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JURIES, JUSTICE & MULTICULTURALISM

NANCY S. MARDER*

I. INTRODUCTION

The modern jury plays many roles. At the very least the jury's tasks are to find facts, to apply the law, and to render judgment. Trial judges typically describe this conventional view to jurors when they instruct jurors that these are the jury's sole functions.¹ Privately, judges might acknowledge that juries

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1. Throughout the trial, judges instruct jurors that their job is to find the facts. As one typical instruction provides: "Your purpose as jurors is to find and determine the facts. Under our system of justice you are the sole judge of the facts." 1A FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 10.01, at 5 (5th ed. 2000). Judges also instruct jurors that they are to take the law as the judge gives it to them: "I instruct you that the law as given by the Court in these and other instructions constitute the only law for your guidance. It is your duty to accept and to follow the law as I give it to you even though you may disagree with the law." *Id.* Judges emphasize that the jury's role is quite different from the judge's role, *see id.* at 8 ("Your job is to decide all of the factual questions in this case . . . I will decide all of the legal questions in this case . . ."), and that the jury's central role is to find facts. *See, e.g., id.* at 20 ("You, and you alone, are the judges of the facts.") (quoting Fifth Circuit instruction); *id.* at 46 ("By your verdict(s) you will decide the disputed issues of fact.") (quoting Eleventh Circuit instruction); *id.* at 38 ("It will be your duty to decide from the evidence what the facts are.") (quoting Ninth Circuit instruction).

do indeed perform additional roles. For example, one judge who presided over a trial that resulted in a hung jury then had the opportunity to watch that jury deliberate because its deliberations had been filmed for television.² The judge, after seeing that the jury's impasse was the result of one juror who nullified, acknowledged in an interview that jurors may sometimes act upon their moral sense and that this was consistent with the jury's role as conscience of the community.³ Supreme Court justices often have focused upon another function of at least the criminal jury, which is to stand as a buffer between the defendant and the government, thus protecting the defendant from the prosecutor's overzealousness or the judge's biases.⁴

Although few would argue with these conventional roles, I believe that the jury plays many other roles as well.⁵ In finding facts and applying the law, the jury also engages in interpretation.⁶ Both the finding of facts (What steps did the police officer take in making the arrest?) and the application of legal standards (Did the police officer use excessive force in making the arrest?) necessarily involve acts of interpretation. Sometimes the jury's interpretations, for example in negligence or products liability, can move the law beyond what the legislature enacted.⁷ At other times, the jury takes a step beyond interpretation and engages in nullification. Through nullification, a jury's resistance to a law or to its application in a particular case may lead the legislature to reexamine, and eventually to repeal, that law.⁸

2. See *CBS Reports: Enter the Jury Room* (CBS television broadcast, Apr. 16, 1997) (Transcript of broadcast at 49). Judge Ryan presided over the trial of Modesta Solano, who had been charged with possession and transportation of drugs. The first trial resulted in a hung jury. Judge Ryan had the rare opportunity to observe that jury's deliberations because it had been filmed by prior arrangement. See *id.*

3. Judge Ryan said of the hold-out who had chosen to vote consistent with his conscience: "He just didn't feel comfortable with what went on here, and so he's interjecting his personal and moral beliefs into it, his—his conscience. And maybe . . . it was legally and rationally the wrong thing to do, but morally he is probably right." *Id.* Judge Ryan acknowledged that there might possibly be a benefit to the nullifying juror who votes consistent with his conscience.

4. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge."); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.").

5. See Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. REV. 877, 907–26 (1999) (describing a "process view" of the jury that focuses on the broad roles played by the modern jury).

6. See *id.* at 908–20 (describing the jury's interpretive role).

7. See Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 113–14 (describing the ways in which the jury helped to shape the law in the areas of negligence and products liability).

8. See Marder, *supra* note 5, at 921–25.

The jury also serves several populist functions. As Alexis de Tocqueville presciently remarked about the jury more than 150 years ago, the jury serves as a “free school,” educating the citizenry about democracy and the responsibilities of self-governance.⁹ Serving on a jury and voting are the two opportunities for citizens to participate directly in their government. Direct participation through jury service takes on special meaning for those members of society, such as African-American men and all women, who were long excluded from jury service, first by law and then by practice, and who only recently have secured their rightful places on the jury.¹⁰ Only twenty-five years ago, in *Taylor v. Louisiana*,¹¹ the Supreme Court held that the exclusion of women from the venire violated a defendant’s Sixth Amendment right to a jury drawn from a fair cross section of the community. After *Taylor*, devices such as affirmative registration, which had kept women from being summoned for jury venires in numbers proportionate to their numbers in the community, had to be discarded.

The jury also plays a key role, along with judges, in constituting the judiciary. As an institution consisting of ordinary citizens temporarily called to serve a governmental function, the jury is able to dispel popular distrust of the judiciary and to secure community acceptance for verdicts, even verdicts that are highly contentious and that may be seen differently by different communities.

The jury’s populist roles—teaching jurors lessons in democracy, signalling full citizenship, and inspiring community acceptance of verdicts—have expanded as jury service has become more inclusive. Only fifteen years ago, in *Batson v. Kentucky*,¹² the Supreme Court returned to the subject of peremptory challenges—a subject that it had addressed twenty years earlier in *Swain v. Alabama*,¹³—and recognized that peremptories were still being used by prosecutors to keep African-American men from serving on petit juries. With *Batson*, prosecutors could no longer exercise peremptories based on race and a defendant no longer had to show that the prosecutor was exercising discriminatory peremptories in case after case, as the Supreme Court had earlier

9. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 275 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1988) (1850).

10. See Marder, *supra* note 5, at 888–89 nn.42–43.

11. 419 U.S. 522 (1975).

12. 476 U.S. 79 (1986).

13. 380 U.S. 202 (1965).

established in *Swain*.¹⁴ Rather, *Batson* permitted a showing based on the defendant's case alone to suffice. Over the past decade, the Supreme Court has expanded the scope of *Batson* so that now no party can exercise peremptories on the basis of race,¹⁵ ethnicity,¹⁶ or gender¹⁷ in civil¹⁸ or criminal cases.¹⁹ At least theoretically, the peremptory challenge no longer can be used to keep members of racial or ethnic minorities or women of any color from serving on petit juries.²⁰

The opening up of the jury has changed some of the lessons that the jury system now teaches about citizenship and participation. One lesson is that jury service is no longer limited to an elite. Groups that traditionally have been excluded are now to be included. The members of these groups are full citizens and their participation on the jury is assumed. A second lesson is that expectations about what a jury should look like have changed. If there is to be broad community acceptance of a jury's verdict, then the jury must be seen as drawing its members from the entire community.²¹ Although any given petit jury of twelve may not be representative of the community, in general the more representative juries are, the more likely there will be community acceptance of verdicts.

Now that jury service is open to many who have been excluded in the past, and consequently, the jury has the potential to be truly diverse, it is worth considering what differences a diverse jury can make to the jury's

14. *Batson*, 476 U.S. at 92–93 (describing the burden required of defendants after *Swain* as “crippling,” thus leaving prosecutors’ peremptory challenges “largely immune from constitutional scrutiny”).

15. See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (prohibiting the defendant’s use of peremptories based on race); *Batson*, 476 U.S. at 86 (prohibiting the prosecutor’s use of peremptories based on race). See also *Powers v. Ohio*, 499 U.S. 400, 402–04 (1991) (establishing that white defendants can challenge a prosecutor’s use of a race-based peremptory challenge).

16. See *Hernandez v. New York*, 500 U.S. 352, 358 (1991) (recognizing that peremptories cannot be exercised on the basis of ethnicity, though in this case the defendant failed to establish a prima facie case).

17. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (extending *Batson* to gender-based peremptory challenges).

18. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (holding that private litigants in a civil suit cannot use peremptory challenges to exclude jurors on account of their race).

19. See sources cited *supra* notes 15–16.

20. The Court’s efforts notwithstanding, discriminatory peremptories persist. See, e.g., *Minetos v. City Univ.*, 925 F. Supp. 177, 185 (S.D.N.Y. 1996) (“It is time to put an end to this charade. We have now had enough judicial experience with the *Batson* test to know that it does not truly unmask racial discrimination.”); *Developments—The Civil Jury*, 110 HARV. L. REV. 1408, 1462 & nn.177–78 (1997).

21. See Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM. 285 (1999) (describing two cases in which the juries were largely homogeneous and the verdicts were criticized by various communities and subjected to charges of jury nullification).

deliberations.²² Some would argue that diversity should make no difference. In Part II of this Article, I set forth two contrasting views that have dominated the Supreme Court's approach to diversity and the jury venire. One view, which I will call the "reasonable person" view, holds that jurors' background characteristics, such as race, gender, age, education, income, and religion, make no difference to the jury venire. The second view, which I will label the "cultural diversity" view, holds that jurors' backgrounds, life experiences, and perspectives will, in subtle and unknowable ways, inform how jurors see cases. This view, therefore, posits that a venire that reflects a community's diversity is important to the deliberations of the petit jury. In Part III, I explain why it matters which of these two views about jury venire and diversity courts hold true. Courts and justices have vacillated between these two views, which have, in turn, shaped other aspects of the law concerning jury structure, including peremptory challenges and voir dire. I argue that the "cultural diversity" approach toward the venire comes much closer than the "reasonable person" view to explaining how juries work. In Part IV, I go a step further than the Court, which has considered this question only with respect to the venire, and I ask: What difference does diversity make to the deliberations of the petit jury? I undertook an empirical study to explore this question and I describe it in Part IV. The findings of the study suggest that some types of diversity, such as gender and sometimes age, make a difference to the tone and thoroughness of jury deliberations and to juror satisfaction with the experience of serving on a jury, including juror satisfaction with the deliberation and verdict. Finally, in Part V, I consider implications of the empirical work that extend beyond the deliberations.

II. TWO CONTRASTING CONCEPTIONS OF DIVERSITY AND THE JURY VENIRE

A. "REASONABLE PERSON" VIEW OF THE VENIRE

One view, which I will call the "reasonable person" view of the venire, has been most forcefully articulated by Chief Justice Rehnquist. It assumes that people are fungible as jurors as long as they are impartial. According to this view, whether the jury venire, or pool, is diverse makes little difference. All that is required is that twelve impartial jurors can be drawn from the venire to constitute a petit jury.

22 I use the terms "diversity" and "cultural diversity" broadly and interchangeably and assume that they include many different characteristics, such as gender, age, and race, to name just a few.

This view was advanced by then Justice Rehnquist in his dissent in *Taylor v. Louisiana*.²³ The *Taylor* Court held that women could not be excluded from the venire without violating a defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community.²⁴ Justice Rehnquist did not believe that anything would be lost to the jury or by the defendant if women were systematically excluded from venires, any more than if members of occupational groups, such as doctors or lawyers, were exempted from jury service.²⁵ The only important matter was whether defendant Taylor had been tried by a biased or partial jury.²⁶ Absent a claim of such partiality, Rehnquist assumed that the defendant was tried by the impartial jury to which he was constitutionally entitled.²⁷

Justice Rehnquist rejected the Court's view that with the exclusion of women from the venire, "a flavor, a distinct quality" would be lost to the petit jury.²⁸ To Rehnquist, such efforts to describe what was distinctive about women's, or for that matter men's, contributions to the jury "smack[ed] more of mysticism than of law,"²⁹ and certainly did not deserve constitutional protection.

Underlying this view is the belief that "reasonable persons" will decide a case based on the evidence in the same way as any other group of reasonable persons. Thus, it makes no difference whether the venire included both men and women; all that is required is that twelve impartial jurors could be drawn from the venire. The idea that jurors can "put aside" their backgrounds, including their gender, race, age, and any other characteristic, and assume a universal stance, a "reasonable person" perspective, which would be shared by other reasonable persons,³⁰ also underlies this view.

23. 419 U.S. 522, 538 (1975).

24. See *id.* at 537 ("Accepting as we do, however, the view that the Sixth Amendment affords the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, we think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male.").

25. See *id.* at 542 (Rehnquist, J., dissenting) ("[P]resumably doctors, lawyers, and other groups, whose frequent exemption from jury service is endorsed by the majority, also offer qualities as distinct and important as those at issue here.").

26. See *id.* at 541 ("[T]he criminal defendant involved makes no claims of prejudice or bias.").

27. See *id.* at 543 ("Absent any suggestion that appellant's trial was unfairly conducted, or that its result was unreliable, I would not require Louisiana to retry him . . .").

28. *Id.* at 542 (quoting *Ballard v. United States*, 329 U.S. 187, 194 (1946)).

29. *Id.*

30. But see Catharine Pierce Wells, *Tort Law As Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2402 (1990) (explaining that there are no omniscient observers who judge from "an ideal post of observation" but merely observers who judge, at best, from "partial perspective[s]"); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist*

This view has found recent expression in opinions of the Seventh Circuit. In several cases alleging violations of the fair-cross-section requirement, the Seventh Circuit has opined that what is critical is not the representativeness of the venire but that the defendant has been tried by an impartial jury.³¹ Whereas the Court in *Taylor* focused on the virtues of representativeness,³² and alluded only in passing to the fact that a representative venire would ensure impartiality,³³ the Seventh Circuit shifted its focus to impartiality. Although the Seventh Circuit still applies the three-part fair-cross-section test set forth in *Duren v. Missouri*,³⁴ it is guided by the notion that impartiality, rather than representativeness, is the core component of the fair-cross-section requirement. The Seventh Circuit's approach rejects the motivation behind the fair-cross-section requirement as expressed in *Taylor*: to require jury venires to be representative because the systematic exclusion of any group might result in the loss of important perspectives from jury consideration.³⁵ The Seventh Circuit's view is consistent with the "reasonable person" perspective taken by Justice Rehnquist in his *Taylor* dissent.

The "reasonable person" view of the jury venire makes it more difficult for defendants to succeed on fair-cross-section claims; they not only must satisfy the *Duren* test,³⁶ but also must show that they were tried by a partial or

Jurisprudence, 8 SIGNS: J. WOMEN CULTURE & SOC'Y 635 (1983) (dismissing any claim to an objective, universal point of view as the male perspective).

31. See, e.g., *United States v. Raszkiewicz*, 169 F.3d 459, 466 (7th Cir. 1999) ("As noted, the main purpose of the fair cross-section requirement is that the defendant get the benefit of an impartial jury."); *United States v. Ashley*, 54 F.3d 311, 313 (7th Cir. 1995) ("While juries must be taken from a source that is representative of the community . . . , the Constitution does not require this to ensure representative juries, but rather impartial juries.") (citation omitted); *Silagy v. Peters*, 905 F.2d 986, 1011 (7th Cir. 1990) ("The ultimate concern of the fair-cross-section requirement is to ensure that each criminal defendant be afforded his sixth amendment right to an 'impartial jury.'").

32. See *Taylor*, 419 U.S. at 530-33.

33. See *id.* at 530-31 ("[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.") (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

34. 439 U.S. 357 (1979). To establish a prima facie violation of the fair-cross-section requirement, *Duren* requires a defendant to show:

(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 364.

35. See *Taylor*, 419 U.S. at 531-33 (citing *Ballard v. United States*, 329 U.S. 187, 193-94 (1946); *Peters v. Kiff*, 407 U.S. 493, 502-04 (1972)).

36. Another way in which the Seventh Circuit has made it more difficult for defendants to establish distinctiveness is by establishing criteria for distinctiveness, which it borrowed from the Eleventh Circuit. Whereas the Supreme Court in *Duren* had left the concept of distinctiveness vague and open ("that the

biased jury. Although the Seventh Circuit said that it had not added a new requirement to the three-part test,³⁷ in effect it has done so by denying fair-cross-section claims unless the defendant has shown that the jury seated was actually partial.

B. "CULTURAL DIVERSITY" VIEW OF THE VENIRE

The "cultural diversity" view of the venire, which was suggested but not labelled as such by Justice Marshall in a due process context³⁸ and by Justice White in a fair-cross-section context,³⁹ opines that people necessarily bring their backgrounds, life experiences, and various perspectives into the jury room, and therefore, it is important that groups not be excluded at the venire stage. Such exclusions might limit the range of viewpoints available to the jury during deliberations. The Court, however, was careful to distinguish between the venire and the petit jury. Although it has held that no group may be systematically excluded from the venire, it has imposed no similar requirement on the petit jury⁴⁰ on the ground that, as a practical matter, such a requirement would be unworkable.⁴¹

Having limited this view to the venire, the Court struggled with the connection between people's background characteristics and how they affect the venire. The Court's discussion makes it clear, however, that the diversity of the venire is important so that perspectives are not lost to the petit jury. What these perspectives are, the Court has trouble saying. In *Peters v. Kiff*,⁴² Justice Marshall attempted to describe the effect on the petit jury that excluding African Americans from the venire would have in a case in which the defendant was a white man: "When any large and identifiable segment of the community is excluded from jury service, the

group alleged to be excluded is a 'distinctive' group in the community," *Duren*, 439 U.S. at 364), the Seventh Circuit has said that the elements of distinctiveness are: "(1) the existence of qualities that define a group, (2) similarity of attitudes, beliefs, or experiences, and (3) a community of interest among group members." *Raszkiwicz*, 169 F.3d at 463. One paradox of this test is that the larger the excluded group, and therefore, the more apparent the fair-cross-section violation, the more difficult it is to show distinctiveness because of the unlikelihood that a large group would share a "similarity of attitudes, beliefs, or experiences" and "a community of interest."

37. See *Raszkiwicz*, 169 F.3d at 466 ("A defendant need not, in addition to the three requirements imposed by *Duren*, 439 U.S. at 364 . . . , also show that he was prejudiced by the alleged constitutional violation.").

38. See *Peters*, 407 U.S. at 493.

39. See *Taylor*, 419 U.S. at 531.

40. See *id.* at 538 ("It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen mirror the community and reflect the various distinctive groups in the population.").

41. See *id.*

42. 407 U.S. at 503.

effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.”⁴³ Three justices in *Peters* believed that such an exclusion violated the defendant’s right to due process.⁴⁴

In an earlier case, *Ballard v. United States*,⁴⁵ Justice Douglas had attempted to articulate the effect that the exclusion of women from the venire had in a case involving a mother and son charged with using the mail in a fraudulent manner to promote a religious program:

It is said . . . that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.⁴⁶

Justice Douglas looked to the supervisory power of the federal courts to conclude that the exclusion of women from the venire was impermissible.⁴⁷

In *Taylor*, Justice White relied on the above language from both *Ballard* and *Peters* to explain why the exclusion of women from the venire violated a defendant’s Sixth Amendment right to a jury drawn from a fair cross section of the community.⁴⁸ He concluded that women “are sufficiently numerous and distinct from men” that their exclusion from the venire violates the fair-cross-section requirement.⁴⁹ Lower courts would later puzzle over what it meant for a group to be “distinct,”⁵⁰ but in *Taylor*

43. *Id.*

44. Justices Douglas and Stewart joined Justice Marshall in holding that the exclusion of African Americans from the venire violated a white defendant’s right to due process. *Id.* at 493.

45. 329 U.S. 187 (1946).

46. *Id.* at 193–94.

47. *See id.* at 193.

48. 419 U.S. at 531–32 & n.12.

49. *Id.* at 531.

50. *See, e.g., United States v. Raszkiewicz*, 169 F.3d 459, 465–67 (7th Cir. 1999) (holding that reservation Native Americans are not distinct from urban Native Americans for fair-cross-section purposes,

the Court accepted the views expressed in *Ballard* that men and women might have different perspectives and make different contributions in the jury room and that the systematic exclusion of women might result in the loss of valuable perspectives during deliberations.⁵¹ In these cases, the Court suggested that the “cultural diversity” of the venire mattered because it would affect the diversity of the petit jury and the variety of perspectives available for group consideration during deliberations.⁵²

The Court, however, qualified its cultural diversity view in several respects. First, it did not assume that members of a group would vote a certain way. The connection between background and viewpoint involved “a subtle interplay;” there certainly was not a one-to-one correspondence. As Justice Marshall explained in *Peters v. Kiff*: “It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.”⁵³ Second, the Court made clear that while the venire must be broadly drawn from the community, the same could not be said of the petit jury.⁵⁴ Third, although no group could be systematically excluded from the venire, the venire actually summoned did not have to mirror the community exactly.

To summarize, requirements for the venire have been largely shaped by the “cultural diversity” view expressed in such opinions as *Peters*, *Taylor*, and *Duren*. According to this view, the representativeness of the venire is important because people of different backgrounds contribute different perspectives in ways that are unknowable but nevertheless significant. If, for example, the venire excludes African-American men or all women, their viewpoints and perspectives will be lost to the petit jury. Although this view has shaped the law of the venire, there is a countervailing view, voiced by

and therefore, their exclusion from the venire did not violate defendant’s Sixth Amendment fair-cross-section right); *United States v. Barry*, 71 F.3d 1269, 1273–74 (7th Cir. 1995) (concluding that defendants failed to establish that accused, but not yet convicted, felons are a distinct group for fair-cross-section purposes).

51. *Taylor*, 419 U.S. at 531–33.

52. In *Taylor*, the Court also thought the systematic exclusion of a distinct group would impede the jury’s capacity to perform its other functions, including serving as a buffer between the defendant and the government, providing for “[c]ommunity participation in the administration of the criminal law,” and maintaining “the broad representative character of the jury . . . partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.” *Id.* at 530–31 (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

53. 407 U.S. at 503–04.

54. See *Taylor*, 419 U.S. at 538 (“It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.”).

Chief Justice Rehnquist and others, suggesting that a representative venire is unnecessary as long as an impartial petit jury is seated. The assumption here is that all “reasonable people” will regard the evidence in the same way. Thus, one need not worry about the diversity of the venire or the petit jury. The “reasonable person” view, though not the prevailing view, is now finding support among lower courts such as the Seventh Circuit.

III. HOW THE TWO CONCEPTIONS SHAPE OTHER ASPECTS OF THE JURY’S STRUCTURE

The debate between Justice Marshall and Chief Justice Rehnquist is not limited to the venire; it shapes other aspects of the law governing the jury as well. For example, whether one adopts a cultural diversity or a reasonable person view will affect one’s response to peremptory challenges, which allow each side to remove a certain number of prospective jurors without having to give any reason for the strikes. Only within the past fifteen years, beginning with *Batson v. Kentucky*,⁵⁵ has the Court shifted from a reasonable person to a cultural diversity view of peremptory challenges and prohibited the exercise of peremptories based upon race, ethnicity, and gender.

A. PEREMPTORY CHALLENGES

1. Reasonable Person View

The reasonable person view of peremptory challenges prevailed until the Court’s decision in *Batson*, and is now expressed mainly in dissent. Until *Batson*, peremptory challenges were regarded as almost sacrosanct. Although never guaranteed by the Constitution, they were part of this country’s jury tradition and the Supreme Court was very reluctant to alter them in any way.⁵⁶

In *Swain v. Alabama*,⁵⁷ the Court considered whether the prosecutor’s use of peremptory challenges to exclude African-American men from a jury violated an African-American defendant’s right to equal protection. The Court concluded that a defendant would need to show that the prosecutor had exercised peremptories in this discriminatory manner in case after case in order to establish an equal protection violation, and that the defendant in *Swain* had failed to do so.⁵⁸ The Court was reluctant to interfere with a prosecutor’s use of peremptories, and the heavy evidentiary burden that the

55. 476 U.S. 79 (1986).

56. *Id.* at 91.

57. 380 U.S. 202 (1965).

58. *See id.* at 223–24.

Court imposed on a defendant reflected the Court's belief in the importance of protecting the peremptory challenge.

Underlying the Court's reticence to restrict the peremptory was the "reasonable person" view that had shaped the practice of peremptories for many decades. This view assumed that prospective jurors were fungible and if the defendant or prosecutor had an uneasy feeling (however irrational or "unreasonable") about any prospective jurors, up to a certain number, then they should be able to exercise their peremptories, without any limitations, and strike those prospective jurors from the petit jury. Because one prospective juror was as good as the next, according to this view, the priority was to allay either party's disquietude.

Prosecutors exercised peremptories against African-American men,⁵⁹ precluding them from serving on petit juries; however, the reasonable person view maintained this was not cause for concern because white jurors would serve just as well. (In fact, white jurors would more easily fit the "reasonable person" profile because the Court may have, consciously or unconsciously, accepted a history of stereotypical thinking according to which the reason and competence of African Americans had been called into question).⁶⁰ The reasonable person view justified prosecutorial strikes of one African-American juror after another because all groups were subject to peremptories, and therefore, no stigma attached.⁶¹ The exercise of a peremptory meant only that an individual prospective juror could not serve on a particular jury. The exercise of a peremptory meant only replacing one juror whom the defendant or prosecutor found objectionable with another who was equally capable of being reasonable and who caused no offense to either side. The reasonable person view did not focus on the cumulative effect of these strikes and the absence of members of a particular group on jury after jury.

59. Some prosecutors did this not just by happenstance but because it was part of their training. When *Batson* was before the Court, Justice Marshall circulated newspaper articles among the justices that reported on Texas prosecutors' training, which included a manual instructing them to exercise their peremptories against African-American prospective jurors. See *Batson*, 476 U.S. at 104 & n.3 (Marshall, J., concurring) (noting that a prosecutor's office manual used in Dallas County, Texas, instructed prosecutors to use peremptories to eliminate members of minority groups from juries); Memorandum from Justice Marshall, to the Conference (Mar. 24, 1986) (located in the Justice Marshall Papers at the Library of Congress) (copy on file with author) (sharing with the Court articles from Dallas newspapers that revealed that prosecutors used their peremptories to exclude African Americans and other minorities because of a stereotypical view that they would be more sympathetic to the defense).

60. See Marder, *supra* note 21, at 302-03 & n.86 (noting that stereotypes about African Americans' competence had a long history in this country and shaped some of the press' treatment of the verdict in the O.J. Simpson state criminal trial).

61. See *Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting) ("[A]s long as [peremptories] are applied across-the-board to jurors of all races and nationalities, I do not see . . . how their use violates the Equal Protection Clause.").

In some ways, this view of the peremptory challenge does not seem very "reasonable" at all. First, defendants' or prosecutors' distrust of particular prospective jurors, oftentimes based on stereotypes, is likely to be quite unreasonable.⁶² Their feelings of unease about prospective jurors, particularly unease based upon prospective jurors' race or gender, suggest that they do not find one juror as able as the next to serve, but rather that they find only one white, male juror as able as the next white, male juror to serve on the jury. Second, the fact that prosecutors or defendants want to strike jurors who may be a different race or gender than they are suggests that they think that jurors will bring different views into the jury room, and therefore, they want jurors to serve whom they think will share their own views. Although the reasons given to defend peremptories were based on the "reasonable person" conception, in fact, proponents of peremptories appear to have shared some, albeit unvoiced, cultural diversity assumptions.

2. Cultural Diversity View

Those who took a cultural diversity view focused less on individual challenges and more on the pattern of peremptory use, and saw that peremptories were being exercised largely against African-American men, and later, women of all races. As a result, African-American men and all women were less likely than others to serve on petit juries and their perspectives were more likely to be lost to the petit jury. Whereas proponents of the reasonable person view looked at each exercise of a peremptory challenge as an individual event requiring simply the substitution of one prospective juror for another, cultural diversity proponents looked at the overall effect and saw a pattern of exclusion, leading to the loss of viewpoints potentially available to the petit jury. Although the Court had prohibited the systematic exclusion of groups with respect to the venire,⁶³ it hesitated to limit the exercise of peremptory challenges.

The twenty years between *Swain* and *Batson* made clear that the pattern of discriminatory peremptories was not disappearing on its own. Whereas in *Swain* the Court defended the peremptory, through the reasonable person view, in *Batson* the Court modified the peremptory, abandoning the reasonable person justification, albeit haltingly. In *Batson*, the Court began to adopt the cultural diversity view; it recognized that discriminatory

62. Even Justice Rehnquist agreed: "Such use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken." *Id.*

63. See *supra* Part II.B.

peremptories harmed the defendant, the excluded juror, and the community.⁶⁴ As a result, it held that when a defendant made a prima facie showing of a race-based peremptory, the burden shifted to the prosecutor to provide a reason for the peremptory.⁶⁵ The trial judge was to decide whether the prosecutor's reason was race neutral or pretextual.⁶⁶ If the former, the peremptory was to be permitted; if the latter, the peremptory was to be prohibited on the ground that it violated the defendant's right to equal protection. Prior to *Batson*, no reason had to be given for the exercise of a peremptory challenge, unless the defendant was able to meet the "crippling burden of proof" of *Swain*, which essentially immunized prosecutors' peremptory challenges "from constitutional scrutiny."⁶⁷

Once the Court had taken this first step in the direction of cultural diversity, it was difficult to turn back.⁶⁸ In a series of peremptory challenge cases, the Court expanded the scope of *Batson*. *Powers v. Ohio*⁶⁹ allowed a white defendant to challenge peremptories exercised against African-American jurors; *Edmonson v. Leesville Concrete Co.*⁷⁰ applied the new peremptory challenge rules to civil cases; *Georgia v. McCollum*⁷¹ prohibited the defendant from engaging in race-based peremptory challenges; and *J.E.B. v. Alabama ex rel. T.B.*⁷² prohibited all parties from exercising peremptories on the basis of gender.

Although the Court has moved in the direction of a cultural diversity view, which has meant limiting the ways in which peremptory challenges can be exercised, it has come to this view slowly and in a piecemeal fashion. Justice Marshall, a proponent of cultural diversity for the venire and the petit jury, would have abandoned peremptory challenges altogether.⁷³ In his view, as long as there are peremptories, they will be used in a discriminatory

64. See 476 U.S. at 87 ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.").

65. See *id.* at 97.

66. See *id.* at 98.

67. *Id.* at 92-93.

68. But see *Purkett v. Elem*, 514 U.S. 765 (1995). Although this opinion is a *per curiam* rather than a signed opinion based on plenary review, it could be seen as a half-step back from *Batson*, 476 U.S. at 79, and its progeny. In *Elem*, the Court held that a party's reasons for the exercise of a peremptory need not be related to the facts of the case as long as the reasons are nondiscriminatory. This allows a party to give any reason at all, no matter how fanciful, which is at odds with the Court's requirement in *Batson* that the reason must be "a neutral explanation related to the particular case to be tried." *Batson*, 476 U.S. at 98.

69. 499 U.S. 400 (1991).

70. 500 U.S. 614 (1991).

71. 505 U.S. 42 (1992).

72. 511 U.S. 127 (1994).

73. See *Batson*, 476 U.S. at 108 (Marshall, J., concurring) ("[O]nly by banning peremptories entirely can such discrimination be ended.").

manner, and only with their wholesale elimination can jury selection proceed without discrimination. In a concurrence in *Batson*, he observed: "The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system."⁷⁴ The Court, however, has not followed his lead. It has moved in the direction of cultural diversity, but it has not pursued cultural diversity as strongly as Justice Marshall urged.

B. VOIR DIRE

Voir dire, which is the questioning of prospective jurors to elicit information about those who can serve and those who should be dismissed either for cause or through peremptory challenges, is another aspect of the jury that has been shaped by the struggle between reasonable person and cultural diversity views. In federal court, where judges primarily conduct voir dire,⁷⁵ the reasonable person view of voir dire prevails. In contrast, in some state courts where attorneys primarily conduct voir dire,⁷⁶ the cultural diversity view predominates.

1. Reasonable Person View

In federal court, where judges typically conduct voir dire,⁷⁷ they generally take the reasonable person view of the process. The voir dire

74. *Id.* at 107.

75. *See infra* note 77.

76. *See infra* note 95.

77. The federal rules of civil and criminal procedure give federal courts discretion about whether they allow attorneys to conduct the entire voir dire or whether the court conducts the entire voir dire and merely allows attorneys to supplement questions asked by the court. *See* FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a). In practice, however, federal courts typically conduct the voir dire. According to one survey, based on 420 completed questionnaires, approximately three-fourths of federal district judges conduct the voir dire without oral participation of the attorneys. GORDON BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION: PRACTICES AND OPINIONS OF FEDERAL DISTRICT JUDGES 6 (1977). According to another study, 53.4% of federal courts allow only the judge to conduct voir dire in criminal cases; 31.1% allow the attorneys to submit supplemental questions; 13.2% allow the attorneys to ask all of the questions; and 2.3% allow the attorneys or clerks to ask questions outside the presence of the court. WORKS OF THE COMM. ON THE OPERATION OF THE JURY SYS. OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, THE JURY SYSTEM IN THE FEDERAL COURTS 174 (1973). The trend is toward judge-conducted voir dire. *See, e.g.*, JURY TRIAL INNOVATIONS 53 (G. Thomas Munsterman et al. eds., 1997) ("[T]he majority of federal judges and a substantial portion of state judges have, over time, assumed a dominant role in examining potential jurors in voir dire."); John B. Ashby, *Juror Selection and the Sixth Amendment Right to an Impartial Jury*, 11 CREIGHTON L. REV. 1137, 1158 (1978). A recent example of a state that has moved in the direction of curbing attorney-conducted voir dire and increasing judicial supervision of the process is New York. *See* James Barron, *Top New York State Judge Issues Rules to Ease Life on Civil Juries*, N.Y. TIMES, Nov. 2, 1995, at A1 (describing Chief Judge Judith Kaye's efforts to reform the New

process, as undertaken by federal judges, assumes that most jurors can serve. Federal judges engage in a limited voir dire and elicit little information from prospective jurors.⁷⁸ Although such a cursory voir dire is no doubt shaped by busy dockets and limited trial time, it also is shaped by the reasonable person view, which assumes that one prospective juror is as able as the next. Certainly, prospective jurors must meet the statutory qualifications for jury service,⁷⁹ and not fall into one of the few categories that could result in a dismissal for cause, such as being related to the parties or having a financial stake in the outcome.⁸⁰ Outside of these constraints, however, the federal judge is mainly concerned with whether the prospective juror can be impartial. Impartiality is largely ascertained by asking the prospective juror if he or she can be impartial. Once the judge is satisfied that the prospective juror meets this criterion, then he or she can serve.

Voir dire in federal court is based on reasonable person assumptions. These include the following: one prospective juror is as able as the next to serve on the petit jury; the only criterion for service is impartiality; and the juror can and will advise the court whether he or she can be impartial. The Federal Rules permit a federal judge to conduct the voir dire and to take supplementary questions from attorneys if the judge so chooses.⁸¹ Anyone who has ever sat through a voir dire in federal court or has read a transcript of one knows that this is a cursory process at best. Federal judges typically ask prospective jurors, in a public and group setting,⁸² whether they know any of

York State jury system, including "streamlin[ing] a lawyer-dominated process that she called 'an annoyance and a frustration' to jurors who sometimes spend their two weeks of jury duty without getting selected for a case or seeing a judge").

78. Barbara Babcock observed this trend twenty-five years ago and lamented it then. See Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975).

79. See 28 U.S.C. § 1865(b) (1994) (providing qualifications for jury service, which include: residence in the judicial district for at least one year; attaining the age of eighteen years or older; citizenship; an ability to read, write, speak, and understand English; no physical or mental impairment that would interfere with jury service; and no charges pending or conviction for a crime punishable by imprisonment for more than one year).

80. See *Hopt v. Utah*, 120 U.S. 430, 433 (1887) (providing some guidance as to when a for-cause challenge should be granted).

81. See *supra* note 77.

82. Some judges have recognized the need to ask follow-up questions of prospective jurors individually and in the more private setting of the robing room. See, e.g., Babcock, *supra* note 78, at 547 ("[A]nother method of restricting the information-gathering function of voir dire is to address all questions to the jury panel at once, rather than as individuals."); Kimba M. Wood, *The 1995 Justice Lester W. Roth Lecture: Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105, 1119 (1996) ("I began asking each juror sensitive questions in the robing room . . . without having required them to request a private session. The difference in the quantity and the quality of the information the jurors revealed was striking . . ."); Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, CT. REV., Spring 1999, at 10 (recommending that all prospective jurors be individually questioned, even those who had remained silent during the general questions).

the parties or lawyers; where they live; where they work; whether they are married; if so, what their spouse does; whether they have children and what their children do; whether they have served on a jury before and if so whether that jury reached a verdict.⁸³ In criminal cases, prospective jurors may be asked whether they have been a victim of a similar crime or have a close friend or relative who was a victim of such a crime. They also may be asked whether they work in law enforcement or have friends or relatives who do so or whether they or their friends or relatives have been the subject of any law enforcement investigations or charges. Finally, in civil and criminal cases, prospective jurors will be asked whether there is any reason why they cannot serve. Should a prospective juror proffer such a reason that goes to bias or partiality, the judge typically asks the prospective juror whether he or she still can be impartial.⁸⁴ Few people are willing to admit, in that public setting, that they cannot be impartial.⁸⁵

The voir dire process, structured in this way, leads to little information, but perhaps that is because little information is required, at least by judges. Lawyers, not judges, exercise a certain number⁸⁶ of peremptory challenges.⁸⁷ Judges need to elicit only enough information to excuse appropriate prospective jurors for cause and to make sure that the prospective jurors who are seated can be impartial. Given that prospective jurors are asked if they

83. For a sample voir dire in federal court, see Transcript of Voir Dire, *United States v. Torres*, No. 77 Cr. 680 (S.D.N.Y. May 19, 1980) [hereinafter *Torres* Transcript]. This voir dire, conducted by Judge Knapp, was probably more searching than most conducted by a judge in federal court because the defendant, who represented herself, refused to be present. Thus, Judge Knapp took special care to make sure that any prospective jurors who felt they could not serve because of hardship or feelings about the case, no matter how vague, were immediately dismissed.

84. See, e.g., *Torres* Transcript, *supra* note 83, at 70–71, 74, 77, 79, 83, 89, 91, 96, 98 (providing exchanges during the voir dire when the judge asked prospective jurors if they thought they could be impartial). The judge, however, often has some discretion as to how far to push this inquiry. For example, in *Ham v. South Carolina*, 409 U.S. 524 (1973), in which the defendant was an African-American man with a beard, the Court held that the trial judge was obligated by due process to ask jurors whether they were prejudiced against African Americans, but not whether they were prejudiced against defendants with facial hair. *Id.* at 527–28.

85. See, e.g., Wood, *supra* note 82, at 1120 (“My experience left no doubt in my mind that most prospective jurors will choose to say nothing rather than reveal to everyone in the courtroom that they, for example, . . . have certain ethnic or racial biases . . .”).

86. The number of peremptory challenges varies based upon whether the case is civil or criminal or in federal or state court. For example, in a federal civil case, each side has three peremptory challenges. See 28 U.S.C. § 1870 (1994). In a federal criminal case, the number varies based upon the potential penalty. See FED. R. CRIM. P. 24(b). In a capital case, both the government and the defendant each have twenty peremptory challenges, whereas if the offense is punishable by more than one year’s imprisonment, then the government has six peremptory challenges and the defendant has ten. *Id.*

87. The lawyers, however, are subject to certain restraints in the exercise of their peremptory challenges. They cannot exercise peremptory challenges based upon race, gender, or ethnicity. See *supra* text accompanying notes 63–74.

can be impartial, once they answer in the affirmative the judge can be confident that he or she has satisfied the goal of voir dire, at least according to the reasonable person view.

Of course, in high-profile cases, where there is a greater likelihood of pretrial publicity, the voir dire, whether in state or federal court, is likely to be more extensive than the voir dire described above. In such cases, prospective jurors may be given a questionnaire before the voir dire in open court that will provide attorneys with both background and attitudinal information.⁸⁸ Attorneys also may rely on jury consultants, both to provide additional background information about the community from which the prospective jurors have been drawn and to evaluate prospective jurors' answers to the voir dire questions.⁸⁹ In addition, in such cases attorneys often are permitted a greater role in supplementing the questions asked by the judge. Even in cases with extensive pretrial publicity, however, judges retain much discretion over which attorney questions to permit, and may agree to some questions, but not to others.⁹⁰

2. Cultural Diversity View

Many attorneys and some academics⁹¹ have criticized the limited voir dire conducted by judges. Attorneys generally subscribe to the cultural diversity view of the voir dire. They want to learn as much information as possible about the prospective jurors. They are interested in learning about prospective jurors' attitudes and perspectives because they think that these views matter and that these views will affect how the juror sees the evidence as well as how the juror thinks about the case. Attorneys, however, have an interest at stake; they would like to learn as much as possible about the

88. One of the lengthiest questionnaires given to jurors was in the state criminal trial of O.J. Simpson. See *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County 1995). The questionnaire in that case contained 435 questions.

89. See, e.g., Jay Schulman, Phillip Shaver, Robert Colman, Barbara Emrich & Richard Christie, *Recipe for a Jury*, PSYCHOL. TODAY, May 1973, at 37 (describing the role of social scientists in helping the Catonsville Nine defendants to develop a profile of the jury-eligible population in Harrisburg, Pennsylvania, where the trial was held, and to rate the prospective jurors in order to decide how defendants should exercise their peremptory challenges).

90. For example, in *Ham v. South Carolina*, 409 U.S. 524 (1973), the trial judge precluded questions about race and facial hair, even though the defendant, an African-American civil rights worker with a beard, was being tried for a drug violation in South Carolina. *Id.* at 526. The Supreme Court held that the Fourteenth Amendment required that the defendant be permitted to ask prospective jurors whether they could be impartial in spite of defendant's race, *id.* at 527, but held that the Constitution did not require that defendant be permitted to ask about facial hair and its effects on juror impartiality. *Id.* at 528.

91. See, e.g., Babcock, *supra* note 78, at 549, 557, 558-63 (arguing that an extensive voir dire is necessary to the exercise of the peremptory challenge and is constitutionally required by due process and equal protection).

prospective jurors because they would like to select jurors who they think will be sympathetic to their case and to dismiss those who they think will be least sympathetic.⁹² In high-profile cases and when representing clients with financial resources, attorneys have turned to jury consultants to help them uncover as much information as possible about prospective jurors.⁹³

Attorneys argue that they are more likely to learn about the prospective jurors if they conduct the voir dire. Their claim is based on the following: they are more familiar with the case than the judge; they are more likely to ask follow-up questions than the judge; and they are more willing to probe whereas judges are unwilling to do so because they see such questions not only as intrusive but also as inconsistent with the judicial role.⁹⁴ Without such probing, however, attorneys claim that they will have little information on the basis of which to exercise peremptories and will have little choice but to rely on stereotypes, even though reliance on some is explicitly forbidden.

The debate between attorneys and judges as to who should conduct the voir dire has been largely resolved in favor of judges in federal court and in most state courts.⁹⁵ This move to judge-conducted voir dire arises out of efficiency concerns and also out of an effort to reduce attorney abuses of voir dire, particularly when attorneys conduct voir dire outside the presence of the judge and are able to ask myriad questions over an extended period of time.⁹⁶ One consequence of this preference for judge-conducted voir dire, however, is that the reasonable person view of the voir dire now predominates.

These two views, reasonable person and cultural diversity, have shaped various aspects of the jury, from the venire to peremptories to voir dire. One point is that the jury is not structured according to one consistent vision. The venire and peremptories now bear the imprint of the cultural diversity view, whereas the voir dire is now governed largely by the reasonable person view. A second point is that the influence these two views have over the jury structure is not static; rather, there has been significant change over time.

92. See Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1088 & n.188 (1995).

93. See Schulman et al., *supra* note 89, at 37.

94. See, e.g., SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 52 (1988) ("[Lawyers] argue that only they are familiar enough with their cases, skilled enough in the art of asking questions, and motivated enough by the demands of their role as advocates, to conduct an effective examination.").

95. See, e.g., *Judge-Conducted Voir Dire*, 274 PRAC. L. INST./LITIG. 541, 543 (1984) (noting that in seven states, voir dire is conducted largely by attorneys; in the remaining states, it is conducted largely by judges).

96. See Barron, *supra* note 77 (describing New York's move from attorney-conducted to attorney- and judge-conducted voir dire to reduce attorneys' opportunities to abuse voir dire).

Whereas the reasonable person view of peremptories prevailed for much of our history, only in the past fifteen years has the cultural diversity view overtaken it. Although these two views, cultural diversity and reasonable person, can be gleaned from judicial opinions concerning the venire and peremptories and from the way in which voir dire is conducted, the area that remains unexplored, and to which I now turn, is the jury deliberation.

IV. WHAT DIFFERENCE DOES CULTURAL DIVERSITY MAKE TO DELIBERATIONS?

Although a majority of the Court valued cultural diversity of the venire because the Court assumed that jurors with different backgrounds have different perspectives that will enrich jury deliberations, the Court had no empirical evidence that this was so. I shared the majority's intuition⁹⁷ but wondered what empirical evidence would show.

I undertook an empirical study to answer this question and focused on the effects of a diverse jury on the process of jury deliberations and on jurors' perceptions of that process. Unlike earlier studies, which had found little correlation between such characteristics as race or gender and verdict preferences,⁹⁸ except in rape and death penalty cases,⁹⁹ I focused on the

97. Other legal academics share this intuition as well. See, e.g., VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 50 (1986) ("[A] jury composed of individuals with a wide range of experiences, backgrounds, and knowledge is more likely to perceive the facts from different perspectives and thus engage in a vigorous and thorough debate."); Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 153 (describing juries that are not representative as juries that "may weaken the information base upon which good deliberation depends, leaving jurors from one section of town uninformed about facts of life on the other side of the tracks"); Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 165. Ramirez observed:

[R]acially diverse juries bring to their deliberations a broader range of life experiences that allow them to use their common sense more effectively when they evaluate the facts presented at trial. . . . To the extent that a racially mixed jury facilitates the sharing of diverse perspectives, information, and experiences, that sharing may lead to a more thoughtful and informed verdict.

Id.

98. See Marder, *supra* note 92, at 1080 & n.157.

99. The only correlations were between gender and cases that involved rape or the death penalty. According to some studies, women were more likely than men to convict in rape cases, see Marsha B. Jacobson, *Effects of Victim's and Defendant's Physical Attractiveness on Subjects' Judgments in a Rape Case*, 7 SEX ROLES 247, 252-53 (1981), or to assign the defendant a longer sentence, see Anne Renkin Mahoney, *Sexism in Voir Dire: The Use of Sex Stereotypes in Jury Selection*, in *WOMEN IN THE COURTS* 126 (Winifred L. Hepperle & Laura Crites eds., 1978).

Several studies have found that women are more likely than men to oppose the death penalty, and consequently, to be excluded from "death-qualified" juries. See, e.g., Claudia L. Cowan, William C. Thompson & Phoebe C. Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition To Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53, 67 (1984) (finding that

deliberations themselves, and not on the verdicts,¹⁰⁰ and on how the deliberations were influenced by several measures of diversity, rather than just a single characteristic.¹⁰¹ By diversity, I mean all of the ways in which we categorize ourselves; however, I limited the study to categories about which I could reasonably inquire of jurors without being overly intrusive. I asked jurors to provide information about their own race, gender, age, income, education, marital status, employment status, and religion. I focused on gender, race, and age because those were the measures of diversity that jurors, attorneys, and to a more limited extent research assistants, could observe about the jury as a whole. When I asked jurors to assess the diversity of their jury,¹⁰² I did not provide them with any definition.

A. HYPOTHESES

At the outset of this project, I had a number of hypotheses about the effects of jury diversity on jury deliberations. One hypothesis was that jurors on more diverse juries might, unfortunately, perceive their deliberations to be more hostile compared to jurors on less diverse juries. I hypothesized this might be so because jurors from different backgrounds might challenge each other's assumptions and as a result generate disagreements, which could have a negative effect on the tone of the deliberations.

A second hypothesis was that diversity in juries ultimately would produce greater juror satisfaction because the jurors would have heard an array of viewpoints and would have considered the case from a number of

potential jurors excluded from death-qualified juries are more likely to be women); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46 (1984) (finding that death-qualified juries are more likely to exclude women and African-American men). A "death-qualified" jury is one in which those who say that they could not vote for the death penalty in any case are excluded from the jury. See *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968) (holding that the State's exclusion of prospective jurors who were not just unalterably opposed to the death penalty, but who simply "expressed conscientious or religious scruples against capital punishment and all who opposed it in principle" violated the requirements of an impartial jury as provided by the Sixth and Fourteenth Amendments); *Lockhart v. McCree*, 476 U.S. 162, 167 (1986) (holding that "'death-qualification,' or the removal for cause of the so-called 'Witherspoon-excludable' prospective jurors" from the guilt phase does not violate the fair-cross-section requirement of the Sixth Amendment).

100. Although my focus is on the deliberation rather than the verdict, I think that the deliberation will, in turn, affect the verdict.

101. See Lisa Hope Pelled, *Demographic Diversity, Conflict, and Work Group Outcomes: An Intervening Process Theory*, 7 ORG. SCI. 615, 626 (1996) ("A limitation of most diversity studies is that they consider only one or two types of diversity simultaneously rather than a larger set; they do not deal with the combined effects of diversity across multiple dimensions.").

102. See *infra* Appendix B, question 15 (asking jurors to rate the diversity of their jury on a seven-point scale).

different perspectives, and therefore, would feel that they had done a better job and would experience greater satisfaction with their deliberations, verdict, and overall jury experience than would jurors on more homogeneous juries.

A third hypothesis was that jurors on more diverse juries would perceive their deliberations to have been more thorough, as compared with jurors on more homogeneous juries. My assumption was that if jurors come from different backgrounds, they are more likely to have different points of view for the jury to consider,¹⁰³ and perhaps to challenge,¹⁰⁴ and as a result, the deliberations would be more careful and considered.

A fourth and related hypothesis was that greater diversity of juries might lead to longer deliberations. I assumed it would take longer for jurors from different backgrounds and perspectives to reach consensus and that greater diversity of juries might even lead to more hung juries, or at least to juries in which jurors were more likely to report that at some point they had believed that their jury would be unable to reach a verdict.

103. See, e.g., Priscilla M. Elsass & Laura M. Graves, *Demographic Diversity in Decision-Making Groups: The Experiences of Women and People of Color*, 22 ACAD. MGMT. REV. 946 (1997) ("In diverse decision-making groups, members have different experiences, values, attitudes, and cognitive approaches; consequently, they bring divergent perspectives to the group's problem.").

104. Even if jurors have different demographic characteristics, this does not necessarily mean they will have different views. Cf. Brooke Harrington, *Cohesion, Conflict and Group Demography: A Multi-Method Integration* 6 (1999) (unpublished paper on file with author) ("As this study will show, both kinds of diversity [demographic diversity and diversity of opinion] have an important influence on [investment club] performance, but diversity of opinion cannot be inferred directly from demography."). Even if jurors do have different views, they may not always feel free to express those different views during the deliberations. In both jury and nonjury contexts, studies have found that women and minority members do not participate at the same rate as white men and do not occupy the same positions of influence as white men. See, e.g., Elsass & Graves, *supra* note 103, at 954 ("Evidence confirms that women and people of color contribute to group tasks at a lower level, make fewer influence attempts, are less frequently chosen as leaders, and are less committed to group outcomes than White males."); Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 594-98 (1987) (citing studies comparing men's and women's participation rates and influence during jury deliberations). Another study observed that in groups in which members had some shared and some unshared information, there was a tendency to discuss the shared information and to seek consensus on that, rather than for members to offer the information that was unique to them. See Garold Stasser & William Titus, *Pooling of Unshared Information in Group Decision Making: Biased Information Sampling During Discussion*, 48 J. PERSONALITY & SOC. PSYCHOL. 1467, 1470 (1985) (describing a situation in which a group would make a better judgment if it pooled the information of its members, but instead, its discussion focused on shared information and the initial preferences of the group members, which were formed without knowledge of the individual members' unshared information). If group members do express different views, then "[e]xploration of opposing positions can help them gather new data, delve into issues more deeply, and develop a more complete understanding of problems and alternative solutions." Pelled, *supra* note 101, at 624.

B. METHOD

This study was based on four sources of information. First, a questionnaire was distributed to actual jurors in Los Angeles County and its environs after they had finished their deliberations and had been dismissed from their jury service.¹⁰⁵ Second, brief questionnaires were given to the attorneys in these same cases.¹⁰⁶ Third, each case file was reviewed. Fourth, research assistants personally assessed the diversity of each jury.

The juror questionnaires were distributed by five research assistants¹⁰⁷ over a five-week period in July–August 1999. The research assistants went to courthouses in Los Angeles, Pasadena, Van Nuys, Santa Ana, Santa Monica, and West Los Angeles¹⁰⁸ looking for criminal jury trials in which verdicts had just been returned or hung juries declared.

Only a few judges were willing to announce to the jurors, after the verdict had been returned or a hung jury declared, that a researcher would be asking them to complete a questionnaire if they consented. Instead, in most cases, as jurors exited the courtroom, and headed toward the Jury Assembly Room to sign out, they were stopped in the hallway or elevator and asked by a research assistant if they would complete a questionnaire anonymously that would take only five minutes. They were not offered any inducement to participate. If they agreed, they were given the questionnaire, and filled it out immediately. If they declined, they were asked if they would complete the questionnaire at home and return it by mail (or by e-mail or fax). If they agreed, they were given a self-addressed, stamped envelope; a few jurors exercised this option. If they declined, however, no further effort was made to recruit them to participate in the study.

The juror questionnaire¹⁰⁹ was divided into three parts. The first part asked for demographic information about the juror. The second part asked the juror to provide background information about the jury, such as the jury's composition by race, gender, and age, background information about the foreperson, and the juror's assessment of the strength of the evidence and the performance of the attorneys in the case. The third part asked the juror's

105. See *infra* Appendix B (Juror Questionnaire).

106. See *infra* Appendix C (Lawyer's Questionnaire).

107. The research assistants consisted of three women and two men. The two men, both of whom are white, were law students in different area law schools in Los Angeles. The three women included one white woman, one Asian-American woman, and one South Asian-American woman. Two of the women were law students in area law schools in Los Angeles, and one was an undergraduate in Los Angeles.

108. It turned out that there were no jury trials in Santa Monica and West Los Angeles during the data collection period.

109. See *infra* Appendix B.

views of the deliberations. Jurors were asked to assess, on a seven-point scale, the tone of the deliberations, how thorough the deliberations were, and how satisfied the juror was with the jury experience and the verdict.

Attorneys for the case were asked if they would complete a brief, three-minute questionnaire. If they agreed, they were given the questionnaire. If they declined, they too were asked if they would complete it at their convenience and return it by mail in a self-addressed, stamped envelope. Because attorney information (names and addresses) was part of the public record, attorneys who did not complete a questionnaire as soon as the trial ended and who did not send in their questionnaire by mail, received a follow-up letter, asking them to complete the enclosed questionnaire. A few attorneys submitted questionnaires by mail shortly after the trial or later in response to the follow-up request.

The attorney questionnaires had three purposes: first, to obtain another assessment of the jury's composition by gender and race; second, to compare jurors' and attorneys' perspectives on certain questions, such as how well the attorneys performed; and third, to have attorneys rate cases in terms of how complex they thought the case was so that I could compare cases that involved different criminal offenses.¹¹⁰

The study's final two sources of information were the case file, which is part of the public record, and the research assistants' personal assessments. For each case in which jurors returned questionnaires, a research assistant collected from the case file background information about the case¹¹¹ and the defendant. From the case file, I had hoped to locate the names and addresses of the jurors, but this information was sealed and unavailable to the public.¹¹² Without jurors' names and addresses, and without any identifying information on the juror questionnaires, there was no way to collect questionnaires from those jurors who did not complete the questionnaires at the courthouse or who

110. Case complexity was not defined for the attorneys. Although a case can be complex for a variety of reasons, from the sheer volume of information, to the number of interconnections needed to decide what happened, to the inferences that jurors would have to draw, see Geoffrey P. Kramer & Norbert L. Kerr, *Laboratory Simulation and Bias in the Study of Juror Behavior: A Methodological Note*, 13 LAW & HUM. BEHAV. 89 (1989), attorneys were asked to rate the complexity of the case without being given a definition of the term. See *infra* Appendix C, question 7 ("Circle a number on the [seven-point] scale below that you think best indicates how *complicated* this case was.").

111. Background information included the case name, docket number, number of defendants, nature of the charge, attorneys' names and addresses, verdict, and date on which the verdict was rendered.

112. In criminal cases in California, judges use "confidential juries," in which "names and identifying information are withheld even after a verdict, but the names are shown to the lawyers during jury selection." Jerry Markon, *Judges Pushing for More Privacy of Jurors' Names*, WALL ST. J., June 27, 2001, at B1. This practice, which has been upheld on appeal, was motivated by concerns for juror safety and privacy. *Id.*

did not return them by mail. Finally, the research assistants were asked to provide their own assessments of the jury composition by race and gender, based upon their observations of the jury prior to its dismissal.

C. LIMITATIONS OF THE METHOD

Because questionnaires were collected from actual jurors after jury deliberations in criminal cases rather than from mock jurors working in a controlled laboratory setting, conditions were sometimes less than ideal.

First, it would have been preferable to have judges' cooperation. The more reliable method of having questionnaires completed would have been to have jurors fill out questionnaires after a verdict had been reached and while they were waiting for the attorneys and parties to reconvene in the courtroom for the announcement of the verdict or immediately after the verdict was announced, but before the jurors left the courtroom. Jurors would have been more willing to complete questionnaires at either of these junctures than when they were already exiting the courtroom and eager to go home. Given judges' reluctance to participate, however, the method chosen was the next best method for distributing the questionnaires.¹¹³

Second, if jurors had included their names on the questionnaires, follow-up interviews would have been possible.¹¹⁴ A brief pretest, however, indicated that jurors, for the most part, declined to include their names on questionnaires. Given jurors' reluctance to provide their names, a requirement that they do so probably would have limited the number of completed questionnaires or compromised the candor of those who did respond.

Third, I had hoped to study juries that had all heard the same type of criminal case, such as assault cases. This, however, was not feasible because an insufficient number of cases of the same type was being heard by juries during the period of data collection.¹¹⁵ As a result, one potential problem

113. Distributing the questionnaires by mail was not an option because, as noted earlier, juror names and addresses were unavailable. *See supra* note 112 and accompanying text. In addition, mailed questionnaires tend to have a low response rate. *See, e.g.,* DON A. DILLMAN, *MAIL AND TELEPHONE SURVEYS: THE TOTAL DESIGN METHOD* (1978); Maria Elena Sanchez, *Effects of Questionnaire Design on the Quality of Survey Data*, 56 PUB. OPINION Q. 206-17 (1992).

114. There still would have remained the problem of obtaining jurors' telephone numbers or addresses. *See supra* note 112 and accompanying text.

115. Data could only be collected during the summer months when research assistants could spend all day waiting for a trial to end. Trials could end at any time, and bailiffs, though generally quite helpful, could only give their best guess as to when deliberations might end, the verdict would be announced, and the jury would be dismissed.

with the data could be that differences in juror perceptions of jury deliberations might be attributable to the types of cases being heard, rather than to the diversity of the juries. One way of correcting for this potential problem, at least in part, is through use of attorneys' complexity ratings of the cases, which allow comparisons across different types of cases. Moreover, the use of the same type of criminal case might have had an unintended drawback. For example, it might be that one type of case, such as drug violations, elicits different reactions based on jurors' gender or race, than other types of cases, and so responses to the deliberations may not be attributed to the diversity of the jury but to the nature of the case. There would be no way of knowing in advance whether the type of case chosen was one that would produce such a response; however, by using a variety of types of cases, there is less risk of encountering such an effect.

Finally, this study focused on juries in Los Angeles and its environs during a limited period of time. Even if Los Angeles were representative of other major cities in this country, and it is unclear that it is, there is always a danger in trying to extend the findings in one city to other parts of the country. Certainly, Los Angeles is a multicultural city with a diverse population, and in that sense it serves as a rich site for a study of the effects of diversity on jury deliberations. The study, however, involved only juries in Los Angeles;¹¹⁶ at most, the findings in this study might be suggestive, but certainly not predictive, of findings in cities of comparable size and demographic composition.

Admittedly, this study's method has its limitations, as described above; nevertheless, the questionnaire responses furnish a wealth of information about actual jurors, deciding real cases, and their perceptions about their jury experiences.

D. CHARACTERISTICS

Twenty-six criminal juries participated in this study.¹¹⁷ Of a possible 312 respondents, 138 jurors returned questionnaires, yielding a response rate of 44%. All twelve jurors on one jury submitted a juror questionnaire and

116. Sociologists would say that the Los Angeles juries cannot be seen as representative of juries throughout the rest of the country. Rather, if I had wanted a representative sampling, I would have had to distribute questionnaires throughout the country. Using Los Angeles to stand for the rest of the country would be an example of "convenience sampling," which is not a reliable method for studying juries on a national level. *See generally* DIVIDED OPPORTUNITIES: MINORITIES, POVERTY, AND SOCIAL POLICY (Gary D. Sandefur & Marta Tienda eds., 1988).

117. Of the twenty-six juries, sixteen were located in Los Angeles, five were in Santa Ana, three were in Pasadena, and two were in Van Nuys.

only one juror on another jury submitted a questionnaire; on average, 5.3 jurors from each twelve-person jury responded. The average composition of a jury by gender in this study consisted of five men and seven women; by race it consisted of five Caucasians, three Latinos/as, two African Americans, and two Asian Americans.

Among the respondents to the questionnaire, men and women were nearly evenly represented. Forty-five percent (61) of the respondents were male and 55% (74) were female.¹¹⁸ Fifty-five percent (75) of the respondents described themselves as Caucasians, 20% (27) identified themselves as Latinos/as, 10% (14) listed themselves as Asian Americans, 8% (11) said they were African Americans, 2% (2) indicated that they were Native Americans, and 6% (8) listed "other," meaning that they did not believe they fit under any of the five categories listed.¹¹⁹

In general, respondents represented a range of ages, were employed, and had a fair degree of education. Whereas the stereotype of the typical juror is of an older, retired person, in fact, the jurors who responded to this questionnaire ranged mainly from young (15% were 18–24 years old; 22% were 25–34 years old) to middle-aged (20% were 35–44 years old; 26% were 45–54 years old; 14% were 55–64 years old), with only 3% who were 65 years of age or older. Also contrary to the typical juror stereotype, almost three-fourths of the respondents (74%) held full-time jobs. Among the remaining one-fourth, 8% held part-time jobs, 10% were students, and 1% were homemakers. Only 3% of respondents were unemployed and only 4% were retired. Consistent with studies based on questionnaires, respondents were a largely educated group,¹²⁰ with 8% having graduated from high school, 33% having attended college, 33% having graduated from college, and 23% having earned a graduate degree. Only 3% of respondents had not completed high school.

The typical profile of a jury foreperson, or leader, is a white man of high social status.¹²¹ Although jurors in this study did not always know the

118. Of the 138 respondents, three did not answer this question.

119. Of the 138 respondents, one did not answer this question. Percentages exceed 100% due to rounding.

120. This is one skewing effect of studies involving questionnaires: those who respond are more likely to be educated than those who do not respond. This was also found to be the case when jurors are interviewed. See, e.g., Diane L. Bridgeman & David Marlowe, *Jury Decision Making: An Empirical Study Based on Actual Felony Trials*, 64 J. APPLIED PSYCH. 91, 93 (1979) ("The 65 jurors who volunteered to be interviewed . . . tended to be well educated: Only 24 (37%) reported attending only grade or high school, whereas 41 jurors (63%) attended college, and this number included 6 who held graduate degrees.").

121. See B. Beckham & H. Aronson, *Selection of Jury Foremen As a Measure of the Social Status of Women*, 43 PSYCHOL. REP. 475, 476–77 (1978) (finding that in 155 juries, women were elected as

profession of the foreperson, the foreperson usually was a white man. Out of twenty-six juries, 65% (17) of the juries had a man as foreperson, whereas only 35% (9) of them had a woman as foreperson. In terms of race, the foreperson was a Caucasian in 77% of the juries, a Latino/a in 8% of the juries, an African American in 8% of the juries, an Asian American in 4% of the juries, and "other" in 4% of the juries.¹²² No African-American men, Asian-American men, or Native Americans served as forepersons.

The twenty-six cases heard by these juries included violent and nonviolent crimes. Violent crimes included misdemeanor child abuse, domestic violence, assault with a deadly weapon, and attempted and premeditated murder. Nonviolent crimes included vandalism, indecent exposure, driving while under the influence of alcohol, possession and/or selling a controlled substance, and possession of child pornography. Of the twenty six cases, 54% (14) resulted in convictions, 23% (6) in convictions in part, 15% (4) in acquittals, and 8% (2) in hung juries. The combined figure of 77% for convictions and convictions in part is consistent with other findings that roughly 75–80% of all criminal cases that are tried result in convictions.¹²³ Among the defendants, 85% (22) were male and 15% (4) were female. Also among the defendants, 35% (9) were African Americans, 31% (8) were Latinos/as, 15% (4) were Caucasians, 4% (1) were Asian Americans, and 15% (4) could not be identified. The defendants' gender, and to a lesser extent racial, characteristics are consistent with other criminal justice statistics.¹²⁴

foreperson one-fifth as often as their numbers would indicate); Fred L. Strodbeck, Rita M. James & Charles Hawkins, *Social Status in Jury Deliberations*, 22 AM. SOC. REV. 713, 715 (1957) ("[O]nly one-fifth as many women were made foreman as would be expected by chance."); Charles Hawkins, *Interaction and Coalition Realignment in Consensus-Seeking Groups: A Study of Experimental Jury Deliberations* 24 (Aug. 17, 1960) (unpublished doctoral dissertation, University of Chicago) (finding that women constituted 36% of jurors, but only 3% of forepersons). See also REID HASTIE, STEVEN B. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 28 (1983) ("[m]ales, higher classes, and end seating are overrepresented" in the role of foreperson); RITA JAMES SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 114 (1967) (noting that businessmen had four times better chance of being selected as foreperson than male laborers; housewives were never selected).

122. The percentages add up to more than 100% due to rounding.

123. One study of ten felony cases in Santa Cruz, California found a conviction rate of 82% and an overall Santa Cruz County conviction rate in felony trials of about 90%. See Bridgeman & Marlowe, *supra* note 120, at 94.

124. The percentage of male (85%) and female (15%) defendants in this study matches the percentage of male (84%) and female (16%) defendants arrested in the seventy-five largest counties in the U.S. in 1996. See BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2000*, at 460 tbl.5.48 (Kathleen Maguire & Ann L. Pastore eds., 2001). Race is a little harder to compare because the categories used by the Bureau of Justice are "White," "Black," and "Other." *Id.* It is unclear whether Latinos/as were included under "White" (40%), "Black" (58%), or "Other" (2%) because the U.S. Census Bureau does not consider Latinos/as to be a racial category. *Id.*

E. ANALYSIS AND FINDINGS

With one exception,¹²⁵ the questionnaire included several questions to test each of the ways in which diversity might affect the jury deliberations, according to the hypotheses.¹²⁶ Two questions were intended to measure hostility,¹²⁷ four were intended to measure juror satisfaction,¹²⁸ four were intended to measure juror perception of thoroughness,¹²⁹ and two dichotomous questions were intended to measure inability to reach a unanimous verdict.¹³⁰ After the questionnaires were completed, the following statistical analyses were performed on the data:¹³¹ a factor analysis to ensure that the relevant questions were measuring the constructs intended;¹³² an internal scale reliability analysis to determine which questions could be combined to create an index measure of hostility, thoroughness, and satisfaction; the creation of a measure of diversity for gender, race, and age of each jury, and regression analyses using the respondents' and research assistants' reports of the racial and gender compositions of the jury and the respondents' reports of the age composition of the jury. Finally, the attorneys' ratings of their case's complexity was included as a covariate in case the complexity influenced the thoroughness and hostility of the deliberations and the jurors' satisfaction with their deliberations. Appendix A provides a more detailed description of the analyses conducted and results obtained.

1. Hostility

The questionnaire responses showed significant effects of gender diversity on the tone of the deliberations, although the racial or age diversity of the jury had no apparent effect on the tone. As the jury became more gender diverse (meaning the number of men and women on the jury approached 50-50), the deliberations became *less* hostile, the tone of the deliberations grew more harmonious, and the jurors treated each other more supportively. These effects were found when using the gender diversity

("Without consideration of Hispanic origin, U.S. Census Bureau data for 1996 indicate that the racial distribution . . .").

125. There was only one measure of deliberation length: jurors' reports of how long their deliberations lasted. Thus, there was no finding on this item.

126. See *supra* Part IV.A.

127. See *infra* Appendix B, questions 23–24.

128. See *infra* Appendix B, questions 32, 34–36.

129. See *infra* Appendix B, questions 25, 26(a)–(c).

130. See *infra* Appendix B, questions 30(a) & (b).

131. See *infra* Appendix A (providing tables and details of the analyses).

132. See *infra* Appendix A (describing adjustments made in response to the factor analysis).

ratings based on the research assistants' assessment of the jury's gender composition and when using the ratings based on the jurors' assessments of their jury's gender composition.

This finding that gender diversity (tending toward equal numbers of men and women on the jury) leads to less hostile and more supportive deliberations is contrary to the hypothesis that diversity (of any kind) might lead to disagreements which, in turn would produce hostile deliberations.¹³³ This finding is also contrary to small-group behavior studies in which all-female groups were found to engage in more harmonious and supportive discussions, whereas all-male groups were found to engage in more competitive and argumentative discussions¹³⁴ and mixed groups bore a greater resemblance to all-male groups' mode of discussions.¹³⁵ This finding is also contrary to the findings of writers who have noted men's and women's different styles of discourse,¹³⁶ e-mail exchange,¹³⁷ and moral reasoning¹³⁸

133. In retrospect, I should have asked jurors to assess how much "conflict" their deliberations produced, rather than the tone of their deliberations because while there may have been disagreement or conflict, there may not have been hostility. My prediction was that diverse juries would have more conflict, and indeed they might have, but the conflict might not have risen to the level of hostility, which may explain why my finding was contrary to my hypothesis. For a study in which diverse groups produced greater conflict, but the group members saw the conflict as beneficial to the tasks they were to perform when they were members of groups that valued collective efforts, see Jennifer A. Chatman, Jeffrey T. Polzer, Sigal G. Barsade & Margaret A. Neale, *Being Different Yet Feeling Similar: The Influence of Demographic Composition and Organizational Culture on Work Processes and Outcomes*, 43 ADMIN. SCI. Q. 749 (1998).

134. See Elizabeth Aries, *Interaction Patterns and Themes of Male, Female, and Mixed Groups*, 7 SMALL GROUP BEHAV. 7, 13-14 (1976) (noting that discussions in all-male groups were marked by competition and aggression and discussions in all-female groups centered on feelings, affiliation, home, and family); B. G. Reed, *Gender Issues in Training Group Leaders*, J. SPECIALISTS GROUP WORK, Aug. 1981, at 161, 162 (finding that all-male groups were characterized by hierarchy and competition, and all-female groups shared feelings and discussed subjects in greater depth). See also Elizabeth Aries, *Male-Female Interpersonal Styles in All Male, All Female and Mixed Groups*, in BEYOND SEX ROLES 292, 294 (Alice G. Sargent ed., 1977) [hereinafter *Male-Female Interpersonal Styles*] (describing supportive behavior in all-female groups in which a member who missed a session was encouraged to participate, in contrast to all-male groups in which a member who missed a session was excluded from discussion); John E. Baird, *Sex Differences in Group Communication: A Review of Relevant Research*, 62 Q.J. SPEECH 179, 189-90 (1976) (observing that in all-male groups, the weakest member is excluded; in all-female groups, any member in danger of neglect is given encouragement).

135. See Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions*, 20 LAW & HUM. BEHAV. 533, 537 (1996) (referring to other studies "showing that men dominate in mixed-gender conversations"); *Male-Female Interpersonal Styles*, *supra* note 134, at 297 (finding that in mixed groups, women spoke less, initiating only 34% of total interactions); Reed, *supra* note 134, at 163 (observing that in mixed groups, women spoke less, spoke primarily to men, shared less personal information, and were less involved in topics and tasks associated with masculinity).

136. See DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND ME: WOMEN AND MEN IN CONVERSATION* (1990) (describing men's tendencies to offer information, to interrupt, and to compete verbally and women's tendencies to listen, to encourage, and to include other speakers in the conversation);

and whose work suggests that women are more likely to engage in a deliberation style that is supportive and inclusive and that men are more likely to engage in one that is competitive. This finding is also contrary to the popular perception of the sexual divide in jury deliberations, exemplified most dramatically by the jury in the Lyle Menendez case, in which women on the jury accused the men of alternately bullying and ignoring them.¹³⁹

One possible explanation for the less hostile, more supportive deliberations found among gender diverse juries in this study can be drawn from Rosabeth Moss Kanter's work on women in the corporation.¹⁴⁰ Her theory is that as the number of women increase in boardrooms across corporate America, women will no longer be seen as mere tokens and subjected to a variety of stereotypes that men hold about women.¹⁴¹ For

Hahn & Clayton, *supra* note 135, at 537 ("Other studies have found general distinguishing characteristics between males' and females' speech. Compared with men, women are less likely to interrupt, and less successful when they do interrupt, while they are more likely to hedge, ask tag questions, and use disclaimers and intensifiers.") (citations omitted); Nancy M. Henley, *Power, Sex, and Nonverbal Communication*, in *LANGUAGE AND SEX* 184 (Barrie Thorne & Nancy M. Henley eds., 1975) (describing how nonverbal acts, such as gesture, movement, touch, and gaze, can contribute to the speaker's power); Candace West & Don H. Zimmerman, *Small Insults: A Study of Interruptions in Cross-Sex Conversations Between Unacquainted Persons*, in *LANGUAGE, GENDER AND SOCIETY* 107 (Barrie Thorne et al. eds., 1983) (finding that in cross-sex conversations, men are three times more likely than women to interrupt the other speaker).

137. See, e.g., Joyce Cohen, *He-Mails, She-Mails: Where Sender Meets Gender*, N.Y. TIMES, May 17, 2001, at D1 (describing research in which "'men tend to make strong assertions,' disagree with others and use profanity, insults and sarcasm [in e-mail exchanges]. By contrast, women tend to use mitigated assertions along with questions, offers, suggestions and polite expressions They are supportive and agreeable [in e-mail exchanges]" (quoting Susan C. Herring, Associate Professor of Information Science and Linguistics at Indiana University at Bloomington).

138. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* 100 (1982) (contrasting the way in which men understand the "moral imperative . . . as an injunction to respect the rights of others and thus to protect from interference the rights to life and self-fulfillment" with the way in which women view the moral imperative as "an injunction to care, a responsibility to discern and alleviate the 'real and recognizable trouble' of this world").

139. See, e.g., *Female Jurors Complain of Sexism Tainting Menendez Deliberations*, N.Y. TIMES, Jan. 31, 1994, at A7; Mary B.W. Tabor, *Stereotyping Men, Women and Juries by Trial and Error*, N.Y. TIMES, Feb. 6, 1994, at 3.

140. See, e.g., Rosabeth Moss Kanter, *Women and the Structure of Organizations: Explorations in Theory and Behavior*, in *ANOTHER VOICE* 34, 56-60 (Marcia Millman & Rosabeth Moss Kanter eds., 1975).

141. See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 208 (1977) (suggesting that women in work settings may assume traditional roles because they are outnumbered by men and that male-female interactions will change when both sexes are equally represented in the workplace). See also Elsass & Graves, *supra* note 103, at 949 ("[I]f the representation of any gender or racioethnic group is small relative to the total group size . . . , members' categorical identities are likely to be highly salient.") (citations omitted).

Kanter, numbers matter.¹⁴² Kanter's work suggests that as women's numbers increased in the jury room and approached half,¹⁴³ men treated the women as equals and women expressed their views because they could speak for themselves, rather than representing "women's" viewpoint.

Another way to explain this study's finding is to posit that men and women have learned to work with each other in a respectful manner, and that this has now been introduced into the jury setting. Such respectful behavior can be explained either cynically or idealistically. The cynical explanation is that, in this age of political correctness when men and women are acutely aware of threats of sexual harassment, they have learned to be more cautious in their interactions with each other in the workplace, and that this pattern can now be seen in the jury room. The more idealistic explanation is that men and women are accustomed to working together in the workplace and treating each other as colleagues now that women constitute 46% of the labor force.¹⁴⁴ According to this view, men and women are simply bringing their experience and comfort level in working with each other into the jury room.

Yet another explanation for the lack of hostility in gender-balanced juries is that male and female jurors altered their behavior in a mixed setting to conform to conventional male-female roles. Accordingly, in a mixed-gender setting, men would become less competitive with each other than they would in an all-male environment and in that same setting women would become less willing to express their own views and more concerned with how the group was functioning as a whole than they would in all-female groups.¹⁴⁵

142. See KANTER, *supra* note 141, at 208. See also Elsass & Graves, *supra* note 103, at 948 ("Although research on group composition effects provides conflicting information about how the exact sizes of the numerical minority and majority affect individuals' experiences in diverse groups, it does suggest that women and people of color especially are likely to encounter negative dynamics when they do not make up the majority of a group.") (citations omitted).

143. It would be interesting to know at what point the dynamics change. If juries of six men and six women produce harmonious deliberations, what do the numbers of men and women have to be before the deliberations become hostile? Is there a "tipping point?"

144. U.S. DEP'T OF LABOR, EMPLOYMENT & EARNINGS, July 2001, at 15 (showing that in the period June-Dec. 2000, men constituted 54% of those employed and women constituted 46% of those employed); *Current Labor Statistics*, MONTHLY LAB. REV., June 2001, at 62 (providing numbers that indicate that for the year 2000, 54% of those employed were men and 46% of those employed were women).

145. Almost forty-five years ago, Fred Strodbeck and Richard Mann observed that in mock juries consisting of men and women, women tended to be concerned with the socio-emotional dynamics of the group, similar to their role in the family. Fred L. Strodbeck & Richard D. Mann, *Sex Role Differentiation in Jury Deliberations*, 19 SOCIOMETRY 3, 5 (1956). In contrast, men played a more active role on the jury and focused on accomplishing the task set out for them, consistent with their role in the family. See *id.* Of course, Strodbeck and Mann were doing their empirical work at a time when men were breadwinners and women were homemakers. Although the divisions between men's and women's roles in the workplace and home are no longer so clear-cut, they have not been outgrown altogether. For a more recent study of

A similar dynamic of “better behavior” can be observed in some prisons that house both men and women, albeit in separate sections. The mix of men and women in prisons produces better behavior and a more harmonious prison environment,¹⁴⁶ and perhaps this same effect accounts for the more harmonious tone of jury deliberations when the jury is gender diverse. This dynamic was also observed in a jury study in which a female attorney examined a male witness, and the male witness was seen by the mock jurors as “friendl[y]” and the authors hypothesized that “in a mixed-gender confrontation, the exchange seems less abrasive and unpleasant.”¹⁴⁷

One unpublished 1988 study provides support for the conventional sex-role explanation and found that changes in women’s status in the workplace did not change their role on the jury.¹⁴⁸ Based on data collected from jury experiments in 1956 in Chicago and 1978 in Boston, researchers predicted and found no change, despite the intervening twenty-two years, in terms of the less powerful seats that female jurors occupied in the jury room, their lower participation rate (a rate two-thirds that of men), and their persuasiveness in the jury room.¹⁴⁹ Their findings were consistent with the theory of sex-role specific style, which suggests that men and women might have different goals in a small-group situation, with men tending to be task

mixed groups in which men engaged in task behavior and women engaged in social behavior, see Wendy Wood & Stephen J. Karten, *Sex Differences in Interaction Style As a Product of Perceived Sex Differences in Competence*, 50 J. PERSONALITY & SOC. PSYCHOL. 341 (1986). For an illustration of such behavior in the jury room, see *Frontline: Inside the Jury Room* (WGBH television broadcast, Apr. 8, 1986) (Transcript of broadcast at 24–25). After the jury had spent two hours in deliberation, and had succeeded in convincing the lone holdout to capitulate and to vote to acquit the defendant, the response of several male jurors was to call for a vote, whereas the response of several female jurors was to ask the holdout if he felt comfortable with his change of vote.

146. See, e.g., Barry Ruback, *The Sexually Integrated Prison: A Legal and Policy Evaluation*, in COED PRISON 33, 44 (John Ortiz Smykla ed., 1980) (“Based on their personal observations, residents at FCI Fort Worth [a sexually integrated prison] opined that physical violence between the men was less common than in other prisons. From the women’s standpoint, the favorable sexual ratio . . . and the resulting attention, minimizes hostilities among women.”); Rosemary Herbert, Note, *Women’s Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182, 1184–85 (1985) (“The limited data available suggest[] that these experiments [in “co-correctional” prisons] have been successful in the terms traditionally used to evaluate correctional programs . . .”) (footnote omitted); *Coed Incarceration*, TIME, Sept. 16, 1974, at 84 (“Though it is too early to judge conclusively, penal experts believe that coed incarceration is a success—at least in improving behavior.”); Aric Press, Ron LaBrecque & Peggy Clausen, *When Prisons Go Coed*, NEWSWEEK, Jan. 11, 1982, at 66 (“There is a gentling effect which seems to occur” when men and women are in prison together.) (quoting Charles Campbell, Alaska’s Commissioner of Corrections); *id.* (“There tends to be much less violence and more desire to participate in work-and[-]education programs . . .”).

147. Hahn & Clayton, *supra* note 135, at 550.

148. See Fred L. Strodtbeck & Richard M. Lipinski, *Women Jurors, Then and Now 2* (1988) (unpublished paper on file with author). I thank Reid Hastie for bringing this study to my attention.

149. See *id.* at 22–25.

oriented and women tending to seek consensus and inclusion,¹⁵⁰ and did not support the role convergence theory, which predicts greater similarity between men and women as women achieve the same occupational status as men.¹⁵¹

Although these theories attempt to explain the gender diverse jury's harmonious deliberations, they do not explain why less diverse juries would have more hostile deliberations. In particular, while small-group behavior studies would predict that all-male juries would engage in hostile deliberations, they do not predict that all-female juries would do so. In this study, however, there were no all-male or all-female juries to test the findings of the small-group behavior studies. In addition, there were no "majority-male" juries.¹⁵² Jurors on the six "majority-female" juries rated their deliberations as more hostile than did jurors on the "no-majority" juries, but six juries may be too small a sample from which to draw any conclusion.

2. Satisfaction

There were significant effects of diversity by gender and age, but not race, on jurors' satisfaction with the jury deliberations, the jury experience, and the verdict. Using the gender diversity ratings based on the research assistants' assessments of the juries' gender composition as a predictor, this study showed that as the jury became more gender diverse, jurors were more satisfied overall, more satisfied with their deliberations, and more satisfied with their verdict. Using the gender diversity ratings based on the jurors' assessments of their juries' gender composition as a predictor, the same effects were found. Using the age diversity ratings based on the jurors' assessments of their juries' age composition as a predictor, as the jury became more age diverse, the jurors became more satisfied with their experience as jurors, and they estimated that other jurors would be more satisfied with the verdict.

The findings that as the jury becomes more gender and age diverse, jurors were more satisfied with their experience, verdict, and/or jury deliberations are consistent with the hypothesis that diverse juries will lead to greater juror satisfaction with the deliberations and the verdict. My theory was that if jurors come from different backgrounds and enter the jury room

150. *See id.* at 4-7.

151. *See id.* at 3-4.

152. Juries were categorized as "majority-male" or "majority-female" juries if at least eight of the twelve jurors were male or female respectively. If there were not at least eight jurors of one gender, the jury was categorized as having no gender majority ("no majority"). In this study, there were no majority-male juries, six majority-female juries, and twenty no-majority juries.

with different perspectives, they will engage in a more complete deliberation and feel more satisfaction in the end with how they deliberated and with the verdict they reached. In addition, I hypothesized that if the jury consists of a fairly even mix of men and women and young and old, then jurors will feel better about the jury from the outset of deliberations and that this will translate into more positive feelings about the deliberations and the experience. This broad representation may give jurors confidence that they have considered the case from different perspectives and have assessed the evidence from different vantage points. This confidence may lead them to feel greater satisfaction with the experience and verdict.

What is curious is that while age and gender diversity led to greater juror satisfaction, as predicted, racial diversity did not. It is unclear why racial diversity would not have the same effects as age and gender diversity on juror satisfaction. Unfortunately, when the racially non-diverse juries were disaggregated so that largely-white juries and largely-minority juries could be viewed separately, the numbers were too small to detect any significant effects.¹⁵³

In terms of juror satisfaction, there are a number of ways in which additional information would have been useful. It would have been helpful to have inquired further of jurors as to why they were satisfied with their jury experience, deliberations, and verdict. There might have been different reasons for male and female jurors' or young and old jurors' satisfaction.¹⁵⁴ It also would have been useful to have asked jurors to assess their own participation on the jury¹⁵⁵ to see whether there was a connection between their assessment of how actively engaged they thought they were in the deliberations and how satisfied they were with the deliberations, jury experience, and verdict.¹⁵⁶ In this study, women and men did not differ in

153. Of the twenty-six juries, sixteen were racially mixed ("no majority"), four had at least eight white jurors ("largely white"), and six had at least eight minority jurors ("largely minority"). Although the small number of largely-white and largely-minority juries made it difficult to detect any significant effects, it does mean that most cases in this study were heard by racially diverse juries.

154. Strodbeck and Lipinski, who used data from jury experiments done in 1956 in Chicago and 1978 in Boston, to see if there were changes in male and female jurors' styles, such as seating choice, participation rates, and persuasiveness, found that women in the 1956 Chicago study "reported significantly greater satisfaction with their jury service than men," Strodbeck & Lipinski, *supra* note 148 at 26, even though women's participation rate was only two-thirds that of the men. *See id.* at 18, 26.

155. Of course, there is always the problem with self-reporting of how accurate and candid jurors are able and willing to be. However, this is a problem inherent in juror questionnaires, which necessarily depend on self-reporting rather than on an outside evaluator's observations or assessment.

156. For an earlier study finding a connection between participation and satisfaction, see Strodbeck et al., *supra* note 121, at 716 (finding that the level of an individual's satisfaction with his or her jury duty was positively correlated with the level of his or her participation).

terms of their responses to the questions they were asked regarding how satisfied they were with the jury deliberations, experience, and verdict.¹⁵⁷ They could have been pressed further, however, to see if they had different explanations for their satisfaction.

3. Thoroughness

Gender diversity had a significant effect on how thorough the jurors thought their deliberations were; however, racial and age diversity had no effects on thoroughness of the deliberations, as perceived by the jurors. Using gender diversity ratings based either on the research assistants' assessments of the jury's gender composition as a predictor or on jurors' assessments of their jury's gender composition, as gender diversity increased, deliberation thoroughness increased.¹⁵⁸

The finding that as the gender diversity of the jury increased, the thoroughness of its deliberations increased, is consistent with the hypothesis that a diverse jury would produce more thorough deliberations than a non-diverse jury. The theory was that jurors from different backgrounds and life experiences would have different perspectives. In contributing their different perspectives, jurors would provide a greater array of ideas for group consideration, and this would lead to more thorough deliberations. The theory also posited that male and female jurors would enter the deliberations with

157. One study of employees in a state agency and two Fortune 100 companies found that men's and women's satisfaction with their work situation was affected by the gender composition of their workplace, with men feeling less satisfaction as their workplace became more gender diverse (and therefore less homogeneous), whereas women did not experience less satisfaction when their workplace became more gender diverse. See Anne S. Tsui, Terri D. Egan & Charles A. O'Reilly III, *Being Different: Relational Demography and Organizational Attachment*, 37 ADMIN. SCI. Q. 549, 569 (1992). This same study also found a similar effect for race, namely that whites became less satisfied with their workplace as the workplace became more racially diverse. *Id.* The study suggested that there was support for these findings in earlier work, see Amy S. Wharton & James N. Baron, *So Happy Together? The Impact of Gender Segregation on Men at Work*, 52 AM. SOC. REV. 574 (1987) (finding that men in mixed-gender work settings reported significantly lower job satisfaction and self-esteem and more job-related depression than men in either largely male or female settings), but that there were also contrary hypotheses. For example, Rosabeth Moss Kanter observed:

Blocked opportunity, powerlessness, and tokenism tend to generate employees who, among other things, have low aspirations, lack commitment to the organization, become hostile to leaders, behave ineffectively in leadership roles themselves, take few risks, or become socially isolated and personally stressed. Aside from the cost to such individuals—often women, but also men—organizations are wasting a large measure of their human talent.

KANTER, *supra* note 141, at 266. She proposed "number-balancing" as one antidote to the deleterious effects of tokenism because "[o]rganizations with a better balance of people would be more tolerant of the differences among them." *Id.* at 283.

158. Throughout the discussion of thoroughness, I will be referring to jurors' beliefs about their jury's thoroughness. Jurors rated how thorough they thought their deliberations were; thus, there are only jurors' perceptions of their thoroughness rather than any external measure.

different ways of seeing the case, and therefore, would challenge each other's assumptions, and that this too would lead to more thorough deliberations.

This effect of gender diversity on thoroughness of deliberations is consistent with some of the findings of a study on gender and its effects on investment clubs.¹⁵⁹ Brooke Harrington, a sociologist at Brown University, undertook a two-part study of investment clubs. In the first part, over the course of a year, she observed six investment clubs, which included two all-female, two mixed-gender,¹⁶⁰ and two all-male clubs with a high and low performer in each pairing, and noted that the low-performing clubs tended to be based on social ties and to value their social relations, whereas the high-performing clubs tended to be based on business relations and to focus on their financial mission.¹⁶¹ The high-performing groups, formed based on business relations among group members, were better able than the socially-connected clubs to allow for dissenting points of view among members. This led to the production of better investment proposals and strategies. The low-performing groups, based on social relations, stifled dissent to preserve social ties.¹⁶²

From this field work, Harrington developed a survey, which she sent to 3000 investment clubs. She received responses from 1279, producing a response rate of 43%.¹⁶³ Among respondent clubs, 38% (467) were mixed-gender clubs and 62% (757) were same-sex clubs.¹⁶⁴ Among her findings were that clubs committed to the task ("task orientation") tended to promote the expression of diverse views, whereas clubs based on social ties ("social orientation") tended to dampen the expression of such views,¹⁶⁵ and that

159. See Harrington, *supra* note 104, at 1 ("The findings suggest that demographic diversity is most likely to enhance group performance when organizations encourage members to cohere around their shared commitment to a task rather than social attraction."). See also Donna Bozzo, *Taking Stock of Investment Clubs: Teamwork May Bring Many Happy Returns*, CHI. TRIB., Dec. 8, 1999, at 6 ("[A]nother recent study at Brown University indicated that mixed-gender clubs fare better—earning about 2 percent more than same-sex clubs."); Richard Teitelbaum, *Mars and Venus Do Better Together*, N.Y. TIMES, Sept. 5, 1999, at 8 ("A new study suggests that when it comes to investment clubs, those that include members of both sexes outperform those of the single-gender variety.").

160. Harrington uses the phrase "mixed-gender" whereas I use the phrase "gender diverse." In discussing her study, I will use her terminology.

161. See Harrington, *supra* note 104, at 12, 17–18.

162. See *id.* at 17–18.

163. *Id.* at 21.

164. *Id.* at 22.

165. Harrington described task orientation as "the dimension of group cohesion in which groups prioritize shared commitment to the task" and social orientation as "the dimension of group cohesion in which groups prioritize similarity and consensus." *Id.* at 3. These terms were originated by Robert Bales in 1953. See Robert F. Bales, *The Equilibrium Problem in Small Groups*, in WORKING PAPERS IN THE THEORY OF ACTION 111 (Talcott Parsons et al. eds., 1953).

demographic diversity (in that the clubs consisted of both men and women) had a positive impact on task orientation and the expression of diverse views.¹⁶⁶ One explanation Harrington offered was that, in the mixed-gender clubs whose focus was the task at hand, there was a willingness of members to challenge each other's investment proposals, and that such groups benefited from the diversity of their members' views because the members felt free to express those views.¹⁶⁷ In contrast, in clubs in which relations tended to be social, members were less willing to be critical of each other's ideas and more willing to go along with any investment strategy that was proposed. Thus, there was a greater tendency for these clubs, whether mixed-gender or single-sex clubs, to engage in "groupthink,"¹⁶⁸ in which critical analysis was sacrificed for camaraderie.

One can theorize that the gender diverse juries acted like the mixed-gender investment clubs committed to their task: in both, members engaged in thorough discussions in which different ways of looking at the matter were considered and challenged. Men and women on the jury, like men and women in the investment club, might have contributed different points of view, leading to a greater array of ideas available for group consideration, and in the end, to more thorough deliberations. In gender diverse as well as in single-sex juries, however, jurors are committed to the task rather than connected by social ties and so, while this part of Harrington's theory would explain why juries are able to resist groupthink, it would not explain why gender diverse juries are more thorough than single-sex juries. Gender diverse juries, like mixed-gender investment clubs, however, might be more thorough than single-sex juries because they have a variety of viewpoints to consider. Because both of these groups—juries and investment clubs—are structured on business relations rather than friendship, members in both settings would be more likely to voice their different viewpoints.

166. Harrington, *supra* note 104, at 28.

167. In another study, business students were assigned to small groups to perform various tasks typical of a business organization and were told that their organization valued either individualism or collective effort. In groups that were diverse by demographic characteristics (nationality, race, and gender) and were encouraged to work collectively, members described their solutions as more creative than members in groups that were homogeneous and encouraged to work individually. See Chatman et al., *supra* note 133, at 749. According to the authors of this study, diversity led to a greater array of ideas for the group to consider and the emphasis on collective work encouraged members to share their different ideas with each other. See *id.* at 777 ("[C]reativity was enhanced more in heterogeneous organizations when the organization emphasized collectivism . . .").

168. IRVING L. JANIS, *GROUPTHINK* 7, 262, 270–71 (2d ed. 1982) (labelling as "groupthink" the situation in which group members conform to the prevalent view and effectively limit the range of ideas expressed and considered by the group).

Some companies that pursue diversity among their workforce have reported similar benefits. For example, in a cover story in *Fortune*, entitled *The 50 Best Companies For Asians, Blacks, and Hispanics*, and subtitled *Companies That Pursue Diversity Outperform the S&P 500. Coincidence?*, the author noted that “minority-friendly companies tend to be superior performers.”¹⁶⁹ These companies, as a group, often have been among the top performers, with their stock prices increasing at a rate that matches or exceeds the Standard & Poor’s 500.¹⁷⁰ By way of explanation, company executives suggested that “diverse groups make better decisions.”¹⁷¹ According to the CEO of Bell Atlantic, diversity in the workforce leads to “more diversity of thinking. If everybody in the room is the same, you’ll have a lot fewer arguments and a lot worse answers.”¹⁷² Such observations¹⁷³ are consistent with at least the finding of this study that gender diverse juries reported more thorough deliberations. Such deliberations, in turn, should lead juries to be better problem solvers (which is, in effect, what juries are asked to do when they are asked to find the facts and apply the law) and should lead them, like diverse companies, to be “superior performers.”

The companies described above found this effect with a workforce that was diverse by race and gender,¹⁷⁴ whereas this study found this effect only as to juries that were diverse by gender. Although the connection between gender diverse juries and thorough deliberations is consistent with the hypothesis about diversity and thoroughness, the absence of such a connection

169. Geoffrey Colvin, *The 50 Best Companies for Asians, Blacks, and Hispanics*, FORTUNE, July 19, 1999, at 52.

170. *Id.* (“More impressively, these companies as a group have performed terrifically, about matching the S&P 500 over the past year and beating it over the past three and five years.”).

171. *Id.* at 54.

172. *Id.* (quoting Ivan Seidenberg).

173. Although the observations of CEOs in minority-friendly companies were anecdotal, the increases in their companies’ stock prices as a group were not merely anecdotal.

174. Another study found this effect with respect to technology-based companies whose founding members were diverse according to industry experience. See Kathleen M. Eisenhardt & Claudia Bird Schoonhoven, *Organizational Growth: Linking Founding Team, Strategy, Environment, and Growth Among U.S. Semiconductor Ventures, 1978–1988*, 35 ADMIN. SCI. Q. 504 (1990). This study hypothesized:

Teams with individuals who have entered the industry at different times are likely to have different points of view about technology, competitive tactics, and so forth. People with long experience in the industry bring a knowledge of how the industry operates. Those with less experience bring freshness in perspective. These different points of view encourage conflict, which, in turn, counteracts the danger that the team reaches premature closure or has an insufficient airing of alternatives. Combining conflicting views may yield innovative and yet viable ways to compete, giving competitive advantage to the young firm.

Id. at 510. After evaluating semiconductor firms founded between 1978–85 in the U.S. according to certain criteria, the researchers found that “the size of the team, members’ past experience together, and members’ heterogeneity in industry experience are linked with higher growth.” *Id.* at 524.

between age and race diverse juries and thoroughness is surprising. One possible explanation is that the life experiences of men and women are still so different that they lead to a variety of ways of seeing evidence,¹⁷⁵ witnesses,¹⁷⁶ and facts,¹⁷⁷ which in turn produces thoroughness. Although I had expected racial diversity on the jury to produce this same effect, that did not occur.¹⁷⁸ One suggestion, albeit an unlikely one, is that the differences in life experiences based on race were not so varied as to affect thoroughness. A more likely explanation is that while this study did not manage to find that effect, that does not mean that the effect is not there; it simply remains for other studies to uncover such an effect.¹⁷⁹

175. According to one study, which tested the effect of attorneys' gender and presentation style (aggressive or passive) on jurors, "[m]ale jurors found the defendant significantly more guilty when the attorney was aggressive, but female jurors found the defendant just as guilty when the attorney was aggressive as when the attorney was passive." Hahn & Clayton, *supra* note 135, at 548. Thus, "[w]hile men are clearly influenced by the attorney's speech style, women may consider the evidence in the trial more important than the style of the attorney" *Id.* Although this was a mock jury study, which did not replicate the courtroom experience in a number of ways, its finding that women may focus on the evidence while men may give more weight to the attorney's style of speech, suggests one way in which male and female jurors might view the evidence differently.

176. See Marder, *supra* note 92, at 1070-72 & n.120 (describing studies finding that men tend to overestimate eyewitnesses' ability to identify a suspect more than women).

177. See, e.g., Susan Glaspell, *A Jury of Her Peers*, reprinted in *THE BEST SHORT STORIES OF 1917*, at 256-82 (Edward J. O'Brien ed., 1918) (providing a fictional account of how men and women viewed facts differently based on the separate spheres they occupied).

178. In a study testing whether an individual's demographic dissimilarity related to his or her perception of emotional conflict within the group, there were positive relationships with gender dissimilarity and tenure dissimilarity, but not with race dissimilarity. See Lisa Hope Pelled, *Relational Demography and Perceptions of Group Conflict and Performance: A Field Investigation*, 7 INT'L J. CONFLICT MGMT. 230 (1996). The author explained that the gender and tenure dissimilar individual might feel different and therefore "experience the group as more conflict-ridden regardless of the actual level of intragroup conflict" or that "a demographically distinct group member makes *all* (or most) group members more uncomfortable . . . fostering emotional conflict." *Id.* at 241. She suggested that race dissimilarity might not have had the same effect in a group in which there was one Asian, one Hispanic, one African American and one Caucasian, for example, because in such a group "'being different'" was a common condition among the group members. *Id.* This explanation might have application to this jury study as well.

179. One jury study, for example, found a connection between jurors' race and jurors' liability findings and damage awards in that African Americans tended to be more pro-plaintiff in their liability determinations and to award plaintiffs higher damages than did Caucasians and Hispanics. See Chris F. Denove & Edward J. Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 AM. J. TRIAL ADVOC. 285 (1995). Although the authors cautioned that litigators should not rely on one demographic characteristic in searching for favorable jurors because that characteristic could be favorable in one fact situation and not in another, they did find race to be "the single most important factor in predicting juror orientation." *Id.* at 293. They found this to be the case in terms of liability findings, *see id.*, and damage awards. *See id.* at 313.

In an early mock jury study involving a rape case in which the race of the defendant was either white or black and the racial composition of the jury was varied (one jury was all-black; one jury was three-fourths black and one-fourth white; one jury was one-half black and one-half white; one jury was three-fourths white and one-fourth black; one jury was all-white), researchers did find a racial effect:

4. Unanimity

Racial, gender, and age diversity had no effects on whether the jury was unable, or thought it would be unable, to reach a verdict. This finding is contrary to the hypothesis that diverse juries may have more difficulty reaching a unanimous decision because their members approach the case from very different perspectives.¹⁸⁰ Only two out of twenty-six juries (8%) were unable to reach a unanimous verdict; this small sample size of hung juries may explain why no effects were observed.

5. Effect of Case Complexity

One effect that was unanticipated, but quite strong, involved the racial diversity of the jury and the attorney's complexity rating. The complexity rating is the rating that attorneys gave their case based on how complicated they thought it was.¹⁸¹ In cases that involved white defendants (of which there were only four),¹⁸² the less racially diverse the jury, the more complex the attorneys rated the case. On the one hand, this finding can be questioned because the number of cases involved is quite small; on the other hand, the effect appears repeatedly and strongly in the analysis. At the very least, this finding is provocative. Unfortunately, there were too few juries from which to draw any conclusions. One question this connection between case complexity and less racially diverse juries raises is whether attorneys exercised peremptory challenges in a way that took race into account in complex cases. Attorneys may have been less worried about *Batson* challenges when the defendant is white even though *Batson* challenges can still be made in such cases.¹⁸³ The attorney's race might also be relevant, and future investigations should take this into account as well. Further study is needed to see whether the connection between less racially diverse juries and

"[W]hite jurors who found the Black defendant 'guilty' on their first ballot tended to hold to this decision and not be influenced by group discussion [and] Blacks as a whole were much more likely than whites to reach a 'not guilty' verdict, regardless of the race of the defendant." J.L. Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 LAW & PSYCHOL. REV. 103, 109 (1979).

180. For a study finding a statistical relationship between the racial diversity of the jury and the likelihood of reaching a verdict, with greater jury diversity leading to more hung juries when the defendant was African-American, see Kenneth S. Klein & Theodore D. Klastorin, *Do Diverse Juries Aid or Impede Justice?* 1999 WIS. L. REV. 553, 564. This same study, however, found no statistical relationship between gender diverse juries and the likelihood that a jury would reach a verdict. *See id.*

181. *See infra* Appendix C, question 7.

182. *See supra* text accompanying notes 123-24.

183. *See Powers v. Ohio*, 499 U.S. 400, 402 (1991) (holding that a white defendant can challenge the prosecutor's use of peremptory challenges to exclude prospective jurors who are African American).

case complexity occurs in a larger number of cases than the current study provides and whether it remains limited to cases with white defendants.

F. SUMMARY OF FINDINGS

Although this study found that diversity had effects on deliberations, not all types of diversity had the expected effects. Quite surprisingly, gender diversity had the strongest effects on jury deliberations. One finding was that as the jury became more gender diverse, the tone of the deliberations became less hostile, more harmonious, and jurors became more supportive of each other. A second finding was that as gender and age diversity increased, the jurors were more satisfied with their deliberations, their jury experience, and their verdict. A third finding was that as gender diversity increased, the jurors perceived the deliberations to be more thorough. A fourth finding, that diversity did not affect whether jurors thought they would be unable to reach a unanimous verdict, is inconclusive because of the small sample size of juries that ended up as hung juries.

V. LESSONS TO BE LEARNED

One of the lessons of this study is that while some types of diversity had the effects predicted, other types did not. Gender diversity had a strong effect, but not always in ways that were anticipated. The findings of this study are consistent with Justice Douglas's intuition: "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables."¹⁸⁴

This study set out to explore that which, in the Justice's words, "is among the imponderables." Although no single study can establish with certainty what differences diversity might make in the jury room, this study began to explore the role that differences, such as those based on race, gender and age, might play in the deliberations.

A. CULTURAL DIVERSITY VS. REASONABLE PERSON VIEWS

The findings of this study, especially the effects that gender diversity has on deliberations, suggest that the cultural diversity view has significant bearing on the deliberations. The cultural diversity view recognizes that people's backgrounds, life experiences, and perspectives shape the way they

184. *Ballard v. United States*, 329 U.S. 187, 193-94 (1946).

perceive cases. This was Justice Marshall's and Justice Douglas's view in their discussions of the venire in *Peters*¹⁸⁵ and *Ballard*¹⁸⁶ respectively, and why they thought no group should be systematically excluded. The danger of such exclusion was that valuable perspectives and experiences would be irreparably lost to the petit jury for consideration during deliberations.

The finding of this study that jurors on gender and age diverse juries are more satisfied with their deliberations, verdict, and jury experience, also is consistent with the cultural diversity view that jurors on diverse juries will approach the case from different vantage points and that the jury, consequently will consider the case from a variety of perspectives, leaving the jurors satisfied with how they deliberated, the verdict they reached, and their overall jury experience. Another finding, that jurors on gender diverse juries perceive their deliberations to be more thorough, is consistent with the cultural diversity view that jurors on diverse juries bring different perspectives to bear on the case and are willing to voice them and that this leads to more considered, thorough deliberations.

The finding that jurors on gender diverse juries perceive their deliberations to be harmonious, is consistent with the cultural diversity view that diversity may affect the way in which jurors deliberate, although the finding went in the opposite direction than anticipated. The hypothesis was that gender diverse juries, consisting of jurors who have different gendered perspectives and life experiences, might produce disagreements, which would lead to a quarrelsome tone; however, this proved not to be the case. Instead, gender diversity in juries led to deliberations that were perceived as harmonious by the jurors. In this regard, gender dynamics apparently played a role in how jurors treated each other during deliberations, which affected the tone in a positive way.

Thus, the several findings of this study can be seen as consistent with the cultural diversity view both in terms of broadening the range of perspectives available to the jury and in improving the effectiveness and experience of the deliberation process.

This study, however, also provides some support for the reasonable person view¹⁸⁷ insofar as there were other measures of diversity, such as race and sometimes age, which did not have a measurable effect on deliberations,

185. *Peters v. Kiff*, 407 U.S. 493 (1972).

186. *Ballard*, 329 U.S. at 193-94.

187. According to this view, the gender, race, or age of the jurors does not affect how they see the case or the way they deliberate or perceive the deliberations. See *supra* Part II.A (describing the reasonable person view).

or at least, this study did not manage to capture these effects. It may be that future studies will capture these effects, or it may be that there are no effects, the latter of which would support the reasonable person view.

B. DIVERSITY AND JURY STRUCTURE

The effects of some, but not other, types of diversity on deliberations also suggest that the jury should be structured in a way that acknowledges that diversity may make a difference, but in ways that are not always knowable or predictable. Courts should encourage diverse juries because diversity does affect the deliberations (or at least jurors' perceptions of the deliberations) in positive ways, but should not mandate diversity because its effects are subtle and cannot be easily predicted. Consistent with this approach, the venire should be widely drawn from as broad a swath of the community as possible,¹⁸⁸ but it should not be manipulated to ensure proportional representation of minorities.¹⁸⁹ The lack of effect that race had on deliberations in this study suggests that race is not the only characteristic that should be considered about jurors, and certainly race should not be considered to the exclusion of all other characteristics. The safer course is to encourage a diverse venire, valuing many different background characteristics, rather than focusing on race alone.

188. One way to create venires that are drawn broadly from the community is to summon prospective jurors from multiple lists, rather than from only the voter registration list that has been relied on at least in the past. The theory is that by drawing prospective jurors from an array of lists, such as tax rolls, drivers' licenses, utility bills, and unemployment compensation, outreach will be much greater than if only the voter registration list is used. See, e.g., Dennis Bilecki, *Program Improves Minority Group Representation on Federal Juries*, 77 JUDICATURE 221 (1994) (describing a pilot program in northern California that used lists of licensed drivers and California identification card holders in addition to voter registration lists to improve minority representation on the venire); David Kairys, Joseph B. Kadane & John P. Lehoczy, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776 (1977) (recommending the use of multiple source lists for the venire, rather than simply relying on voter registration lists); G. Thomas Munsterman & Paula L. Hannaford, *Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years*, JUDGES' J., Fall 1997, at 6 ("A widely used technique was to supplement voter registration lists with lists of licensed drivers. More recently, states have added unemployment compensation . . . recipients, welfare recipients, and state and local income tax filers as supplemental source lists.") (citation omitted).

189. See, e.g., David Margolick, *Question for the '90s: Just What Is a Jury of One's Peers?*, CHI. DAILY L. BULL., Feb. 18, 1992, at 2 (describing Georgia's practice in death penalty cases of requiring venires that resemble the racial and gender composition of the counties from which the jurors are drawn). The Eastern District of Michigan also attempted this, see Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273, 275 (1996) ("The court . . . randomly strikes from the list of persons qualified the specific number of 'white and other' potential jurors needed to obtain a qualified list with racial demographics identical to that of the population."), but the Sixth Circuit held that it violated 28 U.S.C. § 1862 and the equal protection component of the Fifth Amendment. See *United States v. Ovalle*, 136 F.3d 1092, 1109 (6th Cir. 1998).

The findings of this study most strongly suggest that courts should strive for petit juries that contain an equal or almost equal number of men and women. With that mix, petit juries would more likely have harmonious deliberations that were thorough and that left jurors feeling satisfied with the way they had performed their job. Although this study did not examine the effects of gender diverse juries on the verdicts that were reached¹⁹⁰ (and some would argue that unless there is an effect on the verdicts there is no reason to alter current practices), it seems reasonable to assume that more carefully reached, well-considered deliberations will lead to more verdicts based on the evidence, and consequently, to greater acceptance of verdicts by the community.

If gender diverse juries conduct better deliberations, then why not require gender diverse juries? The main reason to eschew a system of quotas is that it would be unworkable.¹⁹¹ People have many different characteristics that could be taken into account, such as race, ethnicity, gender, religion, age, income, education, and sexual orientation, and it does not seem wise to create a hierarchy of characteristics, valuing one over another. Furthermore, it is not possible with a jury of only twelve to have all characteristics of a community represented on a petit jury. For courts to decide which characteristics should be represented would suggest jury manipulation and for courts to attempt to categorize individuals would be offensive.¹⁹²

Current jury practices that hinder the formation of diverse petit juries should be eliminated or at least curtailed. The voir dire, whether judge- or attorney-conducted, should go beyond the perfunctory¹⁹³ and allow for questions that would elicit individual views or attitudes, so that attorneys can focus on the individual jurors rather than on inaccurate stereotypes when they exercise peremptory challenges.¹⁹⁴ Similarly, peremptories should be

190. Such an inquiry would have been difficult in this study because most of the verdicts were convictions in whole or in part (20) with few acquittals (4) and hung juries (2). See *supra* text accompanying note 123.

191. See Marder, *supra* note 92, at 1104-07 & nn.270-80.

192. See *id.* at 1104-05 & nn.270-75.

193. This was Barbara Babcock's position in an early article in which she urged that voir dire be extended so that poor litigants have access to information about prospective jurors and can exercise their peremptories based on that information. See Babcock, *supra* note 78, at 546.

194. See, e.g., David L. Hamilton, Steven J. Sherman & Catherine M. Ruvalo, *Stereotype-Based Expectancies: Effects on Information Processing and Social Behavior*, 46 J. SOC. ISSUES 35, 43-44 (1990) ("Stereotypic expectancies are influential to the extent that information-processing and judgments are based on the group membership information rather than on the individuating information. The implication, then, is that these effects can be reduced if greater importance is attached to the information pertaining specifically to the target person."). But see Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCHOL. 871, 879 (1987) ("[I]t is clearly premature to claim that social stereotypes become

eliminated¹⁹⁵ or at least reduced in number¹⁹⁶ so that attorneys will no longer be able to skew the petit jury's composition by dismissing all or most jurors belonging to one group or another. Although attorneys, in asking questions during voir dire and in exercising peremptories afterward, may believe that they are helping their clients by striking prospective jurors according to certain group-based assumptions, the findings of this study suggest that their assumptions, particularly about gender, are misguided. If attorneys attempt to eliminate all of one gender or another on a petit jury¹⁹⁷ because they believe one gender will be more sympathetic to their client, they fail to realize that they could harm the thoroughness and tone of the deliberations. Less thorough deliberations could affect the way jurors perform their decisionmaking task, and even the outcome they reach, which could be adverse to their client. As any student of Civil Procedure knows, process matters; it contributes both to the perceived fairness of the justice system and to the accuracy of the decision rendered, and this is no less true of juries than of courts.

Courts have long been reticent about intruding in jury deliberations. Although there has been a recent judicial inroad into deliberations, with the Second Circuit requiring trial judges to play a more intrusive role when they have been alerted to potential jury nullification by the jury,¹⁹⁸ in general, judges leave jurors to deliberate on their own, without interference by the courts. Given the effects that some types of diversity can have on deliberations, this is an area where courts should give some guidance. Courts

impotent in the presence of individuating information. Rather, it appears that the nature of the judgment task must be considered in understanding the impact that stereotypes will exert.”).

195. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 107–08 (1986) (Marshall, J., concurring); *Minetos v. City Univ.*, 925 F. Supp. 177, 185 (S.D.N.Y. 1996); JEFFREY ABRAMSON, *WE, THE JURY* 137–39 (1994); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 810, 850 (1997); Marder, *supra* note 92, at 1044–47, 1052–86, 1095–99.

196. See, e.g., Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981, 1011 & n.144 (1996) (citing scholars and commentators who have made this proposal).

197. Such use of peremptories would be contrary to *J.E.B.* and in violation of the Equal Protection Clause. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994). Since *J.E.B.*, the Court has retrenched slightly in *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam) (allowing reasons for the exercise of the peremptory challenge to be unrelated to the facts of the case as long as they are nondiscriminatory). Even if *Elem* had not given attorneys more leeway for avoiding *Batson* and its progeny, it was clear that many attorneys had managed to do so before *Elem*. See *supra* note 20 (noting sources that indicated that *Batson* was failing, in practice, to eliminate discriminatory peremptories).

198. See *United States v. Thomas*, 116 F.3d 606, 608–09 (2d Cir. 1997) (holding that the trial judge, after being notified by the jury, should interview any juror urging nullification to determine if that was the juror's intent, and if so, to remove that juror from the jury, even if the jury was already in the midst of its deliberations). In my view, this is an unfortunate development. See Marder, *supra* note 5, at 947–52 (describing the ways in which the Second Circuit erred in *Thomas*).

should help jurors to be aware of diversity and its effects in the jury room, just as teachers do in schools and employers do in the workplace. Guidance could be given using any number of vehicles, from the orientation film to a brochure¹⁹⁹ to an instruction by the judge. In an instruction, judges could remind jurors of the need to listen to each other, to deliberate in a respectful manner, to try to understand each other's views no matter how different their initial approaches to the case might be, and also to challenge each other's views if they see the case differently.

Finally, jurors should be viewed as a valuable source of information about diversity and deliberations. For too long, courts have viewed jurors as passive²⁰⁰ and have rarely sought their opinions. Yet, jurors are in the best position to know what goes on in deliberations and to have points of view about how deliberations can be improved. Questionnaires are a tool that should be used by every court in the country to solicit jurors' opinions. Courts would gain valuable information about deliberations, and jurors would feel that courts value their opinions and experiences.²⁰¹ Many judges would undoubtedly resist asking jurors about their deliberations and jury experience; however, some judges already give jurors a questionnaire at the close of their jury service and have followed this practice for decades with no ill consequences.²⁰² Other judges are innovators with respect to juries²⁰³ and

199. See, e.g., AM. JUDICATURE SOC'Y, BEHIND CLOSED DOORS: A GUIDE FOR JURY DELIBERATIONS (1999) (providing general information about jury deliberations).

200. This view of jurors explains why some courts are still reluctant to allow jurors to take notes and to submit written questions, even though the benefits of both are apparent to any educator. Many interested in jury reform have recommended these changes. See, e.g., ABA/BROOKINGS INST., CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 18–19 (1992) (recommending notetaking); *id.* at 20 (recommending the submission of written questions to the judge); ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12 (1994) (including a list of recommendations and a proposed bill of rights); KASSIN & WRIGHTSMAN, *supra* note 94, at 128–29 (considering why there is so much resistance to allowing jurors to take notes); B. Michael Dann, “Learning Lessons” and “Speaking Rights”: Creating Educated and Democratic Juries, 68 INDIANA L.J. 1229 (1993) (describing two models of jurors, active and passive, and arguing that current practices encourage passive jurors and proposing reforms that would foster active jurors); B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1994) (describing some of Arizona's reforms to its jury system, including note taking and juror questions); Harold J. Bursztajn, Linda Stout Saunders & Archie Brodsky, *Keeping a Jury Involved During a Long Trial*, CRIM. JUST., Winter 1997, at 8 (recommending that jurors be permitted to ask questions because it keeps them actively engaged in the trial).

201. Another study of actual jurors, which used a questionnaire and interviews, found that jurors “expressed a strong need for closure to their jury experience” and “some of the jurors acknowledged that participating in the study brought about such closure.” Bridgeman & Marlowe, *supra* note 120, at 97. Admittedly, those of us who conduct research based on jurors' views are likely to believe that not only is this a useful method for gaining insight into the jury experience, but also that we might contribute to the jury experience in some positive way.

202. For example, Judges Schwartz and Chotiner in L.A. Municipal Court have distributed questionnaires to jurors for years.

would probably be willing to include a questionnaire as part of their efforts to improve jury service for future jurors.²⁰⁴ Once questionnaires become more widely used, and it becomes clear that they can be crafted carefully so that they do not endanger verdicts, more judges might be willing to collect information through anonymous juror questionnaires.

C. DIVERSITY AND THE BROAD ROLES OF THE JURY

Structuring juries in a manner consistent with the view that diversity should be encouraged but not mandated would help juries perform their broad roles more effectively. I believe the jury does far more than find facts and apply law. The jury interprets and moves the law; it provides a check on the other branches of government, including judges; it inspires community acceptance of verdicts; it allows jurors to participate in self-governance; and it teaches jurors important lessons about democracy and the meaning of citizenship.²⁰⁵ All of these roles can best be performed when the jury is drawn broadly from citizens from many different walks of life. In my view, the lessons that the jury, as a “free school,”²⁰⁶ teaches jurors pertain not only to what they learn from rendering a verdict in the case (although that is certainly important), but also extend to the lessons that jurors learn from deliberating with each other. This study suggests that jurors will engage in more thorough and more collaborative deliberations and take away more positive lessons about the experience and the verdict when juries are diverse, at least by gender and age.

VI. CONCLUSION

Through juror questionnaires, this study has examined jury deliberations from the jurors’ perspectives. The central findings of this study are that a gender diverse jury makes a difference to the deliberations, in particular to the

203. For example, Judge Dann in Arizona and Judge Mize in Washington, D.C. have implemented jury reforms in their own courtrooms and have advocated for and written about jury reform on a state (or district) level. *See, e.g.*, Dann, *supra* note 200, at 1247–79 (recommending changes in jury practice that would lead to greater juror participation); Dann & Logan, *supra* note 200, at 280 (describing Arizona’s jury reforms); Mize, *supra* note 82, at 10 (describing voir dire reforms that he implemented in his courtroom).

204. Judge Dann described the need for judges to seek feedback from jurors during the trial. *See* Dann, *supra* note 200, at 1243. Although he did not mention a questionnaire after the trial, it would be yet another means of enabling jurors to be “active” and of providing courts and judges with feedback as to their experiences. *See id.*

205. *See supra* Part I. *See also* Marder, *supra* note 5, at 907–26 (describing more fully the broad roles of the modern jury).

206. *See* DE TOCQUEVILLE, *supra* note 9, at 275.

harmonious tone of the deliberations and the extent to which jurors believe that they were thorough in their deliberations and feel satisfied with their deliberations, verdict, and jury experience. Another finding was that, as the jury becomes more age diverse, jurors become more satisfied with their deliberations and believe that other jurors are more satisfied with the verdict than in less age diverse juries. All of these findings suggest that the cultural diversity view of the jury comes closer to describing what goes on in deliberations than the reasonable person view, at least insofar as gender and age are concerned. These findings also suggest that courts should do everything in their power to encourage diverse juries, short of actually mandating them, because diversity does affect deliberations in positive, though not always in anticipated, ways. This study, however, is only a first step in exploring the connection between diverse juries and jury deliberations, and future studies are needed to establish the connections more fully.²⁰⁷

207. Future studies could expand upon this study in a variety of ways: they could focus on other geographical areas to study the effects of diversity on deliberations and compare them to the findings of this study, which was based on Los Angeles juries; they could take one particular finding, such as juror satisfaction, and explore it more fully, particularly in connection to participation; and they could focus on judicial resistance to the vital tool of jury questionnaires and examine why this is so and how it might be overcome.

APPENDIX A

FACTOR ANALYSIS

A factor analysis was conducted to ensure that each item (two for hostility, four for satisfaction, and four for thoroughness) was measuring the constructs it was intended to measure.

A principle components factor analysis using a varimax rotation method was run on the ten interval items intended to measure hostility, satisfaction, and thoroughness. The factor analysis produced a three-factor solution, as expected, but two items were not loading on the intended factor. These items asked jurors to rate how satisfied they thought other jurors were with the verdict and how thorough their deliberations were due to the influence of someone other than the foreperson. Jurors seemed to find it difficult to assess the opinions and effects of other jurors.

The factor analysis was then run without these two items. The principle factor analysis using varimax rotation method produced a three-factor solution, but this time the items loaded together on the intended factors. The three remaining satisfaction items loaded highly on the same factor; the three remaining thoroughness items loaded highly together on the same factor; and the two hostility items loaded highly on the same factor. There was high differentiation between the items' loadings on the three factors, and each factor had large Eigen values. Table 1 shows the factor loadings and Eigen values:

TABLE 1: Factor Analysis Solution

	<i>Factor 1</i>	<i>Factor 2</i>	<i>Factor 3</i>
	Satisfaction	Thoroughness	Hostility
Eigen value:	38.8	15.5	12.7
Satisfaction w/verdict	.85	-.01	.24
Satisfaction w/experience	.82	.23	.00
Satisfaction w/deliberations	.75	.18	.32
Considered different views	.02	.79	.06
Thoroughness of deliberations	.06	.67	.30
Foreperson caused thoroughness	.31	.67	-.03

Treated each other well	.08	.14	.87
Tone of deliberations	.35	.08	.73

SCALE RELIABILITY ANALYSES

After determining that the items measured the appropriate constructs, the internal scale reliability of the items measuring each construct was assessed. The scale reliability analyses supported the removal of the two items that the factor analysis had indicated.

The Cronbach's alpha for the scale including all four satisfaction items was .6444; however, the alpha increased to .7896 after the removal of the item measuring "other jurors' satisfaction." The Cronbach's alpha for all four thoroughness items was .3855. After removing "other's contribution to thoroughness," the alpha increased to .5544. The alpha of the three remaining satisfaction items supported the combination of the items into one index of satisfaction; this was done by taking the average of the three satisfaction items for each juror.

The low alpha for the thoroughness items suggested that the remaining three items should not be combined into an index measure of thoroughness because they were not correlating very highly with each other, indicating that they were not all clearly measuring the same construct. The thoroughness items were not combined; instead, they were analyzed separately. The two items measuring hostility were highly positively correlated with each other ($r=.42$, $p<.01$); therefore, these two items were combined into one index measure of hostility by averaging the two hostility items for each juror.

DIVERSITY RATINGS

To create the measure of diversity on the various demographic dimensions for each jury, the observed proportion of jurors in each possible demographic category was subtracted from the expected proportion of jurors in each possible demographic category; the difference scores were then squared, summed, and divided by the number of possible demographic categories. The process can be represented as follows: $\sum [O_x - E_x]^2 / k$, where x is a demographic dimension and k is the number of possible categories in that demographic dimension. This produced an average difference from the expected proportion value for each diversity dimension. The expected proportion that was used assumed an equal number of jurors in each possible demographic category.

For example, to calculate the gender diversity of a jury, we had to determine how many male and female jurors served on a particular jury, then calculate the proportions of men and women on that jury. We then subtracted the proportion of men from .5 (assuming an equal number of men and women, the expected proportion of men is .5, as is the expected proportion of women), squared the difference, subtracted the proportion of women from .5, squared the difference, summed the differences, and divided by 2, the number of possible gender categories (male and female). For instance, if a jury had eight men (a proportion of 8/12 or .67) and four women (a proportion of 4/12 or .33), the calculations would be as follows:

$$[(.5 - .67)^2 + (.5 - .33)^2]/2$$

When diversity is calculated in this manner, a smaller value indicates greater diversity, as the value indicates the average amount of deviance from the perfect diversity, and a larger value indicates greater deviance from perfect diversity. The values for gender diversity, for example, could range from 0 (equal number of jurors in both categories—perfect diversity) to .1250 (12 jurors in one gender category—no diversity). The values for race and age diversity could range from 0 (equal numbers of jurors in each of six possible categories—perfect diversity) to .1389 (12 jurors in one race or age category—no diversity). Diversity based on gender, race, and age was calculated in this way for each jury.

The expected proportion assumed perfect diversity—the same number of people in each category—regardless of the community proportions. We used these proportions as our expected proportions rather than the community proportions because we were interested in assessing how diversity influences deliberation processes, not how these juries differed from the community.

REGRESSION ANALYSES

To test the effects of diversity, we regressed the dependent measures of deliberation processes on the calculated ratings of gender and race diversity. The calculated ratings of gender and race diversity came from the research assistants' case information forms and from the jurors' questionnaires. The research assistants' case information forms asked the research assistants to report the race and gender composition of the jury, and the jurors' questionnaires asked the jurors to report the race, gender, and age composition of the jury. Therefore, there are two measures of race diversity and two measures of gender diversity (one of each diversity rating from the research assistants and one from the jurors) and one age diversity

rating from the jurors. We averaged the research assistants' diversity ratings to form an average of a jury's race and gender diversity, and we averaged the jurors' diversity ratings to form an average of a jury's race, gender, and age diversity.

The data from the jurors were aggregated by taking the average of the responses of each jury member. We then had an average score on each dependent measure for every jury. We regressed each dependent measure on the racial diversity score, the gender diversity score, and the age diversity score.

The mean of the attorneys' ratings of their case's complexity was included as a covariate because we thought case complexity could influence the thoroughness and hostility of the deliberations and the jurors' satisfaction with their deliberations.

HOSTILITY

Although, as shown in Table 2, there were no effects of race or age diversity on the hostility of the deliberations, there were significant effects of gender diversity on ratings of hostility.²⁰⁸ When using gender diversity ratings based on the research assistants' jury composition reports as a predictor, as the jury became more gender diverse, the deliberations became less hostile ($t = 3.78$, $p < .01$), the tone of the deliberations became more harmonious ($t = 2.89$, $p < .05$), and jurors treated each other more supportively ($t = 3.97$, $p < .05$).²⁰⁹ When using gender diversity ratings based on jurors' jury composition reports as a predictor, as the jury became more gender diverse, deliberations became less hostile ($t = 3.48$, $p < .01$), jurors treated each other more supportively ($t = 4.44$, $p < .01$), and the tone of the deliberations was marginally more harmonious ($t = 2.08$, $p = .05$). There were significant effects of the research assistants' average diversity rating on hostility, but as there were no effects of racial or age diversity alone, the effects of the average diversity rating are likely due to the strong effects of gender diversity.

208. See *infra* Appendix A, tbl.2.

209. Hostility scores were coded so that higher scores indicate more hostility and lower scores indicate less hostility (and recall that lower diversity scores indicate greater diversity).

TABLE 2: Effects of Diversity on Deliberation Hostility

Predictor Variable	Model F	R ²	β	Predictor t
RACIAL DIVERSITY (RA's) (N=15)				
Tone of deliberations	$F(2,12) < 1$, <u>ns</u>	.08	.162	$t = 0.22$, <u>ns</u>
Treated each other	$F(2,12) < 1$, <u>ns</u>	.04	.060	$t = 0.21$, <u>ns</u>
Index hostility	$F(2,12) < 1$, <u>ns</u>	.06	.068	$t = 0.23$, <u>ns</u>
RACIAL DIVERSITY (Jurors) (N=20)				
Tone of deliberations	$F(2, 17) < 1$, <u>ns</u>	.06	-.097	$t = -0.41$, <u>ns</u>
Treated each other	$F(2,17) = 2.04$, <u>ns</u>	.19	-.152	$t = -0.69$, <u>ns</u>
Index hostility	$F(2,17) = 1.24$, <u>ns</u>	.13	-.130	$t = -0.57$, <u>ns</u>
GENDER DIVERSITY (RAs) (N=17)				
Tone of deliberations	$F(2,14) = 4.69$, $p < .05$	.40	.616	$t = 2.89$, $p < .05$
Treated each other	$F(2,14) = 9.15$, $p < .01$	.57	.719	$t = 3.97$, $p < .01$
Index hostility	$F(2,14) = 8.09$, $p < .01$	.54	.708	$t = 3.78$, $p < .01$
GENDER DIVERSITY (Jurors) (N=21)				
Tone of deliberations	$F(2,18) = 3.04$, $p = .07$	.25	.433	$t = 2.08$, $p = .05$
Treated each other	$F(2,18) = 14.37$, $p < .01$	.62	.664	$t = 4.44$, $p < .01$
Index hostility	$F(2,18) = 8.40$, $p < .01$	.48	.603	$t = 3.48$, $p < .01$
AGE DIVERSITY (Jurors) (N=21)				
Tone of deliberations	$F(2,18) < 1$, <u>ns</u>	.07	.019	$t = 0.08$, <u>ns</u>
Treated each other	$F(2,18) = 2.40$, <u>ns</u>	.21	.138	$t = 0.64$, <u>ns</u>
Index hostility	$F(2,18) = 1.48$, <u>ns</u>	.14	.083	$t = 0.37$, <u>ns</u>

AVERAGE DIVERSITY

(RA's) (N=15)

Tone of deliberations	$F(2,12)=10.32, p<.05$	.63	.773	$t=4.33, p<.01$
Treated each other	$F(2,12)=4.64, p<.05$	.44	.645	$t=2.92, p<.05$
Index hostility	$F(2,12)=6.69, p<.05$	.53	.705	$t=3.48, p<.01$

AVERAGE DIVERSITY

(Jurors) (N=20)

Tone of deliberations	$F(2,17)=1.07, ns$	.11	.243	$t=1.06, ns$
Treated each other	$F(2,17)=4.05, p<.05$	.32	.390	$t=1.96, p=.05$
Index hostility	$F(2,17)=2.64, ns$	.24	.356	$t=1.68, ns$

SATISFACTION

Although there were no effects of race diversity on juror satisfaction, there were significant effects of jury gender and age diversity on jurors' satisfaction. When using gender diversity ratings based on the research assistants' jury composition reports as a predictor, as the jury became more gender diverse, jurors were more satisfied overall ($t=-2.45, p<.05$), more satisfied with their deliberations ($t=-2.21, p<.05$), and more satisfied with their verdict ($t=-2.31, p<.05$).²¹⁰ When using gender diversity ratings based on jurors' jury composition reports as a predictor, the same effects were found. When using age diversity ratings based on jurors' jury composition reports as a predictor, as the jury became more age diverse, jurors became more satisfied with their experience as a juror ($t=-2.92, p<.01$), and they estimated that the other jurors would be more satisfied with their verdict ($t=-2.93, p<.01$). There were significant effects of both average diversity ratings on satisfaction, and they were similar to those found with gender and age diversity. Table 3 reports the relevant statistics:

210. Satisfaction ratings were coded so that higher scores indicated higher satisfaction and lower scores indicated lower satisfaction (and recall that lower diversity scores indicate greater diversity).

TABLE 3: Effects of Diversity on Juror Satisfaction

Predictor Variable	Model F	R ²	B	Predictor t
RACIAL DIVERSITY (RA's) (N=15)				
Delib. satisfaction	F (2,12)<1, <u>ns</u>	.13	.101	t=0.36, <u>ns</u>
Exper. satisfaction	F (2,12)<1, <u>ns</u>	.10	.334	t=1.16, <u>ns</u>
Verdict satisfaction	F (2,12)=1.03, <u>ns</u>	.15	.306	t=1.09, <u>ns</u>
Others' satisfaction	F (2,12)<1, <u>ns</u>	.05	.193	t=0.65, <u>ns</u>
Index satisfaction ²¹¹	F (2,12)<1, <u>ns</u>	.12	.283	t=0.99, <u>ns</u>
RACIAL DIVERSITY (Jurors) (N=20)				
Delib. satisfaction	F (2,17)<1, <u>ns</u>	.03	.162	t=0.68, <u>ns</u>
Exper. satisfaction	F (2,17)<1, <u>ns</u>	.09	-.247	t=-1.07, <u>ns</u>
Verdict satisfaction	F (2,17)<1, <u>ns</u>	.05	.226	t=0.96, <u>ns</u>
Others' satisfaction	F (2,17)=4.88, p<.05	.36	-.070	t=-0.36, <u>ns</u> ²¹²
Index satisfaction	F (2,17)<1, <u>ns</u>	.02	.066	t=0.27, <u>ns</u>
GENDER DIVERSITY (RA's) (N=17)				
Delib. satisfaction	F (2,14)=3.21, p=.07	.31	-.503	t=-2.21, p<.05
Exper. satisfaction	F (2,14)=2.22, <u>ns</u>	.24	-.499	t=-2.08, p=.06
Verdict satisfaction	F (2,14)=2.95, p<.09	.30	-.553	t=-2.31, p<.05
Others' satisfaction	F (2,14)<1, <u>ns</u>	.07	.210	t=0.79, <u>ns</u>
Index satisfaction	F (2,14)=3.18, p=.07	.31	-.559	t=-2.45, p<.05
GENDER DIVERSITY (Jurors) (N=21)				
Delib. satisfaction	F (2,18)=2.81, p<.09	.24	-.485	t=-2.31, p<.05

211. The index consists of the first three measures of satisfaction.

212. The significant model statistic is driven by a significant covariate, case complexity, not a significant predictor variable, race diversity.

Exper. satisfaction	$F(2,18)=1.13, \text{ns}$	.11	-.321	$t=-1.42, \text{ns}$
Verdict satisfaction	$F(2,18)=3.95, p<.05$	.31	-.557	$t=-2.77, p<.05$
Others' satisfaction	$F(2,18)=1.70, \text{ns}$	.16	.069	$t=0.31, \text{ns}$
Index satisfaction	$F(2,18)=3.60, p<.05$	.29	-.532	$t=-2.62, p<.05$
AGE DIVERSITY (Jurors) (N=21)				
Delib. satisfaction	$F(2,18)<1, \text{ns}$	.11	-.003	$t=-0.01, \text{ns}$
Exper. satisfaction	$F(2,18)=4.42, p<.05$	.33	-.577	$t=-2.92, p<.01$
Verdict satisfaction	$F(2,18)=1.03, \text{ns}$	.01	-.044	$t=-0.18, \text{ns}$
Others' satisfaction	$F(2,18)=6.71, p<.01$	.43	-.535	$t=-2.93, p<.01$
Index satisfaction	$F(2,18)<1, \text{ns}$	.07	-.236	$t=-1.01, \text{ns}$
AVERAGE DIVERSITY (RA's) (N=15)				
Delib. satisfaction	$F(2,12)=3.54, p=.06$	.37	-.509	$t=-2.18, p=.05$
Exper. satisfaction	$F(2,12)<1, \text{ns}$	.08	-.291	$t=-1.03, \text{ns}$
Verdict satisfaction	$F(2,12)=1.65, \text{ns}$	.22	-.401	$t=-1.54, \text{ns}$
Others' satisfaction	$F(2,12)=1.03, \text{ns}$	.15	.368	$t=1.35, \text{ns}$
Index satisfaction	$F(2,12)=1.74, \text{ns}$	.23	-.432	$t=-1.66, \text{ns}$
AVERAGE DIVERSITY (Jurors) (N=20)				
Delib. satisfaction	$F(2,12)<1, \text{ns}$	.06	-.226	$t=-0.96, \text{ns}$
Exper. satisfaction	$F(2,12)=5.03, p<.05$	.37	-.582	$t=-3.03, p<.01$
Verdict satisfaction	$F(2,12)=1.03, \text{ns}$	.06	-.238	$t=-1.01, \text{ns}$
Others' satisfaction	$F(2,12)=5.66, p<.05$	.40	-.200	$t=-1.06, \text{ns}^{213}$
Index satisfaction	$F(2,12)=1.63, \text{ns}$	.16	-.385	$t=-1.73, \text{ns}$

213. As above, the significant model includes a significant covariate (case complexity), not a significant predictor (average diversity).

THOROUGHNESS

Although, as Table 4 illustrates, there were no effects of racial or age diversity on deliberation thoroughness, there were significant effects of gender diversity on deliberation thoroughness.²¹⁴ When using gender diversity ratings based on the research assistants' jury composition reports as a predictor, as gender diversity increases, deliberation thoroughness increases ($t=-2.51, p<.05$).²¹⁵ Similarly, when using gender diversity ratings based on jurors' jury composition reports as a predictor, thoroughness increased as gender diversity increased ($t=-2.58, p<.05$). The same effect was found of the average of the jury's racial and gender diversity; however, because there were no effects of racial diversity on deliberation thoroughness, this effect is likely due to the strong effect of gender diversity.

TABLE 4: Effects of Diversity on Deliberation Thoroughness

Predictor Variable	Model F	R ²	β	Predictor t
RACIAL DIVERSITY (RA's) (N=15)				
Thoroughness	$F(2,12)<1, \text{ ns}$	.08	-.039	$t=-0.13, \text{ ns}$
Considered viewpoint	$F(2,12)<1, \text{ ns}$	.05	-.037	$t=-0.13, \text{ ns}$
Thorough foreperson	$F(2,12)<1, \text{ ns}$	.09	-.310	$t=-1.07, \text{ ns}$
Other thorough juror	$F(2,12)<1, \text{ ns}$	.14	.354	$t= 1.26, \text{ ns}$
RACIAL DIVERSITY (Jurors) (N=20)				
Thoroughness	$F(2,17)=1.57, \text{ ns}$	.16	-.029	$t=-0.13, \text{ ns}$
Considered viewpoint	$F(2,17)<1, \text{ ns}$	.10	-.129	$t=-0.56, \text{ ns}$
Thorough foreperson	$F(2,17)=2.86, p=.09$	.25	-.499	$t= -2.37, p<.05$
Other thorough juror	$F(2,17)<1, \text{ ns}$	.04	.141	$t= 0.59, \text{ ns}$
GENDER DIVERSITY (RA's) (N=17)				
Thoroughness	$F(2,14)=4.11, p<.05$	.37	-.549	$t=-2.51, p<.05$

214. See *infra* Appendix A, tbl.4.

215. Thoroughness scores were coded so that higher scores indicate more thoroughness and lower scores indicate less thoroughness (and recall that lower diversity scores indicate greater diversity).

Considered viewpoint	$F(2,14)=1.38, \underline{ns}$	.16	-.398	$t=-1.58, \underline{ns}$
Thorough foreperson	$F(2,14)<1, \underline{ns}$	.05	-.211	$t=-0.78, \underline{ns}$
Other thorough juror	$F(2,14)<1, \underline{ns}$	.04	-.171	$t=-0.64, \underline{ns}$
GENDER DIVERSITY (Jurors) (N=21)				
Thoroughness	$F(2,18)=5.91, p<.05$	.40	-.483	$t=-2.58, p<.05$
Considered viewpoint	$F(2,18)=2.11, \underline{ns}$	.19	-.299	$t=-1.38, \underline{ns}$
Thorough foreperson	$F(2,18)<1, \underline{ns}$	.01	-.053	$t=-0.22, \underline{ns}$
Other thorough juror	$F(2,18)<1, \underline{ns}$	.02	-.126	$t=-0.53, \underline{ns}$
AGE DIVERSITY (Jurors) (N=21)				
Thoroughness	$F(2,18)=1.93, \underline{ns}$	.18	-.061	$t=-0.28, \underline{ns}$
Considered viewpoint	$F(2,18)=2.14, \underline{ns}$	.19	.304	$t=1.40, \underline{ns}$
Thorough foreperson	$F(2,18)=1.62, \underline{ns}$	.15	-.397	$t=-1.79, \underline{ns}$
Other thorough juror	$F(2,18)<1, \underline{ns}$	.05	.237	$t=1.01, \underline{ns}$
AVERAGE DIVERSITY (RA's) (N=15)				
Thoroughness	$F(2,12)=3.46, p=.07$	.37	-.551	$t=-2.35, p<.05$
Considered viewpoint	$F(2,12)=2.46, \underline{ns}$	.29	-.499	$t=-2.01, p=.07$
Thorough foreperson	$F(2,12)=1.70, \underline{ns}$	.22	-.479	$t=-1.84, p=.09$
Other thorough juror	$F(2,12)<1, \underline{ns}$	.05	.161	$t=0.56, \underline{ns}$
AVERAGE DIVERSITY (Jurors) (N=20)				
Thoroughness	$F(2,17)=3.14, p=.07$	.27	-.339	$t=-1.64, \underline{ns}$
Considered viewpoint	$F(2,17)<1, \underline{ns}$	.09	-.121	$t=-0.53, \underline{ns}$
Thorough foreperson	$F(2,17)=2.92, p=.08$	.26	-.502	$t=-2.40, p<.05$
Other thorough juror	$F(2,17)<1, \underline{ns}$	.10	.271	$t=1.18, \underline{ns}$

APPENDIX B

Juror Questionnaire

Date: _____

Your Juror #: _____ Coding #: _____ Case #: _____
(Please leave blank) (Please leave blank)

Name of Case: _____ Type of Case: _____
(such as burglary, robbery, etc.)

Questions 1-12 are questions about your background.

1. What is your gender? ☐ Male ☐ Female

2. Which of the following best describes your race? (check only one)

<input type="checkbox"/> African American	<input type="checkbox"/> Latino
<input type="checkbox"/> Asian American	<input type="checkbox"/> Native American
<input type="checkbox"/> Caucasian	<input type="checkbox"/> Other (specify) _____

3. How old are you?

<input type="checkbox"/> 18 to 24	<input type="checkbox"/> 35 to 44	<input type="checkbox"/> 55 to 64
<input type="checkbox"/> 25 to 34	<input type="checkbox"/> 45 to 54	<input type="checkbox"/> 65 or older

4. What is your marital status?

<input type="checkbox"/> Now married	<input type="checkbox"/> Divorced
<input type="checkbox"/> Separated	<input type="checkbox"/> Never married
<input type="checkbox"/> Widowed	

5. How many years of schooling have you completed? (check only one)

<input type="checkbox"/> less than 12 years of school	<input type="checkbox"/> college graduate
<input type="checkbox"/> high school graduate	<input type="checkbox"/> graduate degree
<input type="checkbox"/> some college	

6. Which of the following best describes your employment? (check only one)

<input type="checkbox"/> work full time	<input type="checkbox"/> student
<input type="checkbox"/> work part time	<input type="checkbox"/> homemaker
<input type="checkbox"/> retired	<input type="checkbox"/> unemployed, looking for work
	<input type="checkbox"/> unemployed, not looking for work

7. Please give a brief description of what you do for a living, or indicate job title. (If retired, describe your previous job).

8. What is the combined annual income of all the people in your household? (*con't. on next page*)

- | | |
|---|---|
| <input type="checkbox"/> less than \$10,000 | <input type="checkbox"/> \$50,000 to \$74,999 |
| <input type="checkbox"/> \$10,000 to \$24,999 | <input type="checkbox"/> \$75,000 to \$99,999 |
| <input type="checkbox"/> \$25,000 to \$49,999 | <input type="checkbox"/> \$100,000 to \$124,999 |
| | <input type="checkbox"/> \$125,000 or more |

9. Which of the following best describes your religion (even if you are not observant)?

- | | | |
|--|-----------------------------------|--|
| <input type="checkbox"/> Muslim | <input type="checkbox"/> Catholic | <input type="checkbox"/> Hindu |
| <input type="checkbox"/> Episcopalian | <input type="checkbox"/> Lutheran | <input type="checkbox"/> Fundamentalist |
| <input type="checkbox"/> Jewish | <input type="checkbox"/> Baptist | <input type="checkbox"/> Methodist |
| <input type="checkbox"/> Buddhist | <input type="checkbox"/> Mormon | <input type="checkbox"/> Other (specify) _____ |
| <input type="checkbox"/> Christian Scientist | | |

10. Indicate by circling the appropriate response how observant you believe you are about your religion (1=not very observant, 7=very observant)

not very observant ... 1 2 3 4 5 6 7 ... very observant

11. Have you ever served as a juror prior to serving on this jury? ☐ Yes ☐ No

12. If you have served before, how many times have you served? (*not* including this time)

- | | |
|------------------------------------|--|
| <input type="checkbox"/> one time | <input type="checkbox"/> three times |
| <input type="checkbox"/> two times | <input type="checkbox"/> more than three times |

Questions 13-22 are background questions about your jury.

13. Estimate (*in total hours and minutes*) how long your jury deliberations lasted (do not include breaks):

☐ Hours ☐ Minutes

14. How many jurors were there in your deliberations (including yourself)? ☐

15. Circle a number on the scale below that you think best indicates how diverse your jury was (1=not very diverse, 7=very diverse).

not very diverse ... 1 2 3 4 5 6 7 ... very diverse

16. Describe your jury by indicating *the number* of jurors who were men and *the number* who were women:

☐ Men ☐ Women

17. Describe your jury by indicating *the number* of jurors who were of each race listed below, to the best of your knowledge: (*con't. on next page*)

strongly disagree ... 1 2 3 4 5 6 7 ... strongly agree

(c) I found this case an easy one to decide.

strongly disagree ... 1 2 3 4 5 6 7 ... strongly agree

(d) I thought the defendant(s) in this case received a fair trial.

strongly disagree ... 1 2 3 4 5 6 7 ... strongly agree

(e) I thought the jury in this case was fair.

strongly disagree ... 1 2 3 4 5 6 7 ... strongly agree

(f) In general, I believe it is better for society to let some guilty people go free rather than to risk convicting an innocent person who was wrongly accused.

strongly agree ... 1 2 3 4 5 6 7 ... strongly disagree

(g) In general, if the evidence suggests a defendant is probably guilty, but the evidence is not "beyond a reasonable doubt," then the jury should find the defendant "not guilty."

strongly agree ... 1 2 3 4 5 6 7 ... strongly disagree

Questions 23-37 are based on your views about your jury's deliberations.

23. Circle a number on the scale below that you think best indicates *the tone* of your jury's deliberations (1=very quarrelsome, 7=very harmonious).

very quarrelsome ... 1 2 3 4 5 6 7 ... very harmonious

24. Circle a number on the scale below that you think best describes how fellow jurors treated each other during deliberations (1=supportively, 7=hostilely).

supportively ... 1 2 3 4 5 6 7 ... hostilely

25. Circle a number on the scale below that you think best describes how *thorough* your jury's deliberations were (1=not very thorough, 7=very thorough).

not very thorough ... 1 2 3 4 5 6 7 ... very thorough

26. To the extent you thought your deliberations were thorough, indicate your level of agreement with the following by circling the appropriate response (1=strongly disagree, 7=strongly agree):

(a) The deliberations were thorough because the jurors expressed very different points of view

for the jury to consider.

strongly disagree ... 1 2 3 4 5 6 7 ... strongly agree

(b) The foreperson led the jury to have thorough deliberations.

strongly disagree ... 1 2 3 4 5 6 7 ... strongly agree

(c) Another juror (other than the foreperson) led the jury to have thorough deliberations.

strongly disagree ... 1 2 3 4 5 6 7 ... strongly agree

27. Did you change your mind about the verdict at least once during the deliberations?

☐ Yes ☐ No

28. Did other jurors bring up issues during the deliberations that you think were helpful to have considered but that you may not have thought of on your own?

☐ Yes ☐ No

29. Were there issues that you would have liked the jury to have discussed before reaching its verdict but that the jury did not discuss?

☐ Yes ☐ No

30. (a) Was there ever a point in the deliberations when it seemed to you that your jury might not reach a verdict?

☐ Yes ☐ No

(b) If "yes," what do *you think* enabled your jury to reach a verdict? (check only one)

- ☐ the jury discussed *new* evidence/facts/arguments that persuaded the jurors in the minority
- ☐ the judge delivered an instruction that helped the jury to reach a verdict
- ☐ the judge reopened the case for additional argument by the attorneys or additional evidence
- ☐ the jury took a break, which gave jurors time to reconsider
- ☐ other (please explain) _____

31. Was there one juror whom *you think* was more *influential* than any other juror?

☐ Yes ☐ No

If "yes," then answer (a) - (f) about the *influential juror*:

(a) What was the influential juror's gender? ☐ Female ☐ Male

(b) What was the influential juror's race? (check only one)

☐ African American
☐ Asian American
☐ Caucasian

☐ Latino
☐ Native American
☐ Other (specify) _____

(c) What was the influential juror's age? (your best estimate)

☐ 18 to 24
☐ 25 to 34

☐ 35 to 44
☐ 45 to 54

☐ 55 to 64
☐ 65 or older

(d) Was the influential juror the foreperson? ☐ Yes ☐ No

(e) Had the influential juror served as a juror before this case? ☐ Yes ☐ No

(f) Had that juror expressed any expertise in an area relevant to this case? ☐ Yes ☐ No

32. How satisfied were you with the quality of your jury's *deliberations*? (1= not very satisfied, 7=very satisfied)

not very satisfied ... 1 2 3 4 5 6 7 ... very satisfied

33. How *efficiently* do you think your jury deliberated? (1=very efficiently, 7=not very efficiently)

very efficiently ... 1 2 3 4 5 6 7...not very efficiently

34. How satisfied were *you* with the jury's *verdict*? (1=not very satisfied, 7=very satisfied)

not very satisfied ... 1 2 3 4 5 6 7 ... very satisfied

35. How satisfied do you think *other jurors* were with the *verdict*? (1=very satisfied, 7=not very satisfied)

very satisfied ... 1 2 3 4 5 6 7 ... not very satisfied

36. How satisfied were you with *your experience* as a juror (1=not very satisfied, 7=very satisfied)

not very satisfied ... 1 2 3 4 5 6 7 ... very satisfied

37. Now that you have served as a juror, do you have any recommendations that would improve the experience for other jurors? _____

APPENDIX C

Lawyer's Questionnaire

General Information

Docket Number _____

Case Name _____

Courthouse _____

Criminal Charge Filed (statutory reference for most serious charge) _____

Case Type _____

Is this a "three strikes" case? ☐ Yes ☐ NoJury Information

1. How many jurors were there in the deliberations? ____

2. Was the jury sequestered during deliberations? ☐ Yes ☐ No

3. What was the trial outcome (check only one)

☐ Jury verdict-conviction☐ Jury verdict-acquittal☐ Jury verdict-conviction in part☐ Directed verdict-acquittal☐ Hung jury☐ Mistrial (not due to hung jury)☐ Plea☐ Other (specify) _____4. What was the gender composition of the jury? (*indicate numbers*)☐ Men☐ Women5. What was the racial composition of the jury? (*indicate numbers, your best estimate*)☐ African American☐ Asian American☐ Caucasian☐ Latino☐ Native American☐ Other (specify) _____6. Estimate (*in total hours and minutes*) how long jury deliberations lasted (do not include breaks):☐ Hours☐ MinutesCase Information7. Circle a number on the scale below that you think best indicates how *complicated* this case

was (1=very complicated, 7=not very complicated).

very complicated... 1 2 3 4 5 6 7...not very complicated

8. Indicate your level of agreement with the following statements by circling the appropriate response (1=strongly disagree, 7=strongly agree):

(a) In my view, the evidence in this case strongly favored one side.

strongly disagree... 1 2 3 4 5 6 7... strongly agree

(b) In my view, the lawyer for one side performed significantly better than the lawyer for the other side.

strongly disagree... 1 2 3 4 5 6 7 ...strongly agree

9. (a) While the jury was deliberating, did it send out any written questions to the judge?

☐ Yes ☐ No

(b) If yes, how many questions?

☐ one ☐ two
☐ three ☐ more than three

10. (a) While the jury was deliberating, did it ask to see any exhibits?

☐ Yes ☐ No

(b) If yes, how many exhibits?

☐ one ☐ two
☐ three ☐ more than three

11. (a) At any point in the deliberations, did the jury give the judge any indication that it was having difficulty reaching a verdict?

☐ Yes ☐ No

(b) If yes, how did the judge respond? (check only one) (*con't. on next page*)

☐ The judge instructed the jurors to continue their deliberations.
☐ The judge gave some other instruction.
☐ The judge reopened the case for additional argument by the attorneys or additional evidence.
☐ The judge interviewed one or more of the jurors.

- ☐ The jury took a break from their deliberations.
☐ The judge accepted the jury as a hung jury.

12. How satisfied were you with *this jury*? (1=not very satisfied, 7=very satisfied)

not very satisfied...1 2 3 4 5 6 7 ... very satisfied

13. How satisfied do you think your client was with *this jury*? (1=very satisfied, 7=not very satisfied)

very satisfied ... 1 2 3 4 5 6 7 ... not very satisfied

14. How satisfied were you with the jury's *verdict*? (1=not very satisfied, 7=very satisfied)

not very satisfied...1 2 3 4 5 6 7 ... very satisfied

15. How satisfied do you think your client was with the jury's *verdict*? (1=very satisfied, 7=not very satisfied)

very satisfied ... 1 2 3 4 5 6 7 ... not very satisfied

Your Background

16. What is your gender? ☐ Male ☐ Female

17. Which of the following best describes your race? (check only one)

- | | |
|---|--|
| <input type="checkbox"/> African American | <input type="checkbox"/> Latino |
| <input type="checkbox"/> Asian American | <input type="checkbox"/> Native American |
| <input type="checkbox"/> Caucasian | <input type="checkbox"/> Other (specify) _____ |

18. Which of the following best describes your age?

- | | | |
|-----------------------------------|-----------------------------------|--------------------------------------|
| <input type="checkbox"/> 25 to 34 | <input type="checkbox"/> 45 to 54 | <input type="checkbox"/> 65 or older |
| <input type="checkbox"/> 35 to 44 | <input type="checkbox"/> 55 to 64 | |

19. How many years have you been a practicing attorney? ____

20. Please explain whether there was anything unusual about this case that is important for researchers to know:

Thank you for completing this questionnaire.