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### The Jury as Democracy

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## THE JURY AS DEMOCRACY

Jenny Carroll\*

### ABSTRACT

*Almost from the moment the law is set to paper, it is shaped and refined through acts of interpretation and discretion. Police and prosecutors choose which cases to investigate, which to charge and how to charge them. Judges make decisions every day that affect the outcome of cases. These acts of interpretation and discretion are driven by the perspectives of those empowered to make them. All too frequently, they reinforce existing power dynamics. But there are other realms of discretion in criminal law. Whether seeking to apply a legal standard as instructed or engaging in an act of nullification, ordinary citizens serving as jurors engage in unique acts of interpretation, redefining the very concept of the law in terms of their own lived experiences and expectations. In this, jurors serve a democratic function that exceeds their minimalist label as “mere fact finders.”*

*But in this account of the jury, the people who occupy the jury box matter. To imagine the jury as serving this democratic function is inevitably to turn to a conversation about the identities of the men and women who actually serve as jurors. While courts and scholars speak wistfully of a “representative” jury—one that reflects the community from which it is drawn—this conversation remains dissatisfying, as it seeks to compartmentalize discussions of the jury’s function and the jury’s composition.*

*This Paper rejects the separation, instead examining the question of the jury’s composition in the context of its proposed function. In the process, a more nuanced theory of jury selection emerges—one that recognizes that while a representative jury matters, the question of what that representation is and precisely why it matters shifts as notions of function shift. The function this Paper explores is the critical interpretive role the jury plays within the democratic lawmaking body. Viewed through this lens, one must first confront the question of precisely which community the jury seeks to represent and how it achieves that representation. In a world in which different communities may bear the disproportional burden of lawmaking and application, different communities may have a different stake in the jury itself. If so, the use of geographically defined jurisdictions*

*to produce venire panels may cease to make sense. Likewise, the value of proportional representation on individual juries, while promoting some functions, may undermine the jury's democratic viability. Specifically, and perhaps ironically, disproportionate representation on individual juries may actually promote the jury's democratic function. Even more fundamentally the very definitions of "community" and "identity" become fluid in the context of a democratically driven jury that serves as a forum for citizens to constantly realign their own allegiances as they attempt to apply the law to the defendant and so define the law's limits in their own lives. In shifting this conversation about jury composition, the possibility of the jury as a unique democratic space emerges.*

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## INTRODUCTION

Almost from the moment the law is set to paper, it is shaped and refined through acts of interpretation and discretion. Most of these acts occur in formal realms. Police and prosecutors choose which cases to

investigate, which to charge and how to charge.<sup>1</sup> Judges make large and small decisions every day that affect the outcome of particular cases. Even the earliest decisions a judge makes—to issue a warrant, to find probable cause based on the barest of legal affidavits, to release a defendant pretrial—can impact the outcome of the case. By the time a defendant's case moves towards resolution, the exercise of judicial interpretation and discretion is more prosaic: Is the objection sustained or overruled? Is the evidence admissible or not? Should the court apply leniency in sentencing? The list is nearly endless, but each one, even the most rote, pushes the law away from the static construct of its legislative creation toward a more nuanced understanding. All too frequently, these formal acts of interpretation and discretion are driven by the perspectives of those empowered to make them, whether by election, employment, or appointment. In the process, existing power dynamics are maintained and different communities are left to bear the weight of these discretionary decisions disproportionately.

But there are other realms of discretion in criminal law as well, ones that offer the potential at least to grant a forum for marginalized perspectives.<sup>2</sup> Whether parsing a factual question, seeking to apply a legal standard as instructed, or engaging in an act of nullification, ordinary citizens serving as jurors engage in unique acts of interpretation, redefining the very concept of the law in terms of their own lived experiences and expectations. While jurors may simultaneously serve many other roles, it is this complex interpretive capacity that opens the possibility of a democratic function that transcends the singularity of the verdict. In the space of the jury room, jurors become a source of law as they contemplate the defendant's fate, mapping the law across their own lives in the process. As the debate over the function of the criminal jury rages in the courts and among scholars, the reality of the jury's interpretive power lingers.

In this regard, the jury's ultimate answer of "guilty" or "not guilty" is deceptively simple. To unpack this answer is to acknowledge that the juries serve functions beyond that of mere fact finders—their verdicts set the law's scope and power in their world. But to imagine the jury as serving a

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1. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 12 (2007).

2. See Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. 579 (2014); Heather Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9 (2010).

democratic function that encompasses the power to exercise interpretive discretion is inevitably to turn to a conversation about the identities of the men and women who actually serve as jurors.<sup>3</sup> If a jury's verdict serves some lawmaking function, then who serves as a juror matters. The conversation to date centers on the need for a "representative" jury—one that reflects the community from which it is drawn,<sup>4</sup> but this conversation is inevitably dissatisfying as long as it seeks to compartmentalize discussions of the jury's function and discussions of the jury's composition. It leaves critical questions unanswered.

Precisely what community should the jury represent? In the face of other discretionary decisions, it seems odd to suggest that all communities are equally affected by either crime or the enforcement of criminal law. Particular populations, and frequently particular geographic spaces, often shoulder a disproportionate impact. Should these most affected communities have a stronger stake in the representative jury? Should a local jury be composed of ever more compact circles of eligible venire? Not unrelated, how should representation be defined? Is descriptive representation sufficient, or is a more holistic construct of representation required—one that seeks to account not only for varying perspectives, but the deliberative conditions that will allow those perspectives to emerge? Should concepts of vicinage remain tethered to jurisdictional boundaries defined geographically? Or should the concept of a local jury be reimagined to account for shifting citizen identities and allegiances?

At the heart of these questions is a conversation about the jury's function. To reject the separation between the jury's composition and the jury's function is to shift the discussion towards a more nuanced conception of jury selection and the ideal of "representativeness." It is to recognize that while a representative jury matters, the question of what that representation is and precisely why it matters shifts as notions of function shift. If one accepts that the jury serves a critical interpretive function within the democratic lawmaking body, then concepts of juror composition must also shift. Without this shift, the recognition of the jury's democratic function will ring hollow. Citizens will fear the power of the jury's verdict to engage in rogue acts of lawmaking. The populist interpretive power of the jury will be lost, ceded to safer, more formal realms.

To preserve the potential of the juror's interpretative function without undermining our faith in the jury system, then, requires a multilevel approach. This Paper initiates a new conversation with regard to jury selection, concluding that prior allegiances to proportional representation

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3. See Carroll, *Nullification as Law*, *supra* note 2, at 626.

4. See *Duren v. Missouri*, 439 U.S. 357, 364–66 (1979).

on individual juries are misplaced. Instead, there may be significant benefits attained through disproportionate juries and venires constructed with an acknowledgement of diverse communities' different experiences under the law. This requires, in turn, a re-conception of how we speak of jury selection itself—one informed by the jury's potential as a democratic actor. I begin my analysis in Part I by considering the different functions of the jury – as fact finders, educators, and members of the larger communal democracy. From there, in Part II, I consider the current jury selection jurisprudence, examining how the Court's construction of the jury supports or undermines particular functions. In Part III, I turn to the rich and emerging literature on deliberative processes, considering how what is known about group decision-making processes can inform arguments surrounding jury function and composition. Finally, in Part IV, I conclude that current allegiances to notions of a "majoritarian jury" and the use of geographically defined jurisdictions to produce venire panels may not make sense in light of the jury's larger democratic function. First, given the nature of the jury's inquiry, a majoritarian position simply may not exist, at least not in the way that such a position is ordinarily described. Second, venires that acknowledge the disproportionate impact of the law on particular populations may actually promote the jury's unique role within the democracy. These realizations are informed by literature exploring the potential of second order diversity on non-aggregate bodies such as juries,<sup>5</sup> but also by the reality that concepts of culpability and identity are fluid. The jury, in fact, can serve as a forum for citizens to realign their own allegiances as they attempt to apply the law to the defendant.

### I. THE JURY'S FUNCTION

The precise borders of the criminal jury's function are not well defined. The Court itself has recognized that the jury plays different, often interlocking, roles within the democracy,<sup>6</sup> some more limited than others in their power to drive the construction and interpretation of law. Juries educate the public and provide transparency in an otherwise opaque and distant process. They are a mechanism for public participation in the criminal justice system, giving citizens a rare and direct stake in the application and interpretation of law. These educative and participatory

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5. See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1106–08 (2005) (defining second order diversity as "seek[ing] variation among decisionmaking bodies, not within them") (emphasis omitted).

6. See *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (noting that the criminal jury offers a unique opportunity for democratic participation); *Duncan v. Louisiana*, 391 U.S. 145, 155–57 (1968) (describing the jury's role as a check on government power).

functions in turn boost the community's confidence in the verdict any given jury ultimately reaches. Juries also serve as a check on the power of government, accepting or rejecting attempted applications of the law. Citizens participating as jurors can shore up or, at times, undermine the community's confidence in the actions of formal government actors and the criminal justice process itself.<sup>7</sup>

But jurors serve another important potential function: they inject community value into the law itself. In their deliberations and verdicts, they force the law out of the realm of the theoretical, into the space of their own lives. Juries, and the citizens who comprise it, become active participants in governance—commanding the law to respond to the citizen's vision as the citizen seeks to conform to its strictures. This role of the jury in creating law, though small in its empire of a single verdict, nonetheless serves a critical democratic function—grounding the law in the living world of the citizens whose obedience it commands. In each of these functions the jury takes on increasing power and potential to shape the law, but these functions are not mutually exclusive of one another. While some are admittedly more controversial than others, an examination of each informs a meaningful discussion of jury composition.

#### A. *The Jury's Communitarian and Democratic Functions*

On some primary level, the criminal jury serves a series of communitarian functions. The jury box is, literally and figuratively, a space for the public to be included in, and witness, the criminal justice process.<sup>8</sup> In this function, the jury is simultaneously a moment of public participation similar to other moments of enfranchisement,<sup>9</sup> a tool of public education,<sup>10</sup>

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7. For recent examples of this on the grand jury level consider the decisions not to indict the officers involved in the deaths of Eric Garner on Staten Island, New York, and Michael Brown in Ferguson, Missouri. See *Reaction to Eric Garner Grand Jury Decision*, N.Y. TIMES CITY ROOM BLOG (Dec. 3, 2014, 2:22 PM), [http://cityroom.blogs.nytimes.com/2014/12/03/the-death-of-eric-garner-the-grand-jury-decision/?\\_r=0](http://cityroom.blogs.nytimes.com/2014/12/03/the-death-of-eric-garner-the-grand-jury-decision/?_r=0); Tierney Sneed, *Garner, Brown Decisions Sparks Calls for Grand Jury Reform*, U.S. NEWS & WORLD REP. (Dec. 12, 2014, 12:17 PM), <http://www.usnews.com/news/articles/2014/12/12/after-eric-garner-michael-brown-decisions-calls-for-grand-jury-reform>.

8. See *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (noting that “with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process”).

9. See *Duren*, 439 U.S. at 364–66; Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218–20 (1995).

10. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 93–94 (1998); ANDREW GUTHRIE FERGUSON, *WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION* 23–24 (2013); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 318 (Arthur Goldhammer trans., Literary Classics 2004) (1835) (noting that “the jury . . . is also the most effective means of the teaching people how to rule”); Vikram David Amar, *supra* note 9, at 218–20;

and a source of public confidence in the verdict and the process which produces it.<sup>11</sup> Alexis de Tocqueville described the American jury system as a training ground for self-governance, educating the citizenry and establishing a critical link that promoted other methods of civic involvement. He wrote: “[The jury] places actual control of society in the hands of the governed, . . . rather than of the government.”<sup>12</sup> He continued that juries prepared people “to be free,” instilling in them a sense of duty to their community.<sup>13</sup> He concluded that the jury “should be seen as a free school that is always open, to which each juror comes to learn about his rights, . . . and receives practical instruction in the law.”<sup>14</sup> This description is consistent with the Founders’ vision of the jury as a critical link to other rights of political participation.<sup>15</sup> These sentiments are echoed in the Court’s modern description of the right to jury trial.<sup>16</sup>

The criminal jury system also serves a vital communitarian function as a check on the power of formal government.<sup>17</sup> Citizens sitting as jurors

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John Gastil et al., *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585 (2002).

11. See George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804, 808 (1995) (noting that the presence of diverse groups on the jury is one way to ensure the public’s confidence in a verdict and the process that produced it).

12. TOCQUEVILLE, *supra* note 10, at 250–51.

13. *Id.* at 252–53.

14. *Id.*

15. John Adams wrote extensively about the jury as a component of the budding democracy. He argued that “the common people [as jurors], should have as complete a control . . . in every judgment of a court of judicature” as they have in the other branches of government, and that it was “not only [the juror’s] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.” 2 CHARLES FRANCIS ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 253–55 (1971). His vision of the jury was driven in no small part by his fear that judges “being few . . . might be easily corrupted; being commonly rich and great, they might learn to despise the common people, and forget the feelings of humanity, and then the subject’s liberty and security would be lost.” Letter from John Adams (signing as Earl of Clarendon) to William Pym (Jan. 27, 1766), in *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS* 51, 55 (C. Bradley Thompson ed., 2000). In short, he envisioned a jury described by Alexis de Tocqueville in 1835 that “teaches men the practice of equity.” TOCQUEVILLE, *supra* note 10, at 320; see also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Vikram David Amar, *supra* note 9, at 218.

16. See *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (analogizing jury service to voting rights); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) (same).

17. See 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*342; *THE FEDERALIST* NO. 83, at 558, 564 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing that whatever misgiving one might have about the criminal jury that “the trial by jury must still be a valuable check upon corruption”); THOMAS JEFFERSON, *The Administration of Justice and Description of the Laws?*, in *NOTES ON THE STATE OF VIRGINIA* 140, 140 (Richmond, J.W. Randolph 1853) (stating that the best hope for the citizenry lies with the citizen jury rather than the government that might seek to curtail citizens’ rights); Akhil Reed Amar, *supra* note 15, at 1182–90; Jenny E. Carroll, *The Jury’s Second Coming*, 100 GEO. L.J. 657 (2012) (describing the role of the jury as a check on the power of government); Carroll, *Nullification as Law*, *supra* note 2, at 588–89 (describing the jury’s power to reconstruct law through verdict as a vital component of its ability to check the power of government);



engage in direct self-government, curtailing or accepting the formal construction, application, or interpretation of law.<sup>18</sup> In the process, and in the context of the case before it, the jury offers an opportunity for the people to ensure that the law reflects their own values and expectations.<sup>19</sup>

This function of the jury is not without its controversy. While the Founders' descriptions of the criminal jury are replete with references to the juror's right to review questions of law and their role as source of legal meaning, the Supreme Court adopted the opposite view a century later; by 1895, jurors in federal court were instructed that they were not permitted to consider questions of law but, rather, were consigned to a role of fact finder.<sup>20</sup> While the jury's power to consider questions of law persisted and persists, it does so as an unsanctioned act.<sup>21</sup> Despite this apparent curtailment of the jury's function as a source of law, recent Supreme Court precedent has suggested a reinvigoration of this role. The Court has harkened back to the Founders' rhetoric of the jury as a political actor. In incorporating the Sixth Amendment's right to jury trial to the states, the Court defined the prime purpose of the right to a jury trial as "to prevent oppression by the [g]overnment" and "[f]ear of unchecked power."<sup>22</sup> In the context of criminal cases, such protections were rooted in an "insistence upon community participation in the determination of guilt or innocence."<sup>23</sup> More recently, in a line of decisions beginning with *Apprendi v. New Jersey*,<sup>24</sup> the Court has suggested a renaissance of the underlying sentiment

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Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353, 388 (2004) ("Revolutionary colonials refused to define law as an instrument of the state which could not be judged by the common man. Rather, they viewed it as the reflection of their community which ordinary men were equally capable of judging for themselves.").

18. See Carroll, *Nullification as Law*, *supra* note 2, at 588; see also Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 705 (1995) (describing the power of jurors to push for new constructs of law through nullified verdicts); Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS., Autumn 1980, at 51, 68–69 (describing the jury as a "social barometer" that measures the community's acceptance of formal creation, application, and interpretation of the law).

19. See Carroll, *Nullification as Law*, *supra* note 2, at 620.

20. See *Sparf v. United States*, 156 U.S. 51, 64–80 (1895).

21. As will be discussed in a moment, it may be that such acts of legal interpretation do occur, though in an unrecognized fashion. Courts or scholars may fail to detect them for a variety of reasons, and the jurors themselves may fail to identify them as acts of legal interpretation generally or as acts prohibited by the jury instructions.

22. *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968). The Court in *Duncan* acknowledged that the literal and figurative wisdom of permitting juries to consider complex legal matters had long been a subject of debate but concluded that when jurors arrived at different conclusions than judges, they fulfilled the purposes for which they were created—to check the government's power and to ground the law in the community's values. See *id.* at 156–57.

23. *Id.* at 156.

24. 530 U.S. 466 (2000).

surrounding the jury's political function, if not the right to contemplate questions of law itself.

While confining its discussion to the nature of factual questions the jury must consider,<sup>25</sup> *Apprendi* rests on the historical principle that citizens serving as jurors push the law to account for communal values. Without this opportunity for the citizenry to engage in law interpretation, the law may become static, mechanical, and unable to account for those it seeks to represent. *Apprendi* embraces the jury's role as a "guard against a spirit of oppression and tyranny on the part of rulers [and to function] as the great bulwark of [our] civil and political liberties."<sup>26</sup> Subsequent cases in the line describe the criminal jury as central to governance serving as a "circuitbreaker in the State's machinery of justice"<sup>27</sup> and note that jurors adopt a democratic function when they enter the arenas where law is constructed through their own acts of interpretation.<sup>28</sup>

This rhetoric draws heavily from the Founders' description of the criminal jury as serving a vital role in the democracy. That this democratic function would be tied to a group of citizens whose empire was limited to a verdict in a single case may seem counterintuitive. Jurors, after all, serve a limited tenure and have no special capacity beyond their appointment as jurors. But jury service can transcend such limitations when jurors, whether seeking to apply a legal standard as instructed or engaging in an act of nullification, interpret and redefine the very concept of the law not in terms of formality but in terms of their own lived experiences and expectations.

As such, the jury becomes a bridge between a law created, applied, and interpreted in formal spaces by formal actors, and the governed community. But this idea of the jury—one that straddles the worlds where formal power creates law and where citizens as jurors reshape it with their own normative visions—stands in the shadow of the jury's institutional history. If the Founders imagined a jury steeped in the ideal of citizen righteousness, it was quickly supplanted by an institution better suited in its exclusive construct to enforce existing power dynamics, just like its formal counterparts. Whatever heroic tales nullifying juries may have spun in

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25. See *id.* at 476–77 (“[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be . . . proven beyond a reasonable doubt.” (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (internal quotation marks omitted))).

26. *Id.* at 477 (second alteration in original) (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (Boston, Little, Brown & Co. 4th ed. 1873)) (internal quotation marks omitted).

27. *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

28. See *id.* at 306–07 (“The jury could not function as circuitbreaker in the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.”).

response to the law's more formal narrative, they were drowned in a sea of verdicts rendered by juries that served to enforce local prejudice and oppression, rather than to strike a blow for the common man.

To speak, then, of a jury interpreting or remaking law is to speak of a rogue and dangerous moment. It is to evoke an ongoing memory of juries exercising their power of discretion to produce oppressive results—even in the face of progressive exercises of discretion by the formal branches. It is to confront the inevitable question: how can we, as a community, trust the jury, in its obscure deliberative process and exclusive construction to represent us all in their verdict?

As a nation we are rightly haunted by memories of rogue juries. By many accounts, the jury as an institution is a risky proposition. Unlike elected officials, juries deliberate and decide in backrooms and behind closed doors. They have no obligation to divulge the basis for their decisions—if they recognize them in the first place. As parties and judges choose the jury and assign its role, the citizen has little power to oppose the chosen jury, or even those eligible to be chosen. Those chosen, even under the best of systems, may still give pause. Jurors serve because they are ordinary, not extraordinary. What renders a citizen a good juror may be the very characteristics that would make us reluctant to elect or appoint them to decide important matters in our own lives. They are simultaneously everything like us—common citizens—and nothing like us—not required, and at times not able, to accurately reflect the very population they purport to represent. They have no special expertise or knowledge (if they did they would be unlikely to survive voir dire). They do not have to be leaders or heroes or geniuses. They need only be eligible to be summoned (a designation that excludes swaths of the community even in its best forms) and appear when called for jury duty.

Once chosen, there is no continuity to their tenure. They render their verdict and leave the jury box. We as a community have little standing to participate in the process by which they are selected. We have no place in the room where they debate and decide their verdicts in our names. In some jurisdictions we are not even entitled to learn their names.<sup>29</sup> We live instead with their decision alone—responding only after the fact, if at all.

Ironically, perhaps, the very characteristics which make jurors reliable make it difficult to trust them as a collective group. They are an everyday

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29. See, e.g., 28 U.S.C. § 1863(b)(7) (2012) (providing that federal district courts may empanel an anonymous jury in a non-capital case “where the interests of justice so require”); *United States v. Dinkins*, 691 F.3d 358, 371–74 (4th Cir. 2012) (discussing various circuit court decisions defining when anonymous juries may be empaneled); *United States v. Ross*, 33 F.3d 1507, 1520 (11th Cir. 1994) (identifying the five factors emphasized by courts when finding “[s]ufficient reason for empaneling an anonymous jury”).

unknown—ordinary in every way until chosen for a limited and secretive tenure of service in our names. The trepidation we might feel at the outset over the legitimacy of their decision-making prowess is compounded by the possibility that their verdict might extend beyond a judgment of factual questions to something far more complex—an assessment of culpability and, perhaps, a different understanding of law. A verdict that has the potential to be an indicator of our collective comfort with the law—whether in its formal construction or application or interpretation—is also one that may well exceed the boundaries of the case in which it was rendered.

Admittedly, to transcend the singularity of their role, jurors must either deliver verdicts that garner national attention in their shocking and apparent departure from expectation, or they must wait until their verdicts aggregate and, in the process, force some meaningful change through formal government process. But even the small moment of the verdict can take on a larger democratic significance when that verdict suggests that the jury did not accept the formally constructed law. In this instance, even the single verdict can signal a divergence between the law as constructed and the law as lived or imagined by the citizens. This signaling capacity may drive change that republican democracy cannot, forcing the law to become nimbly responsive in ways that formal powers often fail to be. To the extent that the composition of the jury matters, it matters especially when the conversation shifts toward this larger democratic function—the shaping of law to reflect communal values.

### *B. What the Jury Does, Even When It Judges Facts*

Lurking beneath the surface of the discussion of the jury's grander functions is the reality that jurors *are* charged with determining the facts of any given case. This task is deceptively simple in its description. When citizens sit in judgment on a criminal case, they determine the culpability of the defendant. Their factual conclusions may well drive this decision (as opposed to their conclusions about the law), but these *mere* factual determinations carry a weight that conclusions of facts in other contexts lack. Even in systems in which juries do not participate in the sentencing of the defendant (and perhaps remain blissfully unaware of the practical consequences of their verdicts), their guilty verdict is a necessary prerequisite to the state's use of force as punishment.<sup>30</sup> While the executive

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30. Many judges argue that criminal juries should be allowed to hear evidence of the defendant's potential sentence prior to determining guilt precisely because the jurors are making decisions that far exceed what one ordinarily thinks of as a factual determination. See *United States v. Polizzi*, 549 F. Supp. 2d 308, 406–08 (E.D.N.Y. 2008), *vacated*, 564 F.3d 142 (2d Cir. 2009) (arguing that a jury should hear evidence of the defendant's potential sentencing range before rendering a verdict and

may determine the application of the law writ large, juries have the ultimate say writ small—accepting or declining the executive’s invitation to enforce the law against a defendant and to move him from the category of accused to convicted.<sup>31</sup>

Unpacking a question of culpability requires some examination of who deserves conviction and punishment. The complexity of this inquiry far exceeds the apparent binary choice between guilty or not guilty. Overwhelmingly this examination occurs in a public space controlled by the formal brokers of power. The legislative branch defines the boundaries of a crime and establishes a punishment regime. The executive, in a myriad of enforcement decisions, defines any particular person’s eligibility to be prosecuted. The judiciary parses and interprets the law, defining further the parameters of its reach. But finally, in the quiet and decidedly non-public space of a jury room, twelve ordinary citizens are left to place the law’s formal construct into the context of the lived world by answering either “guilty” or “not guilty” on the verdict form.<sup>32</sup> In this pivotal moment when the law leaves the theoretical realm and enters the realm of actuality, the juror’s own concept of the world may shift even a factual determination.<sup>33</sup> In this sense, even if one rejects all larger functions of the jury, the composition of the jury still matters and may drive factual determinations. Jurors make “subjective” determinations of culpability, even in their “objective” assessment of facts.

That the verdict may be small and only applicable to the defendant before the jury does not diminish this reality that even in the determination of facts, jurors map out the boundaries of the law and the government’s power. Undoubtedly this realization drives both fears that juries are imperfect vessels to trust with the complex task of defining law—whether in construction or application—and the notion that juries must be diverse to function properly. If we truly believed that the province of juries could be confined to a near rote and objective determination of facts, diversity should matter less. One plus one equals two whether a white man or a black woman answers the question. But juries rarely determine such simple questions, and the consequences of what they *do* determine are what give

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describing the history of juries declining to convict defendants of higher offenses, which carried capital sentences, despite factual evidence to support such convictions).

31. This argument is admittedly somewhat mitigated by the relative rarity of trials, but even plea bargains take place in the shadow of potential (or past) verdicts and in a system with limited resources to allow trials. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

32. See Akhil Reed Amar, *supra* note 17, at 1183–88 (noting that juries bring the community’s value to bear when rendering verdicts); Carroll, *Nullification as Law*, *supra* note 2, at 586.

33. See Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129, 151–52 (2014) (arguing that in the application of standards jurors apply their own norms to factual inquiries).

us pause. On some fundamental level, we see them for what they are. We fool ourselves with the label of “fact finder” only briefly. In the end we know that as they contemplate the defendant’s fate, they contemplate our own concept of culpability, guilt, punishment, and law. They toss about our own uneasy relationship with the government and the law it creates. Unlike other democratic actors, jurors simultaneously occupy the space as the decision maker and the citizen. While they certainly serve a representative function, that function is unlike other democratic representatives. They do not “represent” the citizens; they are the citizens.

Regardless of what other systematic function one assigns to the jury, the exclusion of particular members of the population undermines the function itself, rendering the jury just one more shadowy and exclusive actor in the elite realm of governance.<sup>34</sup> Our faith in this function is driven or damaged if the process by which the jury is chosen consistently excludes swaths of the very population its decisions affect.<sup>35</sup>

## II. MAKING SENSE OF THE COURT’S JURY SELECTION JURISPRUDENCE: OF FAIR CROSS SECTIONS AND EQUAL PROTECTION

Having briefly laid out the functions of the jury, the question of jury composition looms. The Sixth Amendment promises defendants an “impartial jury,”<sup>36</sup> but speaking of this promise in terms of the practicalities of actual defendants and actual juries is complex. Jury selection jurisprudence has revolved around two doctrines: the fair-cross-section doctrine and enforcement of the Equal Protection Clause. The fair-cross-section doctrine is central to the Court’s interpretation of the Impartiality Clause. The Court has interpreted the Impartiality Clause to require that the venire members be “drawn from a fair cross section of the community.”<sup>37</sup> Defendants wishing to raise a fair-cross-section challenge must show that a “distinctive group” was excluded from the jury; that the group’s long-term representation on jury venires is not “fair and reasonable in relation to the number of such persons in the community”; and that “this underrepresentation is due to systematic exclusion of the group in the

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34. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (arguing that the jury’s power as a check on government is achieved in part by its ability to include all members of the community in its composition).

35. See Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 709–11 (1993).

36. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”).

37. *Taylor*, 419 U.S. at 537.

[particular] jury-selection process.”<sup>38</sup> This requirement only applies to venires, not petit juries, and requires a long range view.<sup>39</sup>

Juxtaposed with the Court’s fair-cross-section analysis is its jurisprudence on the Equal Protection Clause. The core of this jurisprudence is the *Batson* case line, which prohibits parties from exercising peremptory strikes based on race or gender.<sup>40</sup> *Batson* shifts the conversation about jury diversity out of the positive terms of the fair-cross-section doctrine and into negative terms. In *Batson*, the goal becomes not to empanel a diverse jury, or even to create a system that would make a diverse jury possible, but to prevent the use of peremptory strikes to remove jurors.<sup>41</sup> This distinction may seem minor, but it is a fundamentally different way of thinking of both the jury and the value of diversity. In addition, *Batson* and its progeny block the parties’ ability to adjust the jury’s composition to reflect the community’s proportional population by barring the use of peremptory strikes based on race or gender.<sup>42</sup> Only in thinking of these doctrines in the context of the jury’s underlying functions is it possible to reconcile them and move forward.

At first blush, these two doctrines seem paradoxical. The fair-cross-section doctrine eschews any allegiance to diversity on a particular jury, requiring diversity over time and only across the venire, while the equal protection analysis enshrined in the *Batson* line of cases speaks of diversity in the negative, prohibiting any party, including the defendant, from striking a juror based on his membership in a protected class. Neither would seem to guarantee a diverse jury in any particular case. Yet, considering the various possible functions of the jury, diversity would seem critical to achieving at least some of the aims of the system.

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38. *Duren v. Missouri*, 439 U.S. 357, 364–66 (1979). Once a defendant makes this prima facie fair-cross-section claim, the State must justify the exclusion by citing a “significant state interest.” *Id.* at 367–68; see also *Taylor*, 419 U.S. at 538 (holding that to prove a fair-cross-section violation the defendant must show systematic exclusion of a distinctive group resulting in unreasonable underrepresentation of that group on the venire).

39. See *Duren*, 439 U.S. at 366 (the fair-cross-section analysis considers the jury selection process as a whole, as opposed to any particular jury); *Taylor*, 419 U.S. at 538 (the fair-cross-section requirement only applies to venire panels and does not apply to any particular panel, but rather the collective venire panels over time).

40. See *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *Powers v. Ohio*, 499 U.S. 400, 403 (1991); *Batson v. Kentucky*, 476 U.S. 79, 83–84 (1986).

41. See *supra* note 40 and accompanying text.

42. See *supra* note 40 and accompanying text.

*A. The Concept of a Demographically Representative Jury in Fair-Cross-Section and Equal Protection Jurisprudence*

If we view the jury as serving a limited function of educating those who serve on the jury, the exclusion of some does not upset that function *per se*.<sup>43</sup> Those who serve on the jury, regardless of their identity, will achieve that educational benefit.<sup>44</sup> But if we imagine the jury serving a representative function, then the jury's ability to realize that function swings on its ability to achieve diversity in its composition. This is true in terms of the jury's descriptive diversity,<sup>45</sup> but also in terms of its substantive diversity.

Perceptions of legitimacy may be linked to jury composition in different ways. Descriptive diversity alone on juries may increase public confidence in a verdict.<sup>46</sup> Even in the face of other elite and formal discretionary decisions that dominate the criminal justice system,<sup>47</sup> a descriptively representative jury offers tangible proof of inclusion.<sup>48</sup> Likewise, jurors themselves may be more confident in the trial process and the verdicts produced if the jury is descriptively diverse.<sup>49</sup> In contrast, verdicts produced by homogenous juries are often viewed with suspicion.<sup>50</sup>

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43. See AKHIL REED AMAR, *THE BILL OF RIGHTS*, *supra* note 10, at 93–94; Gastil, et al., *supra* note 10.

44. See Vikram David Amar, *supra* note 15, at 218–20.

45. Social scientists describing electoral representation have coined the terms “descriptively” and “substantively” representative that seem applicable here in the context of juries. A body that is “descriptively” representative is one made up of members who reflect traits in proportion to the larger population. A body that is “substantively” representative is one that reflects the larger population's interests or values. In the context of electoral law, the theory seems to be that bodies that are descriptively representative, are also substantively so. See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 112–43 (1967).

46. See Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1038 (2003); Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury de Medietate Linguae*, 4 VA. J. SOC. POL'Y & L. 645, 663 (1997); King, *supra* note 35.

47. See Gruber, *supra* note 33, at 162 (noting that executive and judicial decision-making bodies are overwhelmingly dominated by educated white males).

48. See Ellis & Diamond, *supra* note 46; King, *supra* note 35.

49. See Nancy S. Marder, *Juries, Justice and Multiculturalism*, 75 S. CAL. L. REV. 659, 692 (2002) (noting that “jurors’ satisfaction with the jury deliberations, the jury experience, and the verdict” improved with gender and age diversity, but interestingly were not significantly affected by racial diversity).

50. See Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 704 (1995) (“Few statements are more likely to evoke disturbing images of American criminal justice than this one: ‘The defendant was tried by an all-white jury.’”). A more recent example of outrage over a verdict produced by a seemingly homogenous jury (an all female one) occurred in the trial of George Zimmerman for the killing of Trayvon Martin. See Gruber, *supra* note 33, at 130.



That perceptions of legitimacy should be linked to a descriptively diverse jury makes sense given the nature of the jury itself. Whatever the Sixth Amendment guarantees for impartiality, there are no such promises of accountability. Unlike other democratic actors, jurors are neither elected nor appointed with the accompanying public confirmation process. Their deliberative processes are closed and shielded from public scrutiny or inquiry until after the verdict is rendered and, arguably, the damage is done.<sup>51</sup> Jurors are chosen and labor in relative obscurity with no “institutional tether” to the population they represent.<sup>52</sup> Jurors are chosen for their ordinariness and lack of predisposition in a case.<sup>53</sup> There is no requirement that they be experts in any particular field. Our hope is that they will learn on the job, processing evidence and legal arguments to reach a fair verdict with no other skills than their fortune to be called to serve, to appear for service, and to survive the voir dire process.<sup>54</sup> Mechanisms of accountability are disabled in the hopes of preserving the jury’s impartiality and independence from the parties to the case or the government generally.<sup>55</sup> There are few requirements for jury service; jurors are composed of the ordinary men and women who live and labor under the law.<sup>56</sup> The verdict forms they are called upon to complete are sufficiently vague to obscure any divination surrounding deliberation or the jury’s basis for decisions.<sup>57</sup> Courts cannot inquire into the basis for jury decisions,<sup>58</sup> and

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51. See Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 53–54 (1994); Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567 (2011).

52. See Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568, 1574 (2007). The Federal Rules of Evidence actually prohibit jurors from testifying as to their deliberative processes. See FED. R. EVID. 606 (“[A] juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment.”).

53. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 325 (2005).

54. See *Patton v. Yount*, 467 U.S. 1025, 1037 n.12 (1984) (“The constitutional standard [is] that a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court . . .” (citing *Irvin v. Dowd*, 366 U.S. 717, 723 (1961))).

55. See *Yeager v. United States*, 557 U.S. 110, 122–23 (2009) (“A jury’s verdict of acquittal represents the community’s collective judgment regarding all the evidence and arguments presented to it. Even if the verdict is ‘based upon an egregiously erroneous foundation,’ its finality is unassailable.” (per curiam) (citation omitted) (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962))); *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) (stating that the “public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation” (quoting *Fong Foo*, 369 U.S. at 143) (internal quotation marks omitted))).

56. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION*, *supra* note 53, at 325.

57. See, e.g., *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998) (emphasizing a reluctance to require special verdict forms because of the intrusion on the jury’s ability to serve its independent function); *United States v. Townsend*, 924 F.2d 1385, 1413 (7th Cir. 1991) (same); *United States v. Escobar-Garcia*, 893 F.2d 124, 126 (6th Cir. 1990) (same); *United States v. Collamore*, 868 F.2d 24, 28 (1st Cir. 1989) (same); *United States v. Roman*, 870 F.2d 65, 73 (2d Cir. 1989) (same);

acquittals are exempt from review entirely.<sup>59</sup> Even the standard for determining guilt leaves room for jurors to inject values beyond the mere contemplation of facts.<sup>60</sup>

While lack of accountability allows jurors to deliberate without fear of repercussion from formal government,<sup>61</sup> the absence of a meaningful mechanism to hold jurors accountable for their verdicts also renders inclusion (and a demographically proportional composition) all the more important to ensure a sense that verdicts reflect the community's values.<sup>62</sup> This suggests that regardless of the "substantive accuracy" of the jury's verdict, the perceived legitimacy of that verdict is linked at least in part to the jury's ability to accurately reflect the population of the community it purports to represent.

But descriptively diverse juries may tend to be substantively diverse as well, or at least more open to diverse perspectives.<sup>63</sup> The presence of female jurors and jurors of color alters the deliberative process, regardless of whether or not those individuals present a unique ideological perspective.<sup>64</sup> In short, the conversation about culpability changes when descriptively diverse populations are included. As jurors are asked to determine facts and to apply objective standards in their assessment of culpability, they inevitably draw on their own experiences and expectations.<sup>65</sup> A jury that shares no common experiences with the defendant may find it difficult to contextualize his defense. These jurors may find the defendant's narrative unpersuasive and his decision-making processes foreign. The reasonableness of the defendant's action or his claim that doubts persist may ring hollow if the jury cannot find itself in

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*United States v. Desmond*, 670 F.2d 414, 416 (3d Cir. 1982) (same); *Watts v. United States*, 362 A.2d 706, 714–15 (D.C. 1976) (en banc) (same); *State v. Hardison*, 492 A.2d 1009, 1015–16 (N.J. 1985) (same); *People v. Ribowsky*, 568 N.E.2d 1197, 1201 (N.Y. 1991) (same).

58. See *United States v. Shepherd*, 576 F.2d 719, 725 (7th Cir. 1978) ("The purpose of affording a right to have the jury polled is not to invite each juror to reconsider his decision, but to permit an inquiry as to whether the verdict is in truth unanimous.").

59. U.S. CONST. amend. V (the Double Jeopardy Clause prohibits the state from appealing an acquittal).

60. See *supra* notes 32–33 and accompanying text.

61. See Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell's Case*, 111 YALE L.J. 1815 (2002) (noting that the absence of judicial review of jury verdicts allows jurors to vote without fear of reprisal).

62. See *Re*, *supra* note 52, at 1574.

63. See Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"*, 61 J. POL. 628 (1999).

64. See David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001); Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2105 (2010).

65. See CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (2003); Gruber, *supra* note 33.

him or his story. Without a diverse perspective, jurors applying a purportedly objective standard may merely serve to reinforce dominant cultural norms.<sup>66</sup>

These norms, though dominant, may fail to account for the unarticulated ideals of the community—ideals that may bubble to surface in the jury's contemplation of a particular case. Questions of culpability are complex and multidimensional in the context of the defendant's life. As will be discussed further in Part IV, even jurors who stake a claim to a position in the abstract may find themselves carving exceptions into that position in light of the evidence they hear and the ability of either party's narrative to resonate with the jurors. This suggests that a diverse jury is more likely to render a verdict that not only appears more legitimate, but actually reflects the community's multidimensional norms and values, particularly in the context of the defendant's life.<sup>67</sup>

The Court's own account of the importance of inclusion on juries recognizes that descriptive diversity can produce substantive diversity as well.<sup>68</sup> The Court has repeatedly emphasized the value of diversity of views as a means to ensure quality deliberation and critical reflection.<sup>69</sup>

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66. See Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1066 (2005); Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 818 (1992) (arguing that when objective standards are applied by those already in positions of power, those "standards always, and already, reflect them and their culture"). Various scholars have suggested mechanisms to shift the application of objective standards to account for differences between the fact finder's perspective and the defendant's. Cynthia Lee has suggested asking jurors to analyze the defendant's reasonableness by "switching" the identities of the defendant and the alleged victim. LEE, *supra* note 65, at 252–59; see also Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71 (1992) (arguing that the application of objective standards by privileged jurors to defendants outside the corridors of power serves to reinforce existing power dynamics regardless of the "justice" of the resulting verdict); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997) (same); Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665 (2001) (same).

67. See Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 144 (1996) (arguing that a descriptively representative jury is more likely to account for varied perspectives and so more likely to achieve substantive representation in any particular community); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1030 (2003) (noting that the presence of diverse perspectives on the jury increases the quality of deliberations).

68. See *Taylor v. Louisiana*, 419 U.S. 522, 533 (1975) (noting that excluding women from juries diminishes the perspectives of the deliberating body); *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972) (plurality opinion) (excluding groups "deprives the jury of a perspective on human events"); *Ballard v. United States*, 329 U.S. 187, 193–94 (1946) (holding that women possess "a flavor, a distinct quality" relevant to jury deliberations); see also Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1893 (2005) (noting "that women might be entitled to a 'jury of their peers' because men and women might reason differently about moral or legal guilt").

69. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 134 (1994) (citing *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)); *Ballew v. Georgia*, 435 U.S. 223, 233 (1978).

The fair-cross-section doctrine arguably achieves this accuracy in representation by providing the defendant with the “fair possibility” of being judged by a jury that reflects the demographics of the community.<sup>70</sup> Put another way, it promises any given segment of the population a fair possibility of being chosen for a jury. Viewed through a lens of functionalism, however, the fair-cross-section “promise” is problematic. From the perspective of the citizenry, the possibility of being chosen for a jury does not necessarily include *actual* opportunity to serve, and from the perspective of the defendant it does not include the *actual* opportunity to have a representative jury in his particular case.

Nonetheless, the Court has declined to extend the fair-cross-section requirement to the petit jury.<sup>71</sup> This seems odd. The Sixth Amendment, after all, references the jury itself—not the venire, which is only the mechanism by which petit juries are assembled and chosen. Beyond this, if the goal of the fair-cross-section doctrine is to protect the defendant’s Sixth Amendment right to an impartial jury, and demographic proportionality ensures this impartiality at least in part, then it would seem that the fair-cross-section requirement should apply to each jury rendering a verdict.<sup>72</sup>

Setting aside momentarily the inevitable critique of the difference between a “fair possibility” of representation and actual representation, it is worth recognizing that efforts to achieve demographic accuracy on juries is challenging in and of itself. The size of the jury by its very nature demands exclusion.<sup>73</sup> There are only so many seats in the jury box.

The nature of identity itself further complicates the equation. To define the characteristics that render any given person “representative” is, inevitably, to categorize and prioritize competing aspects of who the person is and why a particular trait matters. To date, the Court has relied on the presence of immutable traits such as race and gender to determine whether

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70. See *Holland v. Illinois*, 493 U.S. 474 (1990); *Taylor*, 419 U.S. 522.

71. See *Taylor*, 419 U.S. at 538 (noting that even while holding that women could not be excluded from juries based on their status as women “we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population”).

72. See *Duren v. Missouri*, 439 U.S. 357, 371 n.\* (1979) (Rehnquist, J., dissenting) (“[I]f ‘that indefinable something’ [possessed by female jurors] were truly an essential element of the due process right to trial by an impartial jury, a defendant would be entitled to a jury composed of men and women in perfect proportion to their numbers in the community.”); Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 369–71 (1999); Gerken, *supra* note 5, at 1115 (“[A]lmost any theory that would explain why we care about a pool that mirrors the population would also favor a jury that does the same.”).

73. See *Lockhart v. McCree*, 476 U.S. 162, 173–74 (1986) (noting the “practical impossibility of providing each criminal defendant with a truly ‘representative’ petit jury”).

a fair cross section has been achieved.<sup>74</sup> But identities, even of those who possess permanent and immutable traits, are not themselves permanent or singular in their perspective. In this sense, descriptive representation can serve only as a proxy to inform the community of whether or not every eligible member has had an opportunity to participate and whether substantive representation is achieved through that participation. As will be discussed further in Part IV, one of the unique features of the jury system is that it may open spaces for competing aspects of the citizen's identity to emerge. Just as questions of culpability are multidimensional, so are constructs of identity. At any given moment a citizen may find herself balancing competing allegiances as she seeks to engage in the larger body politic.

Beyond these practical concerns, application of the fair-cross-section doctrine to petit juries would seem to contrary to the Court's equal protection jurisprudence, which prohibits the use of peremptory strikes based on the race or gender of the juror.<sup>75</sup> This creates an odd dynamic in which the Court simultaneously recognizes the value of diversity in the context of fair cross section analysis while prohibiting any party—including a defendant—from using diversity characteristics to select a jury.<sup>76</sup> Taken one step further, the Court's Equal Protection Clause jurisprudence would appear to preclude some remedies for violations of the fair-cross-section doctrine.<sup>77</sup> Applying this model to the petit jury only muddles the dilemma. Given *Batson*'s prohibition on racially preferential selection, achieving a fair cross section on any individual jury seems more akin to a happy coincidence than a constitutionally mandated (or desirable) plan.<sup>78</sup> By limiting the fair-cross-section requirement to the venire panel,

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74. *Id.* at 175 (identifying women, African-Americans, and Hispanics as improperly excluded groups).

75. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Powers v. Ohio*, 499 U.S. 400, 407 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986).

76. See Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 965 (1998) ("A defendant is thus placed in a strange position: he is entitled to a jury drawn from a fair cross section specifically because it increases the odds that different groups and perspectives will be represented in the jury pool, which in turn helps ensure that the panel is impartial; when actually seating a jury, however, he may not take those same characteristics into account.").

77. See John P. Bueker, Note, *Jury Source Lists: Does Supplementation Really Work?*, 82 CORNELL L. REV. 390, 430-31 (1997) (noting that one way to increase representation with a jury system would be to modify the selection process to afford members of minority groups a greater probability of being selected). Courts have attempted such remedies only to see them struck down. See, e.g., *United States v. Ovalle*, 136 F.3d. 1092 (6th Cir. 1998) (striking down a policy of removing nonblack citizens from the venire jury wheels so as to achieve proportional representation of black jurors).

78. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991) (stating in the context of civil juries that "if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution"); Ellis & Diamond, *supra* note 46, at 1051.

the Court has avoided this head-on conflict with its Sixth and Fourteenth Amendment jury selection jurisprudence. Such avoidance, however, does not mitigate the inconsistency that bubbles around the edges of each doctrine.

More globally, linking the jury's representative function to a directly proportional petit jury contradicts underlying principles of modern jury selection. Modern jury jurisprudence counsels towards a randomization of the selection process as a means of ensuring fairness. This effort of randomization is laid over vicinage requirements mandating that juries be drawn from the district where the alleged crime occurred.<sup>79</sup> A byproduct of vicinage (a perhaps not accidental one given the federalism debates at the Founding that still smolder today) is the creation of micro-jurisdictions within macro- ones. As populations vary among districts, states, and regions, any given randomly selected jury may simultaneously reflect the micro-jurisdiction it was drawn from, while failing to represent the larger macro-jurisdiction's population.<sup>80</sup> To the extent that jury selection jurisprudence aligns itself with the notion that a random jury will both avoid the possibility of entrenched bias and produce consistent verdicts (and so the application of law across districts) this may be problematic. In the context of vicinage requirements, the fair-cross-section doctrine promises representation only on a micro-jurisdictional level.<sup>81</sup> As a result, juries and the verdicts they produce may both satisfy the fair-cross-section requirement for the micro-jurisdiction, while nonetheless fail to represent the larger macro-jurisdiction's viewpoint. This in turn raises the twin specters that the jury will not be perceived as representative by the larger community—it will, in fact, lack the broad range of perspectives the Court recognizes as critical to effective deliberation and acceptance of the verdict as legitimate—and that the verdicts among micro-jurisdictions may be inconsistent. The fair-cross-section doctrine tolerates such inconsistencies. It is violated only by a demonstration of underrepresentation over time and within the jurisdiction in which the defendant was tried.<sup>82</sup>

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79. See U.S. CONST. amend. VI (stating that a defendant is entitled to a "jury of the State and district wherein the crime shall have been committed"); Jury Selection and Service Act (JSSA) of 1968, 28 U.S.C. § 1863 (2012) (requiring that federal juries be randomly selected within designated geographic restraints).

80. See Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79, 109 (2004).

81. See *United States v. Ashley*, 54 F.3d 311 (7th Cir. 1995) (declining to create new jury districts or to combine existing jury districts in an effort to increase diversity under a fair-cross-section claim).

82. See Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1702 (2000).

The notion of vicinage raises an additional question: Which community is the jury meant to represent? Vicinage arguments supported not only a strong anti-Federalism streak present at the Founding, but also an enforcement ideal that those who made the hard decisions regarding a particular defendant's culpability should be those most affected by the alleged crime itself—the men, and later women, who lived in the shadow of the crime and the law's enforcement. In the face of executive discretionary decisions, it seems odd to suggest that all communities are equally affected either by crime or the enforcement of criminal law. Particular populations, and frequently particular geographic spaces, often shoulder a disproportionate burden of law enforcement. Arguably, these most affected communities have a stronger stake in the representative jury. In short, jury service should allow them to lay claim to, and to push back on, the power exercised by formal branches in ways that they were unable to in other democratic and electoral processes. As will be discussed further in Part IV, if we are to take seriously the purported goals of the fair-cross-section and equal protection doctrines as promoting the jury's function—including larger democratic functions—the concept of vicinage may need to be redefined, with the resulting jury becoming a realm where those with the greatest stake are represented most greatly. Admittedly, the Court has not adopted this approach, or even deigned to speak of it, but it seems an ever-present yet glossed-over question.

Perhaps the Court's reluctance to require proportional representation on each jury transcends concerns about practicalities or long-established jury selection processes. Rather, the Court has come to accept that descriptive representation may only achieve a portion of its desired effect. Embedded in this realization is a different account of why diversity matters. Certainly it creates an appearance of representation: women will see fellow women sitting on the jury; Latinos, fellow Latinos; blacks, fellow blacks. There is a value in this visual of participation, but it will not guarantee or necessarily create substantive representation. Worse, linking a particular juror to a community and designating him or her *the* representative of all who share his or her trait may undermine the ability to engage in the deliberative process.<sup>83</sup> The juror's deliberation would become disconnected to the case and would become yet another generalized political statement, undermining the community's faith in the verdict.<sup>84</sup> That interest voting may not occur,

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83. See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 140 (1994) (contending that jurors selected for their race may believe they represent a particular perspective and "would be less prepared to enter into the kind of independent and impartial deliberations that historically have differentiated jury behavior from voting behavior").

84. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 243–45 (1997); Eric M. Albritton, *Race-Conscious Grand Juror Selection: The Equal Protection Clause and Strict Scrutiny*, 31 AM. J.

or that members selected for a particular trait may fail to fall within the neat stereotypes that drove the party to choose them (or more accurately not to strike them) in the first place,<sup>85</sup> may be of little consequence. The damage to the verdict's legitimacy, and the jury system as a whole, may be done if the larger public believes that the jury is merely one more forum in which citizens act as proxies for larger political agendas driven by far more formal actors.<sup>86</sup> The Founders' vision that the jury serve a unique role in governance—controlling a small but vital empire where the particular application of a law was weighed by the community—is lost, in part, if the jury's deliberation becomes nothing more than an allegiance to dogmas established in other political processes. It potentially ceases to serve a unique function.<sup>87</sup> This suggests that the value of representation as a function of the jury is linked to the larger democratic function of the jury as a space for direct citizen lawmaking and interpretation.

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CRIM. L. 175, 212 (2003) (noting that jurors chosen for race will undermine the legitimacy of potential verdicts by suggesting a predictive voting pattern); Andrew Kull, *Racial Justice: Trial by Cross Section*, NEW REPUBLIC, Nov. 30, 1992, at 17, 20 ("[A] person can neither represent another's interests effectively nor judge him fairly unless he is of the same race."); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 COLUM. L. REV. 725, 733 (1992) ("A race-based generalization about the likely views of jurors cannot lawfully be the basis for any legal rule.").

85. In fact, jurors, through a deliberative process may abandon their idiosyncrasies in ways that do not occur in the electoral process. See KENNEDY, *supra* note 84, at 252. They may also weigh competing allegiances and aspects of their rich and multi-faceted identities when asked to contextualize in an individual case or defendant. See Carroll, *Nullification as Law*, *supra* note 2, at 627. Certainly jurors may deliberate and vote recklessly, refusing to abandon a belief or bias, but the public's faith in the institution rests in part on a belief that this is a rare occurrence—that in fact, jurors, like voters, take their roles seriously and that there is a virtue in their ability to bridge the formal law and the common experience. See *id.* at 586; Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1485–86 (1991) (suggesting that the jury deliberation process enforces public faith in verdicts because it encourages citizen jurors to vote on the "public interest, rather than their self-interest").

86. The Court has recognized this risk over and over again. See *Miller v. Johnson*, 515 U.S. 900, 914 (1995) (warning that equal protection jurisprudence "forbids" reliance on stereotypes); *Shaw v. Reno*, 509 U.S. 630, 647–48 (1993) (expressing concern that racial stereotypes were furthered by the belief that members of particular racial groups "think alike" and will bring a singular perspective to a case); *Batson v. Kentucky*, 476 U.S. 79, 104 (1986) (prohibiting "action based on crude, inaccurate racial stereotypes").

87. I hesitate in this for two reasons. First, there are unique aspects to the jury's deliberative process, as will be discussed further in Part III, that may occur regardless of whether the juror enters the deliberation room believing he is an "interest-based" voter. Second, there may be times when jurors do in fact nullify as a commentary on a law as a whole, as opposed to merely as applied to a particular defendant, and this act may further the bridge function of jurors. See Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1156–58 (1997).



*B. The Concept of an Enfranchising Jury in a Fair-Cross-Section and Equal Protection Analysis*

There are other possible functions for the jury. Given the significant challenges of both achieving a representative jury and reconciling a theory of representation with the Court's fair-cross-section and equal protection analysis, it is helpful to consider an alternative possibility: Perhaps the jury serves an *enfranchising* role in addition to or perhaps in lieu of its representative role. Under this conception of the jury, as with other electoral processes, legitimacy swings on the citizen's *opportunity* to exercise the right, as opposed to the *actual* exercise of the right.<sup>88</sup> In the context of juries, allegiance to an enfranchisement model would suggest it matters less that a descriptively representative juror actually served on any given jury than that they had a fair opportunity to be called to serve. Placed in the rubric of the Founders' vision of the jury as a body uniquely able to monitor the application of formally created and applied law, this opportunity to have a voice might well be sufficient, even if did not necessarily create an opportunity for that voice to surface on every jury.<sup>89</sup>

An enfranchisement vision of the jury neatly avoids the conflict between the fair-cross-section doctrine and the Court's sense that diversity among serving jurors provides valuable perspective. If one views the jury's function as to enfranchise the community, then inclusion in any particular petit jury and the competence such inclusion brings matters less. In fact, the absence of any particularity in selection may insulate the jury against claims of undue influence. The resulting jury is independent and therefore capable of achieving a larger democratic function that includes checking the power of government or rethinking the construct of law, regardless of whether it is a *descriptively* representative jury.<sup>90</sup> Individual juror competence, however defined, is simply less important, supplanted by group competence and the faith that with an equal opportunity for all to participate, one juror is as qualified as the next.<sup>91</sup> Likewise, under an enfranchisement model, micro-jurisdictional differences matter less. Like

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88. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Ballard v. United States*, 329 U.S. 187, 195 (1946); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 223, 225 (1946); *Glasser v. United States*, 315 U.S. 60, 85 (1942), *superseded by statute*, FED. R. EVID. 104(a), *as recognized in* *Bourjaily v. United States*, 483 U.S. 171 (1987); *Smith v. Texas*, 311 U.S. 128, 130 (1940).

89. See AMAR, *THE BILL OF RIGHTS*, *supra* note 10, at 94–96, 100; JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 293 (1996); Vikram David Amar, *supra* note 9, at 253–54; *see also* *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (describing jury service as a unique opportunity for “community participation”).

90. See *Holland v. Illinois*, 493 U.S. 474, 480–81 (1990).

91. See *Thiel*, 328 U.S. at 220 (“Jury competence is an individual rather than a group or class matter.”); *see also* *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 154 (1994) (Kennedy, J., concurring) (quoting *Thiel*, 328 U.S. at 220).

any local electoral process, there is an expectation of differences among different communities.

Adopting an enfranchisement model, however, fails to account for key differences between the jury system and the electoral system. These differences render the enfranchisement model unlikely to produce the desired faith in the system if the “opportunity” to serve never translates into actual service. On a most basic level, elections are public events. Voters know well in advance when an election is, what or who is on the ballots, whether they are eligible to vote, and when it is all over, what the result of the election is. Once a ballot is cast, each vote counts equally, which means in theory that each voter has an equal opportunity to see her particular position put into effect. Even with some spectacular recent failures, the electoral system is a model of transparency and efficiency in comparison to the opacity of the jury selection process.

In contrast, a jury summons arrives almost magically, unexpectedly, in the mail on a schedule seemingly entirely its own. Not everyone who is eligible to serve as a juror is summoned at the same time, and even among those summoned most turn out to not be needed.<sup>92</sup> Summoned jurors may also serve different purposes than one another. Unlike their electoral brethren who know what they will be voting on in advance (we hope), jurors may be assigned a role as civil or criminal jurors randomly. The end result is that disenfranchisement may be harder to detect among jurors than it is among voters.<sup>93</sup> This can undermine community faith in the jury system itself, which may explain the fair-cross-section doctrine’s requirement that exclusion be demonstrated over time—as well as its grant of third-party standing to protect a juror’s interests.<sup>94</sup> Without either provision, it might be impossible to detect when particular groups were excluded from the opportunity to participate or to raise a claim surrounding this exclusion. Third-party standing provisions are also consistent with juries serving a larger democratic function. While the defendant does have a particular interest in a jury of his peers, the interest is not his alone.<sup>95</sup> It is also ours, as a community. Defendants therefore litigate not only on their own behalf, but on behalf of all of us when they raise fair-cross-section challenges.

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92. Certainly high plea bargain rates render many jurors unnecessary and even create a question about the utility of juries generally. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1911–12 (1992); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

93. See *Campbell v. Louisiana*, 523 U.S. 392, 398 (1998); *Carter v. Jury Comm’n*, 396 U.S. 320, 329–30 (1970).

94. See *Powers v. Ohio*, 499 U.S. 400, 415 (1991).

95. See Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 398 (2009).

Another key difference between jury selection and voting is the existence of peremptory strikes. Peremptory strikes allow parties to remove jurors for no articulated reason, or in some cases, for the most cursory (and possibly illusory) of articulated reasons.<sup>96</sup> Historically, peremptory strikes have been used disproportionately to exclude cognizable groups. The use of peremptory strikes, therefore, arguably makes the selection process less random, less fair, and more partial. I cannot quarrel with this critique, but I do think it is incomplete. Peremptory strikes are frequently the only method to vindicate a defendant's perspective and to ensure him some control over the selection of the jury that will determine his culpability. But like the right to a jury itself, this benefit is not exclusively the defendant's. The presence of the peremptory strike can also vindicate the public's interests by removing any feared biases that may not rise to the level of a for-cause strike.

Beyond these apparent imperfections in the analogy between the electoral and jury processes, the enfranchisement account of jury service is problematic on other levels. Both the fair-cross-section and equal protection jurisprudence define limited populations as eligible for remedies if disenfranchised. These populations share the immutable traits of race and gender. Exclusion from jury service based on transient characteristics or characteristics that may be less readily identifiable cannot be remedied under either doctrine, despite the Court's caution that it should avoid stereotypes based on immutable traits. The Court has justified limiting challenges to exclusions based on immutable traits both in terms of descriptive representation and in the practical terms of how to demonstrate the exclusion itself.<sup>97</sup> The immutable trait allows the community not only to recognize itself, or some variant of itself, on the jury, but also to recognize when particular groups have been excluded for improper reasons. The very permanency and clarity of the trait serves as a tell for the state of mind of the actor who excluded individuals possessing this trait.

The difficulty with this explanation is that it seems to be premised on a notion of identity that the Court itself recognizes as dangerous. As discussed above, identities, even of those who possess permanent and immutable traits, are not themselves permanent or singular. Any given person simultaneously embodies different perspectives and allegiances. Some—like race or gender—are fixed (or relatively fixed); others—like political allegiance or social class—are not. Just as descriptive representation cannot guarantee substantive representation, so the presence of an immutable trait can serve only as a weak proxy to inform the

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96. See *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

97. *Id.* at 122.

community of whether every eligible member has had an opportunity to participate. This creates an odd quandary for proponents of the enfranchisement model. If faith in the model rests on a sense that all members of an eligible population have had an equal opportunity to participate, then defining *exclusion* from that opportunity becomes critical. With only narrow categories of exclusion eligible to raise claims, the population may lose faith in the system's ability to recognize, much less remedy, their own exclusion.

A final key difference between electoral processes and the jury system lies in the character of the jury's decision-making process. The significance of this difference will be explored further in Part III, but unlike voters, jurors come to their decisions in the presence of one another. Their verdicts are the process of face-to-face deliberations. While this may be a double-edged sword in any discussion about composition, at a minimum it renders the jury system distinct from its electoral counterpart. As with the discussion of the representative function of the jury, embedded in the conversation about the enfranchisement model is a sense of the jury's larger democratic function. The opportunity to serve on a jury matters because juries serve as opportunities for governance and law creation. While the Court has not explicitly addressed this larger democratic function in its jury selection jurisprudence, thinking about jury composition requires an acknowledgment of this function, however you define it.

### III. THE WILD CARD OF DELIBERATION

With competing and conjoining theories of the jury in place, the importance of jury composition emerges, and yet the discussion is still incomplete because it fails to account for a critical and unique component of the jury process—deliberation itself. As jurors struggle to determine the defendant's culpability, they do so in one another's presence. In theory, this process should spark not only debates among the citizen jurors, but also a reasoned exchange of ideas and perspectives that furthers democratic process.<sup>98</sup> The verdict that results from deliberation is thereby rendered

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98. Within the larger democracy, deliberation is extolled as a means to not only inform the citizenry but to ensure that they make good choices. See JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY & AMERICAN NATIONAL GOVERNMENT* 1-2, 6-39 (1994) (arguing that the Founders envisioned a deliberative democracy, even if only one that was deliberative through representation); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (examining deliberative democracy and proposing possible expansions of its scope); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW & DEMOCRACY* (William Rehg trans., MIT Press 1996) (1992) (describing how deliberation furthers democratic institutions by encouraging the exchange of ideas). James Fishkin and Bruce Ackerman

legitimate not only by way of the composition of the jury that reached it, but also by way of the process by which it was reached.<sup>99</sup> In short, deliberation among jurors should produce a wiser, more righteous outcome than a conclusion reached by the individual alone. But this notion is far from settled. In fact, studies of deliberating groups conclude that they are just as likely, and possibly more likely, to censor minority voices and force uniformity, even toward a demonstratively false result.<sup>100</sup> Deliberations plagued by internal informational influences and social pressures may drive groups to error, even if information available to those involved in the deliberation would have produced “correct” results.<sup>101</sup>

#### A. *A Caveat: What Do Juries Decide?*

These studies are worth examining as we think about a larger democratic function for juries. But they are also difficult to apply whole cloth to jury deliberation, as they tend to focus on group determination of a factual issue or issues.<sup>102</sup> In other words, they revolve around a universe in which there is a known right and wrong that can be tested and ascertained. But jury verdicts are more complex. Even if we narrow our focus to verdicts that seek to determine the presence or absence of a factual occurrence, a true right or true wrong answer may be difficult to locate. Jurors hear evidence and arguments in an adversarial forum in which competing witnesses may describe a single event with varying perspective, detail, and accuracy. Even objective facts invite subjective overlay. A woman may in fact be dead. Her husband may in fact have struck the fatal

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have argued that there ought to be a national holiday devoted to deliberation as a means of promoting a democratic ideal. See BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 3–16 (2004).

99. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 115–24 (1990) (examining the educative effect of deliberation and the likelihood the deliberating parties will acquiesce to what they perceive to be legitimate decisions).

100. See IRVING L. JANIS, *GROUPTHINK* 6–10 (2d ed., rev. 1983) (arguing that groups tend to promote consensus over accuracy in decision making); Daniel Gigone & Reid Hastie, *Proper Analysis of the Accuracy of Group Judgments*, 121 *PSYCHOL. BULL.* 149 (1997); Robert J. MacCoun, *Comparing Micro and Macro Rationality*, in *JUDGMENTS, DECISIONS, AND PUBLIC POLICY* 116, 120–26 (Rajeev Gowda & Jeffrey C. Fox eds., 2002) (explaining that many factors can cause groups to reach less accurate results than individuals acting alone); Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 *N.Y.U. L. REV.* 962, 965 (2005) (noting that “[w]ithout structural protections, . . . groups may well err, not in spite of deliberation but because of it”).

101. See Sunstein, *supra* note 100, at 966.

102. A prime example is the Condorcet Jury Theory, which takes as a starting point that people are answering a question that has two possible answers—true or false—and that there is in fact a correct answer to the query. See William P. Bottom et al., *Propagation of Individual Bias Through Group Judgment: Error in the Treatment of Asymmetrically Informative Signals*, 25 *J. RISK & UNCERTAINTY*, Sept. 2002, at 147, 151–54. The theory goes on to argue that assuming that the average probability of each juror answering correctly exceeds 50% then the probability of arriving at a correct answer to any question by majority increases towards certainty as the group’s size increases. *Id.* at 153.

blow. These facts may be admitted and acknowledged by all, but the ultimate question of the husband's guilt may remain elusive. Did the husband act in self-defense, a fit of rage, or in the midst of psychotic break? Did he misunderstand the consequences of his actions or to whom he administered the deathblow? Did he act as anyone else in his position would have, or was he "unreasonable" with all the subjective calculations such an assessment curtails? Was he drunk or simple or cunning or sad or betrayed or devious or justified? If he was all or any of these things, can he now fashion an excuse that his fellow citizens, sitting as jurors, can weigh against the death of his wife to conclude that he is not legally guilty, not sufficiently culpable to warrant punishment?

If the jury's task is further complicated by a conscious or unconscious acknowledgement that they are judging not just these "factual" questions but also what they mean to the larger community, is it possible to ascertain a "right" verdict? It may be that we can "agree" as a community that the husband killed his wife and that killing is wrong and killers culpable; but we may also agree that we would be disquieted by his conviction, either because we do not believe the law should apply to *him* or we do not agree that the law prohibiting *his* behavior should exist at all. In short, defining a "right" or factually accurate verdict may be complex.

At the end of the day, there may be some value in this struggle amongst the citizenry to layer legal and factual analysis as they deliberate towards a verdict. It may also suggest that the best we can hope for from a jury is an *approximation* of our sense of what should constitute guilt in any given case. In moments when dissent from formally constructed norms embodied in the law surfaces, juries, in their deliberations, can offer a correction. Whether identified as nullification or a failure of proof of pure facts beyond a reasonable doubt, juries are in a unique position to insert a competing notion of a "right" result into their verdict. To these juries a strict application of the law, or even the law itself, may produce what appears to their own senses to be a "wrong" result. In weighing the possibilities of this unique and larger democratic function of the jury, examination of juror composition is insufficient. It is also necessary to examine deliberation and the complexities of the jury's decision-making process.

### *B. What We Were Thinking When We All Got Together*

Unlike other electoral processes, juries reach their verdicts through a deliberative process that depends on interactions between and among deciding parties. The common belief has been that such interaction would result not only in consensus (when possible), but also an informed and accurate decision-making process. Closer examination suggests that this may not in fact occur. While those deliberating may be more confident in

their decisions after deliberation, this confidence does not necessarily correlate with accuracy.<sup>103</sup>

Several pitfalls await deliberating decision makers. The presence of a systematic bias will sway individual answers.<sup>104</sup> The fact that deliberation would require the presentation of this bias to the group does not, it turns out, insulate against the effect of such biases on the group's ultimate judgment.<sup>105</sup> In circumstances where error and confusion are widespread, individual answers and group decisions tend to be worse than random answers, even when considering questions that exceed binary choices.<sup>106</sup> Certainly many of these group errors can be avoided by employing experts to make decisions in their area of expertise,<sup>107</sup> but the use of experts may actually serve to undo some of the benefits of jury decisions by undoing juror independence and disrupting their common status. In other words, what we gain by employing experts to produce "accurate" verdicts, we lose in democratic function by resigning our decision-making authority to yet one more formal or non-common actor.

We might hope that forcing decision makers to consult with one another and deliberate toward a shared conclusion would both drive them away from biases and encourage them to reject patently improper anchors.<sup>108</sup> But this premise rests on assumptions that have proven difficult to realize consistently in the context of group decision-making. First, group deliberations generally drive toward a lowest common denominator.<sup>109</sup> Put another way, they tend to reduce variance and encourage conformity. Second, the group's interaction tends to increase confidence, but not necessarily accuracy.<sup>110</sup> So a group, after deliberating, may enjoy a false sense of security that the decision reached by consensus is accurate regardless of whether that sense is grounded in any sort of reality.<sup>111</sup> As a

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103. See Chip Heath & Rich Gonzalez, *Interaction with Others Increases Decision Confidence but Not Decision Quality: Evidence Against Information Collection Views of Interactive Decision Making*, 61 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 305, 306 (1995).

104. See Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 120, 120-22 (Thomas Gilovich et al. eds., 2002) (noting the effect of false anchors, even arbitrary or clearly incorrect anchors, on individual decisions).

105. See Sunstein, *supra* note 100, at 975.

106. *Id.* at 976 (describing a study conducted at the University of Chicago Law School).

107. See J. Scott Armstrong, *Combining Forecasts*, in PRINCIPLES OF FORECASTING: A HANDBOOK FOR RESEARCHERS AND PRACTITIONERS 417, 419-33 (J. Scott Armstrong ed., 2001) (describing numerous studies in which experts exhibited a high degree of accuracy in judgments in their particular fields or closely related fields).

108. See Sunstein, *supra* note 100, at 980.

109. See ROGER BROWN, SOCIAL PSYCHOLOGY: THE SECOND EDITION 206-07 (1986).

110. See Heath & Gonzalez, *supra* note 103, at 306.

111. See RUPERT BROWN, GROUP PROCESSES: DYNAMICS WITHIN AND BETWEEN GROUPS 175-77 (2d ed. 2000).

result, members of the deliberating group may identify their decision as legitimate regardless of its accuracy.

Part of the problem seems to stem from the fact that those deliberating often do not share information; thus the group's decision does not represent its collective wisdom, but rather the wisdom to which the group agreed to defer.<sup>112</sup> This wisdom is not necessarily the wisdom that is either correct or consistent with more "broadly shared normative framework[s]," but rather is the wisdom that is able to garner "at least some initial social support."<sup>113</sup> In short, groups tend to converge on "truths" under two conditions: first, when the position garners support early in the deliberative process; and second, when the question before the group is one which has a demonstrably accurate answer or an answer that resonates with the group.<sup>114</sup> Perhaps most discouraging from the perspective of jury deliberation, group deliberation tends to discourage novelty and force conformity, even around less desirable outcomes.<sup>115</sup> In the context of the jury, all this suggests that *12 Angry Men* is nothing more than an aspirational tale; the lone hold-out, even if correct and passionate in his beliefs, will not sway his fellow jurors.<sup>116</sup> At best, he can hope to hang the jury. In real life, when the majority of participants in the group process are wrong, the group tends to be wrong as well.<sup>117</sup> Groups "do[] not use information efficiently," and group deliberation provides little of the expected protection against erroneous conclusions.<sup>118</sup>

In considering why group deliberations tend not to live up to their promise, Cass Sunstein suggest two possibilities: informational influences

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112. See *id.* at 170–93 (noting that group performance is complex and has mixed results in terms of accuracy); Gigone & Hastie, *supra* note 100, at 149–53 (finding that group judgments tend to be as accurate as the mean judgments of their members, though less accurate than the conclusions of their most accurate voters); Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 713 (1996) (concluding there is "no simple empirical answer" as to whether groups make more or less biased judgments than individuals).

113. MacCoun, *supra* note 100, at 120.

114. *Id.*

115. See BROWN, *supra* note 111, at 176 (noting that brainstorming exercises in a group context tend to discourage novelty and therefore concluding that "brainstorming is actually most beneficial when carried out initially in *private*, the interacting group then being used as a forum for combining and evaluating these individually produced ideas").

116. In Reginald Rose's film, Henry Fonda plays a lone juror who convinces his fellow jurors that there is reason to doubt the evidence presented in a case against an eighteen-year-old accused of stabbing his father to death. Fonda, passionate in his belief that witnesses have testified inaccurately against the defendant, is able in the end to persuade his fellow jurors to acquit the eighteen-year-old. See *12 ANGRY MEN* (MGM Studios, Inc. 1957).

117. See MacCoun, *supra* note 100, at 124 (demonstrating that group interaction amplifies individual bias).

118. Armstrong, *supra* note 107, at 433 (concluding that combining individual knowledge in the context of group deliberation does not produce more accurate results).



and social pressures.<sup>119</sup> The first possibility, informational influences, holds that particular group members are likely to defer their own beliefs if they diverge from the apparent beliefs of the majority—the stronger the apparent belief of the group, the more likely the deferral.<sup>120</sup> So if a juror finds her belief system to be in the minority, and particularly if she is the sole dissenter, she is unlikely to challenge the group's conclusions even if in the process she ignores evidence that contradicts such conclusions.<sup>121</sup> If a member of a group presents as an "authority" on a particular subject, other group members will defer to the identified authority, even if the authority's position contradicts any given member's own conclusions.<sup>122</sup> While an advantage of the deliberative process is that it is designed to encourage members to voice reasons for their conclusions,<sup>123</sup> these reasons—once voiced—may have a silencing effect on conclusions or reasoning that contradict them.<sup>124</sup>

Information influences are further complicated by information cascades. Such cascades affect group decision makers, including jurors, by producing a tendency to follow positions that are articulated early and with confidence, even if such opinions are both contrary to their own opinion and are in fact incorrect.<sup>125</sup> This cascade has a cumulative effect: the more members align with a particular view, the more it appears that the view reflects a strongly held majority position. Accordingly, jurors may be driven to an improper verdict by the early articulation of a particular position with confidence.<sup>126</sup> In addition, jurors may fail to disclose

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119. See Sunstein, *supra* note 100, at 984–86.

120. See DAVID KRECH ET AL., *INDIVIDUAL IN SOCIETY* 510–14 (1962) (individuals are highly susceptible to majority influences).

121. See KRECH ET AL., *supra* note 120; Solomon E. Asch, *Opinions and Social Pressure*, in *READINGS ABOUT THE SOCIAL ANIMAL* 13 (Elliott Aronson ed., 7th ed. 1995).

122. See KRECH ET AL., *supra* note 120.

123. See HABERMAS, *supra* note 98, at 340–41 (stating that the deliberative ideal is premised on the conclusions based on reasons given by group members).

124. See Sunstein, *supra* note 100, at 985 ("The problem is that when reasons are given, group members are likely to pay attention to them in a way that can lead such members to fail to say what they know.").

125. See Lisa R. Anderson & Charles A. Holt, *Information Cascades in the Laboratory*, 87 AM. ECON. REV. 847, 859 (1997) (noting that "initial misrepresentative signals start a chain of incorrect decisions that is not broken by more representative signals received later").

126. See Fabio Lorenzi-Cioldi & Alain Clémence, *Group Processes and the Construction of Social Representations*, in *BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP PROCESSES* 31, 49–50 (Micahel A. Hogg & R. Scott Tindale eds., 2001); David Hirschleifer, *The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades*, in *THE NEW ECONOMICS OF HUMAN BEHAVIOR* 188, 193–95 (Mariano Tommasi & Kathryn Ierulli eds., 1995). Unfortunately none of the studies provide information regarding which sorts of actors are likely to present their viewpoints first and thus capitalize on the cascade effect, but read in the context of studies regarding confidence of opinion, one might expect members of the majority to do so.

information that might be helpful to other members of the group in response to the cascade effect.<sup>127</sup>

Beyond information influences, social influences affect group decision-making. Social influences control because people fear being subjected to social sanctions and derision for expressing opinions that deviate from the group's emerging position.<sup>128</sup> In the context of deliberation, social influences can result in self-censorship and silence when a party believes that his position will be disliked or even just different.<sup>129</sup> This silencing effect is not anchored to the accuracy of the belief,<sup>130</sup> but is driven by the probability that the belief contradicts a dominant position in the group and, therefore, will be subject to scrutiny and ultimately disapproval.<sup>131</sup> These social pressures can be intense, particularly if a group is cohesive and charged with reaching consensus.<sup>132</sup>

The result of such social pressures is suboptimal decision-making conditions. Divergent opinions either will not surface at all or, if they do, will be presented with reluctance—increasing the likelihood that they will be discounted by the group.<sup>133</sup> For members of traditional minority groups, or those with a lower social status—including people of color, women, and those less educated—this fear of social ostracization or rebuke is more pronounced and carries with it echoes of historical and existing power dynamics.<sup>134</sup> As a result, members of these groups tend to speak less and to carry less influence when deliberating in groups dominated by those with higher social status.<sup>135</sup> In practical terms this means that the mere presence

127. See Anderson & Holt, *supra* note 125.

128. Sunstein, *supra* note 100, at 986.

129. See Glenn C. Loury, *Self-Censorship in Public Discourse: A Theory of "Political Correctness" and Related Phenomena*, 6 RATIONALITY & SOC'Y 428, 430 (1994).

130. See Robert L. Thorndike, *The Effect of Discussion upon the Correctness of Group Decisions, When the Factor of Majority Influence is Allowed for*, 9 J. SOC. PSYCHOL. 343, 345, 355 (1938) (noting that majority pressures will influence individual decisions even when there is a "clearly right" answer that the individual knows to be correct but different than the majority's position).

131. Loury, *supra* note 129, at 430–31.

132. See José M. Marques et al., *Social Categorization, Social Identification, and Rejection of Deviant Group Members*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP PROCESSES 400, 403 (Michael A. Hogg & R. Scott Tindale eds., 2001).

133. *Id.*

134. *Id.*

135. See Jacob K. Goeree & Leeat Yariv, *An Experimental Study of Jury Deliberation* (Institute for Empirical Research in Economics, Working Paper No. 438, 2009), available at <http://ssrn.com/abstract=1476567>; Garold Stasser & William Titus, *Hidden Profiles: A Brief History*, 14 PSYCHOL. INQUIRY 304, 308 (2003) (noting that individuals who tend to be in minority positions in larger communities tend to conceal or silence their perspective in the context of group deliberations, particularly in the face of a strong presentation by someone occupying a majority position in the larger community). Stasser and Titus found this to be true even when low status members possessed unique information that was relevant to the decision at hand. *Id.* Stasser and Titus went on to note that group

of diversity on a jury may not increase perspective as the Court hoped. Rather, it may only replicate the perspective available in the larger community, at least as to the ultimate question of guilt.<sup>136</sup>

In a related vein, members of a decision-making group may seek to conform their opinions to what they perceive as the opinion of the larger group.<sup>137</sup> This creates a reputational cascade. Even if the individual member disagrees with the position of the group, he may doubt and ultimately conform his position rather than challenge that of the group.<sup>138</sup> This may occur even in a space such as a jury room where deliberation is an articulated and anticipated part of the process.<sup>139</sup> The end result may be a polarization of the group's position.<sup>140</sup> Studies indicate that the risk of polarization is especially high if a group member perceives himself as possessing a shared identity with other members of the group and links that identity to a particular position.<sup>141</sup>

All this suggests that the biases or errors of a group's individual members may actually be amplified in the context of group decision-making processes, particularly if the bias is widely shared.<sup>142</sup> But even this is a double-edged sword. Biases that are not widely shared tend to be corrected by group deliberation.<sup>143</sup> These tendencies are also more pronounced in circumstances where interdependent decisions are being made and there is no clear "right" or "wrong" answer.<sup>144</sup> Finally, the

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members tended to overestimate the accuracy of high status members of groups and underestimate that of low status (or minority) members. *Id.*

136. See Baldus et al., *supra* note 64, at 124 (reaching the same conclusion); Kotch & Mosteller, *supra* note 64, at 2127 (concluding that minority presence on juries may affect sentencing decisions in capital cases).

137. See Sunstein, *supra* note 100, at 1001–02 (describing experiments tracking reputational cascade).

138. *Id.*

139. *Id.*

140. See BROWN, *supra* note 111, at 209.

141. See *id.* at 210 (noting that polarization is most likely when members have a shared identity and perceive a position as linked to that identity).

142. See Garold Stasser & Beth Dietz-Uhler, *Collective Choice, Judgment, and Problem Solving*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP PROCESSES 31, 49–50 (Michael A. Hogg & R. Scott Tindale eds., 2001); MacCoun, *supra* note 100, at 121–26 (showing amplification of widely shared biases by juries).

143. See MacCoun, *supra* note 100, at 121–26 (suggesting that biases that do not share widely held support tend to be silenced or corrected in the context of jury deliberations); see also Sunstein, *supra* note 100, at 993 (proposing that one benefit of social influence in the context of group deliberation is that individual members with egocentric biases may correct them in the face of a group judgment that the belief is not widely shared).

144. See BROWN, *supra* note 109, at 222–26 (concluding that when asked to answer questions involving morality or normative issues, group discussions produced increasing polarization among members even beyond their pre-deliberation tendencies); see also Kerr et al., *supra* note 112, at 714 (suggesting that biases, informational influences, and social pressures are amplified in group

presence of a genuine dissenting perspective can enhance group performance by forcing members of the group to question their own biases and information sources.<sup>145</sup>

### C. *Why This Matters for Juries*

This research offers several possible insights for jury selection jurisprudence. On the one hand, the Court's intuition that composition matters is right, both for the reasons the Court has articulated and for another critical reason. Beyond the fact that composition may well increase the external sense that a verdict reached by the jury is a "legitimate" one, the composition of the jury may offer the opportunity for a genuine dissent that may well inject a varied perspective into the deliberative process. This in turn may push jurors to engage in the type of reasoned discussion that the deliberative ideal promises.

But composition, and specifically composition measured over time, may matter for another reason as well. To the extent that research into deliberation suggests that group decision-making processes may stifle, rather than promote, minority voices, the presence of a fair cross section on any given jury would not provide the genuine dissent that pushes jurors to reconsider their position. In order for this to occur, the minority presence would need to be stronger, a near or actual majority presence. This suggests that our consideration of jury composition with an eye toward a larger democratic function is not sufficient. A still more nuanced examination is required—one that overlays what we know about the constitutional requirements of diversity and deliberative group dynamics.

## IV. RETHINKING JURY SELECTION

Much of the literature on jury selection focuses on the need to increase diversity on individual juries—to render any given jury's composition reflective or nearly reflective of the community from which it is drawn.<sup>146</sup>

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deliberation settings in which "real-world decision tasks" are required that tend to lack certainty and listing, among other examples, jury deliberations).

145. See Alexander L. George & Erik K. Stern, *Harnessing Conflict in Foreign Policy Making: From Devil's to Multiple Advocacy*, 32 *PRESIDENTIAL STUD. Q.* 484, 486–87 (2002) (finding that the presence of a "staged" devil's advocate did not benefit group decision-making processes, but the presence of genuine dissent did, even in the face of its status as a minority). So maybe Henry Fonda was right after all. See *supra* notes 115–116 and accompanying text.

146. This description of diversity is not unique to discussions about juries, though it certainly pertains to them. Discussions of diversity in the modern literature take on a fidelity to proportional representation. See SANFORD LEVINSON, *WRESTLING WITH DIVERSITY* 24 (2003); HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 60–91 (1967) (describing diversity as an integration of populations on decision-making bodies to reflect the community's population). In order to be diverse,

The theory is that if juries are to serve a larger democratic function, then they need to reflect the community's makeup. Their failure to do so jeopardizes their function and, in the long run, raises questions about the legitimacy of the process and the value of the verdict produced.

But the proposition is tricky. There is no question that all portions of the population must have an opportunity to serve on juries. That is the ground the Supreme Court has carved out in the debate, and the proposition seems uncontested and uncontestable. This proposition, however, is decidedly different than requiring or ensuring proportionality on any single jury. In fact, non-proportional representation may better facilitate the jury's function as an alternative source of law within the democracy. First, non-proportional representation may open a space in the deliberative process for previously excluded or suppressed perspectives to present. This brings a distinct value if we view jurors as more responsive democratic actors. But beyond this, jettisoning allegiances to proportional representation on petit juries may allow for a more nuanced consideration of representation—one that recognizes that while a representative jury matters, the question of what that representation is and precisely why it matters shifts as notions of function shift.

If one of the underlying values of the jury is that it can play a critical interpretive role within the democratic lawmaking body, then one must first confront the question of precisely which community the jury seeks to represent. In a world in which different communities may bear the disproportional burden of lawmaking and application, different communities may have a different stake in the jury itself. As a result, using geographically defined jurisdictions to produce venire panels may cease to make sense. The shifting nature of identity and the complexity of the question that jurors ultimately consider further complicates the inquiry and counsels towards a new conception of jury composition.

#### *A. Second Order Diversity and the Jury*

While adopting a proportional representation requirement on petit juries would create descriptive representation, it may also be counterproductive to the democratic function of the jury. Proportional representation renders the jury system akin to other electoral processes, with corresponding minority and majority viewpoints. Coupled with what we know about deliberative process, requiring proportionality on any given

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the composition of any decision-making body must mirror that of the relevant population in question—whether it be the city, county, state, or nation. See PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 22–23 (2003).

jury may only serve to reinforce existing perspectives. Minority or divergent views would be unlikely to present. While this might shore up the macro-jurisdiction's sense that the verdict produced in any given jurisdiction was legitimate and would certainly promote continuity in the vision of the law, it prompts the question of what is the remaining function of the jury, and is it at all distinct from other electoral functions?

In contrast, allowing variance among decision-making bodies will be more likely to produce divergent outcomes. Proponents of this second order diversity recognize that there may be affirmative benefits from non-proportional representation on non-aggregate decision-making bodies such as the jury.<sup>147</sup> In a nutshell, proponents of second order diversity argue that homogeneity on the jury is not the problem, but rather the problem is the failure to empanel—at least sometimes—minority homogenous juries or near minority homogenous juries.<sup>148</sup> These minority dominated juries open a space in the political conversation for those ordinarily relegated to the margins by giving a meaningful opportunity for voice, even in the small realm of the jury room and the verdict form.

Beyond this, depriving the majority of its status, even in a small forum like a jury, alters its own perceptions of power and place in a community. Minority populations are not only vested for once with the power to decide, but majority populations are, for brief moments, divested of that power. This serves an educative function for both sides, forcing each to recognize the position normally occupied by the other and offering windows for shifting identities and allegiances. When traditional power dynamics are collapsed, even if only in the context of a single moment of deliberation, a corridor is opened to reconsider and redefine one's identity within the larger community and democracy. In the process, a more nuanced and empathetic political identity may emerge.

Allowing for variance among juries also allows for substantively different outcomes than would occur in other electoral processes. As electoral institutions grow larger and larger, this matters more. The electoral process tends to drive decisions toward a lowest common denominator, much as group think dynamics do.<sup>149</sup> Participants compromise their positions again and again, abandoning parts of their own belief systems along the way. In national or even statewide elections, voters tend to express with dismay the absence of any candidate that reflects their own particular interests or perspective. Faced with less than optimal or

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147. See Gerken, *supra* note 5, at 1104.

148. See *id.*

149. See Phoebe C. Ellsworth, *One Inspiring Jury*, 101 MICH. L. REV. 1387, 1396 (2003) (reviewing REGINALD ROSE, *TWELVE ANGRY MEN* (1955)); Gerken, *supra* note 5, at 1125; Sunstein, *supra* note 100.

reflective choices, voters either opt out (by not voting) or vote for someone who is the best of all available options. In this world minority perspectives rarely surface, buried beneath an avalanche of majority rule and accompanying compromise. If juries are forced to mirror populations precisely in their composition, we should expect roughly, if not precisely, the same results that we would see in any other voting process. But when the proportionality requirement is shed, the possibility of previously marginalized (and ghettoized) results emerges. While such results admittedly may not represent the values of every member of the community, they may represent the values of some members of the community more precisely than results from other formalized power processes. Beyond this, they may force a recognition of a perspective previously excluded. No single theory or identity is allowed to dominate. In the words of Heather Gerken, we cycle and, in the process, "vary our strategies for dealing with group conflict."<sup>150</sup>

A further conversation about diversity and identity is embedded in this discussion. While diversity seems to be the linchpin to any discussion about the jury's democratic function, defining what is meant by this term, or why it matters, is not. Among different populations, diversity can mean different things, and the sufficiency of integration can be a moving target depending on the object of the integration and which population is asked to judge its sufficiency.<sup>151</sup> Scholars define diversity in terms of a statistical integration evidenced by a representation proportional to the population,<sup>152</sup> though even they vary on which aspects of the identity must be proportionally matched. Regardless of its precise definition, that the ideal of proportional diversity does not occur in the real world, and that decision makers frequently fail to achieve this standard (or even anything close to it), does not seem to alter it as a touchstone. Nor does the practical failure to realize proportional diversity in other contexts sway the pervasive belief that diversity achieves some benefit otherwise unobtainable (although there may be considerable debate about what exactly that benefit is or how diversity makes it happen).

On at least one level, this may be tolerable. The notion of diversity hints at a fixed status of majority and minority identity. In fact, in most contexts, such categories tend to be far more porous or elastic. Identity,

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150. See Gerken, *supra* note 5, at 1104.

151. See SCHUCK, *supra* note 146, at 19; Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 318 (1997) (noting that minority populations tend to think of diversity in different terms than majority populations).

152. See SCHUCK, *supra* note 146, at 22-23.

after all, is complex and multidimensional.<sup>153</sup> The very characteristics that may render any given individual a member of a majority in one context may render the same individual part of a minority in another context. Democratic processes should both acknowledge and benefit from these shifting statuses. As different group decision-making opportunities emerge, the possibility of a near constant minority status encourages empathetic behavior and multidimensional assessment of policy and resolution of conflict. But on some fundamental level, and even in the face of shifting identities, it is still possible that some portion of the population will occupy a space designated as an electoral minority.

This embedded reality of a constant and semi-fixed minority creates a challenge within our democracy where we value majority rule and cling to a faith that the will of the majority benefits the whole.<sup>154</sup> This creates a fixed power dynamic where minorities may enjoy influence, but not decision-making power.<sup>155</sup> While members of a minority population may be able, through coalition building, to exercise that influence to affect policy, reliance on majority rule precludes the possibility that the minority will ever have an opportunity to make decisions that truly reflect their ideals.<sup>156</sup> On the one hand, perhaps this is the same process of compromise we all engage in and accept as part of the representative democracy.<sup>157</sup> But for those who reside in the fixed minority classification, their ability to insert their perspective in the process of compromise may be minimal or non-existent. While none of us may get everything we want in any given policy, some of us may get less and some of us may never be heard at all.

A second order diversity analysis, therefore, suggests that in the context of juries there may be some benefits to thinking of diversity *across* petit juries, rather than *within* petit juries. Abandoning an allegiance to proportionally representative petit juries creates a space for electoral minorities to sometimes seize power and control the definition of the law at a critical moment when the law is applied to a defendant whose narrative especially resonates even in the face of the government's counter-narrative. It offers a rare opportunity for power dynamics to be redefined and, in the process, the law itself modified to accommodate other voices and lives.

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153. See ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 20–32 (1971); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 133 (1956) (describing communities as governed by near constant minority rule).

154. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 525 (1997).

155. See LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 5, 65–66 (1994) (noting the profound reluctance of majority populations to share power with minority groups).

156. See Gerken, *supra* note 5, at 1124–25.

157. See *id.* at 1125.



Suddenly, different values are cast as middle ground, and previously excluded factions have the opportunity to edit the law they could not create in other more formal and majoritarian-driven contexts.<sup>158</sup> In this, juries realize a democratic function of allowing previously unrepresented perspectives to present, even if just in a limited forum, and even if they are merely the product of reconfigured identity allegiances in light of the defendant's narrative.

As attractive as the prospect of second order diversity is as a means to empower minority perspectives, it is not without its drawbacks. Encouraging heterogeneity among juries jettisons an individual rights analysis in favor of a global or systematic benefit.<sup>159</sup> Defendants relinquish a claim to a jury that accurately reflects the community from which it is drawn. The community itself accepts shifting norms in this limited decision-making realm—with concepts of majority and minority shifting with each new empanelment. Whatever promise of newly realized power this vision of heterogeneity offers, it relegates its rulers to the smallest of empires with a limited grant of authority over a single case, a single verdict—with the only hope for more expansive power coming in the form of aggregation among verdicts. This realized power is quickly ceded in other realms (like other elections), where former majority and minority statuses return and former dynamics of control remain.

### *B. Rethinking Majoritarianism in the Context of the Jury*

Second order diversity offers the tempting possibility to think of juries as a sort of quasi-electoral process. Electoral processes seek the inclusion of an array of voters, and so offer representation to varying perspectives in any given community. That any given representative may lose an election, or fail to represent accurately every perspective in his community, does not undo the reality that each eligible voter in the community had the opportunity to vote and will, at least in theory, have that opportunity again. The enfranchisement model, after all, depends on an acceptance that there is an inherent value in the unfettered opportunity of all eligible voters to vote.

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158. Madison was a proponent of majority-thwarting factions, suggesting larger or even at-large election districts as a means of precluding constant control of single groups. See THE FEDERALIST NO. 10, at 82–84 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 51, at 323–25 (James Madison) (Clinton Rossiter ed., 1961). While his description of such voting districts was limited to a discussion of electoral power, the same logic would seem to apply to any decision-making body in which entrenched majorities might be created based on proportionality.

159. See Gerken, *supra* note 5, at 1136–39 (acknowledging that this may be problematic).

In a nation where voting rights remain a central and contested battlefield in an ongoing struggle for civil rights and equality,<sup>160</sup> the proposition that an equal opportunity to vote matters is sound, but the right to vote alone is insufficient.<sup>161</sup> For all its symbolic and actual importance, there is a disconnect between the act and those possibilities latent in the act. Even in the most educated and involved electoral population, in voting we seek some imperfect alignment of our own values and identities in an array of representatives and positions. Each of us prioritizes and abandons parts of ourselves in the name of compromise and consensus (or undoubtedly at times in the resignation of the best available option). The extent to which these compromises occur may vary depending on the nature of the election itself, but even diluted, they persist.<sup>162</sup>

This reality of electoral compromise is both valuable and necessary. To vote, whether for a candidate or issue, is to act prospectively and abstractly. My own vote for Bill de Blasio in November 2012 did not cause universal Pre-K to magically appear, or class differences in New York City to instantly dissipate, even though I understood in voting for him that he supported both causes.<sup>163</sup> I lent him my support and my vote because I understood that he would push for the realizations of both of these central tenets of his campaign. The implementation of either is a complex political struggle that I may witness only from the sidelines, as my own values are buffeted and at times abandoned for the sake of the compromises that eventually, hopefully, will produce some Pre-K and some increase in economic equity.

But whether we are talking about the election of a mayor or a president or the legalization of marijuana, or the sanctioning of gay marriage, in voting we are looking forward to what the candidate or the law can be, not what it will be or even is. Jurors do not enjoy the benefit of that distance. In rendering a verdict, jurors remove the law from the realm of the abstract and ground it (sometimes both literally and figuratively) into the life of the defendant. They do not wonder who will someday be arrested under the law or what defense might be raised in response. In the realm of the case before them, they know. In their deliberations, the jurors contemplate the past as constructed through the evidence presented, the present in the very

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160. See generally *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

161. See GUINIER, *supra* note 155; Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991); Samuel Issacharoff, Comment, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013).

162. See GUINIER, *supra* note 155, at 65–66 (arguing that localized elections may more accurately represent communities than national ones).

163. See <http://www.billdeblasio.com/issues> (defining de Blasio's position as a mayoral candidate with universal Pre-K and equalization of wealth distribution through the "millionaires" tax listed prominently).

real terms of the defendant and victim before them, and the future as they wonder how their decision will shape the world going forward. To occupy this position, simultaneously imagining a past, present, and future of law, is a rare space. It renders jurors distinct from other voters and the jury distinct from other electoral processes.<sup>164</sup>

Jury service is different from electoral processes for other reasons as well. Juries are by their nature small and local in ways that few elections are. In addition, juries lack the anonymity that voting promises. Jurors not only live with each other outside the jury room, but in the jury room. Unlike voting, jury deliberation is not a solitary process. Jurors argue and debate with one another in an effort to push the verdict forward. In the process, their values may be buffeted, suppressed, or altered.<sup>165</sup> In considering the value of second order diversity, the reality of deliberation suggests that meaningful dissent will occur only in moments when minority voices become the majority.

This reality of juror deliberation and the distinct nature of the questions that jurors seek to answer suggest that a conversation about second order diversity alone is insufficient. Instead, it is helpful to move the conversation about juries away from conversations about majoritarianism that dominate the electoral debates and the literature on voting, and to recognize the uniqueness of the jury as a democratic institution. Jurors, forced to examine the law in the context of their own lives and the lives of the defendant before them, occupy a unique democratic space that requires them, in the course of deliberation, to constantly rethink their own identities, allegiances, and expectations of government. For the vast majority of jurors this may not be a weighty proposition—narratives that resonate will emerge and verdicts will be rendered with an almost expected routineness. But in moments when jurors find themselves confounded by the formal construct of law, their vital potential emerges and their verdicts cannot only open space for different perspectives, but can actually push for a more nuanced construct of the law itself—even if only in the realm of a single case. In this sense, the jury owes no allegiance to the values of a “majority.” Such a majority may not exist in the space of these jury rooms. Instead they owe their allegiance to the process of engaging with their fellow citizens in an effort to discern both what the law is and can be when

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164. This is not to say that the opportunity for jury service is not an opportunity for enfranchisement and representation. It is. Just as it is important to create a voting system that gives all citizens a chance to vote, it is important to create a jury selection system that gives all citizens a chance to be jurors. And just like voting, the chance to serve is not enough. The chance to be heard matters as well. It matters for many of the reasons the chance to be heard matters in other electoral processes—the idea that, in casting their ballot, their vision of the world may be realized, however imperfectly. Because of the realities of the jury system, however, it matters differently for jurors.

165. See *supra* notes 100–145 and accompanying text.

it is applied in the context of the criminal case before them. That second order diversity may allow those unique perspectives to emerge, or may trigger a reconsideration of one's identity allegiances, is critical to this function.

This unique democratic function may well counsel not toward a jury composition that neatly reflects community populations on each jury, but rather toward equity in composition over time to assure the development of the genuine dissent critical to the deliberative process and—at times—the creation of a majority on a jury that stands in stark contrast to that which empowered formal actors. In doing so, the accepted dichotomy of integration or segregation falls by the wayside and a far more complex landscape of diversity jurisprudence emerges. This new jurisprudence recognizes the unique function of the jury and seeks to modify conceptions of diversity to accomplish the function in light of what is known both about group decision-making processes and the role of the jury as a democratic institution. It is a solution that finds purchase in the proposition that some decision-making bodies do and should look nothing like the populations from which they are drawn.

### C. *Rethinking Vicinage*

Girding this conversation about second order diversity and majoritarianism is the more fundamental question of how juries themselves are chosen. Historically, vicinage was crucial to the Founders' conception of the jury as a source of local values and as a check on formal government.<sup>166</sup> Concerns that government would create, apply, and

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166. Originally, the Constitution held no requirement for local juries. See U.S. CONST. art. III, § 2, cl. 3. Anti-Federalist opponents of the Constitution seized on this omission, which was in sharp contrast to the common law's requirement that juries be selected from the county where the crime occurred. See ABRAMSON, *supra* note 83, at 22 (discussing anti-Federalist reaction to the lack of a local jury requirement); BLACKSTONE, *supra* note 17, at 344 (defining the common law term of *vicinage* to mean that jurors must be drawn from "the county where the fact is committed"). The anti-Federalists reasoned that, without local juries, verdicts would no longer reflect the sentiment of the communities most affected by the alleged crime and the judicial system could become a forum for tyranny. See ABRAMSON, *supra* note 83, at 22. To the anti-Federalist, the thought of removing a trial from the community in which the crime allegedly occurred smacked of colonial tactics to try accused traitors in England in front of jurors more sympathetic to the crown or at least less sympathetic to the colonies, as opposed to in America where their treason allegedly had occurred. See *id.* at 22–23 (describing the British government's efforts to quash the budding revolt by bringing colonists to England to be tried in front of "hostile jurors" and perceptions among anti-Federalists that the federal government's efforts to eradicate local jurors amounted to little more than forum shopping).

In contrast, the Federalists advocated a broader jury pool in order to prevent conviction or acquittal based on the juror's extrajudicial knowledge of the case. See *id.* at 26. This was particularly crucial to those who recognized the tenuous state of the federal government. As James Madison noted, forces of rebellion still existed and there were those who even post-Revolution were displeased with the establishment of a centralized government. See 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL

interpret laws that were contrary to the citizens' own values were alleviated by the implementation of the vicinage system—designed to ensure that at the end of the day, after all other formal exercises of discretion within the criminal justice system, questions of culpability were local.<sup>167</sup> This construction of the jurisdiction, and so its source of venire panels, is geographically based. Like electoral districts, vicinage is a product of the citizen's physical residency.<sup>168</sup> It does not seek to account for other aspects of the citizen's identity—though certainly the initial construction of the geographic boundary may consider this. On some fundamental level, this geographically constructed vicinage makes sense. Whatever disputes may periodically arise around the reconfiguration of a particular jurisdiction, there is some underlying ease in drawing a physical line to demarcate a boundary.<sup>169</sup>

But this historical allegiance to geographically based vicinage may not make sense for several reasons. First, geographically based vicinage was linked to a jury system in which a limited and homogenous population was eligible to be jurors.<sup>170</sup> To the extent that this population might inject an alternative perspective into the law through its verdicts or might serve as a correction in the face of overly aggressive government action, it does so despite the fact it shared the immutable traits of the ruling class, and was often the ruling class. In our brave new world in which formerly ineligible persons may serve on juries and by their service may push discussions of culpability in different directions, their geographic location may become less significant to the realization of the jury's larger function. Second, and not unrelated, such geographical definitions of jurisdictions may neglect to account for the disproportionate impact of other discretionary decisions on

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STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 537 (J.B. Lippincott Co. 1907) (1836). Madison feared that to require local juries in the trials of such rebels would end in disaster and ultimately result in disunion of the federal government. *See id.*; *see also* 2 *id.* at 112–13 (noting that Massachusetts delegate Christopher Gore argued that the continuation of the common law tradition of local juries risked inconsistent and biased verdicts). In these debates, Jeffrey Abramson notes, there was an internal tension between notions of what justice is and should be: should it be decided by local juries who truly reflected the community's sense of culpability or should it be determined by juries drawn from farther afield who were less likely to be biased and more likely to protect the new federal government? *See* ABRAMSON, *supra* note 83, at 26; *see also* Middlebrooks, *supra* note 17, at 388 (2004) ("Revolutionary colonials refused to define law as an instrument of the state which could not be judged by the common man. Rather, they viewed it as the reflection of their community which ordinary men were equally capable of judging for themselves.").

167. *See* ABRAMSON, *supra* note 83, at 22; Middlebrooks, *supra* note 17, at 388.

168. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–02 (2014).

169. *See* Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19, 20–23 (2013); Richard H. Pildes, *The Supreme Court 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 114–15 (2004); Issacharoff, *supra* note 161, at 113.

170. *See* Carroll, *The Jury's Second Coming*, *supra* note 17, at 699–701.

particular populations.<sup>171</sup> Not coincidentally, these populations tend to be among the most marginalized in other formal spheres.<sup>172</sup> If part of the jury's value is its ability to reconfigure notions of "majority" and offer an opportunity for divergent perspectives to surface, then the ability to achieve this value is enhanced if the construction of venire panels acknowledges these functions jettisoning geographically based notions of vicinage in favor of an approach that considers the identities of those who would be called. The venire selection would still be randomized in the sense that no particular person would be called, but the pool from which the randomized venire was chosen would consider factors beyond the potential juror's geographic location.

Logistically, this reconception of vicinage is difficult and raises some of the fundamental questions underlying all discussions of jury composition. How would vicinage be defined? Which identity traits would drive the construction of the venire? Which governmental body would make such choices? Would they be constant, or near constant, as existing jurisdictional bounds are? Or would they shift with different charges and different defendants? To the extent that they offer the benefit of accounting for the disproportionate effect of lawmaking, application, and interpretative discretion, how should the effect be measured? Do those who live in a high crime or high crime enforcement neighborhood have an interest that exceeds those who feel the collateral effects of such crime and enforcement decisions?

These are questions that will ultimately need to be answered in light of the larger function we hope the jury can realize. Like notions of second diversity and reconstruction of majoritarianism around juries, they may well require a fundamental change in how we think about the question of jury composition. But to consider them is to open the possibility that the jury can more effectively achieve its democratic potential while still promoting a sense of legitimacy in the system in which it moves.

#### CONCLUSION

In the criminal justice system, juries serve different functions. The Court's current description of the jury alludes to a larger democratic function that has long operated in the shadow of more formally constructed law. In this description, the jury is a space in which citizens engage directly with the law and the formal powers that control it. In this realm the

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171. See Butler, *supra* note 18.

172. See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); ANGELA J. DAVIS, *supra* note 1, at 33–39.

composition of the jury matters and cannot be divorced from the discussion of its function. As different communities bear a disproportionate burden of lawmaking, application, and interpretation, notions of jury composition must shift to acknowledge this reality. Just as allegiance to directly proportional petit juries emerges as contrary to the larger democratic function of the jury, so geographically defined jurisdictions cease to make sense as the only valid source of a venire. Instead, jury composition should be reimagined as a forum to embrace the citizen's fluid identity and to promote diverse perspectives within democracy.