors. This is another reason why the two cases present such a compelling contrast. As stated earlier, when persuading other jurors, Timothy adopts a more analytical approach, pointing out the perceived gaps in the prosecution case. She arrives at her preferred verdict in one way, and convinces the other jurors of the rightness of it in another way. Her approach is far more complex than any existing model would suggest. Using Weinstock’s (2011) terminology, she engaged in both knowledge telling and in knowledge transforming.

When it was time to deliberate in the Capano trial, Carter wanted to read some things again and he was determined not to be rushed. He decided to focus first on the jury book, noting bits that he wanted to discuss. He then turned to the victim’s diary and planner (Carter 2000, pp. 308–9). He surmises that she would have written candid entries in those documents thinking that no one else would ever read them. He was clearly confident that she would reveal herself in those entries. Making good use of the jury book, and his own notes, he continued to methodically examine key bits of evidence that he had noted. He referred on several occasions to the importance of documentation as lending credibility to evidence; and it seems clear that he wanted to see the writing first hand.
Carter’s strategy may not have been the very best available if there were no restraints. But given the restraints that did exist, it seems to have been a very good and methodical strategy. It was easily sufficient for him to amass enough information to make a logical character evaluation of the accused and the victim. This was not a solitary effort. It is clear that the jurors discussed things that they were examining and discussed the evidence in general (Carter 2000, pp. 316, 329). The point this thesis is making about Carter is that he chose a strategy that utilised the schema or tool of character evaluation. He chose to focus on the material that he thought would give him the best insight into the characters of the protagonists.

Ultimately he concluded that it was simply not credible that the victim had been the manipulator in her relationship with Capano. The documentation showed clearly that she was a troubled and romantic woman who broke off the relationship and regretted having entered into it (Carter 2000, p. 330).

It is of course impossible, in practical terms, for jurors to revisit all of the evidence. That would require them to look at or read all of the exhibits and to sit through a reading of the entire transcript. Time would clearly not allow that. All jurors and all juries must make decisions about what evidence is important. However, it must be said that Carter’s approach was still very thorough and focused. Interestingly, this was a case where the chairperson allowed a relaxed approach to deliberation—such that the jurors undertook private scrutiny of exhibits interspersed with discussions (Carter 2000, p. 304). But still they had to choose what to examine.

Mary Timothy’s approach cut a swathe through most of the evidence. Focusing on how she felt about the characters in the case she suddenly—and without much apparent effort—concluded that Angela Davis was innocent (Timothy 1974, p. 190). Her shortcut was far more dramatic than Carter’s. This is not to say that her approach overall was any less rational because she later, as a second step, identified significant shortcomings in the prosecution case.

There is little doubt, however, that in the words of Herbert Simon (1956), both jurors were satisficing in their own way. That is, they were using a decision making strategy that was adequate rather than the best possible. This is more
obvious in the case of Timothy who satisfied to a greater extent than Carter. As a result, the schemas and tools that supported character evaluation differed in the two cases.

**Selective coding and theory development**

Selective coding is a process of defining relationships between the core category and other categories. Thereby, categories are integrated and a theory developed (Moghaddam 2006). It is a stage of theory development. Earlier sections of this chapter have already gone some way to delineate relationships between the Jurors’ Toolkit and other categories. It remains to integrate those relationships into a theory.

A grounded theory is a statement of relationships between well-developed categories. It explains the who, what, when, where, why and how of an event (Strauss and Corbin 1998, p. 22). The theory developed in this thesis touches upon all of these things.

The findings reported in this chapter are based upon a qualitative analysis of a significant dataset that provided a basis for theorising. There is a great richness and diversity in juror and jury decision making. This makes it unlikely that any simple theory will adequately explain how juror and jury decision making rely upon personal knowledge and belief.

This thesis is presenting, rather than testing, a theory. However, the author was mindful that a theory is of little value if it is expressed in terms that make it difficult or impossible to test. In this context the author was guided by the precept of Karl Popper (1963, pp. 36–7). He argued that a theory must be falsifiable if it is to be useful and truly scientific.

The following theoretical postulates emerged from the dataset after extensive analysis using standard techniques of grounded research theory. Not all of the postulates are concerned with the use of personal knowledge and belief; some are more general. Many of these postulates have already been expressed or implied in the above discussion.
The juror as a constructivist

The sense in which a juror is a constructivist

Jurors are constructivists. Useful knowledge or belief is constructed in their minds. Knowledge or belief is constructed from information but not all of that information comes from trial inputs. Some of it is already internalised and some is learned during the trial from extra-legal sources. In short, jurors construct meaning out of evidence and other knowledge and belief by using their schema and internal tools and certain rules that are imposed by the legal culture. Ideally, the constructs will have a good fit with external reality. But of course that cannot always be guaranteed.

The use of the construct

The knowledge or belief that jurors construct in their minds will not always be useful or sufficient for them to vote confidently. It might be like a tune with many bars missing. Sometimes the knowledge or belief that is constructed enables jurors to decide upon a verdict. However, that knowledge or belief might not constitute a full picture or narrative of events being debated at the trial. A juror might, for example, construct a view of a defendant as a person who could not commit a crime of violence. However, despite having that view, they might be unable to form any view or picture as to what really happened or who was involved.

An actionable construct is one that allows the juror to vote. In an ideal case, it might consist of a complete narrative or a script that fits neatly and obviously into a verdict category. Indeed, it might be framed in a verdict category. An example is the narrative with key elements: 'It is beyond reasonable doubt that Smith murdered Jones on 30 May using a handgun. It was a premeditated contract killing.' Another juror's construct might be: 'Smith was murdered on 30 May, probably by Smith, or Brown or Clark. There is no cogent evidence showing it was definitely Smith and therefore a reasonable doubt as to his guilt.' A third might be: 'Smith does not fit the stereotype of a murderer. I have a strong intuitive feeling that he is innocent, but no clear idea as to what really happened on 30 May, who is guilty or what their motive might have been.' Any one of the three would allow the juror to vote one way or the other.
The tools of construction

In the course of decision making jurors use a large, rich and diverse toolkit. This is a set of mental tools, operations and schemas—including such things as intuition, heuristics, analytic thinking and speculation. Over ninety such schemas and tools emerged from the data but this list is clearly not exhaustive. No prior research of which the author is aware has attempted to list the schemas and tools that jurors utilise.

Two components comprise the toolkit. The first is a large store of schemas and tools. The second is a mechanism that selects tools or schemas depending on several factors including the nature of the case and the skills and proclivities of the juror. It is through the use of the schemas and tools that personal knowledge and belief are utilised.

Not surprisingly, most, if not all, of these schemas and tools are used in other kinds of decision making. Juror and jury decision making share many features with other kinds of decision making. A jury can be viewed as a group engaged in a collaborative learning and decision making task. Ideally, through the use of the schemas and tools, jurors are able to produce actionable constructs.

Some of the schemas or tools are more accurately described as affective states or states of mind. Others are mental operations. Some are consciously invoked or deliberative and some are caused by the circumstances. In this thesis they are all referred to as schemas and tools because there is no single descriptive word that encompasses them all.

When in use, the schemas and tools have several significant properties. They vary along several dimensions. They can:

- be personal, or interpersonal—or both at different times
- involve fast or slow—that is, deliberative—processing to varying degrees
- be fact-laden or value-laden or a mix thereof
- involve a varying degree of emotion or indeed no emotion
- be licit or illicit to varying degrees having regard to the rules of the legal culture
The use of personal knowledge and belief by jurors and juries

- rely to a variable extent on personal knowledge and belief
- produce to a variable extent other personal knowledge and belief.

If the type of schema or tool is included as a property of the category, then any instance of a schema or tool in use occupies a point in an eight-dimensional space. This dimensionality emphasises the complexity and individuality of a tool in use.

The schemas and tools are employed both before and during deliberation. Some schemas and tools are used individually by a juror acting alone. Conversely, some are used collectively or interpersonally, making them particularly useful during deliberation. Some can be used both individually and collectively. For example, experimentation can be used individually or collectively; that is, by several jurors acting together. Intuition, on the other hand, is always personal. But that is not to deny that jurors may have similar intuitive judgements or may share their intuitions with other jurors.

Schemas and tools are of various kinds. There are deliberative schemas and tools—such as weighing evidence; social tools—like arguing; and schemas and tools that operate without conscious effort. Intuition is one of these.

These schemas and tools exhibit rich and multiple associations with each other. Any combination is probably possible, but there are also natural or common groupings. By way of illustration, determining consistency naturally coexists with assessing credibility. Experiencing strong emotion often leads to a value judgement or to experiencing empathy or sympathy. Thus the schemas can be chained together. Consider as an example figure 14 which shows both a temporal and logical relationship between the tools or schemas.

**Figure 14: The chaining of schemas or tools**

Source: Derived from author's research
In this example, determining consistency facilitates the assessment of credibility that then enables the juror to attach weight to the evidence. For example, Lesly, in the memoir of the subway gunman trial, repeatedly uses consistency or lack of it to assess credibility and thus to attach weight to testimony (Lesly and Shuttleworth 1988, p. 70). In this way, some tools can utilise other tools. The output from one schema or tool can be the input to another. The use of one schema or tool may naturally promote the use of another or in some cases inhibit it.

The order in which schemas and tools can be used is also variable. For example, jurors and juries can often determine the credibility and relevance of evidence before constructing a narrative. But there are also occasions where they construct a narrative and then assess its likelihood as a method of determining the credibility of evidence.

There are relationships between these schemas and tools and other significant categories that have emerged from the dataset but which are not themselves schemas or tools. For example, experimentation is much more likely to occur with the informal style of deliberation identified earlier. Some schemas and tools are consciously invoked—for example, analysing instructions; whereas the use of others appears automatic—for example, a flash of insight.

Whether or not a schema or tool will be invoked at a particular time depends on the:

- nature of the trial and the evidence
- proclivities and skills of the juror or jury
- degree of control exerted by the judge
- occurrence of related schemas and tools that act as promoters or inhibitors
- chance factors
- influence of other jurors/participants
- influence of the legal culture, and
- emotional state of the juror.
Other factors that impose bounds upon what the juror can do include the cognitive complexity of the evidence and chance. The emotional states of jurors can depend upon chance factors external to the trial and these can powerfully influence the utilisation of schemas and tools.

There are limits to the decision strategies that jurors and juries can realistically use. In that sense, their rationality is bounded, and they must satisfice, like all other decision makers in the real world. Their decision strategies tend to be adequate rather than optimum. This is not to say that they ignore the legal requirements for the standard of proof. Time pressure, cognitive complexity, information overload and psychological stress can also impose limitations upon jurors. However, not all jurors are limited to the same extent by such factors.

The use of certain schemas and tools, or the emphasis placed upon them, will often depend on the natural talents and proclivities of the juror. To apply the law, an intellectual person is likely to carefully analyse judicial instructions. A less intellectual juror may be more inclined to adopt a commonsense notion of the law or simply be guided by other jurors as to the meaning of the judge’s instructions on the law. An artist or visually inclined person may read body language or facial expressions of key players in the trial. A person with strong political views and values will take the opportunity to use them, making value judgements, if they can discover a political angle. A person who has personal knowledge or expertise in a relevant area will use it if an opportunity presents itself. For example, a gun enthusiast will closely examine, and even experiment with, any guns that become exhibits.

**Character evaluation**

Character evaluation is a most important tool that is in constant use. The extent to which this is used has not been acknowledged in the research literature. A juror can evaluate personality intuitively by reading body language or by a more deliberative process. Character evaluation depends intimately upon personal knowledge and belief. Other important schemas and tools are:

- narrative construction
- script building
The likelihood of various scenarios is assessed crudely. There is certainly no evidence that jurors use and update an internalised probability meter.

The prevalence of character evaluation is explained in part by features of the adversarial trial. Parties often present alternative narratives to the court. The narratives often depict the protagonists in very different ways. An obvious way of choosing between narratives is to evaluate the characters of the protagonists. In this way, the juror can work out which narrative the characters fit.

**Narrative construction and script building**

Narrative construction is frequently employed. It is much the same as script building. It is an important schema or tool—even a meta-tool or meta-schema—but its use is not universal as acknowledged by Devine (2012). There are cases where juries are simply unable to construct a narrative from the evidence—perhaps because the trial issues do not lend themselves to that approach. There are other cases where they choose an entirely different strategy—for example, evaluating character. Even when narrative construction is employed it is not always the dominant schema or tool. Furthermore, narrative construction could more accurately be described as narrative choice in many instances. The jury simply decides whether it prefers the prosecution narrative or the defence narrative. It does not have to build one from scratch. There are also instances where jurors and juries appear to have been quite unable to construct any meaningful shared narrative. The OJ Simpson trial is an example of this.

**The individuality of the construct**

Many of these schemas and tools can have a significant tacit element. For example, a personal memory or belief obviously contains elements that are, of their nature, private, unexpressed and perhaps even difficult to articulate. This is

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27 However, a defendant in a criminal trial does not strictly have to do this.
particularly true when the knowledge or belief is based upon personal experience called to memory during the trial.

Jurors do not always share their reasoning with other jurors. Accordingly the use of schemas and tools or a particular set of schemas and tools often remains private. At times jurors will express to their peers a different set of reasons to those which led them to their preferred verdict.

Many of the properties of schemas and tools have a subjective aspect and the actual choice and sequence of use of tools will vary from juror to juror. Thus, it is clear that the knowledge and belief that jurors construct will always have a strongly individual character. Their constructs are individual. Jurors do not need to have identical constructs to reach consensus on the verdict. Even when juror constructs are very similar they will almost certainly have been built in different ways.

**Personal knowledge and belief**

Jurors make extensive use of personal knowledge and belief. When directly used, they can be described as tools or schemas in their own right. Personal knowledge and belief can be both inputs to, and outputs from, other schemas and tools. For example, personal knowledge may result from experimentation—or from examining exhibits or conducting research. Personal knowledge may be an input—perhaps an unconscious input—to a heuristic or to an intuitive judgement.

**Factors that enhance the epistemic objective: the inverted U curves**

A significant relationship connects the strength of the evidence with the more innovative tools such as experimentation. Thus, innovation is more common when the strength of the evidence is close to the threshold required by the law to prove a case. In short there is an inverted U relationship between the strength of the evidence and the tendency to be innovative. Since some innovation clearly constitutes a form of disobedience, it is not surprising that there is a similar relationship between the strength of the evidence and the level of disobedience. Where the evidence is overwhelmingly strong, or very weak, jurors are less likely to be innovative and less likely to break the rules. In this thesis the author
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surmises that when the evidence is very strong there are no gaps for the jurors to fill. When the evidence is weak they probably would not bother trying because the gaps would be too wide. The relationships are shown in the following diagrams. However, the relationships must be understood as applying most clearly when other factors are constant.

**Figure 15: The relationship between innovation and strength of the evidence**

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Innovation

Strength of the evidence
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Source: Derived from author’s research

**Figure 16: The relationship between disobedience and strength of the evidence**

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Disobedience

Strength of the evidence
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Source: Derived from author’s research

The use of personal knowledge and belief is very widespread and important. Thus, it renders invalid any assumption that the judge and the jury are reaching a conclusion based on exactly the same material. Depending on the extent to which jurors share knowledge, it may also render invalid a belief that jurors base their decisions on exactly the same material.

Nonetheless sharing knowledge and collaborative learning are most valuable features of jury decision making. The diversity of the jury can help to counter
individual limitations. A jury makes better decisions than an individual. And a large jury makes better decisions than a small jury. This is attributable to not only the mathematical effect of aggregation—the Condorcet Jury Theorem. It is also due to the sharing of knowledge and the sheer diversity of juror decision making reflected in the number and possible combinations of schemas and tools. This helps to reduce the effect of individual errors.

**The importance of the epistemic objective and factors that enhance it**

Jurors have a very strong urge to learn and discover and accordingly tend to resist the passive role that the legal culture tries to impose upon them. This helps to explain their willingness to use extra-legal sources of information. The indoctrination of jurors into the legal culture is inadequate. The epistemic objective frequently overwhelms the non-epistemic objective, thereby compromising fairness and proper process. In such cases, reliance upon personal knowledge and belief is far more likely and there is a greater tendency for such knowledge and belief to be acquired improperly.

Attempts by the judge to exert a high level of control over the jury can be counter-productive. This is especially so if it frustrates the jurors’ attempts to:

- learn
- experiment
- be innovative
- share knowledge; and
- discuss matters with other jurors.

Jurors and juries can, and often do, become subversive of the legal culture to a greater or lesser extent. Because of the secrecy surrounding jury deliberation this will rarely be obvious to the external observer. The instruction often given not to discuss the case before formal deliberation begins is almost universally ignored. Violation of judicial instructions is more likely when the rationale underlying an instruction is not properly explained. More significant is the violation of an instruction not to:

- undertake personal research
- visit a crime scene
The use of personal knowledge and belief by jurors and juries

- engage in various kinds of re-enactments; or
- do personal experiments out of the jury room et cetera.

Even this sort of violation is surprisingly common and is a consequence of the dominance of the epistemic objective.

**The third style of deliberation**

The evidence-driven and verdict-driven styles of deliberation are well documented. However, there is a third style of deliberation that is associated with a high level of experimentation, innovation and the use of personal knowledge and belief. This is a relaxed, informal style. The jury breaks up into small groups that hold personal discussions, examine exhibits and other evidence, engage in re-enactments et cetera. Sometimes individuals will go off alone to think about the evidence. This third style, which can last for a considerable time, is a prelude to more formal discussion of the evidence.

**Circumstances where personal knowledge and belief can become critical**

The strength of the evidence is the variable most closely linked to verdict, as originally suggested by Kalven and Zeisel (1966). But it is clearly not the only factor that influences the verdict. In cases where the strength of the evidence is close to the threshold required by the law to prove the case, other factors can become critical as shown in Figures 17 and 18. Personal knowledge and belief could become extremely important where the evidence is close to the threshold.
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Figure 17: Idealised decision making

The red line shows idealised jury behavior. The likelihood of conviction is zero up to point A where the strength of the evidence equals the required standard of proof. Above that it is 100%.

Figure 18: Actual decision making

The green line shows actual jury behavior. When the strength of the evidence is very close to the threshold A, the behavior departs from the ideal. There is a small chance of a conviction despite there being a reasonable doubt and a small chance of an acquittal despite the absence of a reasonable doubt.

Source: Derived from author's research
The importance of demographic factors

The gender of jurors can be a significant factor in some cases. This is largely because females and males bring to the jury a different set of personal experiences, knowledge and belief. Gender can be a marker for personal knowledge and belief that the juror uses in decision making.

The race of jurors can be a significant factor in some cases because race can also be a marker for personal knowledge and belief. There are instances where race is clearly linked to racial prejudice. For example, when a Caucasian juror has prejudicial beliefs about African-Americans. However, there are other instances where the juror's race is relevant because the juror has a storehouse of knowledge or belief linked to his or her race and personal experience. This use of racially based knowledge does not involve prejudice in so much as knowledge and beliefs are well founded, reasonable and, of course, relevant.

Sometimes juror demographic factors can be correlated with a particular type of verdict. Generally, this correlation is partially attributable to the fact that these factors are markers for personal knowledge or belief.

Effective functioning of the jury

A certain level of friction between jurors appears to assist jury deliberation. Too little friction does not conduce to proper discussion of issues. Too much friction makes the jury dysfunctional. The Yerkes-Dodson law would appear to be applicable to jury deliberation. A certain amount of stress is productive. Too much or too little is not. A certain amount of stress may conduce to the use of fast processing in preference to slow processing or vice versa. Too much stress will inhibit both kinds of processing.

A jury with a large number of educated people will not necessarily function any better than a less intellectual jury. Common sense and the collective experience of the jury are just as important as high intellect or a high level of education. Highly intelligent or highly educated jurors sometimes distract the jury with abstract or philosophical arguments that can be counter-productive and lead nowhere. Conversely, poorly educated or unintelligent jurors can struggle to grasp even simple issues and create significant frustration for their peers.
Obsessive jurors are undoubtedly diligent, but their rigidity can frustrate other jurors. In general, jurors with extremes of any personality trait can create problems because of the effect on jury harmony. This is particularly true in the case of such traits as emotionality, obsessiveness and aggression.

Strong leadership of the jury is most important to keep the jury on track, to shape deliberation and to prevent serious conflict that could make the jury dysfunctional. Indeed, internal leadership appears to be more important to the functioning of the jury than judicial leadership. That is too often ineffective. Enlightened leadership encourages informality and innovation to a useful degree. The effective leader keeps the jury on task without being obsessive or overly controlling.

Serving on a jury can be an extremely stressful experience for which jurors are generally inadequately prepared. Most jurors are highly diligent although there are certainly instances of jurors who refuse to make any contribution to deliberation. Stress can produce emotional turmoil, interpersonal conflict and even paranoia. Emotional breakdowns are frequent in long or difficult cases.

None of the existing models discussed in the literature review appear to be adequate to explain all cases of juror and jury decision making. Many models are overly rationalistic in that they emphasise reason—that is, the slow, deliberative, logical mode of cognitive functioning—and ignore or underplay the intuitive, fast, emotional mode. As stated above, narrative construction might best be considered as a meta–tool or schema, the use of which is very common but not universal.

Another difficulty with models is that they do not take proper account of the importance of personal knowledge, belief and values. Juror and jury decision making rely on a rich and varied set of schemas and tools that are combined in many ways. For this reason, they generally confound any attempt at explanation in terms of a simple model.

The diagram below is an integrative relationship diagram that shows the main categories and the relationships between key categories.
Figure 19: Relationship diagram which shows the relationships between key categories.
Some key information flows follow the red arrows.

Source: Derived from author’s research
Chapter summary

In the process of open coding, more than one-hundred-and-forty codes were created and grouped into different categories. These categories were further grouped into various types. Some, such as participant, were entities. Some, such as obedient, were features of the jury—and later became properties of the jury. Many were mental schema or tools used by jurors. Amongst this group were intuition, analytical thinking, character evaluation, assessing credibility, Narrative Construction and using expert knowledge.

Narrative Construction is very important. It is a meta-schema or tool, but its use is not universal. Some trials do not lend themselves to that approach. There are also cases where the jury approach is more accurately described as narrative selection than Narrative Construction. The parties present competing narratives. The jury's task is to choose between them. Character evaluation can be the tool of choice in this task since the litigating parties will depict the main actors in very different ways.

Axial coding produced a hierarchical ordering of the categories. It also revealed relationships between the categories. The mental schema and tools exhibited rich interrelationships. Many combinations were found, but some were seen very frequently. By way of illustration, determining consistency of evidence, assessing credibility and weighing evidence was a very common triad. There were also relationships between certain of the schema and tools and categories external to them. For example, a trial where there are numerous gaps in the evidence will foster speculation. Whether or not a schema or tool will be used at any time depends on several factors, as outlined above. Important factors include:

- the nature of the trial and evidence
- the skills and proclivities of the juror; and
- the occurrence of other schemas that could act as promoters or inhibitors.

What has emerged from the data is a model of juror and jury decision making that explains and incorporates the role of personal knowledge and belief. Such decision making is richer and more diverse than posited by other models.
Juror reasoning is not always methodical, logical and deliberative. Intuition and heuristics are commonly employed. The process—like other kinds of decision making in the real world—displays a balance of fast and slow mental processing. Juror and jury decision making is not a thing apart; it shares many features with other kinds of decision making.

Jurors and juries make use of many kinds of personal knowledge and belief. Personal memories, evoked by trial evidence, can lead to sudden profound insights. Powerful emotions engendered by experiences within or outside of the courtroom can lead jurors to make value-laden judgements that strongly influence the verdict. This is partly because it affects the processing of evidence. Intuitive judgements are often based in part upon prior knowledge and experience. For some jurors, these are as important as, or more important, than conclusions reached by rational inference from trial evidence. Jurors conduct their own research and experiments. Some of this is within the rules and some is not. Jurors use their own specialist or expert knowledge at times and there are certainly instances when this has been of great value to the jury.

The use of personal knowledge and belief pervades juror and jury decision making at many levels. Personal knowledge and belief are themselves tools when put to direct use. They are also inputs to, or outputs from, other tools and schemas. Jurors can and do share their personal knowledge because they are willing to learn collaboratively.

This thesis proposes that both the level of juror obedience, and the level of innovation, depend in part upon the strength of the case presented. It is in cases where the evidence is neither overwhelmingly strong, nor very weak, that jurors are most inclined to be innovative. The epistemic objective is then at its zenith. Accordingly, that is also when the jury is most inclined to break the rules—although the tendency is always present; and some rules are almost always broken. When a case is incredibly strong, there are no gaps to fill and a limited role for speculation. When a case is weak, there is little point.

One of the more significant and surprising findings in the study is that juries are very frequently disobedient or even subversive to some extent. Serious disobedience is often the result of extreme frustration with the culture of the legal system. Juries strongly resent being kept in the dark and they bristle at
measures intended to maintain them in a passive role. There are times when that strong sense of frustration or resentment is combined with an equally strong desire to learn the truth. On these occasions, juries will tend to act independently in a way that could theoretically threaten the rights of the parties to a fair trial.

Chapter Five considers how these propositions, derived from the data, sit alongside other findings in the area of jury research and more generally.
Chapter Five: Discussion

Introduction and outline

This chapter develops answers to the research questions posed in the first chapter and outlines the contribution that this thesis makes to knowledge. The chapter also critically discusses the research findings in the context of previous knowledge of jury and juror decision making. It also discusses the degree of consistency between the theory derived from these findings and other knowledge about the jury. Following that, it suggests that some important findings in the jury literature need to be reassessed. The thesis also discusses possible refinements to, or elaborations of, the theory suggested by that literature.

These findings offer no support to the traditional, but increasingly unpopular, view that juries are passive recipients of information until the stage of deliberation. Jurors and juries deliberately disobey judge’s instructions with surprising frequency. The significance of this is discussed having regard to the accepted norms and values of the legal culture. These include the principle that the trial is conducted with two key objectives: the epistemic objective and the requirement of fairness. Jurors’ zeal to discover the truth can lead them to neglect considerations of fairness.

The central finding from this research is that jurors utilise many schemas and tools. The author has called this the Jurors’ Toolkit. It consists of a large store of schema/tools and a selection mechanism. Inputs to that mechanism govern the actual choice of schema and tools. Many of these schema/tools use the personal knowledge and belief of jurors; sometimes in ways of which the juror is unlikely to be fully conscious. Other schemas and tools generate new knowledge and belief. Accordingly, personal knowledge and belief permeate juror decision making to a considerable degree and it is arguably unrealistic to suppose that its use can be controlled or kept within the narrow bounds of legal guidelines.

There has been very little attention given to this topic in previous jury research. There is a need to revise some current models of juror and jury decision making. This research discusses how the idea of the toolkit sits with those models, and how it offers a more complete account of the juror’s use of personal knowledge.
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and belief. This leads to a discussion of the insights into juror and jury decision making that follow from an application of ideas from various theories of decision making. These include:

- knowledge management theories
- bounded rationality theory
- collaborative learning theory; and
- dual-processing theories.

The thesis also discusses the degree of consistency between these findings and those theories. Many of these research findings are consistent with findings in other academic disciplines. For example, findings about how juries become innovative and discover new knowledge are consistent with the knowledge management literature about tacit knowledge discovery. Certain schemas and tools that jurors use, as shown by their memoirs, are the same as System 1 Thinking identified by researchers such as Kahneman (2011). Aspects of the literature dealing with bounded rationality would appear to be clearly applicable to the jury as has previously been suggested. This helps to explain the behaviour of jurors confronted with difficulties such as cognitive complexity and information overload.

This research also points to the need for a re-evaluation of some of the classical findings in the jury literature. In particular, the findings about jury accuracy and the reasons why judges and juries sometimes favour different verdicts need to be reconsidered. This is especially relevant in the context of the author's findings about the extent to which jurors use personal knowledge and belief. This finding also means that demographic factors can be viewed in a new light. For example, issues such as jurors’ race and gender sometimes exhibit correlations with verdict. This can also be viewed in a new light given the number of instances in which jurors appeared to use knowledge and belief associated with their demographic group. These outnumbered the very few instances in which blatant prejudice was shown or even suspected.
Legal culture

Traditional view

The traditional belief that the jury is a passive recipient of data and information (Diamond and Vidmar 2001; Marder 2005, p. 19) finds no support in this study. The study findings further undermine the traditional view of the jury as a body of passive observers. The findings in this thesis support the view of Hans (2002, p. 88) that:

...jury decision making is a more active process than presumed by the idealised adversary model. The assumptions that jurors are initially neutral and remain so until the end of the trial, and that they passively receive evidence presented by the adversaries, are not borne out.

The findings affirm strongly that jurors are most unlikely to be purely passive observers of events at any stage of the jury trial. Rather they are:

- constantly processing data and information
- discovering knowledge—sometimes illicitly
- supplementing evidence with personal knowledge and belief; and
- using their experience and a whole host of schemas and tools to interpret evidence.

Generally, they process information from the beginning of the trial until the end. The Jurors’ Toolkit is always open and in use.

Disobedience

Several findings about legal culture, and the jury’s attitude to it, are novel and demand further discussion. According to Devine, Clayton et al. (2001), it is a fundamental assumption underlying the jury system that juries are willing and able to comply with the judge’s directions. The most unexpected finding emerging from this research is the sheer extent of the jury’s activism and its willingness to disobey the judge. Jurors are surprisingly often subversive of the legal culture. In many of the memoirs studied, some disobedience was mentioned—an unexpected finding. This point is overlooked in most of the academic literature. The findings also suggest that judges at times try to be overly controlling thereby triggering strong counter-reactions. In the findings, there is an example of an English jury getting around a judge’s decision
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forbidding examination of a car. The jury used binoculars to view a car of the same model.

Jurors do not like being restricted in their quest for the truth, although there are significant individual variations in how they react. The Scott Peterson case, for example, featured jurors who were sticklers for the rules and jurors who were more than happy to disregard them. It is true that the case law examined in the literature review revealed instances of jurors disregarding judicial instruction, or taking on an investigative role that was inappropriate. However, that body of case law gave no indication of the extent of the practice and limited insight into the importance to the verdict of what was discovered. Conversely, the New Zealand Commission Report suggested that serious violations of the rules—such as jurors visiting crime scenes—were fairly rare (NZLC pp 37 1999 paras 7.43–7.45). The current study suggests that deliberate disobedience to judicial instruction may be far more common than previously thought.

It is significant that jurors are often highly critical of the legal culture. This criticism is often a consequence of frustration at the way the court has treated them. This is not a new finding. It has long been known that jurors feel dissatisfaction at aspects of the culture that they feel prevent them from doing a proper job. But most of them are left with a reasonably positive view of jury service (Diamond 1993). The analysis for this thesis shows that jurors often become very angry when they discover that facts which they regard as relevant have been withheld from them. Once again this is a clear demonstration of the strength and influence of the epistemic objective. Jurors become angry when they feel they are not being told the whole truth.

The sheer extent of the anger and frustration expressed in some of the memoirs was surprising. It is notable that many of the memoirs include a section at the end where the writer recommends reforms to the jury system—for example, Grove 1998; Timothy 1974. In this study, to the extent that they understand legal culture, jurors tend to be highly critical of it—or aspects of it. Mary Timothy was insulted to be treated like a child (Timothy 1974, p. 79).

The findings suggest that jurors are inadequately educated about the legal culture. They have a skewed view of that culture and do not embrace all of its values. This author’s research suggests that this is partly because the rationale
underlying various rules and directions is not properly or adequately explained to jurors. This is consistent with the New Zealand Commission finding that juries had little grasp of the importance of some of the rules that they violated (NZLC R69 2002 para. 7.45). Jurors are particularly frustrated by measures adopted to keep them in the dark about various things that they consider to be of critical relevance and importance. Burnett noted that they are frustrated when they are denied information that they view as significant. For example, being denied information about the character or history of a defendant or other significant person about whom they have to make an important judgement (Burnett 2002, p. 71). Juries can react against judicial control and start to make their own rules. Grove (1998, p. 151) candidly mentions his jury’s frustration at the way they were treated at times and the danger inherent in that:

It was ostentatiously addressing counsel over our heads in his not in front of the children manner. So out we had to go again, speculating madly and feeling rather betrayed by His Lordship, on whom we relied to treat us like grown-ups.

My advice to the judiciary is never to leave conundrums hanging in the air like this: all sorts of mischief might ensue.

**Balancing objectives**

Ideally, jurors and juries would be able to find a balance between the epistemic and the non-epistemic objectives mentioned by Walker (2006; 2007). This analysis strongly suggests that the epistemic objective frequently overwhelms the non-epistemic objective that values fairness and proper process. That explains the jury’s tendency to disobedience and its willingness to use knowledge inappropriately gained. This tendency is likely to increase as powerful epistemic tools—such as the internet and online databases—become more readily available (Artigliere 2011). Jurors—enabled to undertake their own investigations and driven by curiosity—may find the temptation irresistible. Clearly this presents a major challenge to the legal system. In the information age, jurors are going to find it much easier to augment their own knowledge and belief, even as a trial progresses. One would expect that the use and influence of personal knowledge and belief upon the verdict will increase rather than decrease.
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Chapter Five

The Jurors’ Toolkit

The central finding was the existence of the Jurors’ Toolkit—a large and diverse set of schemas and tools used by jurors and juries. It was the core category. Future research will undoubtedly uncover other schemas/tools. Many of the tools are used in other contexts and in everyday life. These include:

- intuition
- heuristics
- stereotyping
- consistency assessment; and
- analytical reasoning.

The toolkit is important in this thesis because it is through the use of schema and tools that personal knowledge and belief are employed and useful constructs built. The direct use of personal knowledge and belief are themselves tools. But they also act as inputs to other tools/schemas and outputs from still other tools/schemas.

The two parts of the Jurors’ Toolkit

The toolkit is seen as having two parts. The first is a store of schemas and tools; the second is a selection mechanism. Various inputs to the selection mechanism govern the choice of schemas and tools. This mechanism is not always under conscious control. A schema or tool can be automatically invoked as it was when Mary Timothy had a sudden epiphany in the trial of Angela Davis. The notion of a toolkit divided into a store and a selection mechanism is novel.

The analysis shows that, to some extent, jurors’ choice of schemas and tools reflects their individuality, skills and predispositions. These operate on the selection mechanism. The emergence of an extensive set of schemas and tools that can be used in various combinations suggests that juror and jury decision making is more complex and diverse than any existing model has allowed. But this is hardly surprising. Discussing the importance of individual differences in jurors, Devine (2012, p. 182) makes the point that biological and social influences on individual jurors create dispositional tendencies. These determine that individual jurors will react to, and process, evidence in individual ways. This research strongly confirms that.
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No prior research of which the author is aware has attempted to identify all of the schema and tools that jurors utilise. Other models have rarely advanced to that level of detail. For example, the Narrative Construction Model championed by Hastie, Penrod and Pennington (2002) does not include detailed postulates as to the kinds of tools that are used in constructing narratives. The Director's Cut Model, or sub model, of Devine (2012) is similar in some ways to the Narrative Construction Model. However, it acknowledges that to a significant degree:

- jurors utilise internal schemas
- some juror cogitation is unconscious; and
- internalised knowledge and belief are used in the process.\(^\text{28}\)

This research confirms those aspects of Devine’s theory. It also explores new territory by cataloguing many of the schemas and tools used and the source and role of personal knowledge and belief.

**System 1 and System 2 Thinking**

As previously noted, a distinction exists between mental processes that are fast and often unconscious and those that are conscious, slow, rational and deliberative (Evans 2008; Kahneman 2011). Some of the schemas and tools in the toolkit involve the fast style—System 1 Thinking; and some the slow, cognitive style—System 2 Thinking; Good decision making in everyday life relies upon a harmonious blend of the two different styles (Sadler–Smith 2008b). The same can clearly be said of juror and jury decision making.

As stated in the literature review, there is a quite limited literature on dual process theories and their potential application to the jury. There is some reference in the jury literature to jurors’ use of heuristics and fast cognitive processing (Colwell 2005; Krauss and Sales 2001; Sunstein 2003). Honess and Charman (2002) assert that their heuristic–systematic model is directly relevant to the jury.

The analysis in this thesis has produced significant evidence that confirms that jurors use the two cognitive styles—often in tandem. Jurors often engage in slow deliberative processing. It is analytical and logical. But there are also jurors who are assisted by strong intuitive feelings, flashes of insight and heuristics.

\(^{28}\) That model specifically recognised the importance of internalised story structures and stereotypes.
Furthermore, there were examples in the dataset of single jurors using both cognitive styles in a harmonious way. For example, reaching a decision with a flash of insight and then confirming it using a more analytical approach.

There has been recent interest in the role of personal knowledge and belief in System 1 Thinking. For example, it is known that intuition can rely upon stored memories (Betsch 2008). Heuristics often rely upon assumptions or beliefs—some of them formed as a result of past experience (Sunstein 2003; Chaiken 1980). In the memoirs, the reliance of fast processing on personal knowledge or belief was at times quite obvious. There were notable examples in the memoirs of the use of the availability heuristic which clearly relies on personal knowledge of the occurrence of certain phenomena (Sunstein 2003).

These research findings suggest that narrative construction is a meta tool or meta schema. It is undoubtedly important but its use is not universal because some cases do not lend themselves to that approach and some jurors are more inclined to use alternative tools. This confirms the view of Devine (2012). Furthermore, other tools such as character evaluation appear to be as, or almost as, important. The same can be said of script building. That is to say, it is best regarded as a meta tool or schema. In many respects of course, it is very similar to narrative construction.

The sheer variety of schemas and tools available, the richness of associations between them; and the influence of other factors—including chance factors—in their use is somewhat unexpected. What seems very clear is that both chance factors and personal factors can, at times, have a significant bearing on what jurors decide and indeed the way that they decide. This would seem to imply that there is an element of randomness in the way that individual jurors approach decision making. But that is certainly not to say that the process is irrational.

**The complexity of juror decision making**

These findings support, to some extent, the Narrative Construction Model, and more so, the Integrative Multi-Level Model. However, it is very clear that juror and jury decision making are highly complex phenomena. No existing model can explain all instances of them. However, these findings and theory can augment
these two respected models by explaining the use of schema and tools in the construction of narratives and scripts.

**Discovering new knowledge**

As explained in Chapter Two, there is a body of jurisprudence from the United States arising from challenges to verdicts based on allegedly improper juror investigations and research (Hawk 2004; Kirgis 2002). If extraneous information reaches jurors, it can give rise to a presumption of prejudice (Gleeson 2011). The jurisprudence results from unusual and rare challenges to verdicts where an appeal court is prepared to admit evidence of how jurors came to a verdict. An interesting case was that of *Ex parte Lasley* 505 So. 2d 1263, 1264 (Ala. 1987). This was an appeal against conviction by a defendant who had been found guilty of deliberately injuring two children by holding them in scalding water in a bath. The defendant claimed to have left them in the bath to answer the door. The burns had not been deliberately inflicted. Three jurors conducted home experiments, running hot water into a bath and testing the temperature at various time intervals. One juror also consulted a law book to better understand legal terms. Undoubtedly, part of the appeal of the bath experiment was the ease with which it could be done.

The appeal court granted the defendant a new trial on the basis that juror misconduct had been proven which might have unlawfully influenced the verdict. Such jurisprudence is interesting and quite consistent with the findings from this analysis. But the jurisprudence really gives us no idea of the prevalence of the kind of conduct that is challenged in those cases. An old common law rule dating from the time of Lord Mansfield prevents jurors in many jurisdictions from presenting evidence that could impeach their own verdict (MacKenzie and Bromberg 2010). It is only in jurisdictions that have created exceptions to that rule that such cases could possibly come to light. And even then, it will require at least one juror to blow the whistle, so to speak.

Sometimes jurors conduct their own experiments and research outside of the courtroom and the deliberation room. This is the sort of juror conduct which courts label inappropriate. The jury literature suggests that improper jury experiments, research and investigations are infrequent (MacKenzie and Bromberg 2010). But there are so many instances in the dataset of jurors
conducting experiments and investigations that it is difficult to view this behavior as infrequent. In all likelihood, it is only in a very small fraction of such cases that such juror behaviour is directly challenged in an appeal court.

What jurors learn from their own experiments and investigations is clearly of use to them in reaching a verdict although its exact importance is clearly variable. This variability is a consequence of several things. One is the importance of the thing being tested. The outcome of the test or experiment may throw light on a major or minor issue. Discovering by experiment that a sword was blunt would not be a major step in a conspiracy trial in which there were hundreds of exhibits—including numerous weapons.

**The sources of personal knowledge and belief**

The sources of personal knowledge and belief that jurors use are manifold. In this respect the findings in this thesis are consistent with other parts of the literature on juries. The New Zealand Law Commission Report gave instances of jurors using knowledge derived from their personal experience—including occupational experience; and sometimes from their own inquiries conducted while the trial was ongoing (NZLC pp 37 1999; para. 7.42–7.45). But this was described as background knowledge suggesting that it was not central to the case.

The jurisprudence confirms that the use and sharing of personal knowledge and belief can sometimes be important to the outcome of a trial. This is consistent with the findings of this research but somewhat at variance with the New Zealand Enquiry findings. However, the latter findings were based on a small sample.

**Media coverage**

A juror may absorb information through exposure to media coverage before or during the trial. This has been well acknowledged and indeed, as outlined in Chapter Two, there is a vast literature investigating the potential biasing effect of such exposure (Studebaker and Penrod 1997; Steblay, Besirevic et al. 1999; Ruva, McEvoy et al. 2007; Lieberman and Arndt 2000). Devine (2012) suggests that pre-trial publicity can be absorbed and act like a shooting script. It is
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perhaps a presumptive view of what the evidence will disclose. But of course, the final script may be quite different if the evidence conflicts with that publicity.

In the published memoirs only Roth (1986) acknowledged having been influenced by such publicity. She indicated that upon reading an account of certain evidence in the media, she reminded herself of the need for objectivity because she had interpreted the same evidence somewhat differently. Admittedly this was only a single instance. But it suggests that it is unsafe to assume that media exposure—to the extent that it does affect jurors—will always have a biasing effect.

**Examination of exhibits**

It appears from the memoirs that jurors given the opportunity to examine exhibits are quick to do so. Such examination is not confined to confirming that the exhibit has the evidential value claimed by the party tendering it in evidence. It can take the form of experimentation. Jurors examine exhibits with fresh eyes. In the course of their scrutiny, jurors often discover new facts of significance. The extent to which jurors will closely scrutinise exhibits, looking for fresh significance, was a surprising finding not foreshadowed in the literature that was reviewed. But if jurors are curious, and driven by the epistemic objective, as previously suggested, then the behaviour is entirely predictable. Once again—in the rare cases when they learn about it—this behaviour is clearly viewed with suspicion and disapproval by judges. Burnett recalled the judge refusing a request for a magnifying class which the jury wanted in order to look closely at photographs.

**Experiments**

This zest for investigation takes various forms. The findings in this thesis show that jurors often conduct experiments, sometimes outside of the court. Such experimentation does not always involve exhibits. Once again, there is limited discussion of this tendency in the general literature and it has not been the focus of jury studies. However, the jurisprudence includes occasional cases where verdicts have been challenged because of juror experiments that were arguably inappropriate. Successful challenges of this kind are not common because of a long-standing rule that prevents jurors from giving evidence to impeach their
own verdicts except in unusual cases (Diehm 1991). Juror experiments have occurred in and outside of the deliberation room and even in the jurors’ own homes (Mackenzie and Bromberg 2010). This was borne out in the research conducted for this thesis.

The findings of this research are once again consistent with the jurisprudence. Indeed, they add to the jurisprudence by suggesting that experimentation and investigation—even of an illicit kind—is far from uncommon. The epistemic urge seems to be enlivened at the outset of the trial and persists until the end.

**Crime scene visits**

The most problematical cases, historically, were undoubtedly those where jurors visited crime scenes to make their own observations in violation of the judge’s instructions. MacKenzie and Bromberg (2010) report numerous historic instances of this in the case law. There was no specific instance of this behavior in the dataset. It is reasonable to speculate that the ready availability of tools such as Google Earth may, in time, provide a partial substitute for illicit juror field trips.

**Internet research**

Obviously, today, it is possible for a juror to attempt to research a defendant’s history on the internet. Indeed, this has happened (Morrison 2011). There is growing awareness and concern about jurors using electronic media to conduct research (Goldstein 2001; Artigliere 2011; McGee 2010). The author found only one instance of this in the dataset; but of course, many of the memoirs were written before the advent of the internet. In some American States, for example Alabama, judges’ instructions expressly forbid jurors from using the internet or social media (Mackenzie and Bromberg 2010). In all likelihood, the availability of the new technology has merely exacerbated a pre-existing problem—that is, the problem of the overzealous juror. The modern abundance of investigative tools gives much greater scope to the operation of the epistemic objective.

**Use of personal expertise**

A juror may use his or her personal expertise and erudite knowledge in some area to evaluate trial evidence. The memoirs included several instances where this had happened. Other jurors vary in their response to this. As in the Peterson
case, an obsessive juror may object that it is a violation of the rules. Once again, the personal use of expertise is rarely discussed in the jury literature but has been the subject of judicial discussion in the decided cases. In the literature review the author mentioned the case of the *State v Mann*\(^{29}\) where an engineer calculated the odds of a screwdriver falling sharp end upwards. Of course, expertise of an academic or professional kind is but one type of special knowledge. The memoirs show that jurors use special knowledge of many kinds, as did the London jurors in the kidnapping case (*Grove* 1998, p. 184).

Expertise can help in the evaluation of evidence or in the discovery of new knowledge. In Chapter Two, several cases from the jurisprudence are cited where appeal courts grappled with the problems that this can cause in those unusual cases where it comes to light. One such case was the *People v Maragh*\(^{30}\) involving a death from blood loss mentioned previously. A juror who was a trained nurse explained to her peers that—contrary to what an expert had told the court—she had seen cases of ventricular fibrillation caused by blood loss. The appeal court ordered a new trial.

It has been suggested that jurors are overly influenced by experts and accept their testimony uncritically. However, it is quite clear that jurors who possess a degree of expertise in the same area are quite willing to overrule expert testimony with which they disagree. Both the dataset and the jurisprudence provide instances of this.

It also seems clear that jurors, when confronted with conflicting expert evidence, will not hesitate to use personal expert knowledge to help them decide what evidence to accept. The findings are consistent with the jurisprudence in that there are numerous instances where jurors will be prepared to use their own expertise to assist the jury as a whole. They do this by sharing their personal expert knowledge in a way that can influence the group to reach a particular verdict.

Once again, the number of examples of this identified in the dataset strongly suggests that the phenomenon happens frequently. Furthermore, the expert knowledge is not necessarily the sort of knowledge acquired professionally or

\(^{29}\) 2000–NMCA–088, 129 N.M. 600
\(^{30}\) 729 N.E.2d 701 (N.Y. 2000)
vocationally. It may be associated with a hobby or a special interest. Where guns are exhibits, members of the jury who are shooters invariably examine them closely—as happened in the trial of the Black Panthers. There were instances in the dataset where the contribution of an expert juror appeared to be highly significant in the decision making process. The retired psychologist on Grove’s jury was said to be very useful in a case that was pregnant with psychological issues (Grove 1998, p. 49).

However, the dataset also produced one notable example of a jury refusing to allow one of its members to supplement medical evidence given at trial with his own medical knowledge. This occurred in the Scott Peterson trial. It is not entirely clear from this account whether an appeal court, following the approach in the *State v Mann* 39 P.3d 124 (N.M. 2002), would have regarded the juror’s use of expert knowledge as appropriate or not. The test in that case was whether the juror was using expert knowledge to evaluate trial testimony—an appropriate approach; or whether he was exposing the jury to entirely new material (Hawk 2004). Of course, in practical terms, that distinction may be a hard one to draw. It would not be surprising if jurors failed to grasp the distinction even if it were explained to them. What seems clear is that when jurors possess specialist relevant knowledge or expertise, they will not hesitate to use it—unless active steps are taken to prevent this from happening. Jurors in the dataset did not generally turn their minds to the issue of whether the use of extraneous knowledge of this kind was inappropriate. Their approach was similar to that taken by the jurors surveyed by the New Zealand Law Commission,

**Direct knowledge of a fact in issue**

In some rare cases, a juror may have some direct knowledge of a fact in issue. But in the dataset these occurrences were rare and did not relate to facts or allegations that were of any great significance. The author surmises that the selection process would exclude most potential jurors who had direct knowledge of facts in issue.

**Bizarre sources**

Some of the sources of personal knowledge and belief reported in the memoirs were, to say the least, bizarre or eccentric. Mary Timothy’s reliance on
Hollywood Westerns to inform herself about the accuracy of handguns is a case in point (Timothy 1974, p. 117). It is unclear whether such eccentric sources of belief are commonly employed. It is hard to be certain, because jurors will not always report the source of something they believe.

**Confusing evidence and other information**

Ruva, McEvoy et al. (2007) discovered that some jurors confuse pre-trial publicity with actual evidence. That is, they fail to accurately recall the source of prejudicial material that affects their viewpoint. Looking at the matter more generally, it seems plausible that jurors sometimes do not remember the source of their knowledge or belief. Thus, they are not in a position to distinguish between what is based on trial evidence and what is not. A juror could not be expected to ignore personal knowledge or belief if they thought, mistakenly, that the evidence supported it. Since System 1 Thinking is sometimes reliant on knowledge or belief below the level of awareness, it is entirely possible that a juror could make use of something like media publicity or other extraneous material without even being aware of it.

**Consulting legal sources**

A juror may consult a law book to gain a better understanding of critical legal terms. The New Zealand Law Commission commented on instances of jurors bringing law books into the deliberation room (NZLC pp 37 1999 para. W37.42–7.45). There have also been cases of this reported in the jurisprudence (Mackenzie and Bromberg 2010). Despite the lack of examples of this in the dataset—it was clear that juries often struggled to understand legal terms. Thus, the behaviour does not seem surprising. The failure of some judges to clarify their instructions when requested could of course fuel that behaviour. Some judges were particularly unhelpful when asked to clarify the law. Burnett (2002, p. 91) complained that the presiding judge, when asked to clarify matters, initially reread his initial instructions—a useless exercise.

What the dataset showed were examples of jurors correcting each other’s misapprehensions about the law or about the judge’s explanations of it. The deficiency of juror understanding of legal instructions is a very well-supported finding (Darbyshire, Maughan et al. 2002; Hans 1994; Eisenberg and Wells 1993;

In the memoirs, the jury as a collective unit was clearly much better at grasping the law than were individual jurors—largely because they shared personal knowledge and belief. Intellectual jurors such as Burnett in the New York homosexual murder trial take a sophisticated understanding of some aspects of the law into the deliberation room. This greater understanding is undoubtedly of great benefit to the jury if it is shared.

The analysis in this thesis certainly confirms various possible explanations for the curious phenomenon of jury accuracy notwithstanding a poor grasp of judicial instruction. First, as suggested by the academic literature, laymen's notions of the law may effectively substitute for judicial instruction (Finkel and Groscup 1997; Finkel and Handel 1988). There were certainly instances of this in the dataset. Burnett, although not legally trained, had a good layman's understanding of many legal concepts. Secondly, twelve minds are better than one and by an aggregation process it may be that misunderstandings are eliminated. Burnett (2002) also reported several instances of that in his jury experience. Thirdly, there were many instances in the dataset of juries seeking clarification of instructions from the judge. So it is likely that many examples of misapprehension are corrected in that way even though some judges are spectacularly unhelpful. This is an area where the sharing of personal knowledge appears to be highly significant.

Burnett recounts that members of the jury initially had great difficulty understanding how the self-defence issue was relevant and indeed how it was to be resolved. They sorted it out largely by discussion amongst themselves. Ultimately, the issue of onus and standard of proof was clarified by the judge (Burnett 2002, p. 95).

The multifarious uses of personal knowledge and belief and the extent of such uses

*Direct use*

Personal knowledge and belief can be used directly or it can be used as an input to one or more schemas and tools. For that reason, this thesis describes the
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direct use of personal knowledge and belief as a schema or tool in its own right. It can also be created by the use of those schemas and tools—for example, by experimentation conducted outside of the court. One of the more significant postulates emerging from this analysis is that jurors use personal knowledge and belief and tacit knowledge in a variety of ways. The author also found that they are used to a far greater extent than is acknowledged in the academic literature.

*Inputs to schemas and tools*

Personal belief and knowledge strongly permeate and influence juror decision making. At times, they are inputs to other schemas or tools. For example, a juror may have personal knowledge or a personal experience that, brought to mind upon hearing certain evidence, invokes a strong emotion. This could then colour that evidence or in some other way influence the juror’s approach to it. In an extreme case, a strong emotional reaction can activate a juror’s deeply held values to the extent that their approach becomes normative. It then impels them towards a decision that seems morally rather than legally justified.

Thus, personal knowledge and belief can pervade juror decision making even when they are not directly used. Less influential in cases where the evidence is very strong or very weak, these things may be critical in borderline cases. This is an important point. The factor most determinative of verdict is the strength of the evidence. That proposition has not been seriously challenged since Kalven and Zeisel (1966) affirmed it. The truth of the proposition has been demonstrated in mock jury studies where variations in the strength of the evidence are followed by variations in the conviction rate. Furthermore, these variations can be substantial (Devine, Clayton et al. 2001).

In the real world, there will be cases, perhaps many cases, where the strength of the evidence is close to the threshold required to prove the case. It may be slightly over or slightly under the threshold. Either way, personal knowledge and belief could become critical factors. The frequency of such cases can be inferred from the proposition that very strong and very weak cases are less likely to go to trial.
Background information

Although it has been commonly accepted that jurors use their own knowledge and belief, the importance of this has clearly been underestimated. Even the New Zealand Law Commission appeared to understate the practice. It reported on jurors typically providing background information about issues relating to the case. These things were known from the juror's occupation or life experience. The Commission reported on several instances where jurors picked up adverse information about the character of an accused, and very few instances when jurors conducted their own external inquiries (NZLC pp 37 1999 paras 7.43–7.45). The picture that emerged from the New Zealand study was of jurors frequently using their own knowledge to provide information of a fairly innocuous kind. They rarely transgressed the rules and conducted inquiries or accessed information inappropriately. That picture is consistent with the postulate in the Narrative Construction Model that jurors use personal knowledge and belief to fill in gaps in stories. However, a postulate of this thesis is that the use of personal knowledge and belief goes well beyond this in many cases.

As a substitute for evidence

The juror memoirs suggest that personal knowledge and belief are often used in the absence of evidence and sometimes in preference to the evidence. The jury that convicted Jack Ruby was so unimpressed by weeks of defence medical evidence that they chose not to discuss the medical evidence about a particular type of epilepsy, relying on their own knowledge (Causey and Dempsey 2000, p. 157).

Assisting credibility judgements

Personal knowledge and belief can be used to assist jurors in making credibility judgements. Since credibility assessments are such a vital part of what juries do, this is to be expected. Assessing credibility is one of the most frequently used tools. Indeed, it is impossible to conceive of a diligent juror not using this tool. Obviously, it is used in combination with other tools. For example, a juror attempting to construct a narrative needs to work out first which evidence should be accepted and which should be rejected. The Director's Cut sub theory
of the Integrative Multi-Level Theory likens this to a director cutting a film (Devine 2012 pp. 186-199). In short, the juror selects the evidentiary building blocks. Necessarily, this requires a credibility judgement or a series of them. The output from a credibility judgement is then an input into narrative construction or film cutting, depending on the model used.

From the analysis conducted for this thesis, determining credibility is a schema or tool used in close association with others. Of course, credibility judgements are of various kinds. In some cases, the credibility of the evidence of a witness can be assessed in the context of a whole body of other evidence given by other witnesses. In other cases, the credibility of the witness may have to be assessed without that benefit. The consistency of eyewitness evidence is an influential factor for determining its credibility. Jurors, for example, tend to discount, to some extent, eyewitness testimony that is flawed by contradiction (Berman and Cutler 1996). There was a lot of confirmation of this in the dataset. However, some juries, including the subway gunman jury, were quite sophisticated in their approach to eyewitness evidence. They were prepared to discount the importance of minor contradictions or those that could be explained away as simple human error.

The analysis showed that juries hearing experts are not only interested in perceived competence; they are also interested in the expert’s motivation for giving evidence. Jurors know that expert witnesses are sometimes earning their living from siding with one party in a forensic dispute. If the expert witness is seen as being mercenary, the jury’s assessment of their credibility may be quite negative. This is consistent with the finding of Ivkovic and Hans (2003) that jurors value experts whom they perceive to be good teachers with sound credentials and acceptable motives. In general, jurors will pay attention to both the messenger and the message (Ivkovic and Hans 2003). Indeed, this was quite clear from the dataset. The research literature acknowledges that the mode of assessing the credibility of scientific experts may depend on the complexity of the evidence. When evidence is particularly complex, jurors will tend to ignore content and focus instead on the credentials of the witness. But with less complex evidence, they focus on content (Cooper, Bennett and Sukel 1996).
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Both verbal and non-verbal factors associated with the witness are significant. For example, both judges and juries are influenced by facial appearance (Porter and Brinke 2009). But ultimately, jurors’ assessments of the credibility of any witness, whatever the cues, are based on perceptions of underlying competence, likeability, believability and trustworthiness (Brodsky, Neal et al. 2009; Brodsky, Griffin et al. 2010). Such perceptions are heavily dependent on personal knowledge and belief. In the Scott Peterson trial, a juror could hardly contain his contempt for a defence medical witness who was shown to have made a basic blunder in his calculation of time of death. The loss of trust was apparent (Beratlis et al. 2007 p. 127).

There was no clear example of a jury struggling to understand complex scientific evidence. However, it seems likely that some of the jurors in the OJ Simpson trial were unclear about the implications of DNA evidence. And yet a lack of trust in prosecution witnesses was obviously a significant factor leading to Simpson’s acquittal. Trust in witnesses is obviously not only dependent on their presentation and performance at trial. Some jurors clearly harbour beliefs about the trustworthiness of witnesses of various kinds—especially police. In all likelihood, a profound distrust of police—especially one that arises from shared knowledge and belief of a demographic group—will prove very difficult to overcome.

In the narrative model, the juror assesses the internal consistency and descriptive adequacy of the story that has been constructed—a kind of evaluation for credibility (Hastie, Penrod and Pennington 2002, pp. 22–3). This analysis shows that jurors use personal knowledge and belief to answer several key questions, including:

- is the witness honest?
- If particular evidence is not believable on some point, how does that reflect generally on the credibility of the witness on other matters?
- What reason might the witness have for lying or stretching the truth?

Many jurors, in assessing credibility, conduct thought experiments where they imagine themselves to be part of the action. They ask themselves how they would have acted and what they would have done in the circumstances depicted in the evidence. Such a thought experiment could be viewed as projecting...
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oneself into the narrative to determine how realistic it is. It seems to be reasonably consistent with the notion that jurors assess stories by testing their internal consistency and descriptive adequacy, as suggested by Hastie, Penrod and Pennington (2002 pp. 22–3). Projecting oneself into the narrative obviously invites the use of personal knowledge and belief. Indeed, that is the whole point of it. But credibility judgements themselves often use inputs that are the products, or outputs, of other tools. Making the credibility judgement may be assisted by intuition; or it may draw on knowledge or belief of how people are likely to act in certain circumstances. In the alternative it may be based on a belief about the kinds of people who are reliable witnesses or how people behave when they are dissembling. A simple example is that of a juror who is confident that he or she can tell when a person is lying by looking at their eyes. Some jurors have a lot of confidence in witness status as an indicator of credibility. Such judgements rely on belief that certain kinds of persons are reliable and certain kinds are not. It is not difficult to see that when a juror chains schemas and tools together, personal knowledge or belief is likely to feature as a significant input at some point and perhaps at many points.

Making rough assessments of likelihood

The personal knowledge and belief of a juror, including expert knowledge, assists jurors in making rough assessments of the likelihood of something having happened. This does not happen, however, in the way postulated in the mental meter models. The mental meter models posit that jurors calculate various probabilities in the course of a trial and even during deliberation (Lieberman and Krauss in Grosscup and Tallon 2009; Hastie, Penrod and Pennington 2002). In a criminal trial, the reading would be a quantification of the likelihood of guilt (Hastie, Penrod and Pennington 2002). However, these models are not consistent with the subjective experience of jurors (Devine, Clayton et al. 2001). There is a paucity of empirical support for any of the mental meter models (Darbyshire, Maughan et al. 2002). According to Glockner and Engel (2008) there is mounting evidence that most people do not mathematically integrate evidence. According to those authors, jurors are not meter readers; they are storytellers.
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There is no evidence from the dataset of jurors constantly updating internalised probability calculations. Of course there was an instance in the jurisprudence of a juror using expert knowledge to calculate the likelihood of certain phenomena with a fair degree of precision (Hawk 2004). Since there was no example of that in the dataset, the author surmises that such cases may be relatively rare. And, in any event, it is not the same as keeping a running calculation of guilt or liability.

Rough assessments of likelihood are fairly commonplace. Such assessments, which are qualitative rather than quantitative, will invariably rely on personal knowledge and belief in some way. Sometimes jurors will make a rough assessment of something having occurred by conducting their own experiments. At other times, they may be assisted by beliefs that may or may not have any foundation in fact. Mary Timothy’s assessment of shooting accuracy based on Hollywood westerns is a case in point (Timothy 1974, p. 117).

The author found no evidence in the memoirs of jurors trying to calculate precise probabilities. Assessments of probability were mainly very general and imprecise. Furthermore, they did not attach to an overall assessment of guilt; rather they related to some specific issue or event. In short, there was no example of a juror thinking along the lines, ‘There is an eighty per cent chance that the defendant did it’. There were, however, examples of jurors thinking, ‘That bit of evidence is highly unlikely to be true’. Assessment of probabilities is not the whole of juror decision making. It is merely a single schema or tool that can be employed throughout the trial in major or minor ways. It seems to be used far less often than character evaluation.

There are also occasions when jurors relate stories that have a direct relevance to the issue of whether something happened or the likelihood of something having happened. The stories obviously rely on personal memory. The fact that a juror can recall to memory an instance of something—that has a marked similarity to something alleged in evidence—bolsters its credibility. This is a clear example of the availability heuristic at work. Using this, a person may assess the likelihood of some event by the ease of recall of a similar event. (Greening, Dollinger and Pitz 1996; Agans and Shaffer 1994; Tversky and Kahneman 1974; Sunstein 2003). The availability heuristic is a commonly used tool, yielding rough assessments of likelihood. There is no doubt that Carter used
this on several occasions, frequently invoking personal memories to assist his crude calculus (Carter 2000).

*The importance of character evaluation.*

In this thesis, character evaluation is a central schema/tool—almost as important as Narrative Construction or script building. The existing jury literature does not place much emphasis on character evaluation. However, there is some recent research suggesting that perceptions of a person’s moral character can be intuitively driven and can influence judgements about blame, responsibility and causation in fairly complex factual scenarios (Nadler and McDonnell 2011).

The findings in this thesis suggest that, generally, jurors are far more interested in character evaluation than in assessing probabilities. This fact is impossible to reconcile with the mental meter models. In the dataset there were more than one hundred instances of jurors engaging in character evaluation but no example of a *precise* attempt to calculate a probability. This is a striking confirmation of the view of Devine, Clayton et al. (2001) that mental meter models are not consistent with the subjective experience of jurors.

Jurors assess personalities of all trial participants—not only those suing or being sued or prosecuted—and at times in great detail. This suggests that personality assessment is a very important strategy. However, as stated previously, there is little in the academic literature to support this. The centrality of character evaluation would certainly help to explain the anger that jurors voice when they discover that salient character evidence has been withheld from them. The phenomenon is also interesting because in the Anglo–American legal tradition, bad character evidence is not generally admissible to prove the commission of an offence (Leonard 1998). But it is clear that juries will use it if they can and draw inferences about character from whatever evidence is available.

Jurors assess personality in ways that are diverse, idiosyncratic and strongly influenced by personal knowledge and belief. They make detailed observations of parties and other trial participants and use these observations in an attempt to determine their state of mind or to plumb the depths of their personality. In

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31 The *Criminal Justice Act 2003* overturned this common law principle in the United Kingdom.
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so doing, they utilise personal knowledge and belief about how personality is, and indeed states of mind are, revealed by external behavior. Some jurors have great confidence in their ability to read body language. Others think that their trade or profession has equipped them to rapidly judge character and personality. Still others think that the way in which a person speaks can reveal their character or that a person’s eyes will reveal their level of intelligence. Reading a person’s writing, for instance in a letter or a journal, can significantly influence a juror’s assessment of the personality of the person who did the writing.

An adequate model of juror and jury decision making must recognise the importance of schemas and tools other than Narrative Construction or script building. Existing models have not done this and that suggests a serious deficiency in them. Alternatively, it indicates that they were formulated at a high level of abstraction—far removed from the level of operations inside the juror’s head.

Narrative Construction and character evaluation are very powerful tools often working together in various ways. When constructing a narrative, a juror hears evidence, evaluates it for relevance and credibility, and then uses it to build a story if it passes muster. This of course is the theory (Pennington and Hastie 1991; Hastie, Penrod and Pennington 2002).

Character evaluation does not require that a juror build a narrative. In a criminal trial, the prosecution and defence commonly present contrasting narratives. The jurors tend to choose rather than build one. A juror using character evaluation may consider what the evidence reveals about the character of the defendant and at times the victim. Having determined character, the juror asks which of the given narratives this character or these characters fit into. There is no need, and no attempt, to construct a narrative—but merely to select one from the alternatives—utilising character evaluation.

Closely related to character evaluation is the tool that the author has labeled *knowing how a person would act in certain circumstances*. In the dataset, the tendency to use this tool was ever present. Evidence is given that a person acted in a certain way in particular circumstances. The juror projects himself or herself into the action and decides how they would have acted. It is a tool that greatly

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aids the making of credibility judgements. Once again, there is a clear parallel between this schema and the availability heuristic as described by Tversky and Kahneman (1973). In thinking about how a person would act in certain circumstances, a juror often tries to remember how they or another person acted in similar circumstances. In cases where no such memory comes to mind the exercise has a hypothetical character.

Jurors sometimes experience strong emotion that colours the evidence or assists a juror to feel empathy. Evidence presented in criminal trials in particular is often challenging to a person of average sensitivity. So it is not surprising that strong emotional reactions occur. Discussions about the role of personal knowledge and belief in the existing literature do not link it directly to emotional reactions or the development of empathy.

There is certainly a body of literature indicating that emotional states can affect the way that evidence is processed. Semmler and Brewer (2002a) showed that sad jurors are more likely to pick up testimonial inconsistency, suggesting perhaps that their evidence processing is more careful, and of the slow, systematic, deliberative kind. This is System 2 Thinking. In that study, mock juror mood was manipulated by altering the kind of evidence received and the way that it was presented. The same authors suggested that trial circumstances that induce anger in jurors may also impair processing and in that way have a biasing effect on their approach to evidence and to defendants. The findings from the research completed for this thesis support that view. But they also suggest a refinement to the theory. Personal memories of jurors may at times be intermediate between the evidence and the production of anger. That is to say, evidence may evoke a personal memory that has nothing to do with the trial. Emotions can be aroused by that memory, which then affect the juror’s approach to the evidence or the whole trial. This certainly happened with the juror Frank in the first death penalty case.

Assisting understanding of legal concepts and verdict consequences

Some jurors, like Lesly, Burnett and Timothy, enter the trial with a fairly sophisticated understanding of legal concepts and of the legal system. The findings suggest that such jurors will have insight into strategy and trial procedures. Sometimes jurors can be very savvy about what lawyers are really
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trying to do and consequently are not easily fooled by legal tactics.

One aspect of legal savvy is understanding verdict consequences. In theory, jurors should not think about verdict consequences when determining whether a person is guilty or innocent or when deciding whether a party is liable in a civil trial. In practice they invariably do. There were numerous instances in the dataset. Grove’s jury found out though a contact that the defendants would serve approximately seventeen years if convicted (1998, p. 149). Clearly one of the jurors had investigated the issue, and reported the answer to the rest of the jury.

None of the jury decision making models acknowledge that verdict consequences influence verdicts. This is a major failure. In the Narrative Construction Model, jurors find and select the best fit between their narrative and verdict categories (Pennington and Hastie 1991; Hastie, Penrod and Pennington 2002). This is envisaged as a purely logical exercise. It is a matching exercise divorced from value judgements and certainly does not depend on verdict consequences.

The data suggests that jurors often give considerable thought to the consequences that will attach to a particular verdict. If jurors think that a defendant has done something very wrong in the moral sense, they may be inclined to render a guilty verdict. They will sometimes be inclined to render a guilty verdict even if they have lingering doubts about whether the defendant has committed the exact offence with which they have been charged. This approach is strongly driven by a value judgement—namely that some behaviour is so reprehensible that it must be punished irrespective of its legal characterisation. Value judgements, in turn, are often shaped by personal memories, knowledge and belief.

Such thinking is also shaped by personal beliefs about the legal system. For example, one belief—common to some jurors in the first death penalty case—was that a life sentence did not mean a life behind bars (Sundby 2007 p. 37). Fear that a defendant would ultimately be released and reoffend can strongly impel a capital jury towards imposing the death penalty. The real issue, whether mitigating factors prevail over aggravating factors or vice versa, is driven into the background in such cases. In the real world of jury deliberation, jurors are often unable to decide on a verdict without considering the consequences of their decision. Their personal belief and knowledge regarding sentencing and
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parole become very important. Factual issues and normative issues can become conflated and the cart can lead the horse.

Implications for jury research and the need to re-evaluate some findings in the jury literature

The findings from the present study are of great interest but they also raise important questions about other areas of jury research. Some of the conclusions expressed in the jury literature should be reconsidered.

Jury reliability and accuracy

If jurors use personal knowledge and belief—and if that usage is extensive and significant—which the data analysis strongly indicates is the case—it would help explain disagreement between judges and juries. Researchers in this area have ignored the fact that judges and juries will often make decisions based on overlapping but non-identical sets of data and information. In their classic study of judge–jury concordance, Kalven and Zeisel (1966) acknowledged that judges might know and be influenced by facts unknown to the jury. However, they overlooked the converse possibility—that the jury could make its decision in part on the basis of facts or indeed beliefs not known to the judge. This study supports that explanation. At times juries will know or believe things beyond the ken of the judge; and these things may be highly significant in reaching a decision.

However, Kalven and Zeisel’s overall confidence in the jury as a reliable decision maker is certainly not called into dispute in this study. There were certainly examples of individual jurors becoming quite confused by aspects of the evidence. There was even an example of an English juror believing that two people were on trial in a single-defendant trial (Brooks in Barber and Gordon 1976, p. 30). But in most cases, the jury as a whole appeared to comprehend the facts quite well. It also seemed to approach areas of disputed fact with great care, confirming an observation by Kalven and Zeisel (1966).

However, when a jury is strongly activist, and determined to discover the truth, there is every likelihood that it, or some of its members, will consider some material not known to the judge. It follows that Kalven and Zeisel’s explanation for judge–jury discordance needs augmentation.
The authors grouped the explanatory factors for judge–jury discordance into five categories. These were labelled:

- evidence factors
- facts only the judge knew
- disparity of counsel
- jury sentiments about the individual defendant; and
- jury sentiments about the law.

The following sections deal with each factor in turn.

Evidence factors

Kalven and Zeisel (1966, p. 166) made the point that differences in the use of evidence would logically seem to arise in one of three ways. First, doubts about evidence could liberate the jury to be guided by sentiment—a tendency avoided by the judge. Secondly, the judge and the jury could simply evaluate evidence differently. Thirdly, judge and jury might attach quite different meaning to the notion of a reasonable doubt.

As to the first point, there were certainly instances in the dataset of jurors being guided by sentiment or emotion. However, it is not the case that emotion only influences juries in cases where they have doubts about the evidence. It can strongly colour that evidence; that is, affect the way that it is received and evaluated. Emotion can create doubts about, or even strengthen, evidence.

The second point is the most interesting, and follows on from the first. This study leaves no doubt that different people might evaluate the same body of evidence very differently. Leaving aside the fact that jurors experiment and discover knowledge of their own, it is certainly clear that individual jurors vary in such fundamentals as the method of determining credibility. This is a vital part of evaluating evidence. But the memoirs disclose that some jurors can have very idiosyncratic approaches to issues of credibility. Invariably these approaches are closely linked to personal knowledge or belief. As a result, a group of jurors could often reach conclusions about credibility at variance to those of the judge.

By way of illustration, most judges, this thesis surmises, would have seen instances of authority figures, police and corrections officers, giving evidence that was successfully impugned—that is, shown to be false. Thus, they may be
less inclined to make a credibility judgement based purely on witness status. These instances would perhaps add some support to the idea that judges and juries could be quite at variance in their evaluation of evidence. In that respect the analysis of the research presented here supports Kalven and Zeisel’s assertion. Assessments of evidence depend upon assessments of credibility that are themselves highly dependent on personal knowledge and belief.

As to the third point, there were instances in the memoirs of individual jurors who would have been quite happy to overlook, or even reverse, the onus of proof. This is consistent with Kalven and Zeisel’s view that judges and juries could approach the issue of proof in very different ways. Certainly, there is nothing arising from this analysis to overturn the finding that individuals will quantify a reasonable doubt very differently.

Facts that only the judge knew
Judges often know a defendant’s criminal history. They will also know the detail of other evidence that is withheld from the jury because of successful objection by counsel. After all, it is they who have had to rule on the objection. Jurors express anger and frustration at being denied the totality of known facts. Thus, it is highly likely that they would have acted on those facts or been influenced by them if they had been disclosed. Kalven and Zeisel (1966) relied heavily on judges’ feedback. Some of those judges acknowledged that the additional material known only to them, including criminal history, influenced their choice of verdict. This adds significant weight to the published finding that some judge-jury differences can be explained on the basis that the judge knew facts unknown to the jury.

Disparity of counsel
There are many instances in the dataset of juries lauding or criticising lawyer performance. Max Causey thought that Jack Ruby’s lawyer could have obtained a merciful outcome if he had adopted a different line of defence (Causey and Dempsey 2000, p. 200). There is no reason to doubt Kalven and Zeisel’s conclusion that counsel performance could influence the verdict and that the tendency could be stronger for juries than for judges.
Jury sentiments about the individual defendant

There is certainly evidence from the dataset that jury sentiment about the defendant can make a significant difference—as it clearly did for Mary Timothy when she exonerated Angela Davis (Timothy 1974). In all likelihood it was a very significant factor in the OJ Simpson case. The defence lawyers in that case aimed to select a jury featuring a high proportion of African–American women because of their known support of Simpson. They succeeded. Surveys, conducted by jury experts, had indicated that this particular demographic group strongly believed in Simpson's innocence (Bugliosi 1999, p. 74).

Jury sentiments about the law

There were several instances in the dataset when juries became embroiled in philosophical discussions about the law. But there were certainly no clear examples when a particular verdict was chosen because the jury disagreed with the law and decided to disregard it. But they came close, particularly in the New York homosexual murder trial (Burnett 2002). The findings of the present study are consistent with the view of Kalven and Zeisel (1966) that jury sentiments about the law could lead to judge and jury differences.

Conclusions about jury accuracy

If jurors and juries consistently use personal knowledge and belief, then this could at least contribute to an error rate of the magnitude detected in the classic studies. It would be most surprising if it did not. What is less clear is which direction the divergence would take. Would the use of personal knowledge and belief by jurors and juries tend to make them lean in favour of the defendant in a criminal trial? There were instances in the data set of jurors using personal knowledge and belief in an exculpatory and an inculpatory way.

There is nothing in the jurisprudence to suggest that when jurors engage in their own investigations, the results always favour criminal defendants. But the obvious reason is that such jurisprudence is invariably the result of a convicted defendant trying to appeal against a guilty verdict. That particular body of literature is never going to disclose examples of jurors using personal knowledge and belief in a way that favoured the defendant. No criminal defendant is going to appeal that outcome.
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Some examples of judge–jury discordance—based on jury utilisation of personal knowledge and belief—could be subsumed into one of Kalven and Zeisel’s five existing categories. For example, if a juror does illicit research on a defendant and discovers facts that influence the jury, then this would fit into the category of jury sentiments about the individual defendant. But we also should acknowledge a sixth category of explanation as being important in its own right. That category could be labeled personal knowledge or belief of jurors. It covers cases that cannot be accommodated by the existing categories. This research points to the possible contribution of this to judge–jury disagreement. It is a worthy area of research and could clarify this most important issue. Proper research along those lines would assist in an understanding of the influence of personal knowledge and belief.

It is clear that Kalven and Zeisel’s explanation for judge–jury discordance is incomplete. The present study allows us to provide a more complete explanation. Matters known, or beliefs held, only by the jury or members of it, and not by the judge, will contribute to some extent to the disagreement between judges and juries over verdict. This is highly significant given the acknowledged importance of judge–jury concordance as a widely accepted indicator of jury accuracy.

The Narrative Construction and the Integrative Multi–Level Models

It is important to consider how these findings and analysis fit with juror and jury decision making models. One reason for this is that some such models accord a fairly specific role to the personal knowledge and belief of jurors.

None of the existing models of juror and jury information processing are entirely supported by this investigation and analysis. This analysis yielded quite a bit of support for the Narrative Construction or Story Model—at least to the point of suggesting that Narrative Construction is a most important tool or schema. Narratives are important not only because jurors sometimes construct them as a major step in reaching a verdict. They are also vehicles that jurors use to share personal knowledge with other jurors. There were numerous instances of this in the dataset.

There was even more support for the Integrative Multi–Level Model which accounts for both juror and jury decision making. It also accommodates fast and
slow processing styles and acknowledges the importance of pre-existing knowledge. In relation to juror decision making, the two models have strong similarities—since, in effect, narratives and scripts are pretty much the same thing. The second model is the more elaborate because it describes deliberation as well as individual, or pre-deliberation, decision making. This next section will focus on Narrative Construction before returning to add some comments about the other model.

It is useful to repeat the major features of the Narrative Construction Model. The model posits that jurors build a narrative in their heads (Pennington and Hastie 1991; Hastie, Penrod and Pennington 2002; Lempert 1991). That narrative is the one that best fits the evidence. Because the evidentiary picture is not complete, they are forced to fill in gaps by using their personal knowledge and belief. Narrative construction is an ongoing process, and jurors do it individually as they absorb the trial evidence. They then find the best fit with verdict categories, as explained by the judge, and the narrative. But the present analysis confirms the view of Devine (2012) that narrative construction is not invariably used. It explains why this is so.

The narrative model does not accord adequate weight to the use of personal knowledge and belief in decision making. As a meta-tool or schema there is no doubt that it is frequently used. After other schemas and tools have done their job, a proper narrative can often be constructed and there is no doubt that this approach is often employed. The same can be said of character evaluation and script building.

Narrative construction is not only used to build a story from the totality of the evidence. In the dataset, there were instances of it being used on a small subset of the total evidence to try to build a picture of just one incident. A good example of that can be seen in the Menendez trial memoir. Thornton explains that the jury speculated about how a relatively brief therapy session actually fitted into total therapy that lasted for many hours (Thornton, Wrightsman et al. 1995, p. 77).

Jurors sometimes explain their approach using the language of narrative construction. An English juror commented that the presentation of evidence piece by piece made it hard to build a picture (Brooks in Barber and Gordon
1976, p. 33). Knox rated counsel for OJ Simpson very highly—in part because they were so good at delivering narratives (Knox and Walker 1995, p. 264).

Does personal knowledge or belief help jurors select or build a narrative? The data says it does. Furthermore, its role goes well beyond filling in gaps in narratives. In Grove’s account, for example, the young female juror’s knowledge of relationships and loyalty in Mediterranean families helped the jury to ultimately select the prosecution case—narrative—over the defence one (1998, p. 184).

In many trials, the parties present the narratives and narrative selection replaces narrative construction (Devine 2012). This study certainly confirms that. It will not be necessary for the jury to construct one, unless perhaps they are of the view that neither narrative fits the evidence. To help choose a preferred narrative, jurors will not only test the options against the evidence that they have chosen to accept. They will also test the narrative against their stock of personal knowledge and belief. This will, in many instances, incorporate special knowledge. Although narratives are undoubtedly important, narrative construction is not always the preferred approach.

**Weaknesses of the Narrative Construction Model**

While the author acknowledges that narratives are useful—and that jurors will often construct them—it is clear that the model does not apply to all trials. The model also has other weaknesses. There are several reasons why narrative construction will not be used. But there are also some respects in which the model seems deficient or perhaps incomplete. It is clear, for example, that it does not give sufficient weight to the role of personal knowledge and belief or to knowledge discovery in the course of the trial. But there are other deficiencies. Narrative construction is not always used because it is one tool among many. Circumstances pertaining to the trial and juror characteristics may foster a different approach.

First, there are trials that simply do not lend themselves to this approach. The Jack Ruby trial did not really suit this approach because the only issue was Ruby’s state of mind, and whether he was temporarily insane because of an attack of psychomotor epilepsy (Causey and Dempsey 2000). There is no
evidence that the jurors went down the path of narrative construction. There was no need to construct a story because the key events were common ground between the parties and easily grasped. It must be remembered that the parties determine what is really at issue in any trial in an adversarial system. A case with many disputed areas will present more fertile ground for the construction of narratives than a case where the issues have been significantly narrowed down. This narrowing of issues is encouraged by courts of law.

Secondly, and as stated above, there are cases where jurors do not really build a narrative. Instead, they choose between very complete alternative narratives that are served up to them by the parties. The point may seem somewhat pedantic, but story selection would appear to be different to story construction. At least in American trials, the narratives are often presented up front, through the prosecution and defence opening statements. And since some jurors lean towards a verdict on hearing opening addresses (Waters and Hans 2009), we might surmise that narrative selection or narrative preference can feature at a very early stage. The finding of Waters and Hans (2009) creates additional difficulties for the Narrative Construction Model. This is due to the fact that verdict preference can manifest before jurors have had any opportunity to start building a narrative out of the evidence. It seems plausible that the narrative to which the juror has leaned from the outset could, at least in some cases, becomes a framework or filter. Thus, it could influence the way that jurors assess and accept evidence. Or to use the language of Devine (2012), that narrative could become an influential shooting script.

Prosecution and defence cases in the Capano trial were in essence competing stories between which the jury had to decide. Carter (2000) made his choice after engaging in a careful analysis of evidence that was particularly pertinent to character evaluation. In this way he made a thorough assessment of the characters of the defendant and the deceased.

Thirdly, there are clear cases where jurors have simply been unable to build a narrative, but are left in a state of confusion. Devine (2012) labels such jurors puzzlers. Undoubtedly, this will often be the case where a not guilty verdict is returned in a criminal trial. The New York homosexual murder was such a trial. It seems that jurors will not build a narrative at any cost. They will certainly
engage in speculation, but if no persuasive narrative presents itself their efforts will be frustrated. Thus a juror will not necessarily select the best narrative. On that point the Narrative Construction Model needs amendment. The best narrative may lack sufficient cogency to be entertained. In the present research, the author theorises that even when narratives are constructed, that construction does not occur in isolation from consideration of the standard of proof. A narrative can only be selected with regard to that standard.

Fourthly, there are cases where the juror simply prefers or uses a different schema or tool. Mary Timothy reached a preferred verdict in an emotionally charged flash of insight (1974, p. 190). This flash of insight did not constitute a story, but rather a personal conviction that Davis was innocent. As stated above, the Narrative Construction Model visualises juror decision making as being a conscious, rational process applied to a clearly defined and legitimate set of information inputs. The model clearly cannot account for those cases where a juror reaches a decision using fast processing—such as a flash of insight—without really knowing why they have reached that decision. A flash of insight may be preceded by a growing intuitive feeling; but this is clearly something different from the construction of a narrative. The importance of sudden insights to some jurors is not surprising. There is much evidence that the brain processes information subconsciously (Sadler–Smith 2008b p. 495).

Finally, as noted by Devine (2012) there are cases, invariably criminal, where the jury seems to adopt the approach of simply picking holes in the prosecution case. In these situations they don’t appear to attempt to build a story about what really happened. This was Mary Timothy’s approach in her deliberation with other jurors. She created a list of evidence that suggested involvement by Davis and then, having decided her innocence, looked for weaknesses in the evidence. She went through this list with fellow jurors (1974, pp. 234–9). But it appears that this was done for the benefit of other jurors, and not for Timothy herself. If a juror can see many holes in a prosecution case, then that is sufficient to make a personal decision—even without attempting to build a narrative. In such a case the juror will form a construct that is less than a complete story; it may simply be a view that the prosecution case is inadequate.
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The narrative model posits that juries create verdict categories and then fit the chosen narrative into the most appropriate category. There is certainly ample evidence from the analysis of this research that jurors often take the judge’s instructions and create verdict categories. However, this does not always happen since in some cases the categories will be quite obvious. In other cases it will not be necessary. For example, Mary Timothy’s sudden insight that Angela Davis was innocent made it quite unnecessary for her to give any thought to verdict categories. Conversely, in the Black Panthers’ trial, the author of the memoirs clearly thought about verdict categories and was somewhat bemused by the law’s complexity (Kennebeck 1973, pp. 220–222).

In most cases where jurors have been able to construct a story or build a script, there is no doubt that they ultimately fit that story into the best-fit verdict category. This happened in the trial of the subway gunman (Lesly and Shuttleworth 1988).

The level of difficulty in creating verdict categories will depend upon:

- trial issues
- the number of charges laid
- the complexity of the law; and
- the clarity of judicial instruction.

The rare cases when juries engage in nullification do not fully fit the full Narrative Construction Model or any other model. That is because there is no attempt to fit the narrative into the best-fitting verdict category. Occasionally juries are prepared to return a verdict notwithstanding their awareness that the evidence does not justify it. For example, a jury might decide to acquit a party whom they believe to be guilty. Or, perhaps more rarely, convict a party whom they believe to be technically not guilty of the crime charged. Rather than looking for the best fit, they shoehorn their findings into the preferred verdict category. The preference is based on a value judgement. Certainly members of Burnett’s jury were minded to adopt this approach but were ultimately dissuaded (2002, pp. 117–118). Cases where no story has emerged that can be fitted into a verdict category, and cases of nullification, where the jury ignores the law, clearly do not fit the Narrative Construction Model.
However, the findings presented in this thesis offer partial support for the Narrative Construction Model. It has been, and is, a useful model and seems to fit some instances of juror reasoning. The Integrative Multi-Level Model is even better. It offers an explanation of individual and collective processes and also acknowledges the importance of tools and schemas other than narrative construction. It acknowledges the extra-legal factors, such as pretrial publicity, that can influence the verdict. Finally it acknowledges dual processing concepts and the importance of System 1 thinking.

**Hastie, Penrod and Pennington’s list of data inputs**

As we have seen, Hastie, Penrod and Pennington (2002) approached juror decision making as a rational process to be analysed within the information processing context. They did this by:

- describing the trial as a psychological stimulus
- identifying the processing demands of the juror's decision task; and
- outlining the sequence of cognitive processes performed by the juror.

The writers suggested nine inputs to the jury. These were listed as the:

- indictment
- defendant's plea
- prosecution’s opening statement
- defence’s opening statement
- evidence of witnesses
- defence’s closing arguments
- prosecution’s closing arguments
- judge's instructions on procedural matters; and
- the judge’s instructions on verdicts.

The procedural instructions include such things as the:

- presumption of innocence in a criminal trial
- admissibility of evidence
- standard of proof; and
- instructions related to credibility.
The judge's instructions on verdicts tell jurors how to fit factual findings into separate verdict categories (Hastie, Penrod et al. 2002, pp. 15–17).

Obviously, Hastie, Penrod et al. (2002, p. 180) acknowledged that internal knowledge played a role:

> These nine input items constitute all of the data that the juror has to work with coming from external sources, namely the trial itself. However, other types of knowledge are used in the juror’s task whose source is internal. The jury uses ‘factual’ knowledge of the social and physical world that appears relevant to the case. Factual knowledge includes the juror’s beliefs, although these beliefs are not necessarily true, such as beliefs about the effects of a certain weapon, motives and behaviour, eyewitness memory, alcohol and its effects on motor coordination, or opinions about social customs among ethnic groups. Another type of information that is not part of the trial data is the ‘strategic’ knowledge that the juror employs in the decision process. This knowledge comprises information-processing strategies that could determine how the data is organised and combined to form a mental ‘product’ that can be transformed into a decision.

It is immediately apparent that the above list of inputs cannot be complete. First, it does not include, as inputs, certain questions and statements that participants might make in the course of the trial that are not specifically linked to evidence. There are instances in the memoirs where these inputs have been significant enough to be the subject of comment by jurors. An example is Lesly’s comment in the subway gunman trial that it was almost impossible to ignore those questions asked by the lawyers that were disallowed by the judge (Lesly and Shuttleworth 1988, p. 86). Even though the questions were not answered and did not in that sense elicit any evidence, the implication lying behind the question was clear enough and difficult to ignore. This was particularly so when the question was repeated or perhaps asked again in a different way.

Additionally, all of the types of personal knowledge and belief outlined in the findings and in this chapter can become inputs for the jury as a whole. That is to say, one juror’s personal knowledge or belief, once shared, can become a useful input for another juror or for the jury as a whole. Thus, in the London Kidnapping Trial, Grove reported that the expert psychological knowledge possessed by the oldest juror was shared with the others and helped them to make sense of the case (Grove 1998, p. 184).
Jurors who conduct experiments or research or make their own significant observations in the course of the trial can, and do, share what they have learned. These observations and experiments can be very important—particularly when they relate to exhibits and to a significant scene such as a crime scene. In this research the author is mindful of Lesly’s comment that personal observation of the railway carriage proved to be very important to him during deliberation. In that case the judge had explained that the purpose of the view was simply to help the jury understand the testimony (Lesly and Shuttleworth 1988, pp. 216–7). Judges invariably say this about views but it is hardly realistic. Like Lesly, it seems that jurors often make significant, original observations and discoveries when on a court-conducted view of a crime scene or other place. This also happened in the London Kidnapping Trial, the OJ Simpson trial and the Scott Peterson trial.

As has already been indicated, some jurors find quite unexpected sources of information. We have seen that the artist, Roth, who wrote The Juror and the General, observed reactions of persons in the gallery—that is, the audience. She used these observations to help her assess the credibility of evidence given at one time by the witness in the stand (Roth 1986, p. 56).

Jurors are avid experimenters, especially in a case with a lot of exhibits and perhaps a lot of grey areas. Not all experiments are conducted on physical objects or exhibits. The results of experiments are clearly inputs, and at times significant inputs, to the decision making process. By way of illustration, Burnett and his fellow jurors were concerned about the compressed time frame that the defendant’s version of events seemed to require. During deliberation, they dramatised the defendant’s version and actually timed it. This clearly constitutes an experiment of sorts or at least a re-enactment that can be viewed as a type of experiment (Burnett 2002, p. 67). All of these jury discoveries can be seen as significant inputs and at times they could well be critical inputs.

Clearly, existing research and models have not comprehensively catalogued the inputs to the jury. In particular, the role and significance of personal knowledge and belief—and knowledge discovered by the jury in the course of the trial process—has been significantly underestimated.
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The following page shows the author's graphical representation of the inputs to the criminal jury.
Figure 20: Juror inputs

Those not marked with an asterisk (*) are the author’s addenda.

Source: Derived from author’s research
Hastie and Pennington’s Theory of Pre-deliberation Processing

The inputs obviously do not just sit in the juror’s memory while the trial unfolds. There is general recognition that processing is ongoing. According to the theory posited by Pennington and Hastie in 1981, the juror individually undertook seven subtasks before the commencement of deliberation. The subtasks were to:

- encode trial contents
- learn verdict categories
- select admissible evidence
- construct a sequence of events
- evaluate evidence for credibility
- evaluate for implications; and
- arrive at a pre-deliberation judgement—that is, a personally preferred verdict.

Of course, as previously stated, the researchers acknowledged that to some extent this model is idealised. The authors acknowledged that jurors would not necessarily complete all of the processing tasks. The encoding in subtask one more or less consists of making a mental record of the trial events as they unfold. The researchers likened the juror to a tape recorder. But once again they acknowledged that actual juror performance may deviate from this ideal because of such mechanisms as selective attention, forgetfulness, inferential embellishment and reorganisation.

Subtask four is to construct a sequence of events. Clearly such a task would be essential if the juror is trying to build a narrative. It seems clear from the authors’ schematic that the juror can cycle back and forth between subtasks four, five and six. That is to say, constructing a sequence of events and evaluating for credibility and implications should not be viewed as strictly sequential. The schematic seems to assume that learning verdict categories and processing the evidence are quite separate tasks. The schematic is also very much based on the model of the passive juror. For example, it assumes that credibility evaluations—or at least those that relate to the constructed story—occur only after the judge has instructed the jury.
This schematic is at odds with various elements of the theory advanced in this thesis and this requires some comment. For example, some jurors’ approach to decision making has little focus on the evidence or focuses on a very small part of the evidence. A prime example is the approach of Mary Timothy that involved an intuitively based epiphany and was not in any sense an ordered process. Even the notion that jurors reach a verdict preference before deliberation is obviously not always accurate. Burnett, for example, makes it very clear that when the evidence phase of the trial ended he was in a state of uncertainty or confusion (2002, p. 91). This analysis supports the view of Devine (2012) that jurors fall into four categories: the believers, doubters, sceptics and mullers. In the memoirs, believers and doubters were readily identifiable. It was not always obvious, however, whether a juror who did not believe, or disbelieved, the prosecution case was a sceptic or a muller and it may be that these two sets merge into each other.32

Indeed, few authors concede having decided on a preferred verdict before deliberation. Some remark about the bewilderment they feel about the task ahead of them. For example, Lesly and Shuttleworth 1988, p. 271) say:

No one's started making broad statements about the case, for instance, or gave opinions about Goetz's overall guilt or innocence. I think we were all somewhat humbled by the complexity of the case and of the precepts the judge had given to us to follow.

There are certainly instances in the memoirs of jurors having arrived at a preferred verdict before the deliberation phase and sometimes while evidence is still being heard. In the first death penalty case, the juror, Ken, was leaning towards the death penalty even during the first part of the trial. That is, before a guilty verdict had been returned (Sundby 2007, pp. 17, 20). In the trial of Scott Peterson, the juror, Beratlis, said the implosion of a defence witness, Doctor March, caused the defence to lose all credibility and that everything now pointed to guilt (Beratlis et al. 2007, p. 127). None of these is surprising in view of the finding—documented in the research literature—that some jurors actually start to prefer one or other verdict when listening to opening addresses (Waters and Hans 2009).

32 The difference is that a skeptic can see merit in more than one narrative, whereas a muller is totally confused and perhaps unable to make sense of the evidence.
Whether jurors have selected admissible evidence is far more difficult to judge from the memoirs. However, there were several notable instances of jurors recalling that certain evidence heard during the trial had been deemed inadmissible. In his recollection of the Capano trial, Carter impressively recognises that certain evidence called by the prosecution would not ordinarily be allowed—because of the hearsay rule. But it was being admitted for a certain purpose only. Evidence of certain things the victim had said to friends and her therapist was allowed for the purpose of showing her state of mind rather than the truth of what she was saying. Carter clearly understood that the evidence was admissible for one purpose only. Furthermore, he understood that the exception to the hearsay rule was allowed in this case because the defence had attempted to denigrate the character of the dead woman. This shows an impressive degree of insight (Carter 2000, p. 39).

From time to time jurors acted quite improperly and discovered or used material that was not even in evidence. In this context it seems plausible that the extent to which they select admissible evidence is highly variable.

Assessing the credibility of evidence begins well before the deliberation phase. Witnesses and parties are often believed or disbelieved as they are giving their evidence. In all of the memoirs, jurors recall making judgements about credibility as witnesses were giving evidence. It would be strange if they did not. Furthermore, assessment, even at this stage, can take various forms. But it is very clear from the dataset that credibility assessment continues well into the deliberation stage. In some cases, juries have approached this task collectively in a very formal and systematic, even algorithmic way. In the subway gunman trial, the jury established rules about the circumstances that would justify disregarding evidence based on a lack of credibility. If the witness had a motive for lying—or if there was reason to question the reliability of their memory—their evidence could be rejected (Lesly and Shuttleworth 1988, p. 276). Since credibility judgements are at the very heart of what jurors and juries do, it is perhaps not surprising that the task can endure throughout the entire trial and the deliberation phase.

The author has already indicated that not all jurors construct a sequence of events. Some trials, for example, the Jack Ruby trial, do not lend themselves to
that approach. Some jurors, for example, Mary Timothy, find useful shortcuts that obviate the need for narrative construction. Of course, there are other cases where the jurors both individually and collectively devoted considerable time and energy attempting to construct a sequence of events. For example, in the New York homosexual murder case, a lot turned on the exact sequence of events. Some evidence suggested that the victim and the defendant had been in a previous relationship. However, the defendant's version of events was that he had only met the victim on the night of the fight. He was shocked to discover that the victim had a penis since he had been expecting to meet a female (Burnett 2002, p.40).

From this analysis, the author would agree with Hastie and Pennington that their own account of pre-deliberation processing is idealised. The findings of this research support the view of Devine (2012) that there are instances where narrative construction simply does not occur.

**Dual Processing**

The author has mentioned previously that the toolkit contains schemas and tools that rely upon fast cognitive processing—System 1 Thinking; and others that rely on the slow style—System 2 Thinking. According to Schroyens et al. (2003):

> Dual-process theories of reasoning draw on the distinction between, on the one hand, highly contextually dependent, associative, heuristic, tacit, intuitive, or implicit processes, which are holistic, automatic, experiential in nature and relatively undemanding of cognitive capacity and, on the other hand, contextually independent, rule-based, analytic, explicit processes, which are relatively slow and demanding of cognitive capacity.

A common feature of some models of juror and juror decision making is the assumption, often unexpressed, that the processes are both methodical and rational. This is perhaps clearest in the case of the mental meter models (Lieberman and Krauss in Groscup and Tallon 2009; Hastie, Penrod and Pennington 2002; Dragoni, Giorgini and Nissan 2001). What could be more rational than a juror constantly updating probability calculations as the evidence unfolds? In these models, the juror is characterised almost as a calculating machine. Even the Narrative Construction Model posits a fundamentally rational and methodical approach with a clearly defined set of inputs and a logical sequence of operations.
The theory that has emerged from this analysis of juror memoirs postulates that juror and jury decision making processes are a composite of more and less logical elements and of fast and slow processing. This view is not only supported by the dataset. It has some support from other literature on juries and is consistent with literature covering other kinds of decision making. It is not a novel finding. Good decision making of any kind blends the two cognitive styles (Sadler-Smith and Shefy 2004). Honess and Charman (2002) have used a dual-process theory to explain juror decision making. Weinstock (2011) characterised jurors as knowledge tellers or knowledge transformers. The transformers were likely to use the slower, deliberative and logical form of processing; the tellers were more likely to use the faster mode. But it seems clear from the dataset that an individual juror can use both modes interchangeably.

Fast and slow processing were both commonly utilised in the dataset. Sometimes one juror used a mixture of both. Some of the fast processing is undoubtedly heuristic, using that word in the sense given to it by Gigerenzer and Gassmaier (2011). As we have seen, they defined heuristics as: ‘...efficient cognitive processes, conscious or unconscious, that ignore part of the information’.

Examples of jurors using heuristics and other kinds of fast processing have been referred to previously. It is most interesting to note that heuristics can even be used to assist credibility judgements. For example, in the case of a juror who believes that witness status is a reliable guide to witness veracity.

Another commonly used mode of fast processing is intuition. According to Akinci and Sadler-Smith (2009): ‘Intuitions are affectively charged judgements that arise through rapid, non-conscious and holistic associations.’

There are numerous instances in the memoirs of jurors using the slow mode of highly logical and analytical thinking and the fast mode that is more spontaneous and frequently employs shortcuts. The dataset analysis also provides some insight into the factors that might induce a juror to use one or the other.

In the memoirs, there are many examples of a juror using intuition. This lends support to the views of Hodgkinson, Langan–Fox and Sadler–Smith (2008) who believe that intuition is of great importance in decision making. It is abundantly
plain that jurors rely on fast processing—indeed they sometimes decide on a verdict this way—and that jury decision making has many features in common with other kinds of decision making. It is notable that some of the schema and tools in the Jurors’ Toolkit, such as intuition, flash of insight and stereotyping are themselves recognised examples of fast processing.

Indeed, fast and slow processing can be seen not as alternative approaches to decision making, but as parallel systems of knowing (Sadler-Smith and Shefy 2004). Thus, although jurors use many schemas and tools, these appear to be used to support both fast and slow processing styles. The Dual Processing Model clearly applies to the jury. Furthermore, the use of such things as heuristics and intuition shows that juror reasoning and decision making share features with other kinds of decision making. It is equally clear that many schemas and tools are influenced by personal knowledge and belief. This is true of those that rely upon the fast cognitive style and those that rely upon the slow style. In the latter case, it will be more obvious.

Clearly jury decision making should not be studied on the basis of an assumption that it is something totally apart from decision making in other contexts. Insights can follow from looking at organisations in different ways, by using different lenses and different metaphors (Thomas and Allen, 2006). As stated in the literature review, cognition that involves such things as analytical thinking, intuition, innovation and experimentation has been acknowledged in other social contexts—for example, decision making in work groups. One fairly consistent finding is that all group decision making relies on a mix of more and less rational types of processing. For example, the use of intuition by business executives has attracted significant academic interest (Akinci and Sadler-Smith, 2009; Hodgkinson, Langan-Fox and Sadler-Smith 2008). It is clear from this analysis that what jurors and juries do in reaching a decision bears significant similarity to what others do individually and as part of collaborative groups in other contexts. The analysis affirms that jurors utilise both modes of processing. It also provides some clues as to what makes jurors prefer the fast mode of processing. The next section considers that.
Factors that are conducive to fast processing or System 1 Thinking

According to Akinci and Sadler-Smith (2009) managers in organisations use intuition in decision making and furthermore, certain conditions conduce to its use including:

- uncertainty
- time pressure
- complexity; and
- the possibility of pattern recognition.

All of these conditions will be present in the context of jury decision making. If they are not present all the time, they will be present for at least some of the time. This was demonstrated by Mary Timothy who clearly suffered from information overload when hearing evidence in the trial of Angela Davis (Timothy 1974, pp. 100, 121, 139). It is notable that she was ultimately assisted by a sudden insight, an undoubted example of System 1 thinking.

In short the very factors that lead individuals to utilise heuristics and other modes of fast processing in other contexts are often present in a jury trial. Jurors and juries operate under conditions that are far from optimal and this has implications for their mode of decision making. It also has a bearing on the use of personal knowledge and belief. When put under pressure, it seems plausible that jurors would tend to rely more on what they already know or believe. The limitations upon juries—that might impede completely rational decision making—are to some extent obvious. And there are interesting examples of them in the jury data. Furthermore, bounded-rationality theory explains why and how individuals and groups can cut corners in decision making. This body of literature has clear application to juror and jury decision making. The analysis supports the proposition that bounds upon rationality foster System 1 Thinking among jurors.
The use of personal knowledge and belief by jurors and juries

The undoubted fact that circumstances of jurors and juries are often far from optimal seems clear when we consider how stressed many jurors appear to have been by their task. The research uncovered references and reports of jurors:

- weeping
- losing their tempers
- suffering from feelings of paranoia; and
- suffering emotional breakdowns.

There are many instances of jurors reporting that they felt extremely stressed. Mary Timothy had difficulty sleeping because she was overwhelmed by the volume of material that she had to assimilate (Timothy 1974, p. 100). What was truly surprising was the number of jurors who admitted to feelings of paranoia. However, such feelings could be attributed to the high stress levels that jurors experience. There is certainly a large body of research connecting paranoia and stress (Moritz et al. 2011).

Undoubtedly, emotional pressures sometimes become extreme and can interfere dramatically with the capacity of the juror to reason. A disturbing feature of the memoirs is the prevalence of serious emotional breakdowns affecting jurors. In the first death penalty case, the juror Peggy was depressed and in a daze. She also suffered from insomnia. After the trial she so regretted voting for the death penalty that she made an approach to the judge attempting to reverse the decision. She suffered from a breakdown and required professional assistance (Sundby 2007, pp. 91, 93, 97–8). In such circumstances, her capacity to reason clearly may well have been affected. Indeed, it would be surprising if this were not the case. In the OJ Simpson trial, one of the jurors told the judge that she could not continue; she was hospitalised for depression. Another juror in that case suffered a similar fate after being dismissed from the jury (Kennedy and Kennedy 1995, pp. 81, 292). In the Peterson trial, juror Richelle Nice suffered two breakdowns after the trial that she attributed to the emotional stress of the trial (Beratlis et al. 2007, p. 212).

Stress is without doubt an important factor affecting deliberation. It appears that there may be an inverted U relationship between stress and performance—an example of the Yerkes–Dodson law that is often mentioned in psychological
literature (Kaufman 1999). In essence this law says that a moderate amount of stress enhances performance; too little or too much degrades it. Its application to juries is not surprising since it has been shown to affect group performance (Kerr and Tindale 2004).

Too much stress seems to be more of a problem with jurors than too little. The research for this thesis found no examples of laid-back juries. However, there were some examples of laid-back jurors—including the English jurors who sat smoking in the corner and refused to participate in deliberation (Morris in Barber and Gordon 976, pp. 86–7). But these cases were exceptional. Most jurors and juries seemed to be actively involved in their task and stressed by it to some extent. Indeed, some jurors, like Richelle Nice, were permanently scarred by their experience (Beratlis et al. 2007, p. 212). This is never acknowledged in the academic literature but is obvious from the personal memoirs. The system fails jurors in this area offering them little or no support during or after the trial.

Serving on the jury can stir the emotions in several ways. Very strong emotion was a feature in the Peterson trial, the first death penalty case and the OJ Simpson trial. But the point the author is currently making about stress is that a certain amount of it might incline the juror to favour fast over slow processing. This is not a bad thing since there seems to be no evidence that overall the slow style is better than the fast style. In any event there is no reason to believe that the slow style would be completely displaced. But too much stress may well impair both kinds of processing—a detrimental outcome predicted by the Yerkes–Dodson law.

There are other limiting factors apart from stress. Jurors are not infinitely intelligent and do not have perfect memories. Nor do they have unlimited time to make a decision. Some jurors struggled with the cognitive complexity of the task confronting them. In some complex trials it is likely that all jurors would struggle with the level of cognitive complexity. In such cases satisficing in various ways would become much more likely.

An extreme example is perhaps that of the juror Felipe, who so infuriated Burnett, and who maintained that Milcray would go to jail for a long time even if he were to be acquitted (Burnett 2002, p. 116). The fact that he could express such an absurd proposition makes it clear that Felipe was a man of low
The use of personal knowledge and belief by jurors and juries

intelligence, poorly educated or both. In the end Felipe appears to have abandoned reason totally, choosing a form of divination. From this he concluded that Milcary was innocent, thereby foreshadowing, in a highly idiosyncratic way, the jury verdict (Burnett 2002, p. 141).

Juries are not always given proper opportunity to clarify things and this is an important, although unnecessary, limitation. Mary Timothy reported that the judge reacted unfavorably to an attempt by a juror to ask a question (Timothy 1974, p. 127). In this research the author has noted other instances in the memoirs of judges being unhelpful and leaving juries floundering—seeking to do their job without adequate instruction.

Juries are also under time pressure. Sometimes they are asked to assimilate a lot of material in a very short time. Sometimes they impose time pressure on themselves. Burnett reported that the juror Paige was desperate to reach a verdict because she was due to attend a shower party that evening (2002, p. 144). Jurors’ memories are tested—especially in cases where they do not take notes and where direct access to the transcript is forbidden. Burnett (2002, p. 101) said that the judge refused to give the jury access to the transcript. However, he agreed that portions could be read to the jury if they specified the evidence they wanted to hear again.

Many jury reforms—especially those that have been introduced in Arizona—were intended to increase the resources available to the jury (Dann and Logan 1995). In other words, they were intended to directly address matters that impose bounds upon rationality. Allowing jurors to take notes is one obvious way of augmenting their imperfect memories. However, not all limitations can be removed by such a simple measure and not all judges are prepared to remove the limitations even when it is within their power to do so. The memoirs provide examples of unhelpful judges.

An additional difficulty that a jury can face is a situation where the strength of the evidence falls very close to the threshold required to prove the case. Facing that difficulty, it seems plausible that jurors would be more likely to rely on personal knowledge and belief and even to augment that by seeking out non-trial sources of information. Indeed, it seems plausible that, in such cases, the use of
personal knowledge and belief could be quite critical to the eventual outcome. This analysis provides support for that view.

No doubt all of the factors mentioned in the preceding paragraphs would clearly impose limitations on the capacity to make a decision in a perfectly logical way and considering all relevant information. Bounded-rationality theory predicts that in such circumstances a purely logical or rational approach to decision making is neither possible nor realistic (Arthur 1994; Simon 1956; Simon 1991; Perrow 1972). Simon (1991) pointed out that learning in any organisation is subject to limitations. He stated that: ‘...human rationality is very approximate in the face of the complexities of everyday organisational life.’

This analysis strongly suggests that this is also true of jurors and juries. There are restrictions upon juror and jury rationality. Because of these restrictions, bounded-rationality theory would predict that a model that assumes a perfectly rational and methodical approach to decision making by jurors or juries in all circumstances would not hold true in practice. And indeed it does not.

The bounds upon rational decision making can induce jurors to cut corners. Jurors and juries face time limitations, as previously stated, and this can require them to make choices about what to focus on. Clearly, in cases where jurors are required to commence discussion, or even vote immediately, the time pressures will be more acute. In the real world, including the real world of the juror and the jury, attention is a scarce resource. Simon (1978) said:

In a world where information is relatively scarce, and where problems for decision are few and simple, information is almost always a positive good. In a world where attention is a major scarce resource, information may be an expensive luxury, for it may turn our attention from what is important to what is unimportant. We cannot afford to attend to information simply because it is there.

The fact that the jury’s capacity to act rationally is subject to limitations does not mean that we should underrate the importance of the strength of the evidence in determining the verdict. Nothing arising from this analysis casts doubt on the postulate that this is the most important factor of them all in determining the outcome of the trial. It has been confirmed in prior studies including the classic study of Kalven and Zeisel (1966). The pre-eminence of that variable—and the close agreement between judges and juries—surely demonstrates that juries
generally achieve rational outcomes. This is the case even if they do not always proceed down optimally rational paths. System 1 Thinking or fast processing can serve jurors very well.

In this thesis the author suggests that in the context of a jury trial satisficing almost always occurs, but does not entail the abandonment of logical reasoning. What it may often entail, in part, is a shift in the balance between fast and slow processing which of itself does not signal a departure from good decision making. The shift in that balance is likely to induce greater reliance on personal knowledge and belief, particularly in ways that are not immediately obvious—because the personal knowledge or belief may be below the level of conscious awareness.

**Organisational and collaborative learning**

As stated in Chapter Two, the collaborative learning literature stressed that groups can vary significantly in the extent to which they will cooperate (Chiu 2000). Since juries are enjoined and required to work together, it is reasonable to expect a high level of cooperation. This analysis generally supports this expectation. Nonetheless, there were instances in the data where jury cohesion broke down—and not just in respect of the ultimate decision. In the Scott Peterson trial, conflict between the first chairman and the others led to his removal from the position of foreman. He was ultimately discharged from the jury (Beratlis et al. 2007, pp. 151-152).

Juries are required to deliberate collaboratively. But there seems to be no doubt that they also learn collaboratively. Swap et al. (2001) stressed the importance of storytelling as a way of sharing knowledge in the business context. Story telling is a prominent feature of the data supporting this study. One wonders whether storytelling might be a universal method of knowledge sharing. There were many instances in the data of jurors telling their own stories as a way of imparting personal knowledge. In juries, it appears that storytelling is an important tool supporting collaborative learning. Most stories of jurors rely upon personal experience and are therefore permeated with personal knowledge. However, some stories were deliberately hypothetical.
The miners in one English jury told personal stories about problems identifying people in dark mines in a case where the identification of a person in darkness was an issue at trial (Morris 1976, p. 87). In the New York homosexual killing case, a focus of the jury was on the violent struggle between the deceased and the accused. One of the jurors told a story about a fight in which he was involved, following attempts by other jurors to re-enact the fight described in the evidence. A really interesting feature of that episode was that the real knowledge was tacit—being embedded in the juror’s recounting of it—rather than in his conscious memory. Talking about the fight, and questioned about his recollection, he realised that his memory of the fight, and his verbal account, were wrong. This led to an important insight that a person’s recollection of a short, violent struggle can be significantly erroneous even if they are trying to tell the truth. So aspects of Milcay’s account that seemed improbable to the jury could be tolerated without undermining his credibility (Burnett 2002, p. 113).

There is certainly evidence that stories are used to serve the same purpose in juries as in business organisations. They are very effectively used as collaborative tools for knowledge sharing and the knowledge that is shared is invariably personal.

Jurors frequently use personal stories to share knowledge. This realisation strongly reinforces the point that tacit and personal knowledge and belief play far more than a peripheral role in jury decision making. Jurors utilise personal knowledge embedded in personal stories to share that knowledge and thus enhance collaborative learning.

People in groups enjoy discovering knowledge. The view of Breu and Hemingway (2002) that groups enjoy knowledge discovery and need no special motivation to engage in it is borne out by the analysis in this thesis. A sense of that enjoyment certainly appears in the juror memoirs. Jurors also become frustrated and even disobedient when the judge obstructs their attempts to discover knowledge—as happened in the London Kidnapping Trial (Grove 1998, pp. 151–2).

Socialisation and the relaxation of rules appear to encourage discovery and indeed the use of personal knowledge. This is consistent with the findings of Nonaka and Takeuchi (1995) about knowledge discovery in organisations. There
is a clear parallel between the third style of deliberation described previously and the socialisation phase of group activity that those authors discuss. Both are marked by a relaxation of the usual rules and a lack of formality leading to knowledge discovery. A certain style of leadership will allow the use of a relaxed approach leading to innovation. It is difficult to imagine a jury sitting stiffly around a table talking and coming up with these new discoveries.

There are undoubtedly aspects of the court culture—especially the more restrictive rules and practices—that are not conducive to jury learning. Thomas and Allen (2006) concluded that it is important for any organisation to encourage and promote informal networking and socialisation. This suggests that loosening the control over the jury might help it to learn—particularly in an innovative way. As stated above, this analysis provided evidence of that. There will be more said about this in the discussion of deliberation methods. But it was clear that those juries that were allowed to deliberate in an informal way were very often innovative. That style enables informal networking as a prelude to the more formal stage of deliberation. In this way, juries appear to be similar to small learning groups in business organisations. When restrictions are relaxed, and informal strategies adopted, they are likely to discover knowledge.

The organisational learning literature stresses the importance of enlightened leadership in a learning organisation (Bass 1997; Bass and Steidlmieier 1999). There are two kinds of leadership in the jury. There is the leadership of the judge and the leadership of the chairperson. The author's analysis makes this clear. Both would appear to be important but the leadership of the chairperson is the more important. The memoirs yield examples of effective and ineffective leadership on the part of the chair. Mary Timothy was clearly an example of a highly effective and diligent leader. The elected chairperson appears to provide effective leadership in most cases; this is less true of judges. Sadly, judges often adopt an authoritarian and rigid style of leadership and refuse or fail to help juries that seek their assistance.

**Effect of demographic factors**

The author's analysis confirms that demographic factors can be important in some cases. There has been a tendency to view any reported correlations between juror race or gender and verdict preference as annoying aberrations.
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from ideal jury behaviour. But such factors might not be solely indicators of prejudice. They often appear to be markers for personal knowledge and belief that can influence preferred verdict in a rational and entirely legitimate way.

Gender

There is some evidence that a juror’s gender can be determinative of their approach to certain types of cases. Once again, this has long been debated but never rigorously proven except with mock juries in a narrow range of cases. Even in those studies where gender was suspected to be influential in the verdict, the effect was weak (Sealy and Cornish 1973). This accords with the findings of this thesis. Gender appeared to be a factor in only a single case in the memoirs.

Male and female jurors can think quite differently about some issues—probably because their life experiences have been different. The Menendez trial presents an excellent illustration of gender as a significant factor because in that case, when the jury had to vote, it divided along gender lines. The female jurors were prepared to accept the possibility that a person could be so terrorised by past abuse that they would be driven to take the life of the abuser. The male jurors were not prepared to accept this—even as a possibility. The author surmises that the female jurors’ gender—and the set of experiences and beliefs that they had formed over their lifetime—led them to accept the plausibility of the defence case. Thornton said that the jury deliberation process became a battle of the sexes and that the men even called the women names. Yet the female jurors were not particularly ‘...compassionate or confused or controlled by their emotions.’ (Thornton, Wrightsman et al. 1995, p. viii). Rather they could accept the possibility of prolonged abuse leading someone to kill out of fear, and were inclined to maintain a reasonable doubt about the guilt of the accused. Thornton regretted that the deliberation had become a man versus woman issue and expressed the view that women are more open minded and respectful of others’ opinions (Thornton, Wrightsman et al. 1995, p. 88).

Race

As a demographic factor, race also seems to be instrumental in some cases—at least in making a juror more or less inclined to express sympathy for a defendant
or other party. Race exhibits a weak correlation with juror verdict preferences (King 1993; Saks 1997; Devine, Clayton et al. 2001). Once again, the analysis in this thesis confirms that race can be a marker for personal knowledge, belief and experience. In those cases, it is knowledge, belief and experience that are really instrumental in affecting verdict preference—not race itself. This was illustrated in the second death penalty case where the jury was prepared to vote for life imprisonment rather than execution. This was despite the fact that the murder in that case had been of a most brutal and sadistic kind. The shared experience and knowledge of some African–American members of the jury was, it seems, instrumental in enabling the jury as a whole to recognise significant factors of mitigation. Assisted in that way, jurors were able to attach a different significance to some of the life experiences of the defendant. One juror commented that African–Americans saw evidence in a different way. They certainly helped other jurors to see how the defendant’s upbringing had brutalised him (Sundby 2007, p. 151).

Michael Knox, one of the jurors dismissed during the Simpson trial, candidly explained the mindset of African–American jurors who felt that the case was a put-up job. He acknowledged how difficult it might be to convince them that a clever and talented man like Simpson could have committed a crime of passion (Knox and Walker 1995, p. 130):

I know many white Americans find it hard to understand how we tend to have blind faith when one of our own is accused of a crime and the evidence is circumstantial. But there’s a long, shameful history of black men being demonised and railroaded in criminal trials. We are skeptical of the white establishment, law enforcement officials and the courts. And there's something else: we want so badly to be proud of our own.

This is not prejudice but belief undoubtedly born of long and bitter experience. Nonetheless, racial prejudice amongst jurors is a reality as demonstrated by other cases. Zerman’s account (1977) made it clear that one member of the jury harboured racial prejudice against African–Americans. This conditioned his whole approach to the trial and the evaluation of the evidence.

There are also notable examples of other jurors acknowledging the danger of racial stereotyping—and therefore striving to free themselves from any prejudice. Zerman (1977, p. 159) says:
Ironically, I think now that where the jury is most to be commended was in the painfully conscious effort nearly all of us made to look beyond our prejudices. When, early in the deliberations, juror six said that he was sorry there were no blacks on the jury, to lend us some insight into how ‘they’ think, he was giving voice to a factual observation that probably disturbed everyone: we were a lily white group sitting in judgement on a young black man.

**Deliberation**

This topic has been addressed obliquely but it is appropriate to say a few more words about it. As we have seen, the research literature mentions two styles of deliberation—one is verdict-driven and the other is evidence-driven. The dataset contained examples of both of these styles. For example, in the Jack Ruby trial the style was verdict-driven (Causey and Dempsey 2000, p. 88). Consistent with other research findings, there was little discussion of evidence. The verdict-driven style does not nurture creativity. Of course it is possible that in some cases juries choose to vote early because they do not believe that there is anything that needs to be discussed. The Ruby trial was like that. However, the jury in the Scott Peterson trial, clearly discussed the evidence at length. This was also true of many of the other juries.

The author’s own analysis demonstrated some juries engaging in a third style of deliberation. In this mode, the jury fragments and individuals or small groups examine exhibits, have their own discussions, conduct experiments or engage in re-enactments of parts of the evidence. They can do some or all of these things. Afterwards, they reassemble and discuss their findings and conclusions. This informal approach—which is invariably a precursor to a more formal phase—seems to sponsor creativity and knowledge discovery. Whether or not a jury engages in such activity seems to depend to some extent on the trial issues as well as the leadership of the group.

It appears that when the jury fragments into subgroups, individuals will be more inclined to utilise their preferred cognitive style in processing and storing information. Learning is assisted when individuals are enabled to utilise their preferred learning style (Sadler-Smith and Riding 1999). This would help to explain why the third style of deliberation is often so productive. For example, a person who is a verbal-analytic type may well choose to read transcript or documentary material. There are many instances of jurors learning in diverse
ways when allowed to do so. Carter’s approach appeared to have been both analytic and verbal. He chose initially to focus on one issue—the characters of the deceased and the defendant. He further engaged in a close analysis of the words of various documents—principally a journal and emails—to draw his conclusions. This suggests that he was analytical rather than holistic. Sometimes an entire jury can seemingly benefit from a particular approach to learning. Lesly was of the view that a re-enactment of the subway shootings using cardboard cutouts helped break a deadlock and led to agreement (Lesly and Shuttleworth 1988, pp. 298-9). The approach was clearly holistic and based on imagery and storytelling.

Deliberation serves the purpose in most cases of producing agreement out of a variety of views. A certain amount of friction in a jury appears to be useful, as it clearly was in the case reported by Burnett (2002). It triggers a robust discussion of issues. Conversely, too much conflict can be extremely detrimental and can drive a susceptible juror to an emotional storm or breakdown.

**Personality traits**

Certain types of personalities may be less inclined to use, or allow others to use, personal knowledge and belief. Obsessiveness is a mixed blessing in a juror. It seems that the obsessive juror can be a boon or a hindrance to the jury. Obsessive individuals—such as John Guinasso in the Peterson trial—are good at following the rules and perhaps less inclined to be innovative, seeing it as a transgression of the rules. He clashed with the first foreman who was drawing upon his own medical knowledge (Beratlis et al. 2007, p. 143). The aggressive juror can create problems for others. For example, they can at times cause them to agree to a verdict that they don’t believe in as happened with Peggy in the first death penalty case. A woman with strong values, she ultimately agreed to a verdict that she clearly found repugnant and contrary to her personal belief that any person can be rehabilitated (Sundby 2007, p. 97). There is no doubt that under extreme pressure, some jurors will simply agree to agree.
Can juror and jury behaviour be adequately described by a simple model?

This thesis contends that a simple model cannot adequately describe jury decision making. Its very richness and diversity confound any attempt to describe it simply. The author analysed the juror memoirs using a grounded theory approach. This produced a complex picture of juror and jury decision making. There is no single or simple description that applies to all jurors and all juries. Jurors have available to them a large set of schemas, tools and strategies. The way that these are combined can result in very different approaches to decision making. Jurors use both fast and slow processing or cognitive styles. They can engage in slow logical analysis of the evidence; or be assisted by sudden intuitive flashes, insights and heuristics.

Narrative Construction is a significant tool or schema. But where character evaluation is used—and deemed by a juror to be of fundamental importance—narrative construction can be ignored. In other cases character evaluation may be a prelude to narrative construction. Generally, the idea that jurors utilise a toolkit of schemas and tools is consistent with many other findings and may potentially illuminate some of the puzzles that persist in jury research. The strength of the Jurors’ Toolkit is that it allows for great diversity, while still acknowledging the importance of narrative construction and indeed script building as major tools. Existing models— which describe different tools/schemas—can accurately explain what jurors do in some, but not all, circumstances. The Jurors’ Toolkit is a unifying concept.

Because they are so active in seeking the truth, jurors do not hesitate to use personal knowledge and belief. Of course social scientists have not really doubted that this occurs—or suggested that it is improper. It is inescapable. But the usage seems to be far more widespread than previous research, or indeed any model, has found or postulated. Jurors, to a great extent, use personal knowledge, belief, research, personal experiments, observations and discoveries extensively. This fact cannot be reconciled with the traditional view, noted above, that a juror is a passive recipient of data and information. That false notion is buried under a mountain of data and experimental findings.
The use of personal knowledge and belief by jurors and juries

A personal element is also apparent in the role of emotion that is often linked to, or dependent upon, personal knowledge. Emotions and values can at times be so strong as to almost dictate a personal decision on the part of the juror. At times jurors are inclined to ignore verdict categories because they feel obliged to render a verdict that satisfies their own sense of justice. This is another problem with the current models—particularly the narrative model that posits that jurors fit factual findings into a verdict category. In short, there are instances when jurors do not particularly care if the facts established by the evidence do not fit the verdict that they want to deliver. However, the high rate of concordance between jury and judge-preferred verdicts as noted by Kalven and Zeisel (1966), and subsequent researchers, makes it unlikely that this is a frequent phenomenon. Indeed, Kalven and Zeisel (1966) concluded that nullification appeared mainly in certain types of cases—for example, those involving charges of tax evasion.

Emotions can be triggered by personal experiences that magnify the impact of evidence. Very strong emotional reactions give rise to value-laden judgements that can swamp the evidence. This happened with the juror Frank in the first death penalty case. An event having nothing to do with the crime or the case made him feel very angry with the defendant and he consciously took on the role of the victim’s champion (Sundby 2007, pp. 118-9, 131).

Chapter summary

There is a high level of consistency between the findings of this research and other findings in the jury literature. However, the findings from this research suggest that some commonly accepted notions about the jury are not accurate. Perhaps the most unexpected finding is the frequency of jury disobedience to the judge’s instructions. At times this can be a reaction against an overly controlling judge. Jurors are determined to discover the truth and have difficulty balancing different trial objectives.

Also, the sheer extent of jury reliance upon personal knowledge and belief was surprising. This factor must be considered in studies of jury accuracy. Jurors use personal knowledge and belief derived from many different sources. They are avid experimenters and investigators. The jurisprudence resulting from allegations of juror misconduct may reveal only the tip of a very large iceberg.
The use of personal knowledge and belief by jurors and juries

But this is not to say that all juror experiments are inappropriate. Many are clearly not.

This investigation suggests that juror and jury decision making styles are subject to significant variation. In part this is due to the richness and diversity of the Jurors’ Toolkit. It is also due to variability in trials and the challenges that they present to the jury. The results presented in this thesis strongly affirm that jurors, like other decision makers, use both fast and slow modes of thinking. Intuition, flashes of insight and heuristics feature in juror decision making and appear to be just as important as the slower, more analytical form of processing. Some of the factors that conduce to fast processing are identified in the literature on bounded rationality. Information overload and time pressure are important in this context.

Juries sometimes deliberate in a relaxed, informal way not previously mentioned in the research literature and at such times they can become very innovative.

The dataset contained cases where racial or gender composition of the jury seemed to influence decision making. Mainly, this was because different groups carried different beliefs and knowledge into the deliberation room. However, there were also instances of racially prejudiced jurors.

This author's findings do not fully support any current model of jury decision making, although it is clear that narrative construction is, at the very least, a most important schema or tool. But it is not always used. One of the reasons for this is that not all trials lend themselves to that approach. Character evaluation is also very important. Juror and jury decision making is not always the orderly and rational process depicted in most of the models. But nothing in this research casts doubt on the long-established finding that juries are generally accurate and reliable.
Chapter Six: Conclusion

Research questions

In this study, the author developed a theory about the use of personal knowledge and belief by jurors, an issue largely overlooked by jury researchers. Personal knowledge and belief can be acquired prior to or during a trial; its defining characteristic in this thesis is its extra-judicial provenance. When jurors do their own research, their new knowledge does not come from trial sources and is not tested in the way that evidence is tested.

The issue has become particularly topical and important because technological developments, especially the creation of the internet and various forms of social media, have greatly increased the opportunity for jurors to conduct their own research and investigations. This tendency is viewed by the judiciary and jury researchers as dangerous and undesirable, sometimes leading to miscarriages of justice.

The specific research questions were:

- When, how, why and to what extent do jurors and juries use personal knowledge and belief in decision making?
- What is its source?
- How significant is it to the verdict?

In answering these related questions, the author developed a theoretical framework which helps to explain jury decision making more generally.

Method

A large set of juror memoirs was analysed using the methods of grounded theory as espoused by Strauss and Corbin (1998). The author demonstrated in Chapter Three that one can have reasonable confidence in the accuracy of the memoirs. For example, many were written by credentialed writers, academics and professional people. Some were based on contemporaneous records. They often recorded events that were emotionally painful, and likely to be etched in memory.
The data ran to well over one million words of memoirs written by jurors. The author's use of this method was highly productive – over one hundred and forty concepts emerged in the course of open coding. Ultimately many became categories; some became properties of categories. Axial coding produced numerous and rich relationships between categories and an elaborate theory readily emerged.

**The main features of the theory that emerged**

Many of the numerous concepts that emerged could be categorized as tools or schemas that jurors were using throughout the trial. These concepts were aggregated into a core category which the author labeled the Juror’s Toolkit. There are two parts to this category: a tool selection mechanism and a large store of some ninety tools/schemas. Jurors use the tools and schemas in processing evidence and in decision making. Furthermore, personal knowledge and belief is instrumental in the use of many of these tools/schemas. At times it is directly used; at other times it is an input to or output from the use of a tool/schema.

Some of the more important amongst the manifold tools/schemas are:

- intuition
- analytical thinking
- heuristics
- speculation
- re-enactment
- experimentation
- satisficing or choosing an adequate rather than an optimal solution
- narrative construction—and scripting
- credibility assessment; and
- character evaluation.
Factors influencing the selection of tools/schemas, and thus the use of personal knowledge and belief, were also identified. They are:

- the nature of the trial and the evidence
- the proclivities and skills of the juror or jury
- the legal culture
- the degree of control exerted by the judge
- chance factors
- the use of related tools/schemas that promote or inhibit the use of other tools/schemas
- the interactions between jurors, and
- the emotional state of jurors.

The schemas and tools have several important dimensions. An instance of the use of a schema or tool can be envisaged as existing at a point in a multidimensional space. For instance, the use of the schema or tool will be individual or social to varying degrees. A re-enactment conducted by several jurors is social rather than individual. Secondly, it will vary as to the extent that it complies with the rules and expectations of the legal culture. Some instances of use will be quite lawful; others will violate the rules and accepted conventions. Thirdly, an instance of the use of a schema/tool will involve fast or slow processing to varying degrees.

The large number of tools/schemas, the influence of personal skills and predilections on the selection of tools/schemas and the influence of other factors tend to make juror decision making a highly individual activity. Viewing jurors as constructivists, their constructions are likely to be highly individual even when they collaborate closely and reach consensus.
Answering the research questions

When, how, why and to what extent is personal knowledge and belief used

When it is used

The Jurors’ Toolkit is open from the beginning of the trial until the end. Personal knowledge and belief is used at all stages.

How it is used

How it is used depends on the tool/schema being applied. There are many tools and schemas and accordingly there are many uses of personal knowledge and belief. It is appropriate to give a few examples:

A juror may assess the personality or the current mood of a defendant, witness or other trial participant by reading body language. Underlying the process is the juror’s belief about how personality and mood are reflected in body language.

A tool such as intuition may depend upon personal knowledge and experience deeply buried in the memory of the individual.

A heuristic, such as the availability heuristic, depends intimately on the memory of the user. For instance, assessing the likelihood of an accident occurring in a particular way, a person using the availability heuristic tries to recall instances of similar accidents.

Juror decision making involves both fast and slow processing as has previously been reported. Fast processing or what Kahneman (2011) has called System 1 Thinking often relies upon personal knowledge and belief in ways that may not be immediately obvious.

The extent of use

The extent of the use of personal knowledge and belief is variable. There were certainly instances in the dataset where it appeared to be heavily relied upon. In the account of the London Kidnapping Trial, Grove (1998) outlines areas in which each juror used special expertise or personal knowledge to assist the group in its decision making.
The use of personal knowledge and belief by jurors and juries

The author of this study theorises that when jurors are under considerable pressure, their reliance on personal knowledge and belief increases. Bounded rationality theory applies to the jury because of the effect of such common limiting factors as:

- time pressure
- information overload
- psychological stress
- evidentiary complexity; and
- memory limitations.

Accordingly, jurors and juries may satisfice, that is, adopt an approach to decision making that is acceptable rather than optimal. In so doing they will be more willing to take shortcuts heavily reliant on personal knowledge and belief.

**Why it is used**

The dataset supports a number of explanations, which are not mutually exclusive, to explain why personal knowledge and belief is used. Jurors use it because it is entirely necessary, up to a point. As constructivists, jurors will invariably utilise what they already know to analyse new information. As Piaget (1980, p. 23) explained, individuals generate knowledge by a process involving the interaction between experience and internal schema, mechanisms or mental patterns which are not innate but acquired. However jurors go well beyond this. At times, they will also try to fill gaps in the information presented by looking for additional sources, even if that involves misconduct.

Underlying juror decision making is a powerful desire to determine the truth. Most jurors are highly diligent and want to deliver the correct verdict. Discovering the truth is more highly valued than abiding by the rules to help ensure a fair trial. Jurors tend to have a lopsided appreciation of the legal culture and its values. To a surprising degree, jurors can be subversive of that culture although the extent of their disobedience is highly variable. The common instruction not to discuss the case before formal deliberation commences is almost universally ignored, evidencing jurors’ desire to collaborate.
The strength of the desire to discover the truth explains why certain kinds of juror misconduct are so common—a surprising finding—and why judicial attempts to control it have often failed. It also explains why so many jurors express strong anger, bordering at times on fury, upon learning that seemingly relevant information, such as a defendant’s criminal history, has been withheld from them.

The source of personal knowledge and belief

The sources of personal knowledge and belief are manifold. Not only do jurors use pre-existing knowledge and belief, they also actively seek out new relevant knowledge during the course of the trial.

Jurors discover new knowledge in numerous ways, including:

- making their own observations inside and outside of court
- re-enacting alleged crimes or incidents
- closely examining and experimenting with exhibits
- visiting crime scenes either secretly or as arranged by the court
- conducting experiments outside of the deliberation room
- reading legal texts; and
- doing private research including internet research.

Jurors sometimes read newspapers or watch television accounts relevant to proceedings even when warned not to. They often rely on special or even expert knowledge that they have acquired by way of a hobby or occupation. Sometimes they have, and use, fortuitous knowledge of a fact in issue.

How significant is it to the verdict?

Where the evidence is overwhelmingly strong or very weak, jurors appear to be less likely to innovate, break the rules or generally rely upon personal knowledge and belief in ways that could be inappropriate. When the evidence is very strong there are no gaps for the jurors to fill in; when weak, jurors would not bother trying because the gaps are too wide. Accordingly, the author theorises that the use of personal knowledge and belief is likely to increase when
the strength of the case is close to the threshold required by the law to prove that case. However, it is also in such cases that the tipping point is likely to be reached by such use, making it highly significant to the outcome. In the dataset there were certainly instances when the use of personal knowledge and belief seemed to be critical to the trial outcome.

**Consistency with other findings in jury research**

The findings are broadly consistent with previous findings of jury research and the jurisprudence arising out of alleged juror misconduct. As stated in the Literature Review, there has been surprisingly little direct research into juror use of personal knowledge and belief, but some findings touched on the issue obliquely. Some of the current findings, such as the prevalence of juror misconduct, were surprising.

**Other models of juror decision making**

Several of these, especially narrative construction, have been the subject of much previous research. The present study confirms that no single schema or tool is always dominant or applicable to all jurors in all cases. The Narrative Construction Model, though supported to some extent by this study, may well be idealised. It also underestimates the importance of personal knowledge and belief, which do far more than fill gaps in narratives or provide background knowledge. Nonetheless, there were many instances of jurors either constructing narratives or assembling scripts. Narrative construction is better viewed as a meta tool or schema, rather than a complete explanation of how jurors decide cases. Some cases do not conduce to that approach as noted by Devine (2012) and confirmed by this study, and some jurors simply prefer other approaches. Devine’s Integrated Multi-Level Model (Devine 2012) appears to be superior to the Narrative Construction Model, but even that is not fully supported.

There was no instance in the dataset of jurors singly or collectively engaging in a sophisticated assessment of probabilities. Accordingly, the mental meter models were not supported by the data to any extent. This was not surprising: other researchers such as Devine, Clayton et al. (2001) have reported a lack of empirical support for such models.
The notion of the Jurors’ Toolkit helps to integrate different models of juror decision making. Different models are equivalent to different schemas and tools which are used not universally, but in certain circumstances. Narrative construction is but one tool or schema—albeit a very important one.

**Demographic factors**

The findings confirm the influence of demographic factors upon verdict in some cases. There were the expected cases of jurors exhibiting racial prejudice. But there was a more common explanation in the memoirs for correlation between jury demographic factors and verdict. As suggested by Hastie (2008), different groups carried into the jury room different stories, for example about police conduct. In short, there are some trials where members of a demographic group enjoy a knowledge advantage. This enables them to use personal knowledge and belief in a constructive way. Such behavior is not aberrant. In the trial of one of the Menendez brothers, all of the female jurors, but none of their male peers, accepted the possibility that the brothers killed their parents out of fear. This produced a hung jury.

**Jury accuracy**

The concordance of jury verdicts and judge-preferred verdicts is one of the most important areas of jury research. There have been attempts, most famously by Kalven and Zeisel (1966), to explain cases of discordance. Clearly, the fact that jurors and entire juries often act on personal knowledge and belief explains a proportion of the judge-jury divergence, an explanation previously overlooked.

**Delivering sound verdicts while not understanding instructions**

The study confirmed that jurors often struggle with judicial instructions—principally those on how to apply the law. Sometimes judges were asked to clarify their instructions but that did not always assist juror understanding. Judges vary enormously in their capacity, or perhaps willingness, to assist juries before and during deliberation, often not rendering instructions clearly or responding helpfully to requests for assistance. However, it was clear that the combined knowledge and cognitive skills of the jurors could often dispel misunderstanding. Jurors sometimes used commonsense notions of the law that
could effectively substitute for instructions, as postulated by Finkel (2000). Additionally, as described by Manzo (1993), there were instances where a useful and practical concept of justice was fashioned by the jury in the course of deliberation.

The findings strongly suggest that testing juror understanding individually is not a sound experimental approach. What matters is what the jury collectively understands and works out in the course of deliberation—in large part by sharing knowledge.

**Deliberation styles**

One novel postulate to emerge from this study is that—contrary to what has been accepted in the past—there are three rather than two styles of jury deliberation. In several trials, an unstructured, relaxed approach was adopted initially as a prelude to evidence-driven deliberation. Individuals and small groups of jurors started to examine exhibits or transcript, do re-enactments et cetera. It was as if the jury had broken up into subcommittees. Much innovation and many useful discoveries seem to result from this informal, relaxed and unstructured approach. If encouraged, jurors are natural collaborative learners. The analogy with Nonaka and Takeuchi’s (1995) theory of tacit knowledge discovery in organisations is notable. According to that theory, when employees are encouraged to relax and socialise, they are very likely to become innovative and to render tacit knowledge explicit.

Judicial leadership is important; but not as important as leadership within the jury itself. Good leadership within the jury can defuse conflict and encourage collaborative learning which requires a harmonious jury. A good leader will ensure full and fair discussion of contentious issues. Conflict can lead individual jurors to depression and nervous breakdown. It does not conduce to good decision making. A surprising finding from this study is that feelings of paranoia are common in jurors. The pressure on them is clearly considerable.

**The contribution to knowledge**

First and foremost, this study answers the important research questions, throwing considerable light on the use and importance of personal knowledge
and belief in jury decision making. The study also confirms many prior findings in the literature, and produces some novel and unexpected findings, such as the prevalence of juror misconduct and the existence of a third style of deliberation which conduces to knowledge discovery.

The rich theory that emerged explains many of the factors that influence juror decision making, including the multiple factors and circumstances that influence the selection of tools/schemas by individual jurors. It also forges connections with other areas of decision making research including tacit knowledge discovery, bounded rationality theory and intuition. The theory is superior to other models of juror decision making, and suggests that they should be viewed as individual tools/schemas in a large set, described as the Juror’s Toolkit. The theory thus unifies much prior research and theorisation.

By explaining juror misconduct as a kind of misdirected diligence, the study could help the judiciary to develop ways of curtailing the problem, principally by improving juror education.

**Limitations of the study**

This was a qualitative study using the techniques and methods of grounded theory as espoused by Strauss and Corbin (1998). It is important to stress that the author has developed, but not tested, a theory. These findings are derived from a particular subset of jury trials that took place in the United Kingdom and the United States over some five decades. The findings are true of that fairly extensive dataset and for that reason the theory enjoys a high level of verisimilitude. However one must bear in mind that the accuracy of autobiographical data cannot always be assured, a point that I discussed at length in Chapter Three.

Any theory needs rigorous testing. If it survives without being falsified, then it is a theory with a high degree of verisimilitude. The purpose of such testing would be to assess how confidently the current findings can be applied to the universe of jury trials. There are obvious reasons for caution. All but one of the cases analysed were criminal trials. The trials took place in only two countries. These are limitations. The author argues that the ideas of Karl Popper are useful.
The philosopher of science, he talks about theories being corroborated rather than proven. Each failed attempt at falsification boosts its verisimilitude. The verisimilitude of a theory is thus a measure of its consistency with data or observation (Popper 1963).

In this study, the author aimed to generate a testable theory with a high degree of verisimilitude arising out of its derivation from a large dataset. The degree of verisimilitude obviously depends upon the extent and richness of the dataset and the correct use of the methodology.

It is important to emphasise that autobiographical data, like any other data, will not be perfectly accurate. However, as outlined in Chapter Three, autobiographical texts are accepted for academic analysis, subject to safeguards of course. In that chapter I mentioned that there are various kinds of errors in autobiography, some deliberate, and others not deliberate. The credentials of many writers, their reliance (often) on records made at the time of trial, the emotional impact which the trial often seemed to have on them, and their apparent desire to report their experiences honestly so that the jury experience could be understood (leading perhaps to reforms), were all accepted by me as indicators of the general trustworthiness of the memoirs.

But it is worth repeating that the best test of external validity, that is the extent to which my postulates can be generalized to the universe of jury trials, will be repeated, rigorous testing against new data. The theoretical postulates that I derived are capable of being tested against new data, and I would welcome that. The theory is scientific in the Popperian sense.

**Importance of the findings**

The findings in this thesis, and the theory derived from them, represent a significant contribution to the knowledge of juror and jury decision making. Improving knowledge of how juries function is vital because of the importance of the jury trial to the administration of justice in common law countries. The jury system has attracted much criticism (Dann and Logan 1995; Penrod 1997). A better understanding of juries will assist in the evaluation of such criticism. Juror misconduct involving research and communication via the internet is emerging
The use of personal knowledge and belief by jurors and juries

as a most serious problem (McGee 2010; Hoffmeister 2010). Urgent measures will be needed to control it. This study throws further light on the reasons for, and circumstances of, juror misconduct.

Future research

Aspects of the theory are very easy to test against different datasets and further research could have a rigorous quantitative character—at least in some cases. For example, the author postulates that there is a third style of jury deliberation—apart from the well-recognised verdict-driven and evidence-driven styles. It would be easy to test, by post-trial survey, how often and when this occurs. Further study could also be directed at determining whether the author is correct in postulating that good leadership in harmonious juries fosters this third style of deliberation. This additional study could confirm or deny whether this is particularly likely to lead to innovation and knowledge discovery.

The use of different schemas and tools in various combinations would also be a fruitful area of study. There could be exploration of the tendency of jurors to chain schemas and tools together. Studies could be designed to isolate juror and trial variables that conduce to the use of particular schemas and tools. On that issue, the author thinks that this research has probably only scratched the surface.

The author’s propositions about the circumstances where jurors are more or less likely to use narrative construction could be tested with mock juries. The nature of the trial issues could be used as an independent variable. In short, the trial issues could be systematically varied to determine whether this had a bearing on the propensity of jurors to use narrative construction or, for that matter, any other schemas and tools.

An interesting issue that could be researched is the extent to which jurors make judgements or assessments of witnesses and other participants based upon very short periods of observation. Ambady and Rosenthal (1992; 1993) have studied the accuracy of some social judgements when the observer has only witnessed a

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33 I have described this as an informal subcommittee style.
thin slice of behavior on the part of another person. For example assessments based on observations of teacher behavior were shown to accurately predict student and headmaster assessments of teacher performance. Surprisingly, this was true even when the behavior observed was non-verbal and the period of observation was seconds (Ambady, N and Rosenthal, R 1993).

Another interesting approach would be to further explore juror and jury decision making using the Gioaia method. This is an elaboration of the grounded theory methodology intended to enhance scientific rigor while not stifling the use of creative imagination (Gioia, Corley & Hamilton 2012). Gioia is a strong advocate of multi-paradigm approaches to research believing that they yield more knowledge than singe paradigm research which can be hampered because of the assumptions and goals associated with an individual paradigm (Gioia and Pitre 1990). Part of this method involves delineating relationships between the informant’s concepts and the researcher’s concepts (Gioia, Corley & Hamilton 2012). Since in my thesis I was able to show clear data structures, and a consistency between jurors’ concepts, and my own (lawyer’s) concepts, that approach may well be fruitful.

My study suggests that juror and jury disobedience is a common phenomenon. Some anonymous surveying of jurors, perhaps well after trials have finished—and in large numbers to assure privacy—might enlighten the judiciary about the prevalence of this. It could reveal the frequency of the phenomenon, the form that it takes and the importance of the knowledge that it yields. Further research could also ascertain whether jurors fully understand that they are breaking the rules or if they understand the seriousness of their conduct. Such a survey could also be aimed at isolating those factors that conduce to disobedience. This thesis has suggested at least two. One is the primacy of the epistemic objective; the other is judicial behavior, including the failure of judges to provide assistance when requested, their tendency to be overly controlling and their failure to properly explain the reasons underlying rulings. An appropriately constructed survey may assist in uncovering those factors that lead jurors and juries to break the rules and may therefore suggest ways of curbing the tendency.
Juries face serious limitations including time pressure, evidentiary complexity, emotional stress and information overload. The author postulates that limiting factors lead to the greater use of heuristics, intuition and other fast-processing modes, that is, System 1 Thinking and to the greater use of personal knowledge and belief. A mock jury study, manipulating such limiting factors, could test the postulate.

A better explanation of judge-jury agreement and disagreement may result from further study of the extent and importance of jurors’ use of personal knowledge and belief. The intent of such a study would be to determine how important that factor is in producing discordance between judge–preferred and jury–delivered verdicts. The researchers would need to collect data from both jurors and judges involved in the same trials.

**Final words**

In introducing this thesis, I noted that juror and jury use of personal knowledge and belief had been under-researched and was poorly understood. The growing and dangerous practice of jurors using the internet and social media to do their own research make it vital that we better understand when and why jurors supplement (or replace) the trial evidence with personal knowledge and belief gained extra-judicially. Such an understanding could help to contain a disturbing trend and could lead to improvements in the jury trial.

This thesis presented a theory, grounded in the data of juror memoirs that not only explained when, how and why jurors and juries use personal knowledge and belief, but also incorporated the explanation into a general model of juror and jury decision-making. That model was shown to be superior to existing models. Many of the tools and schema that jurors use were identified, as were relationships between them and factors that conduce to their use. The thesis presented some novel and interesting findings about the jury, including the surprising finding that juror disobedience was prevalent long before the emergence of the internet. Such disobedience is often a result of misguided diligence.

This thesis forged strong connections between jury research and other fields of psychology and social science including research into cognitive modes, bounded
rationality, intuition, heuristics and knowledge management. It also offered
cogent explanations for some important phenomena including the reported
correlations between verdicts and various demographic factors, including race
and gender of jurors. Obviously, the theory presented in this thesis needs to be
rigorously tested against new sources of data.

The author believes that the jury is a valuable organ of democracy and is
confident that this study contributes significantly to an improved understanding
of its functioning. The manifest diligence of jurors, demonstrated by the current
research, is reassuring, and if properly directed, should assist the better
functioning and survival of the jury.
### Appendix One

This table does not include properties and dimensions of schema/tools. These were explained in the body of the thesis.

<table>
<thead>
<tr>
<th>Category or concept</th>
<th>Property</th>
<th>Dimensions (range from x—&gt;y)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Culture</td>
<td>Enabling learning</td>
<td>Friendly to learning—&gt;very restrictive</td>
</tr>
<tr>
<td></td>
<td></td>
<td>For example, some judges do not allow jurors to even take notes. But many now have a more enlightened attitude. Nonetheless, a court is far from being an ideal learning environment.</td>
</tr>
<tr>
<td>Culture</td>
<td>Hardship and comfort factors</td>
<td>Very comfortable—&gt;very uncomfortable</td>
</tr>
<tr>
<td>Case</td>
<td>Notoriety</td>
<td>Notorious—&gt;run of the mill</td>
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<tr>
<td></td>
<td></td>
<td>For example, the OJ Simpson trial had very high notoriety</td>
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<tr>
<td>Case</td>
<td>Duration</td>
<td>Very short—&gt;very long</td>
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<td></td>
<td></td>
<td>For example, the Simpson trial lasted for some ten months</td>
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<tr>
<td>Issues</td>
<td>Number</td>
<td>Few—&gt;many</td>
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<tr>
<td></td>
<td></td>
<td>For example, the trial of Jack Ruby focused on one issue. That is, whether Ruby was having a seizure when he shot Oswald.</td>
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<tr>
<td>Issues</td>
<td>Complexity</td>
<td>Simple—&gt;very complex</td>
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<td></td>
<td></td>
<td>For example, a case that features a lot of DNA evidence would have great complexity.</td>
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<tr>
<td>Evidence</td>
<td>Credibility</td>
<td>Not at all credible—&gt;highly credible</td>
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<td></td>
<td></td>
<td>Of course, jurors vary as to how they assess</td>
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</table>
The use of personal knowledge and belief by jurors and juries

<table>
<thead>
<tr>
<th>Evidence Strength</th>
<th>Very weak—&gt;very strong</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence Relevance</td>
<td>Barely relevant—&gt;highly relevant</td>
</tr>
<tr>
<td>Outcome Verdict</td>
<td>Guilty, not guilty, liable, not liable</td>
</tr>
<tr>
<td>Outcome Damages</td>
<td>Enormous possible variation</td>
</tr>
</tbody>
</table>
| Outcome Sentences  | Short, lenient—>long, harsh  
Life imprisonment—>death penalty  
Sometimes jurors use their own knowledge of likely sentences and the implications of such sentences to help them determine liability or guilt. |
| Outcome Accuracy   | Accurate—>inaccurate  
Most verdicts seem to be rational and fair. |
| Judge Behaviour    | Poor behaviour—>exemplary behaviour  
For example, the judge in the New York homosexual murder trial was said to be dry and disagreeable. He yelled at one juror with no apparent provocation. |
| Judge Responsiveness to requests | Very helpful—>very unhelpful  
For example, when asked to clarify instructions the jury does not understand, some judges simply reread them—a useless exercise. |
| Judge Control of jury | Weak control—>strong control |
| Judge Clarity of instructions | Very clear—>very unclear |
The use of personal knowledge and belief by jurors and juries

<table>
<thead>
<tr>
<th>Role</th>
<th>feature</th>
<th>rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td>Respected</td>
<td>Highly regarded—&gt;poorly regarded</td>
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<td></td>
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<td>The assessment depends on the judge’s</td>
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<td>behaviour and whether they are helpful to</td>
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<td></td>
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<td>the jury. A judge who is not respected</td>
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<td></td>
<td></td>
<td>may be disobeyed.</td>
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<td>Party</td>
<td>Identity</td>
<td>Demographic features, for example, twenty-</td>
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<td></td>
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<td>year-old, female Caucasian</td>
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<td>Party</td>
<td>Likeability</td>
<td>Very likeable—&gt;very unlikeable</td>
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<td></td>
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<td>For example, Mary Timothy clearly warmed</td>
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<td>to Angela Davis because of her passion</td>
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<td>and intelligence.</td>
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<td>Party</td>
<td>Sympathy</td>
<td>For example, Kennebeck clearly sympathy</td>
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<td>provoking</td>
<td>ised with the Black Panthers. He considered</td>
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<td>a lot of their talk to be simply a form of</td>
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<td></td>
<td></td>
<td>self respect.</td>
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<tr>
<td>Witness</td>
<td>Expertise</td>
<td>Highly expert—&gt;hardly expert at all</td>
</tr>
<tr>
<td>Witness</td>
<td>Credibility</td>
<td>High—&gt;Low</td>
</tr>
<tr>
<td>Witness</td>
<td>Importance</td>
<td>High—&gt;Low</td>
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<tr>
<td>Witness</td>
<td>Likeability</td>
<td>Very likeable—&gt;very unlikeable</td>
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<td>For example, the Peterson trial jury</td>
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<td>clearly despised the defence medical</td>
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<td>witness for having made a fundamental</td>
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<td></td>
<td>blunder in calculating time of death.</td>
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<tr>
<td>Jury</td>
<td>Competence</td>
<td>High—&gt;low</td>
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<td>Incompetent juries would appear to be</td>
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<td></td>
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<td>very rare.</td>
</tr>
<tr>
<td>Jury</td>
<td>Abiding by the</td>
<td>High obedience—&gt;low obedience</td>
</tr>
</tbody>
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Appendices 294
<table>
<thead>
<tr>
<th>Rules</th>
<th>Interestingly most juries break some of the rules. The reason for this is often the desire to uncover the truth. They sometimes collaborate in breaking the rules.</th>
</tr>
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<tbody>
<tr>
<td>Jury Conflict/harmony</td>
<td>Very harmonious→very conflicted</td>
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<tr>
<td>Jury</td>
<td>For example, in the OJ Simpson trial the jurors were at each other’s throats. The draconian measures taken to isolate them for some ten months may have helped to produce this acrimony. An inharmonious jury is not likely to work well.</td>
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<tr>
<td>Jury Diversity</td>
<td>Homogenous→heterogenous</td>
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<tr>
<td>Jury</td>
<td>A diverse jury is likely to bring a large pool of knowledge and experience to the deliberation table. That can be of great assistance.</td>
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<tr>
<td>Jury</td>
<td>A jury that socializes, for example, by jurors lunching together appears to be harmonious. Jurors can work together collaboratively.</td>
</tr>
<tr>
<td>Jury</td>
<td>High→low</td>
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<tr>
<td>Jury</td>
<td>The vast majority of juries are diligent.</td>
</tr>
<tr>
<td>Juror</td>
<td>Various demographic features. For example, old, middle class, white, professional</td>
</tr>
<tr>
<td>Juror</td>
<td>High→low</td>
</tr>
<tr>
<td>Juror</td>
<td>Grade school→university</td>
</tr>
<tr>
<td>Juror Diligence</td>
<td>High→low</td>
</tr>
<tr>
<td>Juror</td>
<td>Most jurors are diligent. Some pray for guidance. They invariably view jury service as part of their citizen’s duty.</td>
</tr>
<tr>
<td>Juror</td>
<td>Varying degrees of many traits. For example, introversion, emotionality, obsessiveness,</td>
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</table>
The use of personal knowledge and belief by jurors and juries

openness to ideas, aggressiveness.

<table>
<thead>
<tr>
<th>Juror</th>
<th>Frustration</th>
<th>High—&gt;Low</th>
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<tr>
<td></td>
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<td>Most jurors express a degree of frustration with the legal system. Frustration can foster disobedience.</td>
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<thead>
<tr>
<th>Juror</th>
<th>Grasp of trial issues</th>
<th>Poor—&gt;excellent</th>
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<tr>
<td></td>
<td></td>
<td>Many jurors fully understand very difficult issues. A few will struggle with basic issues. This obviously depends on intelligence, education and attentiveness.</td>
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<thead>
<tr>
<th>Juror</th>
<th>Hardship and comfort</th>
<th>Very comfortable—&gt;very uncomfortable</th>
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<td></td>
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<td>For example, Mary Timothy’s jury brought in whatever they thought they needed; including a fridge and magazines.</td>
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<table>
<thead>
<tr>
<th>Juror</th>
<th>Abiding by the rules</th>
<th>Disobedient—&gt;highly obedient</th>
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<tr>
<td></td>
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<td>For example, one juror in the Peterson trial used the internet to do research and was dismissed.</td>
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<tr>
<th>Juror</th>
<th>Attentiveness</th>
<th>High—&gt;low</th>
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<tr>
<th>Juror</th>
<th>Post-trial attitude</th>
<th>Same —&gt;different</th>
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<tr>
<td></td>
<td></td>
<td>In death penalty decisions, some jurors regret voting for the death penalty and sometimes try to tell the court they have changed their mind.</td>
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<thead>
<tr>
<th>Juror</th>
<th>Exposure to external information</th>
<th>Much—&gt;none</th>
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<td></td>
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<td>For example, Mary Timothy actually resented the Court’s efforts to prevent her reading and viewing media coverage. Nonetheless she seems to have obeyed the judge’s direction. Other jurors admit deliberate exposure to media. Accidental exposure is common.</td>
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<thead>
<tr>
<th>Juror</th>
<th>Decision—when made</th>
<th>Early—&gt;late</th>
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<tr>
<td></td>
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<td>Most jurors try to maintain an open mind until</td>
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The use of personal knowledge and belief by jurors and juries

<table>
<thead>
<tr>
<th>Role</th>
<th>Category</th>
<th>Description</th>
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<tbody>
<tr>
<td>Juror</td>
<td>Prior jury experience</td>
<td>Much experience—&gt;no experience</td>
</tr>
<tr>
<td>Juror</td>
<td>Use of personal knowledge and belief</td>
<td>Much use—&gt;little use</td>
</tr>
<tr>
<td>Lawyer</td>
<td>Performance</td>
<td>Poor—&gt;excellent</td>
</tr>
<tr>
<td></td>
<td></td>
<td>For example, the Peterson jury was highly critical of his lawyer. He promised to prove his client’s innocence, even though the burden of proof was not on his client. In the estimation of the jury he failed dismally.</td>
</tr>
<tr>
<td>Lawyer</td>
<td>Likeability</td>
<td>Very likeable—&gt;very unlikeable</td>
</tr>
<tr>
<td>Deliberation</td>
<td>Effort</td>
<td>Little effort—&gt;major effort</td>
</tr>
<tr>
<td></td>
<td></td>
<td>For example, Thornton’s jury in the Menendez trial deliberated for over one hundred hours.</td>
</tr>
<tr>
<td>Deliberation</td>
<td>Style</td>
<td>The extant literature discusses two styles: verdict–driven and evidence–driven. This study revealed a third style, when juries break up into smaller groups who examine exhibits, do re-enactments et cetera.</td>
</tr>
</tbody>
</table>
Appendix Two
This appendix contains a more complete description of various categories/concepts. Some of these entries started out as short coding notes or memos and were added to over time.

Abiding by the rules
Juries are expected to behave in accordance with directions and instructions given to them by the judge. The degree of compliance is variable—a finding that emerged very early in this analysis. Surprisingly, juries almost always break the rules. Zerman (1977, p. 64) gives an example of this:

In the jury room and as we leave the courthouse, we are starting to disregard the judge’s admonitions not to discuss the case. There are no discussions in which we all join, but there are conversations involving two or three jurors, one of which I am part of, others of which I overhear.

Adequacy of the investigation
The perceived adequacy of the police investigation was often the subject of comment. Burnett (2002, p. 68) noted:

Some of the police work at the scene was highly selective. Defence repeatedly asked investigators whether they found women’s clothing at the scene. They all said no. But the photos showed otherwise. Surprising that attention was not paid to these items. The whips were not taken into custody. The Medical Examiner, not police, had found them.

Aids to learning
Jurors can be assisted by simple measures such as the provision of pens and notebooks that facilitate note taking. They can also be assisted by the use of plain English instructions. The extent to which any court tried to assist jurors by the adoption of such measures was an interesting variable. Timothy expressed concern that she was not told she could take notes.

Analytical
A highly analytical approach to the case was evident in some memoirs. But not all jurors and not all juries approach issues in an analytical fashion. Sometimes the approach can be strongly emotional or prejudicial. Burnett (2002, p. 45) was mindful of that approach: ‘Once you tell your story into the law, it becomes the object of a precise semantic dissection.’
An analytical style is characterised by a careful consideration of the exact implications of the evidence. Kennebeck (1973, p. 64) noted the difficulty of determining the exact relevance of printed material that had been in the possession of the Black Panthers. He stated:

I was not a court buff or a student of law, but I knew that when you found printed matter in someone’s home you didn’t take it for granted that he had read it or read all of it. You also don’t take it for granted that, if he had read it, he agreed with it. So I decided to go through the newspaper from front to back.

Assumption
Jurors and juries often adopt assumptions to assist them in their reasoning process. They are not always particularly rational or convincing. In his account of the Capano trial, Carter (2002, p. 213) states: 'No one could rise to staff lieutenant in the Prison system without having a lot of integrity.'

The second sentence clearly expresses an assumption which seemed to assist the writer determine credibility of a witness.

Attentiveness
Many jurors commented upon the difficulty in maintaining attention.

Nonetheless, close attentiveness and focus upon details of the evidence were a feature of most juror accounts. Kennebeck (1973, pp. 59, 109) stated:

Detective Coffey had to be called back to the stand because one of the jurors sent the judge a note that there was a problem. Coffey had said that the rifle supposedly found in Tabor’s apartment was fully loaded; our inspection of the bullets that came with it, however, had revealed that they were blanks so Coffey, on his return appearance said that he had used the term ‘fully loaded’ because there was ammunition in the rifle—it didn’t matter whether the shells were blanks or live.

At another point the same writer noted the difficulty of maintaining proper attention but indicated that there was so much repetition in the evidence that this more or less compensated for an occasional lapse of attention.

Bargaining or compromising on verdict
Divided juries can compromise by agreeing on a verdict that neither faction really accepts. For example, Burnett, in outlining the way that a divided jury ultimately arrived at a consensus, mentions discussion about delivering a compromise verdict of guilty on a lesser charge than murder. Neither faction
The use of personal knowledge and belief by jurors and juries

really agreed with this compromise verdict. However, in that trial the jury agreed to deliver a verdict of not guilty thus avoiding an untenable compromise. This trial was also notable because members of the jury seriously proposed that they should engage in nullification. This effectively means that the jury ignores the law as it has been explained to them and delivers a verdict that accords with their own innate sense of justice. This is an important insight; viz. verdicts are not necessarily the end point of a reasoning process. They can be the end point of a bargaining process.

**Bizarre juror behaviour**

Most models of jury behaviour assume that jurors are reasonably rational and act accordingly. However, there were interesting examples where individual jurors behaved in a way that was anything but rational and was detrimental to fellow jurors and the deliberation process. Burnett (2002, p. 141) gives an account of juror behaviour that is truly disturbing. He states:

> Felipe wandered around reading passages from the bible. Then he dropped coins and bits of paper onto the table, saying that he could read the future and tell the past in this way. He said that Milcray was innocent and would be found not guilty.

**Burden and standard of proof**

At the very heart of the justice system is a standard against which evidence is to be measured before a jury is entitled to deliver a particular verdict. In the criminal justice system, the standard is described as proof beyond reasonable doubt. The burden of proof rests with the prosecution. The category is interesting because of the many instances where individual jurors overlooked or became confused about the standard. Sometimes individual jurors were minded to reverse the onus of proof so as to require an accused person to prove their innocence. Zerman (1977, pp. 48–9) expressed surprise that during jury selection, many potential jurors failed to understand, or perhaps accept, some of the fundamental rules. He noted:

> ...there are some prospective jurors who acknowledge that the defendant's failure to testify in his own behalf would act as a suggestion of guilt, and, indeed, there are others who confirm Singer's suspicion that, deep down, they believe the defence must prove their client innocent. Singer is adept at uncovering all these pre-judgements, and all of them are of course fatal to the person's chances of serving on the jury.
Some jurors reverse the onus of proof during the course of deliberation. In the same trial Zerman (1977, p. 132) identified an instance of this behaviour:

\begin{quote}
At one point, after a long, aimless pause in the deliberations, juror six said with a sly smile, ‘You all keep asking me to explain to you why I think Ricky is guilty. Well, now I ask you how can you prove to me that he is innocent?’
\end{quote}

Jurors can also react negatively to a defence counsel boast that the defence will prove the innocence of the defendant. Jurors were singularly unimpressed when Scott Peterson’s counsel failed to follow up on his promise to demonstrate the innocence of his client. As one juror commented, all that he did was to show that his client was guilty.

However, the memoirs suggested that, generally, jurors were very mindful of rules about the standard of proof and the onus of proof.

**Character evaluation**

Character evaluation occurs constantly both before and during deliberation. Jurors often make character assessments and they do so in quite surprising ways. Burnett (2002, p. 168) described a police witness as an uncomplicated man from the way that he said ‘I do’ when swearing the oath. In the Black Panthers case, the writer describes a witness as a strangely private man with an introverted confusion of soul.

In his account of the Capano trial, Carter (2000, p. 154) indicates that his experience as a sales person gave him confidence in predicting what kind of person a customer was when the customer walked through the door. He uses this to argue that people break down into different types and can be recognised as such.

Sometimes, jurors' evaluations of character rest on stereotypes and they can be confused when someone does not appear to conform to a stereotype. An example of this is seen in the Scott Peterson trial when a juror acknowledges that the defendant doesn't look like a murderer (Beratlis et al. 2007, p. 39). He says:

\begin{quote}
...he didn't look like a criminal, let alone a killer. There were no tattoos, no pockmarked face, no sloppy clothes or dirty nails. The clean cut Peterson just didn't look the part.
\end{quote}

Lesly (1988, p. 153) made a detailed assessment of the subway gunman, based upon a recorded interview:
Goetz’s animosity toward Braver was so profound he seemed like a different person during these exchanges. There was a marked change in the tone of his voice and particularly in his body language. Throughout much of the interview Goetz sat sideways in his seat with his left leg crossed over his right and his back hunched, as if he were withdrawing into himself and away from the camera and the people. Responding to Braver’s questions, though, his body would uncoil as he lashed out at her, his back stiffening, his torso twisting in his seat as he turned to face her, the pointed finger thrusting at her emphatically. He used his arm as if it were a mallet (the forefingers pointed straight out and locked together, some), as when he told Braver and the detectives that he wanted to kill those guys. It was at such times during his videotapes that the dangerous nature of Goetz is apparent. Otherwise we would have never seen how the meek mild mannered individual in front of us in the courtroom had been capable of committing a violent act.

**Commonsense**

This category emerged relatively late in the open coding and is really self-explanatory.

The category of commonsense is closely related to the category of assumptions. Carter (2000, pp. 245–6) states that it is common sense that things sent into and out of a correctional facility will be closely monitored ‘...otherwise criminals could send and receive all kinds of things.’

**Conflict and harmony**

The harmony of a jury is vital to the wellbeing of jurors and has a strong bearing on the quality of deliberation. An inharmonious jury is one where vituperation and abuse replace rational discussion. The data reveal many examples of harmonious and inharmonious juries. In cases where juries were characterised by a high level of disharmony and abuse, the effect upon individual jurors could be devastating.

Burnett (2002, p. 128) comments that one juror, identified as Pat, threw a tantrum because other jurors would not agree with her suggestion that they should sit through a reading of significant parts of the evidence. Although Pat was insistent that this should occur, she was unable to articulate, to the satisfaction of the jurors, why it was so important. It is clear, however, that Pat was not in good health, was running out of a prescription drug, and that this may well have affected her mood.

Zerman (1977, p. 130) indicates that the majority of the jurors became enraged when two would not agree with a majority verdict. When it became clear that the
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jury’s inability to reach consensus would necessitate sequestration overnight, some of them who had been silent for hours became vocally abusive.

The trial of OJ Simpson provides the best example of a jury fraught with conflict. Surprisingly, none of this appeared to have anything to do with the evidence or the trial issues. It was all purely personal and some of it apparently grew out of racial intolerance. Kennedy says that grudges grew out of the smallest things. (1995 pp. 213-215).

Perhaps the best example of a harmonious jury was the one empanelled for the Jack Ruby trial. It reached consensus quickly on the trial issues with no evident conflict or animosity.

**Consistency**

Jurors look for consistency both from individual witnesses and in a party’s overall case. Consistency begets credibility. Burnett (2002, p. 76) makes this point quite clearly when he says:

> Two different police had claimed to kick in the door. This was a small point but a powerful one. Could we trust anyone who had given evidence on anything.

Zerman (1977, p. 104) is particularly mindful of inconsistencies in the evidence of prosecution witnesses. At one point, he notes:

> Contradictions and improbabilities infest today’s testimony like maggots in rotting meat: One. Jimmy said Ricky was wearing a burgundy shirt; Jennifer said a leather jacket. Two. Jimmy said he was the first one to leave the car; Jennifer said she wasn’t sure if he ever left the car—so obviously she left before he did...etc

At another point Zerman (1977, p. 113) says:

> Ricky may be guilty. I’m sure I will never know. But I find the testimony of those three kids so full of contradictions, inconsistencies, gross improbabilities—things I just cannot attribute to failure of perception and memory—that the State’s case sinks like a torpedo boat.

Lesly (1988, p. 144) tolerates certain kinds of inconsistency in testimony. He states:

> There were admittedly quite a few contradictions and inaccuracies in Boucher’s testimony, but I felt they were all very tangential, that they did not alter the substance of this testimony, and that they could all be easily explained. So much of what happened occurred so quickly, and what happened in the car before the shootings were things that person might not
take special notice of at the beginning, much less recall with precision 2 1/2 years later. In my mind, therefore, there was with all the eyewitnesses a great deal of room for certain types of discrepancies because so much time had elapsed since the incident.

**Control of the jury**

Judges are expected to keep control of juries but it is clear that they vary in their instruction style. Judges who are overly autocratic can quickly get jurors offside. Judges control juries by giving directions and issuing instructions. Important instructions are given to the jury about how to apply the law to the facts. The judges also give directions governing the conduct of the jury during the trial. For example, they are admonished not to discuss the case, even among themselves, before deliberation begins. They are warned not to read, listen to or watch media accounts of the trial. They are often warned to stay away from crime scenes or other areas that are mentioned in evidence. An interesting insight that emerges from this study is that control of the jury is invariably less than perfect. There appears to be an inclination in jurors to disregard rules and instructions—particularly those that have not been properly explained to them.

Attempts to control the jury were most extreme in the case of the OJ Simpson trial. These attempts may well have been counterproductive. The jury in that trial appeared to be seriously dysfunctional. Two participants, dismissed from the jury, suffered nervous breakdowns involving attempts at self-harm. Some of the jurors became paranoid. Their feelings were probably justified—it is clear that sheriffs’ officers were searching their rooms.

Kennedy tells us that he was summoned to the judge’s chambers. The judge informed him that a map had been discovered in his hotel room. He was warned that it was inappropriate for a juror to undertake their own investigation. However, the juror had an innocent explanation for possessing a map (Kennedy 1995, p. 159). At another stage, Kennedy tells us that he felt a rush of paranoia. He was determined to know if someone was entering his room and placed a thread under his shoes. One day he found it missing. He suspected everyone (Kennedy 1995, p. 162).

In the Scott Peterson trial, John Guinasso (Beratlis et al. 2007, p. 61) commented on the monitoring of the behaviour of the jury. He was often pulled over by a court officer when going to the jury room during a break. He stated: ‘The reasons...
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were various, ranging from looking tired to being too animated with facial expressions while listening to testimony.’

Credibility judgement
A credibility judgement is, of course, a judgement about the extent to which a witness is believable. Jurors and juries must make such judgements because otherwise their task would be impossible. Juror memoirs show how quickly jurors make these judgements and the factors that they tend to rely upon in doing so.

In Burnett's account of the homosexual killing in New York, the jury ultimately acquitted the defendant while clearly disbelieving aspects of his account. The jury was sympathetic to the possibility that the defendant was being less than honest because he was trying to cover up the fact that he had been experimenting with homosexuality (Burnett 2002, p. 146). If so, it was possible that he was still a victim of an assault who had killed another in the course of defending himself.

It seems that credibility judgements can be informed or based upon various considerations. As previously noted, consistency is obviously an important factor. There are instances where determining the credibility of an account is assisted by the sheer improbability of what has been asserted. A good example of that is found in the Black Panthers trial. Allegedly the Panthers had tried to ambush police and opened fire on them. Kennebeck indicates that this account was very difficult to accept since the jury could not understand how Panthers could miss police if shooting at them from a distance of three feet as alleged. The jury also could not understand why no cartridges had been found in the area (Kennebeck 2003, p. 143).

Curiously, there are also examples where the sheer improbability of an account leads the jury to conclude that it is unlikely to have been a lie. Burnett (2002, p. 145) refers to this when he speaks of the sheer improbability of some aspects of Milcray's account and quotes a Tertullian dictum that something is certain because it is impossible.

It seems that jurors are often assisted in making credibility judgements by their knowledge of how people ordinarily behave. Zerman (1977, p. 131) uses this
The use of personal knowledge and belief by jurors and juries

approach when assessing the credibility of an apparent eyewitness to a murder. He states:

At one point I mentioned one of Jennifer’s most astonishing statements: she and Clarissa and Jimmy had never discussed among themselves seeing Ricky commit a crime, not even after their mother gathered them into her car and drove them to the precinct house to talk to the police. ‘What wheels turning in her head could make us think that we would believe something like that?’ I asked, rhetorically.

We have already seen, in the Capano trial memoir, an example of a witness being accorded a high degree of credibility because of his status as a corrections officer.

Sometimes, when determining credibility, a juror asks themselves how good their own memory would be in similar circumstances. This approach is often used in the Capano memoir (Carter 2000, p. 278). There was an issue as to whether a globe was installed into a pre-existing fixture. The witness claimed that he remembered this job despite doing one hundred since. The writer accepted this.

Based on my own working experiences, I remember a lot of the things I have done. I remember the problems I have had when designing and testing hot mix paving products or stone products and the individual customers who have had either special requests or complaints, so the notion that someone may remember a job based on a problem at that job site is not a farfetched one.

Jurors also look for motives to lie. Lesly (1988, pp. 88, 276) stated:

…it was clear that Canty was not going to give any testimony about what really happened. He had a $5 million civil lawsuit against Goetz. That in itself was a reason why he could not be trusted to tell the truth.

Interestingly, the subway gunman jury established a rule to apply before discounting a witness. They would need to identify a motive for lying or else have reason to believe that the witness had memory problems.

**Culture**

A court of law, like any other institution, has its own culture that is manifested in a variety of ways and at a variety of levels. Its rules are part of the culture. Jurors often question aspects of this culture and highlight ways in which they believe that aspects of the culture impede them in their task. Jurors often appear to be perplexed by aspects of the culture—particularly the exclusionary rules of evidence. In any criminal trial, past offending or misbehaviour by the defendant is a closely guarded secret. It is only to be disclosed to the jury in exceptional circumstances. Burnett notes that juries find this rule infuriating (Burnett...
The use of personal knowledge and belief by jurors and juries

2002, p. 71): ‘I was being asked to decide if someone did something to someone else. How could the nature of either someone be off limits?

Zerman voices concern about another ruling (1977, p. 66). He states:

But I'm disgruntled by one of the judge's pronouncements: while hearing testimony, the jury is not to be shown any of the evidence introduced by either side. Only after we begin our deliberations will we be permitted to examine exhibits.

Jurors frequently express their frustration at having to take a passive role in a matter in which they are the ultimate decision maker. In the death penalty case, a juror named Peggy expressed the concern that she was not able to talk first-hand to witnesses.

A female juror in the Angela Davis trial found aspects of the jury's treatment by the judge to be quite insulting. She observed (Timothy 1974, p. 79):

I was perfectly capable of deciding for myself what I should refrain from reading. The arbitrary assumption that I and my fellow jurors were not able to maintain our intellectual integrity if we were exposed to inflammatory statements in the press was almost insulting. Where did the courts think we had been for the first twenty, thirty or even fifty years of our lives?

The same juror makes a highly pertinent comment as follows: ‘...that sometimes court processes are so formalised that the purpose of it becomes lost in the routine. (Timothy 1974, p. 125)

Timothy (1974, p. 125) also saw aspects of the system as being sexist and observed:

In the courtroom, the roles of women were few and strictly secondary. These included court reporters. The female attorneys did not utter a single word during this part of the trial, at least in the presence of the jury.

Of course, this book was written almost forty years ago. There is no doubt that female participation in the judicial system is far greater in 2010 than it was in 1970.

Interestingly, juries sometimes rebel against the more restrictive aspects of the culture. In this sense, they develop their own counterculture that appears to be subversive to the larger culture in which they are immersed. In the subway gunman trial, Lesly (1988, p. 218) tells us:
Even though no talking was allowed, there still was a certain amount of communication going on through our contact and even hand signals at times. We took turns playing the roles of the people who had been on the train; and I remember, for instance, sitting in the Cabey seats with another juror—Bob Leach, I think—came up and pointed his finger at me, portraying Goetz. I then demonstrated to him how I thought Cabey might have twisted in the seat to receive the bullet at the proper angle.

Denied the right to talk, the jurors communicated via hand signals. In the London kidnapping case, Grove (1998, p. 151) echoes sentiments expressed by Burnett. He says:

> It is clear that jurors feel and express considerable frustration at some of the restrictions that are placed upon them. They are particularly concerned about being denied the opportunity to hear evidence which, common sense tells them, would greatly assist them in their task of determining trial issues. They resent being treated like children. They become very frustrated at delays when the reasons are not properly explained to them.

The memoirs were written over a period of approximately fifty years and in various jurisdictions. Aspects of the legal culture have changed in all jurisdictions over that time. In particular, there is now much greater focus on assisting jurors, for example, by encouraging them to take notes and issuing them with comprehensible instructions. However, other restrictive aspects of the culture are unchanged.

**Decision—when made**

The timing of individual decisions is, it seems, a factor of interest and significance. There is clearly no general rule as to when individual jurors reach a decision about the case. From the memoirs, it seems that some jurors make up their mind before the deliberation phase. Others are quite undecided when they reach that phase. Burnett observes that when he left the courtroom at the end of the evidence, he was undecided about the case and felt that to be quite strange. It seems likely that, in Jack Ruby’s trial, all of the jurors entered the deliberation phase persuaded of his guilt. None of them wanted to discuss the issue of insanity which was the only issue relevant to guilt.

**Deliberation effort**

The effort that goes into deliberation varies significantly from one trial to the next. It is clearly related to deliberation time. Burnett’s jury deliberated over a period of four days and was sequestered for that period. The deliberation
involved extensive discussion of the issues. The jurors made full use of the opportunity to personally view exhibits. They did re-enactments of the fight scene. In the course of deliberation, the jury tangled with some very complex philosophical issues including the difference between law and justice. They also considered the possibility that they could disregard the law and render a verdict that accorded with their own notions of justice.

In his account of the Capano trial, Carter indicates that when the deliberation phase commenced, he was determined to take his time and give thought to the issues. Other jurors were of a similar mind. They appear to have eased themselves into the task of deliberation by starting out with fairly loose and unstructured discussions about the evidence.

Many juries approach the task of deliberation methodically. They write out issues to be discussed on boards or large sheets of paper that are posted in a position where they can readily be seen. In one death penalty case, a juror recounts that the jury filled up many sheets of paper that listed both mitigating and aggravating features of the offence.

In the Menendez Brothers trial for the murder of their parents, the jury deliberated for one-hundred-and-six hours without reaching a unanimous decision. Because the jury was deadlocked, indeed divided along gender lines, the judge was forced to declare a mistrial.

In the Jack Ruby trial, after hearing weeks of evidence, including a great deal of highly technical psychiatric and neurological evidence, the jury deliberated for only two hours and twenty minutes. There was no discussion of the defence of insanity. This is very surprising since it was really the only issue before the jury. Causey’s account makes clear that none of the jurors were able to take seriously the contention that Ruby suffered from a rare form of epilepsy causing him to act like an automaton. Most of the period of deliberation was spent determining whether Ruby should be sentenced to death. The jury agreed that this was the appropriate penalty after a surprisingly short period of time.

**Deliberation style**

The existing literature acknowledges two styles of deliberation. The first is verdict–driven and starts with a vote. The second, and much preferred style, is
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evidence-driven. Avoiding an early vote, jurors discuss the evidence without committing themselves to any particular position on the verdict itself. This leaves them more open to persuasion. Interestingly, this analysis showed a third deliberation style in which the jury initially breaks up. Some of the members go off alone while others separate into groups that examine transcripts and items of evidence. It is a style of deliberation that often leads to significant knowledge discovery. Burnett (2002, p. 102) reports that by examining photographs, members of the jury realised that some evidence given to them was not credible. He stated:

Those watching the video on the TV noticed that unless the door of the apartment was fully open, it was not possible to see the futon. This threw doubt on Nateesha’s testimony that she saw the defendant on the futon when she was in the hall and Cuffee was in the doorway. It did not seem possible.

Burnett’s jury adopted the third approach that included jurors re-enacting the fight. The re-enactments resulted in some people changing their minds about the defendant’s credibility. One juror conceded that nothing the defendant had said was strictly impossible.

Carter (2007, p. 304) also described this third style of deliberation. He indicated that the Capano jury broke up into small groups:

Mariah and Kate began with the diary and planner of Anne Marie Fahey, Henry and Hal were working with the Beretta pistol and would later ask some of the ladies to dry fire the weapon (once again understanding this was not the actual pistol allegedly used) and I sat with the jury book utilising Connolly’s method of noting the page number and the amount of lines up and down to get to the part of the document that I wanted to discuss.

Apparently, this relaxed approach appealed to the jurors. Carter (2007, p. 304) states:

There was plenty of time and I was not going to discuss how I felt at this point. I wanted to read some things again and look at the other evidence again. It was easy to tell the other jurors felt the same way about examining the evidence. Still, we conducted ourselves fairly loosely that day, throwing out ideas and questions in a random manner, we began discussing the believability or lack thereof of Deborah McIntyre and Gerry Capano, and it went on like that for a while.

On the second day of deliberation, the foreman expressed the view that they should be more disciplined in their approach. However, this did not mean that
they had to start deliberating as a single unit the whole time. Carter indicates that he continued to focus his attention on reading the victim’s diary.

In a death penalty case, the jury commenced by agreeing on a set of norms or rules to govern the deliberation. One member of the jury was appointed as a recorder. The juror’s task was to maintain two sheets of paper. One sheet listed aggravating factors while the other listed mitigating factors (Sundby 2007, p. 20).

In the Jack Ruby trial, the jury deliberation was verdict–driven. Indeed, on the issue of guilt, there was no discussion of the evidence. However, when the deliberation commenced, the foreman stressed the solemnity of the jury task to the jurors. He asked for several minutes of silence to allow jurors to search their own minds and seek divine guidance. The foreman then wrote down a list of the main issues as he saw them and asked for feedback as to whether anything had been omitted.

In the Scott Peterson trial, the jury deliberation commenced rather informally with a discussion of inconsequential things such as the way that the lawyers had dressed. When formal deliberation commenced, it appears to have been quite methodical. A master list of issues to be discussed was created. Individuals were given two minutes to talk about an issue. One juror, John Guinasso, monitored the deliberation to ensure that there was no breach of the rulebook. The writer observes (Beratlis et al. 2007, p. 139):

> Guinasso monitored the jury rule book. One of the most important elements of the guide, that he enforced strictly, was only discussing trial evidence and not outside matters or thoughts. Eventually this caused conflict between him and Jackson.

In the subway gunman trial, the judge spoke to the foreman and made suggestions about how deliberation could proceed. As to the rules, Lesly (1988, p. 271) explains:

> First, there was to be no speaking out of turn. Whenever someone had something to say, the person would have to raise a hand and wait to be recognised by the foreman. There also was to be no talking unless all were present. Discussion was suspended whenever someone had to visit the lavatory or for any other reason had to leave the room. We followed both of these rules carefully throughout.
The jury proceeded very methodically, considering the charges in order (Lesly 1988 p. 272). There was some initial disagreement as to whether votes should be taken openly or secretly. In the end, the jury favoured open voting because it was time efficient.

A very interesting feature of the deliberation in the subway gunman trial was the initiative shown by a juror who managed to ease tensions. This paved the way for a unanimous verdict on all counts. The central issue in that case was whether Goetz had acted reasonably in using deadly force against four young men who demanded money from him in a train carriage. According to the judge’s instructions, the jury had to consider what a reasonable man would have done in Goetz’s position. According to the writer, some jurors appeared to have difficulty in thinking about a reasonable man. One juror, who by profession was a graphic artist, created a paper figure of a character whom he called William Reasonable. He also created figures representing the other protagonists. According to Lesly (1988, p. 299):

He introduced the figure as William Reasonable. The figure had a sad mouth. He then cut out four other figures that he called Unreasonable numbers one to four. They had angry threatening expressions. He stuck the figures with chewing gum onto a plastic covering on the subway chart. He then replayed his interpretation of what had happened from beginning to end. It was done in a deadpan, humorous way, eased tensions, and got everyone smiling. Moseley’s argument was also persuasive, because he played out the entire scenario. All the evidence had been piecemeal.

**Diligence**

Individual jurors vary enormously in their degree of diligence. The memoirs revealed examples of individual jurors who acted irresponsibly—at times refusing to engage in the process of deliberation. However, most jurors were extremely diligent in the way that they discharged their obligations. Some wrestled obsessively with complex legal and indeed ethical issues. Burnett (2002, p. 129), reporting on the approach of one juror, stated:

Adele indicated that she had stayed up late the night before wondering about the connection between law and justice. Her thrust was that if the law did not achieve justice, then why should it have any force? Her loyalty should be to justice.

The juror, Felipe—who enraged Burnett—told the other jurors in the course of the deliberation that he wanted to leave and would vote either way to achieve that (Burnett 2002, p. 140). Burnett also observed that another juror appeared especially anxious to reach a verdict. He discovered that she had a wedding shower that evening.

Kennebeck made lengthy notes each evening (Kennebeck 1973, pp. 125, 200). His diligence is manifest in the following passage:
As I typed my notes at intervals that evening in my apartment, I brooded over this culmination. I was not logically ticking off evidence and counter evidence; I was in an emotional stew, a kind of baffled despair. It didn't matter that the defendants, some of that diverse bunch, may have had unlovely records. They hadn't conspired to commit all those crimes, we had heard no proof at all that they had done any of the things that the mysterious grand jury had accused them of.

In the Capano trial, Carter (2000, pp. 42, 69, 136) tried to remain focused by watching witnesses carefully and moving about in his chair. He thought it important to pay very close attention knowing that something said in evidence could be refuted during cross examination. The same writer found that while walking he was mentally replaying the testimony in his mind and asking himself how credible the various witnesses were. He was particularly concerned that some witnesses may have made deals with the prosecution and this could limit their credibility.

Timothy reported that jurors made pacts with each other that they would poke one another if there were any sign that the other person were falling asleep (Timothy 1974, pp. 69, 101). The same writer, having failed to notice a small discrepancy in some testimony, chastised herself and decided to question and analyse every statement made in evidence.

Kennedy, an OJ Simpson juror was intent on taking everything in—like a sponge. For that reason, he started taking copious notes (Kennedy 1995, page 140). He also made a point of watching OJ Simpson's reactions in the courtroom.

In the Peterson trial (Beratlis et al. 2007, p. 14), juror Belmessieri's commitment is obvious. He said:

I reminded myself of the core values that I learned as a marine—Honor, courage, commitment—and how they applied to the trial and my part in it. I wanted to do nothing less than the right thing for the right reasons. There was no way that I would want to find an innocent man guilty of the murder of his wife and unborn son. It would be the greatest injustice I could ever imagine. I could never live with myself.

Overall, there is considerable evidence that people selected to be jurors are diligent. The literature discloses several exceptions but these appear to be extremely rare.
Done that
Sometimes jurors gain insight from things they have personally done. In the Capano memoir, Carter refuses to attach any significance to evidence that a major prosecution witness has been spending a lot of money. He notes that he and plenty of other people spend money foolishly. Whatever money the witness, Gerry, spends has no bearing on his testimony (Carter 2000, p. 100). Carter also contemplates the tendency to misjudge people (2002, p. 306). He surmises:

Most of us have probably been taken in at least once in our lives by a person who turned out to be completely the opposite of what we expected, perhaps at the cost of emotional pain, cash, possessions and in retrospect we would say that we should have seen it coming, but we did not because of feelings of love, loyalty devotion.

In the Menendez Brothers trial, the prosecutor tries to establish that one of the defendants used a credit card to pay for an inexpensive phone call. The prosecutor claimed that he did this to help establish an alibi at a particular time. Based on personal experience (Thornton 1995, p. 32), the juror rejects the suggestion:

...one thing Bozanich keeps insisting is that the reason Lyle used his Sprint card to call Gary Berman from the Santa Monica Civic Centre is so there would be a record of the call. He says he wasn't trying to establish an alibi that he always used to Sprint card even if for local calls. This is a small, but not insignificant, detail which I am taking personally; I, too, use my calling card at payphones, even if it's only a $.20 local call! Sure it costs more — I am paying for convenience.

Drawing conclusions during the trial
The extent to which jurors make decisions as the evidence unfolds and the extent to which they maintain an open mind is highly variable. This seems to be the case even though the jurors are admonished not to reach any conclusions until the evidence phase is finished. Kennebeck makes it very clear that he decided the prosecution case against the Black Panthers was baseless as it was unfolding (Kennebeck 1973, pp. 128, 192):

I got uptight and angry not so much at the quarrelling as the nonsense that it seemed to me the State of New York was asking us to swallow.

And yet Kennebeck asserted that he was able to maintain an open mind:

Of course I have to reserve judgement until I hear the DA; and even at this stage I can honestly say that I frankly sincerely patriotically dutifully think that it is fairly possible that he will pull all his bits and pieces together into a
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sharp picture of conspiracy. Maybe there is something bigger there that has escaped my busy mind. There must be something that enables him to believe, still, that he has a case.

Carter (2000, p. 223) observed that he was:
...pleased when Tom Capano was called, because the situation could go either way. He had come across as a manipulator, e.g. in his letters, but that would not mean that he was a murderer.

However, there are instances where the conclusions reached by jurors are so strong or so damning that they would appear to be determinative of the way that the juror will ultimately vote. Belmessieri—when listening to tapes of Scott Peterson talking to his mistress—concluded that he was a chameleon and a sociopath (Beratlis et al. 2007, p. 106).

Duration
Some of the trials were indeed lengthy. The Black Panthers' trial commenced in October 1970 and ended in May 1971. The Menendez Brothers trial lasted for six months. The OJ Simpson trial ran for ten months. There is no doubt that lengthy trials are extremely taxing. It is clear from the literature that long trials place extraordinary demands upon jurors.

Education level of jurors
It is often suggested that average jurors are ill equipped to assimilate and assess complex evidence, particularly when that evidence is given by scientists or forensic accountants. The educational level of jurors is an interesting variable.

A disparity in the education level of jurors can cause tension. But there are also instances where the major conflict appears between persons with a similar high level of education. Burnett was a professional historian. By a strange coincidence, a fellow juror was also an academic historian. She held out for a guilty verdict whereas Burnett argued consistently for acquittal. The debate between them became abstract and philosophical. One issue they canvassed was the distinction between law and justice. Another was the supposed right of a jury to engage in nullification and render a verdict that ignores the law but accords with the jury's fundamental sense of what is just.

Friction also emerged in the jury that heard the Scott Peterson case. The first foreman had qualifications in both law and medicine. In different circumstances, one can imagine that a person so qualified could have greatly assisted the jury in
deliberation. This foreman alienated the less well-educated jurors. A large part of the problem was his pedanticism. But he also clashed with another jury who insisted that he should not supplement the trial evidence by relying upon his own expert knowledge of medicine (Beratlis et al. 2007, p. 139):

Jackson then turned to the topic of the medical evidence of Doctor March. He believed this witness could exonerate Peterson. The others found this confusing because the witness had imploded on the stand (Beratlis et al. 2007, p. 142). The friction between the foreman, Jackson, and the others became so strong that he ultimately asked to be excused. In due course, he was discharged on the ground that he admitted discussing the case with a fellow juror before the conclusion of the evidence (Beratlis et al. 2007, p. 154).

In the London kidnapping case, Grove tells us that only two of the jurors had attended university and a few read newspapers regularly (Grove 1998, p. 16). In contrast to the jury hearing the Scott Peterson case, this jury was very happy to utilise the specialist knowledge possessed by its members. The oldest member of the jury was a retired educational psychologist who was a doctor of philosophy. Grove tells us that his specialist psychological knowledge proved to be a great bonus to the jury when it started deliberating (Grove 1998, p. 49).

**Emotional reactions**

Jurors experience strong, and at times damaging, emotional reactions in long and arduous trials. The literature suggests that emotionality is an interesting category or variable. It posits that the extent to which a juror is emotional affects their capacity to proceed upon rational lines of deliberation.

In the trial of OJ Simpson, two of the jurors who were ultimately discharged, suffered nervous breakdowns and engaged in self-harming behaviour. Admittedly this would represent an extreme reaction. One of the female jurors in Scott Peterson’s trial suffered multiple breakdowns after the conclusion of the trial.

Burnett recalls that he cried as he left the court at the end of the trial (Burnett 2002, pp. 12, 128). In same trial, a juror threw a tantrum when the other jurors would not agree to listen to a reading of large segments of the transcript. Another juror in that trial became hysterical—screaming at the court officer and weeping.
There is a surprising number of instances of the jurors developing paranoid reactions. In the Black Panthers’ trial, Kennebeck suspected that his home phone was being tapped (Kennebeck 1973, p. 108.) Other jurors came to suspect that there were dossiers on them. In the trial of OJ Simpson, Kennedy came to suspect that his room was being searched. It ultimately became plain that this was correct.

During the Capano trial, Carter, standing at a bus stop, started to wonder whether he was being watched. He queried whether his participation in the trial had caused him to become paranoid (Carter 2000, p. 88). In the Scott Peterson trial, a female juror cried after participating in an experiment to see whether she could fit into a cooler in which the victim’s body had been placed. She and other jurors realised that the victim’s legs must have been broken to get her into the confined space and this realisation caused great distress.

In one death penalty case, the jurors agreed on a rule that if emotions got out of hand during deliberation they would break for five minutes (Sundby 2007, p. 12). One juror, Peggy, who was more sympathetic to the defendant than the others, was on the verge of a nervous collapse. She was suffering from fatigue and depression. She found herself wandering around a supermarket in a daze and ultimately agreed to return a verdict that the defendant should be executed for his crime. After the verdict was delivered, she quickly came to regret her agreement, even trying to make contact with the judge so as to express her dissent (Sundby 2007, pp. 98–9). After the trial, she was suffering from insomnia and depression. Ultimately she sought counselling and eventually regained her mental balance.

Jurors who feel under pressure—or who are emotionally distraught, during deliberations—often retreat to the bathroom.

During the trial of Angela Davis, Timothy believed her telephone was being tapped. So did another juror (Timothy 1974, pp. 45, 100, 109). The same writer indicates that she suffered from nightmares for a period of up to ten days during the trial. At a later time, she came to believe that the FBI had been targeting her son because of her involvement in the trial. She thought the FBI was sending her a message that her children were vulnerable.
John Guinasso observed that as the Scott Peterson trial progressed, all of the jurors were breaking down emotionally and physically (Beratlis et al. 2007, p. 194). After the trial, he enquired about the availability of a counsellor only to be told that the court did not offer this service.

**Exhibits**

Jurors are entitled to examine exhibits once they are tendered in evidence. There are many examples in the memoirs of jurors discovering things from their examination of exhibits. Jurors quite frequently seemed to discover new relevance for exhibits. Exhibits were particularly important in the trial of the Black Panthers. Introduced into evidence by the prosecution, it seems that many of them undermined the prosecutor's case. According to Kennebeck (1973, p. 62):

> I pulled the sword out of its sheath and ran the edge carefully along my wrist. It was blunt; so was the tip of the blade. Couldn't have been used for tenderised shish kebab. Cripes, Mister Phillips—this is a Black Panther revolutionary conspiratorial weapon? That's what I didn't say, didn't even let my face show.

At another point, jurors noticed that rounds given to them with a weapon were blanks. A detective was recalled to qualify his previous evidence that the gun was found to be loaded.

Jurors appear to be very keen to make their own examinations of exhibits and to draw their own conclusions from them. In the trial of the Black Panthers, much literature found in the possession of the defendants was introduced into evidence. This was supposedly to bolster the case that they conspired to commit acts of violence. When a newspaper of a radical kind is introduced into evidence, Kennebeck (1973, p. 64) is properly cautious in not drawing hasty conclusions about it:

> I was not a court buff or a student of law, but I knew that when you found printed matter in someone's home you didn't take it for granted that he had read it or read all of it. You also don't take it for granted that, if he had read it, he agreed with it. So I decided to go through the newspaper from front to back.

The jury listened to tapes of conversations among various defendants. The writer was unable to discern any conspiratorial intent from them. Kennebeck (1973, p. 82) stated:
It seemed to me just wild talk, some of it inspired by the Battle of Algiers and other sources. Wild talk, bad blacks tossing around threats and insults. Playing the dozens with the forces they thought were oppressing them.

In the Capano trial, Carter made significant use of written materials that had been introduced into evidence. He spent much of the first day of deliberation examining a journal kept by the victim. He also examined letters and emails. From these materials, Carter was able to draw useful conclusions about the personalities involved in the case. He finds significant indicators that the defendant is a manipulative character. For example, at one point Carter (2000, p. 188) notes:

\[
\text{... strange that the defence brought out emails that seemed to prove controlling behaviour. What comes out in the emails is someone who harangues, whines, cajoles or compliments and proclaims to love whoever he is communicating with, to get his way, which is not criminal, but must be annoying as hell.}
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**Expert evidence**

The memoirs disclosed a range of responses to expert evidence. The responses ranged across the entire gamut from great respect to near contempt. Invariably, jurors scrutinise the possible motives of experts. At times, expert testimony is dismissed in a contemptuous manner.

There are numerous examples of juries rejecting expert evidence. There are also examples showing juries can and do think about expert opinion in an analytical and critical way.

In Jack Ruby's trial, the jury completely rejected a large body of expert medical opinion. This expert evidence was called on behalf of Ruby. It was attempting to show that he suffered from a rare epileptic condition that caused him to act in an involuntary way. What is most surprising about that particular jury deliberation is that no member of the jury wanted to discuss the issue. It appears that all jurors had privately reached the same conclusion. Admittedly they had also heard a large body of medical evidence opposing the defence view.

In the Capano trial, a psychiatrist called by the prosecution was unable to point to any material objectively establishing that the victim had feared the defendant. Carter (2000, pp. 47, 44) notes:
Under cross examination, the Doctor was unable to find any threatening emails from Capano to Fahey. The longer he looked, the more his credibility faded. Carter decided to discount aspects of the doctor’s evidence that were not supported by his notes.

In a death penalty case, one faction of the jury was particularly critical of a psychiatrist called to give evidence. They characterised him as a hired gun who would give evidence to assist the highest bidder.

In the Scott Peterson trial the jury heard conflicting evidence from two medical specialists. The victim had been pregnant at the time of her death. The prosecution used the age of the unborn child at that time to try to establish the approximate date upon which mother and child had died. The jury reacted most favourably to the evidence of the prosecution medical witness. His evidence was described as cut and dried. Conversely, the evidence of the defence expert was significantly undermined when it appeared that he had made an incorrect assumption about the likely date of conception. The defence expert, Doctor March, was described as imploding in the witness box. Juryman Beratlis said that the implosion of this expert witness caused the defence to lose all credibility. Everything pointed to guilt (Carter 2000, p. 127).

**Exposure to information before and during trial**

A significant feature of trials in the United States is an attempt to select a jury uncontaminated by exposure to relevant information before the trial. American trials are often characterised by a very lengthy pre-trial procedure in which attorneys for each party get an opportunity to question potential jurors.

Depending upon the answers given, objection may be made to the participation of a juror. Invariably, potential jurors are asked about their existing knowledge of trial issues and whether they feel that they have been prejudiced by pre-trial exposure to this. Carter, when selected for the Capano trial admitted, when questioned, that he had read media coverage of the case. He further admitted that if you can believe what you read in the media, then Capano was probably guilty (Carter 2000, pp. 27–8). But he added to this by saying that there was no reason why he could not give the case his undivided attention and render a fair
and impartial verdict. He also acknowledged that he had no objection to the imposition of a death penalty.

In the Menendez case, potential jurors were required to fill out a four-page questionnaire exploring their knowledge of the case (Thornton 1995, pp. 3–4). The writer says that she had learned about the case from reading a People magazine in a dentist's rooms. Thornton also talks about the difficulty of avoiding all media exposure when a trial has become the focus of significant public attention.

In all cases, of course, the judge gave jurors constant reminders of the need to avoid exposure to media accounts. These reminders included their obligation not to discuss trial issues with anyone until deliberations began.

**Expression of emotion by witness or party**

Jurors pay close attention to the emotional reactions of witnesses and parties. They also constantly question whether the reaction, or lack of it, is consistent with the position that the witness or party wants them to believe. In the London kidnapping case, the prosecution presented the victim as a man who had endured a violent kidnapping. The defence was that the alleged victim and the defendants had faked the kidnapping to get money from the victim's wealthy family. The jury was shown a video of the victim at the time of his release and for obvious reasons showed interest in his perceived reaction. Grove (1998, p. 63) describes his thinking in the following terms:

> And George: was his demeanour as shown in the video really that of the newly released kidnap victim? Shouldn't he have been crying or breaking down or something, rather than smiling and composedly asking if someone had telephoned his mother? There was much uninformed speculation on this score.

In the trial of the subway gunman, Lesly appeared fascinated by video and audio recordings of interviews with the defendant in which the defendant appeared to display two contradictory sides of his personality. At times he appeared to be full of rage and at other times he was contrite and full of self-loathing. For example, the defendant's demeanour appeared to change suddenly when confronted with a female district attorney (Lesly 1988, p. 153).

Sometimes, jurors are unable to decide what lies behind a particular reaction. In the Capano trial, Carter notes that a witness appears to be stunned when reading
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a letter while giving evidence. But he concedes the possibility that she is simply sluggish and having some difficulty reading cursive writing. A two-stage process is evident in a lot of the reminiscences. The juror observes an apparent reaction or emotion but questions whether their perception is accurate. Having identified a particular reaction or emotion, they ask whether that is to be expected or look for some explanation of it.

Jurors often query why a witness appears to be nervous or ill at ease. In the account of the subway gunman trial, Lesly (1988, p. 72) stated:

Smithern was so nervous and uncomfortable on the stand that I never believed she was lying to seek some measure of fame and fortune. I felt she was trying to cooperate and was doing her best to recall what she had seen. She really just seemed to have a lousy memory. She could not remember, for instance, from what station she had entered the subway that day.

Eyewitness account

The memoirs show that juries are capable of discounting eyewitness accounts.

Jurors often considered the factors that might render eyewitness testimony unreliable. This was particularly evident in the subway gunman trial. The shooting of four victims occurred in a railway carriage in the presence of numerous passengers some of whom were witnesses. Lesly noted a general problem with eyewitness testimony. The problem was that—although everyone had seen something—there was no one who had witnessed the entire incident from beginning to end (Lesly 1988, pp. 103–4). He sagely observes that the eyewitnesses could provide pieces of the puzzle but it was left to the jury itself to assemble those pieces into a picture. In that case, in determining what weight to accord eyewitness testimony, Lesly carefully assessed the internal consistency of a witness account and its consistency with other evidence. For example, if a witness account was riddled with contradictions, it could not be regarded as reliable. If the account, although not self-contradictory, was contradicted by a large body of other evidence, then that also would be a reason to reject it. The writer also thought about whether a witness would have any motive to lie. For this reason, he discounted an account given by one of the victims who was intent upon suing Goetz for civil damages. Lesly (1988, p. 162) stated:

Ramseur agreed to give evidence. He was extremely bitter, and in the process of serving up to 25-year jail term. He offered a self-serving version of
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the events surrounding the shootings. He was also suing Goetz — his suit was reportedly for 9.5 million — and that fact by itself made his testimony suspect in my eyes — he had a vested interest in the trial’s outcome and a big incentive to hedge the truth or to lie.

Lesly was prepared to overlook discrepancies in accounts given by the victims at the hospital. He thought that these were relatively minor (Lesly 1988, pp. 169, 286). He was also impressed by the fact that most of the eyewitnesses saw the four victims as a group. This fact, in his opinion, lent support to the defendant’s perception that they had approached him and threatened him as a group or unit. This seemed to make Goetz’s assessment seem more reasonable. The closeness of the individuals did make them a threat.

In the Capano trial, a female witness gave evidence of her observations from her window. Carter attached little weight to what she said. Photographs of the scene strongly suggested that the heavy, thick foliage of a tree would have significantly obscured her view of events.

Fitting facts to verdict category.
According to theory, a most important phase of deliberation consists of fitting the facts to a verdict category. This presupposes that the jury has succeeded in making factual findings. The way in which juries go about the task of fitting facts to verdict categories is significant and the memoirs cast some light on how this can happen.

The Menendez case presents a good example of a jury agreeing that the defendants had acted wrongly and indeed illegally. However, they were unable to find unanimity as to which category of illegality was relevant. As Thornton (1995, p. vii) stated:

A common misperception is that the jurors who did not vote to convict the Menendez Bros of murder wanted them to go free. The fact is that every juror felt the defendants should be held accountable for the killings, and every juror made a decision as to which level of guilt they believed best fit the facts of the case: first-degree murder, second-degree murder, voluntary manslaughter, or involuntary manslaughter. The problem was not that we could not all decide on a verdict; it was that we just could not all agree on one.

The difficulty of finding the appropriate verdict to fit the facts is nowhere more evident than in the death penalty phase of murder trial deliberations. In this phase, the jury does not have to deliver a verdict of guilty; it has already been
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rendered. Nonetheless, the jury has to make a decision about penalty. To do that, it must determine whether the mitigating factors prevail over the exacerbating features of the crime or vice versa. So it still has to put the facts into an appropriate category. Not surprisingly, juries seem to agonise over this decision. The difficulty of the task is heightened by the intrusion of subjective value judgements and problems of interpretation.

In one death penalty case, one juror viewed evidence about a defendant's miserable early life as a mitigating factor calling for mercy. However, another juror interpreted the facts as showing that the defendant did not have sufficient character and moral fortitude to pull himself out of unsatisfactory life circumstances. One group of jurors, described by the writer as the chorus, had a philosophy that acknowledged the existence and importance of free will (Sundby 2007, p. 43). Anyone with such a belief is, of course, likely to resist an argument that a defendant has been a victim of adverse circumstances and forced to follow a particular path in life.

A single juror, Peggy, viewed the defendant with sympathy. A social worker by training, she thought that the defendant’s unhappy life experiences, particularly as a child, had seriously affected him. In particular, she thought that the loss of a brother at a young age had a major and detrimental impact upon his development. She was therefore inclined to believe that the mitigating factors outweighed the factors of aggravation. However, she was in a minority of one and was ultimately persuaded to change her mind.

**Flash of insight**

Sometimes jurors seemed to be assisted by sudden moments of enlightenment.

A death-penalty juror’s son was involved in a serious motor vehicle accident during the trial. He told the jury about his sickening realisation that he could lose his son and not have the chance to say goodbye to him. He pointed out that the family of the victim, who died instantly when shot in the head, had been denied the opportunity of saying goodbye.

Kennedy, when viewing the victim’s home in the OJ Simpson trial, experiences sudden insight into how violent stabbing murders can have taken place without
the neighbors hearing anything. The trees and shrubs in the locality are very dense.

**Frustration with the system**
This category is interesting for several reasons. Firstly, data emerging from other studies of the jury—including juror surveys—demonstrates very high levels of frustration with the judicial system. A common grievance of jurors is that they are inconvenienced, kept in the dark and forced to spend long periods in unproductive waiting. All of the reminiscences showed the existence of such frustration to a greater or lesser extent. This is important if only because it gives one reason to think that the literature has accurately reported the feelings and observations of jurors. In short, it is an indication of validity.

Burnett states that it is perverse to separate admissible and inadmissible facts about the characters involved in the trial. For example, he thinks it would be very useful to know whether Milcray had been previously arrested for shaking down homosexual men. He expresses frustration with the fact that this sort of evidence would only be made available to the jury in the event that the defendant chose to testify. In other jurisdictions, even that would not be sufficient to allow the evidence in. Burnett (2002, p. 71) states, very pithily: ‘I was being asked to decide if someone did something to someone else. How could the nature of either someone be off limits?’

Burnett finds this aspect of the system infuriating and counterintuitive.

He also expresses frustration at some of the fine legal distinctions that he is asked to comprehend without even having the benefit of a pencil to make notes. Burnett states (2002, p. 82):

> ...there was also a degree of scholastic hair splitting. The prosecution introduced two theories of second-degree murder. One was the standard intent theory and another was the depraved indifference theory. If Milcray had acted with depraved indifference to human life, then the jury could disregard intent and find him guilty of murder in the second degree.

He says (Burnett 2002, p. 82): ‘These are fine distinctions, the sort that Thomistic quibblers love.’
Jurors frequently complain about the court's failure to explain to them what is happening—particularly during periods when they are forced to wait in the jury room. Burnett refers to the court 'keeping us hazy'.

Kennebeck talked about the strain of not being able to discuss the evidence with anyone in the Black Panthers trial. This was particularly frustrating because of his personal view that much of the prosecution evidence held little weight.

It is common for jurors to complain about the tedium associated with long trials. Kennebeck (1973, p. 109) says that there were hours of tedium during which one or more jurors might be inclined to nod off.

Zerman expressed his frustration at the judge's ruling to the effect that jurors could only examine exhibits during the deliberation phase instead of when they were introduced into evidence. He makes a highly pertinent observation that jurors are most interested in seeing exhibits when they relate to evidence currently being given.

In one death penalty case, Sundy (2007, p. 166) noted:

> Jurors could be particularly frustrated by refusals of common sense requests, such as requests for copies of transcript. Jurors felt they were being treated like children while at the same time being asked to decide whether someone should live or die.

Timothy refers to her boredom during the jury selection phase. Since potential jurors were interviewed individually she was forced to endure a fortnight of waiting (Timothy 1974, pp. 17, 80). She also expressed her irritation at the judge's warning that the jurors could not read media accounts et cetera. Her own view was that she was perfectly capable of deciding what she could and could not read. She says, in effect, that the legal culture is silly in maintaining a belief that jurors cannot distinguish between evidence and media interpretations of the evidence (Lesly 1974, p. 80).

Lesly (1988, pp. 97, 176) noted that jurors became angry with the prosecution because they felt they had been forced to endure useless testimony. Indeed, some victim testimony was later stricken from the record. Grove, when discussing delays in the London kidnapping case, says that the judge would sometimes give them a rough idea of the cause of a delay. But usually he would not. He found it profoundly irritating. According to Grove (1998, pp. 53–4, 117):
...when I learned after the trial about some of the hair-raising stuff that had indeed been discussed in our absence, it merely confirmed the suspicion that a British trial is not always the quickest or surest way to arrive at the truth, even if it is the fairest.

Grove also noted anger at the fact that information was withheld from the jury:

I have yet to meet a single former juror who does not feel mildly outraged that such significant information is withheld from juries until after the verdict.

The consequence is that juries are required to judge the honesty of defendants without the aid of vital knowledge, that every day we all use in weighing someone up—what is this person really like, what is his or her history.

Gender
There has been a preoccupation with gender amongst social scientists who study jury behaviour. The memoirs showed one very striking example of a jury dividing along gender lines. This was in the Menendez trial. There was evidence of the past sexual abuse of the defendants by their father whom the defendants had shot. The female members of the jury, unlike their male counterparts, accepted that fear could drive a victim of sexual abuse to commit a murder.

Jurors themselves are conscious that females and males may have different knowledge and perspectives. Carter was interested in ascertaining the views of female jurors as to whether they would submit to the demands of a male lover to keep a relationship going.

Timothy perceived an element of sexism in the running of the court. She noted, for example, that there were few women participants and that those few filled subordinate roles—such as the role of court reporter. She also makes the cryptic comment that the court was run by men who had long ago worked out how to make a trial run with the minimum of conflict. But, she added that male dominance did not extend to the jury room. Chauvinist behaviour was quickly pointed out, as was racist behaviour or comment (Timothy 1974, p. 126).

Grasp of trial issues
A jury’s effectiveness demands a good grasp of the trial issues—both legal and factual. The memoirs reveal that individual jurors vary significantly in their capacity to grasp such issues. This is hardly surprising given the variability of cognitive ability in any juror population.
Juries understand factual issues much better than they grasp legal issues. The latter are often explained in obscure language and not properly clarified when clarification is requested. Kennebeck (1973, p. 220) noted the judge's instructions that possession of explosive substances:

...constitutes presumptive evidence that said possession was with the intent to use the same unlawfully against the personal property of another. He explained further: we can't find someone guilty of possessing explosives unless we decide that he intended to use them against someone; but as Lewis Carroll might be fascinated to know, the fact that the culprit possessed the stuff allows us to presume that he intended to use it criminally. It seemed to me to be a sticky roundabout: a viscous circle. I wondered whether our presumption couldn't cover other possibilities, eg showing off, demolition.

Timothy (1974, p. 100) says that the indictment of Angela Davis for conspiracy was too complex to take in at one sitting. She was overwhelmed by the amount of information that she had to assimilate and suffered from nightmares.

In his account of the London Kidnapping Trial, Grove (1998, p. 141) refers to the difficulties arising from the joint trial of several defendants. In their minds, the jurors would have to distinguish one defendant from another. Such a task, of course, can become exceedingly difficult when jurors have to decide between varying degrees of admissibility for the same evidence. The evidence could be declared to be admissible as against one defendant but declared inadmissible as against another or others.

**Hardship and comfort factors**
The literature revealed factors that jurors perceived as creating hardship or increasing comfort. Many jurors are concerned about the economics of jury participation because not all employers continue to pay wages while their staff are serving on a jury. The allowance paid by the court is generally meagre.

John Guinasso, was forced to continue working throughout the course of the Scott Peterson trial because his employer would not continue to pay his wages. Working nights, he suffered from exhaustion as the trial progressed because he was only sleeping for a couple of hours on trial days. His request to be discharged was refused. The total remuneration provided by the court was fifteen dollars a day plus a ten-dollar allowance for travel. In contrast, Carter's (2000, p. 22) employer was prepared to pay his wages until the Capano trial finished.
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Jurors can react badly to the emotional impact of the trial, to the physical conditions that they are forced to endure, and to the perception that they are being controlled. Carter (2000, p. 74) found it difficult sitting in a confined space where he suffered from shortness of breath and feelings of panic.

Timothy (1974, pp. 47–8) reported that her jury turned the jury room into a comfortable, even a homely, place. She says:

Jurors’ facilities were made comfortable, with comfortable chairs, tables. Jurors brought in coffee, food etc.

They all chipped in to buy a fridge. They brought in games, books, and magazines. An astrology book gave them the chance to discuss themselves.

Attempts to control the jury appeared to be excessive in the trial of OJ Simpson. One juror reported that the jurors were treated like criminals. Deputy sheriffs were trying to monitor personal conversations. They were continually issuing rules of conduct. One juror had to be discharged when she told the judge that she could not take it any more. After her discharge, she was hospitalised and treated for depression (Kennedy 1995, p. 81). Yet in the same trial, the judge arranged various entertainments for the jury—including a piano recital by famed pianist Roger Williams, and a showing of the film Philadelphia. In that case, jurors were allowed conjugal rights visits.

Hardship experienced by jurors

Burnett (2002, pp. 121, 154) reports that a fellow juror, named Pat, was running out of a prescription drug and appeared to become more volatile as time went on. Eventually Pat became ill and had to be taken to the hospital.

The experience of the social worker in the death penalty case, was clearly harrowing. Enduring significant emotional pressure from another juror, she eventually succumbed and agreed to the death penalty. But when the agreement was reached, she was in a state of emotional exhaustion (Sundby 2007, p. 93). Almost instantly regretting her acquiescence in the jury’s decision, she tried to contact the judge after the trial. She suffered from depression requiring psychological counselling.

Sometimes the physical discomfort of sitting in the jury box for long periods is a major problem. In the Scott Peterson trial, juror Greg Beratlis was in agony from back pain. As an analgesic, he consumed vodka (Beratlis et al. 2007,
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pp. 146, 212). In the same trial, juror John Guinasso said that all of the jurors started to break down emotionally and physically. His attempt, after the trial, to obtain some counselling arranged by the court was not successful. Fellow juror Richelle Nice suffered two nervous breakdowns after the trial.

**Interest in the trial**
The writers maintained a high level of interest in the trials that they participated in. Without that, they would hardly have bothered to commit their experiences to writing. However, it is obvious from their observations that some other jurors had very little interest. Indeed there are several instances where jurors were so disinterested that they refused to participate meaningfully in any deliberation.

In the Capano case, Carter (2000, p. 136) reported that he would repeat testimony in his mind as he walked. He asked himself questions about witness credibility. In the Menendez trial memoir, the writer (Thornton 1995, p. 8) regarded the opening statements of prosecution and defence as being as riveting as anything seen on television.

**Invoking a personal memory of a juror**
Jurors constantly rely upon personal memories. In the trial of Angela Davis, Timothy (1974 p. 119), hearing evidence of the effect of a shotgun blast upon the victim's head and face, was reminded of a hunting incident:

A very large question arose in my mind as to the accuracy of his memory. For example, his description of the judge's face falling apart as though in slow motion seemed highly improbable, especially to anyone familiar with the effect of a short-range shotgun blast. I had hunted wild game birds with my husband. One day when I was still learning the use of a shotgun, we were walking through a fallow pumpkin field. Art raised his gun and fired at a medium-sized pumpkin about six feet away. The pumpkin disappeared instantly and totally! It happened so fast that I couldn't see it happen. The pumpkin was sitting there...and then it was gone. I observed no slow motion effect. That incident made me carefully consider the validity of Gary Thomas' perception.

Whether or not this is a reliable use of a personal memory is beside the point. Burnett's jury was clearly dissatisfied with the defendant's account of a fight. One issue was how his credibility would be affected if the account was not strictly accurate. Another juror, who had a history of fighting, recounted one of his fights (Burnett 2002, p. 113):
Dean said that in a rage one might do anything. He narrated a bad brawl that he had in the navy. He said that a younger superior had leapt up from his desk, stabbed him in the neck with a biro, and sunk his teeth into his ear. Dean had said that the smaller man had leapt from a sitting position but got his teeth into his ear. The writer challenges this, and Dean agrees it is not possible, because he would have had the time to get out of the way.

Burnett said that this demonstrated how hard it could be to remember the details of a fight (2002 p. 113). This realisation gave the jurors cause to tolerate inaccuracies in the defendant’s account.

A more amusing personal memory comes to the mind of Carter in the Capano trial memoir. Capano was on trial for murdering his lover, or more correctly, the murder of one of his lovers. At one stage, evidence was given of Capano encouraging another lover to engage in a sexual act with a third person. Carter (2000, p. 125) queried evidence that that person, an admitted philanderer, failed to become aroused. The writer states that he is: ‘...at least at half mast if I even think about oral sex.’

However, he recalls a personal experience when he was afraid to have sex as part of a threesome, so concludes that the witness might be telling the truth.

A critical use of personal memories is found in one of the death penalty cases. A dominant juror’s memories of his own early life caused him to reject the defence contention that the murderer was himself a victim of unfortunate circumstances that led him inexorably into a life of crime. Sundby (2007, pp. 108–9) says:

Frank could not identify any mitigating factors. When asked whether Lane reminded him of anyone, he said ‘Yeah, me’. I kept comparing his life to mine. I mixed my background with his a lot, because I had the same choices he had, but I knew which ones to make to keep out of those situations.’

He knew what Lane’s family was like. It reminded him of his own family. Frank’s father had been a physically abusive alcoholic.

So Frank viewed his own life as empirical proof that the defendant could have turned his life around.

**Judge’s behaviour**

Judges behave in different ways. Most, fortunately, behave in a courteous fashion. However, others, unfortunately, are rude and overbearing. Jurors react negatively to displays of bad manners by those sitting on the bench.
Burnett (2002, pp. 57, 37) describes the judge as a dry and disagreeable man. The same judge comes across in Burnett’s account as being authoritarian and overly controlling. He refused to allow the jurors to have notepaper and writing implements. Burnett notes, with an element of surprise, that the judge, having been rude to everyone, adopts a courteous and protective attitude to a camp witness. When Burnett was appointed foreman, the judge made no effort to explain the role of the foreman or whether the jury could overturn his decision to put Burnett into that role. Burnett recalls that the judge yelled at him on one occasion, accusing him of failure to disclose the fact that he was unfit for jury service. However, Burnett was clearly not unfit for that service. He was merely suffering from pain in his leg causing him to stand up at one stage.

After the verdict was delivered, the judge thanked the jury but added that others, notably servicemen, had done far more for their country. Thus, it is very clear from Burnett’s account that this judge did not do much to assist the jury and at times made their task more difficult.

In the Black Panthers’ trial, Kennebeck clearly believes that the judge is biased in favour of the prosecution. The writer is particularly critical of the judge’s failure to control the district attorney and for castigating the defence counsel and calling him menacing (Kennebeck 1973, pp. 183, 214). Kennebeck is also highly critical of the judge’s summing up. He describes it as being monotonous and consisting of a lumpy recollection of prosecution evidence.

Judge’s instruction
The judge controls the jury by issuing instructions. Importantly, at the end of the pre-deliberative phase, the judge instructs the jury as to the law. There are numerous instances in the memoirs of jurors complaining that they cannot understand instructions. Requests to have them clarified often do not meet with any sympathy or success.

When Burnett’s jury sought clarification, the judge simply read his instructions again. Burnett notes that this did not resolve any of the questions that they had asked. In a death penalty case, the judge’s instructions were long and indecipherable. A written copy was delivered to the jury which went through the instructions word by word. Some parts seemed to contradict other parts. They were too wordy and detailed for the average person (Burnett 2002, p. 49).
In the Black Panthers trial, the judge was imaginative when explaining the legal concept of conspiracy. He told the jury that they might consider it to be something like a play, with various characters playing different roles of greater or lesser importance.

Zerman (1977 p. 125) indicates that the jurors were unanimous in their praise of the judge who appears to have been impeccably fair and very clear in giving instructions to the jury.

Agresta began by explaining that our purpose was to determine the facts of the case—to decide, by weighing and comparing the credibility of the various witnesses, whether the defendant had broken a law. It was not our function to question or interpret the law. Laws are made by our legislators and it is our job only to help enforce them. He continued with a thorough review of all the evidence that had been presented, witness by witness. He was remarkably fair and complete. He then went into a long and rather complicated explanation of the two counts of murder in the second degree: the first count, felony murder, refers to homicide committed during the course of an attempted robbery; the second, common law murder, was homicide with intent to kill.

Timothy notes that the judge gave a comprehensive opening instruction to the jury at the commencement of the trial. This covered things like the standard of proof but also dealt with issues as to how the jury might go about assessing the credibility of the witness by considering their demeanour (Timothy 1974, p. 56). The judge also indicated that the jury should not discuss the case with anyone until it was submitted to them for deliberation. She was not told that she could take notes but decided to go ahead and do so anyway (Timothy 1974, p. 73).

In the subway gunman trial, jurors were issued with earphones so that they could listen to various interviews with Goetz and read transcript. The judge instructed them that the sounds that they heard were the evidence whereas the transcripts of the conversations were presented for guidance only (Lesly 1988, p. 55). The judge also frequently warned the jury that the attorneys’ questions were not of themselves evidence (Lesly 1988, p. 86).

**Juror comprehending or failing to comprehend**

There are many instances of individual jurors or groups of jurors becoming confused about issues. Burnett reports:
Pat displayed even bigger confusion. She thought that self-defense was relevant only if they found the defendant guilty of manslaughter (Burnett 2002, p. 93)

Kennebeck stated that during the voir dire, Hiram seemed to give contradictory answers as to whether Puerto Ricans were treated fairly in the country. He stated that Puerto Ricans are treated fairly and that they are subject to discrimination. He did not acknowledge any contradiction (Kennebeck 1973, p. 105). Obviously, in this case, although Hiram was not confused about a trial issue, it is nonetheless a fairly extraordinary example of a juror engaging in startling contradiction.

Zerman reports that some jurors did not think it mattered where witnesses said they were standing in relation to a van when the victim was shot. These witnesses asserted that they could still have seen the action. Zerman makes the point that serious contradictions in witness testimony have a bearing on credibility—a point that these other jurors did not appear to consider.

Commenting on one of his fellow jurors, Zerman (1977, p. 130) says:

Juror five, probably the oldest person in the room, was convinced to the end that Ricky was guilty, but in objective terms he never really explained why. He kept alluding to ‘bad vibes’ and to the ‘feeling in his gut’—he rarely went beyond the viscera to the brain.... His occasional contributions were usually incorrect, irrelevant, or incredible. He forgot testimony, seemed incapable of understanding some of the arguments we offered, was mired in that gut certainty that Ricky was ‘guilty as hell’.

**Juror interaction**

Jurors interact, either well or badly, to varying degrees. Since jurors must act in collaboration, poor interactions are unfortunate and potentially inauspicious. In the OJ Simpson trial, it is clear that the jury was divided into factions from very early on. The factions were partly drawn along racial lines but also along other lines since most of the jurors were African–American. In that trial, there seems to have been an enormous amount of interpersonal animosity amongst jurors. At the time of Kennedy's discharge, which was clearly very traumatic, none of his peers showed any sign of empathy or understanding (Kennedy and Kennedy 1995, p. 262).
Burnett recounts that he came to loathe the juror Felipe and wondered whether there are some citizens who cannot distinguish life from daytime television (Burnett 2002, p. 15).

During deliberation, interactions can become very heated. Burnett recalls that two of the jurors, Dell and Pat, became extremely abusive towards each other. Foul language was used. One juror burst into tears and ran into the toilet (Burnett 2002, p. 135).

Leaving aside the deliberation phase, juror interactions in most trials seem to be quite positive. Most of the writers recall positive interactions during breaks from the trial. In the Black Panthers’ trial, several jurors played chess (Kennebeck 1973, p. 103).

Timothy reported that jurors were keen to get to know one another and used first names. In the jury room, they were provided with comfortable chairs and tables. They brought in coffee making facilities and all chipped in to buy a fridge. They also brought in games books and magazines. Someone contributed a book on astrology which gave them all the chance to discuss themselves. Three of the jurors who lived some thirty miles from the court, formed a car pool (Timothy 1974, pp. 47–8, 52).

Timothy sagely observed (1974, p. 129):

> Being kept in the jury assembly room for long periods meant we had the additional problem of adjusting to each other as we waited together. Fortunately we had lots of space and excellent facilities. The chairs were comfortable and couches and tables were available.

The jury in Jack Ruby's trial was a congenial group. They maintained morale through joking and witticism. Even during the jury selection phase, those already selected for service passed the time by playing games. Some of the men used monopoly money to play poker (Causey 2000, p. 56).

In the Scott Peterson trial, some of the interactions during the early part of deliberation were not at all positive. In particular, there was marked conflict between the first foreman, Jackson, and others. Jackson appears to have had some quirky habits that were obviously irritating. For example, when leading deliberation, he sat on the back of his chair with his feet on the seat—as if he were sitting on a throne. His refusal to express his personal views when acting as
foreman also caused annoyance as did his reliance upon his own medical knowledge. Other jurors expressed the view that he never fitted in and he was eventually discharged in circumstances suggesting that he may have engineered a situation leading to inevitable dismissal.

Groves (1998) mentions that he and the other jurors exchanged Christmas cards.

**Jurors’ experiments**

Jurors thirst after knowledge and, if given the opportunity, will discover it on their own. When given exhibits to examine, they often experiment with them and conduct re-enactments. When allowed to visit crime scenes, jurors often conduct personal experiments and re-enactments although there are times when the judge will prevent this from happening. Within the ambit of the term jurors’ experiments, the author of this thesis included numerous activities by which juries discover facts not disclosed to them through the calling of evidence.

Burnett reported that in the course of deliberation, a seminar-style discussion ended when the jury broke up into sub units. Several interesting things emerged quite quickly. Those watching the video on the television noticed that it was not possible to see the futon unless the door of the apartment was fully open. This cast doubt on witness testimony. Also, several jurors looking at photos had seen something white and diaphanous on the futon. They could not decide whether it was women’s underwear, or a hairnet left behind by an investigator. A request for a magnifying glass was refused (Burnett 2002, p. 105).

Burnett also reported that several jurors did re-enactments of the fight as the defendant Milcray had described it. The re-enactments were important. Adele, a juror who had held out for a conviction, conceded after the re-enactments that nothing that Milcray had said was strictly impossible (Burnett 2002, p. 112).

In the Black Panthers trial, Kennebeck closely scrutinised literature, tendered in evidence, that was supposed to corroborate or support the conspiracy theory. By scanning it closely, he ascertained that there was no sign or indication that it had even been read by the defendant from whose premises it was seized. For example, there was no underlining or other marking.

Zerman (1977) indicates that the prosecution made a minor issue of the defendant being unable to recall the street address of his auntie. The defendant
maintained that he had visited her premises on the day when he allegedly murdered a salesman. That night, Zerman asked his own son to give street addresses for three of his aunties. The son was not able to give a full address for any of them. Thus Zerman queried the significance of the defendant not being able to give this information.

Lesly (1988, p. 218) used a viewing of a railway carriage to test ideas about what different witnesses might have seen in the subway shooting. He mused:

I was impressed, however, by the narrowness of the subway car and how little space there was between the rows of seats on either side of the aisle. Although I had for many years been a frequent subway rider, being in this old-style car while contemplating the testimony I’ve heard and imagining the situation that Goetz had faced did have a definite effect on me. I realised that even if only one or two of the youths had been standing in front of him with the intention of attacking him, Goetz had no real room to escape. But I also saw that while Goetz was firing at Canty, he was extremely vulnerable to attack if Cabey or Ramseur had tried to jump in. His back was turned and they couldn’t have been more than a few feet away.

In our deliberations both of these factors proved to be extremely important considerations; and so, although it was awkward and the situation circus like, being very much a media event, the subway car visit was in fact very valuable, winning some crucial points for the defence.

Grove (1988, p. 75) reported on a view taken during the London Kidnapping Trial:

...we timed the opening and closing of the garage doors and examined the other exhibits. We paced out the alleged length of the alleged gunman’s alleged run towards George, keenly aware of the difficulty of judging distance in such unscientific circumstances. One juror wanted to restage the attack among ourselves. The message was conveyed to the judge—the answer came back: no. Decorum was preserved.

**Jury selection**

In the United States, jury selection in a prominent trial can last for weeks. This is not, however, a feature of juries in other jurisdictions. There are examples in the literature of jurors making quite insightful comments upon the process of jury selection. Parties are given a certain number of peremptory challenges as well as challenge for cause. The latter, but not the former, must be justified.

Some jurors appear to be quite open about their inability to be fair. Burnett notes that during a voir dire examination, one young man said that he could not be fair,
because he thought that recidivism rates were far too high. The judge explained the standard and onus of proof and asked the panel whether anyone would hold the State to an unreasonably high standard (Burnett 2002, pp. 25–7).

In the Black Panthers trial, Kennebeck indicated that he had no opinions on the guilt or innocence of the defendants and no fixed opinion on the Black Panther party. He agreed that police brutality and racial injustice should be eliminated.

There are curious examples of people giving such bizarre answers when questioned during the jury selection phase, that their exclusion was inevitable. In the Black Panthers’ trial, a potential juror repeatedly asserted his disbelief that any person would lie under oath (Kennebeck 1973, pp. 35, 112).

Zerman provides a disturbing example of what appears to be racist selection. In that trial the defendant was a young African–American man. The prosecution challenged every black man and woman in the jury pool (Zerman 1977, p. 46).

Timothy was of the view that her jury was representative racially and in terms of gender (1975, pp. 13–14). But curiously, she later says that economics was a force driving selection. Because of this, minorities disappeared from the pool. The group left consisted of middle-aged, middle-class people employed by industries large enough to absorb the cost of jury service. She cannily observed that the voir dire questioning of potential jurors serves two purposes. It helps to expose prejudice and preconceptions and it enables lawyers to educate potential jurors about their own theories of the case (1974, pp. 20–2). None of the potential jurors acknowledged racist sentiments. However, some were willing to indicate that they were disturbed by communism and would not feel comfortable sitting on a case that involved that philosophy. The relevance of this was that Angela Davis was a philosopher of the Marxist persuasion. Timothy believed that many potential jurors raised the issue of communism simply as a way of avoiding jury service. The only African–American in the pool was eliminated by challenge (Timothy 1974, p. 25). Timothy’s view of this was that the trial’s notoriety was such that the prosecutor was damned if he did and damned if he didn’t.

Kennedy described the extraordinarily onerous measures adopted to select a jury for the OJ Simpson trial. Potential jurors had to fill out a seventy-nine page
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questionnaire containing two-hundred-and-ninety-four questions (Kennedy 1995, p. 28).

It seems that many juries are not representative of the community in various respects. In the Scott Peterson trial, seven of the twelve jurors had Italian ancestry and ten had been raised as Catholics. In the OJ Simpson trial the vast majority were African–American and only two had been to college. In the trial of Angela Davis, as we have seen, the jury was overwhelmingly middle-aged and middle-class.

Knowledge of factual issues

Factual issues can become extremely complex. The jury, as fact finder, can therefore take on a very onerous obligation. Juries can master a high level of detail. Many of the memoirs showed that individual jurors had great difficulty in grappling with the facts.

There are examples of jurors having difficulty in disentangling factual issues. Burnett reports that a juror changed her opinion and was inclined to find the defendant guilty after deliberations. She felt that the struggle that the defendant described could not have occurred in the confined space in which the deceased's body was found. Burnett explains that the fight did not necessarily occur at the exact point where the body was ultimately located.

Sometimes jurors can be overwhelmed by the volume of facts presented to them. Timothy reported that she had nightmares for ten days. She attributed this to the difficulty in assimilating a flood of information. Burnett reported that the prosecution presented a large body of facts but that most of those facts were not actually in dispute (Burnett 2002, p. 48). This is quite a common observation.

However, there are also instances of juries mastering the detail so well that they discover significant discrepancies in the evidence apparently unknown to prosecution and defence.

In the Black Panthers' trial there was evidence of an ambush where a bullet was said to have passed through a police officer's pouch. The jury remembered this detail but on examining the pouch found that it appeared to be intact.

Jurors do not always accept that factual issues presented to them by the parties are real issues. In the Capano trial, Carter reported that the prosecution tried to
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depict the defendant, Capano, as controlling in his relationship with the deceased. The defence tried to present him as a gentleman of the old school. The writer’s response to this is that it is mere hair splitting. He was determined to look for more convincing evidence as to character.

Timothy was confused about the purpose of a large body of evidence called in the trial of Angela Davis. The evidence proved that there had been a kidnapping in the courtroom and a death—or indeed multiple deaths. She could see very little evidence connecting Angela Davis to these things whereas the evidence that there had been a kidnapping et cetera was overwhelming. But the kidnapping was not in dispute. She wondered whether a large body of evidence was called merely to satisfy some legal requirement.

There is an obvious relationship between factual and legal complexity. This is demonstrated by the subway gunman trial. Goetz was charged on an indictment with thirteen separate counts. The factual elements of the counts varied which meant that the jury had to deal with significant factual complexity.

Knowledge of how a person might act
An understanding of how people act, of personal traits and habits and proclivities and the application of that understanding is a constant feature of juror participation. Furthermore, it manifests in a variety of ways. Some of these are quite mundane. Burnett reports on an attempt to impugn the credibility of the defendant by showing that his application to join the Marines failed to disclose a pre-existing physical injury. Burnett is completely dismissive of this attempt. He knows that recruiters are assessed by the number they recruit. Accordingly they may not press an applicant to disclose an injury (Burnett 2002, p. 72).

Jurors often reflect on the likelihood that a person would have acted in the way that they say they acted. Clearly in so doing they rely upon personal knowledge and personal experience combined with their expectations of what average people would do.

In a death penalty case, the jurors were shown a video recording of a shooting recorded on closed circuit television camera. The defendant, Lane, also viewing the video, was observed not to react in any way. A juror expresses surprise
because she can’t imagine not reacting if she viewed a video of her shooting someone. In the Scott Peterson trial, (Beratlis et al. 2007, p. 140) noted:

The jurors viewed the taped interview that Peterson had with police. When he answered his cell phone and spoke to his sister-in-law, he did not appear to be concerned or in torment. He politely answered the phone. Beratlis said ‘...wait a minute, I'm going to be sitting in a chair with both my hands in my pockets. My phone rings and I am thinking to myself, it's my sister-in-law. If my sister-in-law is calling me at 12.30 in the morning and my wife is missing, I'm thinking she's got some information. It wouldn't be, Hey how's it going?’

Beratlis said Peterson further damaged himself when he asked about grief counselling (Beratlis et al. 2007, p. 140).

In the trial of Angela Davis, Timothy’s belief about the personality of the defendant and how she would and wouldn’t act was more important to her than the evidence led by the prosecution. From her observations of the defendant, and a reading of certain love letters that she had penned, Timothy inferred that Davis was highly intelligent, passionate and idealistic. A person with those attributes would not, in Timothy’s view, have become involved in a rash and ill-considered crime involving the kidnapping of court staff including the judge. According to Timothy, this was the crime of a juvenile immature personality.

Juries can use knowledge of how people might act to explain an apparent lack of credibility. We can see an example of this in Burnett's account. The jury acquitted Milcry, while acknowledging the unlikelihood that his account was fully truthful. Burnett surmised that if Milcry had homosexual tendencies and had been sexually involved with the deceased, he may well lie about that given that he was engaged to a young woman. Thus, his lack of credibility on some issues did not necessarily point to guilt.

**Knowledge of legal issues**

Under this category, it is necessary to include both general knowledge of the law and knowledge of the law specific to the case at hand. Obviously, some jurors come to the trial armed with an impressive level of knowledge about the law and courtroom procedure. This is clearly true of Burnett who earned his living as an academic historian. For example, he was aware of the fact that defendants in murder trials are not obliged to take the stand and seldom do so because this could expose a prior criminal record (Burnett 2002, p. 70). Note that this principle does not apply in all jurisdictions. Burnett was also able to give the jury a lucid and accurate account of the notion of nullification. This involves the jury ignoring the letter of the law and acting in a way that satisfies its collective
conscience. In a layman, this level of legal knowledge is very impressive. Some of Burnett’s comments on the legal culture are philosophical and apposite. He states (2002, p. 80):

...we associate truth with knowledge, with seeing things fully and clearly, but it is more correct to say that access to truth always depends on a very precise admixture of knowledge and ignorance. This is nicely captured by the traditional figure of justice, a blindfolded woman holding a scale.

Where juries are concerned, the courts pay particular attention to ignorance, keeping the jury in the dark—about certain pieces of evidence deemed inadmissible, about the procedural technicalities that constrain the activities of the court, about the most basic sense of what is to be expected in the unfolding of the trial...

Burnett notes that some of his fellow jurors are unclear about aspects of the law. He notes that about half of those who had said they thought Milcray was acting in self-defence are also willing to say that he was guilty of one of the charges. And yet self-defence is a complete answer to the charges. Burnett notes that the juror Pat is seriously confused in believing that the jury can only consider the issue of self-defence if they find the defendant guilty of manslaughter. She has put the cart before the horse. Even Adele, who like the writer is an academic historian, becomes confused at one point. Misunderstanding the burden of proof, she expresses the view that if the defendant wishes to rely on self-defence, then he must prove it beyond reasonable doubt (Burnett 2002, p. 107).

In the Capano trial, Carter shows an impressive understanding of the reasoning underlying various rulings about the admissibility of evidence. For example, he says (2000, p. 39): ‘First witness was the brother of the deceased. His hearsay evidence was allowed because the defence had impugned the deceased’s character in their opening.’

At another point, the same writer acknowledges that testimony from certain friends of the deceased about things she said concerning Capano was only admitted into evidence to show her state of mind. At yet another point, the writer expresses an understanding that in the trial process, there is a discovery phase in which counsel disclose their evidence (Carter 2002, p. 102).

In the subway gunman trial, Lesly (1988, p. 41) also displays an impressive understanding of the rationale underlying a ruling on admissibility. He says:
There was argument about the admissibility of some hearsay of Cabey. He admitted that they were hassling Goetz. Slotnick argued that it was allowable as an exception because it was an admission made during the course of treatment. Cabey had no reason whatsoever to fool or lie.

**Lack of awareness**
Juries often develop an awareness of things that are not disclosed to them by the judge, counsel or through the evidence. A good example of this is found in the Scott Peterson trial. It seems that, in that trial, the jury picked up on the reason for long-standing tensions between the families of the defendant and the victim.

Beratlis said that he and the other jurors were unaware of the class distinctions at the beginning of the trial. Some lawyers believe that jurors sneak peaks at the news or engage in conversations about the trial when they are out of the courthouse. However, it was only through their observations in court, and the testimony presented, that they would learn of the clashes between the families.

**Lawyer performance**
In the literature, many jurors have commented positively and negatively about the behaviour and performance of trial lawyers and how that affected them. Juries are very aware of, and judgemental, about lawyer performance. There are many examples of this. Burnett (2002, p. 104) notes:

> ...the jury were scornful of the defence lawyers’ attempt to discredit prosecution witnesses by asking if they would trust them with their children. This was seen as anti-gay bias.

In the Black Panthers’ trial, the jury became very critical of the prosecutor. When the prosecution introduced Black Panther literature and insisted on reading it into the record, Kennebeck was convinced that he was doing this purely for the benefit of the media. Other jurors are also critical of the prosecutor (Kennebeck 1973, p. 206):

> ... one day at lunch a juror went so far as to say of the prosecutor that he simply doesn't know the audience he is talking to. There was general dissatisfaction about the length of the prosecutor’s summation.

There are also examples of the jurors expressing high praise for the lawyers. For example, Zerman (1977, p. 122) says:

> Kellam delivered his summation first. He was absolutely masterful. At least as much an actor, more precisely, a thundering evangelist as an attorney, he
gave a performance that lasted over an hour and kept me riveted for its entire length.

He further adds that Kellam managed to bring out every inconsistency and improbability in the evidence given by the four youths who were the main witnesses for the prosecution (Zerman 1977, p. 123). Zerman is particularly critical of the prosecutor’s tactic of repeatedly referring to the unsavoury pasts of his main witnesses. He regarded this as an ineffective and transparent tactic but doubted that it really affected the outcome of the trial (Zerman 1977, pp. 152–3).

In the Capano memoir, Carter is repeatedly critical of the defence lawyer’s insinuations which are never backed up by any concrete evidence. For example, the lawyer insinuates that the deceased had many lovers. However, he does not call any evidence to this effect (Carter 2000, p. 54).

In a death penalty case, a juror is perturbed by the failure of the defence attorney to look the jurors in the eye. They view this as an acknowledgement that the defence is a lost cause.

Timothy states that the prosecutor at one stage bored the jury because he constantly spoke in a monotone. She finds this surprising in what she characterises as the trial of the century (Timothy 1974, p. 68). Timothy also pays close attention to the language of the prosecutor and his use of the expression ‘we think this will show’. To her mind, this reveals that the prosecutor is not overly confident about his case.

In the mistrial of the century, the writer extols the defence attorney’s opening address saying that it was magnificent.

Max Causey is generally critical of the entire defence in the trial of Jack Ruby. He clearly thinks that Melvyn Belli bit off far more than he could chew. The defence tried to prove that Ruby suffered from psychomotor epilepsy and that he was in the grip of a seizure when he fired his gun at Lee Harvey Oswald inflicting mortal wounds. Causey believes that the defence was far too ambitious. Causey (2000, p. 9) states:

In my layman opinion, any good lawyer could have gotten Ruby off with something less than the death sentence if he had thrown Ruby on the mercy of the court and pleaded plain old temporary insanity brought on by emotional stress over the loss of his beloved President.
He is also critical of Belli’s conduct when the verdict is finally delivered. Belli started to scream at the jury which Causey characterises, quite properly, as unprofessional conduct.

In the Scott Peterson case, the jury was unimpressed by the prosecutor’s opening. They felt that it bombed. Juror John Guinasso described it as unemotional. They were also critical of the defence.

Some of the jurors in the same case were critical of defence counsel in making a promise that he failed to honour. In his opening, the defence attorney promised to show that Scott Peterson was stone cold innocent. It seems that this promise backfired (Beratlis et al. 2007, p. 73).

‘stone cold innocent?’ Said Belmessieri. He didn’t have to prove to me that he was innocent. The prosecution had to prove to me that Peterson was guilty. By saying this, Geragos seemed to suggest that even though didn’t have to, he would prove his client was innocent. It just hung over the trial, and by the end of the defence case, I thought, good try Mark. He said that he would show us he was innocent. All he did was prove to me he was guilty.

John Guinasso thought that the prosecutor was brilliant in his final address. He also thought that the defence attorney blundered in his character assassination of his own client. However, it appears that this assassination really consisted only of acknowledgements that his client was a faithless husband. Guinasso wondered whether the defence attorney had run out of money for the case (Beratlis et al. 2007, pp. 131–2).

In the subway gunman memoir, the writer, who was trained as an actor, was appreciative of the defence opening because the lawyer moved about more and, overall, it was more dramatic than the prosecution’s opening. As to the defence attorney’s attempts to discredit prosecution witnesses, the writer seems to imply that he went further than was strictly necessary (Lesly 1988, p. 69):

I also have got to see Slotnick cross examine with the aim of discrediting the witness, how he would persist in pressing every possible point of contention far beyond what was needed to raise the necessary degree of doubt. He would then set out to damage the credibility of the witness; he would try to completely destroy them. And not every time with every juror, but often enough, he would succeed.

The next witness was Troy Canty. Slotnick’s cross examination took two full days and became a wearying war of attrition. It was tedious to listen to and tried the...
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patience of the prosecutor and the judge. The outward geniality and extensions of professional courtesies between the lawyers all but broke down because of what Waples considered Slotnick’s flagrant violations of appropriate conduct. But the author also wondered if Waples’ show of outrage and moral indignation wasn’t an equally calculated stance.

Slotnick would ask questions which were objected to and disallowed. But since the questions were repeated in different ways, it became difficult for the jury to ignore the implications. (Lesly 1988, p. 86) says:

Waples would get angry and Slotnick asked the same questions innumerable times. We were reminded many times by the judge that questions were not evidence so Canty’s lack of memory about an incident meant that we had to disregard it. The cumulative effect, though, of hearing the accusations repeated so often and the absurdity of Canty’s negative responses made this virtually impossible.

The end result was that the jury became equally angry with the prosecutor for having called the witness and the defence attorney for his drawn out and tedious cross-examination. The writer says that several jurors voiced their resentment of the prosecutor for having called two of the victims as witnesses. The prosecution seemed to gain very little from calling these two witnesses (Lesly 1988, p. 97).

The writer of the subway gunman memoir commends a tactic of the defence attorney that he describes as brilliant. The attorney presented to the court a re-enactment of the shootings while a defence ballistics expert was giving evidence. Black members of the Guardian angels played the parts of the four victims. The writer says that the attorney’s intention was clearly to allow the jury to see what four tough guys would look like together in one end of a subway car. The four were dressed in a rough streetwise fashion. According to the writer, the re-enactment produced something of a shock effect (Lesly 1988, p. 199).

At another point in the trial, the writer noted that the prosecution and defence attorneys became extremely hostile towards one another. The prosecutor became so infuriated by testimony given by a defence expert that he lost his temper and thereby unnecessarily antagonised and alienated that expert.

The writer was appreciative of the final addresses of both prosecuting and defence attorneys. He says, in particular, that the prosecutor’s performance was
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riveting. It included an attention-grabbing demonstration intended to show that the fourth victim could not have been shot while standing up (Lesly 1988, p. 247). The quality of this address was such that maintaining attention was not a problem. Notwithstanding his most favourable impression of the prosecutor's closing, Waples acknowledges that it is not sufficiently supported by the evidence.

Leadership

Any group engaged in a collaborative task will suffer if the elements of strong leadership are lacking. The literature shows examples where strong leadership was present and effective and others where a lack of leadership led to conflict and disharmony.

Several writers of the literature examined for this thesis were placed in positions of leadership in the jury. This generally occurred as a result of voting by the jury. However, Burnett reports that when the foreman already selected failed to turn up, the judge appointed him and he moved into the foreman's seat (Burnett 2002, p. 84). However, the jury voted for Max Causey to be the foreman while he was in the rest room. He requested a second vote but the outcome was the same. Once selected, the various foremen and forewomen exhibited varying degrees and somewhat different styles of leadership.

Zerman (1977, p. 127) reports:

...juror eight said 'the state ain't got no case.' Then there was silence in the room. It was broken by juror one, our forewoman, and she proved the biggest surprise of all. She, who over eight days had smiled a lot and said very little, took command immediately and she was nothing short of remarkable. As we began deliberating, with exhibits gathered up and put aside, she exchanged seats with juror five and moved to the end of the table opposite me. From then on, where she sat became the head of the table.

It is clear from this account that the female leader was effective in what became an emotionally charged deliberation.

Burnett proposed a few ground rules. One of these rules was that, in order to speak, a juror must first raise their hand. Initially, it seems, Burnett favoured close control of the deliberation. Another juror recommended a more freewheeling and less exacting style (Burnett 2002, p. 91). Ultimately Burnett agreed to this approach. It seems that when he loosened the reins, allowing
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Jurors to examine or discuss various exhibits individually or in small groups, the creative juices really started to flow.

Another interesting feature of Burnett’s leadership is that he appears to have lectured the jurors on topics such as jury nullification and the difference between law and justice. He says that at one stage, he told the jury the story about classical Greek Justice. He recalls waking up one morning with a sense that he had to move the jury to a unanimous decision (Burnett 2002, pp. 136, 159).

During deliberations on that day, he said that the burden on the state was heavy and that the reason for that was to protect citizens from the power of the state (Burnett 2002, p. 163). The deliberation in this case was characterised by a level of tension and dispute between Burnett and a fellow academic historian identified as Adele. She was holding out for a guilty verdict. At times their arguments and discussions were academic and highly abstract. Nonetheless, the jury ultimately voted unanimously for a not guilty verdict. There is no doubt that Burnett’s leadership was effective in this case.

It is not only the selected leader who exhibits leadership. In the death penalty case, a juror, Frank, saw it as his duty to take on the role of victim’s champion during deliberations (Sundby 2002, p. 131). In the Scott Peterson trial, John Guinasso took on the role of ensuring that deliberation did not stray into forbidden areas or otherwise transgress the rules.

Causey (2000, p. 88) took his role very seriously:

As foreman of the jury, my first official act was to emphasise to the other members the importance and the solemnity of the task before us. I asked for a couple of minutes of complete silence so that each juror could search his or her own mind, and if the jury decides, ask divine direction in arriving at a decision. I personally said a short silent prayer and I suppose several of the others may have done likewise. I had never before sat on a jury of any kind and, therefore, I didn’t have any formulated idea as to how a foreman was supposed to perform. But I reasoned that it was my responsibility to organise and direct the collective reasoning of the other eleven members in a systematic analysis of the evidence. I took a pen and paper and jotted down what I thought were the issues that we have to decide. Then I wrote to the other jurists asking for their opinions as to whether or not I had left out an important issue.

In the Scott Peterson trial, the first foreman was qualified in both medicine and the law. However, friction emerged between himself and others. The jury voted
to remove him from the chairman's role. Ultimately he was discharged after admitting having discussed the case inappropriately. The other jurors were concerned at his reliance on personal medical knowledge. Guinasso, it seems, took particular exception to this. The majority of the jury felt that the prosecution medical evidence was unassailable and that the defence medical expert had been totally discredited. Once Jackson was removed, the deliberation appears to have settled down and proceeded more or less normally resulting in a unanimous guilty verdict.

In the subway gunman trial, the judge assisted the foreman by meeting with him before the deliberation and making suggestions about how it might be handled. The jury adhered to the rules carefully throughout the course of deliberation.

Mary Timothy became the forewoman in the Angela Davis trial. From her account, she reached a conclusion in the course of the trial that the defendant was not guilty. Thereafter, she perceived it as being her role and duty to persuade the jurors to acquit. Accordingly, she analysed the prosecution case to find the weaknesses in it. An interesting feature of this approach is that she followed one line of reasoning in her own mind that led her to conclude that Davis was not guilty. But in leading deliberation she adopted a quite different line of reasoning.

There is no suggestion, however, that she attempted to bully the other jurors into adopting her own view. She was extremely diligent in finding and adopting materials on deliberation to assist the jury.

**Media**

It is theoretically possible that jurors could rely on media accounts to supplement trial evidence.

In recent times there has been major concern about the impact of newspaper and television accounts of crimes on people who become jurors. The concern is that the material that they have viewed or read will influence jurors. Invariably, jurors once empanelled, are instructed not to read or watch accounts of the trial in which they are participating. However, jurors have admitted disobedience to such instructions.
But there is evidence that jurors have a healthy cynicism about media accounts. In the Capano memoir (Carter 2000, p. 16) the juror writes:

The news Journal was on a roll. They could not print enough about Tom Capano and his alleged involvement. I was reminded of the turn-of-the-century muckrakers and their ilk who built newspaper empires on sensationalised stories, using insinuation and out and out lies to sell a product, a tradition which has never really died out.

In the jury selection phase, Carter admitted that he had read media accounts. He also stated to the court that—if you can believe media accounts—Capano is probably guilty. But he also expressed confidence in his ability to render a fair and impartial verdict (Carter 2000, pp. 27–8).

In all of the trials examined, the jurors were given repeated warnings not to read the media coverage. Indeed, this is one of the things that seems to stick in their memory. Some jurors, like Mary Timothy, find these warnings insulting and unnecessary. Interestingly, she does not say that she would never read or watch media coverage but rather implies that she would not be influenced by it.

Nonetheless, it is clear that Mary Timothy ordinarily abided by the judge's directions. Members of her family clipped relevant articles from the newspapers and said that she could read them after the trial had finished (Timothy 1974, p. 51). There was one occasion when she admitted disobedience. The judge had directed the jury to avoid watching or reading media coverage of some current event involving prisoners attempting to escape. Timothy felt that the judge's direction was unreasonable because she could not see any relationship between a current matter and the issues at trial. She reports feeling a real sense of conflict with the rules. When she arrived home that night, she asked her family who had been killed in the current matter. This was an admitted violation of the judge's rule.

Most jurors seemed to take the judge's directions seriously. There is little evidence of jurors habitually reading or watching media accounts. There are some exceptions to this however.

In The juror and the General, the female juror admits reading media coverage of one day of testimony. The journalist's view was very different to that of a juror.
This caused her to reassess her own attitude to the trial. It made her question whether she was being objective enough.

**Memory—reliability of**
The reliability of the human memory is often an issue in trials. The literature illuminates how juries have attempted to assess the reliability of memory. The academic literature suggests that jurors have too much faith in eyewitnesses. In researching materials for this thesis the author found much material that contradicts that view.

It seems clear that jurors use their knowledge of their own experience to assess the reliability and fallibility of human memory. A prime example of this is seen in Burnett’s account where a fellow juror gave an account of a brawl that he had been involved in many years before. The account was shown to be flawed—indeed impossible. This brought home to the juror, and to Burnett, the potential for inaccuracy in giving an account of a savage fight. To Burnett, it became clear that a hostile questioner could easily get another person tangled up in giving an account from a ‘charged and impressionistic memory’. In the context of that trial, this was an important insight because the defendant’s account of a savage fight was not wholly credible.

In the trial of Angela Davis, one issue was whether the kidnappers had referred to the Soledad Bros, a group of imprisoned terrorists. Because one witness could not remember any comment, Mary Timothy reasons that another witness has remembered too much. Her reasoning about this is confusing.

In the subway gunman trial, it seems that the reliability of witness memories was foremost in the jurors’ minds. The jury had to decide how to deal with testimony that might contradict other testimony to a greater or lesser extent. Lesly (1988, p. 144) describes the problem as follows:

> ...there were admittedly quite a few contradictions and inaccuracies in Boucher’s testimony, but I felt they were all very tangential, that they did not alter the substance of this testimony, and that they could all be easily explained. So much of what happened occurred so quickly, and what happened in the car before the shootings were things that a person might not take special notice of at the beginning, much less recall with precision 2 1/2 years later. In my mind, therefore, there was with all the eyewitnesses a great deal of room for certain types of discrepancies because so much time had elapsed since the incident. And I felt that the crucial aspect of Boucher’s
testimony—seeing Goetz shoot Cabey when Cabey was seated—was the kind of image that would stick with that person, not something a witness would likely forget. Boucher seemed very clear and confident on this fact and corroborated what Goetz said. It would take a lot to make me think that was wrong.

In the same case, Lesly concluded that a witness, one of the victims, was lying. This conclusion rested on the fact that the witness’s memory appeared to be so selective. But it was also clear that the witness had an incentive to lie because he was suing the defendant. The jury had to determine how much credibility attached to Goetz’s own account of the shootings. The consensus was that he was more reliable regarding events leading up to the shooting than he was thereafter.

Motive
It is clear from the literature that juries look for motives to explain human actions. They will far more readily accept evidence that a person took a particular action if there is also evidence demonstrating that the person had a motive to do that.

It is true that the prosecution in a criminal case does not need to establish a motive for the crime. However, it is also clear that juries—using their knowledge of life and of people—look for a motive.

Burnett acknowledged that the prosecution did not need to show a motive for killing. However, he felt that there should have been a ‘wisp of a rationale’ as he put it for a particularly cruel killing involving some twelve stab wounds to the head (Burnett 2002, p. 74).

In the trial of Angela Davis, the prosecutor suggested to the jury that the defendant was trying to free the man she loved. Timothy appears to be rather scornful of the prosecution suggesting that an activist like Angela Davis would act out of passion rather than out of political conviction. She clearly thinks that the prosecution case on that point is premised on a sexist assumption.

In Scott Peterson’s trial, the evidence given by the defendant’s mistress greatly assisted some of the jurors. The fact that he was carrying on with another woman might help explain why he would kill his wife.
Bellmessieri said the light went on when he realised Peterson was carrying on this torrid love affair over the phone at the time of his wife's vigil (Beratlis et al. 2007, p. 164).

**Open mindedness**
Jurors are admonished to remain open-minded during the course of the trial. There are numerous examples in the literature of jurors reminding themselves of this obligation.

Burnett acknowledges that he had an ingrained bias in favour of the defendant. At one stage, after hearing a particular witness, he felt a deep desire for the prosecution to fail (2002, p. 73). It is not clear why he felt this way. Furthermore, it did not prevent him from reserving his judgement until deliberation. When he left the courtroom at the end of the evidence, he felt undecided and thought this was strange. Of course, having a bias does not mean that a person cannot maintain an open mind so long as they are aware of the bias and take steps to counteract it. Burnett acknowledged that in a case such as the one that he judged, reasonable people could have different opinions about the proper verdict (2002, p. 157). It seems clear that Burnett did his best to maintain an open mind.

In the Capano memoir, Carter maintains an open mind by telling himself that he is involved in a long trial and that there will be plenty of time to consider everything (2000, p. 135).

In a death penalty case, the juror Peggy evinces an open mindedness in saying that she distrusts simple explanations. In that way, she was able to accept that the defendant's conduct had been brutal and depraved and yet maintain the belief that he himself was not depraved.

In his account of the subway gunman trial, Lesly gives a most impressive indication of the capacity to maintain an open mind and suspend judgement. In recorded interviews, Goetz had made inflammatory and angry statements justifying the shootings. Lesly (1988, p. 65) was able to overlook this as 'the inflammatory rhetoric of an angry man'.

Lesly (1988, p. 65) felt that his job as a juror was:
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...to see past the emotional tirades when they concern what he was feeling, what he wanted to do, and study what it was that he really did, what actually happened. He could not be judged on his words, only his deeds.

The rest of the jury came to the same conclusion. They attached weight to what Goetz said about issues of fact but disregarded his emotional outbursts. It was possible that Goetz's comments about committing atrocities were the product of feelings of guilt and revulsion.

From Grove's accounts of the London kidnapping case, it is clear that he had no difficulty in maintaining an open mind because he was so bewildered by the evidence. He said (1998, p. 121):

...the trouble was that the defendant's manner was so erratic as to make it hard to judge what he was saying by ordinary criteria. Another example where, even commonsense was willingly suspended. A native English speaker, who was garrulousness would have been highly suspect.

It seems the jury gave him the benefit of the doubt because of his linguistic impediment

**Personality or traits of jurors**

An interesting feature of the literature is the number of instances in which jurors appear to have become paranoid. Mary Timothy reveals her suspicion that the FBI had deliberately targeted members of her family to remind her that they were vulnerable. In the OJ Simpson trial, several jurors clearly became paranoid. It is possible, of course, that their feelings were fully justified.

From the body of literature examined for this thesis, it is clear that jurors who have obsessive traits can affect the jury both positively and negatively. In the Scott Peterson trial, John Guinasso is presented as a somewhat obsessive individual, but a totally honest man who is a stickler for the rules. Before the deliberation phase, he caused one juror to be removed by the judge for a transgression of the rule prohibiting discussion with others. He did this by writing a note to the judge (Kennebeck 1973, p. 83). He took it upon himself to police the rules about deliberation as he understood them.

In the death penalty phase, Guinasso reminded Marino that he could not take into account his own religious beliefs. According to the law, only aggravating and mitigating circumstances were relevant to the determination of penalty. Guinasso is presented as a man who is both obsessive and forthright. For this...
reason, he clashed with the first foreman, a qualified medical practitioner, who was using his personal medical knowledge in ways that Guinasso considered to be illegitimate. Interestingly, it is clear that the first foreman was also an obsessive character. He filled up numerous notebooks with his own notes taken during the course of the evidence. He irritated the jury by his insistence on reading through his copious notes during the deliberation phase saying that he could not make a decision on a point without going through this exercise. There was clearly an element of irritating pedantry in his leadership style. When wearing the hat of foreman, he refused to express his personal views. This case is most interesting because it is the only example of the jury discounting personal knowledge. The likely reason for this was the foreman’s obsessiveness and his conflict with another obsessive character.

Burnett recounts his and other jurors’ irritation at a juror, Pat, who kept demanding that they listen to a re-reading of a very large body of evidence. The rest of the jury rejected Pat’s demands. She became increasingly emotional and at one stage threw a tantrum. It is clear from Burnett’s account that Pat was unwell, having run out of prescription medication. Ultimately the state of her health required that she be taken to hospital.

The forceful, domineering juror can obviously create problems for others. In one of the death penalty cases, Frank was said to be just such a juror. His treatment of the much younger and apparently introverted Peggy seems to have bordered on abuse. It was undoubtedly bullying of a kind. Certainly, under constant pressure from the others, and particularly Frank, she ultimately changed her mind and voted for the death penalty. It is clear that she very quickly regretted this and contacted the judge after the trial to register her concern and her desire to change her vote. From her own account it seems that she was on the verge of a breakdown at the end of the deliberation.

Peggy was a social worker. She focused on the unfortunate circumstances of the defendant’s early life. Given her occupation, it seems reasonable to suppose that she had knowledge and insight about the effect of early trauma upon the later development of antisocial personality tendencies. It is clear that she had a strong belief that seriously adverse circumstances in the person’s early life can lead them into criminality and delinquency. Under sustained pressure from Frank.
and others she felt unable to maintain the merciful position dictated by her personal knowledge and belief.

The author of this thesis suggests that obsessive personalities are less likely to cave in to pressure of this kind.

The irresponsible or delinquent juror appears to be a rarity. Felipe, who so annoyed Burnett, is depicted as being both stupid and irresponsible. He failed to engage properly in the deliberation process. He argued, irrationally, that Milcray would go to jail for a long time irrespective of the jury's verdict. At one point, he utilised a system of divination to determine guilt or innocence. He offered to vote either way because he wanted the deliberation to conclude. He tried to escape from the court but was apprehended. He asked to be discharged and was threatened with contempt. It is interesting to speculate about what might happen if a jury was burdened with three or four like him. From Burnett's account, it seems highly likely that the juror lacked the intellectual capacity to engage meaningfully in the jury process.

**Post-trial attitude**

In some instances, the jurors have changed their mind about a verdict after the conclusion of the trial. This is not common but has happened particularly in death penalty decisions. This is a matter of considerable concern. In most cases, however, jurors have maintained that the decision was correct.

In one of the death penalty cases, as we have seen, the juror Peggy was pressured into agreeing to the death penalty. She was clearly suffering from nervous exhaustion. Immediately regretting her decision, and the jury's verdict, she tried to contact the judge to register her concern. Peggy was clearly bludgeoned into concurrence, in the metaphorical sense. She ceased to rely upon her reservoir of personal knowledge and belief. Her story is most disturbing.

It is interesting to contrast her case with that of Richelle Nice who was one of the jurors in the Scott Peterson trial. Both women appear to have had a nervous collapse at the end of their participation in deliberation. Richelle suffered from several nervous breakdowns in the years following the trial. But she did not question the accuracy or appropriateness of the verdict or the death penalty.
Prejudicial matters
There has been considerable interest in irrelevant but prejudicial factors that can affect the verdicts. The most notable and most commonly studied factor is race.

In the juror literature, three of the trials studied in the research for this thesis lent themselves to a consideration of race as a factor. In all such cases, the defendant or defendants were African–American. In two cases the jurors—being well aware of the race issue—seemed able to set it aside and make a fair decision. In the third case, the majority were able to do this but had to contend with racial stereotypes presented by a particularly obstinate juror.

Burnett and his fellow jurors had to decide the guilt or innocence of a man who had stabbed to death another openly homosexual man. The defendant claimed that he was defending himself from a violent attempted rape. Several prosecution witnesses were homosexual; some were transvestites. But the jury did not appreciate the defence attorney’s attempt to discredit these witnesses by asking jurors if they would trust them with their children. This was perceived to be an example of anti-gay bias (Burnett 2002, p. 104).

Zerman (1977, p.159) reported that his fellow jurors, in the main, tried to rid themselves of the effects of bias or prejudice. He said:

Irrationally, I think now that where the jury is most to be commended was in the painfully conscious effort nearly all of us made to look beyond our prejudices. When, early in the deliberations, juror six said that he was sorry there were no blacks on the jury, to lend us some insight into how ‘they’ think, he was giving voice to a factual observation that probably disturbed everyone: we were a lily white group sitting in judgement on a young black man.

Mary Timothy accepted the claim of Angela Davis that the prosecution was based, in part, upon male chauvinism (Timothy 1974, p. 88). This chauvinism was said to consist of the tacit assumption that a female would act out of sexual passion rather than political conviction. Timothy indicates that her jury was not prepared to tolerate examples of chauvinism or racism amongst themselves.

In the Menendez trial, the jurors were, unusually, divided along gender lines. The female jurors were able to accept the possibility that the brothers, terrorised by years of abuse, had killed their parents out of fear. The male jurors, on the other hand, could not accept this even as a possibility. This is perhaps not a case of
male jurors being affected by prejudice but more a case of gender specific knowledge or awareness being available to the female members of the jury.

**Racism**

This is a subset of prejudicial matters as discussed above.

Jurors are conscious of racial issues. Zerman comments that the prosecution by peremptory challenge excluded every black man and woman from the jury (1977, p. 46). The defendant in that trial was a young African–American man.

In his memoir of the Black Panthers' trial, Kennebeck acknowledges that perhaps he is overly willing to excuse the Panthers as victims of society. He surmises that his white Liberal conscience is about to be severely tested (1973, p. 32).

There are also numerous examples of jurors advancing racial stereotypes. Zerman (1977, pp. 129) says:

> Juror two found it difficult to believe that in ‘their ethnic group’ these kids would turn on one of their own and, made up such a story simply for the reward. He told us a rambling anecdote about a black man who had once worked with him and who had stood by another black in circumstances where no white man would have supported another white. I answered that it would be a miracle for us to know what may have motivated the kids — the range of human experience was just too broad and the possible explanations were endless.

And again, Zerman (1977, p. 131) says:

> On human nature, or more precisely black human nature, he knew more than the rest of us because he sees blacks socially. His first memorable statement once deliberations began was: ‘I am sorry there are no blacks on this jury,’ because blacks know how other blacks think. Said juror one, then, and repeatedly over the next nine hours, ‘Philip, we shouldn’t, we mustn’t, talk about colour.’ Juror six smiled condescendingly.

But in the end, Zerman believes that the jury was able to look beyond its prejudices. Certainly, the jury ultimately acquitted the defendant. Yet Zerman believed that two jurors who, for a period, held out for a guilty verdict, had deep-seated negative feelings towards African–Americans.

However, there is no doubting that a juror with a particular ethnicity can assist the jury by calling upon relevant knowledge and experience. In the second death penalty case, two African–American jurors helped to persuade their colleagues that the defendant was the victim of a brutal upbringing. They explained that, because of his upbringing, he never had the chance to lead an ordinary life.
The use of personal knowledge and belief by jurors and juries

Sundby 2007, p. 151). The contribution of these jurors was to make sense of the events in the defendant’s life in a way that the rest might not have been able to do unassisted.

Grove tells us that a juror of Mediterranean ancestry assisted the jury by explaining the strength of family ties in such families. The female juror explained the unlikelihood that the victim would have agreed to a scheme to swindle money from his own family.

Mary Timothy experienced anxiety because she had African–American friends and believed that she could be viewed as a white oppressor if the jury found Angela Davis guilty (Timothy 1974, pp. 46, 115). She is also sensitive to potentially racist attitudes in witnesses. She says that a San Quentin Corrections Officer gave evidence about shooting two of the men in the van. Timothy also observed that his recital sounded ruthlessly cold blooded, and called to mind the image of someone shooting tin ducks at a sideshow. She wondered if he stopped shooting because a white man called out for him to stop.

The jury in the trial of OJ Simpson clearly experienced racial issues. An elderly African–American man, an alternative juror, hated whites and refused to speak to a young African–American female juror when he learned that she had adopted a Caucasian child. In its seating arrangements for meals, the jury divided along racial lines. This jury was composed predominantly of African–American people.

Clearly race is an important category but it has several facets or aspects. A juror of a particular race can bring valuable knowledge to a jury. Conversely, racist attitudes can obviously interfere with the jury process.

Reasoning to a decision

The exact way in which a juror reasons is of considerable interest and appears to be subject to considerable variation. The literature shows one example where an influential female juror reasoned privately to the conclusion that the defendant must be innocent. However, she then adopted a quite different line of reasoning to persuade fellow jurors.

It is perhaps an article of faith that juries and jurors reason to a decision. But there are many instances of jurors coming to a conclusion without being able to
elaborate a logical argument leading to that conclusion. Zerman (1977, p. 130) gives us a good example:

Juror five, probably the oldest person in the room, was convinced to the end that Ricky was guilty, but in objective terms he never really explained why. He kept alluding to ‘bad vibes’ and to the ‘feeling in his gut’—he rarely went beyond the viscera to the brain. Thus, as he was a holdout, he was mostly content to allow juror six to do battle for them both. His occasional contributions were usually incorrect, irrelevant, or incredible. He forgot testimony, seemed incapable of understanding some of the arguments we offered, was mired in that gut certainty that Ricky was ‘guilty as hell’.

At times, Burnett’s line of reasoning appears to be somewhat unusual. At one point, commenting on the credibility of the defendant’s account, he states (2002 p. 145):

Milcray’s story seemed weaker than a calculated lie would have been. It was improbable enough to leave the impression of truth.

Mary Timothy was persuaded of the innocence of Angela Davis in part because she perceived her to be a passionate and highly intelligent young woman. But she was accused of a crime that appeared to be the product of an immature and impulsive mind. It did not fit. In reaching this conclusion, Timothy ignored most of the prosecution evidence. However, once she had realised that Angela Davis was innocent, she scrutinised the prosecution case to establish where the holes were.

In death penalty cases, jurors are supposed to reach a decision about penalty by determining whether aggravating factors of the crime outweigh mitigating factors or vice versa. But some jurors clearly approached the task in quite a different way. They relied upon a belief that the defendant would probably never be executed even if sentenced to death. Thus, they reasoned that it would be better for such a dangerous person to be locked away without hope of parole. They were happy to vote for the death penalty because they did not believe that it really entailed actual execution.

**Requests from jury**

Juries frequently make requests of the judge. Not all such requests are met with a favourable or helpful response. Many such requests are for clarification of instructions that the jury finds difficult to understand or for the reading of passages of evidence. The judge’s willingness or capacity to clarify the
The use of personal knowledge and belief by jurors and juries

information requested by the jury is a variable factor. For example, there are instances of judges purporting to clarify their instructions by simply repeating them—a futile exercise.

Grove reports that the jury on which he served asked the judge if they could view the motor vehicle in which the victim had allegedly being transported after his kidnapping. According to the evidence, he had been bundled into the boot by a large villain who travelled with him in that boot. The jury understandably, wanted to examine the boot in question. How big was it? Could two men have been transported in that way? Since the request was so reasonable, it was somewhat surprising and undoubtedly frustrating that the jury's request was refused.

Judges will discourage or disallow attempts by juries to engage in their own investigations. But there is obviously a subtle distinction between going on a view arranged by the court—for example, of a crime scene—and engaging in one's own investigation. In the London Kidnapping Trial, the jury was taken to view the premises where, according to the prosecution, the victim had been imprisoned after his kidnapping. The jury asked the judge to allow it to restage the kidnapping among themselves. This request was disallowed (Grove 1998, p. 75). Nonetheless, on this occasion the jury managed to conduct some experiments and investigations. It timed the opening and closing of the garage doors and paced out the distance that a gunman had allegedly run to the position of the victim.

In the Scott Peterson trial, the judge allowed the jury to view the defendant's boat in which, allegedly, he had transported the body of his wife after murdering her. The boat was on a trailer. The judge allowed two jurors to climb aboard. The defence lawyer protested that they were conducting experiments.

**Significant factors in decision**

It seems that in every decision some factors stand out as being particularly, or even overwhelmingly, important. This variable stood out as something worthy of further consideration.

Jurors can, and will, point to turning points in the evidence or the deliberation. One piece of evidence, one witness or one sudden realisation can change their
The use of personal knowledge and belief by jurors and juries

view about the trial. In the Scott Peterson case, it appears that the evidence of his mistress had a major impact on some of the jurors. The witness had cooperated with police and taped various telephone conversations with Peterson after the disappearance of his wife. The conversations proved—and indeed Peterson admitted—that he was having an affair.

Juror Julie Zanartu stated (Beratlis et al. 2007, p. 100):

The tapes exposed him as a liar and he lost all credibility. If he was going to lie about one thing, he is going to lie about everything he did.

Beratlis et al. (2007, p. 100) stated:

Belmessieri—I don’t think Scott was ever in love with Amber; he just used her to live this dreamworld he felt he deserved,’ he said. ‘The tapes really verified that the kid was a pathological liar. He might have walked if there were no tapes.’

In the trial of Angela Davis, Mary Timothy was convinced of the defendant’s innocence after reading her letters. She was convinced that there was a mismatch between her personality and the personality of a person who could have conspired to commit the crime in question.

There is a clear parallel between Mary Timothy’s approach in that case and Carter’s approach in the Capano trial. By carefully reading the victim’s diary and emails, he concluded that she was not the manipulative person that Capano depicted. From his account, it is clear that Carter spent more than a day reading and thinking about these materials.

In the first death penalty case, the juror, Frank, had a personal experience in the course of the trial. This experience profoundly affected him and seems to have shaped, to a considerable extent, his opinion about penalty. He and his wife were called out in the middle of the night after being told that their son had been involved in a serious motor vehicle accident. Driving to the hospital, it occurred to him that he might not see his son alive again. Fortunately, although seriously injured, his son survived. The thought stuck in Frank’s mind that the victim’s family had also been notified in the middle of the night about the shooting. But in their case, they did not get the opportunity to say goodbye. Frank took it upon himself to become the victim’s champion in the deliberation process. It appears
that his personal experience of almost losing a relative significantly increased his empathy for the victim and the victim's family.

In the subway gunman trial, a turning point in the deliberation occurred when one of the jurors, a graphic artist by profession, cut out paper figures representing Goetz and his four victims. According to Goetz, the four men had demanded money from him. That is, he viewed them as aggressors. The juror drew menacing faces on four of the figures. He then conducted a re-enactment of the shootings. He labelled the figure representing Goetz as Will Reasonable.

According to Lesly, this demonstration enabled the jurors to consider the incident without having also to consider those aspects of Goetz's personality and presentation that had disturbed them. In his taped interviews, Goetz at times presented as a very disturbed and angry man. When viewing the demonstration with the paper figures, the jurors were able to consider what might have happened without being affected by their beliefs or concerns about Goetz himself. According to the juror, this demonstration led to a breakthrough. It resolved a deadlock and led to a unanimous not guilty vote on all but one of the major charges.

**Socialisation**

In some juries, individual jurors socialised in a very positive way. In other cases, jurors were affected by interpersonal animosities and refused to interact beyond the boundaries of a small faction.

There are many examples of jurors socialising in a positive way; there are also several examples when this clearly did not happen and when the jury was divided by serious conflict. The best example of the socially dysfunctional jury comes from the OJ Simpson trial. The jury was deeply divided. The division was not simply on racial lines since the vast majority of those jurors were African-American. However, that particular jury seems to have been fairly atypical.

The examples of jurors getting on and socialising well easily outnumber the negative examples. In the Black Panthers' trial, Kennebeck (1973, pp. 198–9) described a fairly typical instance of socialisation in the following terms:

...the next day, the jury was sent away because a defendant was sick. I went to a coffee shop with Joe and Claudette; we talked about the emotional effect of Afeni's speech—an impact that hardly anyone could deny. Claudette
said that she was not sorry to have this one-day vacation; she had been so drained by the speech that she felt she had to level off. We talked about racism, law and order, the dangers of being radical...

Zerman reported that four of the female jurors in his jury regularly went to lunch together (1977, p. 105). On one occasion, one of the four told him that it would take a long time for the jury to come to a decision. When asked why, she only indicated that she had heard this, leading him to believe that the four women had been unable to resist the temptation to discuss the case.

Mary Timothy indicated that the jury room was furnished with comfortable chairs. The jury chipped in to purchase a fridge. They brought in coffee, food, magazines and games. She started to play games, including poker, with the others. She also became part of a car pool (1974, pp. 47–8, 52).

The degree of social cohesion in the jury seems to be very important and justifies the inclusion of this category. There is certainly some evidence that when jurors work together cooperatively they can discover new knowledge, hold fuller and more robust discussions and maintain their focus. In any event, proper deliberation depends upon cooperation which it seems can be improved if the jurors have bonded in some way. This may not happen, of course, unless the trial continues for a matter of days, weeks or months.

There is also evidence that if jurors socialise and bond, they are better able to handle the emotional pressure and trauma that a trial can produce. In her memoir of the Menendez trial, the evidence of child abuse emotionally affected Thornton and others. On one occasion, several jurors were crying and the writer felt tense and numb. Afterward, she and several other jurors went out to have a drink. Thornton (1995, pp. 26–7) said:

It's like we're all going through something that no one else can relate to, and even though we can't discuss it much, we kind of like to just be together.

In the same trial, although the jury was unable to agree on a verdict, it seems that there was reasonable social cohesion between the jurors. According to Thornton (1995, p. 27):

...we immediately set up a table for ourselves with a coffee pot, and we take turns bringing in instant beverages, pastries, fruit etc. We sit around at least half the time playing cards, reading magazines, giving each other advice etc. It's really hard to concentrate sometimes because it is so noisy in there, but,
considering there are 18 of us crammed into a relatively small room, we get along amazingly well.

**Special knowledge of jurors including expertise**

A common feature of the jury trials studied in the research for this thesis was the use of specialist or personal knowledge by individual jurors. The most notable case was that of the Scott Peterson trial where the foreman was qualified in both medicine and law. His reliance upon medical knowledge was resented and resisted by the body of the jury. The resulting conflict ultimately led to his withdrawal from the jury. Unusually, this actually happened after the deliberation had commenced. In this case, the juror’s special knowledge and expertise were rejected by the rest of the jury. However, it is far more common for jurors to welcome the assistance that they can gain from the specialist knowledge of one of their number.

Jurors use special knowledge—of that there can be no doubt. This knowledge can take many forms. It can be knowledge of matters that are in evidence or even knowledge of the law. Burnett tells us that a fellow juror, Adele, raised the issue of nullification in the course of deliberation. She was supporting a verdict of guilty, and felt that nullification might justify rendering a verdict that accorded with her sense of justice even if it was not fully supported by the law. Burnett, who was also familiar with the doctrine of nullification, explained it to the rest of the jury.

In the Black Panthers’ trial the prosecution introduced bullets into evidence describing them as rounds. One of the jurors, who knew about ammunition and guns, pointed out that these were not live rounds. They were not even proper blanks because they did not contain any explosive powder (Kennebeck 1973, p. 60).

In one of the death penalty cases, the juror, Frank, noticed the defendant tugging at his sleeves trying to pull them down. Perhaps drawing a long bow, Frank inferred that the defendant was trying to conceal his tattoos. Frank himself had tattoos and was not ashamed of showing them. He also knew that there are ordinary tattoos and there are tattoos that indicate that the person wearing them is a member of a specific gang. Relying upon his observation, and calling upon his personal knowledge, Frank inferred that the defendant was a member of the
Arian brotherhood. This is a white supremacist group that is particularly active in American prisons.

In the account of the London kidnapping case, Grove indicated that several members of the jury were able to assist during deliberation by drawing upon their personal knowledge. A retired psychologist assisted by drawing upon his knowledge of psychology. The postman assisted with his knowledge of the local geography. In particular, he told his colleagues that the prison where the defendants were incarcerated was on his delivery route. It was a facility designed for hard nuts. From this, the jurors deduced that the authorities regarded the men as Category A prisoners and dangerous. The same juror apparently had a good knowledge of cars that later proved to be valuable to the jury.

Grove also observed that the real issue for the jury to decide was whether the defendants were dangerous criminals. They also had to remember that the defendants were innocent until found guilty. A woman with a Mediterranean background told the jurors about the close family ties in Mediterranean families. Another juror had a specialised knowledge of electronics and telecommunications and was able to help the jury understand some evidence about phone tapping. One of the jurors was a cab driver who had a very good knowledge of central London that also proved to be useful. A female juror had some experience of police handcuffs and she explained to the other jurors how they worked. This was of interest because of trial evidence that his kidnappers handcuffed the victim.

Mary Timothy gives an interesting account of her reliance upon special knowledge. She states (1974 p. 119):

The now crippled prosecutor gave evidence of what happened in the van. He saw the right side of the judge’s face pull away from his skull as though in slow motion.

She said:

A very large question arose in my mind as to the accuracy of his memory. For example, his description of the judge’s face falling apart as though in slow motion seemed highly improbable, especially to anyone familiar with the effect of a short-range shotgun blast. I had hunted wild game birds with my husband. One day when I was still learning the use of a shotgun, we were walking through a fallow pumpkin field. Art raised his gun and fired at a
medium-sized pumpkin about six feet away. The pumpkin disappeared instantly and totally! It happened so fast that I couldn’t see it happen. The pumpkin was sitting there...and then it was gone. I observed no slow motion effect. That incident made me carefully consider the validity of Gary Thomas' perception.

In the Scott Peterson trial Beratlis et al. 2007 p. 51), one juror recognised an obvious reason for the long-standing tension between the families of the defendant and the victim. Patently, he relied upon personal knowledge:

The Rochas are valley people and the Petersons San Diego, he said. It's like water and oil. One gets dirt on their hands and the other one might get a splinter. The Rochas are farm people. They are down-to-earth, out working the soil. Dennis Rocha, whom we met later, is an average guy. He owns a water truck and a little ranch. He is a marine corps veteran.

In the subway gunman trial, Lesly (1988 p.11) was an expert in martial arts. He regarded this as a significant bonus, given the issues that were to arise in the course of the trial. He states:

I had to do a lot of soul-searching as I became capable of inflicting mortal damage on a person through the skills I had learned. Besides having a knowledge of self-defence techniques, I also felt I would understand better than most people the nuances of the Goetz scenario and be able to judge more precisely the nature and extent of the threat he faced.

There is no doubt, from his account, that Lesly drew upon his knowledge of self-defence as the trial progressed.

In the same trial, the defence established that Goetz had previously been the victim of an assault. This had led to an injury involving the meniscus in his knee joint. Lesly says that he had suffered a similar serious injury to his knee and was able to relate to that aspect of the evidence.

Speculation
Not surprisingly, jurors frequently engage in speculation as the evidence unfolds and it seems that this may assist them in comprehending the case or cases.

Burnett noted the tendency of fellow jurors to speculate. He pithily stated that they preferred Occam’s knitting needles to Occam’s razor (2002, p. 61).

In the London Kidnapping Trial, the jurors noticed a gay magazine in the film shown of the crime scene. This started speculation as to which of the protagonists was gay although this was strictly of no relevance.

Appendices
There is no doubt that jurors try to fill in gaps in the evidence that is presented to them. Speculation is therefore part of the Jurors’ Toolkit. The case that Burnett wrote about lent itself to speculation because there were so many gaps in the evidence. For example, one of the prosecution witnesses referred to a white adult male being present at the unit where the killing occurred. Burnett (2002, p. 60) indicates that there was speculation as to what part the white male may have played.

Milcra had said that the deceased mentioned someone being in the bathroom. The presence of another person could account for one of the minor puzzles. Milcra said the TV was on when he left, but police had found it off the next day. Burnett implies that people prefer a more elaborate explanation to a simple explanation. The case that Burnett observed had many sensational elements. Some of the witnesses for the prosecution were drag queens. The lifestyle of the victim must have seemed quite alien to many of the jurors. In these circumstances, speculation is perhaps inevitable. Certainly Burnett reports that other jurors imagined, and were fascinated by, possible scenarios.

Zerman reported that one of the jurors in his case came up with a theory for the crime. They posited that the defendant—and the four major prosecution witnesses—all young adults, had jointly planned to rob the victim who was delivering potato chips to a shop. In the course of the robbery, the salesman had been killed. The four witnesses banded together to give evidence depicting the defendant as the sole malefactor. The juror surmised that the offer of a reward had motivated the four to scapegoat the defendant. This was all sheer speculation unsupported by any evidence since it is clear from Zerman's account that defence counsel did not raise any such theory in the course of the trial.

In his account of the London kidnapping case, Grove mentions that at one point the jury was shown a film depicting certain objects at the crime scene. One of the objects was a gay magazine. This fuelled considerable speculation as to which of the main players was homosexual although it also seems clear that sexuality was not in any sense relevant. Grove says that it was a theme that the jurors could not let go of throughout the trial and that their curiosity was not satisfied until the end.
In his account of the subway gunman trial, Lesly reveals the extent of his own speculation and theorising about the shootings. A major issue was the position of the fourth victim, in relation to Goetz, when the victim was shot. The prosecution contended that the victim was seated when he was shot. If that was so, then the case against Goetz was considerably strengthened.

Lesly (1988, p. 255) engaged in a very disciplined form of speculation as he explains in the following passage:

Goetz said in his taped statements that Cabey was holding onto the strap above his seat pretending he wasn’t with the others like he wasn’t aware of what was going on. I believed it likely, therefore, that Cabey was standing facing the seat, as most strap hangers do, rather than facing the aisle as the defence had argued through Quirk’s demonstration. In either case, Cabey would have been standing in profile to Goetz but according to my theory, Cabey’s right side would have been exposed to Goetz rather than his left, rendering impossible the defence’s argument that the fourth shot crippled Cabey because the bullet entered his left side. I believed that the left flap of Cabey’s jacket could have been hanging out over the seat—especially since the pocket was weighted with a screwdriver—and the fourth bullet could have travelled through it inside and out and then struck the panel. Cabey then could have turned around and sat down, and, as the fifth shot was fired, flinched to his right, exposing his left side.

Stereotyping
Stereotyping appears to be very common. Negative examples appear in the literature and these include racial stereotyping. There are also examples of jurors rejecting stereotypes presented to them. In the trial of Angela Davis, the female juror agreed with Ms Davis. She claimed that the prosecution was relying on a stereotype of a female as someone who would act out of sexual or romantic passion rather than political passion. Timothy (1974, p. 88) unhesitatingly rejected this: ‘In a mistrial of the century, the writer rejects any stereotype regarding how a guilty person should look or an innocent person should act.’

In the Scott Peterson trial, a juror expressed surprise that the defendant—who was described as a handsome athletic man—did not exhibit any of the features associated with criminality (Beratlis et al. 2007, p. 39):

...what struck Beratlis the most about Peterson, however, was that he didn’t look like a criminal, let alone a killer. There were no tattoos, no pockmarked face, no sloppy clothes or dirty nails. The clean cut Peterson just didn’t look the part.
Zerman reports that a fellow juror relied on racist stereotypes, suggesting that African–Americans, in contrast to Caucasians, would refuse to give evidence against a person they knew to be guilty.

**Storytelling**
There has been considerable interest in the narrative building model of juror deliberation. In addition, there are many examples in the literature of jurors telling personal stories as an aid to constructing a larger narrative about the trial that they are observing.

In his memoirs, Burnett relates that a fellow juror told the story of a nasty brawl that he had been involved in while serving in the navy. The narrative led to a reconstruction that ultimately led to a realisation that someone’s recollection of a fight can be quite inaccurate. This was an important insight for that jury because the accuracy of the defendant’s account of the fatal struggle was a significant issue.

There are numerous instances in the literature of jurors recounting anecdotes. Zerman reports that a fellow juror told a rambling story about a black man who had stood by another black man. The circumstances were such that no white person would have stood by another white person. The point of the story was the juror’s contention that African–American youths would not have turned against another African–American simply so that they could claim a reward.

Jurors also invent stories or depict hypothetical situations in the course of discussing issues. In the accounts of the subway gunman trial, Lesly gives several examples. One of these was a hypothetical situation where a son shot his father hoping to benefit from an inheritance. However, he only managed to wound, and not kill, his father. This hypothetical story was discussed to explore the concept of intent in relation to the crime of attempted murder.

**Strength of the case**
The strength of the case is, it seems to the author of this thesis, a very important variable. If a case is overwhelmingly strong—or for that matter overwhelmingly weak—then the probability of a wrong verdict appears to be minimised. In cases where the evidence is not overwhelmingly strong it appears that there is a much greater possibility of jurors acting independently. For example, it gives jurors scope to speculate, discover their own evidence and build their own theories.
the Black Panthers’ trial, Kennebeck frequently comments upon the paucity and inadequacy of the evidence. Kennebeck (1973, p. 192) wrote in his journal:

Of course I have to reserve judgement until I hear the DA; and even at this stage I can honestly say that I frankly sincerely patriotically dutifully think that it is fairly possible that he will pull all his bits and pieces together into a sharp picture of conspiracy. Maybe there is something bigger there that has escaped my busy mind. There must be something that enables him to believe, still, that he has a case.

And at another point Kennebeck (1973, p. 200) says:

...as I typed my notes at intervals that evening in my apartment, I brooded over this culmination. I was not logically ticking off evidence and counter evidence; I was in an emotional stew, a kind of baffled despair. It didn't matter that the defendants, some of that diverse bunch, may have had unlovely records. They hadn't conspired to commit all those crimes, we had heard no proof at all that they had done any of the things that the mysterious grand jury had accused them of.

The trial of Jack Ruby provides an instance where the prosecution was overwhelmingly strong and the defence case exceedingly flimsy. Indeed, the jury thought so little of the defence that, according to Max Causey, they did not even deliberate on the issue of guilt. When a case is overwhelmingly strong, it seems that there is a reduced opportunity for juror speculation. There are literally no gaps to fill.

Burnett acknowledges that the New York gay murder case was neither overwhelmingly strong nor overwhelmingly weak when he notes that reasonable people could disagree on a verdict (Burnett 2002, p. 157).

In the Scott Peterson trial, juror John Guinasso (Beratlis et al. 2007, p. 245) said that every piece of circumstantial evidence pointed towards the defendant.

**Sympathy or dislike**

Jurors often expressed strong likes and dislikes for defendants, parties and participants. This has been the subject of considerable interest by behavioural scientists. The literature examined in the research for this thesis presented many examples where jurors reacted very strongly in forming a strong liking or dislike for a party. Mary Timothy, in the trial of Angela Davis, formed a strong and favourable opinion of her concluding that she could not have committed the crime with which she was charged. This seemed to have been more important than the actual evidence linking her to the crime.
Writing about the trial of a group of Black Panthers, Kennebeck (1973, p. 40) did not attempt to hide his admiration for them, stating: ‘I have admired many aspects of the Black Panther party, I sensed that much of their frightening talk was a form of self-respect.’

In the Scott Peterson trial, jury members expressed enormous sympathy for the victim and indeed her family. Photos of the victim shown to the jury appeared to have a considerable effect upon them. Beratlis et al. (2007, p. 55) stated:

...like the other members of the jury, Richelle Nice cracked emotionally when she saw the video. ‘The video just put a personality to the face we all saw and fell in love with.’ she said. ‘Seeing her alive had a great impact on me. My heart sank into my stomach. I remember thinking how bad could it have been? It looks like a life I only dream of. How could this have happened? Who did this and why if it was Scott? You felt the love she had for him. It poured into that courtroom, with only pictures for statements.’

Sympathy appears to be a significant factor in death penalty cases. In particular, jurors often seem to express considerable sympathy for the family of the victim. However, the jury’s task in such cases is to weigh the aggravating and mitigating factors and there is no role for an expression of sympathy. In one of the death penalty cases, a juror expressed considerable sympathy for the defendant’s mother. She said that the woman reminded her of her own mother. In the same case, the juror, Frank, was so moved by the plight of the victim’s family that he took it upon himself to become the victim’s champion in the deliberations.

Burnett tells us that one of the jurors in the New York gay murder case urged the others to think about the victim. Some photos of the victim’s unit, where he was killed, depicted a crucifix on the wall. The juror pointed to it in urging others not to forget about the deceased.

In the second death penalty case involving a truly sadistic and brutal murder, the jurors were able to feel a degree of sympathy and understanding for the defendant notwithstanding the atrocity of his crime. The depiction of his early life circumstances was horrible. He had, himself, been the victim of prolonged and serious physical and psychological abuse dealt him by a sadistic father.

In the subway gunman trial, the juror indicates that he was able to sympathise with Goetz when he said that he simply wanted to return to a normal life.
sympathy for him was perhaps not easy since he is depicted as such a disturbed and distorted character.

**Tactics—understanding of**

Some jurors have a keen insight into the tactics employed by the lawyers. They are certainly not naive observers of the trial as it unfolds. They can be very critical of tactics that they regard as unfair. Jurors can be very critical of lawyers intimidating things that they fail to later prove. In the death penalty case, a juror commented that the prosecution did an excellent job of discrediting a defence psychiatrist. The prosecution showed that, in effect, the psychiatrist made his living by giving evidence in cases of this kind.

In his account of the trial of the subway gunman, Lesly notes that Slotnick asked questions that were clearly improper and that he knew were bound to be objected to. He undoubtedly used this tactic because he believed that jurors cannot completely discount what they heard (Lesly 1988, p. 21)

Zerman observes that the prosecutor himself drew attention to the unsavoury histories of some of the prosecution witnesses. He surmises that the reason for this was to weaken the impact of these disclosures. Zerman thought this was a naive tactic.

Timothy took offence when a lawyer showed a witness a photograph of a judge with a shotgun pointed at his neck. The photograph had actually been taken in the course of an armed siege of a courtroom where a mass kidnapping occurred. Viewing the photograph, the witness broke down. In Timothy’s view, (1974, p. 106) the incident was contrived by the lawyer to get the jury emotionally involved. She disapproved of the tactic.

In the Scott Peterson trial, some jurors noted that there were several beautiful young women seated behind the defence lawyer. They were wearing miniskirts. Several jurors surmised that the defence lawyer was trying to distract the jury at a time when key prosecution testimony was being given (Beratlis et al. 2002, p. 2).

In the same trial, several jurors were highly critical of the defence attorney’s promise, in his opening statement, that he would prove his client to be ‘stone cold innocent’. The statement created an expectation that was never satisfied.
Juror Belmessieri said that this promise hung over the trial. But in the end, all the defence did was to prove their client guilty.

**Thinking about verdict consequences**

Jurors often give weighty consideration to the consequences of making a particular finding. Indeed, it is hardly surprising that this appears to be an overwhelming factor in death penalty cases. It is also a feature of criminal trials. Some jurors seem inclined to find a defendant guilty because they are alarmed at the prospect of letting a dangerous criminal loose on the streets. Zerman (1977 p. 138) gave an extreme example of this:

> Juror one started to cry. I felt limp and choked. ‘Christ almighty, we did it. We did it,’ I said to myself. But within seconds juror six had leapt to his feet, his eyes blazing, and like a titan of vengeance, tottering and about to collapse, he screamed at us all: ‘...and how many of you believe with me that we are turning an animal loose on the streets again?’ It seems almost comical now to remember that two or three hands shot up immediately.

In one of the death penalty cases, some of the jurors viewed with scepticism the assurance that a life sentence would be served without parole. Accordingly, they adopted the view that if Lane were not executed, he may in due course be released. Once in the community, he could offend again. One juror even expressed the fear that he might come looking for the jurors. Whereas some jurors can be fearful of the prospect of setting a dangerous defendant free, others are more concerned at the prospect of convicting an innocent defendant.

A group of jurors thus regarded a death sentence as an insurance policy. It was unlikely that it would ever be carried out. However, if imposed, it would mean that the defendant would be subject to harsh conditions, unlikely to escape and less likely to cause problems. Of course, these considerations were irrelevant from the legal perspective. The jury should have focused only on aggravating and mitigating circumstances. But it is clear that there was also considerable focus on the potential consequences of a particular verdict. Thus, jurors’ own knowledge and belief about the consequences of a death sentence as against a life sentence play a role in their deliberations in these cases. Furthermore, it is clear that jurors are justified in believing that the death penalty is unlikely to be carried out. Detainees on death row in American prisons are more likely to die by suicide than by State execution—a strange statistic.
In the second death penalty case, a juror identified as Jerry was, like the victims, homosexual. The victims had hustled for sex to make ends meet. The juror was familiar with this aspect of the gay scene. He was very concerned that the defendant, if allowed to live, would have access to young male prisoners. Jerry was initially inclined to the death penalty because he identified with the gay victims and viewed the crime as an attack on the gay community. But he was also concerned about the defendant’s sexual conduct in prison if allowed to live.

**Understanding of people**

Jurors frequently make judgements about the personalities and inclinations of participants in the trial. Of course, to some extent this is inescapable. It seems that there is some inherent notion of the ordinary range of human behaviour and reaction that jurors rely upon. An interesting example occurred in the Capano case. The prosecution and the defence agreed that the defendant and the deceased had been having an affair. However, they disagreed about which party had been the manipulator or seducer and which party had been the victim. Carter analysed the evidence very closely and found significant support for the prosecution view that the defendant was the manipulator and seducer and the deceased was the victim. He built a profile of the protagonists by carefully analysing and considering evidence disclosed in emails, diary entries and therapists’ notes. It was by no means a superficial judgement but a very deep exploration of character relying upon all of the available evidence.

Mary Timothy formed a very clear view about Angela Davis’ personality. In particular, she believed her to be highly intelligent and passionate. The formation of this opinion appears to have been something of a turning point for her. She could not believe that a woman like Angela Davis would involve herself in a crime that was impulsive, poorly planned and the product of an immature mind.

**Use and value of particular evidence**

Jurors clearly do not take evidence at face value. More to the point, their interpretation of the meaning and significance of particular evidence does not always coincide with the view of the party who has produced that evidence.
The literature shows that jurors frequently attached significant weight to aspects of the evidence that were not particularly emphasised by either party. Of interest is the nature of the evidence that seems to appeal to certain jurors.

In the Black Panthers trial, the prosecution showed the jury a film about the Battle of Algiers. The relevance of the film, according to the prosecution, was that ideas from it had been reproduced in some revolutionary document created by the Panthers. Kennebeck draws quite different conclusions from the film. He says that it is really about fighting against oppression. It is a film about self-defence. He feels that the district attorney missed the point of the film.

In the same case, the prosecution produced written material, found in the possession of the defendant, and tendered it to prove revolutionary intent. Kennebeck quite logically reminds himself that the fact of possession does not prove that the defendant read the material. In addition, even if the defendant read the material, that does not prove that he agreed with it. The juror closely scrutinised the material, looking for signs that the defendant had actually handled the document.

When listening to tapes of conversations between the Panthers the juror is unable to discern any evidence of plotting. To him it sounds more like wild talk (Kennebeck 1973, p. 82). Evidence is led about one of the Panthers telling the others that he had brought back some dynamite. Kennebeck wondered whether the Panther used the word dynamite in the sense of something sensational.

In general, the memoir of the Black Panthers' trial shows a juror who tended to discount the value of almost all the evidence that the prosecution produced. To him, the evidence either held little value or else helped him to see things from the defence's perspective. He is particularly scathing of the production, in evidence, of a map that is supposed to show that the Panthers were planning to attack a railway line. There is no railway line actually shown on the map (Kennebeck 1973, p. 190). At another point Kennebeck noted that the only act of insurrection that was really proven was the cutting of telephone lines. But on this occasion, an undercover policeman carried out the deed.

In the first death penalty case, the defence called a prison officer who gave evidence that the defendant behaved well. But this appears to have backfired.
The conclusion that the majority of the jury drew from the evidence was that the defendant was manipulative to the point that he could influence a prison officer. In the same case, there were angry murmurs in the jury box when details of the defendant’s extensive criminal record were made known. That group identified as the chorus started to view the defendant as incorrigible, a man who had chosen to walk the path of criminality and not mend his ways (Sundby 2005, pp. 47, 69).

In the Scott Peterson trial, the jury heard tapes of the defendant’s conversations with his mistress following the disappearance of his wife. To some jurors these tapes were critical in proving guilt. To others, they were more important in the subsequent deliberation about whether to impose the death penalty. For example, Belmontessiere concluded that Peterson was a chameleon and a sociopath. Guinasso said that the tapes exposed Scott as a man who planned events to accomplish a devious and heinous goal. Juror Tom Marino, a religious man, was alone in initially holding out for a life sentence. But he was influenced by tapes produced by Peterson’s girlfriend that showed the defendant to be unconcerned about his missing wife. Marino ultimately voted, with the rest, for the death penalty.

In the same trial, the implosion of a defence medical expert on the stand was a massive blow to the defence. Juror Beratlis said that everything now pointed to guilt (Beratlis et al. 2007, p. 127). The defence expert had made an assumption about the date on which the deceased had conceived a child. The assumption was shown, in cross-examination, to be incorrect.

In the subway gunman trial, the jury wrestled with the issue of whether Goetz’s perception of threat was reasonable. Although there was much contradictory evidence about the events leading to the shootings, all witnesses agreed that at least three victims had approached Goetz as a single unit. They were said to be bunched together. This added credence to Goetz’s assertion that he had been surrounded and further made his perception of being threatened look more realistic.

**Use of extraneous material**
The legal system expends much time and energy trying to prevent jurors from accessing or relying upon extraneous material. If that material is carried around
in a juror's head, then such attempts are likely to be futile. Interestingly, the literature shows many other examples where jurors have sought out and relied upon extraneous material. One of the more interesting examples arose in the London Kidnapping Trial where the jurors used a pair of binoculars smuggled into the jury room to view a particular motor vehicle model. The trial judge had, surprisingly, refused the jury's request to view a particular vehicle used in the alleged crime. So they took matters into their own hands. A relevant issue in the trial was the spaciousness of the boot in which, according to the prosecution, the victim and one of the defendants had been transported.

The literature shows many other examples where extraneous material has been used. In the Scott Peterson trial the prosecution alleged that the defendant had dumped his wife's body in San Francisco Bay. A juror improperly accessed an internet site to learn more about currents in the area. In another trial, a juror took a psychological journal featuring an article on interrogation techniques into the jury room. The jurors thought that police investigators had used one of the techniques.

Kennebeck (1973, p. 145) wrote:

> Next day, Fred Hills brought into the jury room a collection of readings on psychology, with a piece on police interrogation that discussed the 'Mutt and Jeff' technique. When a mean cop, Mutt, fails to force a confession out of the suspect by violence or the threat of it, he is shooed away by nice cop, Jeff, who gives the suspect sympathy and comfort. According to the article, this sense of release often leads the captive to spill out a confession that may or may not be reliable.

Fred made no comment when he brought the book in and pointed the article out to me. We discussed it in general terms; Claudette Sullivan got into the conversation and read the piece. So did Joe Rainato, and some of the others. We took it for what it was worth—an article which conceivably any one of us might have come across on our own.

Burnett reports that one of the jurors found a copy of the judges’ sentencing guidelines on the bench. Consulting the document, the jury discovered that if the defendant was found guilty, he would be sentenced to life imprisonment. Obviously, there are many different classes of extraneous material. A judge's sentencing guide and an article on psychology found by a juror are both clearly extraneous in the sense that neither comprised evidence in the case. Sometimes, extraneous material is actively sought. This happened in the Scott Peterson trial.
The use of personal knowledge and belief by jurors and juries

where a juror started her own investigation on the internet. Sometimes it consists of chance experiences or observations.

Grove reports that he and other jurors chanced to see the victim outside the courtroom. He had his head against a wall and was weeping. The observation was discussed with the rest of the jury and all agreed that they ought not to be influenced by it. In other cases, the jurors have drawn inferences from the behaviour of parties in the courtroom even though that behaviour does not really constitute any form of evidence. In one of the death penalty cases, the sympathetic juror, Peggy, concluded early on that the defendant was guilty. She said that a question from the prosecutor before the commencement of the trial suggested that the defendant was guilty. It's difficult to understand why anyone would draw that inference—most prosecutors would surely believe in their own case.

In the defamation trial written about in The Juror and the General, Roth indicates that she didn’t rely only on witnesses to determine whether answers were true or false. She also looked at the reactions of various persons observing the trial.

**Use of notes**

Traditionally, judges would not allow jurors to take notes during the course of the trial. The judicial attitude, apparently, was that jurors would not know what was relevant and what was not relevant and might waste time in unproductive activity. Fortunately, a more enlightened attitude now prevails and jurors are allowed, and at times encouraged, to take notes—at least in some courts. The extent to which they do so, and the use they make of notes, is, however, quite variable. The memoirs give examples of the efficient and productive use of notes together with some examples of the obsessive noting of very large quantities of evidence. There are also examples of the jurors whose memories were so good that they managed to retain the important facts without resorting to notetaking.

Jurors take notes in the courtroom and to some extent in the jury room during the deliberation phase. Some jurors elaborate on their notes in their own homes or incorporate them into a form of journal.
The use of personal knowledge and belief by jurors and juries

Burnett reports that the jury, in the jury room, watched a taped interview of the defendant by police. One juror, Adele, noted all of the inconsistencies in the defendant’s statements.

Kennebeck seldom took notes in the courtroom but he did scribble them down during the breaks in the Panthers’ trial and typed them up at night. In the Scott Peterson trial, the first foreman took copious notes, filling numerous notebooks. His later insistence that he could not discuss a topic without reading his notes irritated other jurors.

In her account of the Menendez trial, Thornton reports that jury notes became an important part of deliberation. However, the jurors were not allowed to take their notes home and so did not have much time to reflect on them. Thornton reported on the variability of note taking. While she was still using her first book some of the jurors had filled up two or three. The juror sitting next to her would simply note the date, the name of the witness and then provide a very brief synopsis of the evidence.

Grove states that one third of the jurors made notes, filling approximately one notebook every month. The jurors were not allowed to take their notebooks home. He overcame this by writing notes at night (Grove 1998, p. 97).

Validity factors
One aspect of this is the accuracy of accounts.

There are aspects of the memoirs that can be compared to findings emerging from other modes of study of the jury. Jurors writing the memoirs expressed much the same criticisms and much the same sense of frustration at aspects of the system as they have expressed in jury surveys.

The jurors who wrote their own memoirs certainly took steps to ensure accuracy. They have admitted at times changing names to protect identities, although of course in notorious cases this would be pointless.

Lesly borrowed a tape recorder and cassette so that he could make journal notes every night. Similarly, Max Causey kept a journal that he used to write his account of the Jack Ruby trial.

Thornton states that every day she summarised and commented on testimony that she considered to be important.
Values
Jurors have to make value judgements from time to time. There were many examples where reliance upon personal values was of significant importance in the course of reaching a decision. This is nowhere more evident than in death penalty cases. In some such cases, some jurors viewed as abhorrent the prospect of the State taking a human life. For other jurors, it is simply a matter of reliance upon the biblical dictum: ‘an eye for an eye and a tooth for a tooth’. For persons with those strong and opposed values, it is difficult to see how any amount of deliberation could produce compromise. In such cases, the importance of personal values is overwhelming.

It is not always obvious, perhaps, that a value judgement is being employed. Burnett reports a discussion during the deliberations about following the letter of the law and the spirit of the law. This was part of the discussion about the doctrine of jury nullification. Several jurors felt strongly that what the defendant had done was wrong even if he was not technically guilty as charged. Paige urged them to follow the spirit and not the letter of the law. She didn’t want him to go entirely free. They could punish him for lying and abandoning a wounded man (Burnett 2002, p. 118). The role of values here is clear.

Value judgements are obviously very important in death penalty cases. There are examples of jurors who were most reluctant to support the death penalty being selected in two juries where they ultimately had to grapple with a life and death decision.

In one of the death penalty cases, the juror, Peggy, a social worker, held out against the death penalty until the pressure from other jurors became too great and she succumbed. She clearly had a strong humanitarian outlook. She perceived the defendant himself to be a victim of tragic circumstances. Most of the other jurors seemed to have a different set of values. They strongly believed that individuals are to be held accountable for what they do. This is seen most clearly in the case of the juror, Frank. Although similar to the defendant when young, Frank had reformed. He believed that the defendant had not availed himself of that same opportunity. The juror Ken revealed his value system when he said that if you take a person’s life you pay with your own.
In Scott Peterson’s trial, the jury, after delivering a guilty verdict, was re-summoned after a break to decide the penalty. Tom Marino, a highly religious juror, resisted the death penalty until John Guinasso admonished him not to allow his personal religious values to influence his thinking.

Mary Timothy’s feminist values were apparent from her account of the Angela Davis trial. She shared the defendant’s belief that the prosecution was partially based on a sexist assumption. That assumption, she explains, was that a woman would act from sexual or romantic passion rather than political conviction. She noted that men dominated the courtroom; the few females who participated were restricted to subordinate roles.

Lesly recounts that a particularly articulate juror named Brodie was reluctant to acquit the subway gunman on a technicality. To her, it was important that her decision was right in the eyes of God and not only according to law. She was clearly a well-educated woman; the writer describes her as an English professor. Lesly urged her not to put this moral load upon herself. Ultimately the jurors agreed that they must judge Goetz in accordance with the laws relating to justification and self-defence rather than in accordance with any personal moral code (Lesly 1988, p. 297).

It is apparent from the foregoing that when value judgements are used, they are often allied with religious belief. Max Causey indicated that at the beginning of deliberation he asked the jurors to observe several minutes of silence to reflect upon their task. He took the opportunity to say a prayer asking for divine guidance.

**Voting**

Voting can occur at different times depending upon the style of deliberation that has been chosen. It can also be undertaken by secret ballot or openly. The timing and type of voting is a variable of interest.

The juror reminiscences tend to support the observation that if the jury votes early, then there is a not likely to be a full discussion of the issues. There are two clear examples. In the Jack Ruby trial, the jury indicated that it did not want to discuss the issue of guilt and so a vote was taken at the outset. Admittedly, this is different from the foreman taking a vote without asking jurors whether they...
wanted to hold a discussion first. It is somewhat surprising that the jury was prepared to forego the opportunity to discuss medical evidence that had occupied such a large part of the trial. The parties agreed that Jack Ruby had shot Lee Harvey Oswald.

The issue was Ruby’s mental state. The defence contended that, at the relevant time, Ruby was in the grip of an unusual epileptic seizure, resulting in automatic, unthinking behaviour. On that basis, the defence tried to bring Ruby’s action within the ambit of the McNaughten rules that govern the defence of insanity. Under those outdated rules, a person is technically insane if they do not know what they are doing or—while knowing what they are doing—do not know that it is wrong. The defence had to prove on the balance of probabilities that Ruby was insane. This required them to prove that Ruby acted in an unthinking way such that he did not know what he was doing at the relevant time. Weeks of testimony were devoted to this medical issue and eminent psychiatrists and neurologists were called to support both the prosecution and the defence. But the defence had so little impact on the jurors that they were prepared to reject it without deliberation. Consequently, the jury devoted most of its deliberation time—over two hours—to discussing the appropriate penalty.

The OJ Simpson murder case has often been cited as an example of a jury deliberating for an unexpectedly short period. In this case, it seems that deliberation lasted for four hours. However, that period included a delay caused by the jury’s request to have certain evidence read to it. This is also an example of a case where a vote was taken at the outset. The result was ten not guilty and two guilty votes. From the account given in Madam Foreman—a Rush to Judgement, it is very difficult to determine precisely what issues were discussed during deliberation and at what depth they were discussed. But it is impossible to believe that the jury could have considered all or even most of the issues raised in ten months of hearing and evidence.

However, there were numerous issues in the OJ Simpson trial. Furthermore, different jurors had clearly arrived at different views on them. One juror believed that OJ Simpson had been at the scene and that his blood had been found at the scene. Another believed that he knew something about the crime but that his guilt hadn’t been proved. A third believed him totally innocent. It is
therefore impossible to take at face value the chair's indication that the jury all shared the same doubts.

In the Menendez trial, the jury remained deadlocked after one-hundred-and-six hours of deliberation (Thornton 1995 p. xx).
### Appendix Three

Table 1 grouped into types

<table>
<thead>
<tr>
<th>CONCEPT</th>
<th>TYPE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Participant</td>
<td>Category</td>
</tr>
<tr>
<td>Case</td>
<td>Category containing subcategories, issues, evidence and outcome</td>
</tr>
<tr>
<td>Court</td>
<td>Category having subcategories, case, participants and culture</td>
</tr>
<tr>
<td>Deliberation</td>
<td>Category with important properties, effort and style</td>
</tr>
<tr>
<td>Culture</td>
<td>Category—itself a subcategory of court. It has its own subcategories including explicit rules and procedures; and implicit rules and assumptions</td>
</tr>
<tr>
<td>Construct—actionable</td>
<td>Concept</td>
</tr>
<tr>
<td>Confession</td>
<td>Concept grouped as part of evidence</td>
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<tr>
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<td>Concept grouped as part of the category participant</td>
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<tr>
<td>Lawyer</td>
<td>Concept grouped as part of the category participant</td>
</tr>
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<td>Party</td>
<td>Concept grouped as part of the category participant</td>
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<td>Issue</td>
<td>Concept grouped as part of the category case</td>
</tr>
<tr>
<td>Outcome</td>
<td>Concept grouped as part of the category case</td>
</tr>
<tr>
<td>Significant factor in decision</td>
<td>Concept grouped as part of the category outcome</td>
</tr>
<tr>
<td>Judge</td>
<td>Concept grouped as part of the category participant</td>
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<tr>
<td>Jury</td>
<td>Concept grouped as part of the category participant</td>
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<td>Media</td>
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<tr>
<td>Outcome</td>
<td>Concept grouped as part of the category, case</td>
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<tr>
<td>Concept</td>
<td>Property</td>
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<td>-------------------------------</td>
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<tr>
<td>Judge</td>
<td>Concept grouped as part of the category, participant</td>
</tr>
<tr>
<td>Lawyer</td>
<td>Concept grouped as part of the category, participant</td>
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<tr>
<td>Party</td>
<td>Concept grouped as part of the category, participant</td>
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<td>Witness</td>
<td>A concept grouped as part of the category, participant</td>
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<tr>
<td>Significant factor in decision</td>
<td>Concept grouped as part of the outcome</td>
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<tr>
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<td>Concept grouped under the category, participant</td>
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<tr>
<td>Evidence</td>
<td>Concept underneath the category case</td>
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<td>Aids to learning</td>
<td>Property of culture</td>
</tr>
<tr>
<td>Jury selection</td>
<td>Property of culture</td>
</tr>
<tr>
<td>Duration</td>
<td>Property of the case</td>
</tr>
<tr>
<td>Hardship and comfort factors</td>
<td>Property of the culture</td>
</tr>
<tr>
<td>Control of jury</td>
<td>Property of the judge</td>
</tr>
<tr>
<td>Attentiveness</td>
<td>Property of the juror</td>
</tr>
<tr>
<td>Bizarre juror behaviour</td>
<td>Property of the juror</td>
</tr>
<tr>
<td>Decision—when made</td>
<td>Property of the juror</td>
</tr>
<tr>
<td>Education level of jurors</td>
<td>Property of the juror</td>
</tr>
<tr>
<td>Exposure to external information before and during trial</td>
<td>Property of the juror</td>
</tr>
<tr>
<td>Frustration with the system</td>
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<tr>
<td>Grasp of trial issues</td>
<td>Property of the juror</td>
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<tr>
<td>Hardship experienced by jurors</td>
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<tr>
<td>Intelligence level of juror</td>
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<tr>
<td>Juror grasp of issues</td>
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<tr>
<td>Lack of awareness</td>
<td>Property of the juror</td>
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<tr>
<td>Personality of juror</td>
<td>Property of the juror</td>
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<td>---------------------</td>
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<tr>
<td>Post-trial attitude</td>
<td>Property of the juror</td>
</tr>
<tr>
<td>Prior jury experience</td>
<td>Property of the juror</td>
</tr>
<tr>
<td>Diligence</td>
<td>Property of the juror and jury</td>
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<tr>
<td>Abiding by the rules</td>
<td>Property of the juror and the jury</td>
</tr>
<tr>
<td>Identity</td>
<td>Property of the juror, party, witness</td>
</tr>
<tr>
<td>Competence</td>
<td>Property of the jury</td>
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<tr>
<td>Conflict and harmony</td>
<td>Property of the jury</td>
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<td>Juror interaction</td>
<td>Property of the jury</td>
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<tr>
<td>Socialisation</td>
<td>Property of the jury</td>
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<td>Lawyer performance</td>
<td>Property of the lawyer</td>
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<td>Accepting evidence</td>
<td>Tool/Schema</td>
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<tr>
<td>Adequacy of investigation–assessment of</td>
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<tr>
<td>Agreeing/affirming</td>
<td>Tool/Schema</td>
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<tr>
<td>Analytical thinking</td>
<td>Tool/Schema</td>
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<tr>
<td>Applying standard/onus of proof</td>
<td>Tool/Schema</td>
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<tr>
<td>Arguing/contradiction</td>
<td>Tool/Schema</td>
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<tr>
<td>Assumption–making</td>
<td>Tool/Schema</td>
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<tr>
<td>Bargaining or compromising on verdict</td>
<td>Tool/Schema</td>
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<tr>
<td>Bizarre belief–using</td>
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<tr>
<td>Bullying or applying pressure</td>
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<tr>
<td>Burden and standard of proof–applying</td>
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<td>Character evaluation</td>
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<td>Checking or clarifying evidence</td>
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<td>Common sense—using</td>
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<td>Considering verdict consequences</td>
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<td>Corroboration—seeking</td>
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<td>Creative or imaginative thinking</td>
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<td>Distrust of authority—acting on</td>
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<tr>
<td>Done that—personal experience of fact in issue</td>
<td>Tool/Schema</td>
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<tr>
<td>Drawing conclusions during the trial</td>
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<tr>
<td>Emotional reactions of participant—noting</td>
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References

AMBADY, N. & ROSENTHAL, R Half a minute: Predicting teacher evaluations from thin slices of nonverbal behavior and physical attractiveness. Journal of Personality and Social Psychology, Vol 64(3), Mar 1993, 431-441


BERATLIS, G., MARINO, T , BELMESSIERI, M, DENNIS LEAR, D , NICE. R , GUINASSO, J, ZANARTU J, SWERTLOW, STAMBLER F (2007) We, the jury: deciding the Scott Peterson case, Phoenix Books Inc.


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EATON, A. (1976) IN BARBER, D. & GORDON, G. (Eds.) *Members of the Jury*


The use of personal knowledge and belief by jurors and juries


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Appendices
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KENNEBECK, E. (1973) *Juror Number Four: The Trial of Thirteen Black Panthers as Seen from the Jury Box*, New York, Norton.


The use of personal knowledge and belief by jurors and juries


MANZO, J. F. (1994) You Wouldn't Take a Seven-Year-Old and Ask Him All These Questions: Jurors' Use of Practical Reasoning in Supporting Their Arguments. Law & Social Inquiry, 19, 639-663.


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**CASES**

Briginshaw v Briginshaw (1938) High Court of Australia  60 CLE 336
Ex parte Lasley  505 So. 2d 1263, 1264 (Ala. 1987)
People v Maragh  (2000) Court of Appeals of New York. 729 N.E.2d 701
Rushnestsy v State (1922) Texas Court of Criminal Appeal. 244 S.W. 372, 373 (Tex. Crim. App. 1922)
Satterwhite v the State. Court of Appeals of Georgia. No. A98A 1523

**STATUTES**

Jury Act (1977) NSW
Contempt Act (1981) UK.