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CRIMINAL LAW

IN SEARCH OF THE IMPARTIAL JURY*

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I. INTRODUCTION

The sixth amendment to the United States Constitution guarantees an accused the right to an impartial jury.[1] A jury, however,

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[1] U.S. CONST. amend. VI. The sixth amendment applies only to the federal government. The right to an impartial jury was extended to the states in Duncan v. Louisiana, 391 U.S. 145 (1968). In *Duncan*, the Supreme Court incorporated the sixth amendment provision into the fourteenth amendment's due process clause, finding that it was a fundamental tenet of Anglo-American jurisprudence. *Id.* at 149. The right to jury trial is also mentioned in article III of the Constitution: "The Trial of all Crimes except in Cases of Impeachment, shall be by Jury . . ." U.S. CONST. art. III, § 2(3). *See also* Ristaino v. Ross, 424 U.S. 589, 595 n.6 (1976)(right to impartial jury guaranteed both by incorporation of sixth amendment into fourteenth and by principles of due process); Peters v. Kiff, 407 U.S. 493, 501 (1972)(same). The Court in *Duncan* did note that there is no right to jury trial for "petty offenses." 391 U.S. at 159. *See also* Baldwin v. New York, 399 U.S. 66 (1970)(offense carrying penalty of imprisonment for more than six months is not "petty").

The focus of this Article is on impartiality in the criminal jury context. The seventh amendment provides for a jury trial in many civil cases. U.S. CONST. amend. VII. Unlike the sixth amendment, no guaranty of impartiality is explicitly mentioned in the seventh amendment. While this striking change of language might seem to suggest, as a matter of construction, that there is no constitutional right to an impartial jury in a civil trial, such an interpretation was probably not intended by the drafters, who envisioned a civil jury trial as it existed at common law. *See* McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984). *See also* Kiernan v. Van Schaik, 347 F.2d 775, 778 (3d Cir. 1965)(right to impartial jury in civil cases is implicit in fifth and seventh amendments). *See generally* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

need not and does not provide reasons for its verdicts.[2] Jurors cannot be punished or otherwise held legally liable for their decisions.[3] Their deliberations are protected from critical scrutiny by a shroud of secrecy.[4] Verdicts of acquittal are virtually unreviewable by appellate courts,[5] and verdicts of guilty are only slightly less so.[6]

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[2] *See, e.g.*, United States v. Lee, 532 F.2d 911 (3d Cir.), *cert. denied*, 429 U.S. 838 (1976); United States v. Miller, 284 F. Supp. 220, 225 (D. Conn.), *appeal dismissed*, 403 F.2d 77 (2d Cir. 1968).

[3] *See, e.g.*, Butz v. Economou, 438 U.S. 478, 509 (1978); Yaselli v. Goff, 12 F.2d 396, 403 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927). *See also* Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976)(grand jurors). Jurors could at one time be fined or imprisoned for returning an improper verdict, but this is no longer the case. *See* M. BLOOMSTEIN, VERDICT: THE JURY SYSTEM 17-18 (1968); W. CORNISH, THE JURY 140-42 (1965); P. DEVLIN, TRIAL BY JURY 17-18, 41, 67-69 (1956); Friloux, *Another View from the Bar* in THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 228 (R. Simon ed. 1975).

[4] *See* Tanner v. United States, 107 S. Ct. 2731 (1987), United States v. Homer, 411 F. Supp. 972, 980 (W.D. Pa. 1976), *aff'd*, 545 F.2d 864 (3d Cir.), *cert. denied* 431 U.S. 954 (1977); United States v. Miller, 284 F. Supp. 220 (D. Conn.), *appeal dismissed*, 403 F. 2d 77 (2d Cir. 1968); United States v. Driscoll, 276 F. Supp. 333 (S.D.N.Y. 1967); Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785). *See also* 18 U.S.C. § 1508 (1982)(crime to listen to, observe, or record proceedings of jury or attempt to do same); FED. R. EVID. 606(b)(juror may not testify as to factor influencing verdict except to disclose extraneous prejudicial information brought to the jury's attention or outside influence).

The rationale behind the rule that a juror may not impeach the verdict of the jury was discussed by the Supreme Court in McDonald v. Pless, 238 U.S. 264 (1915). The Court observed that the rule was based on a balancing of policy considerations:

> The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.
>
> These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

Id. at 267-68.

[5] *See* 18 U.S.C. § 3731 (1982 & Supp IV 1986)(government may not appeal where reprosecution would be barred by double jeopardy). *See also* Bullington v. Missouri, 451 U.S. 430, 446 (1981)(double jeopardy protects defendant from imposition of death penalty at second trial where jury at first trial imposed sentence of life imprisonment); Burks v. United States, 437 U.S. 1, 10 (1978)(double jeopardy prohibits retrial of defendant whose conviction is reversed for insufficiency of evidence).

Reviewability of jury verdicts, even if allowed, would be difficult in practice. Secrecy in the jury's proceedings prevents lawyers and others from finding out the gist of the

Given this lack of accountability, the requirement of impartiality stands as one of the few and one of the prime safeguards insuring that a jury will reach a fair and just result.

The law has been less than clear as to what is meant by impartiality. Platitudes about its value abound, but giving content to this concept has proven more difficult and challenging. The difficulty springs from the fact that all adults have beliefs, values, and prejudices which make impartiality in the *tabula rasa* sense impossible. The challenge is to define impartiality in a way that is both acceptable to the legal system and takes into account the moral, political, economic, and psychological baggage that prospective jurors bring with them.

The difficulty and challenge involved in identifying the components of impartiality is compounded by the fact that trial lawyers do not seek impartial jurors.[7] This observation is not so much an expression of cynicism as one of reality. Lawyers would do their clients a not easily explained disservice if they rejected a juror believed to be disposed to their side in favor of one thought to be neutral. It is each attorney's responsibility to discover and to challenge, either for cause or peremptorily, jurors who are biased towards the opposition. There is no obligation to excuse jurors believed to favor one's own side.[8] By the adroit use of challenges, each side strikes those jurors thought to be most partial to the opposition. The question that needs to be asked is whether, after this subtraction, the

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discussion in the jury room. *See* United States v. Davila, 704 F.2d 749 (5th Cir. 1983); United States v. Barber, 668 F.2d 778, 786-87 (4th Cir.), *cert. denied*, 459 U.S. 829 (1982). *See generally* Harnsberger, *Amend Canon 23 or Reverse Opinion 109*, 51 A.B.A. J. 157 (1965); Palmer, *Post Trial Interview of Jurors in the Federal Courts—A Lawyer's Dilemma*, 6 HOUS. L. REV. 290 (1968). This secrecy combined with the rule that jurors cannot impeach their verdict serves to frustrate attempts to determine whether jurors acted rationally. *See* McDonald v. Pless, 238 U.S. 264 (1915); United States v. Weiner, 578 F.2d 757 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978); FED. R. EVID. 606(b). *See generally* Note, *Impeachment of Jury Verdicts*, 53 MARQ. L. REV. 258 (1970).

6 A verdict of guilty cannot be overturned on appeal if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979)(emphasis in original).

7 *See, e.g.*, J. FRANK, COURTS ON TRIAL 121-23 (1949)(citing sources); Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case*, 43 LAW & CONTEMP. PROBS. 116, 117 (1980); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 286 (1968).

8 It is probably improper for an attorney to fail to reveal juror biases which would clearly justify disqualification for cause, such as that the juror is related to a party or has a financial interest in the case, known to the attorney but not to opposing counsel or the court. *See In re* Shon, 262 A.D. 225, 28 N.Y.S.2d 872 (1941)(upholding disbarment of attorney for, inter alia, permitting two men with whom he was personally acquainted to sit on jury without advising court or opposing counsel of relationship).

remainder is an impartial jury. If so, it is the result of fortuity rather than the conscious search for impartial jurors.

The view that an impartial jury will emerge from the elimination of jurors partial to the opposition is based on a questionable equating of impartiality with the absence of partiality. Additional qualities may be required of our ideal juror. Although it may not be technically accurate to refer to these as qualities of impartiality, they are personality characteristics, mind sets, values, and orientations which contribute to impartial decision making.

Even the modest goal of eliminating partial jurors is difficult to achieve in practice. It assumes equal access to information about jurors and equally adept attorneys on each side. These assumptions, already suspect, have become more so as a result of the increasing tendency to enlist trained behavioral scientists to help identify jurors with subconscious predispositions for or against a party's side.[9] By conducting demographic studies and background investigations of jurors, analyzing their psychological profiles, and observing paralinguistic cues and body language during voir dire, these experts attempt to predict which jurors will favor which party. In one sense this is not new: lawyers have always sought, usually on the basis of hunch or intuition, to choose favorably disposed jurors. What is different is that the social scientists, with their more sophisticated techniques and more rigorous methodologies, are more likely to succeed.[10] By converting what was an "art" into a "science," the social scientists increase the threat that a partial jury will be impanelled. While in theory the advances in social science methodology could be used to further the objective of impanelling an impartial jury, to date the opposite has probably occurred.[11]

There are two critical steps in the search for an impartial jury.

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9 *See generally* NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES (2d ed. 1987); McConahay, Mullin & Frederick, *The Uses of Social Science in Trials with Political Overtones: The Trial of Joan Little*, 41 LAW & CONTEMP. PROBS. 205 (1977); Schulman, Shaver, Colman, Emrich, & Christie, *Recipe for a Jury*, PSYCHOLOGY TODAY, May 1973, at 37; Note, *The Constitutional Need for Discovery of Pre-Voir Dire Juror Studies*, 49 S. CAL. L. REV. 597 (1976). Both wealthy parties, who can afford to pay those experts, and political activists, whose cause attracts volunteers, have used the assistance of social scientists.

10 Some commentators have questioned whether social scientists are in fact effective. *See, e.g.*, Berman & Sales, *A Critical Evaluation of the Systematic Approach to Jury Selection*, 4 CRIM. JUST. & BEHAV. 219 (1977); Saks, *Scientific Jury Selection: Social Scientists Can't Rig Juries*, PSYCHOLOGY TODAY, Jan. 1976, at 48. Regardless of the present ability of social scientists to pick a jury, however, at some point, as their theoretical understanding of human behavior increases and their practical ability to identify subconsciously biased jurors does likewise, the courts will have to face the issues raised by their involvement in jury selection. Even at present, the question is one of degree, as social scientists increase the probability that a jury which is not impartial will hear the case.

11 *See* Etzioni, *Creating an Imbalance*, 10 TRIAL 28 (1974).

First, a workable definition of impartiality must be formulated. What does the legal system mean when it uses the term? What should it mean? Can the qualities which make for an impartial juror be identified? This Article will address these issues by first reviewing common law conceptions of impartiality and relevant Supreme Court decisions. Neither the common law nor the Court has adequately dealt with the concept, and an alternative approach based on a more psychologically sophisticated view of human nature, as well as on the underlying theoretical goals of the legal system in seeking an impartial jury, will be offered.

After the qualities of an impartial juror are identified, the next step is to find such jurors. As the adversary system operates, lawyers cannot realistically be expected to perform this task. The responsibility must be that of the judges.[12] However, at present they lack adequate tools to discharge this responsibility. Social science methodology, currently used by trial attorneys to frustrate the search for an impartial jury, holds the potential for allowing judges to impanel an impartial jury.

II. HISTORICAL CONCEPTIONS OF THE IMPARTIAL JURY

A. COMMON LAW ORIGINS

Scholars have traced the historical roots of the jury to a variety of sources.[13] For present purposes, it is not necessary to resolve the debate over the origins of the jury. In England, the jury system appears to have replaced trial by ordeal,[14] by which accused persons

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12 "The obligation to impanel an impartial jury lies in the first instance with the trial judge . . . ." Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981).

13 In what is probably the most authoritative work on the subject, Forsyth traces the jury's origin to the various modes of trial developed by Anglo-Saxons and Anglo-Normans. W. FORSYTH, HISTORY OF TRIAL BY JURY (1852). Forsyth suggests that the jury system resulted from an evolutionary process; thus, no precise point in history for its initial use can be identified. *See also* W. CORNISH, *supra* note 3, at 10-12; P. DEVLIN, *supra* note 3, at 3-14; Eastman, *The History of Trial by Jury*, 3 NAT'L. B. J. 87 (1945); Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249 (1892); Warner, *The Development of Trial by Jury*, 26 TENN. L. REV. 459 (1959).

14 *See* W. FORSYTH, *supra* note 13, at 80-81. There were several forms of ordeals, all based on the religious premise that God would protect the innocent. One consisted of the accused's carrying hot iron for a certain distance. The accused's hands were then wrapped in bandages. After three days the bandages were removed. If the wounds had healed, the accused was pronounced innocent. A second and related form of ordeal based on the same healing principle entailed removing a stone from boiling water. In another form of ordeal, a defendant was immersed in water. If the water rejected the defendant's body, indicated by its floating, the defendant was deemed guilty. A defendant whose body sank was deemed innocent. In a final form of ordeal, the ordeal of the "accursed morsel," the accused had to swallow a piece of bread while praying that it would choke him if he were guilty. If the defendant choked on the bread or was unable

proved their innocence by surviving some form of torture, and trial by battle,[15] wherein the parties established the superiority of their respective positions through combat.[16] Conceding that both trial by ordeal and trial by battle were suspect means of fair dispute resolution, it is not clear why it was thought that group decision making by untrained lay persons "unaccustomed to severe intellectual exercise or protracted thought,"[17] the jury system, would yield better results than, for example, decision making by experienced, educated judges.[18] One could speculate that the preference for juries reflected a distrust of one person rule,[19] a fear that judges appointed and/or paid by the state would favor state interests over those of the defendant,[20] and a confidence in the superiority of the common sense views of ordinary citizens over the technical methods of a legal

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to swallow it cleanly, it was taken as a sign of guilt. The religious sanction for trial by ordeal was undermined in 1215 when Pope Innocent III forbade clergy from further involvement. *See* F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION 5 (1969).

15 W. FORSYTH, *supra* note 13 at 86-97, 202-03. As in trial by ordeal, trial by battle had a religious underpinning: God would allow the righteous to prevail. Many were apparently not convinced, and those who were able to recruit "champions" could have them fight in their stead.

16 A third form of trial also existed—trial by compurgation. Judgment was based on the testimony of compurgators, who swore not to their knowledge of the facts but rather to the credibility of the accused. If a sufficient number of compurgators, usually 12, vouched for an accused's truthfulness, the accused was entitled to an acquittal unless more swore against him or her. *See* W. FORSYTH, *supra* note 13, at 72-84. The obvious deficiency of trial by compurgation was its suceptibility to perjury.

17 P. DEVLIN, *supra* note 3, at 4.

18 Juror decisionmaking may not have been an unwelcome development to judges. Jurors, because of their relative anonymity, can protect judges from reaction to unpopular decisions. After service, jurors melt back into the community from which they came. *See* United States *ex rel.* McCann v. Adams, 126 F.2d 774, 775-76 (2d Cir. 1942). Were it not for the jury, the more visible and permanent judge might become a lightning rod for any public dissatisfaction with a verdict.

The choice between judge and jury is not insignificant. In their study of the American jury, Kalven and Zeisel found that judges and jurors rendered different decisions in approximately 25% of the cases examined. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY ch. 5 (1966). In most instances the jury was more lenient than the judge. *Id.* at 59. An even greater disparity between judge and jury was found by Baldwin and McConville. J. BALDWIN & N. MCCONVILLE, JURY TRIALS 46 (1977).

19 Fear of unchecked power may have been a particularly acute concern in the United States and may have been a major factor in its decision to preserve the jury system. *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968). As a practical matter, a twelve person jury will be more difficult to subvert or bribe than a single judge, particularly if a unanimous verdict is required. *See* Apodaca v. Oregon, 406 U.S. 404 (1972) (unanimous jury verdicts not constitutionally required); Johnson v. Louisiana, 406 U.S. 356 (1972)(same). Less cynically, group decision making may be more effective than individual decision making, for members of the group bring to the jury a wider variety of experiences and perspectives. *See* Joiner, *From the Bench* in THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW (R. Simon ed. 1975).

20 *See* 4 W. BLACKSTONE, COMMENTARIES *349; P. DEVLIN, *supra* note 3, at 158-60.

logician.[21] The true explanation lies more in history. The first jurors were chosen because of their status as witnesses.[22] They possessed personal knowledge of the events which gave rise to the legal dispute, and consequently were thought to be best positioned to adjudicate it.[23]

Not until a relatively late stage in the evolution of the jury did presentation of evidence to persons unacquainted with the facts replace decision making by persons who knew the facts.[24] As society became more complex, it was less realistic to expect members of the community to know all the facts necessary for a fair resolution of a dispute.[25] In some instances the twelve person jury could not accommodate all who had information bearing on the case. It became necessary to examine witnesses who were not part of the jury. Once this practice of questioning witnesses began, it was logical to extend it to all witnesses. Thus there was no longer a need for witnesses to serve on the jury. This development had the serendipitous effect of eliminating from the jury persons whose familiarity with the facts may have compromised their impartiality.

With the transition of jurors from fact knowers to fact finders came a corresponding concern that jurors be impartial. Otherwise, there was the danger that their verdict might be based on personal favoritism rather than on the evidence. The ideal juror was thought to be one who was not acquainted with the parties and their witnesses and who had no knowledge of the facts and no interest, financial or otherwise, in the outcome of the case.

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21 *See Duncan*, 391 U.S. at 156 ("If the defendant preferred the common sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.").

22 P. DEVLIN, *supra* note 3, at 5-8. W. FORSYTH, *supra* note 13, at 54. It is most likely that the practice of swearing jurors originated in their function as witnesses. P. DEVLIN, *supra* note 3, at 5.

23 *See* W. FORSYTH, *supra* note 13, at 126-28; W. CORNISH, *supra* note 3, at 10-12. *See also* Hassett, *A Jury's Pre-Trial Knowledge in Historical Perspective: The Distinction Between Pre-Trial Information and "Prejudicial" Publicity*, 43 LAW & CONTEMP. PROBS. 155 (1980).

English juries were never left totally to their own devices in determining facts. Judges were permitted to comment on the evidence, thereby giving the jurors the benefit of their experience and insight. Of course, the jurors were not obligated to follow the advice of the judge. *See* Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 305 (1915). This practice of allowing judicial comment on the evidence was drastically limited or abandoned in the American colonies. *Id.* at 307.

24 *See* W. CORNISH, *supra* note 3, at 11, 275. A number of intermediary stages occurred in this metamorphasis. At one point, a mixed jury, consisting of both witnesses and persons ignorant of the facts, was employed. *See* V. HANS & N. VIDMAR, JUDGING THE JURY 27 (1986).

25 W. CORNISH, *supra* note 3, at 11, 275.

B. "INDIFFERENCE"

The concept of impartiality as an *a priori* lack of knowledge about or interest in the case was encapsulized in Lord Coke's formulation equating impartiality with "indifference."[26] The latter term, however, was ill chosen. Jurors should not be indifferent in the sense of not caring, and being satisfied to reach a verdict by a flip of the coin or roll of the dice. They should not be indifferent to the demands of justice. More accurately, Coke was concerned with neutrality: prior to hearing the evidence, jurors should not be inclined to either side.

Even as so redefined, the value of "indifference" should not be overrated. More critical than an initial indifference is the willingness and ability to set aside any pretrial partiality and listen to the evidence with an open mind. Detachment, open mindedness, and objectivity in fact evaluation are the roots of neutrality.[27] In their deliberations, impartial jurors must resolve not to let their pretrial lack of indifference affect the fairness of their verdict.

Coke's full statement required an impartial juror to be "indifferent as he stands unsworn."[28] In terms of this temporal vantage point, Coke's statement is incorrect as applied to a criminal trial. At the outset of a prosecution jurors are not supposed to be impartial. The presumption of innocence demands that they be biased in favor of the accused. It is the state's obligation to overcome this institutionally created bias in favor of the defendant by proof beyond a reasonable doubt.[29] As thus conceived, the concept of impartiality must be read in the context of the Anglo-American criminal justice system. In a different legal order in which, for example, a defendant and the state started on an equal footing or in which the accused was presumed guilty, impartiality might take on a different meaning.

At some point, presumably after introduction, consideration, and discussion of the evidence, jurors must commit to one side's position in order to reach a verdict. Permanently neutral jurors will produce a hung jury. In a sense, however, a hung jury is a victory for a defendant, who can return home and avoid prison. This out-

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26 E. COKE, COMMENTARY UPON LITTLETON § 155(b) (London 19th ed. 1832), *quoted in* Reynolds v. United States, 98 U.S. 145, 154 (1879). The Supreme Court continues to cite the Coke formulation. *See, e.g.*, Turner v. Murray, 476 U.S. 28, 32 (1986).

27 *See* A. MONTEFIORE, NEUTRALITY AND IMPARTIALITY 1-33 (1975).

28 E. COKE, *supra* note 26, at § 155b.

29 *See In re* Winship, 397 U.S. 358 (1970). Because of the presumption of innocence and the state's burden to prove guilt beyond a reasonable doubt, it is improper to create a mandatory presumption which has the effect of shifting to the defendant the burden of proof regarding an element of the crime. Sandstrom v. Montana, 442 U.S. 510 (1979).

come reveals another institutional bias within the criminal justice system. In addition to the presumption of innocence, the requirement that a prosecutor prove a defendant's guilt beyond a reasonable doubt skews the inquiry in favor of the accused. A jury which is equally persuaded by the state and the defense or is "indifferent" to the two sides' positions is legally bound to rule against the state. The legal system demands that the jury convert its indifference into a partiality for the accused.

A final deficiency in Lord Coke's maxim is that, while it may identify an ideal or at least one important aspect of the ideal of impartiality, it does not tell how to attain that ideal. The common law did recognize that the matter should not be left solely to the courts; parties and their attorneys should be part of the process. To remove from the jury persons who were not impartial, the law permitted each side to challenge individual jurors as well as the entire array of jurors.[30]

C. A JURY OF ONE'S PEERS

Some assert that there is a right to a jury of one's peers. The apparent source of this claim is the reference to "judicum parium" in the Magna Carta.[31] In practice it seems to have meant that one should not be judged by those of inferior status.[32] Thus, it was a one way proposition: the upper classes could judge the lower but not vice versa. The English system achieved this objective to an extent by making land ownership a qualification for jury service.[33] In the less class conscious "new world," peers were defined as persons of the same legal status as the accused.[34]

Regardless of definition, the requirement of a jury of one's

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30 *See* W. FORSYTH, *supra* note 13, at 159-60, 175-80, 230-33; W. CORNISH, *supra* note 3, at 47-52. For a history of the development of challenges in both England and the United States, see Moore, *Voir Dire Examination of Jurors*, 16 GEO. L.J. 438 (1928).

31 *See* Marshall, *The Judgment of One's Peers: Some Aims and Ideals of Jury Trial* in N. WALKER, THE BRITISH JURY SYSTEM 1, 5 (1974). Forsyth, however, maintains that "judicum parium" did not refer to the jury. W. FORSYTH, *supra* note 13, at 108-14. *See also* B. KEENEY, JUDGMENT BY PEERS (1952); J. VAN DYKE, JURY SELECTION PROCEDURES ch. 1 (1977); LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841 (1976).

32 *See* Marshall, *supra* note 31, at 5.

33 *See* P. DEVLIN, *supra* note 3, at 17. The property requirement for jury service was not formally abolished until the Criminal Justice Act, 1972, ch. 71. As a practical matter, the amount of property which had to be owned was so minimal that the requirement had ceased to have a significant impact long before passage of the Act.

34 *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1879)("The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."). A jury of one's peers is not specifically guaranteed in the United States Constitution.

peers does not seem to be directly related to impartiality. Indeed, to the extent that one's peers can be expected to empathize with one's acts, the result is a favorably disposed jury, rather than a jury of neutral disposition.[35] Conversely, a jury can be impartial even if it does not contain any of the defendant's peers.

Some commentators have suggested that only a jury of peers can fully understand the acts of the accused.[36] These commentators tend to use "peers" in the sense of persons who share a common racial, ethnic, or cultural background with the accused. Besides the practical impossibility of amassing such jurors, the implicit but questionable assumption is that a juror is incapable of understanding the actions of a person of a different background. Such an assumption overlooks the role of the attorney in presenting the evidence in a comprehensible light. Furthermore, the amount of understanding necessary to decide a case impartially may require sympathy and empathy but not necessarily an identity of common experience.

Perhaps for these reasons, the concept of a jury of peers has not been taken literally.[37] An alien juvenile charged with an act of terrorism, for example, would not be entitled to a jury of youthful foreigners who were themselves terrorists. Nor is a black defendant entitled to an all black jury,[38] despite occasional academic arguments to the contrary.[39]

The inclusion of a defendant's peers on the jury may to some extent legitimate an adverse verdict. A defendant, as well as the class of which the defendant is a member, will be more likely to accept the verdict of a jury of peers than the verdict of a jury from which peers have been excluded. Besides legitimating verdicts, peers may provide guidance and insight to other jurors and thereby facilitate impartial decision making.

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35 *See* J. VAN DYKE, *supra* note 31, at ch. 2. Such a jury might also be less likely to empathize with the victim to the extent that such empathy influences a jury's consideration. *Id.* at 11.

36 Professor LaRue suggests that peers should include "those who have enough in common with the accused, or who have enough sympathy for the accused, to be able to give a realistic evaluation of his story." LaRue, *supra* note 31, at 867. *See also* V. HANS & N. VIDMAR, *supra* note 24, at 50.

37 *See* Virginia v. Rives, 100 U.S. 313 (1879)(black defendants had no right to have blacks on either petit jury which tried them or grand jury which indicted them). At an early point in United States history, however, defendants were entitled to some jurors of their own background. *See, e.g.*, United States v. Carnot, 25 F. Cas. 297, (C.C.D.C. 1824) (No. 14,726); LaRue, *supra* note 31, at 850-62.

38 *Rives*, 100 U.S. at 323.

39 *See* Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970). For case authority for the general proposition, see *infra* note 60.

D. IMPARTIAL JURY V. IMPARTIAL JURORS

Although the terms "impartial jury" and "impartial jurors" have been used interchangeably up to this point, there is a difference between the two. Intuitively, it would seem that an impartial jury must be composed of impartial jurors. Some courts and commentators, however, maintained that there can be partial jurors on an impartial jury.[40] This apparent anomaly is based on a concept of checks and balances. Two jurors with competing biases will force each other to confront the merits of their opposing positions, thereby contributing to a full airing of views and impartial decision making.

The validity of the theory is suspect. The assumption is that either prejudices are amenable to persuasion or, if not, will offset each other.[41] This is not necessarily so. Some biases are firmly held and are not susceptible to displacement. Willingness to be persuaded by the arguments of others will also be a function of the stubbornness of the juror, regardless of the strength of the bias. Nor do conflicting biases cancel each other in a criminal trial; a pro-defense juror who will always vote for acquittal is not offset by a pro-prosecution juror who will always vote for conviction. In such a situation, the defendant cannot be convicted in a jurisdiction which requires a unanimous verdict.[42]

To try to construct a jury with offsetting biases would, in any event, be a formidable task. It would be virtually impossible for a judge to determine when a jury had the appropriate mix of biases.[43] More fundamentally, the checks and balances approach to jury composition assumes that the legal system will be served by the seating of prejudiced jurors. Thus, a person's political, moral, social, and economic views, far from being undesirable baggage, are viewed as indispensable qualities of the ideal juror. However, although a full range of life experiences will contribute to a robust and open dialogue in the jury room, a line must be drawn. Jurors should not be

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40 *See* Ballew v. Georgia, 435 U.S. 223, 234 (1978)("[T]he counterbalancing of biases is critical to the accurate application of the common sense of the community to the facts of any given case."). *See also* R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 8 (1983); Duff & Findlay, *Jury Vetting - The Jury Under Attack*, 3 LEGAL STUD. 159, 164 (1983); Kuhn, *supra* note 7 at 242, 287 (1968); *See generally* J. VAN DYKE, *supra* note 31.

41 *See* People v. Wheeler, 22 Cal. 3d 258, 266-67, 583 P.2d 748, 755, 148 Cal. Rptr. 890, 896 (1978).

42 The Supreme Court has held that non-unanimous verdicts may be constitutionally acceptable. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). For a discussion of non-unanimous jury verdicts, see *infra* notes 132-135 and accompanying text.

43 *See* Lockhart v. McCree, 476 U.S. 162, 177-78 (1986).

permitted to base votes on their biases rather than on the evidence. Judges must insist that jurors not allow their biases to irrationally affect the verdict.

A diversity of biases is desirable, however, if jurors must make primarily value rather than factual judgments. Pornography, for example, is defined in terms of a community standard.[44] The biases of the community are in effect the legal standard, and a jury reflective of the various biases in the community is the objective.

The goal in theory is an impartial jury, not necessarily a jury of impartial jurors.[45] The sum may be greater than its parts. Nevertheless, it would be unwise to ignore the individual characteristics of each juror. As a practical matter, few lawyers have the ability, training, or skill to predict the dynamics of juror interaction. To analyze an individual juror's proclivities is difficult enough. Moreover, no attorney would ever deliberately accept a juror predisposed to the opposition. A jury containing two or more persons with conflicting biases results when each side has failed to excuse a juror favorable to the other side.[46] If only one side slips, the non-impartial juror threatens to undermine the impartiality of the jury. Accordingly, the search for an impartial jury becomes in practice the search for impartial jurors.

Although less likely, a jury composed entirely of impartial jurors may still not result in an impartial jury. Jurors who may be impartial in regard to the parties or the issues may be antagonistic to each other; this antagonism may defeat a consensus.[47] Some impartial jurors, moreover, may lack the strength of character to hold

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44 *See* Miller v. California, 413 U.S. 15 (1973).

45 Judicial statements can, however, be found to the effect that an impartial jury consists of twelve impartial jurors. *See, e.g.*, Mares v. State, 83 N.M. 225, 490 P.2d 667, 668 (1971); King v. State, 129 Tex. Crim. 371, 87 S.W.2d 726,727 (1935); Hillyard v. State, 116 Tex. Crim. 567, 34 S.W.2d 601, 602 (1931).

46 This may not be the result of negligence. Each side, for example, may have exhausted its supply of peremptory challenges, and the bias of a juror may not be sufficiently clear or established to permit the judge to sustain a challenge for cause.

47 *See* V. HANS & N. VIDMAR, *supra* note 24, at 108-09; Saltzburg & Powers, *Peremptory Challenges and the Clash between Impartiality and Group Representation*, 41 MD. L. REV. 337, 354-55 (1982). A member of an actual jury has offered an interesting perspective in this regard:

> I do not suppose many attornies have the opportunity to consider how the jury members might evaluate each other; I recall thinking facetiously during the Panther voir dire that we who had already been chosen ought to have some say in who our fellow jurors would be. This was absurd, of course, but jurors do have to size up and deal with these varied strangers (and, in small communities, friends and acquaintances and enemies) regardless of their mutual opinions.

Kennebeck, *From the Jury Box* in THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 233, 244 (R. Simon ed. 1975).

out against group pressure,[48] thereby destroying the impartiality of the jury. Even if impartial jurors will result in an impartial jury, a jury composed of homogeneous jurors may not be optimal. Homogeneity, with which impartiality is sometimes confused, may prevent the full discussion vital to the decision making process. Fortunately for the legal system, impartiality does not require homogeneity.

E. THE ROLE OF HISTORY

This cursory review of common law conceptions of impartiality will not satisfy the historian. Nonetheless, as shortsighted as it would be to ignore history, to justify the continuation of suspect practices solely on the basis of history would be equally misguided.[49] Although the Supreme Court continues to stress the need for juries to guard against "the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,"[50] the need

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48 For example, in an instructive experiment, Asch asked groups to judge the length of lines. All but one of the participants were directed to deliberately misjudge the length. Each of these confederates expressed in turn the same incorrect opinion. Finally, the true subject was asked his opinion. 37% of the critical subjects concurred in the incorrect judgment. Members of a control group, not subjected to group pressure, made virtually no mistakes. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments, reprinted* in GROUPS, LEADERSHIP, AND MEN 177 (H. Guetzkow ed. 1951). *See also* S. ASCH, SOCIAL PSYCHOLOGY ch. 16 (1952); Crutchfield, *Conformity and Character*, 10 AM. PSYCHOLOGY 191 (1955). These experiments are discussed in Note, *Personality Tests for Prospective Jurors*, 56 KY. L.J. 832, 838-40 (1968). Citing the Asch study, Kalven & Zeisel suggest that for one or two jurors to disagree with the rest and cause a hung jury, the minority must have the support of other jurors at the beginning of the deliberations. H. KALVEN & H. ZEISEL, *supra* note 18, at 463. *See also* Pope v. Illinois, 107 S. Ct. 1918, 1928 (1987)("Since obscenity is by no means a neutral subject, and since the ascertainment of a community standard is such a subjective task, the expression of individual jurors' sentiments will inevitably influence the perceptions of other jurors, particularly those who would normally be in the minority.").

49 *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897):

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Id. at 469. *But see* Younger, *Unlawful Peremptory Challenges*, 7 LITIGATION 23 (1880):

> The real question is whether to tinker with a system, be it jury selection or anything else, that has done the job for centuries. We stand on the shoulders of our ancestors, as Burke said. It is not so much that the past is always worth preserving, he argues, but rather that is is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society . . . .

Id. at 56.

50 Duncan v. Louisiana, 391 U.S. 145, 156 (1968). *See also* Williams v. Florida, 399 U.S. 78, 100 (1970)(purpose of jury is to prevent oppression by government). If these concerns are genuine, it would make more sense to root out the offending individuals via impeachment or indictment where appropriate.

has arguably lessened over time.[51] Today there is a greater meritocracy in the selection of judges, who are now less likely to be the pawns of the ruling class. Perhaps more significant, because judicial appointments based on political patronage still sometimes occur, is the greater public visibility of courtroom proceedings. Newspaper reporters regularly attend trials and welcome the opportunity to expose judicial incompetence. In any event, given the awe and respect with which jurors regard judges,[52] it is probably unrealistic to expect them to expose, even if they were aware of it, judicial bias, eccentricity, or complacency. Nor does the legal system necessarily want jurors to set free a guilty defendant because of their negative reaction to the judge's character.

As for prosecutors, judges are more qualified than jurors to perceive corruption or overzealousness on their part and better positioned to deal with it. Moreover, most prosecutors today are more concerned with limiting than expanding their caseload. The sheer number of possible cases and the ever present backlog mandate careful screening.[53] Practical realities thus deter vindictive prosecutions. Furthermore, the increased competence of police investigation, coupled with their recognized discretion not to arrest in doubtful cases,[54] arguably diminishes the need for the protection afforded by the jury.

The qualifications of the typical juror have changed over time. Jurors today are better educated and better informed. The evidence which they must evaluate, however, has also changed. Complex factual cases and the jargonistic testimony of expert witnesses are no longer exceptional. A more sophisticated and intelligent juror is needed to understand this evidence. In sum, while it is instructive to examine the historical roots of jury impartiality, final assessments must be premised on the present role of the jury and the demands of impartiality in light of that role.

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51 *See* United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972).

52 This view of the judge by jurors is not surprising. The judge sits in an elevated position in the courtroom, cloaked in a black robe. All rise respectfully when the judge enters or leaves. The jury is charged to follow the judge's instructions. Lawyers defer to judge's rulings, and the judge has the power to hold attorneys in contempt. In this environment, where all make a public show of respect to the judge, there is no reason to believe jurors will behave differently.

53 *See generally* La Fave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970); Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the A.B.A.*, 71 MICH. L. REV. 1145 (1973).

54 *See generally* K. DAVIS, POLICE DISCRETION (1975); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965).

III. THE SUPREME COURT'S APPROACH TO JURY COMPOSITION: IMPARTIALITY BY INDIRECTION

To a large extent, the Supreme Court has not directly addressed the question of jury impartiality.[55] Often the issue is subsumed in a more general discussion of the attributes of a constitutionally acceptable jury. The implicit assumption appears to be that a jury which comports with general constitutional provisions will be impartial. Like the assumption that the net effect of removing partial jurors will be an impartial jury, this seems questionable. More significantly, it approaches the concept of impartiality by an indirect route, failing to identify its specific components. Nevertheless, the Court's decisions raise provocative questions, provide insight into the Court's thinking, and merit examination.

A. NON-DISCRIMINATION

The first Supreme Court cases to address the issue of jury composition involved racial discrimination. In *Strauder v. West Virginia*[56] the Supreme Court held that a West Virginia statute prohibiting blacks from serving on juries violated the equal protection clause.[57] A year after *Strauder*, the Court indicated in *Neal v. Delaware*[58] that de facto as well as de jure discrimination was illegal, and ostensibly, that objective selection criteria, when applied consistently yielded all white juries, did not satisfy the Constitution.[59] The Court has

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55 The Court has on occasion specifically declined to formulate a test of impartiality. *See e.g.*, United States v. Wood, 299 U.S. 123, 145-46 (1936).

56 100 U.S. 303 (1880).

57 This principle of non-discrimination applies to both petit and grand juries. Alexander v. Louisiana, 405 U.S. 625, 626 n.3 (1972); Ballard v. United States, 329 U.S. 187 (1946); Smith v. Texas, 311 U.S. 128 (1940); Pierre v. Louisiana, 306 U.S. 354 (1939); Norris v. Alabama, 294 U.S. 587 (1935); 18 U.S.C. § 243 (1982). For a critical analysis of the historical underpinnings of the jury discrimination cases, see Avins, *The Fourteenth Amendment and Jury Discrimination: The Original Understanding*, 27 FED. B. J. 257 (1967).

58 103 U.S. 370 (1881).

59 *See also* Sims v. Georgia, 389 U.S. 404 (1967)(statement by jury commissioner that he did not discriminate in jury selection failed to rebut statistical disparity which created inference of discrimination); Whitus v. Georgia, 385 U.S. 545 (1967)(same); Eubanks v. Louisiana, 356 U.S. 584 (1958)(neutral selection system which operated so as to systematically exclude blacks from jury service was unconstitutional and was not saved by testimony of judges that they had not discriminated in selection of jurors). Congress has codified its commitment to non-discrimination in the selection of grand and petit jurors in the Federal Jury Selection and Service Act of 1968, 28 U.S.C. § 1862 (1982)

Proving discrimination is often difficult. The defendant must generally show that he or she is a member of a cognizable group singled out for differential treatment and that members of the defendant's class have regularly not been summoned for jury service over an extended period of time. *See* Batson v. Kentucky, 476 U.S. 79, 93-95 (1986); Casteneda v. Partida, 430 U.S. 482, 494 (1977). But see sources cited *infra* note 64 for the position that defendant need not be a member of the excluded class in order to

taken care to note, however, that there is no affirmative right to be tried by a jury composed in whole or in part of members of one's own race.[60]

That the Court's concern was not limited to the exclusion of blacks was illustrated by *Hernandez v. Texas*.[61] The defendant alleged that persons of Mexican descent had been excluded from jury service. Rejecting the state's argument that the equal protection clause was restricted to the prevention of discrimination against Negroes,[62] the Court held that the systematic exclusion of any identifiable class of the community violated the fourteenth amendment.

Sex discrimination was at issue in *Taylor v. Louisiana*,[63] where a state statute exempted from jury duty women who did not file a written request to be allowed to serve.[64] The Court ruled that this systematic exclusion of women from jury panels was unconstitutional.[65] Rather than relying primarily on an equal protection analysis, as it had in previous decisions, the Court declared that "the exclusion of women from jury venires deprives a criminal defendant of his *Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community*."[66]

1. *Non-Discrimination and Impartiality*

The *Taylor* Court probably intended to place the emphasis in its statement on the "fair cross section" requirement,[67] but the lan-

challenge the discrimination. The Court has also looked critically on selection processes which provide the opportunity for discrimination. *See, e.g.*, Alexander v. Louisiana, 405 U.S. 625 (1972)(racial designation on jury questionnaire); Avery v. Georgia, 345 U.S. 559 (1953)(color coded juror cards for black and white prospective jurors).

60 Batson v. Kentucky, 476 U.S. 79, 84-85 (1986); Virginia v. Rives, 100 U.S. 313 (1879); Bush v. Kentucky, 107 U.S. 110, 117 (1883).

61 347 U.S. 475 (1954).

62 *Id.* at 477-78.

63 419 U.S. 522 (1975).

64 Interestingly, the defendant in the case was a male, and thus not of the excluded class. The Court as a preliminary matter ruled that this feature of the case did not disqualify defendant from raising his objection. *Id.* at 526. *See also* Peters v. Kiff, 407 U.S. 493 (1972)(white defendant permitted to challenge conviction on ground that blacks had been excluded from jury service); Thiel v. Southern Pacific Co., 328 U.S. 217, 225 (1946)(unnecessary to determine whether defendant was member of economic class allegedly excluded).

65 In *Strauder*, the Court had, in dictum, suggested that jury service could constitutionally be restricted to males. 100 U.S. at 310. *See also* Hoyt v. Florida, 368 U.S. 57, 60 (1961)(upholding statute granting women absolute exemption from jury duty). The Court in *Taylor* rejected this view as one reflective of a time which had "long since passed." 419 U.S. at 537.

66 *Taylor*, 419 U.S. at 535-36 (emphasis added).

67 The Court at various points in its opinion referred virtually exclusively to the fair cross-section requirement. *See id.* at 530, 537-38.

guage suggests that impartiality may also be important in the exclusion cases.[68] If this is true, one might ask how the Court reached this conclusion. Perhaps the Court is of the view that a jury composed of white males is by definition not impartial. The fact that the Justices in these cases did not inquire into whether individual jurors were in fact biased lends support to this thesis. The Court appears to assume that any jury drawn only from the population of white males would not or could not be impartial.[69]

It does not necessarily follow, however, that minorities and women are any less partial. Thus, the replacement of white male jurors with such individuals is not a substitution of impartial jurors for partial ones but rather a substitution of one partiality for another. Alternatively, if white male jurors are by definition partial, perhaps the Court believes that the integration of minorities and women into the panel will render the jury impartial. There does not seem to be any logical or psychological basis for expecting biased jurors to abandon their prejudices because blacks or women are on a jury, although the presence of blacks and women may inhibit overt expression of racist or sexist attitudes.[70] On the other hand, there may be a basis for believing that integration of the jury will increase the jury's impartiality. This conclusion rests on several assumptions: 1) that minorities and women, like white males, are biased and prejudiced; 2) that their biases and prejudices are more or less reciprocal to those of white males; and, therefore, 3) that their biases will expose, offer rebuttal to, and ultimately cancel the biases of the white males.[71]

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68 The Court's statement could be interpreted in any of three ways: (1) that defendant was denied his right to a trial by jury; (2) that defendant was denied his right to a jury which was impartial; or (3) that defendant was denied his right to an impartial jury drawn from a cross-section of the community. The first alternative does not seem to be indicated by the facts. The second alternative is explored in this section of the text. The third alternative is examined in the next section.

69 *See* Turner v. Murray, 476 U.S. 28, 39 (1986)(Brennan, J., concurring in part, dissenting in part)("The reality of race relations in this country is such that we simply may not presume impartiality . . . ."); Strauder v. West Virginia, 100 U.S. 303, 309 (1880)("It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.").

70 *See* Ashby, *Juror Selection and the Sixth Amendment Right to an Impartial Jury*, 11 CREIGHTON L. REV. 1137, 1139 (1978). Whether this inhibiting effect would alter voting patterns is conjectural.

71 In Ballard v. United States, 329 U.S. 187 (1946), the Court offered the following analysis regarding the exclusion of women from juries:

> It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and

All three of the above assumptions are, of course, highly questionable. Moreover, if taken to their logical conclusion, they would require an integrated jury in every trial, not simply the Court's ban on exclusion from eligibility for jury service. Otherwise, a defendant tried by a unintegrated jury would not receive the benefits of integration, even though the jury was chosen from an integrated pool. The most troublesome aspect of the analysis, however, is that it rests on racial and sexual stereotyping which the Court in other contexts has roundly condemned;[72] the Court appears to assume a common biased viewpoint on the part of a class of individuals. Presumably the Court would not expect a juror to vote as a representative of the juror's class if that vote did not express the juror's individual judgment. Perhaps the Court's preference for equal protection rather than impartial jury analysis, as well as its failure to articulate a cohesive theory linking impartiality to class exclusion, reflects reluctance to admit its own stereotypical biases about race, ethnicity, sex, and other factors.[73]

In *Peters v. Kiff*,[74] Justice Marshall reformulated this thesis and presented it in a less provocative guise:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room *qualities of human nature* and *varieties of human experience*, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a *perspective on human events* that may have unsuspected importance in any case that may be presented.[75]

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not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.

Id. at 193-94.

72 *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979); Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975).

73 *See* Ristaino v. Ross, 424 U.S. 589, 596 n.8. The Court in *Ristaino* stated "[i]n our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." *Id.* A more cynical, though similar, observation has been made about peremptory challenges: "The peremptory made without giving reason avoids trafficking in the core of truth in most common stereotypes . . . ." Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 553 (1975).

74 407 U.S. 493 (1972).

75 *Id.* at 503-04 (emphasis added)(footnotes omitted).

Whether "qualities of human nature," "varieties of human experience," and "perspective[s] on human events" are mere euphemisms for bias and prejudice is problematic. At a more basic level, Justice Marshall may have lost sight of the goal of fair and just verdicts. It is not so much nondiscrimination in jury selection which insures impartial decision making, but the selection of impartial jurors which insures nondiscriminatory decision making.

2. *Other Institutional Considerations*

To analyze the Court's jury nondiscrimination decisions solely in terms of their effect on impartiality is, however, to do the Justices a disservice. Implicit and often explicit in these decisions is a recognition that there are values at stake in addition to the rights of the parties: "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."[76]

Perhaps most harmed are members of the excluded class, who are stigmatized by the exclusion. If juries are composed of "solid citizens," and if members of a class are not eligible for jury service, it follows that members of that class are not "solid citizens."[77] Rejection for jury duty, thus, may reinforce and foster prejudices against the excluded class.[78] Conversely, inclusion of these classes on juries may help break down stereotypes.

From a slightly different perspective, exclusion denies members of the excluded class their right and responsibility as citizens to participate in the state created legal decision making process. The jury system is an exercise in self-government, and thus a quintessentially democratic institution. To place class limits on who may serve is to substitute an oligarchic mode of decision making for a democratic one. In this respect denial of the right of jury service is akin to denial of the right to vote: both implicate the rightful role of the citizenry in governmental processes.[79] In addition, to the extent that

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[76] Ballard v. United States, 329 U.S. 187, 195 (1946).

[77] *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

[78] In *Strauder* the Court noted:

> The very fact the colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Id.

[79] *See* Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 330 (1970)("Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to

through jury service citizens learn about the law, the operation of the court system, and principles of fairness, justice, and equality, excluded classes are denied this educational experience.

The state also has an interest in having all segments of society eligible to participate in the jury system.[80] Both the accused and ordinary citizens are more likely to accept the legitimacy of verdicts delivered by juries on which all members of society were at least theoretically eligible to serve. If only certain groups are permitted to serve, members of excluded groups may lack confidence in the resulting verdicts, even if they appear fair on their face.[81] There will always be suspicion about how a jury reaches its verdict. Opening the jury to all serves a function akin to a "sunshine law,"[82] permitting citizens to scrutinize the decision making process firsthand, as well as to participate in it. No doubt satisfied with their own performance, jurors should come away from their experience with a heightened respect for the operation of the legal system as a whole. Thus the nondiscrimination decisions are a partial means both of bolstering public support and confidence in the jury system and of increasing the likelihood of the verdict's acceptance. To achieve these goals actual impartiality may not be as important as the appearance of impartiality. A nondiscriminatory selection system contributes to that appearance.

3. Vindicating Society's Interests

Society, as represented by the state, also has an interest in impartial juries.[83] Recognition of this interest is reflected in the fact

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some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.").

Jury participation is in one sense even more an exercise in participatory democracy than voting. Voting is done in anonymity—voters step in the ballot box and record their selections. They need not disclose or justify their votes to anybody. By contrast, while the deliberations of jurors are secret to the outside world, jurors must frequently defend their positions to each other.

80 *See* Singer v. United States, 380 U.S. 24 (1965)(government need not consent to defendant's waiver of jury trial); Chicago Council of Lawyers v. Bauer, 371 F. Supp. 689, 691 (C.D. Ill. 1974), *rev'd*, 522 F.2d 242 (7th Cir. 1975), *cert denied*, 427 U.S. 912 (1976)("The right to a fair and impartial adjudication extends not only to criminal defendants but also to the government and, through it, to society.").

81 *See* Batson v. Kentucky, 476 U.S. 79, 88-89 (1986); Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Ballard v. United States, 329 U.S. 187, 195 (1946).

82 *See generally* Little & Tompkins, *Open Govenment Laws: An Insider's View*, 53 N.C.L. REV. 451 (1975); Wickham, *Let the Sun Sun Shine In! Open Meeting Legislation Can Be Our Key to Closed Doors in State Local Government*, 68 NW. U.L. REV. 480 (1973).

83 *See* People v. Newsome, 110 Ill. App. 3d 1043, 443 N.E.2d 634, 637 (1982)(state, as well as defendant, is entitled to an impartial jury). *Accord* People v. Guzman, 125 Misc.2d 457, 467, 478 N.Y.S.2d 455, 462 (N.Y. Sup. Ct. 1984).

that the prosecution, as well as the defense, is allowed to challenge jurors,[84] although the right to an impartial jury is given by the Constitution only to the accused.[85] If, however, both sides are actually seeking not impartial jurors but jurors partial to their sides,[86] who will ensure that society's interests in impartial juries, as well as the interests of the excluded classes, are vindicated?

The parties have standing to assert the interests of society and the excluded classes, as well as their own rights to an impartial jury.[87] Whether the former interests are vindicated, however, depends on the losing party both appealing and raising the impartiality issue.[88]

A second possibility is to permit the excluded jurors to challenge their exclusion or to accord standing to an identifiable excluded group to bring an appropriate suit. Courts have allowed class actions of this kind.[89] These suits, however, are expensive and time consuming, and their rarity attests to their inefficacy in preserving the impartial jury requirement in most cases.[90]

A third and more promising possibility is to enlist the aid of the trial judge. In many jurisdictions, judges have already usurped the

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84 *See, e.g.*, FED. R. CRIM. P. 24(b). *See generally* J. VAN DYKE, *supra* note 31, at 150. *See also* Batson v. Kentucky, 476 U.S. 79 (1986)(discriminatory exercise of peremptory challenges by prosecutor violates equal protection clause). At common law the prosecutor's formal right of peremptory challenge was abolished by statute in 1305. 33 Edw. 1, Stat. 4 (1305). In its stead, there developed the practice of allowing the prosecutor to ask jurors to "stand aside," with the result that these jurors would not serve unless the supply of acceptable jurors was exhausted. *See* W. CORNISH, *supra* note 3, at 48; W. FORSYTH, *supra* note 13, at 232. Although there is no constitutional right of peremptory challenge for either prosecution or defense, see Stilson v. United States, 250 U.S. 583, 586 (1919), the right is often granted by statute. *See e.g.*, FED. R. CRIM. P. 24(b). The prosecutor's right of peremptory challenge was recognized by the Supreme Court in Hayes v. Missouiri, 120 U.S. 68, 70-71 (1887). The history of peremptory challenges, both at common law and in the United States, is reviewed by the Supreme Court in Swain v. Alabama, 380 U.S. 202, 212-20 (1965).

85 U.S. CONST. amend. VI.

86 *See supra* notes 7-8 and accompanying text.

87 As a practical matter, whether the accused claims a vilation of personal rights or asserts a jus tertii claim to vindicate the interest of the excluded class matters little. The effect in either instance is to present the issue to the appellate court.

88 *See* Kaufman, *A Fair Jury—The Essence of Justice*, 51 JUDICATURE 88 (1967). Kaufman states:

> [S]ince the Fourteenth Amendment was adopted a century ago, the Supreme Court has decided approximately three dozen cases involving alleged racial discrimination [in regard to juries], and in most instances has found the claim of discrimination to be true. But for each of these successful litigants there were thousands of defendants who passively accepted the system.

Id.

89 *See, e.g.*, Turner v. Fouche, 396 U.S. 346 (1970); Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970).

90 *See* Vasquez v. Hillery, 474 U.S. 254, 262 n.5 (1986).

traditional attorney role in conducting voir dire.[91] Courts no doubt have statutory[92] or inherent authority[93] to excuse on their own motion biased jurors. Nonetheless, judges exercise this authority sparingly. Perhaps they believe that jury challenges are so intricate a part of trial strategy that the decisions properly belong to the attorneys. Alternatively, judges may believe that the adversary system and the dictates of judicial neutrality require that they accept jurors not challenged by either side. A court may also fear reversal if it excuses a juror acceptable to both sides.[94]

Arguably, the trial court should take an active role in excusing jurors perceived to lack the requisite impartiality.[95] Such a role would not compromise judicial neutrality, because the judge would not be searching for partial jurors but seeking to eliminate them. The delegation of this responsibility to the trial judge would ensure that an impartial jury would be actively sought in every case. Part of the problem in allocating this role to trial judges, however, is that they presently lack adequate tools to determine whether a given juror is impartial.[96]

B. THE CROSS-SECTION REQUIREMENT

The discrimination cases discussed in the preceding section may reflect a broader concern that jurors represent a cross-section

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91 *See, e.g.*, FED. R. CRIM. P. 24(a) (giving judges the authority to conduct voir dire). *See also* Ham v. South Carolina, 409 U.S. 524, 527 (1973)(trial judge, though required to inquire of jurors regarding racial prejudice, not required to ask any particular number of questions or in any particular form; trial judge's refusal to inquire of jurors regarding prejudice against persons with beards not unconstitutional); Aldridge v. United States, 283 U.S. 308, 310 (1931)(court may conduct voir dire and has broad discretion as to questions to be asked). *See generally* Gutman, *The Attorney Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOKLYN L. REV. 290 (1972); Note, *Court Control of Voir Dire Examination of Prospective Jurors*, 15 DE PAUL L. REV. 107 (1965); Note, *Voir Dire Examination: Court or Counsel*, 11 ST. LOUIS U.L.J. 234 (1967).

92 *See, e.g.*, 28 U.S.C. § 1866(c)(1982).

93 *See* Rosales-Lopez v. United States, 451 U.S. 182, 188-89 (1981); Connors v. United States, 158 U.S. 403, 413-14 (1895).

94 In addition, a judge may not want to stigmatize a juror who has claimed an ability to judge the case fairly, in effect, or so the juror may perceive, calling the juror mistaken or a liar.

95 *See Rosales-Lopez*, 451 U.S. at 189 ("[T]he obligation to impanel an impartial jury lies in the first instance with the trial judge . . . ."). In Wainwright v. Witt, 469 U.S. 412, 423 (1985), the Supreme Court reaffirmed the central role of the trial judge in impanelling a jury. *See also* 28 U.S.C. § 1866(c) (1982).

96 In brief, it would be desirable to have (1) an initial screening by qualified social scientists working under the auspices of the court to identify persons with the potential to be impartial jurors; (2) "impartiality training" to develop and sharpen that impartiality; and (3) analysis of those jurors called to serve in a given case to determine if they can in fact act impartially in that case.

of the community. The sixth amendment guarantees a jury from "the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[97] In the past half century, the Supreme Court has apparently either transformed this provision into a mandate that jurors be drawn from a fair cross-section of the community or found an independent fair cross-section requirement implicit in the sixth amendment.[98]

When jurors were selected because of their knowledge of the case, it was logical that they be from the "vicinage."[99] Persons from the locality were more likely to know the relevant facts. The purpose of a "vicinage" requirement becomes less clear when the role of the jury is that of fact finder. Convenience to jurors may be a minor consideration.[100] With respect to impartiality, jurors from the vicinage are more likely to be acquainted directly or indirectly with the parties or witnesses and thus may be less able to maintain neutrality until after hearing the evidence.

The concept of cross-section representation should not be taken literally. At an illogical extreme, it would require the seating of jurors irrationally prejudiced against the accused to the extent such prejudice existed within the community. If the legal system were truly concerned that the defendant be tried by a jury of peers,[101] that concern would likely be defeated by a cross-section requirement.

Cross-section representation facilitates the introduction of community values into the decision making process. In some cases these values, rather than impartiality, are what is sought from the

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97 U.S. CONST. amend. VI.

98 The first seed seems to have been planted in Smith v. Texas, 311 U.S. 128 (1940), where the Supreme Court stated: "It 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." *Id.* at 130. This concept was nurtured in Glasser v. United States, 315 U.S. 60, 85-86 (1942) and Ballard v. United States, 329 U.S. 187, 191 (1946). *See also* Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946)("American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community."). In Taylor v. Louisiana, 419 U.S. 522 (1975), the Court finally harvested its crop: "We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment . . . ." *Id.* at 530.

99 *See* E. COKE, *supra* note 26, at 125. *See generally* Blume, *The Place of Trial in Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59 (1944); Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. PA. L. REV. 197 (1909); Kersh, *Vicinage*, 29 OKLA. L. REV. 801 (1976); 30 OKLA. L. REV. 1 (1977). The term "vicinage" should not be confused with "venue." The latter refers to the place where the trial is to be held; the former relates to the place from which the jurors are selected.

100 A federal judge may excuse a juror for whom service would cause "extreme inconvenience." 28 U.S.C. § 1866(c) (1982).

101 *See supra* notes 31-39 and accompanying text.

jury. One example is a prosecution for pornography, in which the legal standard is defined in terms of community values.[102] Less obvious illustrations involve crimes where the jury must determine whether a defendant acted dishonestly, unfairly, or unreasonably. In these cases the jury may be required primarily to make quasi-legal judgments rather than factual determinations. The amorphousness of the controlling legal standard, coupled with the reluctance of the courts to decide the issues themselves, forces the jury to apply community standards regarding dishonesty, unfairness, or unreasonableness.[103] While the legal system could permit the introduction of evidence as to the community standard, it has opted for the less time consuming and perhaps more accurate approach of assuming that a jury composed of a cross-section of the community will reflect community values.

Cross-section representation, like nondiscrimination, may also focus on democratic values having little to do with impartiality. Both provide for full citizenry participation, or at least its appearance, in the legal process. Both help avoid feelings of inferiority which might be suggested by exclusion from jury panels. Both contribute to the acceptance of verdicts by the litigants and the public.

The advantage of a cross-section rather than an equal protection analysis is that the former provides a more sanitized approach to achieving the same democratic goals. The probe for proof of purposeful discrimination, required for an equal protection challenge, is not necessary when cross-section representation is the issue.[104] Nor does the Supreme Court have to imply, as it arguably does in its discrimination decisions, that a jury composed of all white males is by definition biased while minorities and women are either impartial or biased in a way which will offset the biases of the white males. A cross-section analysis requires only a finding that the jury lacked the opportunity to be exposed to the full range of community viewpoints.

Cross-section analysis, however, may pose practical problems that the equal protection approach does not. What community the jury must be a cross-section of needs to be delineated. Is community to be defined in geographic, ethnic, cultural, or ideological terms? If a crime is committed in that portion of a city populated primarily by, say, Puerto Ricans, is it the Puerto Rican connection

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102 *See* Miller v. California, 413 U.S. 15 (1973).

103 *See, e.g.*, Regina v. Feely, 1973 Q.B. 530 (1973)(jury should apply current standards of ordinary, decent people to determine what contributes dishonesty).

104 *See* Castaneda v. Partida, 430 U.S. 482, 509-10 (1977) (Powell, J., dissenting).

which defines the contours of community?[105] Does it matter whether the victim or the defendant is Puerto Rican? Or is the entire city the relevant community?[106] If not, what portion of it? The larger the community, the greater the diversity of viewpoints, yet the further removed is the legal system from the constitutional requirement that jurors be drawn from the district in which the crime occurred. These definitional problems are less central in the discrimination cases, in which all that must be identified is a distinct class or group excluded from jury service.

There are further definitional difficulties. The Supreme Court has spoken in terms of a "fair cross-section requirement."[107] What groups are part of this cross-section? Women[108] and minorities[109] seem to be included. Other groups considered by courts have included aliens,[110] persons with beards,[111] members of a political party,[112] youths,[113] and the elderly.[114] In *Duren v. Missouri*,[115] the Supreme Court stated:

> In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.[116]

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105 *See* Alvorado v. State, 486 P.2d 891 (Alaska 1971)(stressing differences between Native villagers and city residents in holding that trial before latter, where crime occurred in village, denied defendant of his right to an impartial jury).

106 *Compare* Ruthenberg v. United States, 245 U.S. 480 (1918)(jury may be drawn from part of a district) *with* People v. Jones, 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973)(while jury drawn from either entire county or portion of county wherein crime was committed will satisfy sixth amendment, one drawn from portion of county exclusive of place of commission of crime will not).

107 Taylor v. Louisiana, 419 U.S. 522, 535-36 (1975).

108 *Id.*

109 *See, e.g.*, Peters v. Kiff, 407 U.S. 493 (1972).

110 *See* United States v. Gordon-Nikkar, 518 F.2d 972 (5th Cir. 1975)(no right to have resident alien included in grand or petit jury venire).

111 *See* Ham v. South Carolina, 409 U.S. 524 (1973)(trial court's failure to inquire about juror bias towards persons with beards not unconstitutional).

112 At least one court has rejected political affiliation as a basis for exclusion from jury service. *See, e.g.*, Simmons v. Jones, 317 F. Supp. 397, 406 (S.D. Ga. 1970), *rev'd on other grounds*, 478 F.2d 321 (5th Cir. 1973).

113 *See* Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986); Brown v. Harris, 666 F.2d 782 (2d Cir. 1981), *cert. denied*, 456 U.S. 948 (1982); United States v. Guzman, 337 F. Supp. 140 (S.D.N.Y.), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973).

114 *See* State v. Brewer, 247 N.W.2d 205 (Iowa 1976)(persons over 65).

115 439 U.S. 357 (1979).

116 *Id.* at 364. *Accord*, Lockhart v. McCree, 476 U.S. 162, 172 (1986)("The essence of a

The shift in focus to "distinctive" groups is not particularly helpful. For example, if half a community is unemployed, would the unemployed be a "distinctive" group?[117] Size might have some effect on the point at which a group will be deemed "distinctive."[118] If the third element of the *Duren* standard, systematic exclusion, is present, however, why should it matter whether the excluded group is "distinctive?" Moreover, the requirement of a "fair and reasonable" representation of such groups invites statistical haggling.

The Court has not permitted the fair cross-section requirement to serve as a basis for challenges for cause, and has stated that there is "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population."[119] While this surrender to reality seems inevitable, it also

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fair cross section' claim is the systematic exclusion of a distinctive' group in the community.").

117 The most likely answer is "no." *See* Anaya v. Hansen, 781 F.2d 1 (1st Cir. 1986)(blue collar workers not distinctive group). In *McCree*, the Supreme Court stated:

> We have never attempted to precisely define the term 'distinctive group' and we do not undertake to do so today. But we think it obvious that the concept of 'distinctiveness' must be linked to the purposes of the fair cross-section requirement. In *Taylor* we identified those purposes as (1) 'guard[ing] against the exercise of arbitrary power' and ensuring that the 'commonsense judgment of the community' will act as 'a hedge against the overzealous or mistaken prosecutor,' (2) preserving 'public confidence in the fairness of the criminal justice system', and (3) implementing our belief that 'sharing in the administration of justice is a phase of civic responsibility.'
>
> Our prior jury representativeness cases, whether based on the fair cross-section component of the Sixth Amendment or the Equal Protection Clause of the Fourteenth Amendment, have involved such groups as blacks, women, and Mexican-Americans. The wholesale exclusion of these large groups from jury service clearly contravened all three of the aforementioned purposes of the fair cross-section requirement. Because these groups were excluded for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case, the exclusion raised at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common sense judgment of the community. In addition, the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an 'appearance of unfairness.' Finally, such exclusion improperly deprived members of these often historically disadvantaged groups of their right as citizens to serve on juries in criminal cases.

476 U.S. at 174-75 (citations omitted).

Being unemployed would not be an immutable characteristic and would not seem to fall within the Court's guidelines. *But see* Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946)(daily wage earners constitute cognizable class). *See generally* Comment, *Underrepresentation of Economic Groups on Federal Juries*, 57 B.U.L. REV. 198 (1977). In *McCree*, the Court found that "Witherspoon-excludables" were likewise not a distinct group for fair cross-section purposes. 476 U.S. at 175.

118 Consider, for example, the homosexual population in a small rural community. Statistically, it may not be large. If, however, all suspected homosexuals are excluded from jury service, there may be a constitutional violation.

119 Taylor v. Louisiana, 419 U.S. 522, 538 (1975), *quoted in McCree*, 476 U.S. at 172-73; Batson v. Kentucky, 476 U.S. 79, 85-86 n.6 (1986).

means that many juries will not in fact contain that diversity of viewpoints at which the fair cross-section requirement is aimed.[120]

Although the fair cross-section requirement on its face may imply geographical diversity, it is really a diversity of viewpoints which the legal system seeks.[121] The theory is that these differing perspectives will play off each other in the jury room, allowing for a full exploration of the legal and factual issues of the case. Geographical diversity, however, does not necessarily ensure a diversity of perspectives. In every subpart of a community can be found persons whose views, for example, span the political spectrum. To pluck from each of those subparts those members who are politically conservative would achieve geographical but not political diversity. Likewise, cultural, ethnic, sexual, and religious diversity do not, in and of themselves, ensure a diversity of viewpoints. That racial, sexual, and ethnic diversity, rather than a diversity of viewpoints, dominates the Court's thinking is indicated by its failure to ask whether the "black" or "female" perspective can be adequately represented by other members of the community. In the death penalty context the Court has rejected the idea that groups defined in terms of shared attitudes are "distinctive" for fair cross-section purposes. In *Lockhart v. McCree*,[122] the Court upheld the challenge for cause of prospective jurors whose philosophical and moral opposition to capital punishment would prevent or substantially impair their ability to carry out their sentencing responsibilities.[123]

In the final analysis, there does not appear to be any inherent correlation between cross-section representation and impartiality, despite the Supreme Court's assertion in *McCree* that "the Constitution presupposes that a jury selected from a fair cross-section of the community is impartial . . . so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case."[124] The reference to the fair cross-section requirement is arguably superfluous. Twelve randomly selected individuals from the community may all be prejudiced in one way or another; twelve professors of logic with common demographic char-

120 *See* Ballew v. Georgia, 435 U.S. 223 (1978)(refusing in part for this reason to allow juries of less than six).

121 *See Thiel*, 328 U.S. at 232 (Frankfuter, J., dissenting)("The object is to devise a [jury] system that is fairly representative of our variegated population, exacts the obligation of citizenship to share in the administration of justice without operating too harshly upon any section of the community, and is duly regardful of the public interest in matters outside the jury system.").

122 476 U.S. 162 (1986).

123 *Id.* at 175-76.

124 *Id.* at 183.

acteristics, all of whom live on the same block, may be impartial. At best, cross-section representation serves the goal of impartiality not by eliminating bias but by creating a diversity of biases on the jury, thereby increasing the likelihood of obtaining a range of community views. These diverse perspectives should, in theory, promote discussion of all aspects of a case within the jury and are particularly relevant when the legal system consciously desires to ascertain how the community feels about an issue.

As thus conceived, cross-section representation is a means to the end of achieving a heterogeneous jury. But, as indicated, it is a rather crude and unreliable tool. Suppose, for instance, a murder is committed in a ghetto neighborhood whose inhabitants believe in settling disputes by force. The victim is an outsider. A cross-section of the community may yield a jury whose members accept violence as a legitimate means of dispute resolution. A verdict of guilty returned by such a jury is more likely to be accepted by the defendant and the community. The more probable acquittal, however, may not be accepted by the victim's family or society in general merely because a cross-section of the community returned it.

If diversity of viewpoints is the goal, the Court should mandate proportional, or at least some, representation on the jury of all major distinct groups in the community.[125] The Court, however, appears satisfied if juries on the whole are statistically representative bodies. Such statistics are of little solace to a defendant whose jury is not representative. The problem is that, even conceding the simplistic, stereotypic, and most likely incorrect assumption that any member of a group will reflect the views of that group, there are so many such groups that requiring that all be represented on a jury of twelve would be impossible.

It is for this reason that both the cross-section requirement and the nondiscrimination principle, regardless of theoretical merit, are doomed in practice. It is simply not feasible to include all racial, ethnic, religious, cultural, and other distinct groups or segments of a heterogeneous community on a panel of twelve.[126] When one adds to the calculus statutorily prescribed occupational exemptions from jury service,[127] judicial sympathies to jurors who ask to be ex-

125 *See* People v. Wheeler, 22 Cal. 3d 258, 277, 583 P.2d 748, 762, 148 Cal. Rptr. 890, 903 (1978), *noted in* Comment, *People v. Wheeler: Peremptory Challenges—A New Interpretation*, 14 NEW. ENG. L. REV. 370, 386 (1978)). *See also* Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977).

126 *See McCree*, 476 U.S. at 174-75; Batson v. Kentucky, 476 U.S. 79, 86-87 (1986); Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946); Akins v. Texas, 325 U.S. 398, 403 (1945).

127 For a compilation of such exemptions, see J. VAN DYKE, *supra* note 31, at app. C.

cused due to financial hardship,[128] and, most significantly, peremptory challenges,[129] the likelihood of cross-section representation in practice is further decreased.

A number of Supreme Court decisions which run counter to the ideal sought in the cross-section and nondiscrimination cases suggests that the Court is more enamored with theory than reality. For example, the Court has upheld the use of juries of six in criminal cases.[130] The constitutional correctness of this position aside, obvious even to a non-mathematician is that the likelihood of a representative cross-section of the community and inclusion of minority groups will be statistically diminished if the size of the jury is cut in half.[131] Furthermore, if the jury does contain a biased member, there will be fewer other jurors to offer rebuttal.

Exemptions generally are justified on one of three theories: first, that the exempted class is too valuable to society to spare for jury service, such as doctors; second, that the exempted class is too likely to unduly influence other jurors, such as lawyers; or third, that the exempted class is too prone to be prejudiced as a result of their jobs, such as police officers. *Id.* at 130-31.

128 *Id.* at 119-21. *See also* 28 U.S.C. § 1866(c) (1982)(judge may excuse juror upon a showing of undue hardship or extreme inconvenience); *Thiel*, 328 U.S. at 224. The elimination of the poor, according to one author, "results in juries which tend to bring in more convictions and to sympathize less with the underdog.' " Kuhn, *supra* note 7, at 303. It also can lead to the exclusion of minorities. *See* Labat v. Bennett, 365 F.2d 698, 724 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967). On the other hand, one might question whether a person who does not want to serve, as indicated by the request to be excused, will be a conscientious juror. Will the juror who perceives that jury service is causing economic disadvantage be willing to engage in the extended deliberation required in a complex case?

129 *See* J. VAN DYKE, *supra* note 31, at ch. 6. A peremptory challenge can be made for any reason which an attorney sees fit and need not, unlike challenges for cause, be justified to the court. As such, it can be used to eliminate relatively small classes of the population. In one instance, however, where a prosecutor uses peremptory challenges to eliminate all blacks from a jury trying a black defendant, the Supreme Court has found a violation of equal protection. Batson v. Kentucky, 476 U.S. 79 (1986). The Court, however, declined to adopt Justice Marshall's suggestion that because of their potential for discrimination, peremptory challenges should be eliminated altogether, both for the prosecution and the defense. *Id.* at 102-03 (Marshall, J., concurring). *See generally* Note, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, 44 U. PITT. L. REV. 673 (1983).

130 Williams v. Florida, 399 U.S. 78 (1970).

131 The majority in *Williams*, however, disagreed. Referring in part to the cross-section requirement, the Court stated: "[W]e find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers [twelve] . . . ." *Id.* at 100.

In Ballew v. Georgia, 435 U.S. 223 (1978), the Court conceded that the community would be less represented by further reduction of the jury to five. *Id.* at 236-37. In *Ballew*, unlike in *Williams*, the Court supported its position with a wealth of social science studies. *See Ballew*, 435 U.S. at 231 n. 10. Virtually all of the studies cited by the Court were prompted by the Court's decision in *Williams* and were designed to show the negative effects which resulted when the size of the jury was reduced from 12 to 6.

The Supreme Court has also permitted non-unanimous jury verdicts.[132] This decision, too, arguably defeats the purposes behind cross-section representation and nondiscrimination.[133] Part of the rationale for diversity is to expose majority members of the jury to the views of minority members of the community. However, if the majority need not convince the minority that their position is unsound in order to prevail, the value of diversity may be defeated.[134] While the majority may choose not to ignore or override the minority,[135] the potential does not exist if unanimous verdicts are required.

Although it is unlikely that juries will actually be composed of a cross-section of the community, the theoretical possibility may have to be preserved. Appearances may be as important as reality. An avowed or tacit policy permitting discrimination in juror selection or exclusion of an identifiable segment of the community could undermine popular support for the legal system and the law itself. The pertinent point regarding impartiality, however, is that neither nondiscrimination nor cross-section representation can be relied upon to provide an impartial jury as a matter of either theory or practice.

C. JURY NULLIFICATION AND IMPARTIALITY

There is another situation where the legal system is as much concerned with community values as it is with impartiality. The allocation in England to juries rather than judges of the authority to render verdicts was, as discussed previously, in large part attributable to the jury's function as fact knowers rather than fact finders.[136] Yet the emergence of the jury system may also have reflected a desire for community involvement in the legal system. Judges, well educated and generally from the middle or upper classes, often lacked knowledge of or had lost contact with the values of the com-

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132 *See* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). If the jury is less than twelve, however, unanimity may be necessary. *See* Burch v. Louisiana, 441 U.S. 130 (1979).

133 *See* Note, *Johnson v. Louisiana and Apodaca v. Oregon: Unanimity in the Criminal Jury Verdict*, 7 GA. L. REV. 339 (1973); Note, *In the Wake of Apodaca v. Oregon: A Case for Retaining Unanimous Jury Verdicts*, 7 VAL. U.L. REV. 249 (1973); Note, *A Constitutional Renvoi: Unanimous Verdicts in State Criminal Trials*, 41 FORDHAM L. REV. 115 (1972).

134 From an historical perspective, Forsyth points out that one of the major advantages of the unanimity requirement was that it forced those in the majority to listen to and respond to the arguments of the minority. W. FORSYTH, *supra* note 13, at 246.

135 This was the view of the majority in *Johnson* and *Apodaca*. *See Johnson*, 406 U.S. at 361. Kalven and Zeisel, however, found that juries tend to stop deliberating when the requisite majority is achieved. H. KALVEN & H. ZEISEL, *supra* note 18, at 201.

136 *See supra* notes 21-25 and accompanying text.

mon man.[137] The jury vicariously ensured that common, or community, values would not be ignored in the decision making process.[138]

If juries reflected community values, an impartial jury required an impartial community, as a jury which reflected community values would also reflect community prejudices. If the community was not impartial, it would seem that the legal system had to choose between an impartial jury which did not reflect community values and one which was not impartial but did reflect community values. In point of fact, a somewhat schizophrenic compromise was struck. If community prejudices ran sufficiently high against a defendant, a change in venue could be obtained, thereby moving the site of the trial from a clearly partial community to one that was more neutral.[139] On the other hand, a jury could acquit a defendant even though a strict and

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137 Sir William Holdsworth provided a perceptive analysis of the value of the jury in this regard:

> [The jury system] tends to make the law intelligible by keeping it in touch with the common facts of life. The reasons why and the manner in which it thus affects the law are somewhat as follows: If a clever man is left to decide by himself disputed questions of fact he is usually not content simply to decide each case as it arises. He constructs theories for the decision of analogous cases. These theories are discussed, doubted, or developed by other clever men when such cases come before them. The interest is apt to centre, not in the dry task of deciding the case before the court but rather in the construction of new theories, the reconciliation of conflicting cases, the demolition of criticism of older views. The result is a series of carefully constructed, and periodically considered rules, which merely retard the attainment of a conclusion without assisting in its formation. It is only the philosopher, or possibly the professor of general jurisprudence, who can pursue indefinitely these interesting processes. Rules of law must struggle for existence in the strong air of practical life. Rules which are so refined that they bear but a small relation to the world of sense will sooner or later be swept away. Sooner, if, like the criminal law or the commercial law, they touch nearly men's habits and conduct; later, if, like the law of real property, they affect a smaller class, and affect them less nearly. The jury system has for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense.

1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 349 (3d ed. 1922).

138 *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968)("If the defendant preferred the common sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."). As a result, jurors may be more prone to reach an equitable result while judges are more likely to reach a legally correct one. *See* P. DEVLIN, *supra* note 3, at 151-58.

139 *See, e.g.*, Rideau v. Louisiana, 373 U.S. 723 (1963). In Groppi v. Wisconsin, 400 U.S. 505 (1971), the Supreme Court struck down a statute which prevented a change of venue in misdemeanor cases, regardless of the extent of prejudice against the defendant. The Court held that the accused's right to an impartial jury had been violated. *Id.* at 510. *See generally* Orfield, *Venue of Federal Criminal Cases*, 17 U. PITT. L. REV. 375 (1956). It has been suggested, however, that in controversial cases, particularly where the defendant is accused of murder, judges may succumb to community pressure to deny a change in venue in order that the community may exact retribution. *See* Mullin, *The Jury System in Death Penalty Cases: A Symbolic Gesture*, 43 LAW & CONTEMP. PROBS. 137, 142 (1980).

Other possible remedies to combat community hostility may include granting a con-

technical application of controlling legal principles would require a conviction.

This phenomenon, known as jury nullification, has a long, and controversial, history in Anglo-American jurisprudence.[140] An illogical verdict in favor of a defendant in a criminal case is subject to neither review nor reversal, despite the fact that an equally irrational verdict in favor of the prosecution would be reversed.[141] The ap-

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tinuance or bringing in a foreign jury. *See generally* Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349 (1960).

[140] *Compare* Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976)(strong critique of jury nullification), *with* Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972)(favorable view of jury nullification). To some extent, the controversy stems from differing perceptions of what the jury does when it engages in nullification. Critics tend to see an abrogation of a legislatively enacted statute. Proponents tend to explain nullification as an instance of legislative interpretation: the jury is construing the statute in the manner which the legislature would have desired had it anticipated the factual situation. Both views of nullification may be correct: in some instances, such as when a jury refuses to convict for violation of prohibition laws, it is engaged in the former; when a jury acquits in a case of mercy killing, it is engaged in the latter. *See generally* Kadish & Kadish, *On Justified Rule Departures by Officials*, 59 CALIF. L. REV. 905, 911-30 (1971); Pound, *Law in Books and Law in Action*, 44 AM. JUR. REV. 12, 18 (1910); Scheflin and Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51 (1980); Note, *Jury Nullification: The Forgotten Right*, 7 N.E.L. REV. 105 (1971).

The power to nullify is most often traced to Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670). For the defendants' description of their case, see W. FORSYTH, *supra* note 13, at 396-404. In Morissette v. United States, 342 U.S. 246 (1952), the Supreme Court implicitly recognized the power of juries to engage in nullification:

> Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges . . . . They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter.

Id. at 276.

The most famous historical example of jury nullification in the United States involved the acquittal of the American colonist John Peter Zenger for criminal sedition. *See* J. ALEXANDER, A BRIEF NARRATION OF THE CASE AND TRIAL OF JOHN PETER ZENGER (1963). The issue has more recently been raised in trials of political protesters. *See* Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L. L. 71 (1969); Sax, *Rex v. Dean of St. Joseph's, Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 481 (1968).

It is sometimes debated whether jury nullification is a right or a power. Most regard it as the latter. As early as 1784, Justice Willes maintained: "[t]he jury . . . have a constitutional right, if they think fit, to examine the innocence or criminality of the paper, notwithstanding there is sufficient proof of the publication . . . I believe no man will venture to say they have not the power, but I mean expressly to say they have the right." King v. Shipley, 99 Eng. Rep. 774, 824-25 (K.B. 1784). Justice Aghurst, on the other hand, stated: "I admit the jury have the *power* of finding a verdict against the law, and so they have of finding a verdict against the evidence but I deny they have the *right* to do so." *Id.* at 828 (emphasis added). *See also* W. FORSYTH, *supra* note 13, at 261. The semantic distinction of whether jury nullification is a power or a right arguably has little practical effect.

[141] *See* McCleskey v. Kemp, 107 S. Ct. 1756, 1777 (1987). Some courts have characterized nullificaton in terms of lenity. *See, e.g.*, Steckler v. United States, 7 F.2d 59, 60

parent rationale for this dichotomy is that community values should be allowed to temper the rigor of the law.[142] A jury is permitted to be partial to but not partial against an accused.[143] In this respect, jury nullification is consistent with the language of the sixth amendment giving the accused, but not the government, the right to an impartial jury.[144] Nullification is an institutional recognition that, in some instances, partiality may be permissible.

Jury nullification serves other socially useful functions. It indicates to the appropriate authorities that the law no longer accords with community values.[145] When, for example, juries declined to convict for violation of prohibition laws, they expressed popular disapproval of prohibition as surely as if they had voted in a referendum.[146] Similarly, the community may disapprove of particular

(2d Cir. 1925) *quoted in* Dunn v. United States, 284 U.S. 390, 393 (1932). *See generally* United States v. Dougherty, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972)(reviewing history of and justifications for nullification).

142 *See* W. FORSYTH, *supra* note 13, at 430-32. Wigmore points out that the jury system preserves the appearance that the law applies equally to all while permitting individualization in cases in which strict application of legal principles would yield an unjust result. The legal system, thus, may have an active interest in having juries exercise their nullification prerogative. It spares judges, theoretically committed to the letter of the law and its equal application to all, from having to bend legal principles to reach equitable results. Jury nullification permits the system to preserve an outward appearance of objectivity while introducing appropriate flexibility. Wigmore, *A Program for the Trial of a Jury*, 12 J. AM. JUD. SOC. 166 (1929). *See also* P. DEVLIN, *supra* note 3, at 151-58; Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 350 (1960).

143 While it has been argued that as a matter of strict logic, the power to nullify should cut both ways, *see* Simson, *supra* note 140, at 516, there is much to be said for permitting the exercise of mercy, a generally approved value, but not that of vindictiveness, a generally disapproved value. *See* W. FORSYTH, *supra* note 13, at 430-31. Moreover, while neither society nor the criminal law would be outraged if the jury acquitted a technically guilty defendant because he was a "good" person, fundamental principles of legality would be compromised if the jury could convict a technically innocent defendant because he was perceived to be a "bad" person.

144 U.S. CONST. amend. VI. *But see supra* notes 76-86 and accompanying text, which discuss society's interest in an impartial jury. The Supreme Court in other contexts has recognized that constitutional rights accorded to a defendant may be for the benefit of the government as well. *See, e.g.*, Barker v. Wingo, 407 U.S. 514 (1974)(right to speedy trial). For the reasons discussed previously, the right to an impartial jury may also fall into this category. If so, jury nullification might conflict with the government's interest in an impartial jury. However, because jurors need not disclose the basis of their verdict and lawyers are generally barred from pressing jurors to discover that basis, any violation would be virtually impossible to establish. Moreover, even if such a violation could be proved, principles of double jeopardy would safeguard the defendant against further prosecution.

145 *See* P. DEVLIN, *supra* note 3, at 160-62; W. FORSYTH, *supra* note 13, at 429; H. KALVEN & H. ZEISEL, *supra* note 18, at chs. 16-19.

146 Ironically, jury nullification may retard legislative reform by convincing the legislature that there is no need to act. As jurors opposed to the law will engage in nullification, the legislature need not alienate the law's supporters by repealing it. *See* H. KALVEN

penalties. In nineteenth century England, countless crimes carried an automatic death penalty. Jury acquittals often reflected not the defendant's innocence but the jury's belief that the penalty was disproportionate to the offense.[147]

The Supreme Court appears to have overlooked, or at least downplayed, the role of jury nullification in its death penalty decisions. In *Witherspoon v. Illinois*,[148] the Court condemned the automatic exclusion from jury service of persons with conscientious objections to capital punishment. It did permit, however, the challenge of those who, regardless of the evidence, would automatically vote against the imposition of capital punishment. Justice Stewart noted that "a jury composed exclusively of [those favoring the death penalty] cannot speak for the community."[149] In a subsequent decision, however, the Court extended the challenge for cause to those jurors who indicated that their ability to judge a case would be prevented or substantially impaired because of their views about capital punishment.[150] Relating this theme to the concept of the impartial jury, the Court in *Wainwright v. Witt*[151] stated:

> [T]he quest is for jurors who will conscientiously apply the law and find the facts. That is what an "impartial" jury consists of and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors

& H. ZEISEL, *supra* note 18, at 291; Kadish & Kadish, *supra* note 140, at 920-21; *Simson*, *supra* note 140, at 514-15.

147 *See* W. CORNISH, *supra* note 3, at 128-33. W. FORSYTH, *supra* note 13, at 430; H. KALVEN & H. ZEISEL, *supra* note 18, at 310-11. Kalven and Zeisel provide several modern day examples where juries acquit because the penalty is perceived as too severe. *Id.* at 306-10. Severe sanctions for criminal activity, while in theory maximizing the deterrent effect of a law, often prove counterproductive in practice. Potential criminals are not deterred as they know juries will be reluctant to convict in light of the oppressive penalties attached to the offense.

Other instances where juries may chose to engage in nullification occur when they believe the victim has unduly contributed to the crime, the defendant has already suffered sufficiently, or the police have abused their authority.

148 391 U.S. 510 (1968).

149 *Id.* at 520. The Court has subsequently indicated the importance of the impartial jury guaranty in this context by holding that *Witherspoon* violations are not subject to harmless error analysis. Gray v. Mississippi, 107 S. Ct. 2045 (1987).

150 *See, e.g.*, Wainwright v. Witt, 469 U.S. 412 (1985). *See also* Darden v. Wainwright, 477 U.S. 168, 176 (1986). Moreover, in a bifurcated trial, jurors whose expressed opposition to the death penalty is so strong that it would substantially impair their ability to function at the *sentencing* phase may be excused for cause. Lockhart v. McCree, 476 U.S. 162 (1986). The *Witt* standard in theory applies also to those jurors whose ability to judge the case objectively would be hindered by their views *in favor* of capital punishment. It is far less likely, however, that there will be many jurors who will admit to falling in this category.

151 469 U.S. 412 (1985).

to be seated who quite likely will be biased in his favor.[152]

The presumption of innocence does, of course, entitle the defendant to a jury which is biased in his favor at the outset. The Court was concerned with the effect of lingering bias during deliberation. In allowing jurors with reservations about capital punishment to be excused, however, the Court may have sanctioned juries with a bias towards conviction.[153] In any event, the Court's position seems in tension, if not outright conflict, with the concept of jury nullification. Furthermore, although the Court has rejected the argument, its position frustrates cross-section representation to the extent that a portion of the community is opposed to the death penalty.[154] With respect to impartiality, the Court's statement in *Witt* stands in marked contrast to its subsequent callous pronouncement in *Lockhart v. McCree*[155] that even if a jury, from which "Witherspoon-excludables" had been removed for cause, was more prone to convict, such a jury did not offend the constitutional guarantee of impartiality.[156] The Supreme Court has also held that where a jury has recommended a life sentence in a capital case, arguably thereby expressing community sentiment, a judge may override that deci-

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152 *Id.* at 423-24.

153 This was the conclusion of the Eighth Circuit Court of Appeals in Grigsby v. Mabry, 758 F.2d 226, 229 (8th Cir. 1985). Among the studies cited in support of this conclusion were Cowan, Thompson, & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); Goldberg, *Toward Expansion of Witherspoon; Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L. L. REV. 53 (1970); Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971); H. Zeisel, Some Data on Juror Attitudes toward Capital Punishment (University of Chicago Monograph 1968); W. Wilson, Belief in Capital Punishment and Jury Performance (unpublished manuscript, University of Texas, 1964). The Eighth Circuit's decision was reversed in Lockhart v. McCree, 476 U.S. 162 (1986). The Supreme Court expressed considerable skepticism about the validity and reliability of the studies on which the appellate court had relied. *Id.* at 168. The Court proceeded, however, on the assumption that the studies were valid. *Id.* at 173. The California Supreme Court was considerably more impressed by many of these same studies. *See* Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

154 *See McCree*, 476 U.S. at 173-75. The Court reasoned that the fair cross-section requirement was satisfied if the composition of the venire reflected the community, regardless of whether the composition of the jury did. *See also* Witherspoon v. Illinois, 391 U.S. 510, 520 ("Culled of all who harbor doubts about the wisdom of capital punishment—of all who[m] would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority."). *See generally* Winick, *Prosecutorial Peremptory Challenges in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 62-77 (1982). Interestingly, death qualification may adversely affect blacks and females, groups to whom the Court has traditionally been solicitous, more than others. *See* NATIONAL JURY PROJECT, JURYWORK 3-44 (2d ed. 1987).

155 476 U.S. 162 (1986).

156 *Id.* at 173.

sion and impose the death penalty.[157]

A jury is never permitted to decide that a law is illegal or unconstitutional.[158] Nullification, however, allows the jury to express the community's views on the law under which prosecution is brought. In specific cases, nullification allows the jury to express its view of the moral blameworthiness of the defendant. Nullification is thus a limitation on, or at least a refinement of, the concept of an impartial jury.

In cases in which the jury is asked to decide quasi-legal questions regarding values, community input is actively sought.[159] With regard to jury nullification, however, the legal system is more ambivalent about the worth of community values. Judges may direct a verdict in favor of, but not against, an accused. This one sided power is a clear acknowledgement of the jury's inalienable power to acquit, regardless of the strength of the state's case. The legal system recognizes the jury's power to apply its own values rather than those dictated to it by the court or inherent in the law. The failure to require juries to give reasons for their verdicts reinforces this latitude. On the other hand, the idea that jurors in an individual case can in effect undo the work of the popularly elected legislature causes discomfort. Nullification constitutes a threat to the fundamental tenet that the law applies equally to all. Indeed, to some it suggests that there is no such entity as the law except to the extent that a jury is willing to recognize it.[160]

The fact that judges rarely, if ever, inform jurors of their power

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157 Spaziano v. Florida, 468 U.S. 447 (1984).

158 *See* Sparf & Hansen v. United States, 156 U.S. 51 (1895). *See generally* Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1959); Scheflin & Van Dyke, *supra* note 140. This, however, was not always so; at an early period in U.S. history, when principles of democracy were perhaps taken more literally and judges were not trained specialists, juries determined the law as well as the facts. *See* Howe, *supra* at 590-96. Sometimes this right was given by state statute or constitution. *See id.* at 596-613. At least two states, Maryland and Indiana, appear even today to recognize the jury's right to decide both issues of law and fact. *See* V. HANS & N. VIDMAR, *supra* note 24, at 157. In addition, there are arguably still some questions of law which jurors have to decide because the courts have defined a legal concept in terms of its factual components. Issues such as reasonableness and obscenity may fall into this category.

It is sometimes argued that the potential of jury nullification will deter a legislature from enacting harsh or oppressive laws. *See*, P. DEVLIN, *supra* note 3, at 160-62. Not only does this claim not seem to be borne out by empirical evidence, but the argument can be turned on its head: knowing that juries will not convict defendants charged with violating oppressive laws, lawmakers need not overly worry about the consequences of their acts, and may pursue ulterior objectives in passing questionable laws.

159 *See supra* note 102 and accompanying text.

160 See the ABA's response to Professor Van Dyke's views on jury nullification, reprinted in J. VAN DYKE, *supra* note 31, at 246-47.

of nullification may attest to this ambivalence of the legal system.[161] Some jurors may be aware of this prerogative,[162] but no doubt many more believe that their responsibility is to apply the letter of the law. As a consequence, while the legal system tacitly recognizes that nullification in some situations is acceptable, it believes that informing jurors that they may so act is not. The seemingly inevitable result is that jury nullification will be exercised haphazardly, depending in part on jurors' personal knowledge of its availability. Worse still, as jurors receive no instructions from trial judges as to when nullification is appropriate, they may act out of caprice or prejudice rather than principle.

In order to exercise their nullification power in a rational manner, jurors may have to consider evidence that is not technically relevant to guilt or innocence, and evaluate that evidence in light of generalized principles of justice and fairness regarding which they receive no judicial instruction. Nor can the principles simplistically be equated with community values. Community values may be the irrational product of majoritarian prejudices and bigotry; principles of justice and fairness relate to basic and widely recognized ideals and values, such as equality, dignity, liberty, and compassion.[163] Cross-section representation may provide the input of majoritarian community values, but it may not be either the best or even a reasonable means for achieving principled exercises of nullification.

Trial judges also receive little guidance about nullification from

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161 A judge is under no legal duty to inform a jury of its nullification power. *See* Sparf & Hansen v. United States, 156 U.S. 51 (1895); United States v. Dougherty, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969).

Other reasons for refusing to give a nullification instruction may include the following: 1) it will encourage anarchy on the part of the jurors; 2) it is unnecessary and will discourage other more approriate legal and political institutions from addressing troublesome problems; 3) it will frustrate legislative intent; and 4) it will result in the exercise of the nullification prerogative in cases where there is not a "damn good reason" for nullification. The "damn good reason" rationale is advanced by Kadish and Kadish. The authors posit that if jurors are not informed of their power to nullify, they will not exercise it unless they believe there is a "damn good reason" for doing so. The danger, of course, is that they will be reluctant to do so even when there is a "damn good reason" out of fear that they are doing something inappropriate. *See* Kadish & Kadish, *supra* note 140, at 927. *See also* Christie, *Lawful Departure from Legal Rules: "Jury Nullification" and Legitimated Disobedience*, 62 CALIF. L. REV. 1289 (1974); *Simson*, *supra* note 140. These arguments are responded to by Professors Scheflin and Van Dyke. By not providing a nullification instruction, the judge provides jurors with an ability to rationalize a legally correct but unpopular verdict: "We were merely following the instructions of the judge." *See* United States v. Dougherty, 473 F.2d 1113, 1136 (D.C. Cir. 1972); Scheflin & Van Dyke, *supra* note 140, at 85-111.

162 *Dougherty*, 473 F.2d at 1135.

163 *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY ch. 4 (1977).

appellate courts. Even assuming that the parties could discover its occurrence,[164] a defendant could not appeal a jury choice not to nullify, while nullification would result in an unappealable acquittal. That such an irrational approach to jury nullification is tolerated may again evidence the law's desire to maintain the appearance of an impartial jury system, whether or not juries are impartial in fact.

D. KNOWLEDGE AND IMPARTIALITY

Jurors are expected to have some basic understanding of the function and purposes of the trial within the American legal system and the roles of the various participants, as well as a minimal degree of intelligence and literacy.[165] They should be able to comprehend judicial instructions and understand and evaluate the arguments of counsel. They are further expected to be able to draw appropriate inferences from facts established by the evidence. Many of these skills require some minimal education. In pursuing this education, the prospective juror acquires considerable knowledge unrelated to the courtroom proceeding. A completely unknowledgeable juror is an unlikely, if not non-existent, entity.

A judge who refers to a juror's knowledge is concerned with a particular kind of knowledge: that relating to the current case. The judge is concerned whether the juror is familiar with the parties, the witnesses, the attorneys, or the facts of the case. Whether this knowledge comes from personal acquaintance or the news media is incidental.

It may seem strange that a legal system which originally selected jurors because of their first hand knowledge of the facts[166] should now prefer jurors who know nothing about the case. The metamorphosis no doubt involved several stages. Even after it was determined that the jury should not consist of witnesses to the particular crime being tried, the common law requirement that jurors

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164 Whether jurors have in fact engaged in nullification is difficult to know, because of the factual controversies present in most cases and the fact that the jury's general verdict does not reveal which factual version it accepted. Thus, it cannot be determined whether the jury has correctly applied legal principles to fact version A or engaged in nullification in regard to fact version B. Judges will virtually never look beyond the verdict to ascertain its basis. *See supra* note 4.

165 *See, e.g.*, 28 U.S.C. § 1865(b)(2)-(4) (1982). In Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970), the Court declared permissible the restriction of jury service to persons of "good intelligence, sound judgment, and fair character." *Id.* at 332. Amazingly, there have been trials conducted in English where some jurors did not understand the English language. *See, e.g.*, R. v. Thomas, 24 Crim. App. 91 (1933) *discussed in* P. DEVLIN, *supra* note 3, at 35.

166 *See supra* notes 22-25 and accompanying text.

come from the vicinage[167] and the constitutional requirement that jurors be drawn from the district in which the crime occurred[168] increased the likelihood that jurors would be familiar with the parties and witnesses, if not the facts of the case. One advantage to such jurors was that they were better able to assess the credibility of their witness neighbors. On the other hand, there existed the danger that familiarity might induce partiality. Recognition of this possibility led in England to a broadening of the geographical area defining the vicinage,[169] and provided a basis for challenging a juror for cause.[170] Left open was the question of whether in their deliberations jurors could supplement the evidence presented in court with their personal knowledge about the case.[171] This practice is troublesome, for such a juror is, in effect, providing to the other members of the jury unsworn, often hearsay, testimony which has not been subjected to cross-examination. Nonetheless, as late as the nineteenth century, jurors in some jurisdictions were permitted to base a verdict on their personal knowledge.[172]

Judicial rulings defining when knowledge compromises impartiality to the point justifying juror disqualification have lacked uniformity.[173] At one extreme is the position that any knowledge warrants excusing the juror. Under this view, all the challenging party need show is that the prospective juror has heard or read something about the case. At the other pole is the view that knowledge is relevant only to the extent that it undermines the ability to maintain an open mind. Jurors who assert that they can set aside pretrial information and decide the case on the merits, if believed by the judge, will not be disqualified for cause despite their knowledge.

In between these two extremes lies room for a variety of approaches based on a presumed relationship between knowledge and impartiality. One approach, for example, would be to look at the effect the knowledge would likely have on a reasonable person. A refinement would look to the effect on a reasonable person with the particular juror's characteristics. Both of these approaches, resting

167 *See supra* note 99 and accompanying text.

168 *See* U.S. CONST. amend. VI.

169 *See* W. BLACKSTONE, COMMENTARIES 670 (J. Ehrlich ed. 1959).

170 *See supra* note 30 and accompanying text.

171 This practice was clearly permissible at an early stage in the development of the jury. *See* W. FORSYTH, *supra* note 13, at 163-65. However, at that time jurors could be punished for bringing in false verdicts. When this practice, known as the attaint, fell into disfavor, so did that of permitting jurors to return verdicts based on their own knowledge. *Id.* at 165-66.

172 *See, e.g.*, McKain v. Love, 2 Hill 506, 27 Am. Dec. 401 (S.C. 1834). *See generally* Hassett, *supra* note 23.

173 *See infra* notes 174-95 and accompanying text.

as they do on a presumed relationship, constitute a tacit acknowledgement of the difficulty in determining the effect of knowledge on an actual juror.

Just as the description of the recipient of the knowledge can be altered, so too can the strength of the presumption be ratchetted. A court could presume impartiality despite admitted knowledge with the challenging party bearing the burden of demonstrating partiality. Conversely, a court could presume partiality once knowledge was admitted, with the side seeking to seat the juror having the burden of rebutting the presumption.

The Supreme Court's position on the relationship between knowledge and impartiality is difficult to pin down. *Irvin v. Dowd*[174] represented a major attempt by the Court to wrestle with the issue. The Court began with a recognition of the practical problems involved:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.[175]

The Court thus appeared to presume impartiality. It placed the burden of rebuttal on the challenging party: "Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside . . . ."[176]

In applying this test to the facts of the case, however, the Court seemed to do a somersault. It found that persistent and prejudicial news coverage had so permeated the community as to make impartiality impossible.[177] The Court chose to disbelieve the declarations of some impanelled jurors that they could render an impartial verdict. It tendered its own analysis of the psychological processes at work:

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174 366 U.S. 717 (1961).

175 *Id.* at 722-23.

176 *Id.* at 723 (quoting Reynolds v. United States, 98 U.S. 145, 157 (1878)). *See also* Marshall v. United States, 360 U.S. 310 (1959)(presuming prejudice on the part of prospective jurors who knew of the defendant's record).

177 *Irvin*, 366 U.S. at 725.

> The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man . . . . No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father.[178]

Thus, the Court in fact may have presumed partiality rather than impartiality and adopted a theory of opinion formation that made rebutting this presumption virtually impossible. The Court may well have been correct, but it provided no empirical evidence to support its reasoning.

The Court tilted even more towards the position that knowledge per se is unacceptable in *Rideau v. Louisiana*.[179] A local television station had on several occasions broadcast the defendant's confession to the crimes with which he was charged. Given the circumstances, the Supreme Court held that the refusal of the defense's request for a change of venue denied the defendant due process.[180] This unremarkable holding was supplemented by reflections on the more general question of the desirability of "knowledgeable" jurors. Justice Stewart, speaking for the majority, observed:

> For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.[181]

Furthermore, the Court did not find it necessary to inquire whether any individual juror's impartiality had been affected:

> [W]e do not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's

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178 *Id.* at 728. *See also* ABA Advisory Comm. on Fair Trial and Free Press, *Standards Relating to Fair Trial and Free Press* (1968):

> [S]tudies indicate that people tend to form beliefs on a minimum of information and that because of the desire for social approval, they often attempt to reflect the opinions and beliefs of others. Available data also suggest that once formed, an impression or belief is extemely difficult to change, even when the individual is confronted with objective facts that tend to refute it . . . . In other words, the individual is likely to select those elements of observed phenomena which reinforce his preexisting beliefs and to neglect others or even to distort his perceptions so that they will confirm his beliefs.

Id. at 62.

179 373 U.S. 723 (1963).

180 *Id.* at 726.

181 *Id.* (emphasis in original).

televised "interview."[182]

While the decision may have turned on the extreme facts of the case, the Court's language, besides suggesting the extraordinary proposition that the lower court should have granted a change in venue even if none of the jurors had seen or were aware of the television broadcast, appeared to indicate that impartiality presumes lack of knowledge about the facts of a case.

The Court retreated from its *Rideau* position in *Murphy v. Florida*,[183] holding that mere exposure of some jurors to adverse publicity about the defendant did not presumptively deny him due process.[184] Significantly, the Court did what it had declined to do in *Rideau*, examining the transcript of the voir dire to determine whether any of the jurors were in fact biased against the accused.[185] Although previous cases were distinguished as involving widespread community bias,[186] the Court provided no scientific support for its inference that such community bias rendered individual jurors' assertions of impartiality less reliable.

The per se linking of impartiality with knowledge is questionable. One effect is to penalize well-read citizens. The better informed a person is on current events, the less likely that person will satisfy a conception of impartiality which views advance knowledge as undesirable.[187] Individuals who, in most respects, would be considered model citizens will be deemed unfit for jury duty. The seemingly inevitable result will be juries representative of the "average stupidity."[188] Regardless of whether such stupidity is reflective of the community, it is doubtful that this is what the Supreme Court had in mind when it called for a jury drawn from a fair cross-section of the community. Indeed, it would seem that eliminating the more knowledgeable portion of the population from jury duty would be at odds with the requirement of cross-section representation. A blue

182 *Id.* at 727.

183 421 U.S. 794 (1975).

184 *Id.* at 796.

185 *Id.* at 800-02.

186 *Id.* at 802-03.

187 There is a subtle irony between the common practice of drawing jury panels from voting lists, thereby selecting persons with an interest in public affairs, while seeking actual jurors not knowledgable about the case because they do not keep up with current events.

188 H. Spencer, *Representative Government*, in ESSAYS: MORAL, POLITICAL, AND AESTHETIC 182 (1868), *quoted in* Hassett, *supra* note 23, at 156. *See also* United States v. Mesarosh, 116 F. Supp. 345, 348 (W.D. Pa. 1953), *aff'd*, 223 F.2d 449 (3d Cir. 1955), *rev'd*, 352 U.S. 1 (1956)("[T]o obtain a juror who would make the right' answer (from defendants' point of view) to the question propounded, he or she would have to be a person who had lived in a vacuum, or was an imbecile, or a communist.").

ribbon panel composed only of the best informed and most intelligent members of society may not be the objective,[189] but neither is its opposite. Furthermore, in an era in which news coverage is constantly expanding and in which information in a wide variety of forms is readily available, finding an unknowledgeable juror in a highly publicized case may not be an easy task.[190]

While the Supreme Court appeared at one time to be drifting towards the position that knowledge is inconsistent with impartiality,[191] the more pertinent inquiry is the extent to which knowledge has affected impartiality. The focus should be on the "animus" of the individual juror. Only when a juror's ability to decide the case fairly and justly has been compromised by the information or knowledge to which he or she has been exposed should the juror be disqualified. This is not a concession to the pervasiveness of the modern media's coverage of news but a return to principles enunciated at an earlier stage in United States history. In the context of the treason trial of Aaron Burr,[192] Chief Justice Marshall discussed juror knowledge and impartiality against the backdrop of a series of inflammatory articles published by the local press:

> Were it possible to obtain a jury without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury, but this is perhaps impossible; and therefore will not be required. The opinion which has been avowed by the court is, that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him.[193]

The vulnerable point in this analysis is the assumption that faint

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189 *Compare* Thiel v. Southern Pacific Co., 328 U.S. 217, 224 (1946)(jury is not "the province of the economically and socially privileged") *and* Glasser v. United States, 315 U.S. 60, 86 (1942)(jury is not to be "the organ of any special group or class") *with* Fay v. New York, 332 U.S. 261 (1947)(approving use of blue ribbon jury). *See generally* Dubois, *Desirability of Blue Ribbon Juries*, 13 HASTINGS L.J. 479 (1962); Note, *The Blue Ribbon Jury*, 60 HARV. L. REV. 613 (1947).

190 In Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 549 n.3 (1976), the Supreme Court questioned whether a fair trial was even possible in a highly publicized national crime, such as the killing of President Kennedy and his murderer, Lee Harvey Oswald. *See generally* Hassett, *supra* note 23; Padawer, Singer and Barton, *Impact of Practical Publicity on Juror's Verdicts* in THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW (R. Simon ed. 1975).

191 *See supra* notes 174-82 and accompanying text.

192 United States v. Burr, 25 F. Cas. 49 (C.C.D. Va. 1807)(No. 14,692g).

193 *Id.* at 50-51.

impressions[194] can be set aside. Psychologically this may not be so, and in any event the hypothesis must be explored on an individual basis. Even a faint impression may make an indelible, albeit unappreciated, impact on a particular juror's psyche. Expert evaluation may be needed to make this determination. Although this may be time consuming and difficult, the alternative of disqualifying all knowledgeable jurors may be worse. To again quote Chief Justice Marshall:

> It would seem to the court that to say that any man who had formed an opinion on any fact conducive to the final decision of the case would therefore be considered as disqualified from serving on the jury, would exclude intelligent and observing men, whose minds were really in a situation to decide upon the whole case according to the testimony, and would perhaps be applying the letter of the rule requiring an impartial jury with a strictness which is not necessary for the preservation of the rule itself.[195]

Chief Justice Marshall's opinion points the way to the relevant considerations in analyzing the proper relationship between knowledge and impartiality: 1) knowledge on the part of the jurors is more or less inevitable; 2) the more intelligent and well informed the potential juror, the more likely he or she is to know something about the case; 3) persons generally knowledgeable about public affairs will in most instances be more discerning jurors than those who are generally ignorant about public affairs; 4) a juror's impartiality is compromised only to the extent that the juror's knowledge impedes a decision on the merits; and 5) whether a juror's impartiality has in fact been compromised by knowledge must be determined on an individual basis. In short, recognition that a particular juror possesses information relating to a case must be the start, not the end, of the inquiry.

IV. The Myth of the Impartial Juror

The Supreme Court's approach to impartiality has been one of indirection. Both its equal protection and cross-section representation decisions appear aimed at preserving social and democratic values having relatively little relationship to impartiality. Rarely, if ever, have the Justices paused to examine individual juror impartiality. Yet, at its roots, "[j]uror competence is an individual rather than a group or class matter."[196]

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194 Part of the problem, of course, lies in defining what constitutes a "faint impression."

195 *Burr*, 25 F. Cas. at 51.

196 Ballard v. United States, 329 U.S. 187, 193 (1946)(quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946)).

The courts that have dealt with juror knowledge have approached the issue of impartiality somewhat less obliquely.[197] Those which equate knowledge with partiality, either directly or via a presumption, engage in a questionable class generalization: not all members of the class are similarly affected. On the other hand, the knowledge cases can more appropriately be construed to require some showing of an adverse effect of publicity or other pretrial information on a juror's ability to maintain an open mind. The focus is then correctly on the mind of the individual juror. The object is to identify and exclude jurors who would base their verdict on the information received prior to trial, rather than on the evidence presented at trial.

For legal purposes, impartiality is more than the absence of partiality. If partiality is viewed as a negative and its absence a neutral state, impartiality is a positive state encompassing a constellation of juror traits. Impartial jurors must detach themselves from pretrial prejudices and suspend judgment until after hearing the proof presented by both sides. They must accept the institutional biases of the legal system, such as the presumption of innocence and the requirement of proof beyond a reasonable doubt. They must be open to persuasion and be willing to consider the arguments of counsel and the views of other jurors. They must strive to follow the instructions of the judge.[198] They must base their verdict on the evidence and the inferences to be drawn therefrom, tempering their decisions, when appropriate, with a principled sense of justice. If these conditions are present, it does not really matter for purposes of impartiality whether a juror received knowledge about the case prior to trial, whether the jury was drawn from or was representative of a cross-section of the community, whether the jury's values reflected community values, or whether the jury was selected pursuant to a process that excluded certain segments of society from eligibility for service.[199]

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197 *See supra* notes 172-93 and accompanying text.

198 Unfortunately, it may be that many jurors are unable to comprehend judicial instructions. This should not be suprising. Lawyers and judges receive at least three years of formal instruction in law school and often need many additional years of practical experience to fully grasp the subtleties of legal rules and principles whose meanings often divide appellate judges. *See* J. FRANK, *supra* note 7, at 116-18. Moreover, the jury does not receive its instructions until after it has heard the evidence. Thus, it may not pay particular attention to certain testimony because at the time it does not perceive its legal significance. Given the shroud of secrecy which surrounds juror deliberations, it is difficult to discover whether jurors in fact understood a judge's instructions. In any event, judges should try to deliver instructions using ordinary language in ways that are familiar to ordinary citizens.

199 It is not that these concerns are not worthy of judicial attention. Indeed, they are

Indeed, this analysis can be taken one step further. Except for purposes of appearance, it may not matter whether jurors as individuals or the jury as an entity is impartial so long as the jury deliberation process is impartial. Selection of impartial jurors is only a means of achieving the end of impartial decision making. The need to focus on a priori juror impartiality stems from the inability to examine the impartiality of the decision making process in the Anglo-American legal system. It is a part of the price the system pays for its reluctance to expose juror deliberations to critical scrutiny or to require jurors to provide reasons for their verdict. Serendipitously, the decision to concentrate on juror impartiality rather than on the impartiality of the deliberation process may have been an enlightened one. One of the intriguing findings of Kalven and Zeisel[200] in their classic study of the American jury is that jurors often make up their minds before they retire, with deliberations serving only to solidify initial inclinations and to bring about unanimity.[201] If so, impartial decision making is critically dependent on individual juror impartiality.

Identifying in general terms characteristics which would interfere with juror impartiality is not particularly difficult.[202] More difficult is to identify biased jurors in practice, and most difficult of all is to identify the desired entity itself, the impartial juror. The reasons for the difficulties are both methodological and substantive.

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so deserving of judicial attention that they should be addressed directly, and not confused with issues of impartiality. In Batson v. Kentucky, 476 U.S. 79 (1986), for example, the Supreme Court based its decision that peremptory challenges could not be constitutionally used to systematically exclude blacks from juries trying black defendants on equal protection, rather than on the sixth amendment. *Id.* at 89.

200 H. KALVEN & H. ZEISEL, *supra* note 18.

201 *Id.* at 488-89.

202 The various disqualifying characteristics which inhibit open-mindedness in a juror can be catalogued as general or particular. General disqualifying characteristics relate to infirmities which would render a person incompetent to serve as a juror in any trial. Those within this category might include aliens, children, prisoners, and the mentally ill. *See, e.g.*, 28 U.S.C. § 1865 (1982).

Particular disqualifying characteristics are those which would not render the juror unfit to serve in all cases, but only in the particular case for which the juror is called. The juror may be prejudiced against the group of which the defendant is a member, or against the defendant as an individual. The bias may be a function of the relationship of the juror to the parties or their lawyers, as when a juror is a relative; or the juror's direct interest in the result in the case, as when a juror stands to gain financially from the verdict; or merely when a verdict will vindicate a strongly held belief, as when a crusader against pornography sits on an obscenity case. The juror may admit bias, or admit facts, values, or attitudes from which bias can be presumed. *See* United States v. Corey, 625 F.2d 704, 707 (5th Cir. 1980), *cert denied*, 450 U.S. 925 (1981).

A. METHODOLOGICAL DEFICIENCIES IN THE SEARCH FOR THE IMPARTIAL JUROR

Voir dire is the primary legal tool for selecting a jury.[203] Each side is permitted to question jurors. From their responses, the lawyers attempt to assess partiality. An attorney may challenge for cause the juror believed to be partial[204] or, if this is unsuccessful, excuse the juror by exercise of a peremptory challenge.[205]

Voir dire can be quite time consuming, especially when lawyers, as they are prone to do, use it to indoctrinate jurors or to establish a

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203 *See generally* Babcock, *supra* note 73; Gutman, *supra* note 91.

204 In exercising a challenge for cause, an attorney must supply the judge with well-founded reasons why a particular juror will be unable to decide the case fairly or impartially. There is, in contrast with peremptory challenges, no limit to the number of challenges for cause which can be made by each side. The grounds for challenges for cause are generally fixed by statute.

205 An attorney need not give any reason for a peremptory challenge, and the challenge may not be rejected by the court, as may one for cause. The number of such challenges allotted to each side is usually fixed by statute. *See, e.g.*, FED. R. CRIM. P. 24(b). Attorneys will generally use peremptory challenges to strike jurors whom they believe may be biased but whom the court has refused to strike for cause. *See* Hayes v. Missouri, 120 U.S. 68, 70 (1887). Some lawyers believe that the very attempt to have a juror struck for cause may have alienated the juror against the attorney and for this reason will excuse the juror. *See* Lewis v. United States, 146 U.S. 370, 376 (1892). More simply, a lawyer may peremptorily challenge jurors before whom the attorney would feel uncomfortable in trying the case. *See id. See generally* Note, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, 44 U. PITT. L. REV. 673 (1983).

There does not appear to be any constitutional right to peremptory challenges. *See* Stilson v. United States, 250 U.S. 583, 586 (1919). Nevertheless, while the question has not been without dispute, courts tend to permit voir dire questions for the purpose of allowing the attorney to engage in the intelligent and informed exercise of peremptory challenges. *See, e.g.*, United States v. Dellinger, 472 F.2d 340, 368 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); People v. Williams, 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 319 (1981).

The use of peremptory challenges to exclude all blacks from a jury trying a black defendant is unconstitutional. Batson v. Kentucky, 476 U.S. 79 (1986). The Court in *Batson* stated that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the state's case against a black defendant." *Id.* at 89.

Contrary to the position taken in Swain v. Alabama, 380 U.S. 202 (1965), the *Batson* Court held that a defendant need not establish a pattern of discriminatory challenges over time but could base his claim on racially premised peremptory challenges in his own case. *Batson*, 476 U.S. at 93. To establish a prima facie case of discrimination the defendant has to show that he is a member of a cognizable racial group, and that the prosecutor had exercised peremptory challenges to remove members of defendant's race from the venire. *Id.* at 93-94. The defendant can rely on the potential for discrimination inherent in peremptory challenges. *Id.* at 94. The defendant must show that the facts and other relevant circumstances raise an inference of discrimination. *Id.* The burden then shifts to the government to provide a neutral explanation for the challenges. *Id.* Interestingly, the Court in *Batson* gave no indication that its decision would apply to situations other than race based challenges.

rapport with them.[206] To accelerate the proceedings, many judges have assumed responsibility for questioning prospective jurors.[207] Alternatively, a court may limit the time or scope of voir dire[208] or require that questions be addressed to the jurors collectively.[209] All of these restrictions impede the effectiveness of voir dire as a means

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206 *See* Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 522 (1965)(approximately 80% of voir dire spent in an attempt to indoctrinate jurors). In Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984), the voir dire had lasted over six weeks. Chief Justice Burger noted that such voir dire undermined public confidence in the courts and the legal profession. *Id.* at 510 n. 9. He also noted that in response to a question, counsel had said that it was not unknown for jury selection in California to take six months. *Id. See generally* Fried, Kaplan and Klein, *Juror Selection: An Analysis of Voir Dire* in THE JURY SYSTEM IN AMERICA: A CRITICAL OVERIEW 47 (R. Simon ed. 1975); Campbell, *The Multiple Functions of the Criminal Defense Voir Dire in Texas*, 1 AM. J. CRIM. L. 255, 271-72 (1972).

207 *See* Levit, Nelson, Ball, & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916 (1971); Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 250-53 (1981). The judicial authority for this practice is provided in the federal system by FED. R. CRIM. P. 24(a). For the view that voir dire should be left to counsel, see Gutman, *supra* note 91. A full discussion of the issue of who should conduct voir dire can be found in People v. Crowe, 8 Cal. 3d 815, 506 P.2d 193, 106 Cal. Rptr. 369 (1973).

208 *See* United States v. Nance, 502 F.2d 615, 620 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975); United States v. Delay, 500 F.2d 1360, 1366 (8th Cir. 1974); United States v. Grant, 494 F.2d 120 (2d Cir.), *cert. denied*, 419 U.S. 849 (1979). *See also* Suggs & Sales, *supra* note 207, at 251.

Some limitations on the scope of voir dire may be unconstitutional. Ham v. South Carolina, 409 U.S. 524 (1973), provides an instructive illustration. The Supreme Court held that under the circumstances, limitations on voir dire relating to juror racial bias were unconstitutional, but limitations on questions about jurors' attitudes towards persons with beards were not. The defendant, a bearded black accused of a drug offense, claimed he had been framed for his civil rights activities. The Court expressed concern about the limitless scope of voir dire if it opened the door by allowing inquiry into juror attitudes toward men with beards: "Given the traditionally broad discretion accorded to the trial judge in conducting voir dire . . . and our inability to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices, we do not believe the petitioner's constitutional rights were violated . . . ." *Id.* at 528. *See also* Turner v. Murray, 476 U.S. 28, 36 (1986)("By refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury."); Morford v. United States, 339 U.S. 258 (1950); Dennis v. United States, 339 U.S. 162 (1950)(right to inquire on voir dire about attitudes towards persons with Communist leanings). *But see* Ristaino v. Ross, 424 U.S. 589 (1976)(distinguishing *Ham* on the basis of the particular circumstances of the case, and holding that the mere fact that defendant was black and the victim was white did not require the trial judge to allow voir dire relating to a juror's racial prejudice); Rosales-Lopez v. United States, 451 U.S. 182 (1981)(no special circumstances requiring voir dire regarding prejudice towards Mexicans).

209 *See Ham*, 409 U.S. at 527; United States v. Gerald, 624 F.2d 1291, 1296 (5th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981); United States v. Bearden, 423 F.2d 805, 811 (5th Cir.), *cert. denied*, 400 U.S. 836 (1970); Suggs & Sales, *supra* note 207, at 258-59. Some courts have suggested that the better practice is to conduct individual voir dire examinations. *See, e.g.*, United States v. Starks, 515 F.2d 112, 115 (3d Cir. 1975); United States v. Bear Runner, 502 F.2d 908 (8th Cir. 1974).

of detecting partiality.[210] Lawyers may also be reluctant to alienate prospective jurors by asking probing questions or by implying anything other than full confidence in a juror's ability to decide the case fairly.[211]

Realistically, except in the most blatant cases, it is naive to expect to determine impartiality from voir dire. Trained psychiatrists require intensive observation and analysis over an extended time period to understand a patient's psyche. It seems highly unlikely that lawyers can accurately evaluate a juror from the juror's responses to perfunctory inquiries, especially since juror statements about themselves are not very reliable. Persons who are unaware of their subconscious biases will deny them when questioned.[212] Those who are aware may not admit their bias, because of either an unwillingness to confess publicly this perceived character flaw[213] or an overriding desire to serve on the jury.[214] At another extreme are those jurors who try to please an attorney by giving the responses they think the attorney wants to hear.

Voir dire as a search for impartial jurors also breaks down because lawyers look not for impartial jurors but for jurors partial to their side, whom they want to keep, and jurors partial to the opposing side, whom they want to excuse. Lawyers are thus attuned for indicia of partiality for or against their clients, but not for the character traits necessary for impartial decision making. Often attorneys will exercise peremptory challenges against intelligent and discern-

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210 *See* Babcock, *supra* note 73; Fahringer, *supra* note 7. Arguably, the greater control the court exercises over voir dire, the more likely that parties will turn to pre-trial investigation of jurors to determine their leanings. *See infra* notes 215-16 and accompanying text.

211 R. Blunk & B. Sales, *Persuasion During the Voir Dire* in PSYCHOLOGY IN THE LEGAL PROCESS 43 (B. Sales ed. 1977); Kuhn, *supra* note 7, at 244.

212 *See* People v. McCray, 57 N.Y.2d 542, 547, 443 N.E.2d 915, 918, 457 N.Y.S.2d 441, 444 (1982)(citing FRIENDLY & GOLDFARB, CRIME AND PUBLICITY 103 (1967)).

213 *See* United States v. Dellinger, 472 F.2d 340, 375 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973)("Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial."); *McCray*, 57 N.Y. 2d at 547, 443 N.E.2d at 918, 457 N.Y.S.2d at 444. Fahringer reported on a National Jury Project study in which interviews indicated that 71% of the community wherein a highly publicized murder was to be tried had fixed opinions about the defendant's guilt, yet only 15% of the jurors admitted to any predisposition during voir dire. Fahringer, *supra* note 7, at 117. He concluded that "[T]his disparity between the survey results and the uncovering of bias during the voir dire can be explained only be a lack of honesty on the jurors' part." *Id.* at 118. *See also* A. MORRILL, ANATOMY OF A TRIAL 5 (1968); Saltzburg & Powers, *supra* note 47, at 355.

214 *See* Broeder, *supra* note 206, at 510-15, 528; Fahringer, *supra* note 7, at 117-18; Saltzburg & Powers, *supra* note 47, at 355. Indeed, the most biased juror may be the juror least likely to admit bias, in order to have the opportunity to give vent to that bias in the verdict.

ing persons, preferring to try their case to jurors with more malleable minds. Similarly struck will be strong willed individuals, likely to be able to persuade others of their position, because an attorney will not want to rest the client's fate in the hands of one person. Those perceived to be on the extreme, whether ideologically, politically, or economically, are also prime candidates for being challenged peremptorily. The end result is a jury that not only may fail to reflect a true cross-section of the community, but also a jury that may not necessarily be any more impartial than a randomly selected jury.

Voir dire is often supplemented by the investigation of members of the venire prior to trial. Assuming the names are available, defense attorneys can hire commercial jury investigation services or private detectives to investigate potential jurors, or conduct such investigation themselves. Prosecutors often use the police or other state officials for like purposes.[215] These investigations pose obvious threats to juror privacy.[216] In addition, a difference in the resources between parties will result in an uneven use of such investigations, based on the resources of the parties rather than on the needs of the case. The modern trend to enlist trained social scientists to conduct demographic studies of the community in which the trial is to occur, construct psychological profiles of the ideal juror based on those studies, and rank jurors by observing their body language and paralanguistic cues during voir dire[217] exacerbates this imbalance.

B. SUBSTANTIVE PROBLEMS IN THE SEARCH FOR THE IMPARTIAL JUROR

The analysis of the methodological difficulties in identifying impartial jurors threatens to mask a more fundamental, intrinsic, and theoretical defect: there may not be such a creature as an impartial juror. The original concept of the impartial juror as one without discernible bias or private interest in the outcome of the case reflected society's relatively unsophisticated understanding of the human mind. The effects of childhood training and experiences, as well as the role of subconscious motivations, were not fully appreciated. The processes by which biases and prejudices, which form an

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215 *See generally* Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 839 (1968).

216 In Batson v. Kentucky, 476 U.S. 79, 85-86 n.6 (1986), however, the Court referred to this practice but declined to condemn it. *But see* United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980)(upholding refusal of trial judge to disclose names and addresses of jurors in order to protect their privacy).

217 *See supra* notes 9-10 and accompanying text.

integral, albeit an often denied,[218] part of human personality, come into being were not understood. These more subtle, hidden biases were to a large extent ignored in early conceptions about impartiality.

Modern psychological studies have contributed greatly to our understanding of human nature. Freud and his followers have made us aware that subconscious factors may affect everyday activity.[219] It would be remarkable if persons acting in the capacity of jurors were somehow immune from these subconscious influences.[220] Long standing opinions, values, and beliefs cannot be checked like a hat at the jury room door. The Supreme Court was probably correct when it observed in *Irvin v. Dowd*[221] that "[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."[222] Although the Court was referring to the effects of pretrial publicity, the point can be extended to all life experiences.[223] For example, Kalven and Zeisel found that one significant factor leading to disagreements between judge and jury over the verdict was the defendant's attractiveness.[224] Sympathetic defendants elicited greater juror leniency.[225] But what causes a defendant to evoke sympathy?

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218 Denial is a quite understandable phenomenon. Few persons want to admit their prejudices. Most persons would like to believe that they are not prejudiced. Justice Marshall made a similar point in *Batson* in relation to the prosecutor's use of peremptory challenges to exclude blacks from juries of black defendants. The majority had found such practices to be unconstitutional. Justice Marshall, focusing on the issue of proving the prosecutor's motive, observed that it is not so much that prosecutors will lie about their motives, but that they will deceive themselves out of an understandable human desire not to admit their subconscious prejudices. *Id.* at 1728 (Marshall, J., concurring).

219 *See* S. FREUD, THE PSYCHOTHERAPY OF EVERYDAY LIFE (A. Brill ed. 1948); C. JUNG, PSYCHOLOGY OF THE UNCONSCIOUS (1950). *See also* H. ELLENBURGER, THE DISCOVERY OF THE UNCONSCIOUS (1970); L. FREY-ROHN, FROM FREUD TO JUNG: A COMPARATIVE STUDY OF THE PSYCHOLOGY OF THE UNCONSCIOUS (1974); G. GRODDICK, EXPLORING THE UNCONSCIOUS (1950).

220 One can argue that persons may not be as affected by their biases in their capacity as jurors as they may in other situations because the judge admonishes them to act impartially. In their everyday affairs jurors do not receive such reminders, and when they do, it is not by someone with the authority of a judge.

221 366 U.S. 717 (1961).

222 *Id.* at 727.

223 *See* H. KALVEN & H. ZEISEL, *supra* note 18, at 131-32. *See generally* J. FRANK, *supra* note 7. One study reported that jurors spent slightly over one-fifth of their time discussing their own experiences. James, *Status and Competence of Jurors*, 64 AM. J. SOC. 563 (1959).

224 H. KALVEN & H. ZEISEL, *supra* note 18, at ch. 15.

225 *Id. See also* Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task*, 8 J. RES. IN PERSONALITY 45 (1974); Nemeth & Sosis, *A Simulated Jury Study: Characteristics of the Defendant and the Jurors*, 90 J. SOC. PSYCHOLOGY 221 (1973); Sigall & Ostrove, *Beautiful But Dangerous: Effects of Offender Attractiveness and Nature of the Crime on Juridic Judgment*, 31 J. PERSON-

Kalven and Zeisel did not probe the issue, but in part jurors may be responding to characteristics in a defendant which remind them of sympathetic persons with whom they have had contact. Similarly, Kalven and Zeisel discovered that jurors were less inclined to convict for an activity, such as gambling[226] or reckless driving,[227] in which they themselves had engaged.

A juror's values and life experiences may affect the juror's perception of the parties and their witnesses,[228] the issues, and the facts. A juror is in effect a witness to the events of a trial, with all the shortcomings of a witness.[229] If the mannerisms of a party, witness, or attorney remind the juror of a disfavored relative, the juror may subconsciously react negatively to that person's side.[230] Bias may seep in despite the juror's lack of personal acquaintance with any of the principals.

Jurors also tend to have general philosophical predispositions about the issues of a case. An unhappy sexual encounter, long forgotten or long remembered, may surface in a pornography or sodomy prosecution. The particular occurrence which leads to the juror's attitude may be undiscoverable. Often one's attitudes are the product of a series of minor incidents, the cumulative effect of which may be devastating. There now exists, for instance, fairly

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ALITY & SOC. PSYCHOLOGY 410 (1975). *But see* Friend & Vinson, *Leaning Over Backwards: Jurors' Response to Defendants' Attractiveness*, 24 J. COMM. 124 (1974).

226 H. KALVEN & H. ZEISEL, *supra* note 18, at 291.

227 *Id.* at 326.

228 In Turner v. Murray, 476 U.S. 28 (1986), Justice Brennan explained that:

> [S]ubconscious, as well as express, racial fears and hatred operate to deny fairness to the person despised; that is why we seek to ensure that the right to an impartial jury is a meaningful right by providing the defense with the opportunity to ask prospective jurors questions designed to expose even hidden prejudices . . . [M]ight not the . . . juror be influenced by those same prejudices in deciding whether, for example, to credit or discredit white witnesses as opposed to black witnesses . . . .

Id. at 42 (Brennan, J., concurring in part and dissenting in part).

229 *See* J. FRANK, *supra* note 7, at 153. Frank's analysis pertained to judges, but his point is equally applicable to jurors. The troublesome aspect of this observation relates to the reference to witnesses. Even if the legal system could analyze juror attitudes and excuse those jurors psychologically predisposed to one side or the other, it would be hard pressed to anticipate a juror's reaction to a witness. A mannerism of a witness may trigger an association in a juror's mind that causes the juror to be biased against the witness and the side presenting the witness. Prior to the testimony, it would be virtually impossible to predict this effect.

230 *See id.*, at ch. 10. *See also Turner*, 476 U.S. at 43 (Brennan, J., concurring in part and dissenting in part)(subconscious prejudice denies fair trials to those who are the object of the prejudice) and *supra* note 205. To avoid this difficulty, the legal system could permit jurors to see only a transcript of the testimony of a witness. Unfortunately, this cure might be worse than the disease, as jurors would be deprived of non-verbal indicia of truthfulness. *See* Miller & Boster, *Three Images of the Trial: Their Implications for Psychological Research* in PSYCHOLOGY IN THE LEGAL PROCESS, 29-34 (B. Sales ed. 1977).

convincing evidence that "authoritarian" personalities are prone to favor the state's case.[231] Identifying the totality of experiences which result in the formation of an "authoritarian" personality may be impossible.

Even the facts of a case, seemingly subject to objective ascertainment, are filtered through a juror's life history. A juror may disbelieve a factual scenario which conflicts with the juror's personal experiences.[232] Evidence may not be as much an intrinsic entity as a reflection of the personality and values of the jurors.[233] In this regard, juror diversity may enhance accurate fact finding. Since human perception tends to be selective, facts which contradict one's beliefs may be ignored. Homogeneous juries, whose members share a common background, values, and attitudes, will tend to ignore the same facts. A heterogeneous jury, where different jurors see different parts of the picture, is more likely to come up with a sense of the whole.[234] Juror diversity, thus, serves a different function with respect to fact gathering than it is commonly attributed in cross-section representation cases, in which it is seen as introducing a broad spectrum of community values into the decision making process.

The vagueness of controlling legal principles contributes to the extent personal factors have in affecting a juror's deliberations. In a criminal case, the prosecutor must establish the guilt of the accused beyond a reasonable doubt. While all jurors may unequivocally accept this standard, the amount of proof required to create a "reasonable doubt" in an individual juror's mind may be a function of the juror's personality.[235]

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231 *See* Boehm, *Mr. Prejudice, Miss Sympathy and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 WIS. L. REV. 734 (1968); Buckhout, Licker, Alexander, Gambardella, Eugenio & Kakoullis, *Discretion in Jury Selection* in SOCIAL PSYCHOLOGY AND DISCRETIONARY LAW 176 (L. Abt & I. Stuart eds 1979); Note, *Juror Bias — A Practical Screening Device and the Case for Permitting Its Use*, 64 MINN. L. REV. 987 (1980).

232 *See* Hovey v. Superior Court, 28 Cal.3d 1, 24-25, 616 P.2d 1301, 1313, 168 Cal. Rptr. 128, 140 (1980).

233 *See* Hepburn, *The Objective Reality of Evidence and the Utility of Systematic Jury Selection*, 4 LAW AND HUM. BEHAV. 89 (1980); Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 531 (1978). The fact that jurors so often disagree on the first ballot, some 69% of the time in criminal cases according to H. KALVEN AND H. ZEISEL, *supra* note 18, at 488, despite having heard the same evidence and arguments, attests to the effect of personality differences on the perception of evidence.

234 *See Hovey*, 28 Cal.3d at 23-25, 616 P.2d at 1312-13, 168 Cal. Rptr. at 139-40.

235 *See* People v. Carmichael, 198 Cal. 534, 545, 246 P. 62, 67 (1926). Again, diversity may help forge standards acceptable to all the jurors. *Hovey*, 28 Cal.3d at 24-25, 616 P.2d at 1313, 168 Cal. Rptr. at 140.

Numerous studies now suggest a correlation between juror attitudes and such variables as occupation,[236] sex,[237] race,[238] and socioeconomic status.[239] In addition, a juror's family, social, political, and personal associations may all affect the juror's decision making. Unfortunately, jurors are often unaware of these factors or the degree to which they are affected by them.

The juror's mood at the time of trial may also be relevant. For instance, a juror who has recently received a parking ticket which was thought to be undeserved may be less sympathetic to the state's case than a juror who has recently received an unexpected tax refund. These observations about opinion formation and personality dynamics may be neither original nor profound, but their relevance to the concept of the impartial juror is rarely articulated or seemingly fully appreciated. The psychological baggage that human beings bring to the jury room renders illusory any talk of a truly impartial juror.

In their writings, trial attorneys have been more willing to concede the myth of the impartial juror than have judges in their opinions. Trial manuals have long stressed the importance of jury selection,[240] on the premise that the same case, consisting of the same evidence, conducted pursuant to the same trial strategy but tried before different juries can result in different verdicts.[241] It may be going too far to say, as some have, that jury selection is the trial,[242] but it is certainly one of its most critical phases. A lawyer who can pack the jury with persons whose life experiences, values,

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236 *See, e.g.*, Broeder, *Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look*, 40 N.Y.U. L. REV. 1079 (1965); Hermann, *Occupations of Jurors as an Influence on Their Verdict*, 5 FORUM 150 (1970).

237 *See, e.g.*, Snyder, *Sex Role Differential and Juror Decisions*, 55 SOC. & SOCIAL RES. 442 (1971); Stephan, *Sex Prejudice in Jury Simulation*, 88 J. PSYCHOLOGY 305 (1974); Strodtbeck, James & Hawkins, *Social Status in Jury Deliberations*, 22 AM. SOC. REV. 713 (1957); Strodtbeck & Mann, *Sex Role Differentiations in Jury Deliberations*, 19 SOCIOMETRY 3 (1956).

238 *See, e.g.*, R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 111 (1956); Broeder, *The Negro in Court*, 1965 DUKE L.J. 19 (1965). The race of the juror, the defendant, and the victim may all be relevant.

239 *See, e.g.*, R. SIMON, *supra* note 238, at ch. 6; Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. REV. L. & SOC. CHANGE 1 (1973); Rose & Prell, *Does the Punishment Fit the Crime? A Study in Social Valuation*, 61 AM. J. SOC. 247 (1955); Strodtbeck, James & Hawkins, *supra* note 237. *See generally* Fried, Kaplan & Klein, *supra* note 206; Stephan, *Selective Characteristics of Jurors and Litigants: Their Influence on Juries' Verdicts* in THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW (R. Simon ed. 1975).

240 *See* H. BODIN, SELECTING A JURY (Trial Practice Series 1946); A. GINGER, JURY SELECTION IN CIVIL AND CRIMINAL CASES (1985); NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES (2d ed. 1987); R. WENKE, THE ART OF SELECTING A JURY (1979); Darrow, *Attorney for the Defense*, 8 ESQUIRE 35 (1936); Fahringer, *supra* note 7.

241 *See e.g.*, Hermann, *supra* note 236, at 150.

242 *See* Fahringer, *supra* note 7, at 117 ("In most cases, the defendant's fate is fixed

and personality incline them to his or her client's position has won a significant battle in the overall war. Attorneys on each side thus vie to choose jurors favorably disposed to their clients and/or witnesses, their legal position, or the attorneys themselves. The key is to identify subconscious partiality, because blatantly partial jurors will be excused for cause by the opposition. The underlying premise, however, is that all jurors have had their personalities and opinions shaped by their life experiences, and that there are no impartial jurors.

V. CONCLUSION: TOWARDS A REALISTIC APPROACH TO IMPARTIALITY

The attempt to give content to the concept of impartiality has proven to be terribly frustrating. Supreme Court decisions which purport to address various facets of impartiality are more concerned with other values. The goals of the Court's equal protection and cross-section representation decisions are primarily aimed at ensuring that all competent persons have an equal opportunity to serve on a jury and that no potential juror is discriminated against on the basis of race, sex, religion, or other characteristic not related to competency.[243] Ironic as it may seem, given that the sixth amendment speaks of an impartial jury as a safeguard for the accused, these decisions primarily benefit the state, its legal system, and the jurors themselves. Cross-section representation on a nondiscriminatory basis may result in either a partial or impartial jury. As the theory underlying jury nullification indicates, however, impartiality is not as important as the input of the full range of community values and, more cynically, the appearance of impartiality created thereby. If asked to choose between a jury of blacks, women, and Hispanics, for example, all of whom thought alike, and a jury of white Anglo-Saxon Protestant males representative of a full range of social and philosophical perspectives, the Supreme Court apparently would prefer the former. It may be reasonable to accept some loss of impartiality in favor of a gain in nondiscrimination, but this sacrifice should be the product of a conscious and acknowledged choice.

The Court may have focused on aspects of the jury other than impartiality because of the elusiveness of the latter concept. In addition to the methodological problems in identifying impartial ju-

after jury selection."); Friloux, *supra* note 3, at 220-21; *See also* J. VAN DYKE, *supra* note 31, at 139.

243 *See* Lockhart v. McCree, 476 U.S. 162, 175-77 (1986).

rors, it is virtually impossible to define impartiality in any meaningful, scientifically verifiable manner. This is in part because the term refers to qualities jurors bring to their service that cannot be measured by the results of their service, their verdicts. The difficulty of giving content to a constitutional right is obviously no excuse for failing to attempt to do so. The point, however, may be more basic: the impartial juror may not exist. All persons are influenced by their upbringing, education, knowledge, including knowledge about the case, and life experiences in ways that render impartiality an illusion. While this insight may not have been fully appreciated at the time of the coining of the term "impartial jury," social scientists are providing increasing empirical evidence of its validity.[244]

This is not to say that all juries decide cases on the basis of prejudice rather than principle. In most instances they doubtless attempt to follow judicial instructions and abide by the law. Often the evidence will be so overwhelming as to allow but one verdict. However, where there are complex facts, conflicting evidence, or discrepancies in testimony, the leeway exists to resolve doubts by yielding, albeit perhaps subconsciously, to personal sentiment.[245] Jurors most likely decide cases on an overall impressionistic basis rather than by detailed examination of pieces of evidence,[246] which should not be surprising in light of, for instance, the legal system's reluctance to allow jurors to take notes[247] or to provide them with a transcript of the testimony.[248] In reaching this impressionistic judgment, it would be surprising if personal values and life experiences did not play a role.

Even if a truly impartial jury is an illusion, the illusion may be worth preserving. Public confidence in the legal system and the

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244 Even if few attorneys to date have exploited the possible advantages to be gained from jury selection techniques based on social science studies, and then only in major cases, it can be expected that lawyers will increasingly attempt to capitalize on these studies to impanel a jury predisposed to their side.

245 Kalven and Zeisel refer to this phenomenon as the liberation hypothesis. Factual doubt liberates jurors to yield to sentiment. H. KALVEN & H. ZEISEL, *supra* note 18, at 164-67.

246 *See* W. CORNISH, *supra* note 3, at 164-66; Gross, *Adversaries, Juries and Justice*, 26 LOY. L. REV. 525, 540 (1980). *See also* Ballew v. Georgia, 435 U.S. 223, 233 (1978)(jurors must be able to remember important pieces of evidence or argument).

247 To permit jurors to take notes is within the discretion of the trial judge. *See* United States v. Palowichak, 783 F.2d 410, 413 (4th Cir. 1986); United States v. Maclean, 578 F.2d 64 (3d Cir. 1978). The discretion is often not exercised. *See generally* Petroff, *The Practice of Juror Note-Taking—Misconduct, Right or Privilege*, 18 OKLA. L. REV. 125 (1965).

248 *See* United States v. Rice, 550 F.2d 1364, 1374-75 (5th Cir.), *cert. denied*, 434 U.S. 954 (1977); United States v. Morrow, 537 F.2d 120, 148 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977).

willingness of parties, as well as the community, to accept a verdict rest in part upon the perception that the case was decided by an impartial jury. Commitment to the ideal of impartiality may also promote fairer decision making by those chosen to serve as jurors. Entrusting jurors with the decision in contests sufficiently significant to get into court itself generates a sense of responsibility. The further admonition that they be impartial challenges jurors to rise above petty prejudices in an effort to be just.

Nor is there any reason to believe judges would be any better. Like jurors, judges have biases resulting from their experiences, education, and values.[249] The jury at least has the redeeming feature of representing collective community partialities, rather than the idiosyncratic partialities of one individual. Jurors can also challenge each other during deliberation; there may be nobody to challenge the judge's biases. Unlike judges, who quickly become habituated to trials and for whom the deciding of cases may become routinized,[250] jurors bring a freshness of purpose to those few cases they hear.

Furthermore, even if jury impartiality is a mirage, the search for impartial jurors is worthwhile. Impartiality is not an absolute, but a relative concept. To recognize that no person may be totally impartial is not to deny that there are degrees of partiality. Impartiality is an ideal to which the legal system should strive. It is an aspirational, even if unattainable, goal.

Impartiality may be more a learned trait than an innate one. Good intentions on the part of jurors are a necessary but not a sufficient condition to ensure impartiality. If the legal system wants to maximize the percentage of citizens who participate in jury service, and yet expects jurors to be impartial, it must be prepared to teach them how to be impartial. Judicial admonitions and instructions are

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249 W. CORNISH, *supra* note 3, at 175. *See* FRANK, *supra* note 7.

250 *See* W. CORNISH, *supra* note 3, at 174-77. Additionally, Forsyth observes that:

> [A]lthough it may sound paradoxical, it is true that the habitual and constant exercise of such an office tends to unfit a man for its due discharge. Everyone has a mode of drawing inferences in some degree peculiar to himself. He has certain theories with respect to the motives that influence conduct. Some are of a suspicious nature, and prone to deduce unfavorable conclusions from slight circumstances. Others again err in the opposite extreme. But each is glad to resort to some general rule which in cases of doubt and difficulty he may be guided. And this is apt to tyrannize the mind when frequent opportunity is given for applying it. But in the ever-varying transactions of human life, amidst the realities stranger than fictions that occur where the springs of action are often so different from what they seem, it is very unsafe to generalize, and assume that men will act according to a theory of conduct which exists in the mind of the judge.

W. FORSYTH, *supra* note 13, at 443-44.

useful, but insufficient. "Impartiality training" may be required.[251]

Jury impartiality can, in the final analysis, best be understood by recognition of both what an impartial jury is and what it is not. It is not a jury composed of one's peers, one's friends, or one's equals in society. It is not a jury of one's neighbors, or a jury representative of the various ethnic, cultural, sexual, religious, or other identifiable factions of one's community. It is not a jury chosen at random.[252]

An impartial jury is not designed to function like a legal computer, with its goal being the resolution of a dispute consonant with general principles applicable to a class of like disputes.[253] Its focus is on the parties and facts of the individual case before it, and neither past nor future cases need influence its verdict, as they might a judge's decision.

Impartiality involves more than not having a personal or financial interest in the outcome of a case. It involves more than not knowing the parties, witnesses, participants, or anything about the facts. It involves more than just the absence of partiality, although that consideration should obviously not be ignored or minimized.

To be impartial is to assume a role which the legal system asks a juror to play. It requires that the juror bring to bear a number of distinct qualities. An impartial juror must respect the institutionally created biases in favor of an accused, including the presumption of innocence and the government's burden of proving guilt beyond a reasonable doubt. Impartiality thus subsumes an acceptance of the values inherent in the Anglo-American legal system. An impartial juror must be willing and able to set aside pre-trial personal preferences and to suspend judgment until after hearing the evidence. Impartiality thus subsumes neutrality and detachment. An impartial juror must be equally open to persuasion by opposing counsel, as well as by other jurors.[254] Impartiality thus subsumes open-mindedness and evenhandedness. An impartial juror must understand and

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251 *See supra* note 96 and accompanying text.

252 The expressed policy of the United States is for juries "selected *at random* from a fair cross section of the community . . .." 28 U.S.C. § 1861 (1982)(emphasis added). Random selection is desirable in order to avoid discrimination in juror selection. The implicit caveat, however, is that random selection is only a starting point. A randomly selected jury may be impartial but it may not be. Further screening is necessary to ensure impartiality.

253 The Supreme Court's acknowledgement in Duncan v. Louisiana, 391 U.S. 145, 156 (1968), of the jury's role in guarding against corrupt or overzealous prosecutors and compliant, biased, or eccentric judges arguably constitutes a recognition that juries have duties beyond mechanistic application of legal principles to factual disputes. *See supra* notes 50-51 and accompanying text.

254 Ideally, all jurors should also contribute to the problem solving goal of the deliberations. Such contribution, however, is not necessary to impartiality.

resolve to follow judicial instructions. Impartiality thus subsumes comprehension and commitment. An impartial juror must base his or her vote on the evidence, objectively perceived, and the logical inferences to be drawn therefrom. Impartiality thus subsumes objectivity and rationality. Finally, an impartial juror must be prepared to temper, if appropriate, technical legal rules with more universally recognized principles of justice.[255] Impartiality thus subsumes independence,[256] a lack of rigidity, and a commitment to fairness. The right to an impartial jury is the right to be tried before a group of jurors who approximate this ideal to a reasonably acceptable, even if unquantifiable, degree.[257]

255 In order for nullification to occur, the legal system must be constructed in a way that will safeguard the jury's independence. While the power to nullify may or may not be exercised in a given case, it is probably not analytically useful to describe a jury that engages in nullification in terms of impartiality. It is incorrect to classify a jury that convicts a defendant of a violation of an unjust law as not impartial, for the jury is not responsible for the law's passage and has no obligation to acquit. On the other hand, it is incorrect to label a jury that decided out of a sense of principle to acquit a defendant charged with a violation of an unjust law as not having acted in an impartial manner. *See* Montefiore, *Kolakowski* in NEUTRALITY AND IMPARTIALITY 204-07 (A. Montefiore ed. 1975).

256 The framework wherein a jury can act independently is supplied by the legal system itself. By not asking jurors to supply reasons for their verdict, by not inquiring into the process by which they reach their verdicts, and by not holding them legally accountable for their verdicts, the legal system provides an institutional framework for jurors to be independent. Those very qualities which impede discovery of whether the jury acted rationally or impartially also preserve the jury's ability to maintain its independence.

257 As indicated in the introduction, identifying the qualities that make for an impartial juror, as this Article attempts to do, is only the first step in the process. Identifying such jurors in practice is necessary if the legal system is to achieve its objective of impanelling an impartial jury.