Negotiating Justice: The Criminal Trial Jury in a Pluralist America

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The destinies of the two races in this country are indissolubly linked together.

—Justice Harlan
*Plessy v Ferguson*

Justice precedes peace.
—Isaiah

On October 12, 1994, the Governor of California placed a phone call to the chief prosecutor in the O.J. Simpson trial. The prosecutor was scheduled to begin jury selection in the case early the following week, and the Governor expressed his firm belief that a racially representative jury panel would best serve the interests of the people of the State of California as well as the interests of justice. The prosecutor stated that while she agreed in principle, her job required her to take all necessary and proper steps to secure the conviction of the defendant in every criminal case, regardless of the case’s political sensitivity. The Governor said that he did not see it that way, and that, for his part, he was confident that any government employee deliberately jeopardizing the peace and safety of the community as a whole for the sake of an ethical code would not advance far. The prosecutor admitted that the Governor had a point. The Governor was glad she saw it his way, and stated that he was grateful that she had taken time away from her busy schedule to chat.

While this conversation never occurred, it would not be too surprising if it had. From almost every angle, the Simpson case had racially charged
characteristics. Indeed, few are “oblivious to the interracial marriage at the heart of this story.” The accusation that Simpson was framed by Officer Mark Fuhrman because of racial animosity is by now well-known. Even before the trial, it had been discussed in diverse publications ranging from “an ultralurid tabloid, The Globe, to the most up-market mass-circulation magazine in America, The New Yorker.” The racial tension surrounding the case was such that on July 19th, district attorney Gil Garcetti felt it necessary to meet with fifteen black leaders who were concerned that Simpson would not get a fair trial; they urged him not to seek the death penalty.

Even at that stage, opinion polls confirmed that the O.J. Simpson trial had significant racial overtones. One poll showed that, while 62 percent of white Californians thought it was “likely” that Simpson committed the murders, only 38 percent of black Californians did. In light of this disparity, it is striking to note that the jury that the prosecution finally accepted was 70 percent black, in a city where only 10 percent of the population is African-American.

Prosecutors also had reason to feel relieved, though they probably did not feel that way at the time. With the dust from the Rodney King riots just beginning to settle, it is likely that the O.J. trial posed a real threat to public safety and property. As two young black men told one reporter, “L.A. gonna burn to the ground if O.J. convicted.” Empaneling an all-white jury would have only exacerbated the effects of a conviction.

Even before Simpson’s arrest, courts and legislators across the country were developing mechanisms to ensure that juries represent a racial cross-section of their communities. The idea is that such mechanisms will increase public confidence in the outcomes of criminal trials, or at least minimize public outrage and prevent race riots sparked by controversial verdicts.

Florida and California have passed statutes requiring judges to consider the racial composition of the communities involved when they decide to transfer venue. Other jurisdictions have statutes mandating that jury lists, which are

1. Randall Sullivan, Unreasonable Doubt, Rolling Stone 130, 142 (Dec 29, 1994).
2. Id at 141.
3. Id at 143.
4. Id at 142.
5. Id at 202.
7. Sullivan, Rolling Stone at 142 (cited in note 1).
9. Id at 719.
10. Id at 720. These reforms were prompted by two recent controversial cases. The first was the attempted prosecution of the Los Angeles police officers charged with beating Rodney King. The second was the trial of Miami police officer William Lozano for homicide. See generally, M. Shanara Gilbert, An Ounce of Prevention: A Constitutional
typically drawn from such sources as voter registration and driver's license registries, be broadened to include groups that are otherwise underrepresented. In some jurisdictions, courts actively attempt to summon venires that represent the racial composition of the community. In Hennepin County, Minnesota, a new proposal would require each twenty-three-member capital grand jury to contain at least two minority members. While these so-called "jurymandering" mechanisms are becoming more widespread and aggressive, no jurisdiction utilizes racial quotas on trial juries, though several commentators have argued that they should.

This Comment examines the constitutionality of racial quotas in trial juries, and argues that applying racial quotas to the jury is normatively and politically desirable as well as constitutionally permissible. In making the latter claim, this Comment is at odds with the opinions of many scholars and professionals who have written on this issue.

Most experts agree that the Supreme Court's stalwart insistence on "color blind" jurisprudence makes it likely that jurymandering mechanisms will have to pass "strict scrutiny." They contend, further, that proponents of jurymandering programs are unlikely to convince the Court either that the state has a compelling interest in utilizing racial quotas, or that racial quotas are sufficiently well-tailored to achieve that aim. This Comment argues, to the contrary, that states can demonstrate compelling interests which justify using racial quotas when selecting criminal juries. Moreover, this Comment contends that using racial quotas in the jurybox is the best-formulated, best-tailored approach to achieve these compelling state interests.


11. See King, 68 NYU L Rev at 723-25 (cited in note 8).
12. Id at 725.
16. See, King, 68 NYU L Rev at 707 (cited in note 8)(disapproving of racial quotas in the jurybox, but favoring some front-end race-conscious selection processes); Andrew Kull, Racial Justice: Trial by Cross-Section, New Republic 17 (Nov 30, 1992); Letter from Fred L. Morrison to Louis N. Smith, in Hennepin County Final Report, appendix ("It would appear that the proposal would have to meet the 'strict scrutiny' test. None of the rationales put forward seems to reach this high level of necessity"); Memo from Dan Farber to Carl Warren, in Hennepin County Final Report, appendix ("personally find[ing] the proposal quite reasonable" but questioning whether it could satisfy Richmond v J.A. Croson, Co., 488 US 469 (1989)). But see Letter from Sheri Lynn Johnson to Michael O. Freeman, in Hennepin County Final Report, appendix ("the strict scrutiny standard can be met"); Alschuler, 44 Duke L J at 704 (cited in note 15).
17. King, 68 NYU L Rev at 745-60 (cited in note 8).
Perhaps the most common criticism of the use of racial quotas in jury selection is that it will transform the jury from a “deliberative” body focused on ferreting out the facts of crime into a body in which jurors “represent” their racial constituency, a body in which jurors might “just as well mail in their verdict.” What emerges from this Comment is a view of the jury neither as a deliberative institution wherein citizens cast off allegiance or attachment to social or racial subgroups, nor as a representative body in which jurors practice crass interest-group politics at the expense of the polity as a whole. Rather, the jury is seen as a forum in which individuals drawn from interested groups negotiate a just verdict in a specific criminal case within a range of possible just outcomes.

This understanding of the jury has much in common with the familiar model of multiparty negotiation, in which the success of the project depends on the attendance of all interested parties at the bargaining table. Negotiators recognize that the failure to include significantly interested parties not only casts doubt on the fairness of the negotiation proceedings (especially if they are held in private), but may also throw the continued success of the negotiated agreement into doubt.

Conceptualizing the jury as a body that represents both particular group interests and societal interests is not new. In fact, the structure of the institution, as it has developed historically suggests a reading that appreciates such “negotiated” outcomes. Throughout the history of the criminal jury in England and the United States one can find analogues to the jurymandered jury.

Section I of this Comment outlines the Supreme Court’s approach to the issue of race-conscious state action generally, and identifies several state interests that the Court has recognized as compelling. Section II demonstrates how current jury selection procedures fail to achieve these compelling state interests. Section III looks at two models of the criminal trial jury. The first model, that of the “representative” jury, it is argued, has been the bogey-man

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18. Another common criticism is that racial quotas open up the jury system to attack from any defendant who can make a claim to membership in a minority group. On a related note, how will the system accommodate a claim made by a defendant who is half-Mexican and half-Aleutian and describes himself as gay? Must the jury contain members of all of these subgroups?

The fact that this Comment focuses on the state’s compelling interests and not the defendant’s Sixth Amendment right to a cross-sectional jury turns these problems into disputes over policy and not law. Legislators, not courts, must decide which groups are cognizable.

For discussion of this slippery slope problem in the context of a defendant’s Sixth Amendment rights, see generally Alschuler, 44 Duke L J at 34 (cited in note 15).

19. Jeffrey Abramson, We, The Jury 11 (Basic, 1994)


against which much Supreme Court jurisprudence concerning the jury has developed. The second model is theoretically similar to the model of multiparty negotiation and has historical roots in the jury that the Constitution's Founders knew. This model, I argue, provides the theoretical justification for applying racial quotas to trial juries.

I. Compelling Interests

The Supreme Court has held that when a state acts on other than race-blind criteria, that action must be justified by a compelling state interest. Furthermore, the Court requires that the proposed action be as narrowly tailored as possible to achieve the demonstrated compelling end(s).\(^2\) Thus, to pass constitutional muster, jurymandering statutes must either be found not to be race conscious,\(^3\) or they must be driven by a compelling state interest.\(^4\) Moreover, the state must also show that the plan is narrowly tailored to accomplish the desired compelling purpose(s).\(^5\)

What, then, constitutes a compelling state interest? The Court has recognized, either directly or indirectly, four “compelling” interests that might be used to justify jurymandering.

First, the Court has indicated that race-conscious classifications may be justified in order to remedy past and to prevent future intentional racial discrimination.\(^6\) Thus, a state may justify a narrowly tailored remedial program either by showing that the present jury selection process affords state actors the opportunity to discriminate on racial grounds and that underrepresentation has in fact occurred under the system, or by demonstrating

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\(^3\) Of course, any jurymandering effort is likely to be found race-conscious by definition. However, it is possible to argue, with John Hart Ely, that “it is not ‘suspect in a constitutional sense for a majority . . . to discriminate against itself.” Ely, The Constitutionality of Reverse Racial Discrimination, 41 U Chi L Rev 723, 727 (1974). This argument, though, is unlikely to persuade the Court at this stage of the game.

Professor Alschuler, on the other hand, has argued that the “Constitution requires only that the government not stigmatize or otherwise disadvantage people on the basis of race. . . . The jury selection methods proposed in Hennepin County do not stigmatize or disadvantage people on the basis of race, and I believe they are constitutional.” Alschuler, 44 Duke L J at 743 (cited in note 15).

\(^4\) Croson, 488 US at 494-507. One might also argue that jury service is a right or a duty that, sui generis, is inherently different from other areas of equal protection jurisprudence and therefore should not be subject to the standards developed to apply to such issues as affirmative action, employment, and voting rights. It is unclear, however, that the “jury is different” argument is conceptually distinct from the argument that the state has a compelling interest in securing racially representative juries. Because the compelling interest approach is well accepted, this Comment assumes the compelling interest standard to be applicable.

For a compelling argument that the “jury is different,” see Alschuler, 44 Duke L J at 717-23 (cited in note 15).

\(^5\) Croson, 488 US at 506-08.

\(^6\) Id at 494, 509-510. See also id at 511 n1 (Stevens concurring in part).
that the process shown has, in fact, resulted in significant racial discrimination for a substantial period of time.\textsuperscript{27}

Second, the Court has recognized that states have a compelling interest in ensuring the integrity of their criminal justice systems.\textsuperscript{28} Proponents of jurymandering programs have argued that racial diversity in the jurybox encourages impartiality, thereby earning public respect for the system.\textsuperscript{29}

Third, in 1940, the Court recognized that, "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."\textsuperscript{30} In 1975, the Court stated that, in order to promote representative juries, the pool from which jurors are drawn must itself represent a "cross-section" of the community.\textsuperscript{31} Some scholars suggest that cross-sectional jury pools do not adequately protect this Sixth Amendment right, and that the cross-sectional concept should be extend-

\textsuperscript{27} See \textit{Castenada v Partida}, 430 US 482, 493-94 (1977) citing \textit{Washington v Davis}, 426 US 229, 241 (1976). While some states may be able to make this prima facie demonstration, it will probably be a small minority. On the other hand, it may be, as Professor Alschuler suggested to me in conversation, that any state interested in jurymandering will merely hire a firm to dig up evidence of past discrimination in order to meet the Court's requirement. Conversation with Albert Alschuler, Professor, The University of Chicago Law School, in Chicago, IL (April xx, 19xx). Considering the history of minority exclusion from the jury in this country, such evidence should be relatively easy to find in most jurisdictions. See Albert W. Alschuler and Andrew Deiss, \textit{A Brief History of the Criminal Jury}, 61 U Chi L Rev 867, 882 (1994). Under the present standard, therefore, jurisdictions should be able to take prophylactic measures to shield their programs from constitutional attack, by uncovering and confessing evidence of their own past bad behavior.

Whether or not a state can demonstrate the notorious nature of its own past, the approach is inherently problematic. As has been well-noted, race-conscious remedies can seem conceptually inconsistent. While the Court has recognized that the law should be "color-blind," the race-conscious remedial approach allows state actors to discriminate in order to remedy past impermissible racial discrimination. It is a solution that might best be described as homeopathic.

While numerous scholars defend this "benign" approach to racial discrimination on theoretical grounds, the concept of benign discrimination has increasingly sparked public and legal debate. Some scholars believe that the Court will soon narrow the range of permissible race-conscious remedies even further.


\textsuperscript{29} See Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, 16 Hamline L Rev 477, 573-74 (1993). In contrast, critics can argue that race-based selection, by definition, impermissibly uses race as a factor in the criminal trial, and thus compromises the integrity of the criminal justice system. See King, 68 NYU L Rev at 751 (cited in note 8)(suggesting that even if the Court accepts the goal of promoting racial diversity in the jury, the Court may still require race-conscious procedures more narrowly tailored than quotas).

\textsuperscript{30} \textit{Smith v Texas}, 311 US 128, 130 (1940).

\textsuperscript{31} \textit{Taylor v Louisiana}, 419 US 522, 528 (1975) (cross sectionalism is "an essential component of the Sixth Amendment right to jury trial").
ed beyond the voir dire selection stage to the trial jury that is actually enpaneled.\textsuperscript{32}

There are several problems with this line of reasoning. To begin with, the Court has already explicitly ruled that defendants do not have a constitutional right to a jury that is, in fact, representative of a cross-section of the community.\textsuperscript{33} If the Court were to overrule this previous holding, it would open the floodgates to claims from defendants seeking jurors who are racially, ethnically, or otherwise "similar." The Court has stressed its concern over this danger in the past.\textsuperscript{34}

Fourth and finally, the Court has suggested that state use of racial classifications may be justified in response to situations that pose "imminent danger to life and limb."\textsuperscript{35} Recent history reminds us that such danger may often exist in the context of racially charged criminal trials, and it is with this compelling state interest that I begin below.

\section*{II. Current Jury Selection Procedures Fail to Achieve Compelling State Interests}

In 1880, the Supreme Court handed down two cases that have significantly shaped the jurisprudence of race relations and the jury until the present day. In \textit{Strauder v West Virginia},\textsuperscript{36} the Court held that a state statute limiting jury service to "white males" violated the right of African-American defendants to equal protection of the laws guaranteed by the Fourteenth Amendment.

In \textit{Virginia v Rives},\textsuperscript{37} a companion case decided the same day, the Court dramatically limited the significance of \textit{Strauder} by concluding that \textit{de facto} segregation in the jurybox, absent explicit \textit{de jure} exclusion, did not violate the Constitution.\textsuperscript{38} This unfortunate holding helped usher in the "Jim Crow" structures that dominated the legal and social landscape of the South for the next three-quarters of a century.\textsuperscript{39}

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\bibitem{} 32. See Alschuler, 44 Duke L J at 723-728 (cited in note 15).
\bibitem{} 33. Id at 717 n61. See also \textit{Taylor}, 419 US at 538 citing \textit{Fay v New York}, 332 US 261, 284 (1947); \textit{Lockhart v McCree}, 476 US 162, 174 (1986); \textit{Apodaca v Oregon}, 406 US 404, 413 (1972).
\bibitem{} 34. See \textit{Batson v Kentucky}, 476 US 79, 86 n6 (1986) ("Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society.").
\bibitem{} Therefore, this Comment will not attempt to discuss or rely on the defendant's 6th Amendment right to a cross-sectional jury, or the State's interest in protecting that right.
\bibitem{} 35. \textit{Croson}, 488 US at 521 (Scalia concurring).
\bibitem{} 36. 100 US 303 (1880).
\bibitem{} 37. 100 US 313 (1880).
\bibitem{} 38. Id at 322-23 ("It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz. a right to have a jury composed in part of colored men.")(emphasis in original).
\bibitem{} 39. See generally Benno C. Schmidt, Jr., \textit{Juries, Jurisdiction, and Race Discrimination:}
Not until Taylor v Louisiana in 1975, (made possible by the Court's 1968 decision in Duncan v Louisiana, making the Sixth Amendment right to an impartial jury applicable to the states through the Fourteenth Amendment) did the Court hold that:

"The presence of a fair cross section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions."

The Court has repeatedly made clear, however, that the right of a defendant to a jury chosen from a cross-section of the community does not mean that a defendant has a right to trial by a jury that, in fact, mirrors the makeup of the community.

While the Court has made it clear that the Equal Protection Clause does not establish a defendant's right to representative cross-sectionalism in the jurybox, it has never held that a state may not grant such a right in order to achieve its own interests. This fact is particularly compelling if, as will be argued below, the jury selection standards the Court has recognized as necessary to protect the criminal defendant's rights fail to protect compelling state interests.

A. LIFE AND LIMB

Much, if not most, of our nation's most bloody and persistent internal strife has been the product of racial tensions. The Civil War, however historians may debate its etiology, had much to do with race. And although:

[a] great many Americans ... assume that ... urban racial violence began in this country about 1964 or 1965. ... In the decades since the beginning of the Civil War few years passed without at least one race riot, but Americans have always insisted on regarding this kind of violence as extraordinary.

Racially motivated group violence has occurred in other forms too; from 1889 to 1941, some 3,842 lynchings were reported in this country. Such statistics,

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42. 419 US at 526.
46. Dominic J. Capeci, Jr., The Lynching of Cleo Wright: Federal Protection of Consti-
of course, come from a time before video cameras and mass communication, and are therefore probably gross underestimates.

To be sure, unlike the violence that erupted in Los Angeles and around the country in the wake of the Rodney King trials, most of this violence was not sparked by criminal verdicts rendered by “all-white” juries. Nevertheless, racialized criminal trials have a long and sordid history in this country. Criminal verdicts handed down by racially segregated juries have resulted in social unrest ranging from widespread disrespect for the integrity of the judicial system to outright riot. It is appallingly easy to compile a lengthy list of such cases—any one of which could have provoked an uprising comparable in size to the Los Angeles riots of 1992—but a sampling will do:

** On March 25, 1931, a fight erupted on a freight train between two groups of young drifters travelling across northern Alabama. One of the groups was black, the other white. The black group succeeded in throwing all but one of the whites off the train. When the train arrived at the next station in Paint Rock, Alabama, nine black youths believed to be involved were arrested to the cheers of a waiting posse. In the process, the posse discovered two white women dressed in men’s clothing. One of the women said she’d been raped by the young men. Within two weeks time the youths were brought to trial in Scottsboro, Alabama. The nine were tried in four separate trials, none of which lasted longer than a day. All but one of the “Scottsboro boys” were found guilty and sentenced to death. The remaining boy’s trial was declared a mistrial because the prosecutor had asked for life imprisonment (as the boy was only 13 years old) and several of the jurors demanded that the child receive the death penalty. The juries were all-white.

** In the summer of 1955 in Money, Mississippi, Emmett Till, a fourteen-year-old African-American visitor from Chicago, accepted a dare to speak to a white woman. “Bye, Baby,” he said. Several days later, Till’s body was discovered in the Tallahatchie River. Roy Bryant, the husband of the white woman, and J.W. Milam, the woman’s brother, were charged with Till’s murder. The principal evidence against them was the testimony of an African-American, Mose Wright. Following the defendants’ acquittal, they sold their story to a journalist for $4,000. According to the journalist, Bryant and Milam explained that they had meant merely to frighten the child but “had” to kill him when he refused to beg for mercy. The jury that acquitted them was all-white.

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48. While the jury in the criminal prosecution of the officers accused of beating Rodney King was not technically “all-white,” it had no black members. See Seth Mydans, Prosecutor Seeks Retrial of Officer in Rodney King Case, NY Times A20 (May 14, 1992).
49. See Norris v Alabama, 294 US 587 (1935); Dan Carter, Scottsboro: A Tragedy of the American South (LSU, 1969); James Goodman, Stories of Scottsboro (Pantheon, 1994).
50. See Juan Williams, Eyes on the Prize: America’s Civil Rights Years, 1954-1965 39-
** In Miami, Florida, in 1980, four white police officers were charged with beating to death a young black man who had been arrested for a traffic offense. When an all-white jury acquitted the police officers, riot followed.\(^{51}\)

The Court has not been blind to the fact that jury verdicts lacking the confidence of the public can be explosive. Moreover, the Court has recognized that states have an interest in protecting the public from such conflagrations. In *Georgia v McCollum*, the Court declared:

> '[t]he need for public confidence [in jury verdicts] is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes.'\(^{52}\)

Moreover, in this age of telecommunications, the "affected community" may not be limited to the jurisdiction in which the case arose or is tried. Thus, in 1992, Americans across the country watched the fire in Los Angeles on television and reasonably feared that it might spread.

In situations such as these, the sort of *jury pool* cross-sectionalism guaranteed by *Taylor*\(^{53}\) may not adequately protect the public. Indeed, the jury selection process in the Rodney King case almost certainly complied with *Taylor*.\(^{54}\) Even without the now infamous transfer of venue in the King case, it is possible that the court could have empaneled an "all-white" jury in the original venue while complying fully with the dictates of the *Taylor* decision. Had the acquittal been delivered by this hypothetical all-white jury, there is reason to believe that the ensuing riots would have been even worse.

Some may insist that the law should not be bullied by threats of racial violence, but must remain "color-blind" at all costs. They will argue that utilizing racial quotas in the jurybox will not achieve justice, but merely the appearance of justice.\(^{55}\) Abramson, for instance, has complained that

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53. 419 US at 530.
54. Id.
55. See, for example, King, 68 NYU L Rev at 763, 767-775 (cited in note 8); Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* 44 (Chicago, 1994); Abramson, *We, the Jury* at 125 (cited in note 19).
[the] attempt to justify the cross-sectional ideal by reference to its contribution to the appearance rather than the actuality of justice is disturbing. . . . The way to justice, we are told, is not through some mythic course of impartial deliberation floating free of racial, gender, ethnic, and economic bias. Justice, alas, is reached by miring the jury in representing those subtle, imponderable but inescapable biases and preferences we all imbibe along with our group identities.56

This argument, however, embraces a skeletal view of justice that focuses on the jury’s ability to “find” brute legal “facts,”57 but largely ignores the dense interplay between facts and law in a criminal trial. In effect, this view presupposes a Platonic notion of “justice” that is independent from, not constituted by, social processes. Ironically, while condemning race-consciousness in the jury selection process, this view assumes racial difference in the deliberation process; a pure “color-blind” jurisprudence could not permissibly assume that a just result would be compromised by the presence or absence of certain racial groups on a jury. To do that the law would have to assume that members of different races and groups will deliberate differently.58

The more serious suggestion implicit in this argument is that a just outcome is achieved only by a randomly chosen jury, and that the very process of using race-conscious selection procedures contaminates or politicizes the jury’s character in a way that will jeopardize such an outcome. However, as will be argued below, racial quotas on petit juries will probably de-politicize deliberation more often than they politicize it. Moreover, there are good reasons to believe a just result can only be born of a jury that is, in fact, racially integrated.

B. THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

In Taylor, the Supreme Court recognized the right of a criminal defendant to trial by a jury drawn from a pool composed of a cross-section of the community.59 The Court insisted, however, that a criminal defendant has no right to demand that the jury actually empaneled represent the community.60 All the defendant has a right to demand is that the jury is derived by a neutral (read

56. Abramson, We, the Jury at 125 (cited in note 19).
57. There may be good reasons to believe that interracial juries actually find “facts” better than uni-racial ones in this culture. See Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 Cornell L Rev 1, 110-115 (1990).
58. This, as an empirical matter, may well be true in the aggregate. See Nancy J. King, Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions, 92 Mich L Rev 63 (1993). However, the law probably should not seek to enshrine this “difference.”
59. 419 US at 522, 530.
60. Id at 538; Lockhart, 476 US at 173 (“We have never interpreted the fair-cross-section principle . . . to require petit juries . . . to reflect the composition of the community at large”).
"random") process from a representative pool.

As noted above, this certainly does not preclude a state from acting on its own to ensure that trial juries (and not just jury pools) actually represent a cross-section of the community, provided it can come up with an interest the Court would find "compelling." Indeed, the Court has flirted with such an "interest," declaring that representative jury participation is "critical to public confidence in the fairness of the criminal justice system" and that the "broad representative character of the jury . . . [assures] a diffused impartiality."\(^6\)

So, a criminal defendant's right to a "fair cross-section of the community" refers in large part to a method of selecting jurors that is best described as "statistical."\(^6\) As this Comment has examined, the statistical approach may often fail to protect the state's interest in maintaining the integrity of the criminal justice system as a whole.\(^3\) Specifically, the use of a statistical approach to jury selection does not prevent the empaneling of all-white juries in cases as racially charged as Rodney King's.\(^6\) In fact, the statistical approach would guarantee that at least some racially charged cases will be decided by all-white juries.\(^6\) In

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63. This is not to discount entirely the advantages of a "statistical" approach. The principal benefit is the elimination of dangerous human discretion, which can include both intentional and unconscious prejudice. Some may prefer this "randomness" out of a wariness of the possibility for abuse inherent in any system where human discretion could open the door for prejudice to corrupt the institution.
64. In addition, the statistical approach (especially given the current structure of the selection process in many jurisdictions) will produce juries in which minority members are given only "token" representation. The result of such minimal representation may be, as argued below, unnecessarily to politicize the deliberation process.
65. The very fact that a jury is all-white can have the effect of racializing a proceeding:

Few statements are more likely to evoke disturbing images of American criminal justice than this one: "The defendant was tried by an all-white jury." Alschuler, 44 Duke L J at 704 (cited in note 15).

Moreover, the statistical approach, as executed, is far from random. First, "[p]rocedures at each phase of jury selection continue to exclude greater percentages of minorities than whites." King, 44 NYU L Rev at 712 (cited in note 8). Second, challenges for cause, and especially peremptory challenges, cannot help but impose a non-random back-end procedure on a front-end random one, thus distorting the pool. While the Supreme Court has held that peremptory challenges based solely on race or sex are impermissible, it is likely that such impermissible motivations are partial factors in many challenges. As Alschuler has argued:

[C]ourts must determine what reasons for exclusion are disingenuous or pretextual—a particularly difficult task when a prosecutor relies on a juror's asserted mannerisms to justify an exclusion. A black who wishes to serve on a jury must be careful to look directly at the prosecutor. The Fifth Circuit has upheld an exclusion grounded primarily on a prospective juror's failure to maintain eye contact. The prospective juror must not look too much, however. The Seventh Circuit has upheld an exclusion that a prosecutor explained by saying, "Mr. Declinton [the prospective juror] . . . was sitting directly to my right, only a space of approximately four feet from me, and both yesterday and today he spent a great deal of time in examining...
essence, this system may simply pass the buck, preferring the whim of Fate or Luck or Statistics to an engineered outcome—perhaps out of an abundance of caution regarding the possibility for abuse inherent in a system of engineered outcomes.

Several objections will be made to this observation. First, some will contend, the assumption that verdicts handed down by all-white juries in racialized criminal cases would differ appreciably from verdicts delivered by all-African-American juries is both unsupported and, probably, legally untenable—if only because no reliable measurement exists. These commentators will argue that the reasoning that motivated the Court in *Batson v Kentucky* to prohibit prosecutors from using their peremptory challenges to strike jurors solely because of their race also invalidates the use of racial quotas in the jurybox. In *Batson*, the Court held:

[T]he Equal Protection Clause forbids the prosecutor to challenge [peremptorily] potential jurors solely... on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.  

There are several justifications for the Court's holding in *Batson* that are inapplicable to jurymandering programs. First, *Batson* and its twin, *McCollum*, apply specifically to the unique harms created by the impermissible use of race discrimination in peremptory challenges:

Regardless of who invokes the discriminatory [peremptory] challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination.

This palpable, personal stigmatization simply does not occur in jurymandering proposals that are designed to make determinations behind the scenes.

Nor can whites reasonably claim that they are stigmatized as a group, since

me in a way which I felt was in the end becoming rather hostile.”


68. Id at 89.


70. Id at 49.

71. The Hennepin County proposal is illustrative. Under the proposal, would-be grand jurors fill-out an application asking them whether they want to be identified as a minority juror. Of the total list, 21 of 23 total are selected at random. If, according to the questionnaires of these 21, there are at least 2 minority members, the remaining two are selected at random from the general pool. If, however, there are less than two self-identified minority members, names are drawn from an exclusively minority pool. See *Hennepin County Final Report* at 27 (cited in note 13).
they are not excluded generally. Neither is the claim persuasive that whites as a
group are harmed in any other way by mandatory minority representation in the
jurybox.

Moreover, there is reason to believe that African-Americans are more likely
than whites to view jury service, like military service, as a relative good, and that
increasing the numbers of African-Americans on trial juries may turn out to be
Pareto optimal.\textsuperscript{72} As members of a minority group that has suffered the unjust
effects of a criminal justice system that systematically disadvantages them,\textsuperscript{73} it
is possible that African-Americans generally value the opportunity to serve on a
jury more highly than whites. Finally, as will be argued below, Euro-Americans,
as a group, will benefit from a criminal justice system that shares the support
and respect of the community at large. This Pareto-optimal exchange may end up
producing even more benefits for the community as a whole.

Some may say that this argument misses the point entirely. They may argue
that racial quotas on trial juries will perpetuate and intensify racial discrimina-
tion in the law and racial division in society at large. This belief arises, in large
part, from a mistaken tendency to view the jurymandered jury as a "represent-
ativa" institution of majoritarian democracy rather than as an institution of
multiparty negotiation.

III. Two Models of the Jury

A. TILTING AT WINDMILLS: THE REPRESENTATIVE MODEL

To most critics, the danger of the jurymandered petit jury is that it will
encourage jurors to view themselves as racial "representatives" rather than as
deliberative peers.\textsuperscript{74} The danger that jurors will vote as "racial representatives,"
however, has been greatly exaggerated.

First, the danger posed by politicized juries is not new or limited to the
racialized cases. Second, the institutional structure of the jury mitigates the
adverse consequences of politicized deliberation. Third, it is unlikely that

\textsuperscript{72} As Jon Elster has written:
It is not always clear whether something is a good or a burden. Are voting and
jury service rights or obligations? Workers who are offered early retirement schemes
often perceive them as a mixed blessing, as do women with respect to the maternal
presumption for child custody. In both cases, the formal right easily turns into an
informal obligation. For members of the ethnic majority, military service is usually
seen as a burden, but for minority members it is sometimes perceived as a good.
Jon Elster, \textit{Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens}

\textsuperscript{73} Consider the words of Gunnar Myrdal in 1944:
It is notorious that practically never have white lynching mobs been brought to
court in the South, even when the killers are known to all the community and are
mentioned by name in the local press.
Gunnar Myrdal, \textit{An American Dilemma: The Negro Problem and Modern Democracy} 552-
53 (Harper & Row, 1944).

\textsuperscript{74} See Abramson, \textit{We, the Jury} at 125 (cited in note 19).
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jurymanded jurors will be any more likely to view themselves as racial repre-
sentatives than jurors chosen from a randomly drawn panel. In many cases,
jurymanded jurors may feel less compelled to deliberate “racially” than their
randomly-drawn counterparts. Finally, even if racially representative juries de-
crease consensus in the jurybox, disagreement should not be read as a failure of
justice, but as the cost of achieving it in a deeply pluralist culture.

1. A history of the voting juror.

The specter of the representative juror haunts most the Supreme Court’s jurisprudence on equal protection and the jury. In Batson, for example, the Supreme Court declared:

Indeed, it would be impossible to apply a concept of proportional represen-
tation to the petit jury in view of the heterogeneous nature of our soci-
ety.75

What the Court has feared for logistical reasons, others have criticized on other grounds. The vision of the proportionally representative jury, Abramson has noted, is a “nakedly political” vision of “competing groups.”76 As Abramson points out, the use of the proportionally representative jury can lead to a cynicism “in which there [is] not one justice for juries to represent but multiple justices reducible to whom a juror happened to be by race, sex, national origin, religion, occupation, income, educational level, and on and on.”77

In this world, Abramson laments, “there is no longer anything special about the jury . . . that exempts it from the normal barter and compromises of representative democracy.”78

Indeed, some may argue that jurymanded juries will deepen the divisions that already exist in society. Jurymanded juries may merely vote the party ticket; they may be willing to convict or acquit defendants based on issues entirely unrelated to the factual guilt or innocence of the defendant.79 At least

76. Abramson, We, The Jury at 125 (cited in note 19).
77. Id at 124.
78. Id at 125.
79. Such critics could point to a recent development in Tyler, Texas in August of 1992. On August 10th, the New York Times reported that,
[Bl]ack anger over several cases of perceived injustice by the police and the court has broken the quiet [of the town]. Protests have been loudest over the fatal shooting of an 84-year-old black woman [Annie Rae Dixon] by a white police officer in a botched drug raid. . . . On July 10 a grand jury of 8 whites and 2 blacks voted not to return charges against the officers. . . . The Dixon case intruded into an unrelated case five days after the grand jury decision, when three black jurors refused to go along with nine whites in convicting a black man accused of kidnapping, robbing and sexually assaulting a white woman. . . . All the jurors in that case insisted that they weighed the charges on the merits, but several admitted later that the Dixon case had come up in their deliberations and that the debate became heated along racial lines. . . . Since the trial, one of the black jurors, James Hawkins, has frequently spoken out on injustice to blacks and angrily con-
one commentator believes that it is not uncommon for African-American jurors to “refrain[] from voting to convict defendants they thought were guilty because they didn’t want to send any more young black men to prison.” In a regime of jurymandered juries, critics may ask, will such reasoning become the norm, not the aberration?

While it is easy to find examples of today’s juries voting rather than deliberating in the jurybox, it is no more difficult to find examples throughout our nation’s history. In 1765, “a Bostonian could boast that the whigs ‘would always be sure of Eleven jury men in Twelve.’” Before Aaron Burr’s 1807 trial for treason, founding father and then-President Thomas Jefferson (who was both politically and personally hostile to Burr) unsuccessfully attempted to pack the grand jury against Burr. According to Jefferson, the grand jury that was finally empaneled contained, “2 Fed[eralists], 4 Quids, and 10 Republicans.”

Or consider an 1828 case tried in Huntsville, Alabama, immediately following Jackson’s presidential victory over Adams. During his argument before the jury, the defense counsel made much of the fact that the defendant was a relative of Old Hickory himself (if only a distant one). When the jury retired:

[T]hey retired, under charge of the court to the room assigned them for conference; but no conference there took place. Their minds were already made up. A loud “hurrah for Jackson” [sic] was heard as they left the court room [sic], and a few minutes thereafter, they returned with a verdict for the defendant.

It is hard to develop a principled defense of such an overtly political trial. But for every example of the “lawless” jury, there is a jury that felt a duty to obey a “higher” than human law. Such examples can be drawn from every peri-
of our history. Consider, for instance, the acquittal of John Peter Zenger in 1735, the numerous acquittals of abolitionists “accused” of rescuing recaptured runaway slaves before the Civil War, and the acquittals of dozens of Vietnam War protestors during the ’60s and ’70s. Many of these American jurors would, no doubt, agree with the words John Adams penned in 1771, asking: “[I]s it not an Absurdity to suppose that the Law would oblige [jurors] to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment, and Conscience?”

Even with the benefit of hindsight, however, it can be difficult to distinguish between principled nullification and lawlessness. In 1768, British officials seized one of John Hancock’s ships in a Scottish port and accused him of smuggling. The officials took advantage of the fact that the incident occurred on the high seas to bring an action against Hancock in admiralty court, where he could not receive a jury trial. The court upheld the seizure and delivered both the vessel and its contents over to customs officials in forfeiture.

Hancock responded by bringing a suit against the customs officials for trespass. In the trial, which was held before a jury, the judge instructed the jury that the decision of the admiralty court could not be “traversed.” The jurors, nonetheless, held the customs officials liable for Hancock’s loss. Reflecting on this trial, Abramson notes that “Hancock’s jurors took their place among other jury heroes who resisted tyrannical laws.”

The “tyrannical law” that Hancock broke is not altogether different in principle from the crime that sends many to prison today: drug smuggling and sales. Will the Abramson of the year 2200 describe as heroes the jurors who,

85. The most noted colonial jury trial was the trial of John Peter Zenger, a New York printer who was charged with seditious libel for printing a parody of the Governor. The surviving accounts of Zenger’s trial are probably partisan, but whether fair or slanted, these accounts greatly influenced the Founders’ views of the jury. See James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal (Harvard, 1963); Stephen Botein, ed, ‘Mr. Zenger’s Malice and Falshood’: Six Issues of the New York Weekly Journal, 1733-34 (American Antiquarian Society, 1985).

86. In some jurisdictions, it proved impossible for prosecutors to secure convictions of the rescuers from juries sympathetic to the anti-slavery cause. Leonard W. Levy, Judgments: Essays on American Constitutional History 312 n 48 (Quadrangle Books, 1972); See also Thomas D. Morris, Free Men All: The Personal Liberty Laws of the North, 1780-1861 148-59 (Johns Hopkins, 1974); Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 175-225 (Yale, 1975).

87. See, for example, United States v Anderson, 356 F Supp 1311 (D NJ 1973). See generally Abramson, We, the Jury at 57-60 (cited in note 19); Alan W. Scheflin and Jon M. Van Dyke, Jury Nullification: The Contours of a Controversy, 43 Law and Contemporary Problems 51, 199-201 (1980).

88. L. Kinvin Wroth and Hiller B. Zobel, eds, 1 Legal Papers of John Adams 230 (Belknap, 1965).

89. Reid, In a Defiant Stance at 32 (cited in note 82).

90. Abramson, We, the Jury at 24-25 (cited in note 19).

91. Id at 24 (Hancock’s crime was “importing more goods than had been declared during loading”).
because of principle, refuse to convict African-Americans because there are already too many in prison? Maybe over time, those juries that failed to be swayed by Operation Rescue's plea for jury nullification in cases involving abortion protest will be seen as slavishly legalistic. The difference between higher law and lawlessness may be in the eye of the beholder.

2. Structural defenses.

The fear that racial quotas will encourage jurors merely to "vote" along racial lines fails to respect the extent to which the criminal trial jury, as it has developed historically, contains significant and effective checks that encourage deliberation and discourage interest group politics in the jurybox.

First, the jury is a body that deliberates only once. The ad hoc nature of the institution has mixed effects. Critics of the jury may argue that the fact that each jury decides only one case prevents the institution from gaining the expertise necessary to resolve disputes intelligently; moreover, they could contend, the jury's life-span makes consistent verdicts across trials impossible. This position is probably not short on proponents, since criminal justice has been reduced to brute application of the dictum "treat like cases alike." But these critics fail to appreciate the values secured by such ad hoc decisionmaking bodies. Juries have the relative advantage of being less cynical than judges, less jaded, and more attuned to the incommensurability of each case.

Whether or not experience is a desirable juridical quality, it is still suspect in a democratic society. In democracies, the problem of agency capture can be significant. The ad hoc nature of the jury, however, makes it impossible for any group to capture control of the institution from the inside. This means not only that the jurors empaneled in the criminal trial of the officers accused of beating Rodney King will decide only one case, but also that the "institution" of the jury does not take on a bureaucratic life of its own.

The jury is also not burdened by the demands of stare decisis. When jurors consider either "legal," "factual," or hybrid questions, they are generally not constrained by the reasoning of earlier juries, nor are they attempting to speak to later ones. The jury does not function as the Janus-headed judge must.

92. Id at 57-59.
94. Of course, the history of the jury in the United States has been one of exclusion of minorities and women. But the capture of the jury by white males was accomplished not from within the institution itself but from external legal sources. Albert Alschuler and Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U Chi L Rev 867, 877-82 (1994).
95. Indeed, the archetypal jury is so "innocent" of the law that it has been the perennial butt of jokes. For example, Mark Twain gleefully related a case he came across in which:

[w]hen the peremptory challenges were all exhausted, a jury of twelve men was impaneled—a jury who swore they had neither heard, read, talked about nor expressed an opinion concerning a murder which the very cattle in the corrals . . . were cognizant of! . . . It actually came out afterward, that one of [the jurors]
jury need not look forward in time to consider how a “rule of law” will serve to resolve future legal conflicts; nor need they struggle to connect the present decision with a complex tradition of legal principles. Rather, the jury’s eye focuses on the immediate, present, and practical. Juries don’t make law, they make decisions.

Undoubtedly, juries will occasionally give undue influence to factors, political factors for example, that the law does not countenance. There will be those who bristle at the notion that such factors play a role in the decisionmaking process of the jury. A criminal defendant’s guilt or innocence should be weighed, it will be argued, on a balanced scale free of all extraneous concerns.

This argument is persuasive, but overstated. First, sensitivity to political and social factors may not necessarily be stronger in the jurybox than in the judge’s chambers. Second, the fact that judges are repeat players means that a judge’s personal political leanings pose a greater danger to democracy than a juror’s. Moreover, as the Supreme Court has recognized, “statistical studies suggest that the risk of convicting an innocent person (Type 1 error) rises as the size of the jury diminishes.” These studies suggest that the likelihood of Type 1 error is greater in a judge-tried case than in a jury-tried case (an assumption buttressed by common sense).

Second, it is simplistic to see the jury as merely rendering a factual conclusion as to whether a defendant did or did not do a legally proscribed or required act. Rather, on any given set of facts there is a range of outcomes that could be considered just. O.J. Simpson was acquitted. But his jury could have hung. Or he could have been found guilty of murder, or of voluntary manslaughter. The jury’s verdict necessarily contains many subjective elements. They do not find thought that incest and arson were the same thing.

Id at 881-82, quoting Mark Twain, Roughing It 342-43 (Penguin, 1985). The downside to this legal naiveté is obvious. First, jury verdicts, not greatly unrestrained by the law, may not show obvious consistency from one case to the next. Second, jury verdicts loosed from the moorings of the law may be influenced by factors that many might view as insignificant, unwise, legally impermissible, and even immoral.

Defenders of the criminal jury usually claim that the jurybox transforms ordinary people into wise citizens who suddenly show astounding legal sophistication. This claim finds theoretical support in notions of Natural Law and has a long history. It was well-expressed by John Adams in 1771:

The general Rules of Law and common Regulation of Society, under which ordinary Transactions arrange themselves, are well enough known to ordinary Jurors. The great Principles of the Constitution, are intimately known, they are sensibly felt by every Briton—it is scarcely extravagant to say, they are drawn in and imbibed with the Nurses Milk and first Air.

Id at 915-16, quoting L. Kinvin Wroth and Hiller Zobel, eds, 1 Legal Papers of John Adams at 228, 230 (Belknap, 1965).

96. See generally Mary Ann Glendon, A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society 153, 152-73?? (Farrar, Straus, 1994) (defining the “Greenhouse Effect” as “a term (named after the New York Times’s Linda Greenhouse) for the warm reciprocity between activist journalists and judges who meet with their approval”).

merely that O.J. Simpson did or did not kill his wife and her paramour; rather, they find him “guilty” or “innocent” of some particular charge. In short, they make a judgment of “culpability.”

In addition, even if a jury makes Type 1 error—holding an innocent man guilty—the judge can check their error by overturning the verdict as against the manifest weight of the evidence. Both Type I and Type II errors (failing to convict a guilty person) are tempered by what might be the most important element of the structure of the criminal jury system, namely, the traditional unanimity requirement. The fact that each and every juror has the power to hang the jury is difficult to overstress. Not only does the veto power make it possible for the juror(s) convinced of a defendant’s guilt or innocence to check the majority, the awareness of the veto power makes clear to all participants that their job is not fundamentally representative, but deliberative. If jurors treat the jurybox solely as a majoritarian forum, there is a risk that many disputes could result in hung-juries.

3. The jurymandered jury is less racialized.

Consider a jury of eleven whites and one black. In this scenario, it seems likely, especially in a racialized case, that the African-American juror will view herself as a representative of her race. She may ask herself, “If I don’t represent the interests of African-Americans, who will?” Equally problematic, white jurors may tend to view her opinion as “the black perspective.”

98. Consider the 1991 trial of El-Sayyid Nosair for the killing of the founder of the Jewish Defense League, Meir Kahane. William Kunstler, serving as Nosair’s attorney, attempted to get a “third world jury of nonwhites, or anyone who’s been pushed down by white society.” When the jury acquitted Nosair, the judge declared the verdict to be “against the overwhelming weight of the evidence and . . . devoid of common sense and logic.” Alschuler, 44 Duke L J at 735 (cited in note 15).

99. The Court’s 1972 holdings in *Apodaca v Oregon*, 406 US 404 (1972), and *Johnson v Louisiana*, 406 US 356 (1972), authorizing less than unanimous verdicts in state noncapital criminal cases, in theory if not in fact, go a long way towards eviscerating the criminal trial jury. Fortunately, Louisiana and Oregon remain the only states that allow felony convictions based on non-unanimous verdicts. See generally Abramson, *We, the Jury* at 179-205 (cited in note 19).

But see *Ballew*, 435 US at 232-36 (holding that five person juries are not constitutional for reasons made clear by “recent empirical data”). Marianne Constable asserts that this data “could have been used just as well [by the Court] to overturn its earlier decision—that is, it could have been used just as well to say that six-member juries were also unconstitutional.” Constable, *The Law of the Other* at 164 n 25 (cited in note 55).

100. As the defendant’s brief in *Apodaca* argued:

While members of racial, religious, or ethnic minorities, women, poor people, young people or other previously excluded groups may now be represented on juries, a rule permitting a less than unanimous verdict makes it possible for a verdict to be rendered without their acquiescence and indeed without the consideration of their views.

Under current jury selection procedures such a jury would not be at all unusual. Some random selections will produce no African-Americans; some will produce one; some will produce more. In addition, if peremptory challenges are used (albeit impermissibly) to strike jurors based on their race, a party interested in eliminating blacks will have a far easier time doing so than a party interested in striking whites. In contrast, a jurymandered system will not only eliminate variation from panel to panel, but will undercut the purpose of strikes based on race.

The jury that was finally empaneled in the O.J. Simpson case was composed of eight African-Americans, one white, two Hispanics, and a man who identified himself as half Native American and half white. While some commentators viewed this jury as a victory for the defense, at least one expert has speculated that “[i]f the panel has a black majority, race may not be a polarizing element in deliberations, as it might if blacks were in the minority.”

Jurymandered petit juries also have the benefit of deracializing the peremptory challenge process. While neither the prosecution nor the defense in a criminal trial can constitutionally strike a juror based on her race, it is likely that racially motivated peremptories are not uncommon. In addition, in this present regime, well-meaning attorneys and judges are sometimes placed in the position of keeping an unqualified juror on a panel simply because she is the only minority member left in the venire. Failure to strike such a juror not only damages the

102. See Noble, NY Times at A9 (cited in note 6).
105. Consider the case of State v Baugh as described by Professor Alschuler:

A more striking illustration of the dangers of sub rosa affirmative action came in the case of Timothy L. Baugh, an African-American charged with fourteen rapes in Hennepin County. After one of the two African-Americans on the panel of prospective jurors revealed that she knew three of the defendant’s prospective alibi witnesses, Judge Robert Lynn permitted prosecutors to challenge this juror peremptorily. The one African-American still on the panel sometimes answered questions in a way that was difficult to follow. When, for example, this juror was asked why he had checked both yes and no to the question, “Under our system of justice a defendant is innocent until proven guilty beyond a reasonable doubt. Do you agree with that principle,” he replied in part:

You can’t really go on facts that much because that’s one of the reasons I got stabbed because she was being—okay, that facts was I done it, but I didn’t do nothing and come to find out I didn’t do nothing. The facts not always right.

Asked once more to explain, the juror said:

Let’s see, okay, like I did a couple of crimes, but then, okay, I did some of them and—I did most of them, I did do some of them and I didn’t do some and half of the times, you know, the facts are there, but it’s not there.

Other statements, however, displayed a clarity that was sometimes disconcerting. For example, when the juror was asked, “What do you think of the criminal justice
integrity of the trial process, but may have the unfortunate consequence of stigmatizing the minority juror and her race, since this juror will be the only "representative" of her race in the jurybox. This dilemma disappears in a regime, like that proposed by Hennepin County, Minnesota, in which racial representatives are inexaustable.

4. Consensus and justice are not synonymous.

The hung jury is probably more common now than it was at the time of the nation’s founding. This does not indicate, however, that the jury is less "deliberative"; it may well indicate the contrary. The fact that during the early years of the Republic, juries were comprised almost solely of white male propertyholders undoubtedy increased the chance for consensus in the jurybox. In a system of government that ensured the civil rights of only Euro-American propertied males, homogeneous juryboxes probably produced more consensus.

But greater consensus does not mean greater justice. Governor William Shirley of Massachusetts complained that a jury trial in colonial Massachusetts amounted to "trying one illicit trader by his fellows, or at least by his well-wishers." In the debate over the Ku Klux Klan Act of 1871, Senator Sherman offered the testimony of a Southern judge, who complained that

In nine cases out of ten the [white] men who commit the crimes [against African-American victims] constitute or sit on the grand jury, either they themselves or their near relatives or friends, sympathizers, aiders, or abettors; and if a bill is found it is next to impossible to secure a conviction

system?,” he replied, “It sucks.” He also described the rape of one of his friends as “just basically sex.”

Nevertheless, Judge Lynn refused to dismiss the prospective juror for cause and also refused to allow a peremptory challenge by the prosecutor. Perhaps the judge doubted that Minneapolis prosecutors would have challenged a white juror who voiced the same views of rape and of the criminal justice system as this African-American juror. More probably, however, the judge accepted an extra-legal argument against exclusion advanced by the defense attorney. Although the Constitution prohibited this lawyer from taking race into account in exercising his own peremptory challenges, he apparently saw no need to preserve the pretense of colorblindness while arguing about his opponent's challenges: “This was our last chance. We don't have any more opportunities to have a black person on this jury. . . . I ask this Court to let the juror stand.”

Following selection of the challenged juror, a Minneapolis television station broadcast his mug shot. (The mug shot was conveniently on-hand since, just seven months earlier, the juror had been arrested for aggravated robbery. He was later released without the filing of a formal charge). The juror then told the court, “I cannot go on the jury.” Six other jurors saw the mug shot while watching the news in violation of the Judge's order regarding exposure to media coverage of the trial. Judge Lynn then dismissed the jury and began jury selection anew.

106. See Alschuler and Deiss, 61 U Chi L Rev at 877 (cited in note 94).
upon a trial at the bar. I have heard of no instance in North Carolina where a conviction of that sort has taken place.\textsuperscript{109}

Similarly, an increased percentage of hung juries or acquittals should not necessarily be interpreted as a failing of the criminal justice system. One cannot legitimately evaluate a change (say an increase in rates of acquittals) without first establishing the legitimacy of the baseline—an impossible task in the context of criminal trial juries.

Consider the fact that in racially diverse cities like Los Angeles and Washington, D.C., the incidence of hung juries is about 10 percent, twice the national rate.\textsuperscript{110} While this may well indicate that racial composition affects verdict outcomes, it tells us nothing about which regime is achieving greater justice. To conclude that it does rests on the impermissible preferencing of one baseline over another.\textsuperscript{111} It also assumes that the African-American jurors (and not Euro-American jurors) in these jurisdictions impermissibly employ race as a factor in deliberation. In short, it views African-American jurors as “representing” their race in the jurybox by “voting” to advance “black interests” or the interests of black parties.

Professor Alschuler also notes, sarcastically:

\begin{enumerate}
\item Cong Globe, 42d Cong, 1st Sess 158 (1871) (quoting Judge Russell).
\item Some may argue that increased dissension in the jurybox increases chaos and confusion in society at large, because outcomes of trials will be less predictable. This fear may be well-founded in the civil side of the law. Historically, as Morton J. Horwitz has argued, the unpredictability of civil juries in antebellum America may have led the legal profession in an implicit bargain with commercial interests to “subjugat[e]” them. Morton J Horowitz, \textit{The Transformation of American Law, 1780-1860} 140-59 (Harvard, 1977).
\item Outcome predictability, however, is probably not as important in the criminal system as it is on the civil side. Business interests need consistent resolution of commercial disputes in order to regulate and plan future transactions. Holmes’ “bad man” may desire criminal juries that provide legalistically consistent outcomes for much the same reasons. On the other hand, society may benefit from a criminal jury system that is not highly predictable because potential criminal defendants will find it harder to calibrate the risk involved in any given criminal enterprise.
\item It is important to note that outcome predictability, in the criminal trial, is not the same as equal justice. Every defendant convicted of murdering his spouse and lover in the same way and context as O.J. Simpson was alleged to have done should receive a substantially similar verdict and sentence, but not every defendant that kills a spouse and the spouse’s lover does so in the same way. As Professor Alschuler has noted in the context of sentencing guidelines:
\begin{itemize}
\item Equality does not mean sameness; the term more commonly refers to the consistent application of a comprehensible principle or mix of principles to different cases.
\item Excessive aggregation—treating unlike cases alike—can violate rather than promote the principle of equality.
\end{itemize}
\end{enumerate}
The Tyrant of Dystopia beheads his subjects for all crimes from speeding to treason. He and other law-abiding Dystopians take pride in their system, insisting they have achieved perfect equality.\textsuperscript{112}

Thus concepts such as equality are elusive if not scrutinized.

\textbf{B. NEGOTIATING JUSTICE: THE NEGOTIATION MODEL}

An alternative view is available which is at once less crass and less naive: the negotiation model of the jury. This understanding of the jury has much in common with the familiar model of the multiparty negotiation in which it is necessary that all interested parties come together around the table to reach a resolution on an issue or set of issues. Failure to include significantly interested parties not only casts doubt on the fairness of the negotiation proceedings (especially if they are held in private), but may also throw the continued success of the agreement into doubt.

In this model, African-American jurors (for example) "represent" the interests of "their" race in the jurybox not by seeking to advance some agenda; rather, they represent their race by ensuring, by their very presence on the jury, that other groups or individuals do not impermissibly use race in the deliberation process. The jury is a forum in which individuals drawn from interested groups negotiate a just verdict in a specific criminal case within a range of possible just outcomes while ensuring that group identity is neither favored or disadvantaged.\textsuperscript{113}

The first Rodney King trial is a useful illustration. Many, perhaps most, of the Americans who witnessed the beating of Mr. King on television believed that the officers were guilty of using criminally excessive force.\textsuperscript{114} When an almost all-white jury in Simi Valley disagreed, riot erupted in Los Angeles, partly because the result was viewed as unjust. What would have happened if the verdict had come out the other way? One suspects that riot would have been unlikely, but why? One might be tempted to say it is because the result appears to be more just, but is this a fair conclusion? It seems to me more likely that we

\textsuperscript{112} Id at 916.  
\textsuperscript{113} The jury in the trial of Mayor Marion Barry of Washington, D.C., may be an example of such a jury at work. In that case, the jury convicted Barry of one misdemeanor charge, acquitted him on another, and was unable to reach agreement on twelve other narcotics charges. Michael York and Tracy Thompson, \textit{Barry Guilty on 1 Count, Cleared on 1; Mistrial Declared on 12 Other Charges}, Washington Post A1 (August 11, 1990). While there has been no shortage of critics of the Barry jury, there is reason to think that the jury engaged in deliberation that sought to counterbalance what blacks could see as overzealous prosecution tactics. Whether or not the balance struck is a "good" one, it was a decision that all parties could live with.  
\textsuperscript{114} Mayor Tom Bradley of Los Angeles spoke for many Americans when he said of the videotape, "We saw what we saw, and what we saw was a crime." Bill Boyarski, \textit{Ashes of a Mayor's Dream}, LA Times B2 (May 1, 1992).
believe this outcome to be just because it compares favorably to a verdict that would have been delivered by a hypothetical jury composed of both blacks and whites.

To test this hypothesis, imagine a majority African-American jury that also acquits the defendants. Would there have been a riot? Probably not. Does this not suggest that the riot resulted not from the particular verdict but from the combination of a problematic verdict and a problematic (i.e., nearly all-white) jury? How many black jurors would it have taken to prevent riot? One, two, six? It is hard to say, but it is clear, I think, that the verdict (no matter what it was) becomes more palatable with each African-American on the jury.

What if the jury were all-black? Had an all-black jury acquitted the defendants, the public would probably have had greater confidence, even despite the widespread perception of guilt created by the repeated playing of the videotaped beating on television. In effect, in this scenario the community may have been willing to suspend disbelief and admit, “Well, I guess we were wrong.”

If, on the other hand, an all-black jury had voted to convict the defendants, there would likely have been widespread concern, even from people who themselves concluded from the videotape that King was beaten illegally. Why? The answer, I believe, is that in this scenario there is a suspicion that race may have played an impermissible role in the deliberations. Or more accurately, there is the awareness that there was an opportunity in the jurybox for racialized deliberation combined with an awareness that, in any case, there were no whites on the jury to protect “white” interests. And, of course, the verdict does nothing to allay these fears.

This conception of the jury as a body that represents particular group interests as well as the interest of society at large is not new. Juries have always represented group interests as well as judged facts, and they always will. The very structure of the institution, as it has developed historically, suggests a reading that appreciates such “negotiated” outcomes. Moreover, throughout the history of the criminal jury in England and the United States one can find analogues to the jurymandered jury.

The jury is an ancient institution, but much of its early nature remains shrouded in the mist of the past, despite the careful work of historians. In

115. Analytically, this is similar to the reasoning behind the “admission against interest” exception to the hearsay rule.

the institution’s earliest history it is sometimes difficult to distinguish jurors from judges and witnesses. It is also difficult to know when these functions became clearly divided. As Professor Constable has written,

These questions cannot be answered any more clearly now than in 1930, when one author wrote that “none of the writers shed clear light on the supposed transition period, when jurors, as such, ceased to be witnesses and the latter, as such, ceased to be jurors.” To whatever origin or whatever period one traces the modern jury, one can always find, in its precursors, a body of persons, representing the community, speaking the truth about the matters at hand without apparent explicit distinction between fact and law.\(^\text{117}\)

The fact that the role of the proto-juror was not clearly delineated also meant that the juror’s “constituency” could not be precisely identified. Did the proto-juror speak the truth on “behalf” of the defendant, the king, the community, or a subgroup within that community? The answer to this question is that he probably was expected to “represent” the interests of a number of parties when he spoke the “truth” (“an amalgamation of what we now call ‘fact’ and ‘law.’”)\(^\text{118}\) The vision of the juror as a scientific fact-finder with sole allegiance to the state is one that is utterly modern.

In this country jurors have also served as group representatives as well as fact-finders. Article III of the Constitution provides that “the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”\(^\text{119}\) While this provision guaranteed to all federal felony criminal defendants the right to a jury trial, it did not specify from where the jury was to be drawn. Anti-Federalists considered this to be a grave failing.\(^\text{120}\) Patrick Henry, for instance, saw the failure to protect a defendant’s right to a jury from the vicinage as an opportunity for the government to carry a defendant from one extremity of the state to another in an effort to find a jury receptive to the government’s case.\(^\text{121}\) As another Anti-Federalist put it, the federal government “can hang any one they please, by having a jury to suit their purpose.”\(^\text{122}\)


\(\text{118. Constable, The Law of the Other at 15 (cited in note 55).}

\(\text{119. US Const, Art III, § 2, cl 3.}

\(\text{120. See Francis H. Heller, The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development 25 (Kansas, 1951).}

\(\text{121. Abramson, We, the Jury at 22-23 (cited in note 19).}

\(\text{122. Id at 569. Recent memory made many early United States’ citizens sensitive to this}
The Sixth Amendment was meant to remedy this perceived problem. It guarantees that the trial occur in the "State . . . wherein the crime shall have been committed," and that the jury be drawn from the "district wherein the crime shall have been committed." The vicinage requirement was meant to protect a defendant's rights, but it would be inappropriately reductive to view the requirement as exclusively benefitting the criminal defendant. The vicinage right was both the right of the individual and the political right of the community. As Alexis de Tocqueville described the American jury in 1835, it is "a political institution . . . one form of the sovereignty of the people.

The vicinage requirement recognized the interests the local community as a whole has in the trial. Other requirements ensured the representation of specific groups. In the United States jury service has long been linked to the right to vote: from at least the late nineteenth century, state officials have used lists of registered voters to identify qualified jurors, and qualifications for jury service often paralleled those for suffrage. For example, both jurors and voters were required to be freeholders. Generally, however, jury statutes made the pool of potential jurors shallower than the reservoir of voters by adding requirements of good character, sobriety, intelligence, and the like.

danger. In the years leading up to the Revolution, the Crown often attempted to get around colonial juries by trying colonial defendants in the mother country. As Edmund Burke critically described the practice:

[A defendant is] brought hither in the dungeon of a ship's hold . . . he is vomited into a dungeon on land, loaded with irons, unfurnished with money, unsupported by friends, three thousand miles from all means of calling upon or confronting evidence. . . . Such a person may be executed according to form, but he can never be tried according to justice.


The Declaration of Independence also condemned this practice, listing as a grievance ("transporting us beyond Seas to be tried for pretended offenses [and for] depriving us in many cases, of the benefits of Trial by Jury").

123. See Heller, The Sixth Amendment at 35 (cited in note 120).


125. There is nothing sacrosanct about "geographic" community. As Lani Guinier has argued, the geographic community is "artificial" and there is therefore no inherent reason why the notion of "vicinage" cannot be extended to other artificial constructs of "community," including, race. See Lani Guinier, The Tyranny of the Majority: Fundamental Fairness in Representative Democracy 129 (Free Press, 1994).

126. Alexis de Tocqueville, 1 Democracy in America 283 (Knopf, 1945).

127. The Founding Fathers allowed the states to determine the requisite qualifications for jurors in both state and federal courts convening in those states. See The Federal Judiciary Act of 1789, 1 Stat 73 § 29 (1789) ("jurors shall have the same qualifications as are requisite for jurors of the State of which they are citizens").


129. See Alschuler and Deiss, 61 U Chi L Rev at 877-882 (cited in note 94).
Over the course of the eighteenth and nineteenth centuries, as voting requirements were liberalized some jury provisions followed suit. For instance, in 1789 the state of Georgia only required jurors to be qualified “electors.” When, in the following year, Georgia adopted universal white male suffrage, the duty of jury service was extended to all adult white males as a matter of course. Some states, like Iowa, entered the Union with both universal white male suffrage and universal white male jury service.

More often, state juror qualifications remained tied to property holding even after such qualifications were eliminated from voting requirements. Connecticut had a freeholding requirement for both voting and jury service until 1818, when the state abolished the requirement for suffrage. The state retained the freehold requirement for jurors until 1836. In 1821, New York replaced its freeholding requirement for suffrage with a taxing requirement, and in 1826 adopted universal male suffrage. Ownership of property, however, remained a prerequisite to jury service in New York until 1967, when the State abandoned its $250 property holding requirement. Even so, a federal court had upheld the New York requirement for jury service in 1949. Similarly, Indiana entered the Union in 1816, with a property holding requirement for jury service (jurors were drawn from a list of “taxable . . . discreet householders and freeholders”), but not for voting.

Thus, while tax and property requirements for voting all but disappeared from state constitutions by the Civil War, they persisted as prerequisites to jury service well into the twentieth century. Eventually, twentieth century courts deprived the few remaining tax-related requirements of most of their bite by holding that they could be satisfied by the payment of a sales tax on any purchase—or even by the payment of a federal tax.

In the early years of the Republic the right to vote was viewed in “much the same way that one would claim a right to vote as a stockholder in a corpora-

130. An Act to Revise and Amend the Judiciary System of this State (Feb 9, 1797), in Marbury and Crawford, eds, Digest of Laws of the State of Georgia 277-78 (1802). In 1798, Georgia extended suffrage to all white males, presumably ensuring universal white male eligibility in the jurybox as well. Georgia’s liberal approach seems unusual among the colonial states, though it appears to have been commonly followed by states that entered the Union in the years between the founding and the Civil War.

131. See Andrew G. Deiss, Jury Service and the Civil Rights Act of 1875 app (Dec, 1993) (unpublished manuscript, on file with The University of Chicago Law School Roundtable).


137. See Deiss, Jury Service at app (cited in note 131).


tion.” Only those who had “invested” in the community by purchasing land were recognized as having a sufficient interest in the community to warrant the right to vote. The same theory applied to juries. Statutes limited jurors to those who held an interest in the community as evidenced by the freehold. While this philosophy rapidly lost hold in the suffrage context, it showed remarkable longevity in the jurybox. In 1880, for instance, *The American Law Register* published approvingly a passage by New York lawyer, Hugo Hirsh, declaring:

This property qualification, in my opinion, is not attached merely as a guard to prevent the juror from being bribed, but for this better reason, that the juror owning property in the vicinage will have a deeper and better interest in “the life, liberty, and property” of his fellow citizens, and in the honest and proper administration of justice, than one who owns nothing. The one has a permanent interest in the community in which he resides, and the other has none.

Even after the property qualification for jury service began to disappear, other procedures remained that attempted to ensure that only those people with “a deeper and better interest” in the community served on juries. In many jurisdictions, officials, often called “selectmen” or “key men,” charged with selecting jurors were given complete discretion to choose jurors from a qualified pool. As a New Hampshire statute phrased it, the selectmen would make a list of candidates “as they judge best qualified to serve as jurors.”

Over time, egalitarian principles challenged the corporate theory of citizenship that had justified excluding those who owned no property from the jurybox. The first transformation was primarily theoretical: instead of a jury of the propertied, the law established a jury of the highly qualified. In 1942, for instance, a report on the federal jury system from a committee of federal judges called for increased minority presence on juries; the report, however, specifically embraced the key man system defending it on the grounds that:

[N]othing in the concept of [cross-sectional juries] opposes the tradition of federal courts that jurors should be men of recognized intelligence and

141. Id at 110.
143. See *Thiel v Southern Pacific Co.*, 328 US 217, 223-24 (1946) (holding that exclusion of daily wage earners from jury service was unconstitutional).
While representing a shift in theory, in practice this new standard continued to serve as a proxy for property holding.

Historically, then, juries were drawn from those who were judged to hold "better" interests in the community at large. In special situations, the American legal tradition recognized the interests of particular groups in the jurybox. Consider the "slave court," developed in British colonies to try cases of slave criminality that were perceived to require more than "plantation justice." The slave court was used extensively in the South as well as in New York, New Jersey, Pennsylvania, and Delaware before the Civil War. It was, in effect, a "special jury" composed of several justices of the peace and several slaveholding freeholders. In North Carolina in 1741, for instance, the law called for the local magistrate to summon "two justices and four slaveowning freeholders to meet at the courthouse for the trial of the slave." These slaveholders would, it was expected, look after the interests of the slaveholding aristocracy as well as that of the slave.

Or consider the Anglo-American practice of empaneling juries de medietate linguae to hear cases to which an alien was a party. These juries, composed half of aliens and half of citizens, were first used in medieval England in cases between English citizens and Jewish and foreign merchants. In America, these juries were recognized by statute in a number of states and were occasionally used to try cases involving American Indians as well as aliens. In 1823, Chief Justice John Marshall used a mixed jury in a case in which an

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149. Id at 25.
151. Ramirez, 74 BU L Rev at 783-84 (cited in note 21).
152. At least Mississippi, Kentucky, Pennsylvania, New York, Virginia, and North Carolina.
153. Ramirez reports that Plymouth Colony records of 1674 discuss a case involving the murder of an Indian by several other Indians. Twelve of the jurors were Englishmen, but the court decided that "some of the most indifferentist, gra[v]est and sage Indians" should be admitted to the jury "to help to consult and advi[s]e." Accordingly, the court added Six Indians to the jury. Ramirez, 74 BU L Rev at 790-91 (cited in note 21).
154. See Respublica v Mesca, 1 Dallas 73 (Pa 1783); People v McLean, 2 Johnson 381 (NY 1807); State v Antonio, 4 Hawk 200 (NC 1825); Richards v Commonwealth, 11 Leigh 690 (Va 1841).
alien was charged with piracy.\textsuperscript{155} As late as 1911, the Kentucky Supreme Court affirmed that the mixed juries were permissible—at the discretion of the trial judge—by Kentucky statute.\textsuperscript{156}

As far as I am aware, such juries were never actually empaneled to try cases in disputes between African and Euro-Americans, though before the passage of the Fourteenth Amendment, it was sometimes suggested. During the debate surrounding the Pennsylvania Constitutional Convention of 1837-38, for instance, there was heated controversy over whether or not to include a provision granting trial by jury to fugitive slaves. One delegate was skeptical that Pennsylvania citizens would treat African-American as peers:

Trial by jury for fugitive slaves! for blacks by whites! What a solecism, an absurdity. From Magna Charta down, trial by jury has been a trial by peers, by equals; vassals, says Blackstone, by their fellow vassals, lords by their brother lords. If this trial is to be conferred on blacks by their friends, let us as least carry out the true spirit of the grant, and give the blacks a jury of their own colour; give them at any rate a jury \textit{de medietate}, half of the kind of the party to be tried. Otherwise, we violate the very principle of equality consecrated trial by jury as heretofore, and pervert it to the prejudice of those we pretend to befriend.\textsuperscript{157}

The 14th Amendment, by making African-Americans citizens of the United States, made the direct application of the mixed jury conceptually awkward. African-Americans were now equal citizens before the law; the remnants of caste and status were to be thrown aside. Nevertheless, the principle of group representation for which the mixed jury stood—along with the freeholding and vicinage requirements—remains.

\section*{Conclusion}

In an attempt to achieve racial harmony and ensure justice, states are increasingly attempting to ensure racial diversity in the jury box. While no program, to date, has explicitly called for racial quotas on trial juries, such an approach should be considered. This Comment has argued that the states should be able to demonstrate compelling interests in ensuring racially integrated juries. This Comment also contends that the use of racial quotas on the trial jury is the only way of protecting state interests in every case. Moreover, this Comment argues that racial quotas in trial juries do not harmfully discriminate against any race or group. Finally, this Comment demonstrates that the history of the jury system is a history of an institution wherein members of diverse groups negotiate

\begin{itemize}
\item \textsuperscript{155} \textit{United States v Cartacho}, 25 F Cas 312 (CCD Va 1823).
\item \textsuperscript{156} \textit{Wendling v Commonwealth}, 143 Ky 587 (1911). A French citizen had been accused of murder and demanded a mixed jury but, since the statute allowed for mixed juries at the discretion of the judge, the request was denied.
\item \textsuperscript{157} XI \textit{Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania} 297 (Packer, Barret 1938). The amendment failed 76-39.
\end{itemize}
outcomes to particular cases while ensuring that their group's interests are not compromised.

In Federalist No 2 John Jay wrote:

Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs.158

Jay's description, as politically incorrect as it obviously seems today, unquestionably represented the civic reality of the early nation. White men who did not own property, women, African-Americans, Indians, Asians, and Hispanics, were all denied full citizenship.159 How our democratic institutions can survive in a today's truly pluralist culture is one of the most important questions facing us in the twenty-first century. We will not find the answer by hamstringing state governments in their efforts to resolve these tensions. As the Supreme Court declared in 1947,

[W]e . . . will not use [the Fourteenth] Amendment to standardize administration of justice and stagnate local variations in practice. The jury system is one which has undergone great modifications in its long history, . . . and it is still undergoing revision and adaptation to adjust it to the tensions of time and locality. . . . The states have had different and constantly changing tests of eligibility for service. Evolution of the jury continues even now, and many experiments are under way that were strange to the common law. . . . Well has it been said of our power to limit state action that "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation."160

Perhaps now is the time for just such an experimentation.

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158. Federalist 2 (Jay) in (editor??), The Federalist Papers, pincite & (date).