

The Discreet Charm of the Mixed Jury: The Epistemology of Jury Selection and The Perils of Post-Modernism

*Peter J. Richards**

INTRODUCTION

One summer evening in August 1991, a Jewish driver struck two black children in the Crown Heights area of Brooklyn, New York, sparking an incident that exposed the raw underbelly of racial and ethnic tension in parts of America.¹ In the fracas that followed, an orthodox Jewish man was stabbed by a black man, Lemrick Nelson, Jr. Nelson was apprehended and tried in a New York State court for second-degree murder, among other charges. The jury acquitted Nelson of all charges in July 1992.²

Later, both Nelson and Charles Price, another black man involved in the melee, were charged in federal district court under a hate crimes statute for attacking Yankel Rosenbaum.³ This incident, com-

* J.S.D. Candidate 2003, Yale Law School, L.L. M., Yale Law School 2002.

1. *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 145 (2002). The following summary of the events in the case follows Judge Calabresi's account of the facts in the opinion. Both of the children were seriously injured in the crash; one of them later died from the wounds. In the turmoil and commotion that followed, a black man named Charles Price began to address the assembled crowd, in "angry and aggressive" words decriing the unfairness of the treatment given to the Jewish driver in comparison to the two more seriously injured black children, and shouting out statements like, "Let's get the Jews" and "Eye for an eye. No justice no peace." Members of the crowd began to shout back, "Get the Jews." The restive crowd soon transmogrified into a violent, angry mob, "an explosive mass." The group attacked a Jewish couple, assaulted another Jewish man, and to shouts of "get the Jew, kill the Jew," finally chased down a bearded Jewish man, Yankel Rosenbaum, threw him to the ground and beat him repeatedly. Police appeared, and while most of his assailants scattered, Rosenbaum allegedly grabbed one of them, Lemrick Nelson, Jr., by the shirt and held him back. After trying to get out of Rosenbaum's grasp, Nelson finally pulled out a knife, stabbed him and ran off. Rosenbaum later died from the stab wounds.

2. *Id.* at 171.

3. *Id.*

bined with the state court acquittal, generated considerable tension and political controversy over the case. The federal district judge quickly declared, in the early proceedings of the ensuing trial, that he sought to empanel "a moral jury that renders a verdict that has moral integrity."⁴ In this regard, the district judge made some unusual decisions regarding jury selection, apparently in an effort to correct an imbalance caused by the disproportionate number of blacks in comparison to Jews on the panel. For instance, the judge denied a challenge for cause by the defense with respect to a Jewish juror who had expressed serious doubts about his ability to be fair and impartial in the case. In addition, the judge filled a gap created by an excusal by removing another juror from the panel and including a Jewish juror, along with a black juror, both of whom were selected out of the order prescribed by the Federal Rules of Criminal Procedure. The defense consented to the judge's reshuffling of the jury panel. At the conclusion of the trial, both defendants were convicted.⁵ The Second Circuit reversed, citing the district court's violation of the Equal Protection Clause in its failure to carry out the jury selection process in a race-neutral manner.⁶

This case presents many elements of a persistent problem confronting courts as they attempt to maneuver between impartiality and fair cross-representation. In his zeal for seating a jury that could render a verdict with "moral integrity," the New York district judge succumbed to a temptation to which many courts have not been immune, placing such value upon a sense of balance as to go off the constitutional rails in a fruitless quest for subjective impartiality.

The first section of this Article will introduce the dynamics of the relationship between two competing visions of impartiality as it has played out in the opinions of federal and state courts, including secondary sources. I call the two approaches "modernist" and "post-modernist" and examine the arguments that have sought to broaden the scope of the fair cross-section requirement in the name of the latter view, a perspective similar to that motivating the district judge in the Crown Heights case. Part II identifies the Supreme Court's opening gestures in the direction of the "post-modernist" model. Part III carries the development forward, presenting the problems and tensions that have resulted in an uneasy and pragmatic accommodation between the older modernist model and its would-be post-modernist

4. *Id.*

5. *Id.* at 171-72.

6. *Id.* at 213.

successor. This accommodation can be seen most plainly in the interplay of opposing theoretical and practical considerations that inform the jury selection process at two discrete points in time: an early (venue) and late stage (peremptory challenges) of the process. Parts IV and V will pause to examine one particular manifestation of what I designate the post-modern vision of jury selection; one ironically with roots in an ancient historical tradition that attempts to secure more solid theoretical foundations for community participation in juries. These efforts certainly do not lack good intentions. Moreover, the post-modernist critique provides some important insights into the inadequacies of the pure modernist paradigm. Still, it is my conclusion that moving in the direction of a more overtly post-modern model would be ill founded and could ultimately prove destructive, rather than restorative, for the institution of the jury and for civil society in general.

Just as the Second Circuit ruled in the Crown Heights case, the ills that “jury-mandering” seeks to resolve—whether in the name of identity politics, a post-modern desire to “balance the biases,” or as an artificial mechanism for creating a more inclusive sense of community—the real deleterious effects of such attempts simply outweigh the putative benefits. This Article suggests in the concluding section that while further work needs to be done to identify a coherent epistemological account of juror knowledge, the judiciary’s navigation of the constitutional requirements of fairness and impartiality, along with equal protection, remains perhaps the best that can be done under the current circumstances.

I. TWO MODELS OF JUROR KNOWLEDGE

The contemporary model that the “subjective impartiality” approach seeks to supplant, the “blank slate” ideal, competes with a model in which juror competence is viewed in terms of the individual’s status as neighbor and peer, where abstract and absolute neutrality was not the goal; rather, a peculiar kind of “local knowledge” was considered more reliable and effective toward the achievement of justice.⁷ Court opinions dealing with issues regarding jury selection reflect these competing versions of epistemological perspective, alternating between models reliant upon the modernistic conception of knowing based in a form of Lockean empiricism, to a “post-modernist” acquiescence in the impossibility of true impartiality,

7. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 17–55 (1994).

which speaks profoundly about the nature of the deliberative function of juries in contemporary society. Thus, in the Lockean “modernist” model, the ideal “tabula rasa of the impartial juror” shapes the investigative, deliberative process of the trial:

The entire effort of our [trial] procedure is to secure . . . jurors who do not know and are not in a position to know anything of either [the] character [of the parties] or events [on trial] The zeal displayed in this effort to empty the minds of the jurors . . . [is a sign] that the jury, . . . like the court itself, is an impartial organ of justice.⁸

In the microcosm of the criminal trial, it is the experience of facts as they develop in the course of trial that brings the knowledge necessary to the achievement of an effective deliberative process. Ideally, the phenomena of the trial, as well as the reflective process of deliberation—comparing and evaluating the myriad sense experiences accumulated throughout the course of the trial—constitute the legitimate sources of juror knowledge. Rather than forfeit neutrality by operating on the basis of externally obtained information, the juror’s level of knowledge rises or falls according to the level of “experience” she accumulates within the microcosm of the trial.

Yet, in the pluralistic, post-modern world of the contemporary criminal jury trial, a more potent form of “tacit knowledge” is frequently recognized. Here, the limits of appropriate juror knowledge may be set according to categories assigned by identity politics. If juries are said to bring along residual cognitive baggage, it is with respect to their status as members of certain exclusive groups, according to an ideology of difference that strikes noetic barriers along lines of gender, race, ethnicity, religion, or even sexual preference.⁹ Courts have strained to secure the inclusion of members of such disparate groups to ensure a truly representational cross-section of the community.¹⁰ It is said that the unique knowledge such individuals bring due to their identification with and experience as members of such diverse groups allows for the “conscience of the community” to emerge in the course of the jury’s deliberative process.¹¹ Thus, many courts are

8. *Id.* at 17 (quoting *United States v. Parker*, 19 F. Supp. 450, 458 (D.N.J. 1937), *aff’d*, 103 F.2d 857 (3d Cir. 1939), *cert. denied*, 307 U.S. 642 (1939)) (alterations in original).

9. See CAL. CIV. PROC. CODE § 204 (West. 2003).

10. See Nancy J. King, *Racial Jurymantering: Cancer Or Cure? A Contemporary Review Of Affirmative Action In Jury Selection*, 68 N.Y.U. L. REV. 707 (1993).

11. See REID HASTIE ET AL., *INSIDE THE JURY* 9–11 (1983) (“increasing the representativeness of a jury panel, at least in a heterogeneous community, tends to increase the variety of viewpoints represented on the panel. Increasing the variety of views, thereby producing a coun-

coming to consider this kind of intuitive knowledge to be a good thing, while the older notion of local knowledge—any extrinsically derived information about the case at hand, is an evil to be avoided, and the possibility of the kind of abstract neutrality represented above as the “modernist” model—is declared to be virtually non-existent.

While the motivations behind these innovations are well intentioned (*i.e.*, inclusion of diverse, historically underrepresented groups; eradication of invidious forms of discrimination; and maximization of community participation in an important democratic function), there is a concomitant price that is infrequently addressed. The price comes indirectly, in terms of the public perception of the jury as an institution. The judicial ambivalence about the value to be placed on the types of knowledge and experience jurors bring into the courtroom, including the courts’ inconsistency in setting the asymptotes to which jurors and the process for obtaining them are to approximate, has led to a profoundly unsettling confusion that has shaken the integrity of the institution itself. Moreover, the preoccupation with sending the right signals about gender, race, and other categories of identity politics has spawned new complexities in what has been called “an increasingly Byzantine system of justice that devotes more and more of its energy to sideshows and less and less to the merits of the case.”¹²

II. A CHANGE IN FOCUS: TAYLOR’S FAIR CROSS REPRESENTATION PRINCIPLE

Culminating a long, gradual shift of direction, the Supreme Court declared Louisiana’s jury-selection system unconstitutional in *Taylor v. Louisiana*¹³ because its system excluded women from jury service. Thus, the Court decided, the presence of a fair cross-section of the community on venires, panels, or lists from which petit juries are drawn is essential to the Sixth Amendment jury trial guarantee.¹⁴ The Court isolated and fixed its attention on the intuitive knowledge that jurors bring in to the courtroom, irrespective of their ignorance of the facts of the particular case at hand; here, the way of knowing and

terbalancing of biases, is likely to affect fact finding. Individuals from a variety of backgrounds are likely to attend to and remember different aspects of the trial evidence, making the jury as a whole remember the total pattern of evidence more completely. A similar argument can be made for the generation of reasonable inferences and the evaluation of witness credibility. A variety of viewpoints expressed during deliberation may also improve the individual juror’s application of the beyond reasonable doubt standard of proof. Finally, all of these factors taken together are likely to affect the jury’s verdict.”).

12. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 645 (1991) (Scalia, J., dissenting).

13. 419 U.S. 522 (1975).

14. *Id.* at 538.

understanding that comes with sexual identity. Citing its decision in *Ballard v. United States*,¹⁵ the Court averred that “a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.”¹⁶ This seems to lead to the conclusion that any jury without a proportional mix of men and women would be missing the unique “flavor” and “distinct quality” that the Court deemed essential to the fair cross section requirement. Yet, the Court insisted that it was imposing “no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.”¹⁷ “Defendants are not entitled to a jury of any particular composition.”¹⁸ Despite its overt move toward the “post-modern” orientation, the Court seemed to be taking away with the left hand what it had just given with the right. Presumably, the Court saw that imposing its “flavor and distinctness” requirement on the composition of each particular jury panel in the nation would prove to be an unmanageable burden.

In dissent, Justice Rehnquist pointed to the dangers involved in constitutionalizing a group identity-based standard of jury selection. If the goal was to add a higher degree of flavor and distinctness into the jury mix, consistency required an acknowledgment of the fact that “doctors, lawyers, and other groups, whose frequent exemption from jury service is endorsed by the majority, also offer qualities as distinct and important as those at issue here.”¹⁹ The dissent raised the issue as to whether the court was establishing an arbitrary standard based in mere “mysticism” that conflicted with established precedents by setting the constitutional bar for jury selection in terms of group identity.

By adjusting to the terms of its flexible fair-cross-section principle, the *Taylor* Court ironically ran the risk of promoting a shrinkage of the political purposes inherent in the notion of jury service as sublimation of individual identity and interest in the service of a broader common good. It did so through its insistence on constitutionalizing the chemical breakdown of jury composition in terms of group identity. The fair-cross-section principle now functioned as the guarantor of fairness and even neutrality. The achievement of fairness was now tied, not to the objective neutrality of jurors, but, ostensibly, to the chemical balance of a given jury panel’s subjective understandings that

15. 329 U.S. 187 (1946).

16. *Taylor*, 419 U.S. at 532.

17. *Id.* at 538.

18. *Id.*

19. *Id.* at 542 (Rehnquist, J., dissenting).

would result from a proper application of the fair-cross-section principle. As the dissent noted, the focus was no longer upon securing unbiased and impartial juries, but on achieving the proper cross-sectional representation, a target which was constantly moving. "Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place."²⁰

Constitutional analysis of the jury selection process was now hitched to the time-dependent and culturally-determined function of the fair-cross-section principle. The *Taylor* Court set a pattern, a model, by which lower courts and eventually the public at large were in the future to gauge the ways in which they conceptualized the process of jury selection and decision-making. The Court's decision promoted a realignment of priorities at the level of constitutional theory and practice. To be sure, the notion of a unified, complementary jury composed of diverse elements is a common understanding of the nature and purpose of the jury. But here, the element of unity seemed to be shifting out of focus. Because the various groups differed so profoundly, it was constitutionally essential to secure a "place at the table" to all such groups in order to ensure the jury's decisions would truly reflect the consensus of the political community.

No doubt, the Court's intentions were laudable. Yet, the unanswered question ticking away beneath the surface concerned just how the institution of the jury could maintain the voice of unity at the very moment that such unity was being called into question at the deeper epistemological level. Heeding the shifting tectonic plates of historically determined conceptions of political community, the Court developed its conceptual reconfiguration of the jury as a fragmentary mix of disparate voting blocks. In his review of the cases, Professor Jeffrey Abramson has observed:

The ideal of the cross-sectional jury rejects [the] common-law view of impartial deliberation. It sees individual jurors as inevitably the bearers of the diverse perspectives and interests of their race, religion, gender, and ethnic background. Deliberations are considered impartial, therefore, when group differences are not eliminated but rather invited, embraced, and fairly represented. To eliminate potential jurors on the grounds that they will bring the biases of their group into the jury room is, we are told, to misunderstand the democratic task of the jury, which is nothing else than to represent accurately the diversity of views held in a

20. *Id.* at 537.

heterogeneous society such as the United States. If the jury is balanced to accomplish this representative task, then as a whole it will be impartial, even though no one juror is. The jury will achieve the "overall" or "diffused" impartiality that comes from balancing the biases of its members against each other.²¹

The adoption—indeed, institutionalization—of such group-based notions of juror self-understanding represents a momentous shift in the fundamental conception of jury service as a means of democratic participation. Where the average citizenry's engagement in the associational life of civil society approaches the vanishing point, where "everything private . . . becomes grist for the public mill" and "everything public . . . is privatized and played out in a psychodrama on a grand scale," the jury becomes one more staging point for what political philosopher Jean Bethke Elshtain calls a "politics of displacement."²² Because juries represent one of the few ongoing institutional venues for public, deliberative, and democratic engagement, the prospect of a co-opting of the jury institution by a "politics of displacement" is a portentous development. The "politics of displacement" is Elshtain's phrase for a situation in which "private identity takes precedence over public ends or purposes; indeed, one's private identity becomes who and what one is *in public*, and public life is about confirming that identity."²³ The civic responsibilities of jury service run the risk of becoming submerged in a wash of identity politics, where "[t]here is no broader identification with a common good beyond that of the group of which one is a member."²⁴

III. PRAGMATIC ACCOMMODATION: THE BEST THAT CAN BE DONE?

Notwithstanding the Supreme Court's protestations to the contrary, another consequence of post-modern "subjective impartiality" is that the delicate "balance of biases" is stillborn whenever the makeup of an individual jury panel fails to provide the requisite sampling of diverse groups—regardless of the proportionally representative quality of the jury pool from which it is originally selected. The logic of cross-representation drives towards fulfillment at the level of the individual jury; one of the most insistent claims in favor of the cross-representation principle proceeds from the sensible observation that

21. ABRAMSON, *supra* note 7, at 101–02 (citation omitted).

22. JEAN BETHKE ELSHTAIN, *DEMOCRACY ON TRIAL* 37–38(1995).

23. *Id.* at 52–53 (emphasis in original).

24. *Id.* at 58.

the perception of fairness and impartiality is often as important as the reality.

In an influential article published a few years before the *Taylor v. Louisiana* decision, John Hart Ely addressed the question whether there should be an affirmative requirement for states to secure proportional minority group representation on each panel according to their representation in the entire population.²⁵ He singled out the example of jury selection in discussing legislative and administrative motivation in constitutional law because he believed it to be a paradigmatic case for examining the reasons underlying the Court's hesitation to impose positive obligations on states in the name of equality:

[I]f the imposition of such an affirmative obligation is ever appropriate, it surely is appropriate in the jury selection context. The harm which accrues to a litigant from the underrepresentation of his race on the jury which sits in judgment on him is exactly the same whether the underrepresentation was achieved intentionally or unintentionally. No argument can be made, as it can in the districting situation, that a degree of racial imbalance serves a desirable political function. And a standard for policing the obligation to seek a balance readily suggests itself: the state could be obligated to make the racial composition of the panel conform as closely as possible to the most recent census figures for the area from which the jury is drawn.²⁶

The same argument could be made, of course, for achieving proportionality in terms of gender, ethnicity, national origin, or religion to name a few other prominent categories of group identity. Yet, the Court has not ventured this far in the direction of its cross-section principle in the intervening years since Ely wrote and since the *Taylor v. Louisiana* decision. Rather, it has attempted to steer a middle course with its *Batson*²⁷ test, for instance, to invalidate wrongly motivated peremptory challenges. Once members of a racial minority make it on the venire, they can only be challenged off the panel for a race-neutral reason. Attempts at "gerrymandering" the panel on the

25. John Hart Ely, *Legislative And Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205 (1970).

26. *Id.* at 1257. If this was true thirty years ago when Ely wrote, the number of such categories of group identity seem only to have multiplied since. Witness the concomitant proliferation of political interest groups that have organized and located in Washington since 1970. Kay Lehman Schlozman and John T. Tierney, *More of the Same: Washington Pressure Group Activity in a Decade of Change*, 45 JOURNAL OF POLITICS 351, 355 (1983). This is not to say that such groups did not exist prior to 1970, but it is to suggest that the awareness of their identity as political entities with distinct interests has considerably heightened.

27. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

basis of race or gender by either the prosecution or defense have been declared off limits. The *Batson* framework has resulted in a fury of critical commentary that is beyond the scope of this Article to evaluate.²⁸ What is clear is that the Court continues to refrain from going to the length of requiring proportionally representative cross-sections on each jury panel, whether in terms of race, gender, ethnicity, or any other category. It appears that the Court's reasons for refusing to follow its representative cross-section principle to its logical conclusion have not changed.

Since *Taylor*, efforts have been made at different levels to expand the scope of the fair-cross-representation principle to include other categories beyond gender and race. Thus, religion, ethnicity, social status, and sexual orientation have been discussed or implemented. Indeed, the initiatives represented by these examples point to a rather gaping flaw in the current framework. One argument for requiring racial or gender balance on jury panels arises from the fact that ours is a system that seeks to administer justice according to the facts of the individual case. At least in the serious criminal case, we do not pare the facts down to a basic formula, insert them into a computer, and determine appropriate findings and sentence according to the general formula. Rather, because we are dealing with the infinite complexities and variety of human experience, the intent is to ensure a process by which justice is meted out on a case-by-case basis.

Therefore, in the right set of facts, say, a crime committed by a West Indian black man against an African-American black woman, (the relationship between the two groups has long been marked by "[s]eparation, hostility, and conflict"²⁹) the requirement of fair-cross-representation would arguably require more than just a proportional mix of blacks and whites on the jury panel. Even an all-black panel would probably not be satisfactory. It is not just that factors such as race, gender, religion, and politics "are too numerous, and they over-

28. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35 (1992); Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 WILLAMETTE L. REV. 293 (1989); Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J. L. REFORM 981 (1996); José Felipé Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343 (1998); Andrew G. Gordon, *Note, Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV. 685 (1993); David D. Hopper, *Note, Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811 (1988).

29. THOMAS SOWELL, *ETHNIC AMERICA* 219 (1981).

lap in too many combinations, to permit perfectly proportional representation."³⁰ Rather, the example demonstrates that current lines of demarcation—by which the large-block categories of race and gender are factors that must be considered for purposes of meeting the fair-cross-section principle while more subtle, but potentially more relevant, distinctions are not—rest on boundaries that are rather rough-cut, if not downright arbitrary, given the fact that we seek to provide justice in the *individual case*.

If we are not to abandon our dedication to the principle of subjective impartiality, by which we require a jury selection process that—going beyond the objective, reasonable third-party observer—seeks to satisfy, at least in part, the subjective expectations for “impartiality” of the criminal defendant, why not seek to include a suitably proportionate number of obese persons in jury pools for trials involving an obese accused? Or the poor, *mutatis mutandis*, in the relevant case? Certainly it is not unthinkable that a more coherent rationale exists for differentiation along lines of economic status than ethnicity, gender or race.³¹

However, courts have rejected such claims,³² citing the lack of differentiating qualities that would identify, e.g., the poor as a distinct community of interest that is relatively fixed and unchanging over time. The suggestion of such new, as yet unrecognized groupings, is not meant to disparage the undeniable fact that existing “intergroup differences are real, large, and enduring—whether these groups differ racially, culturally, or in other ways.”³³ Yet, surely the West Indian/African-American case calls into question the efficacy of accepted juridical principles of distinction as applied to a single subcategory, the black race.

The expansion of the “fair-cross-section” takes on a different meaning, one tinged with irony, in the context of *Batson* peremptory challenge issues. Here, the Supreme Court has gone so far as to recognize the right of criminal defendants to bring the complaints of jurors excused peremptorily on the basis of race, even where race has no demonstrable relevance to the given case. Thus, if a purported equal protection violation occurs to *jurors* at the defendant’s trial, i.e., if

30. Ely, *supra* note 26, at 1258.

31. See Christopher A. Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1242 (1994) (arguing that “categories of race and ethnicity are analytically ‘slippery’ in a way that indicia of income . . . are not.”).

32. See *United States v. McDaniels*, 370 F. Supp. 298 (E.D. La. 1973), *aff’d sub nom. United States v. Goff*, 509 F.2d 825 (5th Cir. 1974), *cert. denied*, 423 U.S. 857 (1975).

33. THOMAS SOWELL, *THE ECONOMICS AND POLITICS OF RACE* 143 (1983).

black jurors are peremptorily and inexplicably removed from the panel that is to sit in judgment of a *white* defendant, the defendant, though a convicted murderer, is set free.³⁴ In this way, the Supreme Court has gone out of its way to provide no quarter to racial discrimination, even where there has been no demonstration of concrete harm to the defendant.

It seems obvious that the Court has moved far beyond Professor Ely's concern for minority defendants whose race is underrepresented on the jury panel. In *McCullum*, it reached "the remarkable conclusion that criminal defendants being prosecuted by the State act on behalf of their adversary when they exercise peremptory challenges during jury selection"³⁵ and that *Batson* controls the discriminatory challenges of defendants as well as prosecutors. The Court makes these remarkable innovations in the name of a juror's right not to be excluded from a petit jury panel on account of race³⁶ and protects jurors by an ironically zealous adherence to the "modernist" model of impartiality.

This is a point I will be addressing again at a later stage. The irony here is that the Court, in the name of securing a contextualized mix on jury panels, does so by treating the issue of racial discrimination as an "objective," almost doctrinaire abstraction, without apparent regard for the context of the cases in which it makes such pronouncements.

Yet, if it is important to maintain the cross-sectional flavor by impaneling representatives of groups that are in no way implicated by the facts of a given case, (*Powers*), or when it runs against the interest of the criminal defendant to do so, (*McCullum*), then, *a fortiori*, it would seem that the presence of members of groups with a more direct and pertinent connection to the issues of the case should be allowed to remain as well—e.g., the obese defendant mentioned above. Decisions like *Powers* and *McCullum*, symbolic for their gestures of intolerance of racial discrimination, seem to be gratuitous or even arbitrary, because they set limits on the parties' ability to control the make-up of the jury without regard to the impact or even the relevance of such de-

34. *Powers v. Ohio*, 499 U.S. 400 (1991).

35. *Georgia v. McCollum*, 505 U.S. 42, 62 (1992) (O'Connor, J., dissenting).

36. *Powers*, 499 U.S. at 400. Justice Thomas concurred in the result in *McCullum* because he believed the court ought to be bound by the precedent in *Edmonson* but nevertheless pronounced: "In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death. At a minimum, I think that this inversion of priorities should give us pause." *McCullum*, 505 U.S. at 62.

cisions to the actual case. Meanwhile, the interest of the defendant in having a jury that contains a true cross-sectional mix may only be addressed in very rough and potentially inadequate categories, at one stage of removal from the actual composition of the jury itself. It is hardly a surprise that such a settlement remains unsatisfactory to many.

The experience of California is illustrative. Since a California Supreme Court decision held discrimination in jury selection could not be directed against any "identifiable group distinguished on racial, religious, ethnic or similar grounds," the orbit of "cognizable groups" has steadily expanded.³⁷ For example, in a later opinion, the Court proceeded to elaborate a two-part test by which the criterion of "identifiability" could be assessed: a group's members "must share a common perspective arising from their life experience in the group[;]" moreover, "no other members of the community are capable of adequately representing the perspective of the group assertedly excluded."³⁸ Such a definition leaves it wide open.

In its articulation of the fair-cross-section requirement, the *Wheeler* Court emphasized that "the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out."³⁹ Though this language may have been no more than a flourish of gratuitous hyperbole, it still arrests the reader with the forcefulness of its "subjective impartiality" component, for the California court seems to be denying even the possibility of objectivity, resting instead on the "cancellation" effect wrought by a balance of biases. Since these cases were decided, the California legislature has included in its Code of Criminal Procedure the categories of occupation, race, color, religion, sex, national origin and economic status as classifications for which potential jurors may not be exempted from jury service. The statute has recently been amended to include the gay community.⁴⁰

The point of this history is not to call into question the wisdom of California's choices as to cognizable categories but rather to proceed along the asymptotes of Supreme Court rhetoric on the subject of impartiality and the fair-cross-section principle. The California illustration shows the logical outworkings of these concepts and the direction

37. *People v. Wheeler*, 583 P.2d 748, 760 (Cal. 1978).

38. *Rubio v. Superior Court*, 593 P.2d 595, 598 (Cal. 1979).

39. *Wheeler*, 583 P.2d at 755.

40. See CAL.CRIM.PROC. CODE 204 (West Supp. 2001), amended by Ch. 43.

they might take in the future.⁴¹ It also demonstrates the apparent arbitrariness of the barriers erected at the federal level between recognized and unrecognized groups. California seems to be showing a greater consistency in its interpretation of the fair-cross-section standard, given the emphasis on subjective impartiality that has formed the background of judicial discussions of the principle since *Taylor*.

The decisions also demonstrate the danger into which the old "modernist" notion of objective impartiality is prone to fall. The expansion of protected classifications in all directions necessitates a corresponding finding as to the impossibility of locating anyone who can be said to be neutral. Once expansion begins to take place, it becomes very difficult as a matter of logic to set principled limits on such expansion. If it is true that "the only practical way to achieve an overall impartiality"⁴² is to ensure the representation of a sufficient number of conflicting groups so that the biases represented there will cancel one another out, it remains to be asked, what (more pertinent bias could exist than that represented by the perspective of the criminal defendant himself? Thus, the group membership identified by the criminal defendant, that of, say, obese persons or the poor or those opposed to the death penalty, should by all rights have a voice on the jury panel. Does not acquiescence in a situation in which the only biases that are consciously allowed an airing during jury deliberations represent concerns and perspectives irrelevant or merely tangential to the given facts of the case at hand, in effect perpetuate the myth that the Emperor has clothes? Are we actually allowing ourselves to be satisfied with a jury that is not truly impartial at all—given our definition of impartiality—because we are allowing potentially hugely significant sources of bias to go unquestioned and unchallenged? Of course we are—given this definition of impartiality.

All of these concerns used to be addressed by means of the peremptory challenge. But the peremptory challenge has fallen on hard times of late,⁴³ with a growing number of voices calling for its outright

41. For a brief survey of the approaches taken in other states, see Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1661–64 (1985). "Only New Mexico has followed California in ruling that the state constitution prohibits the use of peremptory challenges to eliminate any cognizable group." *Id.* at 1662 (emphasis in original).

42. *Wheeler*, 583 P.2d at 755.

43. *Holland v. Illinois*, 493 U.S. 474, 484 (1990) ("If the goal of the Sixth Amendment is representation of a fair cross section of the community on the petit jury, then intentionally using peremptory challenges to exclude any identifiable group should be impermissible—which would, as we said in *Lockhart*, 'likely require the elimination of peremptory challenges.'" (citation omitted)).

abolition⁴⁴ ever since the suggestion was first given prominence in Justice Marshall's concurrence in the *Batson* case. The peremptory challenge, as Justice Scalia particularly has been wont to remind,⁴⁵ exists to give the task of sorting out the biases most relevant in the given case to those most competent of determining it, i.e., the parties, and to give the parties a degree of flexibility and control over the constitution of the jury panel through their implementation of the challenge mechanism.⁴⁶ Yet, as the number of protected categories of cognizable groups expands—and how could it help but expand, given the courts' methods and definitions for identifying such groups—the parties' ability to control for perceived biases shrivels. Fewer people can be challenged peremptorily because ever greater swathes of the population will be protected by their inclusion in cognizable groups whose continued presence is necessary to maintain the "balance of bias."

As we have seen in the peremptory challenge cases in the line of *Batson*, the discussion reverts to the "modernist" rhetoric of rationality and objectivity.⁴⁷ Such challenges for bias are met with the rebuke that they perpetuate irrational discrimination and cannot be legitimate. This occurs because the parties' apprehension of bias runs into the other "modernist" definition of impartiality—i.e., that which presumes jurors to be bloodless "blank slates"—reinvigorated to prevent the outright slide into pure subjectivity which would be precipitated by its abandonment.

Thus, the two theories of impartiality sit in an uneasy equilibrium, the fair-cross-section's "post-modernist" version operating up to the venire stage, and the "modernist" objective standard kicking in

44. See, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997).

45. See *Holland*, 493 U.S. at 474; see also *Georgia v. McCollum*, 505 U.S. 42, 70 (1992) (Justice Scalia's dissent observed that some attempt to "use the Constitution to destroy the age-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair").

46. See *Swain v. Alabama*, 380 U.S. 202 (1965) (discussing function and necessity of the peremptory challenge). See also Abbe Smith, "Nice Work if You Can Get it": "Ethical" Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523 (1998).

47. Thus, in *Powers*, the court rejected the suggestion "that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror." *Powers v. Ohio*, 499 U.S. 400, 410 (1991). The court confidently stepped into the shoes of the "wronged" juror to respond: "[w]e do not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. Race cannot be a proxy for determining juror bias or competence." *Id.* at 410.

when the time comes for peremptory challenges— *McCullum* and *Powers* squared off against *Holland*. Of course, nobody seems to be very pleased with such an arrangement. Empirical evidence that would support the “bias balance” theory of impartiality is thin on the ground and inconclusive at best.⁴⁸ The stronger current may seem to be coming from the direction of the “post-modernist” camp, as the scope of the peremptory challenge continues to dwindle. Yet, the counter-poise maintained between the two opposing theoretical strains maintains this virtue: it avoids the extremes on either side. Judging by the lines of division in the Supreme Court, it does not appear this development could be the result of a conscious, systematic jurisprudence, so much as the shifting of swinging blocks of voting power on the Court itself. To say that “the Court’s jury impartiality decisions have conformed to a structural theory, through which [they can be viewed] as a coherent body of law,”⁴⁹ may be overstating the case. Yet the balance seems to be a natural one; it basically follows the lines of the pragmatic arrangement recommended by Ely in 1970.

Ely raised another argument that continues to haunt the discussion of race, especially affirmative action: “No matter how careful the explanation that [requiring a racial cross-section on jury panels] is a ‘good use of race,’” the court will be promoting the lesson that use of race is sometimes a valid criterion of choice, a notion that stands at odds with the principle of equality of treatment under the law. Faced with two contradictory teachings, unequipped with the court’s dexterous ability to hold them simultaneously in balance, citizens would be “likely to listen to the voice they wish to hear.”⁵⁰ This notion of the law’s pedagogical function should not be underestimated. When courts rule on a complex and contentious legal, political, and moral issue, they send a message that will ultimately shape the habits and beliefs of the wider culture. Indeed, as Mary Ann Glendon states, there is a “common American propensity to equate legality with morality.”⁵¹ Many such decisions set the course and tone for further civil discourse. Although these kinds of consequences are indirect and difficult to quantify, it does not make them any less real. But, it is pre-

48. See M. Juliet Bonazzoli, Note, *Jury Selection and Bias: Debunking Invidious Stereotypes Through Science*, 18 QUINNIPIAC L. REV. 247 (1998) (“Research on the impact of juror race using both actual and mock jurors has yielded diametrically opposite findings.”) Inconsistent results are also reported for the categories of gender, age, socioeconomic status, and education. *Id.* at 263, *passim*.

49. Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173, 1244 (1995).

50. Ely, *supra* note 26, at 1259.

51. MARY ANN GLENDON, *A NATION UNDER LAWYERS* 269 (1994).

cisely the continuing validity of Ely's argument that has been questioned by more recent calls for reconsideration of the cross-representative principle on the level of the jury itself. More specifically, the ancient practice of the mixed jury has received attention as a potential model for addressing some contemporary problems of jury selection. Now we must turn our attention to this model.

IV. JURIES DE MEDIETATE LINGUAE: "ANCIENT" POST-MODERNISM

Considering the great appeal of the jury's historical pedigree, as a right that is "fundamental to the American scheme of justice,"⁵² perhaps the avenue of "post-modern" argument most informed by historical consciousness is that which leads back to the ancient concept of the jury *de medietate linguae*, an institution dating as early as eleventh-century England. It is worthwhile to examine this curious phenomenon in more detail, for it has exerted an increasing attraction in recent scholarship,⁵³ and jurisdictions throughout the country have not been immune to the draw of the affirmative action, race-conscious method for jury selection.⁵⁴ These mixed juries, or juries "of half-tongue," seem to promise a historically-informed alternative perspective on the problems posed by the potentially explosive combination of minority over-representation in the class of criminal defendants, and under-representation on jury panels. On the other hand, restoring such a model could just make things worse.

The jury *de medietate linguae* appears to have emerged in England with the influx of Jews after the transformations wrought by the invasion of William of Normandy in the second half of the eleventh century. Jewish money-lending invigorated and energized medieval economic conditions. But the population of Jews also opened the spectrum of racial tension, animosity, and violence.⁵⁵ Shortly after the accession of Richard I in 1189, anti-Semitic violence and rioting erupted throughout the kingdom, and the king responded with a charter granting Jews who sued Christians the right to a half-Jewish jury.

52. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

53. See, e.g., Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777 (1994).

54. See Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 711 (1995) (providing a sample of "affirmative-action jury-selection measures currently under consideration or already in place in American jurisdictions;" the author also argues that the Hennepin County, Minnesota use of racial quotas to select juries is constitutional.) *Id.* at 710-17.

55. LEONARD B. GLICK, *ABRAHAM'S HEIRS: JEWS AND CHRISTIANS IN MEDIEVAL EUROPE* 204-33 (1999).

Questions among Jews alone were addressed in Jewish tribunals administering the *lex Iudaica*. Despite a series of royal legal blandishments, the Jews were finally banished from England in the summer of 1290.

With the banishment of the Jews, and the loss of their commercial expertise, came a corresponding surge of foreign merchants eager to reap the benefits of English commercial and money-lending markets. The introduction of these alien mercantile interests assisted in the development of the law merchant, for "the royal courts treated English merchants as a special community with its own customs."⁵⁶ Thus, the mercantile community developed its own rules and procedures for adjudicating disputes; this law merchant featured the availability of juries *de medietate linguae* when enough of the countrymen of the defendant were available. The custom thrived with the promulgation of special statutes authorizing mixed juries, most notably the so-called Statute of the Staple of 1353 promulgated by Edward III.⁵⁷ While the Statute of the Staple made a mixed jury available in all pleas appearing before the staple court, and a statute issued the following year extended the mixed jury privilege to many other sorts of cases and in all courts, many questions remain as to the extent of its use and its precise workings.⁵⁸ Clearly, however, the mixed jury was not merely a complex machinery for overcoming language barriers or a cumbersome translation device. Rather, both merchant and non-merchant cases seem to have operated on the premise that

one should be tried by those who share in a knowledge of the practices of one's community Justice required . . . that members of a community following their own laws or customs while in England be judged, at least in part, by those of their own community and law.⁵⁹

56. ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* 248 (1966).

57. "The 1353 law . . . provided that if a plea or debate between merchants or ministers of the staple (or royally designated market towns) came before the mayor of the staple, to try the truth thereof, 'if the one party and the other be a stranger, it shall be tried by strangers, and if the one party and the other be Denizens, it shall be tried by denizens: and if the one party be denizen and the other an alien, the one half of the inquest or of the proof shall be of denizens, and the other half of aliens.'" MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* 98 (1994) [hereinafter *CONSTABLE, LAW OF THE OTHER*] (quoting 27 Edw. III. st. 2, c. 8, ss. 12-14).

58. *Id.* at 100. Constable notes a whole range of issues: "How were trials conducted? Was the jury limited to particular issues? In what language(s) did the jurors communicate with each other and with the court? And who counted as alien, who as denizen, for the purpose of claiming the privilege, and again in the composition of the jury?" *Id.*

59. *Id.* at 119-20.

The practice of juries *de medietate linguae* or *per medietatem linguae* was finally abolished by statute in the nineteenth century. Though the legislative history of the Naturalization Act of 1870, which did away with the institution, is somewhat threadbare, Constable makes a good case that the general feeling in Lords and Commons centered on objections to the ancient privilege on grounds of its implications for British identity: "it is stigmatizing ourselves as a nation very unjustly to assume that the prejudice against foreigners is such that an alien on his trial will not have a fair trial before British subjects."⁶⁰ Constable consequently sees the demise of the practice and institution of mixed juries as the foil to a corresponding ascendancy of the national centralized state.

Set in this light, the abstract notion of "color-blindness" appears as a concept of relatively recent vintage in jury selection doctrine,⁶¹ or more theoretically, a feature of emergent positivism "in which law appears as propositional knowledge of official acts of social policy," eventually smothering an earlier principle of another law, a "personal law" in which determinative emphasis was placed on "the law of the community to which a person belongs."⁶² A fuller understanding of jury selection must therefore take account of this ancient tradition of the mixed jury where "the judgment of a person must be according to the law or customs of that person's community; such judgment must be by those with knowledge of those customs or—what amounts to the same thing—by those who share in those customs and belong to the same community."⁶³ Moreover, the "essence of the practice and tradition of the mixed jury" lay "[i]n the gathering of the members of two communities jointly to speak the truth of both communities."⁶⁴

More generally, Constable's analysis purports to contrast the rich, textured diversity of a personalized practice of jury selection, arising out of distinct communities, with the abstract, propositional, official barrenness of current American formulations of the "fair cross-section" principle.⁶⁵ In fact, even formulations that express great sympathy with the mixed jury concept do so in the "statistical" terms set by positivism itself. These criticisms merit further consideration.

60. *Id.* at 145 (quoting *Hansard Parliamentary Debates*, 3d ser., vol. 199 (1870), col. 1129).

61. Ramirez, *supra* note 53, at 782. See also Alschuler, *supra* note 54, at 742–43 (arguing for color-conscious jury selection and acknowledging that color-blindness is an impossible goal that is not required by the Constitution).

62. CONSTABLE, *LAW OF THE OTHER*, *supra* note 57, at 6–7.

63. *Id.* at 25.

64. *Id.* at 27.

65. *Id.* at 28–48.

Therefore, we now turn to an examination of the interesting historical paradigm presented by the jury *de medietate linguae*.

V. THE INADEQUACY OF THE MIXED JURY MODEL

A number of things can be said about the mixed-jury approach suggested by Constable and others. First of all, it cannot be denied that such critics are pointing to real deficiencies in our way of thinking about juries, and to the underlying malaise, for which our unsatisfactory principles of jury selection represent only a symptom. As noted above, the call for some form of affirmative action in jury selection, especially with regard to the category of race, has increased in frequency in the "post-modern" era.⁶⁶ Nancy King has observed that "race-bias task forces calling for immediate reform are proliferating" as "more and more jurisdictions adopt race-conscious procedures in order to increase minority representation on juries."⁶⁷ All of this seems to come as a good faith attempt to fill a real epistemological void. It cannot be denied that the notion of abstract juror impartiality, the "tabula rasa" ideal, posits an impoverished account of juror knowledge that fails to measure up to the reality of human experience.⁶⁸ No juror walks into a courtroom as a "blank slate," stripped of any knowledge relevant to the case at hand. As Jeffrey Abramson has observed, to the extent we are able to approximate such an "ideal," to fulfill our "preference for jurors with empty minds[.]"⁶⁹ the end result of the process could hardly be given the name of justice.

Moreover, the complexity of human experience and human language makes it difficult to separate out the kinds of knowledge and experience that constitute bias from a more neutral form of knowledge that will aid in the truth-finding process. Further, it cannot be denied that a greater infusion of the principles of "local knowledge" and "community"—all of those aspects of "personal law" that Constable sees enveloped in the tradition of the jury *de medietate linguae*—could provide a salutary influence on the contemporary law and practice of jury selection. In significant measure, "the story of the mixed jury" does demonstrate "that under state law the richness and complexity of

66. For contemporary arguments for the reinstatement of mixed juries in some form, see, e.g., Lewis H. LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841 (1976); Daniel W. Van Ness, *Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases*, 28 J. MARSHALL L. REV. 1 (1994); Diane Potash, *Mandatory Inclusion of Racial Minorities on Jury Panels*, 3 BLACK L.J. 80 (1973).

67. King, *supra* note 10, at 760-61 and n. 198.

68. See Abramson, *supra* note 7, at 17-55.

69. *Id.* at 49.

persons and their law has given way to the sterility and fungibility of individuals."⁷⁰ Laments over "the loss of community" form a dominant chord in the contemporary literature of the social sciences, one that cannot be ignored.⁷¹

Nevertheless, the dichotomies that emerge from these accounts of the mixed jury tend to obscure rather than clarify. It seems that by focusing with such particularity on the personality of customary law, where in its earliest manifestations the mixed jury bubbled forth from the community apparently in its purest form, Constable almost completely neglects the countervailing force of what she would dismiss with the pejorative title of positivistic official law, but what Maitland called "a wonderful system," that of the "*ius commune*, a common law, of the universal church."⁷² Focusing on the medieval legal and social picture in England through the prism of the early jury *de medietate linguae*, "as the practical embodiment of the personal law of two communities,"⁷³ leaves a distorted picture.

Dwarfing this rather obscure and ambiguous practice, in recognition of the "otherness" of their communities, of granting mixed juries to foreigners and Jews, there had arisen a vast and complex hierarchical system rooted in the church, in the promulgation and application of whose principles England stood not only as passive recipient, but also as active formulator. Just like the *lex mercatoria*, the application of which extended to the participants of a discrete yet international community of actors, the canon law also represented a community of faith extending beyond the boundaries of England to include much of the European continent within its compass, yet a distinct community, with its particular traditions, practices, rituals, customs, and laws.⁷⁴

The prominence of the canon law system, and its huge influence in England at the time of the emergence of juries *de medietate linguae*,

70. CONSTABLE, *LAW OF THE OTHER*, *supra* note 57, at 251.

71. See, e.g., *THE ESSENTIAL CIVIL SOCIETY READER* (Don E. Eberly, ed., 2000); JOHN EHRENBERG, *CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA* (1999); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

72. FREDERICK POLLOCK, *FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 114 (Cambridge: University Press, 2nd ed. 1898).

73. MARIANNE CONSTABLE, *THE JURY DE MEDIETATE LINGUAE: CHANGING CONCEPTIONS OF LAW AND CITIZENSHIP* 15 (1989).

74. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983). Berman makes the startling assertion, for instance, that "[B]asic institutions, concepts, and values of Western legal systems have their sources in religious rituals, liturgies, and doctrines of the eleventh and twelfth centuries Western legal science is a secular theology, which often makes no sense because its theological presuppositions are no longer accepted." *Id.* at 165.

gives the lie to Constable's tidy historical dichotomy between personal law and positive law, between a law based in the richness of interpersonal community, and the propositional, official law of the state. Why indeed should there be such a cleavage, by necessity? Although the fact that the law may be considered objective and propositional does not obviate the element of personality, the practices and traditions of the church and of the canon law, what Professor Harold Berman called "the first modern Western legal system,"⁷⁵ show this to be the case.

Further, by driving a wedge between the subjective and objective dimensions of law, between personality-based and proposition-based formulations of law, commentators like Constable risk the precipitation of further divisions. The concept of neutrality and objectivity in the juror ultimately points to the reason for which the juror is called to service: the exercise of his or her individual judgment on serious questions of criminal responsibility. It is almost axiomatic that the law presupposes a link between the exercise of individual and communal responsibility it imposes upon jurors and the individual responsibility of the criminal defendant whose case they are adjudging. The law rests on the premise that "determinism (the theory that all human action is compelled) is obviously incompatible with the theory of personal responsibility that underlies the criminal law."⁷⁶ Individuals incur criminal responsibility not because they are compelled to do wrong by the environment that surrounds them, or because of their identity as members of a given race or ethnicity, but because they are free moral agents who do wrong by their own choice. It is not mere indulgence in speculative alarmism to ask: what is to become of these basic assumptions about the nature of criminal responsibility given the

75. *Id.* at 199. Berman convincingly argues that "not only legal thought but also the very structure of Western legal institutions have been removed from their spiritual foundations, and those foundations, in turn, are left devoid of the structure that once stood upon them." *Id.* at 198. This is the result of the development in which "it was eventually taken for granted that law, as a product of reason, is capable of functioning as an instrument of secular power, disconnected from ultimate values and purposes; and not only religious faith but all passionate convictions came to be considered the private affair of each individual." *Id.* The argument is that it was precisely the synthesis of rigorous "propositional" systematization of the legal order with a profound philosophical, spiritual, theological conception of the dignity of man within the framework of God's cosmological order that marked the genius of the Western legal tradition in its early flowering.

76. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 435 (1978). This notion of individual responsibility, lying at the heart of modern Anglo-American criminal jurisprudence, similarly forms the backbone of democratic principles of self-government. JAMES Q. WILSON, *MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM?* 73 [hereinafter WILSON, *MORAL JUDGMENT*] (1997).

changing nature of our conception of the volitional responsibility of jurors?

These lay adjudicators receive the call to step in and exercise critical judgment on the criminal responsibility of real defendants. If it is necessary now to acknowledge that it is psychologically impossible for jurors to suspend their own prejudices and biases in order to make an objective assessment of the facts of the case, if their ultimate decisions are so rigidly determined by the idiosyncrasies of their "community," if "thinking black," for instance, requires one result, and "thinking Hispanic" requires a different outcome, then how is it possible to limit this deterministic view of human choice to the decisions made by jurors? If it becomes necessary to build a jury selection system around the proposition that the pervasive influence of gender, race, ethnicity, creed or sexual orientation so shapes our thinking as to make objective decision-making on the part of jurors an impossibility, or a mere illusion, making the goal one of "balancing the biases," the logic of that premise cannot help but assist in undermining the integrity of our most basic notions of criminal responsibility.⁷⁷

Shrinking the categories of human responsibility works from both ends. The determinism that compels the "sad choices" made by criminal defendants promotes a conception of determinism in the decision-making processes of jurors and *vice versa*. The erosion of human responsibility works simultaneously on two fronts: the "evidence" provided in one theater assists to "prove" assertions made at the other. This discussion should also call into question the cohesiveness of the claim of "propositional law's" reduction and degradation of "persons" to a "sterility and fungibility of individuals." According to the

77. WILSON, MORAL JUDGMENT, *supra* 76, *passim*. For a popular account of the argument containing a glossary listing of syndromes, defenses and excuses that have been recently used by criminal defendants, see ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE* (1994). See also SUSAN ESTRICH, *GETTING AWAY WITH MURDER* (1998). For a recent, notorious example, see the arguments advanced against the criminal responsibility of the homicidal mother in Texas, Andrea Yates. Over the period during which this article was written, Yates was tried and convicted in Houston for the murder of her five children, having methodically drowned them one by one in the bathtub at home. The defendant pleaded not guilty by reason of insanity, citing her history of "post-partum psychosis." Despite the sympathy her case received from various corners around the nation, especially among advocates for the mentally ill, her jury of eight women and four men returned the guilty verdict within less than four hours and a sentence to life imprisonment in thirty-five minutes. Jim Yardley, *Mother Who Drowned 5 Children In Tub Avoids a Death Sentence*, N.Y. TIMES, March 16, 2002, at A1. See also Anne Taylor Fleming, *Crime and Motherhood: Maternal Madness*, N.Y. TIMES, March 17, 2002, at D3; Lynne Marie Kohm and Thomas Scott Liverman, *Prom Mom Killers: The Impact of Blame Shift and Distorted Statistics on Punishment for Neonaticide*, 9 WM. & MARY J. WOMEN & L. 43 (2002) (discussing the Yates case and other related trials evidencing an acceleration of the phenomenon of "blame-shifting").

“group-think” presumption, members of distinct communities or groups all think basically the same way, making it necessary in cases that require it for members of two communities to come together jointly “to speak the truth of both communities.” This is arguably just as reductionistic and harmful to the integrity of “persons.” It merely homogenizes people at a different level of abstraction.⁷⁸

Moreover, the analysis seems to ignore the possibility that the historical or contemporary rejection of juries *de medietate linguae* might not necessarily proceed from intransigent prejudice, or systemic bias, from gross and callous ignorance, or from a soul-destroying, atomistic positivism, but rather from the perception that real dangers could inhere in institutionalizing group differences. It is certainly true that “[t]he elimination of racial discrimination in our system of criminal justice is not a constitutional goal that should lightly be set aside.”⁷⁹

Still, the ameliorative powers of the law extend only so far. If in order to eradicate, or at least maximally reduce, all invidious bias or prejudicial taint from the operation of a judicial system, it becomes necessary to build racial and other distinctions into the fixed structural features of the system,⁸⁰ then it is hardly unreasonable to consider the possibility that the price could well be too high or that the means may be incompatible with the purposes set for them. Jeffrey Abramson re-

78. This seems to be the burden of Justice Thomas' warnings in the (not unrelated) voting equality decision of *Holder v. Hall*:

The Court[.] . . . accept[s] the one underlying premise that must inform every minority vote dilution claim: the assumption that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well [W]e have given credence to the view that race defines political interest. We have acted on the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own ‘minority preferred’ representatives holding seats in elected bodies if they are to be considered represented at all We have involved the federal courts, and indeed the Nation [in] an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of ‘political apartheid.’ . . . The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution.

512 U.S. 874, 903–06 (1994) (Thomas, J., concurring).

79. *Holland v. Illinois*, 493 U.S. 474, 503–04 (1990) (Marshall, J., dissenting). Justice Scalia retorted that the dissent had rolled out “the ultimate weapon, the accusation of insensitivity to racial discrimination—which will lose its intimidating effect if it continues to be fired so randomly.” *Id.* at 486. After all, *Holland*, the defendant in the case at hand, was “not a black man, but a convicted white rapist who seeks to use the striking of blacks from his jury to overturn his conviction.” *Id.*

80. Sheri Lynn Johnson, for example, has proposed that black, Hispanic, and Native American defendants should be given the right to have three “racially similar” jurors on a panel of twelve. Johnson, *supra* note 41, at 1695–1700.

cently wrote about the district judge's "jurymandering" in the Crown Heights trial:

Race and religion do matter, and the quality of deliberation is enriched when people from different walks of life serve together on juries. But when judges select jurors as if they are there simply to deliver the Jewish vote or the African-American vote, the noble ideal of representative juries collapses into a vulgar invitation for jurors to be loyal to their own groups, and ultimately undermines all confidence in the jury system.⁸¹

Indeed, it could result in an upending of the institution of the jury itself, a result that would be contrary to the stated purposes of the fair-cross-section ideal. With the current arrangement in which traditional minority groups are subject to under-representation in jury pools, and on juries more specifically, the statistical disparity has led to claims of systemic, inbuilt discrimination.⁸² The assumption, of course, is "that gross disparities would not exist in the absence of unequal treatment."⁸³ Yet "international studies have repeatedly shown gross intergroup disparities to be commonplace all over the world, whether in alcohol consumption, fertility rates, educational performance, or innumerable other variables."⁸⁴ In some cases, such discrepancies may or may not be attributable to discrimination in some form. Yet, in many other cases the disparity simply cannot be explained as the product of discrimination.⁸⁵

Notwithstanding the *non sequitur*, academic proposals continue to issue forth with increasing regularity, designed with the object of rectifying alleged systematic discriminatory disparities. In the context of New Zealand, where aboriginal Maoris are underrepresented on juries and over represented in the class of criminal defendants, it has been argued that Maori participation in the jury process is illegitimate, because this "western" notion of adjudication runs contrary to Maori no-

81. Jeffrey Abramson, "What Makes a Jury Fair?" N.Y. TIMES, January 9, 2002, at A23.

82. HIROSHI FUKURAI ET AL., RACE AND THE JURY (1993).

83. THOMAS SOWELL, THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY 35 (1995).

84. *Id.* (footnotes omitted).

85. Sowell provides an illuminating selected list of disparities "in which it is virtually impossible to claim that the statistical differences in question are due to discrimination." *Id.* Thus, "[a] 1985 study in the United States showed that the proportion of Asian American students who scored over 700 on the mathematics portion of the Scholastic Aptitude Test (SAT) was more than double the proportion among whites." *Id.* at 36.

tions of justice and criminal responsibility.⁸⁶ Such an outcome seems unlikely in the American context, but not unthinkable.⁸⁷

The Maori example highlights the question: why should acknowledgement of difference, "otherness," enhance interest in the perpetual thriving of the jury system itself? What do such "communities" have at stake in its flourishing? Perhaps the jury system does need to go, but this is a separate question altogether. The mere fact that the jury trial or analogous institutions are weaker, or even non-existent, in the traditions of some minority "communities" does not necessarily amount to an argument for abolition. Furthermore, the exaltation of "otherness" does not necessarily issue in greater unity or a more stable institutional integrity. The celebration of diversity may just end in further fragmentation,⁸⁸ but it does not begin to point a feasible way to a system for which greater "buy-in" could be obtained. Indeed, given the fact that "it is difficult to find any such [statistically] even representation in any country or in any period of history," the only way to ensure parity of representation would be to require "quotas or preferences to achieve an artificial statistical 'balance.'"⁸⁹ Surely, political community remains an important and worthwhile goal, despite the centrifugal tensions of pluralism.⁹⁰ Yet, for the reasons we have been examining, the artificially contrived "community," achieved by means of bureaucratic manipulation of the jury selection process, would surely fail to do the work its promoters set for it to do.

Ultimately, the juries *de medietate linguae* were an accommodation to ensure that aliens would be treated fairly. Alienage seems to

86. Neil Cameron et al., *The New Zealand Jury: Towards Reform*, in *WORLD JURY SYSTEMS* 193–97 (Neil Vidmar, ed., 2000). Thus,

[t]he institution of the jury is itself alien to Maori culture and Maori law. In its modern form, at least, it is a product of centralized, professional, and primarily retributive justice systems. If the demand by Maori for all-Maori juries is to make any sense, it can only do so within the context of a discrete Maori justice system—shaped and informed by Maori values and, perhaps, those European institutions that Maori regard as appropriate or useful. It remains unclear whether the jury is likely to be one of those.

Id. at 197 (footnote omitted).

87. See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 680 (1995) (arguing that the "goal [behind race-based jury nullification] is the subversion of American criminal justice.").

88. Then again, this might well be a tacit post-modernist goal, for characteristic of the post-modernist world view is its propensity to disorient, to attack the very possibility of coherence and unity. For the post-modernist mind, reality itself is "unordered and ultimately unknowable." STEVEN BEST AND DOUGLAS KELLNER, *POSTMODERN THEORY: CRITICAL INTERROGATIONS* 9 and *passim* (1991). See also *supra* note 76.

89. THOMAS SOWELL, *THE QUEST FOR COSMIC JUSTICE* 36 (1999).

90. See, e.g., ELSHTAIN, *supra* note 22 at 30–31.

have been determined by nation of birth, so it would be very difficult indeed, if not impossible, to go from being an outsider to an insider. Certainly, it would be counter-productive to recognize a principle that stipulates only certain types of Americans are recognized as such when it comes to putting together a jury, and that other groups must be provided for as a separate, special class.⁹¹ For all its good intentions, this benign, remedial form of segregation could easily end up backfiring and create deeper, more irreparable divisions. Good intentions are not enough.

VI. CONCLUSION

This Article discussed two alternate and competing notions of jury selection and of juror knowledge, arguing that each of them is incomplete and inadequate. The problem is that both conceptions fail to provide a complete account of juror identity and human epistemology. Jurors are neither the abstracted, context-free blank slates of the modernist ideal, nor are they the simple ciphers of post-modern identity politics. Left with an insufficient theoretical compass, most federal and state courts have attempted to steer a middle course, trying to avoid the extremes, and perhaps creating some awkward inconsistencies along the way. *Powers* and *McCullum* come to mind as cases in which the Supreme Court has introduced a potentially dangerous distortion into the constitutional framework; namely, by elevating the rights of jurors to the same level of vigorous protection accorded to criminal defendants under the Sixth Amendment right to a fair and impartial jury. However, as the foregoing historical excursion demonstrates, the Supreme Court's unsteady interpolation between the requirements imposed by equal protection and by the Sixth Amendment jury right finally achieves balance, an equilibrium that seems to be the best available in light of the current social and political climate. This balance prevails, for instance, in the Second Circuit's decision in the Crown Heights case where the court refused to succumb to the alluring promise of "substantive justice" provided by racialist gerrymandering.

91. See Justice O'Connor's warning about the prospect of racial "balkanization" in *Shaw v. Reno*, 509 U.S. 630, 657 (1993):

Racial classifications of any sort pose the risk of lasting harm to our society Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.

Id.

dering in jury selection.⁹² It is a pragmatic accommodation that had been roughly worked out in its current form well before the Court made its pronouncements in *Taylor*. This suggests that the settlement upon which the Court has landed, maintaining the cross-sectional requirement at the level of the jury pool, only as to limited categories of race, gender and ethnicity, is more than just an artificial, ad hoc arrangement.⁹³ Though the Court's approach remains open to the temptations posed by post-modernist, or subjectivist "politics of displacement,"⁹⁴ it starts from a presumption of impartiality in the potential juror, rather than on the inevitability of built-in bias. It gives recognition to the importance of perspective, while, in the end, refusing to surrender to the siren calls of group identity politics.⁹⁵

That such a patchwork arrangement fails to serve as the bonding agent for a more robust form of civil society should be expected. Thus, it would be naive to presume that, if it were possible to find the right formula for making juries more "truly democratic," then a more just system would be the inevitable outcome. Democratic institutions are, after all, neutral tools and means rather than ends. The warning of T.S. Eliot remains pertinent: "[t]he term 'democracy' . . . does not contain enough positive content to stand alone against the forces that you dislike—it can easily be transformed by them."⁹⁶

In Luis Buñuel's cinematic satire, *Le Charme discret de la bourgeoisie* (1972), a series of dream sequences unfolds in which a gathering of socialites make repeatedly futile efforts to dine together. As the film progresses, the group's attempt is thwarted at each iteration, under increasingly bizarre circumstances. In the words of one post-modern legal theorist, "[d]erision is the companion of disillusion."⁹⁷ Buñuel's film skewers the emptiness and futility of his privileged

92. *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002), cert. denied, 123 S. Ct. 145 (2002). Hopefully the court would have reached the same result even if the proportional mix of races in the jury pool had been the reverse of what it was in this case.

93. See Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173 (1995) (concluding, "it is no small measure of the Court's work in this area that its impartiality decisions, if not all of its statements about impartiality doctrine, reveal a logical and conceptual unity").

94. For one example of the argument for "multicultural empowerment" in the context of jury selection, see, Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995).

95. Thus, James Q. Wilson articulates this balance, "For reasons of justice and deterrence, the law must draw a clear line, but that line ought to reflect the most widely shared moral sentiments of the people." WILSON, *MORAL JUDGMENT*, supra note 76, at 111.

96. T.S. ELIOT, *The Idea of a Christian Society*, in CHRISTIANITY AND CULTURE 50 (1939).

97. Anthony Carty, *Introduction: Post-Modern Law*, in POST-MODERN LAW: ENLIGHTENMENT, REVOLUTION AND THE DEATH OF MAN 3 (Anthony Carty ed., 1990).

bourgeois protagonists. Reference to the work in the title to this Article is deliberately ironic. Presumably the purposive and well-intentioned planners of academia and government could not possibly fall prey to the kind of fatuous vanity of Buñuel's bourgeois socialites. Yet, as earnest academics, lawyers, and bureaucrats search to achieve greater degrees of fairness and justice at the level of the jury trial by finessing a balance among the various predicted, conflicting biases of any given jury composition, the exercise begins to suggest the contours of a similar kind of nightmarish exercise in windmill tilting. Even accepting the premises of post-modern epistemology, the despair of objective judgment at the individual level is not displaced by multiplying the range of shortsighted, biased perspectives. If it really is impossible for individual jurors to rise above their various biases to provide objective rational judgment in any given case, then multiplication of such biased perspectives around the table of deliberation will do little to ensure a harmonious and just result. Indeed, given the post-modern presupposition of the "incommensurability" of the "voices" represented by disparate "communities," it is just as likely to produce greater injustices.

Certainly, the very notion of justice, albeit flawed and imperfect, suffers erosion alongside the corresponding diminution of agency and responsibility. It is not necessary to embrace the notion of the modernist blank slate model to see that the required measure of objectivity is possible, even if sometimes elusive. It defaces the dignity of human beings, of whatever race, ethnicity, or gender, to presume human decision-making is so rigidly determined by such categories as to render all hope of rising above the mire of subjective and myopic bias an empty illusion. In the post-modern jury selection sequences adumbrated here, measures ostensibly designed to bring about fairness in the individual case expand and multiply to embrace ever more extravagant gestures in response to the protean demands of an ultimately insatiable "subjective impartiality." Finally, there is no principled way of cabin-ing such a concept within juridically manageable limits.⁹⁸ The jury institution simply cannot bear the weight that is being placed upon it by reformers seeking to restore civil society in the name of a post-

98. See WILSON, MORAL JUDGMENT, *supra* note 76, at 111 (concluding, "[a]nd why stop with race? If race shapes our identity, so also does sex, age, wealth, and political ideology. This implies that men cannot judge women, adults cannot judge children, the rich cannot judge the poor, and liberals cannot judge conservatives For [the law] to offer more, [than 'the promise of fair treatment based on individual accountability'] whether by excusing accountability for some people defined by their group membership or by admitting group-based stories of their oppression, means the end of the law.").

modernist rehabilitation of “communities of otherness.” The spectacle of “otherness” can just as easily function as a fissiparous engine of destruction. Indeed, such destruction (*viz.*, deconstruction) and subversion have been the explicit goals of the post-modernist project.⁹⁹ In the absence of “casual public trust,” Christopher Lasch has observed, “the everyday maintenance of life has to be turned over to professional bureaucrats.”¹⁰⁰ Yet, a reformation of civil society that is imposed from the top down, by the bureaucratic manipulation of governmental institutions, will be stillborn. Surely, “the atrophy of informal controls leads irresistibly to the expansion of bureaucratic controls,” a development which “loads the organizational sector with burdens it cannot support.”¹⁰¹

It would definitely help to have a more coherent theoretical basis for the epistemology of juror selection, and a better theoretical understanding and appreciation of the kinds of knowledge that jurors draw upon the courtroom. Neither the “blank slate” model nor the “balance the bias” paradigm furnishes a complete, satisfactory account. To provide such a reckoning would take the present Article far beyond its intended limits. For now, it is clear that adjustments to the jury system cannot be expected to repair the damage wrought by racial, ethnic or other types of division. The sooner this is recognized, acknowledged, and accepted, the better off we all will be.

99. See, e.g., *supra* note 76.

100. CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* 95, 99 (1995).

101. *Id.*