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## Four Models of Jury Democracy

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## FOUR MODELS OF JURY DEMOCRACY

JEFFREY ABRAMSON\*

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### INTRODUCTION

Is it possible to offer a coherent political theory of the jury, one that both accurately describes jury trials as we currently practice them and that also offers the best justification for those practices and how they may yet be perfected? Given the jury's long history, it may be that there is no one distinct theory of the jury, only many accidental accretions of detail over time. How and why did the English jury arrive at

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the number twelve for its size? Why select jurors from the local community rather than relying on distance to eliminate bias? Where did the unanimous verdict come from? Why don't jurors have to provide a public statement of the reasoning behind their verdicts? Why permit litigants the right to strike a certain amount of otherwise qualified jurors for no reason at all?

Some of these historical practices are no doubt constitutive of the jury, as we have inherited it, in the sense that they go to the core, the essence, or the fundamental purposes served by jury trials. Other features seem merely derivative—strategies valued only so long as they serve the central functions of the jury. The political theory of the jury, if there is indeed a distinct theory, seeks to isolate what is truly constitutive of the jury—what is its very nerve—from what is merely its outer skin, there to protect its vital workings.<sup>1</sup>

The jury whose political theory I seek is the contemporary American criminal jury. For the purposes of this article, I leave aside the question of whether one political theory unites the criminal and civil jury.<sup>2</sup> Suffice it to say that insofar as we cherish the jury as an institution for protecting the accused from state oppression, this is a value more clearly at stake in criminal rather than civil trials.<sup>3</sup>

Historically, the American jury traces its origins back to the English jury.<sup>4</sup> The English jury, in turn, evolved in the early Middle Ages, independent from the earlier appearance of the jury in the ancient Greek world and in the Scandinavian territories.<sup>5</sup> Although the ancient Athenian jury and the Anglo-American jury share no historical roots, they both arose at that moment when justice lost its divine warrant in their respective cultures.<sup>6</sup> In Aeschylus' *Eumenides*, Athena finds judg-

1. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 181, 186–87 (1985), for a distinction between what is constitutive and what is derivative in political theory. See also *Apodaca v. Oregon*, 406 U.S. 404, 410–11 (1972), where Justice White, in his plurality opinion, made a similar distinction in discussing whether the unanimous verdict requirement was essential to the “function served by the jury in contemporary society.”

2. For views on the civil jury, see *infra* pp. 887–90 and note 3. See also Jeffrey Abramson, *Second-Order Diversity Revisited*, 55 WM. & MARY L. REV. 739, 783–803 (2014).

3. It is worth noting, however, that Alexis de Tocqueville, one of the American jury's greatest admirers, thought that many of the values jury trials serve—including educating those who serve and instilling in citizens the participatory habits and civic virtues upon which democracy depends—were served equally well, if not better, by civil juries. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 274 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1966).

4. See generally John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201–35 (1988).

5. WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 1–14 (1852).

6. See *infra* notes 7–8.

ment in a murder trial to be beyond the abilities even of the goddess of wisdom herself and delegates her powers henceforth to juries.<sup>7</sup> In 1215, at the Fourth Lateran Council, the Church withdrew its sanction from trial by ordeal as a procedure for divining God's will.<sup>8</sup> Into the vacuum created, the English jury grew.<sup>9</sup> Whatever else the jury was, is, and will be, it is an institution that expresses the human fragility of justice. In the absence of any divine guide, the jury seeks safety in numbers rather than in one person; in consensus and deliberation rather than voting and outvoting; and in independent tribunals insulated from the state playing God.

The American criminal jury is familiar enough as an example of the liberal tradition's fear of state tyranny.<sup>10</sup> In this tradition, the jury serves the cause of individual liberty precisely by limiting the concentration of power in state hands—by placing an independent body between the state and the accused.<sup>11</sup> But the jury also reflects a companion tradition where we free ourselves not so much *from* government but by *being in* government.<sup>12</sup> Any theory of the jury must account for the way in which the institution is indebted to the liberal view of freedom—what Isaiah Berlin famously called the “negative liberty” we get by limiting government—and to the civic republican view of freedom—the “positive liberty” that comes from participating with others in collective self-government and collective judgments.<sup>13</sup> How can we account for an institution that is designed both to protect individuals from government power and yet exposes them to the power of popular government? This is the great mystery behind the theory

7. AESCHYLUS, *The Eumenides*, in *THE ORESTEIA* 278–79 (Robert Fagles trans., Bantam Classic 1982) (1966).

8. Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 *SYRACUSE L. REV.* 109, 111, 172 (2000).

9. See generally THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800* (1985), for a history of the early English jury.

10. For a classic statement of the liberal tradition, see ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 122–30 (1969).

11. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (“the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . .”).

12. Herbert J. Storing stated:

[T]he question [for the Antifederalist opponents of the Constitution's ratification] was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the *administration* of government.

HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION* 19 (Murray Dry ed., 1981) (emphasis in original).

13. BERLIN, *supra* note 10, at 131–32.

the jury seems designed to live out: the institution is simultaneously all about the political, participatory, or democratic rights of citizens to be jurors, and yet all about the rights of the accused to find in the jury of the people the best protection against oppression.<sup>14</sup> What we need an answer to, above all else, is why (or whether) the project of freedom, in the sense of protecting individual rights against the tyrannies of power, is best accomplished through an institution that (more than any other institution of standing government) leaves power in the hands of the people.<sup>15</sup>

The copious literature on the American criminal jury certainly provides a laundry list of values that jury trials ideally serve: truth; impartiality; democracy; participation; common sense; civic education; legitimacy; protection against oppression, corruption, and error; the appearance of justice; public confidence in justice; and the independence of the judicial branch.<sup>16</sup> However, such a laundry list does not by itself make a theory since it is not apparent how the listed values cohere.<sup>17</sup> How does popular participation in justice contribute to the

14. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (“[Jury service] ‘affords ordinary citizens a valuable opportunity to participate in a process of government . . . .’”).

15. The classical English and American political philosophers are of little help, since they paid fleeting attention to the jury. However, Jeremy Bentham is an exception. See JEREMY BENTHAM, *THE ELEMENTS OF THE ART OF PACKING, AS APPLIED TO SPECIAL JURIES, PARTICULARLY IN CASES OF LIBEL LAW* 6–52 (1821). Tocqueville is another exception, though he confessed to little interest in the jury as a legal institution. See TOCQUEVILLE, *supra* note 3, at 271 n.2. Condorcet’s famous jury theorem is not about actual juries so much as it is a defense of aggregating individual votes. The jury did come to the fore during ratification debates over the Constitution. For colonists having no representation in Parliament, their eligibility to serve on local juries stood out as a bulwark against tyranny. It is not immediately apparent how the colonist’s strategic reasons for relying on the jury to protect them continued to apply once legislatures in the new state and federal governments became representative. See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 22–36 (Harvard Univ. Press 2000) (1994).

16. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage, but is also critical to public confidence in the fairness of the criminal justice system.”); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (safeguard against oppression); *United States v. Parker*, 19 F. Supp. 450, 458 (D.N.J. 1937), *aff’d*, 103 F.2d 857 (3d. Cir. 1939) (“[T]he jury . . . like the court itself, is an impartial organ of justice.”); JOHN RAWLS, *A THEORY OF JUSTICE* 74 (rev. ed. 1999) (truth); TOCQUEVILLE, *supra* note 3, at 273 (“The jury system as understood in America seems to me as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage.”); Irving R. Kaufman, *Foreword: Jury Selection in the Fifth Circuit*, 20 MERCER L. REV. 347 (1969) (“[The] appearance of justice . . . is as important as the actuality of justice.”); Letters from the Federal Farmer (Jan. 18, 1788), in 2 *THE COMPLETE ANTI-FEDERALIST* 315, 320 (Herbert J. Storing & Murray Dry eds., 1981) (“[Juries] are not always minutely skilled in the laws, but they have a common sense in its purity . . . .”).

17. Several recent commentators have suggested that a coherent political theory of the jury can be fashioned by analogizing the jury franchise to the voting franchise and making the equal enfranchisement of citizens on juries the paramount value. They make this argument partly on historical grounds, but also on normative ones. See, e.g., Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995); Barbara Allen Babcock, *A Place in*

truth? Is the jury a political institution or a legal one—a question we might have to answer if it turns out that the right of litigants to screen jurors and the right of jurors to serve come into conflict with one another.<sup>18</sup> And what about the considerable tension between maximizing true verdicts versus the familiar saying that it is “better to let nine guilty persons go than to convict one innocent person”?

These are not mere armchair puzzles. A great deal of practical legal reform in the United States is directed towards making jury lists representative of the community.<sup>19</sup> But what is it that we are after by recruiting jurors from a cross section of the community? Is it that representative juries are better able to be impartial seekers of the truth? Or is it merely (or importantly, as the case may be) that community groups are more likely to accept the verdict as legitimate—whatever it is—when its own members have a say in the result? Do racial and gender groups need “representatives” on the jury to speak to their different and perhaps competing conceptions of justice? Should we assume, in some essentialist way, that we get what we want on juries—representation of *substantively* different views—if we represent *demographic* differences—as if all or most members of a racial or gender group share substantive viewpoints? If that is the case, then what exactly do we mean by “impartiality”?

Consider also the tension between the Fourteenth Amendment’s Equal Protection Clause and the Sixth Amendment’s cross-sectional requirement. The Equal Protection Clause more often than not insists on a race and gender blind approach that dismisses the race or sex of a juror as *irrelevant*; for equal protection purposes, all individuals are the *same* in their capacity to serve, regardless of their demographic

*the Palladium: Women’s Rights and Jury Service*, 61 U. CIN. L. REV. 1129 (1993); Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568 (2007); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?* 92 COLUM. L. REV. 725, 746 (1992). Elsewhere, I have written sympathetically to this view and to the importance of restoring the powers of the jury as a participatory institution. ABRAMSON, *supra* note 15, at 57–95. But I do not believe the enfranchisement conception, standing alone, can generate a coherent description or justification of the jury as we practice it today. The test of any theory of the criminal jury must be whether it persuasively links or blends the rights of the accused to impartial justice with the enfranchisement of ordinary citizens as jurors.

18. Such a conflict arguably occurs whenever litigants exercise a lawful peremptory challenge against an otherwise qualified prospective juror. See *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 150–51 (1994) (O’Connor, J., concurring) (expressing hesitancy to restrict the use of peremptory challenges by defense counsel against one sex or the other).

19. See *infra* Part IV(D).

characteristics.<sup>20</sup> But the cross-sectional principle suggests that race and other demographic features matter crucially enough to jury verdicts that we should seek to balance differences anchored to demography. No jury is said to be impartial, for Sixth Amendment purposes, if selected in ways that may be race-neutral but nonetheless systematically and repeatedly underrepresent recognizable groups in the community.<sup>21</sup> It is difficult to read the cases on jury selection without coming away with a mounting sense of frustration at the intellectual incoherence of our current doctrines, as well as at the practical impediments that keep jury lists, pools, venues, and trial juries remarkably unrepresentative.

In political theory, several ideals or models for democracy compete. The contending theories are not necessarily descriptive of actual democratic practices so much as they are aspirational or normative statements of the principles we seek to practice. We may conveniently refer to the most common of these theories as: (1) direct or populist democracy; (2) representative democracy; and (3) deliberative democracy.<sup>22</sup> The theories diverge on the foundational issue of what justifies democracy. It may be that democracy has no logical connection to wise rule but is simply a procedure for setting public policy according to public opinion whatever the opinions are.<sup>23</sup> Or it may be that democracy is a morally superior form of government since the people together possess a collective wisdom that the one or the few rulers can never achieve.<sup>24</sup> One of the riddles of the American jury is that it has a foot in all three democratic camps. In line with direct democracy, we start by calling potential jurors from among the people-at-large. Yet we hedge our populist bet by permitting litigants to eliminate seemingly qualified candidates in a variety of ways. We call jurors “representatives”

20. See *Holland v. Illinois*, 493 U.S. 474, 478–79 (1990) (noting that purposeful discrimination against a prospective juror solely on account of the person’s race is a violation of the Equal Protection Clause of the Fourteenth Amendment).

21. *Taylor*, 419 U.S. at 530.

22. Nearly all students of democracy recognize the historical and conceptual differences between direct and representative forms of democracy. See, e.g., George Kateb, *UTOPIA AND ITS ENEMIES* 88–101 (1963). The term “deliberative democracy” is of more recent vintage. See sources cited *infra* notes 70–73. Some writers use the term “communitarian democracy” to describe what I refer to as deliberative democracy. See, e.g., Robert N. Bellah, *Community Properly Understood: A Defense of ‘Democratic Communitarianism,’* in *THE ESSENTIAL COMMUNITARIAN READER* 15–21 (Amitai Etzioni ed., 1998).

23. “I always say, as you know, that if my fellow citizens want to go to Hell I will help them. It’s my job.” *Letter from Oliver Wendell Holmes to Harold J. Laski* (Mar. 4, 1920), in 1 *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935* 249 (Mark DeWolfe Howe ed., 1953).

24. ARISTOTLE, *POLITICS* 108 (R. F. Stalley ed., Ernest Barker trans., 1995).

and in some sense expect their verdicts to reflect the views of the community. However, jurors do not actually have constituents to represent, and we go to great lengths to protect their deliberations from any outside influences. Jurors cannot outvote one another but must reach a unanimous verdict. And yet they are not accountable for their verdicts and typically provide no public explanations in the way a deliberative theory of democracy would require.

In this article, I sort out how differences in jury practices reflect differences in democratic theory. I have two goals in mind. First, I hope to provide some guidance to readers from nations unfamiliar with the American jury system who are interested in bringing some form of lay participation into their own judiciaries. Secondly, for a domestic audience that takes the jury as a fixture of democracy, I hope to demonstrate that defending the jury's democratic credentials is harder than one might imagine.

### I. DIRECT OR POPULIST DEMOCRACY

On first blush, the jury seems an example of direct democracy. Indeed, the jury is one of the few surviving institutions where ordinary American citizens do the work of governing themselves.<sup>25</sup> At the heart of jury selection is the belief that the people-at-large have the competence, common sense, and virtue it takes to render just verdicts.<sup>26</sup> There are no elections for American juries, no campaigns where we weigh credentials. There is no longer any initial vetting process, where potential jurors are screened to find those "esteemed in the community for their integrity, good education, and sound judgment."<sup>27</sup> Instead, jury selection is accomplished through the last citizen draft in the United States. Even the military draft has given way to a volunteer army and virtually every other office of government is filled by election, appointment, or volunteering. Only the jury system makes all resident citizens of voting age in the community equally eligible and equally

25. The town meeting is another example of direct democracy in places that still permit all residents to vote on town business.

26. See, e.g., *Thiel v. S. Pac. Co.*, 328 U.S. 217, 223–224 (1946) (guarding against "latent tendencies to establish the jury as the instrument of the economically and socially privileged").

27. *Carter v. Jury Comm'n of Greene Cnty.*, 396 U.S. 320, 323 (1970) (citing to Alabama's statute governing the process for juror selection).



obliged to serve in government, provided they can read and understand English and are not convicted felons.<sup>28</sup>

These are heady ideals. In defending his constitutional blueprints laid out in 1787, James Madison raised doubts about the virtue and knowledge of the people and preferred to design screens, filters, and institutions to hem in popular opinions.<sup>29</sup> By contrast, the jury stands for the radical notion that every citizen is equal to every other citizen in having the qualities to be a juror.<sup>30</sup> To be sure, we no longer have juries the size of the Athenian jury (501 persons) that tried Socrates.<sup>31</sup> But we still start jury selection with the oldest of direct democratic procedures, which is to draw names randomly out of a hat, so to speak.<sup>32</sup> We start from a master list that is inclusive of the names of all resident citizens<sup>33</sup> and randomly select every *n*th name on the list as needed.<sup>34</sup> It is a violation of basic democratic norms whether the government intentionally excludes a person from the jury list or the voter list.

### A. Screening Out Jurors

Upon deeper examination, however, the resemblance of jury practice to direct democracy principles begins to fade. Although we start

28. For the minimal qualifications federal jurors must meet, see Jury Selection and Service Act of 1968, 28 U.S.C. § 1865(b) (2000). Some states even permit ex-felons to serve. See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 109–110 n.211 (2003).

29. THE FEDERALIST NO. 10 (James Madison) (recommending a system that works “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens . . .”). See also THE FEDERALIST NO. 71 (Alexander Hamilton) (stating the need to guard against the “temporary delusion of inclination”).

30.

Which is the best tribunal to try [a] case? This man who sits upon the bench, and who has . . . nothing in common with the people; who has hardly seen a common man in twenty years . . . Is he the better man to try the case than they who have the same stake in the community [as the accused], . . . depending on the integrity of the verdict they shall render?

3 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 458 (3rd ed.1853); see also *Strauder v. West Virginia*, 100 U.S. 303, 306–308 (1879) (holding that excluding persons from jury duty on account of their race constitutes a violation of the Equal Protection Clause of the 14th Amendment).

31. PLATO, *Apology: Defence of Socrates, in DEFENCE OF SOCRATES, EUTHYPHRO, AND CRITO* (David Gallop trans., Oxford Univ. Press 1997).

32. Of course, computer programs do the drawing today, but the principle remains the same.

33. Jury Selection and Service Act § 1861 (“It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community. . .”); *id.* § 1865(b).

34. *Id.* § 1864.

jury selection by placing the names of persons on the eligible list without much screening, the latter stages of selection involve considerable “weeding out” of candidates. These stages constitute a deviation from the “all comers” philosophy of populists. During voir dire, judges or the parties’ lawyers examine potential jurors for bias, prejudice, preconceptions, exposure to pretrial publicity, or personal familiarity with the events or persons to be tried or the witnesses to be called.<sup>35</sup> Trial judges grant challenges for cause when bias is proven to their satisfaction, no matter how many persons are deemed unfit to serve.<sup>36</sup>

More surprisingly, litigants have a right to strike a certain number of potential jurors from the pool of presumably qualified persons who survive challenges for cause.<sup>37</sup> Historically, these so-called peremptory challenges could be exercised for any reason, no matter how arbitrary or capricious.<sup>38</sup> Even today, so long as litigants do not engage in a pattern of challenges aimed at striking persons due to their race, religion, gender, or other protected status,<sup>39</sup> they can dismiss persons on a mere hunch or whim.<sup>40</sup> At this point, the participatory interests of citizens in directly governing themselves give way to the legal rights of litigants to deselect potential jurors.

Peremptory challenges are difficult to justify in populist terms.<sup>41</sup> As we will see when we turn to theories of representative democracy, they do not fit easily with the notion that juries should be selected to form a cross-section of the community.<sup>42</sup> So what are the democratic

35. See generally Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131, 131–146 (1987); Alice M. Padawer-Singer et al., *Voir Dire by Two Lawyers: An Essential Safeguard*, 57 JUDICATURE 386, 386–91 (1974) (examining a lawyer-conducted voir dire).

36. Carol A. Chase & Colleen P. Graffy, *A Challenge for Cause Against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT’L & COMP. L. REV. 507, 509 (1997).

37. See, e.g., Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 380–383 (2010). For some statutory provisions, see FED. R. CRIM. P. 24(b); MASS. R. CRIM. P. 20(c).

38. But see *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (disapproving in part of this unlimited right where it is exercised solely on the basis of race).

39. *Id.* (prohibiting race-based peremptory challenges by the state); see also *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 130–31 (1994) (prohibiting gender-based peremptory challenges).

40. See, e.g., *Purkett v. Elem*, 514 U.S. 765, 769 (1995) (striking jurors with unkempt hair or beards may be ridiculous but still constitutional).

41. It could be argued that peremptory challenges shift control over the final composition of the trial jury from the state to the litigants and thus achieve a democratic empowerment of private citizens. Even so, peremptory challenges defeat the participatory claims of ordinary qualified citizens to serve on juries.

42. Some peremptory challenges are levied based on observations about the individual’s demeanor or behavior: perhaps a lawyer detects a troubling hesitancy in an answer, or a ques-

defenses of the peremptory challenge? Defenders cite a number of plausible purposes. Peremptory challenges shift some power over jury selection from the state to the parties themselves,<sup>43</sup> provide a back-up device to catch would-be jurors who mistakenly survive challenges for cause,<sup>44</sup> and may produce a more middle-of-the-road jury by eliminating the jurors most unacceptable to each side.<sup>45</sup>

Assume for argument's sake that peremptory challenges serve these purposes. Their use still flies in the face of direct democracy by privileging the right of litigants at trial over the participatory rights of citizens to serve.<sup>46</sup> Peremptory challenges come into play only to strike persons whom the judge has accepted as qualified. They rest on the belief that impartiality is difficult to find in the common man.

### *B. Jury Nullification*

There is a second reason why the jury is not aptly described as an institution of direct democracy. In eighteenth century America, the jury enjoyed expansive democratic powers to decide questions of law as well as fact and to render verdicts of conscience, even if this meant departing from the law in a given case.<sup>47</sup> In all but two states,<sup>48</sup> the theory of the modern jury subscribes to a division of labor between juror and judge that Alexis de Tocqueville rightly described as lending

tionable look; perhaps it is that the potential juror may have taken offense at some question the litigant posed during voir dire. But, as numerous trial manuals make clear, peremptory challenges are often exercised on the basis of stereotypes about whole groups. *See, e.g.*, Ford, *supra* note 37, at 388-90 (citing to studies that show attorneys rely on two or three stereotypical characteristics about a defendant's group when using peremptory challenges). Black jurors are said to be pro-defense and hostile to sentencing defendants to death. Jews are said to be pro-plaintiff in cases involving insurance claims; women are said to be more likely than men to convict in rape cases. *Id.*

43. "The law wills not that [a defendant] should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 347 (5th ed. 1769).

44. Chase & Graffy, *supra* note 36, at 509.

45. "Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminat[ing] extremes of partiality on both sides' . . ." Holland v. Illinois, 493 U.S. 474, 484 (1990) (quoting Batson v. Kentucky, 476 U.S. 79, 91 (1986)); *see also* 4 BLACKSTONE, *supra* note 43, at 346-47 (giving defendants confidence in the impartiality of the jury).

46. For the participatory rights of jurors, see Jury Selection and Service Act of 1968, 28 U.S.C. § 1862 (prohibiting discrimination in jury selection) and § 1865(b) (rights of all citizens to serve who meet minimal qualifications).

47. See ABRAMSON, *supra* note 15, at 73-85, for a review of the early American jury's right to decide questions of law.

48. *See* IND. CONST. art. I, § 19 ("In all criminal cases whatever, the jury shall have the right to determine the law and the facts." (emphasis added)); MD. CONST. Declaration of Rights, art. 23 (providing that the jury shall be the judges of law as well as fact in the trial of all criminal cases).

an aristocratic aspect to jury duty.<sup>49</sup> The theory is that while ordinary persons are competent to listen to the evidence and find the facts accordingly,<sup>50</sup> they do not necessarily know the law.<sup>51</sup> On purely legal matters, they must defer to the superior knowledge of the judge and agree to abide by the judicial instructions on the law, whatever they may be.<sup>52</sup> Tocqueville thought it was precisely this educative association with knowledgeable superiors that made jury service valuable. The association instills in citizens the civic virtues necessary to combat the vices of isolation and individualism that imperil democracies.<sup>53</sup> However, the division of labor theory necessarily disempowers jurors in ways that a directly democratic institution would not. Indeed, one of the grounds for removing a juror for cause during jury deliberations would be clear evidence that the juror was unwilling to follow the judge's instructions.<sup>54</sup>

Elsewhere, I have chronicled the rise and fall of jury nullification as a way of charting the American jury's evolution away from its more direct democratic beginnings.<sup>55</sup> In the criminal context, nullification refers to the purported right of jurors to *acquit* a defendant for any reason at all, including ones that fly in the face of the evidence or law.<sup>56</sup> Arguably, acts of jury nullification played a large role in defending liberty when an English jury refused to convict the Quaker William Penn of preaching against the law; when a colonial jury defended freedom of

49. TOCQUEVILLE, *supra* note 3, at 275.

50. See, e.g., *Sparf v. United States*, 156 U.S. 51, 61(1895) (instructing jurors, "You are the exclusive judges of the fact," and noting their ability to judge the credibility of witnesses). While jurors are generally presumed to be able to resolve factual disputes on the basis of their own knowledge, Rules 702 and 703 of the Federal Rules of Evidence permit the introduction of expert witness testimony to assist jurors in matters beyond ordinary experience. FED. R. EVID. 702, 703. In complicated commercial litigation, there is considerable debate as to whether the Seventh Amendment guarantees a right to jury trial on matters beyond the comprehension of ordinary persons of the community. See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966).

51. See *Sparf*, 156 U.S. at 64 (noting "the duty of the jury to receive the law from the court" and proceeding to support this proposition by an exhaustive historical study).

52. One typical pattern federal jury instruction reads: "It is [] your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not." NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 3.1 (2010) [hereinafter MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS]. For similar state instructions, see ABRAMSON, *supra* note 15, at 63.

53. See TOCQUEVILLE, *supra* note 3, at 274 ("By making men pay attention to things other than their own affairs, [jury duty] combat[s] that individual selfishness which is like rust in society.").

54. See *United States v. Thomas*, 116 F.3d 606, 617 (2d Cir. 1997); *United States v. Luisi*, 568 F. Supp. 2d 106, 122 (D. Mass. 2008).

55. ABRAMSON, *supra* note 15 at 67–95.

56. Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 83 (1980).

the press by acquitting the printer John Peter Zenger of libeling the Crown; or when northern juries refused to convict persons who aided runaway slaves to escape in violation of the Fugitive Slave Law.<sup>57</sup> But jury nullification also had its dark side, enabling an all-white jury in 1954 to wink and acquit the killers of Emmett Till.<sup>58</sup> Today, the federal system and all but two states emphatically reject jury nullification, seeing it as a confusion of the roles of jury and legislature.<sup>59</sup> Legislatures in a democracy make the laws, and jurors are duty-bound and instructed to enforce the law whether they agree with it.<sup>60</sup> This widespread official disapproval of jury nullification is at the same time a rejection of the jury's original expansive political power to render verdicts according to conscience.<sup>61</sup> We typically think of jurors today as rendering verdicts according to law and not their own moral scruples.<sup>62</sup> A jury derives its power from the legislated rules they are there to accept and to apply.

## II. DELIBERATIVE DEMOCRACY

Under unanimous verdict rules, jurors cannot simply outvote one another. They must deliberate to an agreed-upon verdict. Since every person's view counts, ideally this privileges the search for reasons that persuade across the normal demographic divides of race, class, education, and the like. Power, it is sometimes said, goes to those jurors adept at defining common ground.<sup>63</sup> No doubt actual jury conversations are messier than this, involving pressure tactics, logrolling, coalition building, or appeals to emotion.<sup>64</sup> But none of this alters the fact that the jury is distinctly designed to encourage rational deliberation, going to great lengths to protect the independence of those delibera-

57. ABRAMSON, *supra* note 15, at 68–85.

58. STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* 42 (Johns Hopkins Univ. Press 1991) (quoting one juror who said that the only reason it took the jury 67 minutes to acquit the defendant was because they stopped for a soda break).

59. See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1137–38 n.54 (D.C. Cir. 1972).

60. See *MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS*, *supra* note 52, § 3.1.

61. See generally GREEN, *supra* note 9, for the origins of the jury's right under English law to render verdicts according to conscience.

62. See *Dougherty*, 473 F.2d at 1137–38 n.54 (instructing jurors to set aside their own views on the morality of the Vietnam War in judging the defendants' guilt or innocence as to charges of malicious destruction of draft registration records).

63. For a fictional study of one juror's ability to persuade the rest, see REGINALD ROSE, *TWELVE ANGRY MEN* (Dramatic Publ'g Co. 1983) (1954).

64. See HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* 488 (Univ. of Chi. Press 1976) (1966) (citing evidence that strong initial majorities almost always prevail on juries due to the pressure they bring on lone holdouts).

tions by imposing conditions of secrecy, sometimes anonymity, and occasionally sequestration.<sup>65</sup>

One can imagine a jury system—Brazil has one—that instructs jurors *not* to deliberate but to express their own individual view untainted by the opinions of others.<sup>66</sup> But a non-deliberating jury cannot be squared with a unanimous verdict jury: one or the other would have to give. When the United Kingdom abolished the unanimity requirement in 1967 and authorized criminal verdicts by a 10-2 margin, jurors were still instructed that they had an obligation to deliberate for at least two hours before the court would accept a less-than-unanimous verdict.<sup>67</sup> In the United States, unanimity remains the rule in federal trials and in state trials in all but two states, beating back many challenges.<sup>68</sup> The survival of the unanimous verdict requirement, whose origins are lost in history,<sup>69</sup> provides evidence for the continuing normative appeal of deliberation as a crucial democratic activity.

### A. *The Requirement of Public Reasoning*

Although deliberation is a key feature of jury behavior, the highly secretive ways in which jurors deliberate violate the connection between publicity and accountability. The problem is that jury deliberation does not fit with the key requirements that standard theories of deliberative democracy insist upon. In accounts of democratic deliberation, indebted to the work of Jürgen Habermas or John Rawls,<sup>70</sup> dem-

65. See generally Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 124 n.1 (1996); Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63 (1996).

66. DANIEL M. BRINKS, *THE JUDICIAL RESPONSE TO POLICE KILLINGS IN LATIN AMERICA: INEQUALITY AND THE RULE OF LAW* 147 (2008).

67. Juries Act, 1974, c. 23, § 17(4) (Eng.).

68. The two states are Louisiana and Oregon. See *Johnson v. Louisiana*, 406 U.S. 356, 369–77 (1972) (Powell, J., concurring) (approving of non-unanimous jury verdicts); *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972) (same). These decisions also declared that, for historical reasons, unanimity was required of all federal criminal juries. See *Johnson*, 406 U.S. at 369 (Powell, J., concurring). In 2011, the Supreme Court denied a writ of certiorari to defendants asking the Court to reconsider the *Johnson* and *Apodaca* rulings. See Petition for Writ of Certiorari, *Herrera v. Oregon*, 131 S. Ct. 904 (2011) (No. 10-344), 2010 WL 3555966, at \*5–11. For an unsuccessful campaign against unanimous verdicts in California, see CAL. DIST. ATTORNEYS ASS'N, *NON-UNANIMOUS JURY VERDICTS: A NECESSARY CRIMINAL JUSTICE REFORM* 6–10 (1995).

69. 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 626 (2d ed. 1899).

70. See generally JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 108 (William Rehg trans, MIT Press 1996) (1992); RAWLS, *supra* note 16, at 15 (noting “the public nature of political principles”); JOHN RAWLS, *THE IDEA OF PUBLIC REASON REVISITED* (1997), reprinted in JOHN RAWLS: *COLLECTED PAPERS* 573, 575–579 (Samuel Free-

ocratic deliberation must be a public and transparent activity, justified by reciprocal “give and take” in debates based on publicly reasoned arguments.<sup>71</sup> The requirement of public reason requires participants in democratic deliberation to “defend their preferred understandings of the public interest or common good on the basis of moral or ethical reasons which are acceptable to all participants.”<sup>72</sup> In other words, democratic deliberation seeks to publicly justify the use of political power on the basis of what is common to all citizens as opposed to invoking arguments that are particular to the interests of only some groups.<sup>73</sup>

By contrast, criminal jurors typically render a “general verdict” of guilty or not guilty that does not disclose the reasoning behind the verdict. At English common law, procedures existed that permitted a jury to render a “special verdict” where they simply found certain facts and left the ultimate decision to the court.<sup>74</sup> But over time, the very “inscrutability” of the general verdict came to be regarded as crucial to protecting the criminal jury’s independence.<sup>75</sup> As Lord Devlin put it, “The freedom of thought given by the general verdict is of the essence of the jury system.”<sup>76</sup>

An institution that equates jury independence with jury secrecy does not fit easily within a deliberative model that requires government actors to give public reasons for their actions. Whenever a jury

man ed., 1999) (requiring appellate judges to publicly provide reasons for decisions but saying nothing about juries).

71. See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 13–14 (1996) (stressing the need for reciprocity in the way citizens treat one another).

72. Melissa S. Williams, *The Uneasy Alliance of Group Representation and Deliberative Democracy*, in *CITIZENSHIP IN DIVERSE SOCIETIES* 127 (Will Kymlicka & Wayne Norman eds., 2000) (emphasis omitted).

73. See, e.g., Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 99 (Seyla Benhabib ed., 1996).

74. See Kate H. Nepveu, Note, *Beyond “Guilty” or “Not Guilty”: Giving Special Verdicts in Criminal Jury Trials*, 21 *YALE L. & POL’Y REV.* 263, 263–64 (2003); see generally Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 *YALE L.J.* 575 (1923). For a case where a jury rendered a special verdict, see *Queen v. Dudley*, [1884]14 Q.B.D. 273 (Eng.). Rule 49 of the Federal Rules of Civil Procedure recognizes the availability of special verdicts and interrogatories in civil cases. FED. R. CIV. P. 49. The Federal Rules of Criminal Procedure also permit use of special verdict forms in a limited number of circumstances. See, e.g., FED. R. CRIM. P. 32.2(b)(5)(B).

75. W.R. CORNISH, *THE JURY* 281 (Pelican 1971) (1968) (“[O]nce the inscrutability principle has gone, the time has come to set up another kind of tribunal.”). For a history of the general verdict, see Kevin Crosby, *Jury Independence and the General Verdict: A Genealogy* (2013) (unpublished Ph.D. dissertation, Leicester University) (on file at <https://lra.le.ac.uk/bitstream/2381/28531/1/2013CrosbyKPhD.pdf>).

76. PATRICK DEVLIN, *THE JUDGE* 148 (1979).

renders a general verdict, the public simply is not privy to the arguments that took place in the privacy of the jury room.

There are important reasons why criminal jurors do not justify their verdicts in public, dating back to the seventeenth century when jurors could be imprisoned for saying something that impeached their verdicts and exposed them to charges of perjury.<sup>77</sup> There may also be weak reasons for shrouding jury reasoning in secrecy—for instance, a fear of learning too much about how the sausage is made, so to speak.<sup>78</sup> But once we accept the practice of the unexplained general verdict and the absence of public reasoning, the jury is not a strong example of deliberative democracy.

Conceivably, we might want to strengthen the deliberative features of jury practice by requiring some sort of public statement about the jurors' reasoning. Jurors could issue written opinions much like judges do. More minimally, they could render special verdicts or answer interrogatories, much like we occasionally do now in civil trials.<sup>79</sup> Or perhaps the presiding judge could engage in a colloquy with the foreperson immediately after receiving the verdict, asking questions designed to reveal the reasoning behind the verdict. Finally, we might release a transcript of jury deliberations with or without accompanying audiotape or videotape. Any of these requirements would serve two major purposes. First, publicity would discipline jurors to deliberate according to reason. Second, the public would be in a position to judge the work of the jury. I do not say that peering inside the famous jury black box will inspire public confidence in jury verdicts, although that would be the hope. I say only that the public would be able to know what occurred during jury deliberations.

However, none of these reforms is likely to occur—a sign that we do not even seek to bring jury practice into full compliance with the deliberative ideal. But perhaps it is the deliberative ideal that should change to accommodate the need for jury deliberation to take place outside the public eye. Substantial evidence exists that exposing jurors

77. See ABRAMSON, *supra* note 15, at 68–73 for an account of the imprisonment of jurors for allegedly perjuring themselves when they acquitted the Quaker William Penn of disturbing the peace, despite publicly informing the court that they did find it factually true that Penn had blocked a thoroughfare by preaching to a throng in the street.

78. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 115 (1949) (“The judges feel that, were they obliged to learn the methods used by jurors, the actual workings of the jury system would be shown up, devastatingly.”).

79. For current uses of special verdicts in criminal trials, see, for example, *Nepveu, supra* note 74, at 269–281. For use of interrogatories in a civil case, see, for example, *Cradle of Liberty Council, Inc. v. City of Philadelphia*, 851 F. Supp. 2d 936 (E.D. Pa. 2012).



to news coverage and the “talk about town” makes it that much harder for them to deliberate impartially.<sup>80</sup> So while most exercises of government power thrive in the light of day, the jury is an example of deliberation where impartiality and independence are enhanced by closing the jury room doors.<sup>81</sup> Within the jury room, the deliberation is face-to-face and jurors seek to hold one another accountable for their positions.<sup>82</sup> Judges typically instruct jurors that all must be present for the deliberation to take place.<sup>83</sup> In the event a juror is dismissed once deliberation begins, the trial judge will typically instruct the jury that they must begin deliberations anew with the alternate juror.<sup>84</sup> I am inclined to conclude that the jury has much to teach us about the range of conditions that enrich impartial deliberation. Standard accounts of deliberative democracy would impose constraints of public accountability that the jury was never designed to achieve.

### *B. The Requirement of General Reasoning*

Most theories of deliberative democracy also place emphasis on the *generality* of reasoning.<sup>85</sup> Basically, this means that participants should strive to reason according to their shared or general interests as citizens rather than by appealing to the particular interests they share only with some discrete subgroup. By privileging arguments based on what unites rather than divides us by race, income, or class, the generality requirement partly captures the ideal of impartiality we wish to inspire in jurors. At the same time, we value differences in perspectives rooted in personal and group experiences. We think it is not only inevitable but also valuable that jurors from different back-

80. See, e.g., *Rideau v. Louisiana*, 373 U.S. 723, 726–27 (1963); *Irwin v. Dowd*, 366 U.S. 717, 725–28 (1961); Neil Vidmar, *Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury*, 79 JUDICATURE 249, 250 (1996).

81. *Patterson v. Colorado ex rel. Att’y Gen. of Colorado*, 205 U.S. 454, 463 (1907) (noting the need to protect trials from “any outside influence, whether of private talk or public print”). As opposed to the secrecy surrounding the jury room, trials themselves are open and public events. *Id.* at 463.

82. See 1 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL AND CRIMINAL (4th ed. 1987) (“[I]t is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement . . . Each of you must decide the case for yourself, individually, but do so only after an impartial consideration of the evidence in the case with your fellow jurors.” (quoting *United States v. Singletary*, 562 F.2d 1058, 1060 n.2 (8th Cir. 1977))).

83. See, e.g., *Criminal Jury Instructions*, STATE OF CONN. JUDICIAL BRANCH 1.2-4 (2007), available at <http://www.jud.ct.gov/ji/criminal/part1/1.2-4.htm> (“Once deliberations start, all deliberations must be conducted in the jury room only when all jurors are present.”).

84. *United States v. Luisi*, 568 F. Supp. 2d 106, 110 (D. Mass. 2008).

85. See GUTMANN & THOMPSON, *supra* note 71, at 13–14.

grounds offer different perspectives on the facts and the law. At least under unanimous verdict requirements, the ability of jurors from diverse backgrounds to agree on a common verdict inspires public confidence that the verdict is the right one.<sup>86</sup> Beyond buttressing public confidence, diversity among jurors provides a substantive argument for thinking that the collective wisdom of the whole comes as the product of many minds. Empirical studies from the business world demonstrate that diversity increases the cognitive capacity and problem solving of the group such that that diverse groups outperform homogeneous groups composed of the highest achieving but like-minded individuals.<sup>87</sup> The same seems true of the jury, though the research is less complete.<sup>88</sup>

Today, many theorists of democratic deliberation accept that residents of a multicultural society are not just fungible citizens who are all the same, but concrete embodiments of different perspectives that deserve fair hearing in public debates.<sup>89</sup> So it may be that the jury is a living example of how diversity contributes to democratic deliberation. I will return to this possibility in Part IV of this article.

### *C. Constructing Norms for the Community*

In theory, the jury task is limited to finding the facts.<sup>90</sup> Once found, they are to render a verdict more or less mechanically by applying the law to the facts.<sup>91</sup> However, this description of the division of labor between jury and judge is simplistic. In many trials, the jury must decide hybrid issues that mix fact and law, such as whether the accused's claim of self-defense was justified by a "reasonable fear" of imminent

86. See, e.g., JON ELSTER, SECURITIES AGAINST MISRULE: JURIES, ASSEMBLIES, ELECTIONS 136–37 (2013).

87. Scott E. Page, *Making the Difference: Applying a Logic of Diversity*, 2007 ACAD. MGMT. PERSP. 6, 9.

88. For a review of studies showing the benefits of racial diversity to the thoroughness of jury deliberation, see Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65 (2008) [hereinafter Sommers, *Determinants and Consequences*]; see also Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006) [hereinafter Sommers, *Racial Diversity and Group Decision Making*] (finding that racially diverse juries are superior to homogeneous juries in error-catching, amount of information exchanged, and length of deliberations).

89. See, e.g., WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); Williams, *supra* note 72, at 124–152.

90. See MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS, *supra* note 52.

91. *Id.*

attack.<sup>92</sup> Jurors must similarly probe what we mean by opaque terms such as “reasonable doubt,” “malice,” or “criminal negligence.” These are not purely factual inquiries.<sup>93</sup> Answering them requires jurors to invoke values and norms on basic questions of reasonableness and human behavior. One of the chief democratic contributions of the jury is often said to be the participation of laypersons in deciding what these basic norms of a community are.<sup>94</sup> Some commentators go so far as to argue that jurors do not “find” some pre-existing community values to apply to the case so much as they “construct” those norms for the community through their deliberations.<sup>95</sup>

The problem once more is that the surrounding community cannot readily know what norms may or may not be motivating juror decisions.<sup>96</sup> Consider the recent decision of the Ferguson, Missouri, grand jury not to indict a white police officer who killed a young black man in a street confrontation.<sup>97</sup> The result left the community to guess exactly what standards the jury had applied in finding that the police officer had acted in self-defense.<sup>98</sup>

I do not doubt that many jury verdicts rest on implicit value judgments left open by legal instructions.<sup>99</sup> But I am less certain that jurors clearly articulate those values to themselves, much less to the public. This lack of communication between the jury and the community—for whose values it speaks—considerably weakens the democratic credentials of the jury as the right body to deliberate about a community’s values and norms.<sup>100</sup>

92. For a study of a jury’s interpretation of self-defense instructions, see, for example, GEORGE P. FLETCHER, *A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 39–63, 170–199 (Univ of Chi. Press 1990) (1988).

93. Mark S. Broudin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 23 (1990).

94. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1108–09 (2005).

95. *Id.* at 1166; Catherine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2408–10 & n.205 (1990) (reasoning that civil juries, by virtue of their representativeness, have the legitimacy to construct through deliberation the norms of the community).

96. See also Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1384–85 (2012) (asserting that civil juries are unaware of the applicable norms in some tort cases).

97. Erik Eckholm, *Witnesses Told Grand Jury that Michael Brown Charged at Darren Wilson, Prosecutor Says*, NY TIMES, Nov. 24, 2014, at A1.

98. *Id.*

99. See, e.g., Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 605 (1993) (discussing how some jury instructions leave some legal concepts undefined, and invite jurors to make normative decisions); Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1649 (2001).

100. See also Solomon, *supra* note 96, at 1384–85.

### III. REPRESENTATIVE DEMOCRACY

The hallmark of any representative democracy is that citizens equally and freely vote for the representatives who govern them and whom they hold accountable by voting them in and out of office in open and competitive elections.<sup>101</sup> Under ideal conditions, representative democracy rests on the consent of the governed.<sup>102</sup>

For the purposes of this article, we can put aside long-standing debates about whether representatives must closely hew to the interests of their constituents or may instead exercise independent judgment about what is best.<sup>103</sup> On either understanding, the theory of representative democracy relies on elections to legitimize representation and to hold representatives ultimately accountable to their constituents.<sup>104</sup>

Weak theories of representative democracy cite the impracticality of practicing direct democracy in large republics.<sup>105</sup> Strong theories, on the other hand, find moral as well as practical benefits since representatives will guard against “the petty passions which often trouble [politics] or the vices that disgrace it.”<sup>106</sup>

One of the most common descriptions of the ideal jury is a “body truly representative of the community.”<sup>107</sup> Through federal law for federal trials and the Sixth Amendment for state as well as for federal trials, jury selection aims to empanel a jury that is as representative of the community as random selection and practical realities permit.<sup>108</sup>

101. ROBERT DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* 10–11 (1982).

102. For a classic statement of the connection between representative democracy and consent of the governed, see JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶¶ 99, 134 (Jonathan Bennett 2010) (1690). However, restrictions on freedom of speech, freedom of the press, the vote, or the right to assemble can undermine the legitimacy of elections and justify courts in striking down laws that impede the proper workings of representative democracy. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). See also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87–88 (1980) (arguing that judicial review is justified when it is representation-reinforcing).

103. For a discussion of actual and virtual representation, see HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 177–180 (1967). See also Edmund Burke, *Reflections on the Revolution in France* 115 (Penguin 1968) (1790) (arguing that each member of Parliament represents the interests of the whole nation).

104. See PITKIN, *supra* note 103, at 177–78.

105. See DAHL, *supra* note 101, at 11.

106. TOCQUEVILLE, *supra* note 3, at 201.

107. *Smith v. Texas*, 311 U.S. 128, 130 (1940).

108. See U.S. CONST. amend. VI; Jury Selection and Service Act of 1968, 28 U.S.C. §§1861–1865 (2012).

Where do juries fit into representative democracy? Although we call jurors representatives, we do not mean that they have constituents to represent. African-Americans are not there to represent African-American points of view any more than women should vote together in favor of women's interests. Constituent representation does not account for the lengths we go in jury trials to keep jurors unaware of how outsiders are reacting to the trial.

Instead, representative jury pools serve two valuable but distinct purposes. First, they provide a visible check on government's ability to discriminate against the equal rights of all to serve on juries.<sup>109</sup> In theory, one could abide by anti-discrimination principles and still screen jurors for some neutral education credential that skewed jury selection in favor of some groups over others. The practical advantage of starting with representative jury pools is that they provide visible evidence that all are equally entitled to exercise the jury franchise.<sup>110</sup>

At any rate, equal representation in jury pools serves a second purpose beyond enforcing bans on discrimination.<sup>111</sup> Representing different ways of thinking has value in and of itself on a jury since it expands the knowledge base of the jury as a whole by bringing diverse perspectives and life experiences to bear on the evidence. The connection of representation to anti-discrimination is straightforward. The argument as to why diversity on juries contributes to impartial deliberation remains hotly contested.

### *A. Descriptive Representation*

To begin, we must ask what kind of diversity contributes to informed and impartial deliberation. Representation enthusiasts argue that the more the jury "looks like the community," the more it, by definition, draws on the views of all and not just some parts of the community.<sup>112</sup> The ideal is that the jury should be a mirror image,

109. See *United States v. Bearden*, 659 F.2d 590, 602 (5th Cir. 1981) ("underlying concern" of the Jury Selection Act is that jury selection "must not result or have the potential to result in discrimination . . .").

110. See *Re*, *supra* note 17, at 1585-88, for an argument about the importance of visibility in enforcing anti-discrimination law.

111. Provisions of the 1968 Jury Selection and Service Act make clear the distinction between the two purposes. Compare Jury Selection and Service Act § 1862 (prohibiting discrimination in juror selection), with § 1863(b)(2) (requiring affirmative steps when drawing juror names so that the resulting jury represents a fair cross section of the community).

112. See, e.g., Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 707-11 (1995) (approving of a proposal to use quotas in order to ensure that minorities have a presence on grand juries).

microcosm, or fair cross-section of the community at large.<sup>113</sup> By its very make-up, such a jury is touted as capable of deliberation fairly representative of the community.<sup>114</sup> However, the match between actual jury practices and the theory of descriptive representation is poor. Twelve spaces cannot accommodate representatives from the myriad of demographic groups in America.<sup>115</sup> Even if they could, descriptive representation suffers from a false and insulting assumption that all members of a given group think the same, so that merely having a woman on the jury—any woman—will give us some putative woman’s point of view. The fallacy here goes by the name of “essentialism,” or the claim that all members of a racial, ethnic, or gender group are fungible or interchangeable commodities.<sup>116</sup> Essentialism makes the hold of demography on attitude so tight as to make all of us prisoners of our backgrounds and incapable of impartial deliberation at all.<sup>117</sup>

In sum, advocates of descriptive representation too readily assume that we get what we want—diversity in substantive viewpoints—simply by having diversity in demographic terms. As one critic puts it, “[A] relation of identity or similarity with constituents says nothing about what the representative does.”<sup>118</sup>

Actual jury selection practices in the United States are not examples of descriptive representation. Although we start from a master jury list that seeks to mirror the demographics of the community, there is no requirement that the jury finally seated maintain any particular level of group representation at all.<sup>119</sup> If the group identities of individual jurors were so crucial to justice, we would expect there to be some

113. See Gerken, *supra* note 94, at 1115–17 nn. 25–35 (relevant sources cited therein).

114. See *Taylor v. Louisiana*, 419 U.S. 522, 529 n.7 (1975).

115. Re, *supra* note 17, at 1572.

116. See Jane Mansbridge, *What does a Representative Do? Descriptive Representation in Communicative Settings of Distrust, Uncrystallized Interests, and Historically Denigrated Status*, in *CITIZENSHIP IN DIVERSE SOCIETIES* 99, 108 (Will Kymlicka & Wayne Norman eds., 2000); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991) (“[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution.”).

117. See Re, *supra* note 17, at 1581 (“[D]emographic conceptions . . . legally enshrine associations between group membership and individual attitudes that are, at best, contextual and ever-changing.”); see also KYMLICKA, *supra* note 89.

118. See Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE*, *supra* note 73, at 354.

119. Compare Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–1862 (2012) (requiring that a master jury list must be drawn from a fair cross-section of the community), with *Holland v. Illinois*, 493 U.S. 474, 478 (1990) (holding that it is not unconstitutional for parties to exclude cognizable groups from the jury through the use of peremptory challenges), and *Taylor*, 419 U.S. at 538 (declining to require that the panel of jurors actually chosen mirror the community or reflect distinctive groups in the population).

requirement about levels of representation on the seated jury—perhaps not quotas, but at least some affirmative action rules for maximizing diversity among jurors.<sup>120</sup> To the contrary, the Supreme Court has interpreted the Constitution's Equal Protection Clause as prohibiting race consciousness in jury selection.<sup>121</sup> We live with whatever level of representation results from random selection from a list formed free of discrimination against individuals or groups. As Heather Gerken has shown, random selection is not a procedure guaranteed to produce mirror image juries.<sup>122</sup> Instead, even under ideal conditions, randomness results in a predictable range of jury compositions, some dominated by majority group members, others over-representative of minority group members.<sup>123</sup>

### B. Substantive Representation

An alternate theory of representation goes by the name “substantive” representation.<sup>124</sup> Here, to echo Hanna Pitkin's terms, the task of a representative is not to stand in for the absent person but to act on behalf of that person's best interests.<sup>125</sup> Representatives can act on behalf of the interests of members of a group without necessarily being from that group themselves.<sup>126</sup>

Suppose that jurors represent us, not simply by looking like us, but by being well situated to act on our behalf. Why should this be so? Why should ordinary persons chosen from the people-at-large have any advantage over judges or panels of experts when it comes to acting

120. Compare Note, *The Case for Black Juries*, 79 YALE L.J. 531, 548 (1970) (advocating for quotas), with Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 171–74 (suggesting that parties be given a fixed number of affirmative choices as to who is included on the final jury).

121. *Holland*, 493 U.S. at 478; see also *United States v. Nelson*, 277 F.3d 164, 207–08 (2d Cir. 2002) (noting that Supreme Court precedent prohibits adding or subtracting jurors in order to achieve a representative jury); *United States v. Ovalle*, 136 F.3d 1092, 1096, 1105–07 (6th Cir. 1998) (disapproving of a trial court's attempt to achieve representativeness on the qualified jury list by randomly striking a specified number of “whites and other” potential jurors from the list).

122. Gerken, *supra* note 94, at 1112–13.

123. *Id.*

124. For the difference between descriptive and substantive representation, see PITKIN, *supra* note 103, at 60–92, 112–44.

125. *Id.* at 60 (“stand for”); *id.* at 113 (“acting for”).

126. See Mansbridge, *supra* note 116, at 103. While one does not have to share an ethnic identity with constituents to act on behalf of them, the demographic characteristics of the representative are not irrelevant. Given the cleavages of race in particular, it is likely that persons from minority groups will bring into the jury room “new information, perspectives, or ongoing insights relevant” to the task at hand. *Id.* at 99, 103. Thus, the distinction between descriptive and substantive theories of representation is not as sharp as many commentators have it. *Id.* at 99–100.

on our behalf in rendering verdicts?<sup>127</sup> I suggest an answer that I will call “representative deliberation.” I choose this name precisely to signal that the jury’s distinct democratic design is one that connects what jurors do (deliberate) with who they are (a diverse group of persons chosen at random but screened for bias) in ways that none of the three ideal types of democracy capture. The jury manages to hold together (1) the populist claim about the collective wisdom of the people with (2) the deliberative claim that many minds outsmart the few brightest minds with (3) the representative claim that diversity among the many minds matters. Direct democracy by itself is an aggregating concept: we simply add up the separate, individual votes of the people to do what most people want. Deliberative democracy standing alone takes its ideals from the Kantian aspiration to reason purely and universally, untainted by any arguments rooted in the particular life experiences of the jurors.<sup>128</sup> Representative democracy by itself tells us more about who the jurors are than what they are supposed to do. By contrast, representative deliberation shows how diversity provides the conditions under which jurors do the best job of turning many different minds to the common task of deliberating to a just verdict.

#### IV. CONNECTING REPRESENTATION AND DELIBERATION

Representative deliberation harks back to John Stuart Mill’s classic arguments for how competition among diverse viewpoints contributes to progress in human reasoning.<sup>129</sup> Mill was no skeptic about the existence of objective truths, nor did he ever suggest that truth was just a compromise among conflicting views.<sup>130</sup> He taught that confrontation with opposing points of view sharpened the debating mind, enriched the perspectives to be mined, and gave power to rational deliberations capable of persuading persons who start out from differ-

127. While we share an interest in getting to the “right” or “correct” verdict, we often disagree about what the accurate verdict should be. These disagreements could be settled if there was some external, independent criterion against which to measure the accuracy of a jury verdict. On certain questions, there will be a way of objectively verifying a jury’s conclusion, such as determining that bullets were fired from a certain gun. But on other questions, such as whether the person who fired the gun acted with the intent necessary to convict him of murder rather than manslaughter, there is no external test of what makes a jury verdict true or false. *See, e.g.,* ELSTER, *supra* note 86, at 17–18. It is for this reason that I propose the model of “representative deliberation” *infra* Part IV.

128. For a summary of Immanuel Kant’s notion of “pure reason,” see generally JEFFREY ABRAMSON, *MINERVA’S OWL: THE TRADITION OF WESTERN POLITICAL THOUGHT* 258–264, 277–278 (2009).

129. JOHN STUART MILL, *ON LIBERTY* 15–52 (David Spitz ed., 1975).

130. *Id.* at 50.



ent places.<sup>131</sup> So it should be with juries. Ideally, diversity enriches the jury's knowledge base, as people from different walks of life achieve a collective wisdom together that no one person has alone. Diversity also serves to check the expressions of prejudice that might luxuriate in the absence of members of disparaged groups.<sup>132</sup> Diversity makes deliberation dynamic and educational, by calling on persons to consider, defend, or abandon their starting attitudes when challenged by others. Diversity even ratchets up the generality of reasoning, by giving power, especially under the unanimous verdict requirement, to arguments that prove persuasive across the normal demographic divides.<sup>133</sup>

Recent studies of so-called "group polarization" give some empirical confirmation to the theoretical connection between diversity and deliberation.<sup>134</sup> When persons are cocooned in homogeneous enclaves, meeting and talking only with those who share their ideological attitudes, they tend to reinforce and to harden one another's attitudes and to move members to even more extreme or polarized positions.<sup>135</sup> In other words, "the views of a non-diverse group—that is, a group whose members largely share the same outlook—tend to become *more* extreme than they were at the beginning of the deliberation."<sup>136</sup> So, if we want deliberation to avoid being an occasion for reinforcing and rationalizing the unchallenged preconceptions jurors bring to the case, we should value diversity on juries.<sup>137</sup>

### A. Two Troubles

This connection between diversity and deliberation on the jury can fall prey to two mistakes. The first mistake occurs if this connec-

131. *Id.* at 50, 53–71.

132. *See, e.g.*, *Ballew v. Georgia*, 435 U.S. 223, 233 (1978) (referring to research showing that in groups, "prejudices of individuals were frequently counterbalanced").

133. *See, e.g.*, *Re, supra* note 17, at 1574–75. *Re* distinguishes between "single-viewpoint" accounts that insist that a particular perspective be present for a jury verdict to be legitimate—for instance a jury without any women might lack a vital perspective on the evidence during deliberations—from "multiple-viewpoint" accounts that "hold that the espousal of a particular viewpoint is less important than having an array of dissimilar views that enrich the quality of deliberations." *Id.* at 1574.

134. *See, e.g.*, Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L. J. 71, 75–76, 97, 101 (2000); *see also* CASS R. SUNSTEIN & REID HASTIE, *WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER* 77–89 (2015).

135. *See* Sunstein, *supra* note 134, at 118–19.

136. Ford, *supra* note 37, at 417.

137. *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries: A Review of Social Science Theory and Research*, 78 CHI-KENT L. REV. 997, 1030 (2003) (finding that racial diversity on mock juries made deliberations more thorough).

tion is used to encourage jurors to *perceive* their task as representing their groups in some static or loyal way.<sup>138</sup> However, the model I am suggesting need not cater to such a misperception. To see why, it is necessary to distinguish between the *internal* perspective we want jurors to have of their duty, and the *external* perspective we have of them. Internally, inside the jury room, we never want jurors to behave as if they have constituents to represent, or as static or allegiant spokespersons for their race or sex or other demographic anchor. Each juror is to enter into deliberations focused on the core task at hand: to convict only the truly guilty.<sup>139</sup>

Externally, however, we have good reasons to consider the demographic composition of a jury. Suppose a hospital is seeking the best course of treatment for a cancer patient. We may believe that all doctors conscientiously seek the best treatment, but we may nonetheless have good grounds for believing that surgeons, radiologists, and internists have different perspectives on what this treatment should be. We do not have to go the essentialist route and maintain that all surgeons are alike to reach the conclusion that a person's specialization has considerable influence on medical judgments. The hospital might therefore put together a team where the three specialties are represented. We ask the doctors to deliberate and to reach an agreement as to the best course of treatment. We do *not* think the team approach encourages them merely to split their differences, nor do we believe that they will see themselves as representing the interests of their specialization; each is concerned with arriving at the best treatment for the patient. From the external point of view, we think the process of arriving at the most sound medical judgment is enhanced by the team's representativeness,<sup>140</sup> but we do not think it is likely that this external perspective will corrupt the internal perspective or frame of mind of the deliberating doctors. Even though the connection between a doctor's descriptive identity (as surgeon, radiologist, or internist) and the doctor's medical views is bound to vary from doctor to doctor, the rep-

138. See Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 113 (1993) ("[J]urors may . . . be just as susceptible as legislators to signals that they should act as racial representatives."); see also ABRAMSON, *supra* note 15, at 140.

139. See also RAWLS, *supra* note 16, at 74.

140. *Study Shows Team Approach Benefits Cancer Patients*, UNC SCH. MED. (Oct. 19, 2010), <http://www.med.unc.edu/www/newsarchive/2010/october/study-shows-team-approach-benefits-cancer-patients>.

representative panel underwrites the patient's and the public's confidence in the final judgment.

Representative panels aim to accomplish similar tasks for jurors.<sup>141</sup> To be sure, we might expect a tighter fit between a doctor's specialty and the substantive medical judgment we are seeking to represent than exists between a juror's race or sex and the substantive views on the case at hand. Still, the empirical evidence is mounting that characteristics such as race and sex do influence substantive views<sup>142</sup> and we can acknowledge that without undercutting the trust we place in individual jurors to reason free of allegiance to their group identities. Indeed, in regard to race and in light of historical mistrust, the evidence seems clear that racially diverse juries do a better job than racially homogeneous juries do in putting race aside, or at least keeping racial prejudice in check, before giving us their best legal judgment.<sup>143</sup>

In putting forward this model of deliberative representation, I place emphasis on the contribution diversity makes to impartial deliberation. However, a second danger for my model arises when persons sympathetic to the model use it to dismiss the very possibility of impartiality. In this altered conception, no one juror is ever capable of leaving demography at the jury room door.<sup>144</sup> Everyone deliberates from a partial perspective and is biased in the strict sense of the term.<sup>145</sup> The best we can do is to see through the mythic nature of impartial deliberation and balance the biases inside the jury room, using the partialities of some to check and to counteract the partialities of others.<sup>146</sup>

141. Jury deliberation differs from medical deliberation in that jury deliberation occurs among laypersons and not experts. But just as the hospital assembles a diverse team of doctors to enrich the knowledge base and perspectives of the medical panel, so the judicial system assembles a diverse team of jurors to enrich the knowledge base and perspectives of the legal panel.

142. See *infra* Parts IV (B)-(C).

143. See *infra* Part IV(C).

144. See also *Commonwealth v. Soares*, 387 N.E.2d 499, 515 (Mass. 1979) ("No human being is wholly free of the interests and preferences, which are the product of his cultural, family, and community experience.").

145. *Taylor v. Louisiana*, 419 U.S. 522, 529 n.7 (1975) ("As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent." (quotation marks omitted) (citing S. REP. NO. 92-516, at 3 (1971))).

146. See *Soares*, 387 N.E.2d at 515 (using the phrase "diffused impartiality" as a label for the idea that a whole jury may be capable of impartiality even though the individual members are not).

This description of how juries reach verdicts might not seem all that different than my model of deliberative representation. However, the amended version takes aim at the mythic nature of deliberation, replacing it with a frank acceptance that the jury is just another example of interest group politics.<sup>147</sup> By contrast, I defend the jury as a deliberative body. Diversity among jurors permits them to achieve a rich collective wisdom. Diversity also buttresses impartiality by prodding jurors to reassess their own preconceptions in light of what they learn from others.

The jury connection between representation of differences and impartial deliberation does not follow the norms of deliberative theories of democracy with their emphasis on arguing only from shared and general values. Rather, jury deliberation raises the possibility that speaking from different life experiences is actually conducive to achieving an impartial verdict in the end.

Do real juries practice this ideal of representative deliberation? In the following section, I review recent studies showing that they do. However, the same studies show how deliberation goes wrong in the absence of diversity.

### *B. Data from Interviews and Actual Jury Deliberations*

Opportunities to examine deliberation on real juries are exceedingly rare.<sup>148</sup>

However, on those occasions where states have permitted the recording of jury deliberations for academic purposes, researchers have found that deliberation influences verdicts and that diversity affects deliberation. Post-trial interviews with actual jurors provide additional evidence for the importance of deliberation. Consider the following three studies.

147. See, e.g., Gerken, *supra* note 94, at 1152 n.44.

148. In 1955, the University of Chicago Jury Project set out to audiotape actual civil jury deliberations, but Congress and more than thirty states responded by passing anti-eavesdropping statutes. See KALVEN & ZEISEL, *supra* note 64, at xv; see also Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1867 (2001). In 1986, Wisconsin permitted the Public Broadcasting Service to televise an actual criminal jury deliberation. *Frontline: Inside the Jury Room* (WTTW television broadcast Apr. 8, 1986), <http://www.pbs.org/wgbh/pages/frontline/programs/info/410.html>. In August of 2004, ABC News televised actual criminal jury deliberations in five trials from three different states. See Dana Stevens, *Court TV: ABC's Fascinating In the Jury Room Deglamorizes the Legal Process*, SLATE (Aug 12, 2004), [http://www.slate.com/articles/arts/television/2004/08/court\\_tv.html](http://www.slate.com/articles/arts/television/2004/08/court_tv.html).

1. In 1995, Arizona adopted a rule change that permitted jurors in civil trials to discuss the evidence during the course of the trial, provided that all jurors were present.<sup>149</sup> In 1998, as part of an effort to study the effects of the rule change, the Arizona Supreme Court authorized the filming of fifty civil jury trials.<sup>150</sup> In order to create a control group, the Supreme Court authorized the temporary suspension of Rule 39(f).<sup>151</sup> Thirteen juries were randomly assigned to the control group in which jurors received the traditional admonition to refrain from discussing the evidence with anyone until the close of evidence (hereinafter referred to as the “No Discussion” juries).<sup>152</sup> Jurors in the remaining thirty-seven trials received permission under Rule 39(f) to discuss the evidence with fellow jurors as a group during breaks in the trials (hereinafter referred to as the “Discussion” juries).<sup>153</sup>

Content analysis of conversations in the “Discussion” juries showed that jurors spent most time on “fact exchanges” (“I didn’t get that straight—was it yellow or a red light?”)<sup>154</sup> or on “inference exchanges” (“If the [other] car swerved to the right, then how could the damage have been only to the left bumper?”).<sup>155</sup> Such content corroborated long-standing hypotheses that “jurors are not passive recipients of trial evidence,”<sup>156</sup> but actively engage during trial by drawing inferences that will weave the facts into a persuasive narrative or story.<sup>157</sup> When given the opportunity to discuss the evidence even before formal deliberations, jurors began working together on constructing that story and on influencing one another through information ex-

149. ARIZ. R. CIV. P. 39(f) (1995). Michigan is one state that ran a pilot program permitting jurors in *criminal* trials to discuss the evidence prior to the close of testimony. See *People v. Richards*, 809 N.W.2d 148, 152 (Mich. 2012) (Young, C.J., concurring), *cert. denied*, *Richards v. Michigan*, 133 S. Ct. 219 (2012).

150. All parties and jurors had to consent to the filming. In the Matter of Civil Jury Filming Project, Order 98-10 (Ariz. 1998), available at <http://www.azcourts.gov/portals/22/admorder/orders99/pdf98/9810.pdf>.

151. *Id.*

152. Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 39 (2003); see also Abramson, *supra* note 2, at 763–65 (reviewing the Arizona project findings).

153. Diamond et al., *supra* note 152, at 39.

154. *Id.* at 42.

155. *Id.* For analysis of jury discussions of legal instructions during the recorded deliberations, see Shari Seidman Diamond et al., *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537 (2012).

156. Diamond et al., *supra* note 152, at 47.

157. See, e.g., REID HASTIE ET AL., *INSIDE THE JURY* 22–23 (1983) (summarizing the story model).

changed.<sup>158</sup> The researchers found that discussion during trial enhanced the jurors' grasp of expert testimony in particular.<sup>159</sup>

One concern about permitting early discussion was that it might lock jurors into a premature decision, before hearing all of the evidence.<sup>160</sup> However, researchers found little evidence of premature commitment.<sup>161</sup> In a sample of twenty cases where one or more jurors expressed an opinion on liability during trial, "by the time the jury took its final vote, jurors in 11 of the 20 cases (55%) had changed from the position they had expressed during the trial."<sup>162</sup> The researchers described the deliberations on the "Discussion" panels as "fluid and dynamic."<sup>163</sup> A companion study, based on post-trial interviews with 1,385 jurors serving in 172 civil trials in Arizona,<sup>164</sup> likewise found that "a substantial proportion of jurors reported changing their minds based on discussions with other jurors during the course of the trial or final deliberations."<sup>165</sup>

Arizona researchers took note of an earlier mock jury study that dismissed deliberation as having little effect on jurors' verdict preferences.<sup>166</sup> By contrast, their interviewees reported significant shifts in opinions following group discussion.<sup>167</sup> One possible explanation for the difference was that the Arizona jurors came "from a far more di-

158. Diamond et al., *supra* note 152, at 48.

159. *Id.* at 71 (As compared to jurors serving on the "No Discussion" panels, "jurors reported significantly greater ease in understanding the expert testimony" when they had the opportunity to discuss the evidence during trial.).

160. *Id.* at 11-12.

161. *Id.* at 48-67.

162. *Id.* at 65-66.

163. *Id.* at 47.

164. Paula L. Hannaford et al., *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627 (2000). Deliberations in these trials were not recorded and researchers based their analysis on post-trial interviews with the jurors. *Id.* at 628. Since the study found no statistically significant differences in "Discussion" and "No Discussion" juries in the timing of when jurors began to form opinions and how often they changed their minds, researchers combined data from all interviewed jurors. *Id.* at 633 n.4.

165. *Id.* at 650-51. *See also id.* at 637-38 (noting that while a substantial number of jurors reported forming a verdict preference before the close of evidence, nearly 95% of them said they changed their opinion at least once during trial. 20% specified that discussions with other jurors prior to deliberation changed their minds and nearly 40% changed their verdict preference during final deliberations.). For another analysis of the interviews with Arizona civil jurors, see Valerie P. Hans et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J.L. REFORM 349 (1999).

166. *Id.* at 628 & n.7 (citing H.P. Weld & E.R. Danzig, *A Study of the Way in Which a Verdict is Reached by a Jury*, 53 AM. J. PSYCHOL. 518 (1940)).

167. *Id.* at 652.

verse jury pool” than was the case in the earlier mock study.<sup>168</sup> In other words, deliberation’s force grew when diversity fueled the conversation.

2. When it comes to criminal trials, post-trial interviews remain the major source of information about actual jury deliberations. One study compiled interview data from jurors who had served on criminal juries in four large urban counties.<sup>169</sup> Authors of the study detected an influence of race on a juror’s vote on a first ballot only in drug offenses tried in the District of Columbia.<sup>170</sup> Even that correlation between race and verdict preference disappeared “after jurors have had an opportunity to deliberate.”<sup>171</sup> The study’s positive finding about the ability of deliberation on diverse panels to bridge racial divides is in line with what my model of representative deliberation would predict.

3. Another source of data about actual jury deliberations comes from the Capital Jury Project’s archive of interviews with 1,155 jurors who deliberated in 340 death penalty cases.<sup>172</sup> These interviews showed pronounced differences between white and black jurors during the sentencing phase of deliberations, with the sharpest differences separating black male and white male jurors. Among the differences were: (1) whether the crime was cold-blooded;<sup>173</sup> (2) how much the victim suffered;<sup>174</sup> (3) lingering doubts about guilt;<sup>175</sup> (4) predisposition to thinking of death as the only appropriate sentence;<sup>176</sup> (5) view of the defendant as a future danger;<sup>177</sup> (6) view of the defendant as remorseful;<sup>178</sup> and (7) openness to considering mitigating circum-

168. *Id.* at 650–51 (noting the “homogeneous and unrepresentative demographic characteristics” of participants in the earlier study finding deliberation did not matter).

169. Stephen P. Garvey et al., *Juror First Votes in Criminal Trials*, 2 J. EMPIRICAL LEGAL STUD. 371 (2004). The four jurisdictions were the Bronx, NY; the central division of Los Angeles Superior Court; Maricopa County (Phoenix); and Washington, D.C. *Id.* at 375.

170. *Id.* at 394, 398 (black jurors more likely than white jurors to vote not guilty on a first ballot in a drug prosecution in Washington, D.C.); *id.* at 394 (the apparent influence of race in other jurisdictions disappeared when the study controlled for relevant variables).

171. *Id.* at 398 (finding “no evidence that a D.C. juror’s race is related to the jury’s decision to convict.”).

172. See William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 189 (2001) (hereinafter Bowers et al., *Death Sentencing in Black and White*).

173. William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1507–08 (2004) (hereinafter Bowers et al., *Crossing Racial Boundaries*).

174. *Id.* at 1506–07.

175. Bowers et al., *Death Sentencing in Black and White*, *supra* note 172, at 203–08.

176. *Id.* at 199–200.

177. *Id.* at 219–21.

178. *Id.* at 211–16.

stances.<sup>179</sup> These differences no doubt explain why death penalty recommendations vary so much with the racial composition of capital juries.<sup>180</sup> A leading study of death penalty deliberation found that achieving even minimal representation for blacks on capital juries dramatically decreased the likelihood of a death sentence for black defendants convicted of killing a white.<sup>181</sup>

In light of the influence of race on capital juries, it is disturbing to find that, even after *Batson v. Kentucky* prohibited prosecutors from striking jurors solely on account of their race,<sup>182</sup> “a black venire member had 2.48 times the odds of being struck by the state as did a venire member of another race” in capital trials in North Carolina.<sup>183</sup> The statistical significance of race on use of peremptory challenges remained “robust” even after researchers controlled for other variables relevant to use of peremptory challenges.<sup>184</sup>

### C. Data from Mock Jury Deliberations

Since opportunities to study real juries remain scant, researchers rely on mock jury studies. For our purposes, experiments have the advantage of being able to vary jury composition as a way of studying diversity and deliberation.<sup>185</sup> Many studies, going back several years, have tried to prove or disprove a link between juror race and verdict preference.<sup>186</sup> No consensus yet exists on this issue.<sup>187</sup> However, recent

179. *Id.* at 181 (“[I]n capital cases, blacks may be more sympathetic than white jurors to mitigating evidence presented by a black defendant with whom they may be better able to identify . . .”).

180. *Id.* at 244–59.

181. *Id.* at 192–94 (documenting a “black male presence” on juries where the presence of two black males or even one reduced the likelihood of a death sentence).

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

183. Catherine M. Grosso & Catherine O’Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1553 (2012).

184. *Id.* at 1554.

185. The disadvantage of mock juries is that they may not simulate the actual jury experience. For difficulties in constructing mock juries, see John M. Conley, William L. Turnier, & Mary R. Rose, *The Racial Ecology of the Courtroom: An Experimental Study of Juror Response to the Race of Criminal Defendants*, 2000 WIS. L. REV. 1185, 1188–89 n. 17, citing to Wayne Weitan & Shari Seidman Diamond, *A Critical Review of the Jury Simulation Paradigm*, 3 LAW AND HUM. BEHAV. 71 (1979).

186. For an overall analysis of many of these studies, see Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW AND HUM. BEHAV. 621 (2005).

187. *Id.* at 622–23 (citing to studies reaching opposite conclusions on whether the defendant’s race influences juror opinions on guilt). See also Sommers & Ellsworth, *supra* note 137, at



studies by psychologist Samuel Sommers provide the strongest mock juror evidence to date for the influence of race on both the initial pre-conceptions of individual jurors and also on the course of deliberation.<sup>188</sup>

In 2005, Sommers partnered with a local trial judge in recruiting members from the actual jury pool to serve as mock jurors in an experiment designed to study the effects of racial composition on jury verdicts.<sup>189</sup> Sommers varied the composition of each mock jury so that half were all white and half had four white and two black members. Each panel watched a video summary of a trial of a black defendant charged with sexual assault.<sup>190</sup>

Sommers concentrated on differences in the behavior of white (majority) jurors when they were placed on diverse as opposed to homogeneous juries. Working from a hypothesis that the mere *expectation* of deliberating on a mixed panel might change the initial verdict preferences of participants, Sommers confirmed that whites placed on diverse panels were already, even prior to deliberation, less likely to form an initial guilty preference than were whites on homogeneous panels.<sup>191</sup> The best explanation for this result is that the prospect of sitting on a racially diverse panel triggered basic norms against bias in individual white jurors.<sup>192</sup> Once such a norm shift occurred, the white jurors on mixed panels parsed the evidence with more care and less bias, at least as measured in terms of demonstrable misstatements of fact or failures of recall.<sup>193</sup>

A second benefit of diversity on Sommers' mock juries was that it enriched and enlarged *information exchange* during deliberations.<sup>194</sup> As expected, black jurors made references to issues that put possibilities of bias on the table for discussion.<sup>195</sup> But it was the *white* jurors on

1010 (concluding that "no consensus has been reached regarding the influence of a defendant's race on White mock jurors").

188. See *infra* text accompanying notes 189–199. I have reviewed elsewhere some of Sommers' experimental data. See Abramson, *supra* note 2, at 765–68.

189. See Sommers, *Racial Diversity and Group Decision Making*, *supra* note 88, at 601.

190. *Id.* at 601–03.

191. *Id.* at 603, 605, 606–07.

192. *Id.* at 607. See also Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice against Black Defendants in the American Courtroom*, 7 PSYCH. PUB. POL'Y & L. 201, 217 (2001) (noting that white juror bias is greater in cases where race is *not* a salient issue in the case).

193. Sommers, *Racial Diversity and Group Decision Making*, *supra* note 88, at 606–07.

194. *Id.*

195. *Id.* at 606.

diverse panels who were responsible for making exchange of information and perspectives different than what they were on the homogeneous panels.<sup>196</sup> White jurors serving on racially mixed panels were the most likely to bring up concerns about racial profiling, police behavior, or prejudice against black defendants.<sup>197</sup>

In other words, the mere presence of two African-American jurors on a six-person panel transformed the behavior of white jurors, motivating *them* to initiate conversations about whether extraneous racial factors had tainted the evidence.

In line with my theory of representative deliberation, Sommers found that discussions in racially diverse groups were “more thorough and competent” than deliberations in homogeneous ones, as measured in any number of ways.<sup>198</sup> Diverse groups deliberated longer (50.67 minutes compared to 38.49 minutes), discussed more case facts (30.48 to 25.93), committed less factual inaccuracies (4.14 to 7.28), left fewer inaccurate statements uncorrected (1.36 to 2.49), cited to more pieces of evidence they considered missing (1.87 to 1.07), raised a greater number of race-related issues (3.79 to 2.07), made more mentions of racism (1.35 to 0.93), and had fewer objections when racism was mentioned as relevant (22% of the time to 100%).<sup>199</sup>

In the real world, the shooting death of an unarmed black man by a white police officer in Ferguson, Missouri, and the subsequent decision of the county grand jury not to indict the police officer for any crime,<sup>200</sup> renewed a national debate about what one commentator called the “physics of race.”<sup>201</sup> The author noted that “[b]lack and white people rarely view race in the same way” and that “one’s culture, one’s experiences, one’s fears and fantasies” change how one perceives a white police officer confronting a black man.<sup>202</sup> The mock jury studies reviewed in this section suggest that black and white jurors bring different but relevant perspectives to bear on jury deliberation. But these studies also show that deliberation on a racially diverse panel mutes the racial effect for the better.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at tbl.2; see also Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 414–15 (2007).

200. See *supra* note 97.

201. Michael Eric Dyson, *Where Do We Go After Ferguson?*, N.Y. TIMES, Nov. 30, 2014, at SR 1.

202. *Id.*

### *D. The Obstacles to Representative Deliberation*

Considerable obstacles to representative deliberation remain. In 2005, defendants in a capital murder case challenged the underrepresentation of African-Americans in the jury pools of the federal trial court in Massachusetts.<sup>203</sup> Pursuant to Federal Rule of Evidence 706, the presiding trial judge appointed me to advise the court regarding the defense challenge.<sup>204</sup> In a division of the district where African-Americans made up only about seven percent of the population over 18 years of age according to Census figures,<sup>205</sup> the judge was not surprised that there were few African-Americans among those who appeared for jury duty.<sup>206</sup> But she was puzzled by the virtual disappearance of African-Americans in jury pool after jury pool.<sup>207</sup>

In my report, I found that a number of factors combined to account for the disappearance of African-American jurors from the jury pool.<sup>208</sup> Some obstacles were peculiar to Massachusetts, which relied on flawed local town lists as a source of different names.<sup>209</sup> Not surprisingly, smaller and wealthier suburbs compiled more accurate lists than did large urban areas, where the population was more mobile.<sup>210</sup> Other obstacles, I have since found, occur nationally. These obstacles include: predictable underrepresentation of minorities in districts that use the voter registration list as an exclusive source of juror names, given that minorities register to vote in lesser percentages than do whites;<sup>211</sup> a greater percentage of jury summonses being returned as “undeliverable mail” when sent to zip codes with predominantly poor and minority populations;<sup>212</sup> and a greater percentage of no-shows from persons in those same zip codes who presumably did receive their jury summonses through the mail.<sup>213</sup> Colleagues and I have doc-

203. *United States v. Green*, 389 F. Supp. 2d 29, 35–36 (D. Mass. 2005).

204. *Id.* at 39.

205. *Id.* at 41.

206. *Id.* at 41–42.

207. *Id.* at 55 (“[T]he vast majority of Eastern [Division] juries will not have a single African-American member.”).

208. See Jeffrey Abramson, Report on the Defendants’ Challenge to the Racial Composition of the Jury Wheels of the Eastern Division of the United States District Court for the District of Massachusetts at 1–68, *Green*, 389 F. Supp. 2d 29 (No. CRIM.02–10301–NG) (hereinafter Abramson Report).

209. *Green*, 389 F. Supp. at 36.

210. *Id.* at 59.

211. See Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 916–920.

212. Abramson Report, *supra* note 208, at 38–41.

213. See *id.* at 42–44.

umented problems like these in federal districts in California, Florida, Illinois, and Massachusetts.<sup>214</sup>

Yet, federal judges are remarkably loath to find that minority underrepresentation violates either the Sixth Amendment guarantee of an impartial jury or statutory provisions of the federal Jury Selection Act.<sup>215</sup> To begin with, these judges typically use a statistical method, known as absolute disparity, that severely underestimates the extent of underrepresentation.<sup>216</sup> In a jurisdiction where a minority group is ten percent of the jury-eligible population but only five percent of the actual jury pools, the absolute disparity test calculates only a five percent loss in minority representation (10-5), even though only half the expected minority jurors are in the jury pools (5/10).<sup>217</sup> Federal judges then find that departures from fair representation are either not substantial enough<sup>218</sup> or that they are not the state's fault, but rather flow from an alleged unwillingness of minority jurors to register to vote or to respond to their summonses.<sup>219</sup>

For federal juries, the Jury Selection and Service Act makes clear that even nondiscriminatory jury selection procedures should be changed if they systematically underrepresent cognizable groups in the community.<sup>220</sup> In the Massachusetts case above, the trial judge

214. See Rose & Abramson, *supra* note 211, at 916-54.

215. See Cynthia A. Williams, Note, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. REV. 590 (1990) (list of over 100 cases where federal courts have rejected challenges to the use of the voter lists as exclusive sources of juror names).

216. See *United States v. Royal*, 174 F.3d 1, 8-9 (1st Cir. 1999) (observing that other circuits use the absolute disparity method); see also *Berghuis v. Smith*, 559 U.S. 314, 330 n.4 (2010) (mentioning the absolute disparity standard, but declining to address it).

217. For an explanation of absolute disparity and an alternative comparative disparity test, see Rose & Abramson, *supra* note 211, at 918-19.

218. See, e.g., *Royal*, 174 F. 3d at 10-11; *United States v. Pepe*, 747 F.2d 632, 649 n.18 (11th Cir. 1984); *United States v. Hernandez-Estrada*, No. 10cr0558 BTM, 2011 WL 1119063, at \*3-4 (S.D. Cal. Mar. 25, 2011). In many jurisdictions, an informal rule has emerged that requires underrepresentation to be by at least ten percent, as measured using the absolute disparity test. *United States v. Pritt*, 458 F. App'x 795, 798 (11th Cir. 2012) ("Under black letter Eleventh Circuit precedent, if the absolute disparity is . . . ten percent or less," the departure from expected levels of representation is within constitutional limits and a defense challenge must be rejected. (alteration in original) (quoting *United States v. Grisham*, 63 F.3d 1074, 1078-79 (11th Cir. 1995) (internal quotation marks omitted)). In districts where the minority population is less than ten percent to begin with, such a threshold would excuse the entire disappearance of minority group members from the jury pool. In its latest pronouncement on the issue, the Supreme Court refused to either affirm or disapprove of the ten percent absolute disparity rule. *Berghuis*, 559 U.S. at 330 n.4.

219. *United States v. Orange*, 447 F.3d 792, 800 (10th Cir. 2006); *United States v. Rioux*, 97 F.3d 648, 658 (2d Cir. 1996).

220. Jury Selection and Service Act of 1968, 28 U.S.C. § 1863(b)(2) (West 2014) (requiring supplementation of voter registration list when its use fails to construct a master list that is a fair cross section of the community).

found a violation of the statute and she ordered remedies, including the targeting of specific zip codes for follow-up summonses whenever responses to earlier summonses were lower than expected from those zip codes.<sup>221</sup> This was a rare federal ruling, and one that the First Circuit Court of Appeals promptly reversed on a writ of mandamus sought by the Office of the United States Attorney.<sup>222</sup>

In light of these continuing difficulties in practicing the ideal of fair representation on juries, several commentators suggest we should fall back on descriptive representation, imposing requirements that the jury as finally seated maintain fair representation. Those requirements can be rigid as they are when scholars argue that quotas are necessary.<sup>223</sup> Or they can settle for giving litigants a limited number of choices in “affirmatively selecting” jurors to their liking<sup>224</sup> or on procedures of weighted summoning to compensate for the predictable failure of pure random selection to yield a jury pool representing a fair cross section of the community.<sup>225</sup>

In my view, we need not lurch back to prescriptions that raise all the difficulties with descriptive representation discussed above. The mere fact that the seated jury does not contain representatives of a particular group does not show that the state systematically sought to bias jury selection. We should distinguish, therefore, as current law in

221. *United States v. Green*, 389 F. Supp. 2d 29, 70–79 (D. Mass. 2005).

222. *In re United States*, 426 F.3d 1, 1 (1st Cir. 2005). The story does have a partial happy ending. District court judges in the District of Massachusetts subsequently revised their jury plan to deal with the problems revealed in *Green*, 389 F. Supp. 2d at 66–67, and stipulated that, whenever a summons was returned as undeliverable from a particular zip code, a replacement summons should be issued to names on the list from the same zip code. However, the district did not go as far as the trial judge had in ordering similar procedures for every summons that was presumably delivered but did not elicit a response. See U.S. DIST. COURT FOR THE DIST. OF MASS., PLAN FOR RANDOM SELECTION OF JURORS (Mar. 1, 2007), available at <http://www.mad.uscourts.gov/resources/pdf/RevisedJuryPlan.pdf>.

223. See, e.g., Alschuler, *supra* note 112, at 707–711 (expressing approval of proposal to use quotas to fill some seats on the Hennepin County, Minnesota grand jury); see also ELSTER, *supra* note 86, at 279 (observing that lay juries in Norway must have roughly equal numbers of men and women.); King, *supra* note 138, at 105–06 (citing to sources advocating for use of quotas); *The Case for Black Juries*, *supra* note 120, at 548.

224. Ramirez, *supra* note 120, at 171–74 (suggesting that parties be given a fixed number of choices as to who is seated on the final jury); see also Bowers et al., *Crossing Racial Boundaries*, *supra* note 173, at 1534–35 (advocating in part for a right to select one or more peers on a capital jury).

225. See, e.g., *Green*, 389 F. Supp. 2d at 70–79 (ordering a weighted mailing of summonses so as to oversample poor and minority zip codes where rates of deliverable mail or responses to summonses are low), *rev'd on other grounds*, *In re United States*, 426 F.3d at 1–4. See also Leslie Ellis & Shari Seidman Diamond, *The Jury and Race: Race, Diversity, and Jury Composition: Battering and Bolstering Jury Legitimacy*, 78 CHI-KENT L. REV. 1033, 1053–58 (2003) (suggesting methods of stratified or weighted summoning).

fact does, between cases where every group was fairly represented in jury selection and cases where the state is responsible for systematically disadvantaging certain groups during selection.<sup>226</sup> A jurisdiction's persistence in using the voter registration list as the sole source of juror names, despite knowledge that the voter registration list does not constitute a fair cross section of the community, is the sort of state action, or rather inaction, that begs for a remedy.<sup>227</sup> It disenfranchises citizens who are not on that list, depriving them of even a chance to be selected for jury duty. The Jury Selection and Service Act specifically acknowledged that use of the voter registration list might not generate a master list representative of the community.<sup>228</sup> For that reason, federal legislation imposes on district courts the affirmative obligation to supplement the voter list with other sources of juror names in order to start from a source of juror names that draws fairly from all segments of the community.<sup>229</sup> And yet, I know of no reported case where a federal judge found that exclusive use of the voter registration list violated the statutory provisions.<sup>230</sup>

## CONCLUSION

We need to do a better job of enforcing the rules on representative jury selection that we now have. Those rules, correctly in my judgment, do not insist on practicing a strict demographic philosophy, where only juries that “mirror” the demographics of the community can represent the community. Instead, they rest on the ideal that I have called “representative deliberation.” In rendering verdicts, juries engage in both fact-finding and norm-finding missions. Both missions are enhanced when deliberation weaves together diverse points of view. Diverse juries find the facts more accurately than homogeneous juries, as they

226. *Compare* *Duren v. Louisiana*, 439 U.S. 357, 366 (1979) (clear evidence that permitting women but not men to decline jury service led to systematic underrepresentation of women), *with* *Berghuis v. Smith*, 559 U.S. 314, 331–32 (2010) (insufficient evidence that state procedure for assigning jurors was responsible for alleged underrepresentation of African-Americans among jurors assigned to courts trying felony cases).

227. Informally, several judges have expressed their belief to me that persons who do not bother to register to vote ought to be eliminated from the jury pool.

228. Jury Selection and Service Act of 1968, 28 U.S.C. § 1863(b)(2) (West 2014).

229. *Id.*

230. “The circuits are ‘in complete agreement that neither the [Jury Selection and Service] Act nor the Constitution require that a supplemental source of names be added to voter lists simply because an identifiable group votes in a proportion lower than the rest of the population.’” *United States v. Pritt*, No. 6:09-cr-110-Orl-28KRS, 2010 WL 2342440 (M.D. Fla. 2010), *aff’d*, 458 F. App’x 795 (11th Cir. 2012) (quoting *United States v. Carmichael*, 560 F.3d 1270, 1280 (11th Cir. 2009)).

scrutinize the evidence from multiple points of view, exchange more information, consider more possibilities, and catch errors more frequently. Representative juries also find a community's norms more democratically, by virtue of bringing to bear diverse views on crucial value-laden constructions of what the law means by "reasonable doubt" or "due care" or "reckless disregard."

Further, representative deliberation does not give up on deliberation, the way advocates of descriptive representation sometimes do. But representative deliberation does not lurch to the opposite extreme and assign to jurors the impossible task of reasoning "universally," as deliberative democrats sometimes insist. By showcasing everyday how representing diversity enhances the impartiality of deliberation, the jury delivers on its promise to give us a democracy rooted in the collective wisdom of the people—all the people.