Two Ideals of Jury Deliberation

Jeffrey Abramson

Several recent works of political theory have put forward a model of democracy that gives deliberation, and popular participation in deliberation, a central place in resolving moral disagreements among citizens. Rather than shunting moral disputes as irresolvable or leaving their solution to the courts, theorists of democratic deliberation have argued that disputes over fundamental moral values have a place in politics and that citizens motivated by mutual respect toward their opponents or similar constraints can reason publicly to attain justifiable conclusions. As philosophers Amy Gutmann and Dennis Thompson put it, the "core idea" behind deliberative democracy is simple: even "when citizens or their representatives disagree morally, they should continue to reason together to reach mutually acceptable decisions."

When asked to give a practical example of such deliberation, deliberative democracy theorists often cite the jury as an institution that embodies the ideal of using collective reasoned discussion to attain a common verdict.

I would like to take a closer look at exactly how the deliberative ideal works in the jury context. I do not seek to determine whether jurors actually live up to the ideals of deliberation, for I assume that they do so only imperfectly. Rather, I will argue that even in the jury setting we are confused about exactly what the deliberative ideal is — and that this confusion is itself one reason deliberation often fails to produce agreement in the jury context.

Two theories compete. One theory demands that each juror be as impartial as possible. This theory's emphasis on individual impartiality as the key to reasoned deliberation greatly constrains who can serve on juries and what jurors can know before trial or say during deliberations.

The alternative statement of the deliberative ideal renounces the search for individually impartial jurors and aims instead at the

† Stulberg Professor of Law and Politics, Brandeis University.
1 Jeffrey Abramson, We, The Jury: The Jury System and the Ideal of Democracy (Basic 1994); Amy Gutmann and Dennis Thompson, Democracy and Disagreement (Harvard 1996); James Fishkin, Democracy and Deliberation (Yale 1991).
2 Gutmann and Thompson, Democracy and Disagreement at 1.
3 United States v Parker, 19 F Supp 450, 458 (D NJ 1937).
overall impartiality of deliberations achievable when a jury represents a cross-section of the community. The more closely the jury mirrors the community makeup, it is argued, the more impartial its deliberations will be.\(^4\)

I will suggest that the individual impartiality ideal and the representative or pluralist ideal (as I shall call it) differ in five important ways: (1) The impartialist asks jurors to bracket who they are and to deliberate impersonally, whereas the pluralist encourages jurors to speak from their personal experience; (2) the impartialist prefers importing jurors from a distance, whereas the pluralist seeks local jurors able to speak for the community aggrieved by the crime; (3) the impartialist prizes indifference and lack of juror emotion, whereas the pluralist values a rough-and-tumble debate; (4) the impartialist fears pretrial publicity and prefers jurors unfamiliar with what the media have been blaring, whereas the pluralist is wary of “dumbing down” juries by equating empty-mindedness with open-mindedness; and (5) the impartialist constrains jurors to render only verdicts according to law, whereas the pluralist is tempted to allow jurors to deliberate according to their conscience.

In the first part of this Article, I will detail these distinctions and attempt to put forward the best case possible for both the impartialist and pluralist ideals. I believe, however, that representation is indispensable for informed, democratic deliberation on juries. And while it is easy to acknowledge this principle in general, I question how far we can push for diversity on juries before we must concede that deliberation is mythic and that representation means only that jurors will represent the opinions and preferences of their own kind. In my conclusion, I will return to this fundamental question, asking how far we can go in resdesigning the jury into a “body truly representative of the community”\(^5\) before we transform a deliberative judicial body into just another political bargaining unit.

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("[A] randomly selected jury will not necessarily be ‘impartial’ in the strict sense of that term, because the jurors bring to the jury box prejudice and perspectives gained from their lifetimes of experience. But they will be impartial in the sense that they will reflect the range of the community attitudes, which is the best we can do.").

\(^5\) *Smith v Texas*, 311 US 128, 130 (1940).
I. THE IMPARTIALITY IDEAL VERSUS THE PLURALIST PARADIGM

A. Bracketing versus Representing

Those who make impartiality the crux of the deliberative ideal prod jurors to bracket or to put aside their personal preconceptions, perspectives, and prejudices about the case. Some of a juror's initial views stem from individual life experiences, while others flow from living life as a person of a given race or sex. But impartiality is achieved only to the extent that jurors pull up the anchors of their own identity, take new bearings from evidence considered impersonally, and then guide themselves toward a “verdict,” which is Latin for “spoken truth.”

Political life offers no truth against which to judge, for example, the accuracy of election results. Assuming voting meets no discriminatory obstacles, election results are considered accurate merely because they tally up majority preferences. The impartialist, by contrast, insists on having an external standard of truth against which to judge jury verdicts. The impartialist thus points out that the defendant in a paternity suit either is the child's natural father or he is not. O. J. Simpson either killed Nicole Brown Simpson and Ronald Goldman or he did not. Jurors are sworn to seek truth in such matters and to put aside their own interests and opinions in order to do so. Sometimes, of course, as the political theorist Michael Walzer points out,

the truth lies beyond [jurors'] reach, and they find themselves choosing among competing approximations. Sometimes they make mistakes; sometimes individual members are corrupt or partisan. Sometimes disagreements are too deep and no verdict is possible; sometimes the members merely strike a bargain. But the criticisms that we commonly make of juries serve in effect to ratify their purpose. For what we say is that they should have done better, or that we could have done better, not that there is nothing to be done. In principle, at least, true speech is possible.

How do we select jurors able to render truthful verdicts and

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8 Michael Walzer, Spheres of Justice 263–64 (Basic Books 1983).
not just deliver opinions? The impartialist focuses on each individual juror, preferring jurors with enough virtue to bracket their own selves and to reason impersonally from the evidence. Since impartiality requires uncommon virtue, the impartialist has historically not sought to recruit jurors from the general population but preferred to screen for people “esteemed in the community for their integrity, good character, and sound judgment.”

Even today, when jury selection by law must start from a list representative of the community at large,10 the impartialist defends lawyers’ remaining rights to eliminate any or all potential jurors suspected of bias, regardless of the ultimate effect on jury diversity.11

By contrast, those who treat representation as the key to jury deliberation reject the bracketing approach to impartiality on both practical and normative grounds. Few if any people can live up to an ideal that requires them to suppress the influence of their station in life, let alone the force of their deeply held moral commitments.12 But even if jurors could conform to the bracketing ideal, such a norm would still be undesirable because it would impoverish rather than enrich jury deliberations. After all, jurors are not simply judges by another name. Their unique mission is to expose adjudication to the experiences of ordinary people drawn from different walks of life, not to insulate adjudication from such perspectives. Deliberation should therefore invite and embrace, not exclude and bracket, expressions of what one differently knows as a woman, a person of color, a taxicab driver, or a victim of crime. Under this model, jurors seek the truth, but it is

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10 28 USC § 1861 (declaring it to be “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 . . . ”). See also Taylor v Louisiana, 419 US 522, 530 (1975) (holding that the Sixth Amendment right to impartial jury trial requires selection from a cross section of the community).

11 Granting of hardship excuses, challenges for cause, and peremptory challenges all have the potential to skew the representativeness of juries. The Supreme Court has specifically upheld the constitutionality of the peremptory challenge system against arguments that the system is inconsistent with the Sixth Amendment requirement for cross-sectional jury selection. See Holland v Illinois, 493 US 474, 480 (1990); Abramson, We, The Jury at 138–39 (cited in note 1).

a "whole truth" best knowable when diversity prods jurors to consider all relevant information and perspectives.\(^{13}\)

I will put the pluralist position another way. The more closely jurors reproduce and mirror the diversity of views in our heterogeneous society, the more completely the jury discharges its democratic mission of accurately representing the views of the whole community. If the jury is balanced to accomplish this representative task, then as a whole it will achieve a degree of impartiality that no single juror is capable of reaching. The jury will achieve the "overall" or "diffused" impartiality that comes from balancing the competing biases and the diverse viewpoints rooted in American demographics.\(^{14}\)

In this balanced deliberation, the experiences of some jurors will supplement the experiences of others, permitting the whole jury to take into account all relevant information and all relevant perspectives. Moreover, when juries are representative, the group bias of some jurors checks the group bias of others, silencing the most blatant expressions of prejudice and encouraging a consensus-driven mode of conversation. The very diversity of jury membership helps bring out arguments capable of moving a divergent group of people toward a mutually acceptable verdict.

Consider, for instance, the 1990 conviction of Han Tak Lee, a Korean-born defendant, for murdering his daughter by arson. No Asian American served on the jury, and several jurors indicated that they were swayed by the prosecutor’s emphasis on Lee’s lack of emotion when firefighters led his grieving wife and him to the charred barn where their daughter’s body was found. Following the guilty verdict, Asian American groups rallied in support of Lee, pointing out that his “behavior during and after the fire was inexplicable to most Americans and appeared to convey his guilt — but it was perfectly in tune with Korean custom.”\(^{15}\)

Whatever the truth may have been about Han Tak Lee, jurors would have been better equipped to find it had they known more about Korean grief customs. Take another case where pluralists see a connection between diversity and deliberation. In 1984,
Bernhard Goetz shot four African American youths on a New York City subway after they approached him asking for five dollars. Goetz claimed that he shot in self-defense, believing that the panhandling was but a prelude to a mugging.

Goetz’s self-defense claim required jurors to make two related judgments. The first was a quasi-factual judgment about whether Goetz “actually” believed an attack was imminent. On this question, pluralists concede that there were better or worse answers for jurors to give when they assessed the credibility of witnesses and decided whom to believe — Goetz who told police that he really was in fear for his life, or those who said Goetz was a racist waiting for a chance to shoot at blacks (the jury concluded Goetz was telling the truth about his state of mind). Things would be easier, of course, if a truth serum or reliable lie detector test could impersonally demonstrate the truth in such matters. Failing such evidence, we rely on jurors to arrive at the truth as best they can.

Once the jury decided that Goetz honestly believed he was about to be attacked, the jurors had to make a second judgment, this time moral and legal, about whether they considered his fears and subsequent acts to be those of a “reasonable person” in Goetz’s circumstances. For the pluralist, at this point an objective truth to guide the jury no longer exists. Certainly there is no scientific experiment that could demonstrate how a fictional construct such as the “reasonable person” would have reacted in Goetz’s situation. Nor is there any impersonal method of legal reasoning we could model for jurors that would generate definite answers about what counts as reasonable behavior. It is true that New York law directs jurors to consider such issues as whether Goetz could have safely retreated and whether he used more force than was necessary to repel the attack. But even the most faithful application of these norms to the Goetz case does not foreclose the debate about whether Goetz should be judged “not guilty” or “guilty.”

For the pluralist, then, the best and most accurate verdict the Goetz jury could have given was a democratic answer: a verdict capable of achieving consensus on a jury fairly recruited across the racial and other divides that influence people’s perceptions of the matter. This is so first because only a representative jury has the credentials to render a legitimate verdict acceptable to the entire

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16 For the facts of the Goetz case upon which I base this analysis, see generally George P. Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial (Chicago 1988).
17 Id at 19, citing NY Penal Law § 35.15 (McKinney 1987).
community. But the concept of legitimacy is of limited help here, for it establishes only that jury diversity inspires confidence in outsiders looking in.18

What about the jurors themselves? How does diversity support their deliberative tasks? In the Goetz trial, a racially diverse jury might be best able to confront the subtle ways in which race influences our fears. Imagine a jury room echoing with the arguments of both those mugged on subways and black kids tired of getting suspicious looks every time they ride the cars. Imagine jurors who themselves carry guns for protection arguing the issues with those who feel more threatened by armed vigilantes in the subway than by African American youths. That would be a jury room with loud and angry exchanges. It certainly would not be a jury ready to decide the issue in a flash and it might even be a jury unable to agree on a verdict in the end. But if the jury could reach a verdict, it would be because power ultimately flowed to those arguments capable of moving minds across the usual fault lines. This is the ideal of representative deliberation, where conversation informed by diversity allows the behavior of the so-called reasonable person to be studied from competing angles and different perspectives until the jury achieves the impartiality that the impartialists wrongly search for in isolated individuals.19

Impartialists remain skeptical about all of this. They ask why anyone should believe a victim of a subway mugging is capable of serving impartially on the Goetz jury, any more than a card-carrying member of the National Rifle Association or the mother of an African American teenager assaulted by skinheads. It is all very well to start jury selection with a pool of persons representative of the community. But unless we whittle that pool down by throwing out those whose minds cannot be changed by deliberation, we make a fetish of diversity for diversity's sake, in ways that will produce hung juries at best, and openly political compromises among partisan jurors at worst. The paramount need to eliminate biased jurors, says the impartialist, trumps even the importance of retaining racial balance on a jury. Of course, when we compose a list of persons eligible for jury duty in general, race is

18 For a defense of representative juries that puts primary emphasis on the jury's legitimation function, see Hon. Irving Kaufman, Foreword: Jury Selection in the Fifth Circuit, 20 Mercer L Rev 347, 347 (1969) (“appearance of justice . . . is as important as the actuality of justice”).

19 “Without the broad range of social experiences that a group of diverse individuals can provide, juries are often ill-equipped to evaluate the facts presented.” Harvard Law Review Association, 101 Harv L Rev at 1559 (cited in note 12).
irrelevant. But in any particular trial, there might be legitimate, case-specific reasons for believing that race will influence the way jurors respond to the evidence. In such a situation, each and every juror must be examined to see if he or she can put racial loyalties aside. Any loss of representativeness on the jury is justified by the gain in impartiality.

Let me now close this debate between bracketers and representers by illustrating the competing ways each side responds to the age-old practice of peremptory challenges. Suppose that a Roman Catholic priest is on trial for trespassing at a Boston abortion clinic during a right to life protest. The priest appears before the jury pool in his habit, making prosecutors wary about the ability of Catholics in the pool to put aside religious affiliations and convict a priest if the evidence so warrants. The prosecutors use their peremptory challenges — challenges trial adversaries historically have exercised without offering any public explanation — to strike the only three jurors with Irish-sounding surnames. Unable to ask jurors directly about their religion, the prosecutors apparently reason that persons with Irish-sounding names in the Boston area are likely to be Catholic and that Catholics will find it difficult to convict a priest no matter what the evidence.

Assume there is no reason to believe these prosecutors are motivated by anti-Catholic prejudice; in another case, they may cast their suspicions on the partiality of Protestants. All they are doing is what prosecutors have done for centuries, that is, making educated guesses about who may harbor hidden prejudices against their side. Sometimes, these hunches are based on matters deemed suspicious about a particular juror — his Malcolm X hat makes him anti-authoritarian and therefore pro-defendant, her stern manner and refusal to smile make her a rigid personality favorable to the prosecution. Other times, the only feature suspicious about a juror is that he or she is a member of a group whose members are generally suspected of having attitudes favorable to the other side. When peremptory challenges are based on group stereotypes, then lawyers eliminate not just this or that

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20 Commonwealth v Carleton, 629 NE2d 321 (1994); Patricia Nealon, Conviction Overturned of Priest Who Blocked Boston Abortion Clinic, Boston Globe 19 (March 1, 1994).
Irish person but all the Irish. The damage to jury diversity can be great. Even so, impartialists defend peremptory challenges as one way to permit litigants to make educated guesses about biases that cannot quite be proved but that nevertheless exist.

But do we empanel an impartial jury when Irish Catholics are systematically removed from a jury trying a Roman Catholic priest? The pluralist warns, correctly I believe, that we contradict ourselves by suddenly switching grounds and assuming that the remaining persons in the jury pool do not bear their own competing group biases, for instance as Boston-area Protestants historically segregated from surrounding Catholic communities. And if we are counting on the priest's defense lawyers to answer tit for tat, by using their peremptories to strike presumed Protestants from the jury pool, then we have to understand that the side targeting a minority religion or race or ethnic group for removal from the jury always has an advantage over the side furtively seeking to purge members of the majority. The prosecution may succeed in eliminating all Irish surnames from the jury room, but the defense could never eliminate all non-Irish.

At this point, the pluralist is clearly asserting that the traditions surrounding peremptory challenge should cede to maintaining some degree of religious balance on the priest's jury and, to generalize the point, some degree of demographic balance on all juries. But even pluralists disagree about what justifies protecting a jury's diversity from the onslaughts of the peremptory challenge. Some rather strict pluralists turn out to be quite skeptical about whether deliberation can truly change jurors' minds. People vote their demographics on juries every bit as much as they do in other voting contexts, so the best we can do is to represent groups fairly on the jury according to their share of the local population. In other words, the strict pluralist stands prepared to transform the jury into just another political bargaining unit, where representatives of different interests assert their preferences when they can, compromise with others if they must, or hang the jury when all else fails.

This is not the defense of representative juries I have been sketching in this paper. The more moderate view, one that I find persuasive, concludes as follows. Because demographics matter as to where jurors start, jury selection should randomly draw people from a representative cross-section of the population as the best way to draw into the jury room diversity of information and values.

22 See Van Dyke, Jury Selection Procedures at 18 (cited in note 4).
But deliberation among diverse people may also awaken all jurors to the blinders of their own demographics, exposing each juror to community diversity more fully in the jury room than almost anywhere else. That experience, one hopes, is awakening and liberating. So awakened, jurors ideally will not serve as representatives of the political sort, as if they owed allegiance to the mere preferences popular in their section of town. Certainly jurors should insist that the views of "their sort of people" be heard and afforded equal consideration with the views of any other group. Merely articulating this desire is an important democratic moment in jury deliberations, a moment where the quotidian hierarchies of power and respect give way to true equality. But if and when this insurgence occurs, jurors should represent their differences only as a way to enrich the capacity of an egalitarian, collective jury to reason beyond its differences toward a mutually acceptable, unanimous verdict.  

B. Distance versus Proximity

A second debate over the ideal of jury deliberation centers on geography. In criminal cases, impartialists prefer strangers to neighbors on the jury. Distance from events, and not proximity, is said to best insulate jury deliberations from community passions and prejudices. Impartialists defer when necessary to historical traditions and constitutional provisions requiring jury trials to be held in the community aggrieved by the crime. But they consider these local norms to be vestiges from a bygone era and would freely grant changes of venue to protect a defendant's right to trial before an impartial jury.  

The Oklahoma City bombing trials of Timothy McVeigh and Terry Nichols are two recent examples where trial venues were moved a considerable distance to secure impartial juries. The presiding federal judge concluded that no impartial jury could be found anywhere in Oklahoma, so great was the outrage Oklahomans shared about an attack on their soil against fellow citizens. Transferring the trial to Denver, it was thought, would curtail the passions with which jurors heard the evidence.  

A more controversial venue change occurred in 1991, when the

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23 For a similar statement of this way of defending the connection between representation and deliberation, see Harvard Law Review Assn, 101 Harv L Rev at 1659 (cited in note 12).  
24 For a general view of the history of the debate over holding trials locally, see Abramson, We, The Jury at 17–55 (cited in note 1).  
25 United States v McVeigh, 918 F Supp 1467, 1474 (W D Okla 1996).
trial of four white Los Angeles police officers accused of beating black motorist Rodney King was transferred from Los Angeles to neighboring Simi Valley in Ventura County. Jurors in both counties were probably equally exposed through television to the infamous videotape of the officers apparently beating King. But Ventura County jurors were thought preferable, insofar as they could deliberate about the King case in and of itself, without turning it into a virtual political referendum on racism in the Los Angeles Police Department.  

Consider a final case about changing venue. One forgets now that a Dallas jury once convicted Jack Ruby of killing Lee Harvey Oswald after Oswald was arrested for assassinating John F. Kennedy. The reason we forget is that the Texas Supreme Court overturned the conviction, ruling that Ruby's motion for a change of venue out of the Dallas area should have been granted. Ruby then saved the courts from finding a fair place to hold his trial by dying in prison. Suppose Ruby had not died — where would the Texas courts have transferred the trial in an effort to find an impartial jury? Were they counting on finding some place in Texas, some place anywhere in the United States where potential jurors had not seen Ruby shoot Oswald on television? I do not believe the courts were that naive. Holding trial in Dallas was said to be uniquely prejudicial because Dallas jurors would be politically motivated to restore pride in the Dallas name by convicting Ruby.  

From Dallas to Oklahoma City, then, changes of venue have become an acceptable way to cure the sometimes unavoidable tensions between impartial and local justice. Pluralists do not deny that such tensions exist, but they prefer to resolve them in ways that keep trials at home. Although judges cannot stop papers from printing what they know, they can stop lawyers from talking to the media prior to trial if their speech produces "a substantial likelihood of material prejudice" in the trial. A trial can also be delayed to permit passions to cool, as long as the defendant waives his right to a speedy trial. And juries can be sequestered from the trial's outset, effectively isolating them from the community and

27 Rubenstein v State, 407 SW2d 793, 796 (Tex Crim App 1966) (McDonald concurring).
29 See Nebraska Press Assn v Stuart, 427 US 539, 568 (1976). But see United States v Moreno Morales, 815 F2d 725, 739 (1st Cir 1987) (noting that court as well as defendant has right to speedy trial).
from the media.\textsuperscript{30}

For the pluralist school, venue changes are a remedy of last resort because local knowledge in the jury room has positive as well as negative effects. If we go back in jury history, a major justification for assigning fact finding to jurors was that jurors, as members of the local community, would hear the evidence in context. Jurors, it was thought, would know the condition of the street where the accident occurred, know how flagrantly the children disobeyed “no trespassing” signs to swim in the quarry, and know the reputations of the defendant or the witnesses. During debates to ratify the Constitution, Patrick Henry defended local knowledge along these lines when he attacked the Philadelphia framers for failing to protect the so-called jury of the “vicinage” — a jury drawn from the community where the crime occurred. “What is meant by [the defendant’s] peers?” he asked, answering that they were “[t]hose who reside near him, his neighbors, and who are well acquainted with his character and situation in life.”\textsuperscript{31}

History has not been kind to Henry’s defense of the way local knowledge increases the accuracy of jury fact-finding. Indeed, one of the great triumphs of the impartiality ideal is to stand history on its head. In the name of impartiality, we now disqualify jurors for having precisely the kind of personal acquaintance with parties or witnesses that once qualified them for jury duty. The most accurate fact-finder is now said to be the person who comes to court entirely ignorant of the events and people on trial.\textsuperscript{32}

Can the pluralist still find any part of the “local knowledge” model to defend? Pluralists argue that the deepest justification for holding trials locally is that only jurors from the community affected by the crime are in a position to render a verdict that democratically reflects that community’s legal and moral judgment about what the facts show. Facts are facts and perhaps can be found as accurately by strangers as by neighbors. But distant strangers necessarily pass judgment on what happened in ways that reflect the prevailing standards in their community, rather than the standards of the affected community.\textsuperscript{33}

\textsuperscript{30} United States v Acuff, 410 F2d 463, 467 (6th Cir 1969).
\textsuperscript{31} Jonathan Elliot, 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 579 (Taylor & Maury 1854).
\textsuperscript{32} United States v Parker, 19 F Supp 450, 458 (D NJ 1937).
\textsuperscript{33} On the loss of community participation when trials are moved to a new venue, see generally Note, Out of the Frying Pan or Into the Fire? Race and Choice of Venue After Rodney King, 106 Harv L Rev 705, 708–11 (1993).
The obstacles to moral evaluation posed by distance and space cannot be resolved by saying that since “the law is the law,” any rational jury should render the same verdict. Suppose the defendant in an arson trial admits to burning down the “crack den” at the end of the block but offers the perfectly proper legal defense of “necessity.” The defendant establishes that the police ignored repeated neighborhood complaints about drug dealing from the house and did not act even after two children were shot by stray bullets during a drive-by shooting incident near the house. His defense is that he turned to arson only as a last resort justified by the necessity to save lives. If the trial is moved from that neighborhood to a secure suburban venue and jurors there reject the necessity defense and convict, can anyone really say this judgment accurately reflects, speaks for, substitutes for, the local community’s judgment of the defendant’s moral and legal culpability? Even if there is a right answer about whether the defendant burned down the house, there is no right answer about whether the laws of arson were meant to be enforced against him.

Indeed, some obviously guilty defendants who could ask for a change of venue do not do so, precisely because they want to be judged by people who know them best. Take the case of Susan Smith, the South Carolina mother who drowned her two young children by driving her car into a local pond. Smith elected to keep her trial at home, knowing that it was inevitable that a jury anywhere would convict her of murder and that the only issue was whether she would be sentenced to death. A venue change would put that decision in the hands of strangers who knew her only from media reports. Closer to home, jurors would be more likely to know someone who knew Smith or her family, to have some background knowledge of her life before the murders, to see her in short as a long time resident of their community, not just forever a monster. Smith’s gamble to keep the trial local apparently paid off when the jury sentenced her to life.

Today, a new debate is brewing over trial geography and the deliberative ideal. If difficulties in empaneling a jury locally necessitate a change of venue, why not at least transfer trial to a site where the jury pool is demographically similar to that of the original venue? Some states have considered demographic

34 Rick Bragg, Keeping Mother’s Trial in Hometown Could be Crucial, NY Times A18 (July 13, 1995); Rick Bragg, Susan Smith Verdict Brings Relief to Town, NY Times A16 (July 30, 1995).
matching as a prudent way to increase the chance that the new jury pool will include people with the same range and mix of attitudes present in the original pool. In this way, the core democratic values associated with our tradition of local juries could be preserved despite a change in venue.

Proposals requiring judges to search for a demographic match between old and new trial sites came to the fore in response to the Rodney King case, a notorious instance where the venue changed from diverse Los Angeles County to predominantly white Ventura County. Not surprisingly, a jury without a single African American (ten whites, one Asian American, one Hispanic American) was then empaneled to judge “impartially” whether four white Los Angeles police officers used excessive force to subdue a black motorist. That jury’s decision to acquit the officers of virtually all charges (they did hang as to one) was widely rejected as illegitimate. It provoked rioting in parts of Los Angeles and eventually led to a second federal trial of the officers for violating King’s civil rights, a trial before a multiracial jury in Los Angeles that convicted the officers of most charges.

In what respect was the Ventura verdict “wrong”? Here it is useful to use a crude fact/value distinction to analyze the jury’s task, even while acknowledging that questions about police brutality combine factual observation and value judgments. However, let us artificially limit the fact-finding mission of the King jury to deciding what raw physical movements took place by whom, against whom, and for how long when the officers confronted King. One would assume that changing the venue of jury trial from Los Angeles to Ventura should have had no substantial effect on resolving the facts at this vulgar, bare-bones level.

But if Venturans and Angelenos function similarly as fact-finders, there is still every reason to believe that they differ in how they evaluate even those facts upon which they agree. One can

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36 See id at 5: 33–35, for bills introduced in the California, Florida, New Jersey and New York legislatures requiring demographic matching.
37 See sources cited in Abramson, We, the Jury at 19–20 (cited in note 1).
38 During trial, the defense concentrated on breaking down the videotape frame by frame, trying to get the jurors to “see” that King continued to move throughout the entire sequence of events. Richard Lacayo, Anatomy of an Acquittal, Time 30 (May 11, 1992). But even Los Angeles jurors would have “seen” King’s movements. As I argue in the text, the difference came in how people evaluated King’s physical movements, whether they rose to the level of a threat justifying the officers’ continued use of force.
39 David Margolick, As Venues are Changed, Many Ask How Important a Role Race Should Play, NY Times 7 (May 23, 1992) (quoting a defense lawyer for one officer saying the case would have been lost without a change of venue).
imagine, of course, a videotape of a police beating so relentless that it leaves no room for reasonable jurors to doubt the force was excessive. But the sequence of events caught on the King videotape was open to some interpretation on the crucial issue of whether King's continued movements justified the amount of force used to secure his arrest.\textsuperscript{40}

The mostly white Ventura jury apparently evaluated what they saw on the videotape in light of attitudes tending to trust the police but be afraid of African American suspects. The jurors' own life experiences apparently made it difficult for them to imagine being in King's shoes but easy to empathize with whites confronting an African American man whose physical movements the Ventura County jurors evaluated as "threatening" or "menacing."

A Los Angeles jury would either have included a sizeable number of African Americans or at least citizens aware of the high level of tension between police and minorities in that city. Such a jury would have judged what they saw on the videotape through a moral lens crafted to bring into sharper focus the legitimate fears of a black man confronted by four police officers, and the significance of the eighty-one blows delivered, the use of billyclubs, and the four-to-one ratio of strength between police and suspect.

In short, what we have are two demographically different communities that viewed the same videotape through remarkably different attitudes about police behavior toward African Americans and vice versa. For the pluralist, this divergence means that the change of venue failed to accomplish its purpose of trying the officers before an impartial jury.\textsuperscript{41} At best, the transfer succeeded only in trading one set of demographic biases for another. At worst, moving the trial to a predominantly white county made it less likely that a jury could reason beyond race in such a case. At least in Los Angeles, a multiracial jury would have had the internal capacity to Mull over the confrontation as it must have appeared both to King and to the officers. If the trial had to be moved at all, then, the best course was to seek a county whose demography maximized the chances of empaneling a multiracial jury.

The impartialist resists imposing color-conscious criteria on change of venue decisions. Whether the King case stayed in Los Angeles or moved to Ventura or some third county, the criteria for selecting impartial jurors should remain color blindness. No

\textsuperscript{40} Lacayo, \textit{Anatomy of an Acquittal}, Time 30 (cited in note 38).
\textsuperscript{41} Susan Herman, \textit{Justice Sees Through a Glass, Darkly}, Newsday 37 (May 4, 1992).
individual juror should be presumed biased simply because he or she is white. For the same reason, no jury should be presumed biased simply because all its members happen to be white. For the impartialist, abandoning these basic colorblind norms when changing venues is akin to abandoning belief in the impartiality of justice itself.\footnote{For a general defense of color blind norms, see Andrew Kull, The Color-Blind Constitution (Harvard 1992).}

C. Indifference versus Engagement

In Massachusetts, the trial judge pronounces a potential juror to be impartial by reciting the words “The Court finds this juror to be indifferent.”\footnote{Commonwealth v Barnoski, 638 NE2d 9, 15 (1994).} The use of the word “indifferent” dates back to the medieval jurist Lord Coke’s definition of the ideal juror: “[He must be] indifferent as he stands unsworne.”\footnote{Irwin v Dowd, 366 US 717, 722 (1961).}

In large part, indifference simply means that a person practices the bracketing ideal — disinterested, neutral, without motives to favor either side at trial. But sometimes jury selection equates indifference with a more troubling moral psychology, a posture akin to apathy, alienation, inattention, or fundamental nonchalance about the trial outcome. Let me give some examples:

1) Who is indifferent enough to serve as a juror on a case trying day care center operators for sexually abusing children?\footnote{See Abramson, We, The Jury at 51–53 (cited in note 1).} A prospective juror of Asian background remarks that his culture has no tolerance for child abuse. The judge explains that American law has no tolerance either, but then further explores the man’s obvious “emotions” on the subject. The judge wants to know whether these passions will override the juror’s duty to presume the defendants innocent. Even though the man accepts the presumption of innocence, the judge dismisses him, apparently doubting that such intensely expressed moral outrage about child sexual abuse can ever be fully contained.\footnote{Id at 53.}

As jury selection proceeds in the case, the judge dismisses those who seem to lack the extra armor it will take to listen to graphic testimony about sexual abuse and yet keep an open mind until all the evidence is in. He dismisses anyone who acknowledges being the victim of child sexual abuse or having a close relative so victimized: such experiences are too powerful to be reasoned aside.
The judge goes on to excuse those who have children in day care centers because they will tend to “empathize” with the child witnesses. He is skeptical about the potential overemotionalism of anyone with children or grandchildren the same age as the alleged victims. The “grandparent” issue is especially important to the judge, given the disproportionately large number of retirees who show up for jury duty. Excusing one grandparent after another, the judge remarks that “we don’t want to put you through this experience” or “we know it is too difficult for you not to see your grandchildren in these children.”

In summary, jury selection in this child sexual abuse works relentlessly to empanel only that slice of the population for whom child sexual abuse is not a “personal” issue or a matter of direct concern. But why should anyone believe that lack of concern for or dearth of emotions about child sexual abuse make for fair and accurate deliberation inside a jury room?

2) Consider another example of how indifference can be essential to impartial deliberation. For years, the Supreme Court has debated whether jurors deliberating a death sentence should hear “victim impact” statements from the relatives and friends of a murder victim. In a 1987 case, *Booth v Maryland*, the Court ruled against admitting such statements because they tended to distract the jury with legally irrelevant appeals to sympathy. A murder victim’s survivors may ask the jury to consider the devastation the murderer has inflicted on them. But, as the Court wondered, why should a murderer be more culpable simply because his victim had a spouse or children? What if the murderer did not know and had no reason to know that his victim had a family? In such a situation, sympathy for the survivors is irrelevant and jurors should be indifferent as a matter of law to their sufferings, focusing only on what the convicted man actually knew and did.

*Booth* was an extremely rigid decision, upholding an ideal of cold-blooded reasoning for jurors deliberating the death penalty. Surely the better view, and the one the Supreme Court itself came around to four years later when it overruled *Booth*, is that the suffering of a murder victim’s kin is a relevant factor for jurors to consider when deciding whether a death penalty is warranted.

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47 Id at 52.
49 Id at 507.
50 Id at 504–5.
However much we want jurors to deliberate death sentences calmly and rationally, we can hardly expect them to be indifferent to the words of his living victims. Murder victimizes more than the dead person, and jurors should have to hear about the full extent of the harm.

D. Empty Minds versus Open Minds

Jurors swear to decide cases solely upon evidence produced in open court.\(^5\) In all cases, this oath means keeping the jury in the dark about information that may be highly probative of the defendant's guilt or innocence. So we do not want jurors to know that the defendant on trial for robbery has been convicted of robbery three times before, that he offered to plead guilty this time around, that the stolen necklace — the only one of its kind in the world — was found in the defendant's apartment but that the judge will not allow it into evidence because the police raided the apartment without probable cause or a warrant to search. Some of this information we keep from juries because its prejudicial impact outweighs its probative value — there is always the temptation to think "three times a robber, always a robber," but perhaps just this sort of thinking led police to pin the blame on the wrong man.

But what about blinding the jury to the recovery of the one-of-a-kind necklace in the defendant's apartment? Just because the police violate the law to find incriminating evidence does not mean that the evidence is any less incriminating. We could therefore have a trial system that allows the jury to know the stolen necklace was retrieved by the police but leaves it to them to consider whether the illegality of the police search somehow makes the recovery of the necklace suspicious. But this is not our trial system; we impose unique and remarkable constraints on what jurors can know or say in the jury room. This is because their task is not simply to convict the guilty and free the innocent, but rather to force the government to prove a defendant's guilt beyond a reasonable doubt without violating the Constitution. These constraints do not just mean that we prefer jurors to err on the side of not guilty verdicts. They also open up a gulf between the deliberations of the public following the case through the media and the narrower deliberations expected of jurors.

In most trials, that gulf is bridgeable because media attention

\(^5\) Patterson v Colorado, 205 US 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court...")
is sporadic. But problems abound in those few but widely watched instances where the press latches onto a case, screaming the grisly facts of a murder in the headlines, televising the shackled suspect being arrested, and publishing every partisan leak from lawyers that incriminates or exonerates the accused. In such circumstances, the ideals of impartiality and representation on a jury fly apart.53

Impartialists argue for a strict standard that would virtually presume bias in anyone exposed to pretrial publicity.54 When the publicity is about matters that are inadmissible in court, such as the defendant's prior record, the presumption of bias is at its strongest. But impartialists doubt that impartiality can survive "media prescreening" even of the likely admissible evidence; no one who has already heard the evidence from the press can truly swear the sacred oath to decide the case solely upon trial testimony. By contrast, the more empty a person's mind is at the start of trial, the more open that person's mind will be. As one federal judge expressed this tabula rasa theory of impartiality:

The entire effort of our [trial] procedure is to secure . . . jurors who do not know . . . anything of either [the] character [of the parties] or events [on trial] . . . . [T]he zeal displayed in this effort to empty the minds of the jurors . . . [is a sign] that the jury . . . is an impartial organ of justice.55

The impartialist is aware that searching for empty minds is likely to lessen the chance that the highly educated, media-attentive sectors of society will serve on juries. But the jury we want is representative only of the impartial. If realities of mass communication mean such a jury is unrepresentative of the community, then so be it.

Pluralists worry about "dumbing down" the jury by making

54 For cases that invoke a concept of "presumed bias," see Irwin v Dowd, 366 US 717 (1991) (adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed); State v Laaman, 331 A2d 354, 357 (1974) ("Inherent prejudice . . . exists when the publicity by its nature has so tainted the trial atmosphere that it will necessarily result in lack of due process."). For the most part, more recent Supreme Court cases have backed away from the "presumed bias" analysis and have insisted on a showing of actual prejudice in jurors through individualized voir dire. For a review of the cases repudiating any concept such as "presumed bias," see Abramson, We, The Jury at 46–48 (cited in note 1).
55 United States v Parker, 19 F Supp 450, 458 (D NJ 1937).
empty-mindedness a necessary condition of open-mindedness.\textsuperscript{56} A favorite story of entrusting justice only to the "fools and rascals" comes from Mark Twain. Observing jury selection for a murder trial where "all men capable of reading" had read press accounts of the crime and where "all men not deaf and dumb and idiotic [had] talked about it," Twain reported the relentless way in which the esteemed minister, the merchant of high character, the mining superintendent of unblemished reputation were all disqualified merely for reading the papers, even though each said he could put aside press accounts and attend only to the evidence. Twain sardonically concluded that "[i]gnoramuses alone could mete out unsullied justice."\textsuperscript{57}

Like Twain, the modern pluralist contrasts the virtue of open-mindedness and the vice of empty-mindedness. Of course, we want jurors whose minds are open to the force of the trial evidence. And yes, we should examine prospective jurors one by one in high publicity cases to explore whether their minds are already made up about important issues on trial. But why presume bias across the board, why start with the elitist assumption that most citizens are captives of the media, believing the truth of all that they read? Pluralists make the telling point that information has the potential to open as well as close the mind. Once inside the jury room, we count on jurors to have the critical capacity it takes to examine the testimony for conflicts and inconsistencies. This is a capacity that those who follow the news are more likely to have than their inattentive neighbors. After all, who knows better than the news junkie that today's top story is tomorrow's lead retraction?\textsuperscript{58}

Take the Iran-Contra trial of Lieutenant Colonel Oliver North as an infamous example of the wholesale disqualification of the media-attentive public. Under a grant of immunity that promised his testimony would not be used against him in a court of law, North testified before the Senate about his role in violating a congressional ban on aid to Nicaraguan rebels (the Contras) by diverting funds to the Contras from secret sales of weapons to Iran. The testimony was carried live on television and was the leading news story for weeks. When jury selection subsequently got under way, the 156 members of the jury pool who reported seeing or reading North's testimony were automatically eliminated, out of

\textsuperscript{56} This argument is made nicely in Newton N. Minow and Fred H. Cate, \textit{Who is an Impartial Juror in an Age of Mass Media?}, 40 Am U L Rev 631 (1991).

\textsuperscript{57} Mark Twain, \textit{2 Roughing It} 56–57 (Harper and Brothers 1913).

\textsuperscript{58} Minow and Cate, 40 Am U L Rev at 658 ("regular exposure to media" inculcates habits of "evaluating the barrage of... rhetoric" useful in the jury room).
fear that they might refer to such testimony in the jury room (in violation of the immunity arrangement). After further examination, the court excused "any prospective juror who had rudimentary prior knowledge of North's immunized Senate testimony." The only persons deemed sufficiently impartial to serve as jurors were those who said "I don't like the news. I don't like to watch it. It's depressing." Acceptable was the woman who recalled seeing North on television but "didn't pay any more attention to him than if it had been the Three Stooges." Likewise, another person was found qualified who said she only reads the newspapers for the comics and the horoscope.

Pluralists balked that the North jury as seated hardly represented a "cross-section" of the community, only a collection of the odd-lot persons whose major qualification to deliberate on behalf of the community was that they were virtual drop-outs from that community. The level of news ignorance required for admission to the North jury was so high that it raised substantial questions about the quality of deliberation one could expect from such an alienated jury. It turned out that North's jury acquitted him on the bulk of the charges. Interviewed afterwards, several jurors remarked that it seemed unfair to make the low man on the totem pole pay for crimes when higher-ups were left off. This remark was troubling in two regards. First, a jury more informed about the news might well have known that higher-ups, including National Security Adviser Rear Admiral John Poindexter, had been indicted for their alleged role in the scandal. Second, the "small guy/big guy" defense played well before a jury whose political apathy roughly correlated with mistrust of government. It is worth raising the question of whether North's defense would have played as well before a jury that equally represented engaged citizens.

E. Verdicts According to Law versus Verdicts According to Conscience

I turn finally to the question of whether deliberating jurors are

60 Id at 1445.
61 Fred Kaplan, North Jurors Won Seats With Blissful Ignorance, Boston Globe 3 (Apr 22, 1989).
62 Dennis Bell, North Jury Selection Begins; Effects of Iran-contra Hearings at Issue, Newday 7 (Feb 1, 1989).
63 Dennis Bell, Criminal or Hero?, Newday 5 (Feb 22, 1989).
64 David E. Rosenbaum, Jurors See North as a Scapegoat for His Superiors, NY Times A1 (May 6, 1989).
better off debating the meaning and justice of the law itself or merely accepting and applying the law on the books. A long and ancient tradition, captured in the hoary phrase “verdicts according to conscience,” entitled jurors to consider whether the law a defendant violated was worthy of enforcement. If jurors felt that the law was inherently unjust or was being enforced against a particular defendant in an unjust or overreaching manner, then jurors were historically free to “nullify” the law by freeing even the guilty defendant.\(^6\)

Jury nullification gave jurors remarkable power to have the final say about how the law should be applied in their own communities. History is full of shining examples, as when Northern jurors refused to enforce the Fugitive Slave Law against defendants who aided runaway slaves to escape.\(^6\) But history also gives us its share of revolting instances when all-white Southern grand juries simply refused to indict “[w]hen the offender was a white man and the victim a Negro.”\(^6\) In between the heroic and the despicable are the more routine instances of jury nullification throughout history: Prohibition-era juries were lax in enforcing the law against small-time, nonviolent bootleggers; juries today remain reluctant to convict drunk drivers in cases where drunkenness is clear but no injury occurred.\(^6\)

Officially today, in all but two states, jury nullification is a disapproved doctrine.\(^6\) Judges typically instruct jurors that they must “apply . . . the law which I will give to you” and that they

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\(^6\) For the history of jury nullification, see Abramson, We, The Jury at 67–95 (cited in note 1).


\(^6\) Harry Kalven, Jr. and Hans Zeisel, The American Jury 291–97 (Little, Brown 1966). In 1998, a jury in Norfolk County, Massachusetts found Boston Red Sox slugger Mo Vaughn not guilty of operating a vehicle under the influence of alcohol, despite testimony from two arresting officers that Vaughn could not recite the alphabet. To dispel the notion that Vaughn’s celebrity status got him off, the court clerk released data showing that during the past year juries in Norfolk County had acquitted 67 out of 119 defendants charged with operating a vehicle under the influence of alcohol. Will McDonough, Nothing Special for Vaughn, Boston Globe G1 (Mar 7, 1998). When measured against data showing that juries convict in two-thirds of misdemeanors cases, the leniency of jurors toward drunk driving defendants calls for some explanation. One factor is the difficulty of proving the case when a suspect refuses a breathalyzer test, as Vaughn had done. The other likely explanation is unwillingness to convict when no injury results from drunk driving.

\(^6\) Maryland and Indiana are the only two states that require judges, upon motion of a defendant, to inform the jury of its right to acquit against the law. See Abramson, We, The Jury at 62 (cited in note 1).
"must follow the law . . . whether you agree with it or not." Such
instructions cut off or suppress jury deliberations in two related
regards. First, the jury is duty-bound to accept the judge's
instructions on the law as the definitive statement of what the law
is. Jurors are thus not free to dispute the judge and to arrive at
their own interpretation of the laws at issue. Second, the jury is
duty-bound to apply that law strictly and mechanically, with no
regard to what they think about its fairness.

The impartialist school applauds the death of jury nullification.
In addition to everything else they must bracket, jurors must
surrender their politics, their own judgments about whether duly
enacted laws are just or unjust, wise, or silly. Outside the jury
context, of course, these are the disagreements that exercise us
most, the disagreements that entice citizens to settle their
fundamental disputes through rational deliberation and
persuasion. We argue among ourselves and petition our
representatives about what the laws should be on abortion or
marijuana or assisted suicide. But inside the jury room,
deliberation is constrained by the fact that the legislature has
already spoken and jurors argue only from already settled
premises. If jurors could unsettle those premises and deliberate
whether they happened to agree with the law, then there effectively
would be no law at all, only an anarchy of conscience, an
unpredictable series of ad hoc judgments by isolated groups of
twelve. All this makes jury nullification the opposite of
impartiality; it is pure license for jurors to pick and choose in the
most subjective of fashions which laws to enforce against which
defendants.71

Pluralists are also wary of jury nullification, but in the end
they are more receptive than the impartialists.72 What they like
about the doctrine — the power it gives juries to reflect community
norms and values — is what they fear about it, knowing full well
that those community norms can themselves be discriminatory or
undemocratic. Moreover, nullification gives even one solitary,
rogue juror the power to hang the whole jury, thereby undermining

70 Manual of Modern Criminal Jury Instructions for the Ninth Circuit 1.01, 3.01 (West

71 For one of the most influential judicial condemnations of jury nullification as inconsis-
tent with the rule of law, see United States v Dougherty, 473 F2d 1113, 1130–37 (DC Cir
1972).

72 See, for example, Alan W. Schefflin and Jón M. Van Dyke, Merciful Juries: The Resil-
ience of Jury Nullification, 48 Wash & Lee L Rev 165 (1991); Darryl K. Brown, Jury Nullifica-
tion within the Rule of Law, 81 Minn L Rev 1149, 1153 (1997).
the struggle to empanel representative juries in the first place. But for all these difficulties, pluralists question whether we can call the jury a deliberative body at all if it is stripped entirely of independent judgment about the justice of a law or the fairness of enforcing it in a particular case. So stripped, jurors might still argue and debate the facts free from judicial control. But once the facts are found, the jury would proceed less by deliberating and more by mechanically applying judicial instructions on the law to the facts as found.

The question then becomes whether there is any way to tame or hem in jury nullification so as to get the good without the bad. Pluralists suggest that there is no inherent contradiction between respecting the rule of law and mercifully refusing to enforce the law in certain circumstances. When police exercise their discretion not to arrest a person they lawfully could; when prosecutors exercise their discretion not to indict the arrested person or to indict only for a lesser charge than the maximum available, no one claims that such discretion is lawless or destructive of law's uniformity. Instead, enforcing the letter of the law too strictly undermines public respect for the law and may well result in applying the law to circumstances that the legislature did not foresee or intend to cover. Jury nullification can serve similar purposes, for there is no reason to believe that jurors as a group will exercise their discretion to be lenient any less responsibly than police and prosecutors exercise theirs. Wholesale rejection of jury nullification seems to rest on the mistaken premise that every departure from uniformity undermines the rule of law, whereas in fact one of the basic norms of the rule of law is that each case is to be judged on its own merits.73

Moreover, consider the discretion judges enjoy under the exclusionary rule to suppress evidence incriminating a defendant as a way of punishing official violations of the law. The effect of excluding the evidence may well be that a guilty defendant eventually goes free, but any other result, the Supreme Court has said in endorsing the exclusionary rule, would reward official lawlessness and undermine respect for the integrity of the trial process. Jury nullification permits jurors to make their own response to official lawlessness, when they essentially set the defendant free rather than ratify the misconduct that built the case against him.74 Of course, sensibly exercising the nullifying power

73 Brown, 81 Minn L Rev 1149 (cited in note 72).
74 Id at 1172–8.
will require jurors to weigh the gravity of the crime against the severity and frequency of the misconduct. We certainly would not encourage jurors to refuse to convict an obviously guilty murderer simply as a way of condemning a prosecutor who suborned perjury. But in the case of a nonviolent drug crime, jury refusals to go along with a borderline legal sting operation may well foster rather than undermine respect for law.

In the above sort of cases, jurors revolt not against the law itself, but against the silliness of applying the law in certain situations or against the rottenness of the agents enforcing it. What about those grander instances where the jury nullifies to declare its rejection of the law itself as unjust? Several Michigan juries have apparently done just that, refusing to convict Dr. Jack Kevorkian of violating state law against physician-assisted suicide even though Kevorkian has defiantly admitted his acts.\textsuperscript{75} The pluralist model seeks to make room for jury nullification as jury revolt. While it is true that we elect legislators, not jurors, to pass laws, we continue to call on jurors to decide if even duly enacted laws remain worthy of enforcement. Repeated refusals of different juries to convict Dr. Kevorkian tell Michigan legislators that the law no longer enjoys popular support, or that the will to enforce it concretely was never there. These are important functions of the jury system, allowing the people-at-large to help define enforceable Michigan law.

But even pluralists would acknowledge problems with defending jury nullification in this way. First, some Michigan juries may enforce the assisted suicide law even as others balk. Unless case-specific variables can explain the different verdicts, Michigan ends up with a balkanized situation where the law on assisted suicide is what any particular jury says it is.

The second difficulty is that jury revolts against the law may be premised on norms and values that contradict basic public policies or settled democratic principles. This was the case with Emmett Till's jury in 1954, when twelve white Mississippians did not think it worth enforcing murder laws against two white men who killed Till, a fourteen-year-old black youth whom the men thought acted sassy toward a white lady.\textsuperscript{76} Jury nullification permitted the jurors to act on such beliefs without fearing ill


\textsuperscript{76} Stephen Whitfield, \textit{A Death in the Delta} 42 (Free Press 1988).
consequences for themselves or for the defendants being freed. As to the defendants, principles of double jeopardy meant they could never be tried for the murders in Mississippi again, not even after they admitted to the murder in *Look* magazine.\textsuperscript{77} The jurors, for their part, simply went home since there was no mechanism to hold them accountable.

The lack of any juror accountability principle is what makes jury nullification so hard to justify on democratic terms. If we do not like the laws enacted by the legislature, we can at least vote the rascals out. But jurors come and go, free to acquit against the law without fear of punishment, without even having to state in writing the reasons for nullifying the law or that they did nullify the law. An unexplained “not guilty” is all that the public hears. For these reasons, even most pluralists remain skeptical that the jury is really an appropriate forum for democratic deliberation about the justice of duly enacted laws.

Consider a current proposal from Georgetown Law Professor Paul Butler that black jurors in particular should drop all pretense of being impartial and use the power of jury nullification in a race conscious manner to acquit guilty African American defendants charged with nonviolent drug possession offenses.\textsuperscript{78} Butler begins by noting that narcotics enforcement falls disproportionately on young black men, largely because the laws punish possession of cocaine in crack form, popular in inner cities, far more severely than possession of cocaine in powder form, popular in white suburbs.\textsuperscript{79} Efforts to seek legislative redress have failed, argues Butler, because African Americans are still sorely underrepresented in legislatures and because racism keeps normal coalition-formation beyond black power.\textsuperscript{80} By contrast, African Americans do have access to jury duty, and the doctrine of nullification permits even a minority of blacks to hang juries as a way to protest the injustice of a war on drugs that makes inner cities the only battlefield. Butler urges black jurors to make their own utilitarian analysis that the costs to the black community of prosecuting nonviolent drug offenses — these prosecutions are a big reason that one-third of all black men in their twenties are behind bars, on parole, or on probation\textsuperscript{81} — far outweigh any public safety

\textsuperscript{77} Id at 54.
\textsuperscript{79} Id at 718–19.
\textsuperscript{80} Id at 709–12.
\textsuperscript{81} Marc Mauer and Tracy Huling, *Young Black Americans and the Criminal Justice*
benefit returned to the black community. Since a similar cost-benefit analysis militates in favor of incarcerating violent criminals, nullification would not be justified on Butler's terms in cases involving violence against a victim.

But Butler's case for jury nullification as a form of "black power" falls under its own weight. He justifies nullification as a last resort in a structurally racist society that perpetuates the political impotence of the black underclass. But if things are that bad outside juries, then they certainly would get a whole lot worse if African Americans started an open campaign of subverting criminal law enforcement on juries. On Butler's own description of racism in America, the backlash would be palpable. Within the world of the jury, white power likely would respond by abolishing the unanimous verdict (as a way of preventing two or three nullification-bent jurors from hanging the whole), and by redoubling efforts to challenge the impartiality of blacks to serve on juries.

To his credit, Butler candidly admits that he wants African American jurors to practice politics on juries as avowed partisans of the interests of their race. He pushes the representative paradigm to an extreme, encouraging juror representatives to use nullification the way legislators use filibusters to hang the process. But there is precious little reason to believe that the minority race

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System: Five Years Later 3 (Sentencing Project 1995).

82 Butler, 105 Yale L J at 715–18 (cited in note 78).
83 Id at 714–19.
84 For a cogent criticism of Butler that sees his argument as internally contradictory, see Andrew D. Leipold, The Dangers of Race-Based Jury Nullification: A Response to Professor Butler, 44 UCLA L Rev 109 (1996).
86 Although African American jurors can be challenged individually for cause, it is not constitutional to use race as a basis for exercising a peremptory challenge against any juror. Batson v Kentucky, 476 US 79 (1986). Nevertheless, many commentators believe that prosecutors continue to use peremptories to strike blacks from juries, avoiding the Batson ban simply by inventing after the fact a race-neutral rationalization for their challenges. See, for example, Charles Ogletree, Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges, 31 Am Crim L Rev 1099, 1107–13 (1994). To the extent that prosecutors already end run Batson to strike African American jurors, Butler's insistence that blacks do and ought to behave as partisans of certain black defendants can only confirm the suspicions that make prosecutors eager to avoid Batson.
87 Butler, 105 Yale L J at 715 (cited in note 78).
would benefit from open politicization of jury behavior. Butler says jury nullification is not justified for whites, given their access to other power channels. This may be true but it is naive to think that whites would not get caught up in a reverse nullification passion, following the lead of right-wing militia members who already see nullification as a way to prevent enforcement of federal gun laws against militia members.88 American jury history is sadly marred by a tradition of all-white juries refusing to deliberate in cases where both victim and defendant were black ("so who cares?") or where the victim was black but the defendant white ("so why bother?").89 We should not easily suggest to jurors of any race, then, that they need not deliberate but may simply go in and practice racial politics. If jurors become representatives in this starkly partisan way, jury room behavior will rarely work to benefit minorities.

II. TWO CHEERS AND ONE NO FOR REPRESENTATIVE JURIES

The past generation has witnessed a paradigm shift in how we regard the jury. Instead of viewing the jury narrowly as a judicial institution designed merely to serve the interests of litigants, we now acknowledge the jury’s broader political and democratic functions.90 These include the equal rights of citizens to serve on juries;91 victims’ interests in having their peers — not just those of the defendants — decide the case;92 and the community’s interest in local autonomy when it comes to judging crimes committed on its soil.93 The old paradigm made impartiality the key to jury selection and saw impartiality in frankly elitist terms that limited jury duty to persons of superior intelligence, education, and character.94 As

88 Id at 680 n 11.
90 Marder, 73 Tex L Rev at 1094–95 (cited in note 21).
92 State v Lozano, 616 S2d 73, 75–76 (Fla App 1993). Officer Lozano, a Miami police officer of Hispanic descent, shot and killed a black motorcyclist in a predominantly black neighborhood of Miami. His original conviction was thrown out and a change of venue ordered. But in searching for an appropriate venue, the Florida courts took into consideration not only the defendant’s interest in having Hispanics represented on his jury but also the survivors of the victim’s interest in having African Americans represented as well.
93 "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. [Unrepresentative] selection procedures . . . undermine public confidence in the fairness of our system of justice." Batson, 476 US at 87.
94 See discussion in text accompanying note 9.
long as these subjective criteria were applied in nondiscriminatory fashion, the mere fact that juries did not "look like America" raised no concerns about the jury's democratic credentials. Indeed, by screening jurors one by one, making all eligible without regard to race, religion, or gender, and yet accepting only those who had the virtue it takes to transcend their own identity politics during deliberations, we supposedly chose jurors best able to deliberate according to democratic norms of equal respect for all.

The paradigm began to shift in 1968 when Congress abolished the elite jury in favor of a practice that drew jurors from a representative cross-section of the population. The shift was justified first on evidence that the supposedly neutral elite criteria were being applied in invidiously discriminatory ways that purposely excluded blacks and women in particular. But Congress was clear that elite jury selection would be wrong even if perfectly nondiscriminatory. The new paradigm insisted that only a "representative" jury could be an "impartial" jury, impartial now redefined as a matter of "balancing," not "bracketing" the inevitable biases jurors bring to their deliberations.

For the first time in history, the paradigm shift made juries into mass democratic institutions, redesigned to mirror in their membership the range and balance of the American people. But it has not proved easy to convert the jury into the mass democratic model, to reconcile the inevitable tensions between impartiality and representation and between litigants' interest in having the final say about who is or is not biased and the community's interest in preventing the adversary process from slanting or manipulating the selection process.

The unresolved question today is how far to push the new ideal of representative juries. Pushing too little undermines the legitimacy of jury verdicts in those communities left underrepresented — there is at least an appearance problem, say, in interracial cases where the jury remains all-white or all-black for whatever reason. But beyond appearances, pushing too little for representative juries may weaken the information base upon which good deliberation depends, leaving jurors from one section of town uninformed about facts of life on the other side of the tracks. Simply not to care about the mix of jurors, as long as each one individually is impartial, is a sign either of naiveté about American life or else of the elitist belief that some particularly virtuous

95 Jury Selection and Service Act, 28 USC §§ 1861–69.
96 Abramson, We, The Jury at 117–18 (cited in note 1).
persons are capable of escaping their own identities and of impersonating the rest of us during deliberation.

On the other hand, pushing the representative model too far leads to the familiar populist fallacy that flatters the many, dismisses deliberation as mythic, and fools us into thinking that jury duty is easy work because all any of us can do in the end is vote our own demographics. On the belief that demography trumps deliberation, the strict pluralist makes numerical balance on the jury an inflexible end in itself, until we arrive at a rigidity of thought that considers only who the jurors are, not what they do.

Let me offer one example of the elitist fallacy of too little concern for diverse juries, and one illustration of the populist fallacy of too much concern for diversity.

A. Voter Lists and the Betrayal of Diversity

Federal law says that the initial jury list must approximate a "fair cross section of the community."\(^7\) In pursuit of this goal, the law specifies that the voter list or voter registration list is the starting source of names but authorizes consulting other sources when necessary to compensate for a group's substantial under-representation on the voter rolls.\(^8\) State laws follow this federal model.

Assume that the choice of the voter rolls as the basic source of juror names was not motivated by a desire to under-represent minorities. Still, that is the effect. Even after legal obstacles to voting have largely been removed, certain groups — the poor in general, African Americans and Hispanics in particular — do not register or vote in proportion to their share of the population.\(^9\) Today, a majority of states respond to the under-inclusiveness of the voter rolls by supplementing that list with names taken from lists of licensed drivers, census data, telephone directories, utility bills, and the like.\(^10\) In order to know when and how to

\(^{7}\) 28 USC § 1861.

\(^{8}\) 28 USC § 1863(b)(2) ("The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy [of recruiting jurors from a community cross-section."]). During debate in the House on this section, it was said in committee that "[t]he voting list need not perfectly mirror the percentage structure of the community, but any substantial percentage deviations must be corrected by the use of supplemental sources. The committee would leave the definition of 'substantial' to judicial decision." Remarks of Rep Celler, 114 Cong Rec H3990 (Feb 26, 1968).


\(^{10}\) David B. Rottman, Carol R. Flango and R. Shedine Lockley, State Court Organization,
supplement, state jury commissioners frequently keep track of the racial and gender percentages in the jury pool.\textsuperscript{101}

Federal courts, on the other hand, are remarkably united in refusing to supplement the voter rolls as a source of jury names. In challenge after challenge, judges find any departures from cross-sectionality attributable to use of the voter lists to be acceptably small.\textsuperscript{102} Commentators who support the federal position add that any loss in achieving the goal of proportional representation for the poor and minorities is offset by the gain in the quality of jury deliberation when we use the voter rolls as an indirect way to screen for civic virtue.

I am inclined to agree with the state position, for at least five reasons. First, use of the voter lists as the sole source of juror names results in far larger levels of underrepresentation than the federal courts seem willing to acknowledge. In the federal judicial district in Connecticut, a jury selection plan survived challenge despite uncontested evidence that Hispanics constituted only 11.0 percent of eligible jurors in a district where they made up 15.7 percent of the adult population.\textsuperscript{103} This is a nation-wide problem, given that only 28.9 percent of eligible Hispanic voters actually voted in the 1992 Presidential election, as compared with 63.6 percent of eligible whites.\textsuperscript{104}

Second, when Congress legislated the requirement of selecting jurors from a community cross-section, it specifically authorized federal courts to supplement the voter rolls in order to achieve the goal.\textsuperscript{105} Persistent failure to use their statutory powers to fulfill legal obligations raises serious questions about whether federal courts even want to achieve the goal of cross-sectional jury lists.

Third, the law on the books specifically requires federal courts

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\textsuperscript{101} An example is DeKalb County, Georgia where the voting age population is divided into thirty-six separate categories, defined by overlapping criteria of age, sex, and race. A computer then selects names to put on the jury list so that each of these thirty-six groups will be represented according to their percentage of the population. Andrew Kull, \textit{Racial Justice: Trial by Cross-Section}, New Republic 17, 18 (Nov 30, 1992).

\textsuperscript{102} For a summary of federal court reluctance to supplement the voter lists as a source of juror names, see Hon. Walter P. Gewin, \textit{An Analysis of Jury Selection Decisions}, appended to \textit{Foster v Sparks}, 506 F2d 805, 816–17 (5th Cir 1975) ("We are aware of no case in which exclusive reliance on voter registration lists has been invalidated"). See also \textit{United States v Cecil}, 836 F2d 1431, 1447–48 (4th Cir 1988) (conclusion of Judge Gewin supported by all reported decisions since).

\textsuperscript{103} \textit{United States v Biaggi}, 909 F2d 662, 677 (2d Cir 1990). For similar cases, see Abramson, \textit{We, The Jury} at 129–31 (cited in note 1).


\textsuperscript{105} 28 USC § 1863(b)(2).
to do more than merely not discriminate when compiling a list of persons eligible for jury duty; Congress mandated an affirmative or positive requirement that the master jury wheel actually be representative of the community. So the defense that no one intends to discriminate against the poor and minorities by using the voter rolls is beside the point.

Fourth, the notion that some serious screening for “civic virtue” occurs when we limit jury duty to voters is almost laughable. Granted, it takes some effort to register and to vote. But the effort is so minimal as not to prove much at all, especially since the motivations it takes to get people to the voting booth may or may not be good motivations for would-be jurors to have. In any event, the transience of the poor makes it that much more difficult to keep one’s registration current or to be physically present come Election Day to vote in the county where one is a registered voter. This makes it likely that we are screening in many instances for lack of permanent address rather than absence of interest. The bottom line, however, is that the “civic virtue” advocates make the classical elitist mistake of assuming nonvoters are somehow dumber than the rest of us, or at least more apathetic in ways that would make them sleepy jurors. There is simply no empirical evidence to condemn nonvoters so universally.

Fifth, the problem is not so much that nonvoters are being underrepresented as it is that nonvoters who happen to be poor and minorities are being underrepresented. This means that, from the very start of jury selection, we lose any realistic hope of getting exactly the kind of racial and economic diversity on actual juries that matters most to making deliberation democratic. The point is not that the nonvoting poor have some particular set of interests that must be politically represented on juries. The point is that they too have a role to play in turning the attention of a jury to facts, information and ways of viewing the evidence, that might otherwise be missed.

For all the endorsement in words of starting jury selection with a list that makes all citizens equally eligible for jury duty, federal courts make a fetish of using the voter lists as a source of juror names, long after it has become obvious that exclusive reliance on that list can undermine chances that the poor and minorities will be fairly represented on actual juries. This should change or else we should stop paying even lip service to the representative ideal for juries.

106 28 USC § 1861.
B. The Push for Quotas

I turn finally to quotas on the jury as an example of pushing the representative model too far. I reach this conclusion hesitantly because I am aware that the logic of much of what I have endorsed in this paper points toward a need for quotas. After all, deliberation takes place only in the jury room, not on the master list. So if it is the case that diversity enriches deliberation, if diversity is crucial to silencing prejudice and to educating jurors to look at the evidence from other points of view, then don’t we need to secure at least some minimal level of representation for at least some groups on the actual jury?107

One could add another argument in favor of jury quotas. The usual political outrage triggered when schools or factories use quotas to the disadvantage of whites is unlikely to develop against jury quotas; the average white person is just not that keen to get on the jury in the first place.

Despite persuasive arguments in favor of jury quotas, at least for minority races, I conclude that they would do more harm than good. Now is a time when faith in the jury system is already precarious, rocked by the Rodney King and O.J. Simpson images of first white jurors, then black jurors simply voting their race. Imposing quotas on jury selection could very well reinforce the growing perception that there is no shared justice for juries to represent in racially charged cases, that the best we can do is to represent the races and let them bargain through their disagreements.

I am not sure that a quota system would deliver that message. Perhaps citizens of good will would view them only as a necessary device for bringing the races together in reasoned conversation. But even then, the potential for divisiveness would be great. And the gain to deliberation would be speculative, when we get down to small numbers and rather offensively assume that putting any three African Americans on a jury assures that the same “black views” on the evidence will be aired.108

Imagine, then, fighting the following “quota wars” as groups in


108 For an argument that members of the black middle class share certain moral views with the white middle class more than with poor blacks, see Alan Wolfe, One Nation, After All (Viking 1998).
America contend to have one or more of the twelve (sometimes only six) jury seats reserved for them.

1) Which groups should be represented on which juries? Only African Americans? Even despite historical discrimination in jury selection against Native Americans, Asian Americans, Mexican Americans and so on? If all racial minorities are eligible, then do we play musical chairs, rotating who sits in the reserved seats depending on the complexion of the defendant, the victim, or both? What about whites — are they all fungible with each other or should a quota system give some recognition to white ethnic or national origin differences? What about insisting that each jury have some gender balance, some representation for the young and the old, the rich and the poor?

These examples only begin listing the groups that would inevitably vie for quota space. If we are going to play musical chairs on the jury, then why not have a gay seat in cases where a gay teacher sues for employment discrimination? What about if the person claiming employment discrimination is a handicapped American suing under the Americans for Disability Act? Or again, what if the handicapped person is Hispanic, do we now have to recruit for an Hispanic American who is also handicapped? What if an elderly Hispanic handicapped female person sues for both age, sex, and handicap discrimination? Not only would this be an impossible system to run in practice; it suggests a remarkable level of balkanization, as if we should fashion designer juries fitted to each case. At some point, the justifications for quotas negate any possible reason to believe in juries and in the ideal of deliberation at all.

2) Even if we scale the quota system back to require only racial quotas, there would still be reasons to balk. Racial quotas insult all races equally by saying we are all not only influenced by race but ultimately allegiant to our own kind. Quotas treat each white like every other white, every African American as having basically the same views as any other African American. This must be the assumption, or else we do not get what we bargain for simply by putting a particular person on the jury simply because we need someone of his or her race in the seat.

Empirically speaking, when we are talking not about a statistical sample but about one or two or three individuals, race is not an accurate predictor of juror behavior.¹⁰⁹ I do not wish to claim

¹⁰⁹ For citations to scholarly studies of the impact of race on jurors, see sources cited in Abramson, We, The Jury at 273 n 19 (cited in note 1). For citations to studies casting doubt on
that a juror's race is totally uninformative about likely views. But the connection in any one person between race and case-relevant attitudes is simply too loose to justify a quota system, given all the practical problems imposing quotas create.

CONCLUSION

Where does all this leave us? Short of quotas, there are steps we should take to maximize the chances of achieving representative juries. Supplementing the voter list with other sources of names is a good place to start. Next, I suggest we pay jurors a living wage so that self-employed and low-income citizens do not have to be excused for financial hardship. This could be done by requiring employers to pay the wages of employees on jury duty. It might make sense to exempt small businesses from this obligation and to cap any employer's obligation at ten days' allowance for jury duty per year. These details can be worked out but the principle of getting larger employers to defray the costs of jury duty is an important one. For self-employed persons or employees not covered by an employer plan, I suggest paying them the prevailing minimum hourly wage. That certainly would speed trials up!

We should also abolish statutory provisions that exempt certain professions from jury duty on the dubious theory that doctors, lawyers and teachers always have something more important to do than serve on juries. And I suggest that we not be so afraid of pretrial publicity. Better to try to keep newspaper readers in the jury pool, disqualifying only those who on individual examination truly seem unable to understand the difference between being tried in print and being tried in court.

Perhaps the most pressing need is to enforce the law prohibiting race-based peremptory challenges. If a prosecutor can explain away his strikes of two African American men in the jury venire by saying he was really responding to their unkempt hair and beards, then when there is a will to strike African American jurors from a particular jury, there always will be a way.

In permitting these "hair-based" strikes to stand, the Supreme Court noted that the prosecutor's inference of bias from hair length was ridiculous and yet constitutional because not racially motivated. If racial diversity on juries has to make way even for wholly

the predictability of any one juror's behavior from demographic factors, see sources cited in id at 281 n 10.

111 Id at 768.
arbitrary uses of peremptory challenges, then we as a society are just not willing to seek representative juries in any robust way. Without abolishing peremptory challenges, we could at least put some bite in Batson by requiring prosecutors to have some rationally articulable basis for asking otherwise qualified minority members of the jury venire to step down. Giving permission to an officer of the court to wield peremptory challenges on sheer whim should not outweigh the public interest in keeping African Americans, no matter what their hair style, on the jury.

All of the above steps are within our reach. They ask only that we cast a wider and finer representative net. We cast the net widely as jury selection commences because every citizen is equally qualified for jury duty and everyone is equally valuable if juries are to speak for the whole community. We make that net out of fine mesh to prevent people from swimming free from jury duty, and to prevent predators wielding peremptory darts to get in.

Of course, some will ask why we need to do this much. Why in the end should we be this concerned about representation on juries? I suppose in Utopia, it will not take diverse peoples on juries to mull the evidence over from all relevant perspectives. Each of us will be impartial and know the whole truth and nothing but the truth by ourselves. I suppose the attainment of this perfect impartiality is why Utopia will not need juries at all, why there will not even be disputes to resolve. In the meantime, we still do have disputes and we rely on jurors who themselves dispute to resolve the dispute justly. Ever since God left the courtroom in 1215, taking with him divine answers rendered in trial by ordeal, we rely on jurors to tell us what human beings can know about justice. From the beginning of this great replacement of God by humans in rendering justice, it has always been thought that no one human being can imitate God's truth, that humans see justice more clearly when they collect their senses, their memories, and their perspectives on events. Collecting people together into a conversation fed by difference but fueled by a search for common ground is never easy. But that is the ideal of the jury system and it remains there, within our grasp.