

Second-Order Diversity Revisited

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SECOND-ORDER DIVERSITY REVISITED

JEFFREY ABRAMSON*

TABLE OF CONTENTS

INTRODUCTION	741
I. FIRST-ORDER VERSUS SECOND-ORDER DIVERSITY	742
II. THE NEGATIVE CASE AGAINST FIRST-ORDER DIVERSITY	749
A. <i>Predeliberation</i>	750
B. <i>Deliberation</i>	755
1. <i>Faction Size as an Obstacle to Deliberation</i>	757
2. <i>Diversity as an Aid to Deliberation</i>	761
a. <i>Actual Jury Deliberations</i>	763
b. <i>Mock Jury Deliberations</i>	765
3. <i>Diversity and Legitimacy</i>	768
III. THE POSITIVE CASE FOR SECOND-ORDER DIVERSITY	772
A. <i>Benefits to Jurors</i>	772
B. <i>The Advantages of Aggregation</i>	775
C. <i>Bargaining in the Shadow of Jury Verdicts</i>	776
D. <i>Cross-Over Participatory Experiences as a Form of Civic Education</i>	777
E. <i>Impartiality</i>	781
IV. CIVIL JURIES: A VARIATION ON VARIATION?	783

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A. Scott v. Harris: *Diverse Attitudes Toward the Police* . . . 788
B. *Mass Torts: Hemophiliacs and HIV* 793
CONCLUSION 798

INTRODUCTION

Counterintuitive claims, by their very nature, are spectacular high-wire acts. They seek to defend the implausible, the opposite of what our intuitions treat as obvious. To prove a counterintuitive hypothesis is profoundly unsettling to received wisdom. We come to see the familiar in a new light.

Heather Gerken's 2005 article, *Second-Order Diversity*, deftly accomplished just such a counterintuition about the jury.¹ Gerken began with what most persons would consider a troubling feature of both the civil and criminal jury systems—that different juries, composed in different ways, reach different verdicts in cases that seem similar.² Ideally, we want like cases treated alike; we do not want verdicts to sway with the luck of the draw as to who is on the jury. We value coherence and consistency, predictability and uniformity as necessary to the rule of law.³ But Gerken turned accepted wisdom on its head and set out to show that variation among juries was, within limits, a virtue, not a vice of the jury system—indeed the crucial virtue that makes juries a check on the inegalitarian tendencies of majority rule in a democracy.⁴ Variation in the racial composition of juries from one case to the next, for instance, accomplishes for law what variation in the racial composition

1. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005).

2. For criticisms of inconsistency in civil jury verdicts, see David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1168 (2000) (“Unpredictability is a serious problem for jury verdicts, partly because it ensures that the similarly situated will often not be treated similarly.”); see also Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2352, 2391 (1990) (explaining how critics of the tort jury lament a “decentralized” system that “undercompensates some victims while overcompensating others”). For parallel criticisms of inconsistent criminal verdicts, see Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1049 (2012) (explaining that the application of criminal justice in Florida is “highly uneven,” with even small changes in the composition of the jury having a large impact on conviction rates).

3. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring) (“[T]he uniform general treatment of similarly situated persons ... is the essence of law itself.”).

4. Gerken, *supra* note 1, at 1102 (“[D]emocracy sometimes benefits from having decisionmaking bodies that ... encompass a wide range of compositions.”); *id.* at 1166 (“[W]e ought to value the fact that different juries will render different verdicts in similar cases.”). *But cf. id.* at 1105 (acknowledging the costs of variation and loss of uniformity).

of districts does for elections: the latter speaks to the democratic fairness of empowering minorities to elect their preferred candidate in some districts and the former, by analogy, to achieving their preferred verdict in some cases.

In this Article, I review both the empirical literature and the democratic philosophy that led Gerken to her embrace of the benefits of variation. I will argue that her counterintuition fails in the end to keep the jury's political and legal functions from flying apart. And I will defend precisely what Gerken rejects—the contribution that diversity on individual juries makes to closing the gap on bodies that are expected both to represent the community and yet do impartial justice.

I. FIRST-ORDER VERSUS SECOND-ORDER DIVERSITY

Gerken's argument begins by distinguishing two concepts of diversity. First-order diversity is a norm or ideal that seeks to make each jury a mirror or microcosm of the community from which it is drawn. In other words, the goal is diversity or representation *within* each jury.⁵ By contrast, second-order diversity seeks “variation *among* decisionmaking bodies.”⁶ What is crucial is not that any single jury be representative of the community but that, in the aggregate, the very differences in jury composition from case to case rotate power and participation among the full, heterogeneous range of groups in the population.

The distinction between first- and second-order diversity is both a descriptive and a normative claim. Descriptively, random selection is not a procedure designed to guarantee diversity within particular juries.⁷ To take Gerken's example, in a state with a 35% African-American and 65% white population, a system designed to achieve first-order diversity would mean that three to four persons on every jury would be African-American. By contrast, random selection will generate a series of results along a spectrum. About a third of juries

5. First-order diversity is “the hope that democratic bodies will someday mirror the polity.” *Id.* at 1102. In this Article, I will follow Gerken's terminology, but, strictly speaking, a jury that is a mirror of the community need not be diverse. In a homogeneous county, a homogeneous jury might very well be representative of the population.

6. *Id.* at 1102 (emphasis added).

7. *Id.* at 1112.

will have five to six African-Americans. Roughly 15%, however, will have two or fewer African-Americans, whereas about another 8% will have seven or more. Thus, what random selection produces is second-order diversity—a variation in jury membership from one case to another, with different groups predominating at different times.⁸

Whereas second-order diversity is a theory that explains the pattern ideally made by random selection, a theory of first-order diversity has less descriptive power. The constitutional and statutory principles governing jury selection only require that the *initial* pool of persons from which potential jurors are randomly drawn be a fair cross section of the community. The Supreme Court has emphatically rejected arguments that particular juries must achieve or maintain mirror-image representation.⁹ Indeed, equal protection jurisprudence prohibits courts from using race-conscious methods to achieve cross-sectional jury representation.¹⁰ The fact that the law does not apply the norm of mirror-image representation to individual juries casts doubt, for Gerken, on whether first-order diversity is really the theory implicit in existing selection methods.

Several strategies could potentially close this gap between theory and practice during jury selection. One approach is to double down

8. *Id.* at 1112-13. Gerken acknowledges that these numbers only hold under ideal conditions. *Id.* at 1112 n.17. In practice, many jurisdictions empanel individual juries far less representative than random selection should achieve. For instance, in Gerken's hypothetical example, nearly half (44.2%) of juries should have three or four African-American members. *Id.* at 1113 tbl.1. But this expectation is defeated when practical problems keep random selection from working as intended. *See, e.g.*, Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 916-54 (studying federal pools where initial sources lists are not representative of the community and where problems with summoning jurors further dilutes representation on actual juries). It is important to keep in mind that, in actual jury pools, much of the departure from first-order diversity is avoidable and *not* the inevitable statistical consequence of relying on random selection. *Id.*

9. *See, e.g.*, *Holland v. Illinois*, 493 U.S. 474, 478-84 (1990); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

10. *See, e.g.*, *United States v. Ovalle*, 136 F.3d 1092, 1106 (6th Cir. 1998) (disapproving of a trial judge's attempt to achieve representativeness on the qualified jury list by randomly striking a specified number of "white or other" potential jurors from the list). Equal protection also prohibits litigants from using peremptory challenges to alter a jury's racial composition. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991) ("[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution.").

on first-order diversity as the right theory and argue for extending the fair cross section requirement to actual juries. That extension can be rigid, as it is when scholars argue that quotas are necessary.¹¹ Or it can be more relaxed, as it is with proposals to give litigants some choice in “affirmatively select[ing] a jury”¹² or with schemes of weighted or stratified selection that only seek to solve predictable problems that keep random selection from working as intended.¹³ These remedies share a theoretical commitment to achieving demographic diversity *within* the jury even though differing considerably on how much they concede to practical difficulties in achieving the goal.¹⁴

11. See, e.g., JON ELSTER, SECURITIES AGAINST MISRULE: JURIES, ASSEMBLIES, ELECTIONS 279 (2013) (noting without approving that juries in Norway must have approximately equal numbers of men and women); Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 707-11 (1995) (expressing approval of the proposal to use quotas to fill some seats on the Hennepin County, Minnesota grand jury); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 106 (1993) (citing to advocates of quotas); Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970).

12. Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 171-76 (suggesting that parties be given a fixed number of choices as to who is seated on the final jury); see also William Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DEPAUL L. REV. 1497, 1534-35 (2004) (partly advocating the right to select one or more peers on a capital jury).

13. See, e.g., *United States v. Green*, 389 F. Supp. 2d 29, 69-79 (D. Mass.) (weighting the mailing of summonses so as to oversample poor and minority zip codes where rates of deliverable mail or responses to summonses are historically low), *rev'd on other grounds, sub nom. In re United States*, 426 F.3d 1 (1st Cir. 2005); see also Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Jury Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1053-58 (2003) (suggesting methods of stratified or weighted summonsing).

14. Quotas run into the practical problem that there are too many dimensions to diversity to be able to come up with an appropriate measurement that could guide what groups to include and which ones to exclude. ELSTER, *supra* note 11, at 280. For this reason, even many proponents of first-order diversity reject quotas. See King, *supra* note 11, at 106 (disapproving of attempts to “statistically engineer[] racial heterogeneity” and conceding that a gap between theory and practice will always remain); Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 703 (2002). To try to close that gap entirely might have more costs than benefits to the legitimacy of jury verdicts, if seated jurors understand themselves as there to represent their group identity. See JEFFREY ABRAMSON, WE, THE JURY 140 (1994); Ramirez, *supra* note 12, at 167-69; see also Marder, *supra* at 703 (“For courts to decide which characteristics should be represented would suggest jury manipulation.”).

The other strategy for healing the breach between theory and practice—Gerken’s strategy—is to jettison the very ideal of balanced demographic representation on individual juries. Even if we were to ever more perfectly practice the theory of descriptive representation,¹⁵ we would still, according to Gerken, reach the democratic dead-end to which such “integrationist” norms lead. To be sure, cross-sectional juries bring minorities to the table and grant them the influence that comes from being present in small numbers. But influence is one thing—power is another; and Gerken normatively prefers second-order diversity to first-order diversity precisely because the former statistically leads to jury trials in which minorities are in control as the dominant numerical faction.¹⁶

Second-order diversity “turns the tables” on the majority by accomplishing for the jury system what the creation of majority-minority districts does for elections: space for minorities to “exert the type of power usually reserved for the majority.”¹⁷ Gerken refers to such results as “disaggregated democracy.”¹⁸ Instead of a model of democracy in which we aggregate individual preferences in ways that repeatedly empower the majority, disaggregated democracy creates topsy-turvy situations “where members of the majority experience what it is like to be deprived of the comfort—and power—associated with their majority status.”¹⁹

One might pause here—Gerken does pause—to consider whether the unanimous verdict requirement gives minorities more than idle presence on cross-sectional juries. After all, the rule would seem to empower even one or two jurors to hold out against the larger

15. See Gerken, *supra* note 1, at 1116 n.32, for a distinction between hesitations about first-order diversity that are based on merely “practical” as opposed to normative difficulties.

16. In Gerken’s hypothetical jurisdiction that is 35% African-American and 65% white, random selection in theory will lead to 8.3% of the juries being majority African-American. *Id.* at 1113 tbl.1.

17. *Id.* at 1104, 1126 (explaining that second-order diversity gives minorities power to decide on a few juries, whereas first-order diversity gives them weak influence on many juries).

18. *Id.* at 1108-09.

19. *Id.* at 1104. Gerken mentions a number of benefits to second-order diversity, but there are two major ones: (1) the power to control the verdict decision and (2) to interpret the law according to one’s norms. *Id.* at 1124-32. Gerken also mentions participatory experiences that flow to minority groups, “regardless of the verdict,” that inhere simply in participating not just as outsiders but as persons with “the dignity to decide” or to “stand[] for” or act on behalf of “the whole.” *Id.* at 1142-52.

majority faction.²⁰ Gerken, however, follows in the tradition of Kalven and Zeisel in debunking deliberation as more mythic than real—a political rather than reasoned process of exerting “strong social-psychological” pressure on outliers to succumb to the will of an initial majority.²¹ Thus, even under the unanimous verdict rule, “individuals who occupy the ends of the democratic spectrum are unlikely to prevail,” as the scales of justice tip in the direction of the median juror viewpoint.²²

Many commentators consider the move toward the middle to be one of the virtues of jury trials because it minimizes the dangers to any one litigant of drawing an outlier jury.²³ Gerken, however, implores us to reconsider our intuitions. The problem is that cross-sectional jury design is a blueprint for permitting the same majority faction to “decide things all the time,” with only that sort of compromise necessary to reach the “tipping point” beyond which remaining jurors are too few to maintain a hold-out.²⁴ From the point of view of basic democratic fairness, Gerken argues, we should be concerned with a process in which the minority is granted seats at the table, only to lose.²⁵

In what follows, I will argue that the *negative* case against first-order diversity and the *positive* case for second-order diversity are

20. However, for a review of many studies showing that “a minority of one rarely influences a jury’s verdict or succeeds in hanging a jury,” see King, *supra* note 11, at 98 (internal quotation marks omitted). But see *infra* text accompanying notes 102-06 for data that even one juror can have an impact on the life versus death decision made by capital sentencing juries.

21. Gerken, *supra* note 1, at 1125.

22. *Id.* at 1125-26.

23. See, e.g., Edward P. Schwartz & Warren F. Schwartz, *The Challenge of Peremptory Challenges*, 12 J.L. ECON. & ORG. 325, 355-56 (1996).

24. Gerken, *supra* note 1, at 1124-25. Gerken does see cross-section design as permitting minorities to “trim” the majority sail and thereby soften the preferred verdict. *Id.* at 1127. But precisely because minorities only achieve influence by moving to the middle, *id.* at 1125, we lose what second-order diversity gives us: a richer democratic portrait of the *range* of views in the community, *id.* at 1161.

25. Gerken does not assume that any particular group identity is going to prove salient or divisive on juries or even that fissures among groups are bound to occur or hold. *Id.* at 1173. She is not concerned when a group finds itself in the minority only now and again because there is no threat of subordination simply from losing. When individuals sharing some group identity are “trapped in a more stable political dynamic and *consistently* are in the political minority on some meaningful subset of issues,” then Gerken sees a need for a democratic design adequate to undo the pattern of domination and subordination. *Id.* at 1110.

not as strong as Gerken would have it. The negative case depends on a radical dismissal of the contributions diversity makes to the transformative power of reasoned argument and collective deliberation on a particular jury—a dismissal called into question by a growing body of empirical research I review in Part I.²⁶ Gerken is right that we have to live with departures from representation that random selection procedures create. However, the evidence I review suggests that we should be doing much more *within* the bounds of random selection to pursue the good of deliberation on first-order diverse juries.

Gerken's positive case for second-order diversity rests on a provocative understanding of what the political functions of the jury are, or ought to be. The issue is not whether the jury is a "political" or "democratic" institution—any decision-making body that drafts ordinary people into the daily business of self-government is obviously an example of democratic politics. But behaving politically on a jury, in the sense of seeking partisan control, vastly differs from behaving politically, in the sense of arguing toward a collective judgment. Gerken correctly points to my previous writings as critical of the first view for importing notions of representation that, however proper in legislative bodies, do not fit the paramount obligations of jurors to protect the rights of litigants.²⁷ I have argued, and will argue here, for the alternative view of the jury as a participatory political and democratic body in the deliberative sense.²⁸

26. I do not argue that diversity is sufficient to protect juries from the many pitfalls that group deliberation is subject to—only that we have good reasons to believe heterogeneous bodies avoid some of the biases that homogeneous panels display. For some of deliberation's perils, see *infra* Part II.B. Diversity might bring its own perils to a group, for instance, by exacerbating group conflict. See Marder, *supra* note 14, at 687-88 (hypothesizing that diversity might breed conflict, but showing in a mock jury trial that gender diversity actually lowered hostility and increased satisfaction).

27. Compare Gerken, *supra* note 1, at 1136-37 n.97, with ABRAMSON, *supra* note 14, at 125.

28. Although Gerken distinguishes first- and second-order diversity, her argument depends on drawing a similarity as well. However composed, juries are said to render verdicts less by modeling deliberation and more by marshaling politics. Gerken, *supra* note 1, at 1152 n.144. Cross-sectional juries politically empower those in the middle. *Id.* at 1125. Second-order diversity gives us verdicts farther to the ends of the spectrum. *Id.* at 1126. My major concern is Gerken's underlying rejection of the deliberative ideal.

At least rhetorically, Gerken's landmark article is replete with phrases that suggest the jury is political in the full representative sense.²⁹ She describes and defends second-order diversity as permitting groups to take turns exercising "control" on juries, and she analogizes that control to the electoral power minorities achieve through the creation of majority-minority districts. Such analogies flatten the differences between voting behavior and jury behavior that explain why we entrust ordinary persons with the power of responsible judgment in legal cases in the first place.³⁰

My concern is that Gerken's views on the politics of juries, though meant to support equal participation for minorities, will end up hurting the very groups she seeks to empower. Any comprehensive theory of the jury has to show how the jury as a political institution, empowering ordinary persons with the power of judgment, goes together with the jury as a legal institution, obliged to be "locally objective" in a particular case.³¹ Gerken's theory of second-order diversity cannot build the necessary bridge between the adjudicative and political functions of the jury; in fact, as I will try to show, she mostly wants to tear that bridge down by arguing that all jury decision making is political in a stark sense.

Gerken does not specifically address whether the political functions of the civil and criminal jury differ in important respects. But I take her to be arguing for a unified theory in which both civil and criminal juries empower a rotating set of persons to participate in "edit[ing] the law,"³² rather than applying it mechanically. When

29. In one particularly dramatic illustration of her views, she writes:

I use the term "collective" rather than "deliberative" in order to leave room for the notion that the political act in which juries are engaged is properly democratic even if it involves old-fashioned foot-stamping, even if the discussions are not framed as a means to achieve the common good but involve logrolling and other hallmarks of interest-based bargaining, even if the jurors understand themselves to be "representing" the interests of their communities rather than the common good, or even if they cannot achieve consensus and must resort to voting.... In my view, juries need not be deliberative ... in order to be democratic.

Id. at 1152 n.144.

30. King, *supra* note 11, at 113 ("[J]urors may ... be just as susceptible as legislators to signals that they should act as racial representatives.").

31. I borrow the phrase "locally objective" from Wells, *supra* note 2, at 2409. For an explanation of the concept of local objectivity, see *infra* text accompanying notes 228-33.

32. Gerken, *supra* note 1, at 1127.

it comes to that editing, the tort jury actually enjoys “unusually high” power³³ to bring community norms to bear on the interpretation of what the law means by “reasonable conduct” or “ordinary care.”³⁴ Because this editing will reflect the norms and experiences of those sitting at the editor’s desk, debates about jury composition are presumably as important in the civil jury context as they are in the criminal. I will turn to specific issues about the civil jury in Part III.

II. THE NEGATIVE CASE AGAINST FIRST-ORDER DIVERSITY

Many scholars criticize the theory of the cross-sectional jury for assuming we get what we want on juries—representation of *substantively* different views—merely by representing demographically different groups.³⁵ Such an equation of demographic balance (the jury “looks like” the community) with substantive representation (the jury “pools” together multiple perspectives), these critics argue, rests on a false and stigmatizing essentialism—a form of stereotyping that sees group identity as permanent and static, which treats every member, say of a racial or gender group, as having the same views and values as every other member of that group.³⁶

33. Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1335 (2012). One historical example of the civil jury’s political power was its resistance to abiding by the legal standard that made contributory negligence a complete bar to a plaintiff’s recovery. Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1649 (2001). In time, this civil jury resistance led to legislative change that “humanize[d] the law.” Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 605 (1993).

34. Noah, *supra* note 33, at 1649 (“Unlike criminal statutes that must proscribe misconduct with great specificity, negligence claims often invite juries to define the standard of reasonable conduct under the circumstances.”); *see also* Wells, *supra* note 2, at 2388 (explaining that in negligence cases, “the line between the judge’s sphere and the jury’s does not separate an area of normative, law-like matters from one that is purely factual.... [N]egligence cases[] present ‘mixed’ questions that invest the jury with broad discretion to decide the ultimate normative questions under dispute.”).

35. *See, e.g.*, Richard Re, *Re-justifying the Fair Cross-Sectional Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568, 1580-81 (2007).

36. *Id.* at 1573. For distinctions among theories of representation, *see* HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1967).

In large part, Gerken agrees with this critique of essentialism and treats group identities as fluid, open-ended, and overlapping.³⁷ She is far from assuming that individuals are fungible commodities or that members of a minority reliably vote together or share the same perspectives.³⁸ She is at pains to agree that we frequently do not know in advance what “axis of difference,” if any, will emerge on a given jury.³⁹ Nonetheless, Gerken acknowledges holding what we might call a “weak” assumption about group difference: “[my] assumption here is simply that some categories will be *salient* to the political process—sufficient grounds for dividing the polity on a regular basis—even if the precise boundaries of these divisions are either porous or contingent.”⁴⁰

So Gerken’s case against first-order diversity comes down to this: if and when fissures crack open and strand a minority time and again on the losing side, the cross-sectional jury—even were we to practice it perfectly—would not deliver much democratic aid across the majority/minority fault line.⁴¹ Minority power on cross-sectional juries is diluted in ways that parallel the dilution of minority voting strength in at-large elections.⁴²

But is the influence minorities can exercise during jury deliberations as weak or soft as Gerken makes it out to be?

A. *Predeliberation*

To know whether deliberation on diverse groups brings any benefits, we first need to know something about the influence of group identity on individual jurors prior to deliberation. I will concentrate on race because this is the paradigmatic case of

37. Gerken, *supra* note 1, at 1110 (explaining that identity can be playful).

38. *Id.* at 1159.

39. *Id.* In line with the parallels that Gerken draws between electoral districts and trial juries, she frequently uses the term “minority” in a numerical rather than a demographic sense. *Id.* at 1109. One of her reasons for preferring second-order diverse designs for the jury is that we get to observe whether variations in verdict correlate with variations in jury composition. *Id.* at 1160-61.

40. *Id.* at 1110. Gerken goes on to specify race as one category that is demonstrably salient in American politics, notwithstanding the fluid nature of many persons’ racial identities. *Id.*

41. *Id.* at 1187.

42. *Id.*

domination/subordination that second-order diversity sets out to cure.⁴³ Although most of the studies below come from criminal cases, studies suggest that attorneys in civil cases make the same assumptions about the relevance of race during jury selection as attorneys do in criminal trials.⁴⁴

It used to be said that even race was a poor predictor of an individual's initial verdict preference.⁴⁵ But carefully done recent research—principally by social psychologists Samuel Sommers and

43. Apart from race, the empirical literature on the influence of background characteristics of individual jurors (for instance, gender, age, income, and educational level) offers mixed results. In the civil area, some researchers report that “background characteristics show only a modest association with verdict preferences” and that “the strongest predictors of jury damage awards are characteristics of the case rather than attributes of the jurors.” Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 301, 306 (1998). Others have argued for the important influence of factors such as a juror's political ideology or cultural profile. See Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 861-62 (2009). On the criminal side, Eisenberg, Garvey, and Wells found that age, gender, and socio-economic status did not correlate with jurors' first votes on the death penalty, even when race did. Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 296, 307 (2001). At least older studies of rape trials showed the influence of gender on a juror's predilections. See, e.g., Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133, 141 (1979). One scholar summarizes the data on the influence of the personal characteristics of jurors on their initial verdict preferences as “less [than] clear-cut and ... consistent.” Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 172 (2007).

44. See Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 441 (2009) (stating that the “strong effect of being black on defense challenges was more pronounced for black males than for black females” in civil trials); see also John Clark et al., *Five Factor Model Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases*, 34 CRIM. JUST. & BEHAV. 641, 647 tbl.1 (2007) (showing that in a sample of 17 civil trials, 12% of the jurors excused by the plaintiff were black, whereas 24% of the jurors excused by the defense were black). Although these studies show that peremptory challenges are motivated by countervailing assumptions by plaintiffs and defendants about the relevance of race to an individual's attitudes, they do not show that peremptory challenges change the composition of jury pools in the aggregate, even if they have discrete effects on the ability of an individual to serve on a particular jury. See Mary R. Rose, *Access to Juries: Some Puzzles Regarding Race and Jury Participation*, in ACCESS TO JUSTICE 119, 123 (Rebecca L. Sandefur ed., 2009).

45. See Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries?: A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1016-17 n.73 (2003) (“For many years, the consensus among mock jury researchers was that little if any consistent correlation existed between juror race and verdict preference.” (citing REID HASTIE ET AL., *INSIDE THE JURY* 121-23 (1983))).

Phoebe Ellsworth—shows that race does correlate with starting views in many but by no means all types of cases.⁴⁶ Sommers and Ellsworth gave mock jurors a written summary of an interracial battery trial in which one member of a high school basketball team was accused of attacking another player who replaced him in the starting line-up.⁴⁷ Half of the mock jurors read a transcript of a case about a white defendant and black victim; the other half read the same transcript but with a black defendant and white victim.⁴⁸ Although every mock juror therefore knew the race of the defendant and victim, half of them read a so-called “race-salient version” of the case in which a defense witness mentions that the defendant was one of only two white (or black) players on the team and had been the subject of racial remarks from many of his black (or white) teammates.⁴⁹ The other mock jurors read a summary in which no testimony drew attention to any issue of race.⁵⁰

Sommers and Ellsworth found that, in the non-race salient case, individual white jurors showed a greater willingness to convict black as opposed to white defendants, rating the prosecution’s case as stronger against black defendants despite the fact that the evidence was the same.⁵¹ However, this racial effect disappeared or waned in the race-salient variant.⁵² Consistent with previous findings,⁵³ the researchers theorized that the most likely explanation for this difference between race-salient and race-neutral cases was that white jurors, socialized to accept egalitarian norms, were on their own best behavior when the case material alerted them to the

46. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL’Y & L. 201, 217, 220 (2001). For a summary of other studies on the influence of race on predeliberation preferences of individual mock jurors, see Sommers, *supra* note 43, at 172-79.

47. Sommers & Ellsworth, *supra* note 46, at 214-16.

48. *Id.* at 214.

49. *Id.* at 214-15.

50. *Id.*

51. *Id.* at 217-19.

52. *Id.* at 217.

53. Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1370-71, 1373 (2000). This case study, based on an altercation between an interracial couple, reached similar results, with similar explanations. However, due to concerns that there might be bias factors special to how jurors view interracial couples, they went on to a second study summarized in the text above.

possibility of racial bias.⁵⁴ By contrast, no such check kept implicit racial bias from seeping into how white jurors heard the evidence in the so-called garden-variety cases.⁵⁵ In other studies, implicit racial bias has been found to “affect the way ... [white] jurors encode, store, and recall relevant case facts.”⁵⁶

Less research has been done into the attitudes of potential minority jurors,⁵⁷ but the evidence supports findings that African-American jurors exhibit a “same-race leniency” in cases involving African-American defendants.⁵⁸ For instance, when white and black prospective jurors were asked to respond to statements such as “The race of a defendant affects the treatment s/he receives in the legal system,” blacks were far more likely to agree.⁵⁹ Given these differing perspectives on the fairness of the criminal justice system, it is hardly surprisingly to find that, on first ballots in mock studies, individual African-American mock jurors “gave lower guilt ratings, shorter sentence recommendations, and more positive personality evaluations” to black as opposed to white defendants.⁶⁰ These findings hold true whether or not the trial was race-relevant, indicating that African Americans have less “politically correct” concerns than whites do when it comes to showing some in-group preference.⁶¹

54. *Id.* at 1370 (arguing that racial content of the trial activated a “motivation to appear nonprejudiced”).

55. Sommers & Ellsworth, *supra* note 46, at 212.

56. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 345 (2007).

57. *See* Sommers, *supra* note 43, at 177-78 (noting a “scarcity of studies examining the decision making of non-White jurors” and the relative lack of attention to other groups, including Hispanics).

58. *Id.* at 178.

59. Sommers & Ellsworth, *supra* note 45, at 1020; *see also* Jordan Abshire & Brian H. Bornstein, *Juror Sensitivity to the Cross-Race Effect*, 27 LAW & HUM. BEHAV. 471, 473 (2003) (citing to a study showing that “76% of Black participants believed the police treated Blacks differently from Whites, compared to 51% of White participants”).

60. Sommers & Ellsworth, *supra* note 45, at 1020. However, one archival study of 300 criminal cases from four jurisdictions disputes the existence of any general correlation between race and a juror’s vote on first ballots and finds the correlation to hold true in its sample only for the votes of African-American jurors in drug cases tried in the District of Columbia involving minority defendants. *See* Stephen P. Garvey et al., *Juror First Votes in Criminal Trials*, 1 J. EMPIRICAL LEGAL STUD. 371, 373, 397-98 (2004).

61. Sommers & Ellsworth, *supra* note 45, at 1019-20. The authors theorize that personal experiences make many African-Americans distrustful of egalitarian claims and hence more

In criminal cases, numerous studies⁶² confirm the correlation between a potential juror's race and initial preconceptions, including studies showing the influence of race on capital sentencing,⁶³ rape trials,⁶⁴ and vehicular homicide mock trials.⁶⁵ Studies of capital sentencing show the combined influence of race plus age and race plus gender.⁶⁶ Data on race and civil juries is harder to come by.⁶⁷ One mock study of a products liability case showed that minority participants were significantly more likely to favor plaintiffs.⁶⁸

willing than whites to acknowledge some level of ingroup/outgroup bias. *Id.* at 1019.

62. For a review of older studies showing influence of race on both pre-deliberation and post-deliberation preferences, see King, *supra* note 11, at 76, 82-85, 89-90 (1993).

63. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 181 (2001) ("Whites are apt to make pro-prosecution interpretations of evidence, especially when defendants are black and particularly on highly determinative issues such as eyewitness identification, probable cause, and resistance to arrest. Blacks may be more critical in their interpretation of factual questions presented at trial, particularly when police testimony is involved.... [B]lacks may be more sympathetic than white jurors to mitigating evidence presented by a black defendant with whom they may be better able to identify and empathize, and whose background and experiences they may feel they understand better than do their white counterparts."). Among the attitudes black and white jurors differ on in death penalty trials are willingness to believe the defendant is remorseful, *id.* at 214-16, empathy or identification with the defendant, *id.* at 215-77, assessments of the defendant's future dangerousness, *id.* at 219-21, and a desire to show mercy, *id.* at 214-15, 217-18. In short, "the race of individual jurors ... infects the capital-sentencing process." *Id.* at 266.

64. *Id.* at 187 (citing GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 154-55, 200-01 (1989)).

65. David A. Abwender & Kenyatta Hough, *Interactive Effects of Characteristics of Defendant and Mock Juror on U.S. Participants' Judgment and Sentencing Recommendations*, 141 J. SOC. PSYCHOL. 603, 608-09 (2001).

66. Bowers et al., *supra* note 63, at 188 n.91 (citing David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 92 fig.10 (2001) (noting that harsher treatment of black defendants at death-sentencing stage is curbed "when young black males and middle-aged black females are better represented on the jury")); *id.* at 192 (summarizing different attitudes of white males and black males toward imposition of the death penalty).

67. See, e.g., Rose, *supra* note 44, at 131 (noting the dearth of studies about race and civil juries).

68. Brian H. Bornstein & Michelle Rajki, *Extra-Legal Factors and Product Liability: The Influence of Mock Jurors' Demographic Characteristics and Intuitions About the Cause of an Injury*, 12 BEHAV. SCI. & L. 127, 143 (1994). The phrase "Bronx jury" is generally used to denote a presumed tendency of minority jurors to favor plaintiffs. According to Rose and Vidmar, the phrase seems to have been coined by Tom Wolfe in *The Bonfire of the Vanities*, in order to describe a plaintiff's lawyer's rationale for filing a medical malpractice case in the Bronx as "a vehicle for redistributing the wealth." Mary R. Rose & Neil Vidmar, *Commentary: The Bronx "Bronx Jury": A Profile of Civil Jury Awards in New York Counties*, 80 TEX. L. REV. 1889, 1889 (2002). Articles appearing around the same time as Wolfe's novel in both the

Another mock study showed the influence of a participant's race, as well as other identity factors, in their attitudes toward a plaintiff suing the police.⁶⁹ But in their study of a products liability case given to mock jurors, Diamond, Saks, and Landsman found only a "modest association" of race, as well as other demographic factors, with individual verdict preferences.⁷⁰

Although the empirical data can be mixed, in some case scenarios, the race of individual jurors clearly matters to starting attitudes. We now need to consider what effect, if any, deliberation has in shifting juror opinions. Advocates of the cross-sectional jury hold that *diversity* makes deliberation dynamic and transforming in democratically valuable ways; Gerken does not believe deliberation with any frequency breaks through the domination/subordination built into the numbers.⁷¹

B. Deliberation

By itself, group deliberation is no guarantee of reasoned argument.⁷² As John Stuart Mill lamented, group life is subject to

New York Times and the Wall Street Journal similarly popularized the perception that deep-pocketed defendants did not fare well in civil trials before minority-dominated juries. *Id.* But Rose and Vidmar showed that there never was much of a Bronx effect in the Bronx. *Id.* at 1896-97.

69. Kahan et al., *supra* note 43, at 853, 857.

70. Diamond et al., *supra* note 43, at 306. Minority jurors were more likely than non-minority jurors to find liability (by a margin of 63% to 46%). *Id.* However, this seeming correlation between race and verdict preference became attenuated when the researchers controlled for other factors influencing initial preferences. *Id.* Interestingly, even while reporting on the variability of civil jury verdicts, the authors cast doubt on how much of the variation could be attributed to second-order diversity. See *id.* (stating that the composite model of juror background characteristics left 94.6% of variations in verdicts unexplained). Instead, the authors singled out jury size as a crucial explanation because juries of six as opposed to juries of twelve were more likely to be unrepresentative (first-order diverse) and hence to leave differences among individual perspectives unchecked. *Id.* at 317. This raises the possibility that civil jury variation has explanations different than criminal jury variation because civil juries are more likely to have less than twelve jurors. See Diamond et al., *supra* note 44, at 429. *But cf.* Schkade et al., *supra* note 2, at 1168 (arguing that jury size would have only minimal effect on reducing the unpredictability of damage awards).

71. Schkade et al., *supra* note 2, at 1145.

72. See Adrian Vermeule, *Many Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 19-20 (2009) (summarizing some of the ways deliberation can fare poorly); see also Jessica M. Salerno & Shari Seidman Diamond, *The Promise of a Cognitive Perspective on Jury Deliberation*, 17 PSYCHONOMIC BULL. & REV. 174, 176 (2010) (citing to studies showing various

conformist pressures that swamp dissent, unless procedures are in place to avoid the tyranny of the majority.⁷³ Other group ills include polarization,⁷⁴ information cascades,⁷⁵ and status hierarchies that make participation unequal.⁷⁶ There may be biasing effects when jurors know too much (pre-publicity)⁷⁷ or too little (who voted what on secret ballots).⁷⁸

Studies of both civil juries⁷⁹ and criminal juries,⁸⁰ especially capital juries,⁸¹ have documented the pitfalls of deliberation. This only makes it more imperative, however, to confront Gerken's insistence that improving the representativeness of individual juries

forms of cognitive inhibition and diminished recall in collaborative groups).

73. JOHN STUART MILL, ON LIBERTY 18, 20-21, 24, 33 (Andrews U.K. Ltd. rev. ed. 2011).

74. Polarization occurs when group deliberation degenerates into nothing more than an echo chamber conversation in which like-minded persons reinforce and harden each other's views. *See, e.g.*, Cass Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 75-76, 97, 101 (2000). As I will argue below, there are reasons to think that diversity and dissent can help groups guard against the polarizing effects of group behavior. Charlan Jeanne Nemeth & Brendan Nemeth-Brown, *Better than Individuals? The Potential Benefit of Dissent and Diversity for Group Creativity*, in GROUP CREATIVITY 63, 72-74 (Paul B. Paulus & Bernard A. Nijstad eds., 2003).

75. Information cascades occur when groups play follow-the-leader and fall in line with what predecessor groups have done. Nemeth & Nemeth-Brown, *supra* note 74, at 77.

76. Bowers et al., *supra* note 63, at 230 (showing that black jurors in interracial capital penalty cases were least likely to be "among the most talkative" during deliberations and most likely to feel like outsiders); *see also* Rose, *supra* note 44, at 132 (citing a study of fifty videotaped civil trials in Arizona that found whites speaking more than nonwhites, even after controlling for income, occupation, gender, and education); Erin York Cornwell & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 LAW & SOC'Y REV. 667, 681-82 (2011) (discussing interviews with jurors in noncapital felony trials suggesting that higher income and education correlate with higher levels of participation).

77. Norbert L. Kerr et al., *Bias in Jurors vs Bias in Juries: New Evidence from the SDS Perspective*, 80 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 70, 81 (1999) (suggesting that deliberation exacerbated biasing effects of pre-trial publicity in close cases but attenuated it in clear cases).

78. *See, e.g.*, REID HASTIE ET AL., INSIDE THE JURY 232 (1983).

79. For a particularly damning study of how deliberation exacerbates the unpredictability of punitive damage awards, *see infra* note 236.

80. *See, e.g.*, Howard C. Daudistel et al., *Effects of Defendant Ethnicity on Juries' Dispositions of Felony Cases*, 29 J. APPLIED SOC. PSYCHOL. 317, 329-30 (1999) (showing that in actual felony trials in El Paso, Texas, Anglo-American defendants received sentences nearly twice as severe as Hispanic defendants from juries that were majority Hispanic); *see also* Levinson, *supra* note 56, at 389 (demonstrating that deliberation only slightly corrects memory errors). *But cf. id.* at 414-15 (noting that diverse juries may deliberate more accurately).

81. *See, e.g., infra* text accompanying notes 102-06.

would do little to change the political dynamics that control deliberations.

1. Faction Size as an Obstacle to Deliberation

I begin with an argument that Gerken places great emphasis upon—that verdicts are controlled less by the course of reasoned deliberation and more by the “social-psychological” pressure that an initial majority can exercise on outliers.⁸²

This concern with faction size dates back to Kalven and Zeisel’s pioneering research during the 1950s and 1960s.⁸³ Kalven and Zeisel famously concluded that “the real decision is often made before the deliberation begins” because “with very few exceptions the first ballot decides the outcome of the verdict.”⁸⁴ Specifically, the authors found that an initial majority on the first ballot will prevail in nine out of ten cases.⁸⁵

There were always problems, though, with Kalven and Zeisel’s halting conclusions about deliberation and subsequent studies suggest that, once a minority coalition reaches three members, the chances of acquittal rise.⁸⁶ Let me take these criticisms in turn.

First, Kalven and Zeisel conceded that their conclusions about deliberation were nothing more than a “radical hunch,” given that they had access to only 225 cases that permitted a comparison of first ballots with final verdicts.⁸⁷ Second, they presumed that the first ballot took place *prior* to deliberation, but this is not always the case.⁸⁸ Many juries follow an evidence-driven, rather than verdict-driven approach, deferring even a first straw vote until after some amount of deliberation.⁸⁹ For instance, in Arizona, where researchers have been able to view actual deliberations in civil jury trials, only 20% of the juries took a vote within the first ten minutes of

82. Gerken, *supra* note 1, at 1125.

83. See generally HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

84. *Id.* at 488.

85. *Id.*

86. See *infra* note 96 and accompanying text.

87. I owe this observation to Jessica M. Salerno and Shari Seidman Diamond. See Salerno & Diamond, *supra* note 72, at 175.

88. *Id.*

89. See HASTIE ET AL., *supra* note 78, at 164 (describing a study in which only 28% of mock juries studied took an immediate vote).

deliberation.⁹⁰ Thus, when a first ballot is finally taken, the results might already show the effects of argument and conversation.⁹¹ Third, their own finding that initial majorities do *not* prevail in 10% of their trial sample should never have been cavalierly written off as showing that deliberation does not matter.⁹²

Studies subsequent to Kalven and Zeisel have only partially confirmed the hypothesis that an initial majority's preferred verdict will be the jury's final decision.⁹³ The threshold for conviction seems to have gone from Kalven and Zeisel's "initial majority" to a "two-thirds" threshold and now to "somewhat higher than two-thirds."⁹⁴ One review of the empirical literature—relied on by Gerken—places the tipping point for conviction between an 8:4 and 9:3 initial vote.⁹⁵ What this means is that "the odds of acquittal increase dramatically," when a minority coalition crosses the threshold of one-third of a twelve person jury.⁹⁶ This data suggests "a large potential role for the impact of jury deliberations" on the many juries that begin with only a weak majority faction.⁹⁷ In one study of civil juries in particular, analysis of responses from 1385 jurors serving on 172 civil jury trials showed nearly 40% reported changing their initial verdict preference during deliberations.⁹⁸ This same study concluded, about

90. Salerno & Diamond, *supra* note 72, at 175.

91. Maria Sandys & Ronald C. Dillehay, *First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 LAW & HUM. BEHAV. 175, 191-92 (1995). Even if a first vote is taken immediately, studies show an "order effect" on supposedly initial individual preferences, with those voting first influencing subsequent voters. *Id.* Thus, if the first ballot is public, the tally may already reflect group influence. I mention this because it gives some reason to believe that deliberation might work better on juries that defer a first-vote until discussing the evidence or a least take votes by secret ballot. *See, e.g.*, HASTIE ET AL., *supra* note 78, at 232 (explaining how jurors that defer a vote are less likely to hang).

92. KALVEN & ZEISEL, *supra* note 83, at 488.

93. *See infra* notes 94-100.

94. *See* Salerno & Diamond, *supra* note 72, at 175.

95. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Research on Deliberating Groups*, 7 PSYCHOL. PUB. POLY & L. 622, 691-92 (2001).

96. *Id.* at 692 (summarizing the evidence in criminal cases as suggesting "that if 7 or fewer jurors favor conviction at the beginning of deliberation, the jury will probably acquit, and if 10 or more jurors believe the defendant is guilty, the jury will probably convict. With 8 or 9 jurors initially favoring conviction, the final verdict is basically a toss-up.").

97. Salerno & Diamond, *supra* note 72, at 175; *see also* Diamond et al., *supra* note 44, at 443 (citing to study showing that a minority of two is "viable").

98. Paula L. Hannaford et al., *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627, 628, 638 (2000).

civil trials, that they show “fluidity of civil juror opinion formation and the significance of group influence.”⁹⁹ Importantly, “jurors tended to rely on each other to a greater extent when the weight of the evidence was fairly close, at least with respect to making up their minds.”¹⁰⁰

Another factor to consider is that many civil and criminal juries face more than an either/or verdict. For instance, even after finding a defendant liable and assessing compensatory damages, civil juries sometimes must choose whether to assess punitive damages and, if so, in what dollar amount. Likewise in murder trials, the choice is not simply guilty versus not guilty but, if guilty, guilty of first or second degree murder or even manslaughter. This range of choices means that final verdicts often do not neatly reflect who won or who lost and may mask considerable compromise, influence, and shifts during jury deliberations. As two commentators summarize their research about complex jury decisions, the verdicts “did not mechanically reflect the predeliberation average or majority verdict preference.”¹⁰¹

Some of the most important studies of faction size and jury verdict come from the capital sentencing phase of death penalty trials. In a set of seventy-four penalty phase trials with an African-American defendant and a white victim, William Bowers and colleagues in the Capital Jury Project documented a “white male dominance effect” and a “black male presence” effect.¹⁰² The “white male dominance effect” provides support for Gerken’s views about “tipping points” on juries, insofar as the Bowers group found that the “presence of five or more white males on the jury dramatically increased the likelihood of a death sentence.”¹⁰³ On the other hand,

99. *Id.* at 652.

100. *Id.* at 642.

101. Salerno & Diamond, *supra* note 72, at 175 (“The modal verdict preference of juries with a choice of four verdicts in a homicide trial was not the most frequent individual predeliberation verdict preference.”).

102. Bowers et al., *supra* note 63, at 192-93.

103. *Id.* at 193 (finding a forty-point difference in the likelihood of a death sentence between juries with four and those with five white male jurors—23.1% vs. 63.2% in black defendant/white victim [B/W] cases). In other words, “[t]he death penalty is three times as likely for the defendant in a B/W case who draws five or more white male jurors as for the one who draws fewer.” *Id.* at 259; *see also* Anwar et al., *supra* note 2, at 1032, 1048 (discussing a similar situation in death sentencing in two Florida counties). In a rare study that shifts from

the “black male presence” effect is harder to reconcile with Gerken’s tendency to dismiss the influence of minority factions on strong majority juries. Bowers found that the presence of a single black juror reduced the likelihood of a death sentence from 72% to 43%.¹⁰⁴ Moreover, white male dominance and black male presence had independent effects. In the absence of white male dominance (i.e., when there were four or fewer white male jurors), the presence of two or more black male jurors reduced the death sentencing rate to 21.4%.¹⁰⁵ A study of capital jury sentencing in Sarasota and Lake Counties, Florida similarly found the presence of even one black juror to have dramatic effects on the likelihood of a death sentence.¹⁰⁶

Such evidence does not show that capital juries are deliberating in any reasoned sense—far from it.¹⁰⁷ But it does show why seeking as much cross-sectional representation on each and every death penalty jury is crucial.¹⁰⁸ Because every state but Florida requires the jury to be unanimous in choosing a sentence of death, holdouts do more than hang a jury; without their consent, the penalty decision by default is a life sentence.

a white/black focus to an Anglo/Hispanic concern, data from 317 noncapital felony cases in El Paso, Texas indicated that majority Hispanic juries imposed far more severe sentences on Anglo than on Hispanic defendants. Daudistel et al., *supra* note 80, at 329-30.

104. Bowers et al., *supra* note 63, at 193; *see also* Bowers et al., *supra* note 12, at 1501. In contrast to the decided effect jury composition had on black defendant/white victim cases, Bowers found little influence in cases in which the defendant and victim were of the same race. Bowers et al., *supra* note 63, at 194.

105. Bowers et al., *supra* note 63, at 193-94.

106. *See* Anwar et al., *supra* note 2, at 1099.

107. Bowers notes that African-American jurors were likely to be dissatisfied with deliberation in cases involving black defendants and white victims, and more likely than white jurors to describe the deliberations as rushed or dominated by a few strong personalities. Bowers et al., *supra* note 63, at 229-31. Moreover, if anything, the views of black and white jurors become progressively polarized as deliberations on the death penalty proceed. *Id.* at 200-02. *But cf.* Marder, *supra* note 14, at 659, 694, 699, 711 (finding no correlation between a juror’s race and age and ratings on the thoroughness, hostility, or unanimity of deliberations in interviews with jurors who served on noncapital criminal trials in Los Angeles).

108. In their study of peremptory challenges in Philadelphia capital cases, Baldus and his colleagues found that prosecution and defense engaged in mirror-image, race-based strikes against black (or white) prospective jurors but that the prosecution was more effective in reducing the number of persons seated on capital juries from its prime target group: young black women and men. This success “resulted in a significantly elevated death-sentencing rate.” *See* Baldus et al., *supra* note 66, at 126.

Imagine, as Justice Brennan did in his dissent in *McCleskey v. Kemp*, a lawyer having to advise a black defendant charged with killing a white man, who faces trial before a jury with no African-Americans on it.¹⁰⁹ It would be small comfort to such a defendant to know that second-order diversity, in other trials, had given other defendants a better draw when it came to racial composition. His chances of a fair hearing on the death penalty depend heavily on the racial composition of the only jury that matters—his own. Whatever advantages second-order diversity may bring for other defendants does not compensate for the loss of first-order diversity in any particular trial.¹¹⁰

2. Diversity as an Aid to Deliberation

If initial divisions among jurors are not as controlling of final verdicts as some theories about group dynamics predict, then we need to consider what effects deliberation has on the final verdict—and in turn what effects jury composition has on jury deliberation.

Let me concede immediately that two of the most frequently cited sources for the benefits of group diversity do not tell us much of interest about the jury.

The first source is Condorcet's famous Jury Theorem, which sets out to demonstrate mathematically why there is wisdom in the multitude. If we assume that every individual has a greater than random chance of getting the answer right, then the greater the number of persons in a group, the more likely the group will arrive

109. 481 U.S. 279, 321 (1987) (Brennan, J., dissenting).

110. It might compensate somewhat if second-order diversity gave prosecutors pause before seeking the death penalty against any particular defendant. Still this depends on the numbers and how risk-averse prosecutors are to drawing a minority-dominated jury. Consider, for instance, Gerken's hypothetical jurisdiction that is 65% white and 35% black. Random selection creates a probability that African-Americans will be in the majority on 8.3% of juries and that whites will be in the majority in 79.8%, with the rest being evenly split. Gerken, *supra* note 1, at 1113 tbl.1. Conceivably, such odds could deter the prosecutor from seeking the death penalty. *See id.* at 1138 n.101. But if 44.2% of all juries can be expected to have three or four African-American jurors, as they should have under conditions of random selection, *id.* at 1113 tbl.1, the comparatively high odds of drawing one of these first-order diverse juries might have more influence on the prosecutor's decision than is exercised by the lower odds of drawing a minority-dominated jury.

at a correct outcome.¹¹¹ Applied to juries, the notion is that representative juries will include individuals with different perspectives based on different experiences and information. By aggregating their information, they increase the chances that the jury will reach the correct outcome.

The trouble is that the Condorcet theorem depends on each individual arriving at his or her preferred outcome independently of others.¹¹² It is, as Rousseau anticipated,¹¹³ an argument *against* deliberation rather than for it. The only jury system that I know of that practices Condorcet's theorem is in Brazil, where jurors cast independent ballots and are precluded from discussing the evidence.¹¹⁴ In short, the Condorcet theorem does not justify our jury practices.

Research from the business world is a second cited source for why juries should be diverse. Scott Page has presented case studies in which diverse management groups "outperformed groups composed of the best individual performers."¹¹⁵ Page, however, is careful to note limits on any mantra that "diversity trumps ability."¹¹⁶ In many instances, the task requires "relevant cognitive skills," and recruitment can be narrowly geared toward assembling a team that, while including a mix of perspectives, employs only individuals with the needed skills.¹¹⁷

But what are the relevant cognitive skills a juror should have? If we knew the answer, I am inclined to think we should dispense with

111. For a description of the theorem, see Solomon, *supra* note 33, at 1362; Vermeule, *supra* note 72, at 3-6.

112. Solomon, *supra* note 33, at 1362; Vermeule, *supra* note 72, at 6.

113. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* BK. II, ch. 3, at 42-43 (explaining that if when a sufficiently informed populace deliberates, the citizens were to have no communication among themselves, "the general will would always result from the great number of little differences, and their deliberation would always be [good]").

114. ABRAMSON, *supra* note 14, at 205.

115. Scott E. Page, *Making the Difference: Applying a Logic of Diversity*, 21 *ACAD. OF MGMT. PERSP.* 6, 9 (2007). For a review of studies showing benefits of group diversity, see Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Further Research*, 2 *SOC. ISSUE & POL'Y REV.* 65, 83 (2008).

116. Page, *supra* note 115, at 9.

117. *Id.* at 16. While noting some correlation between identity-diversity and cognitive diversity, Page warns against relying too much on a person's group identity as a proxy for what the group really needs, which is a diversity of relevant cognitive perspectives. *Id.* at 17-18.

random selection and screen directly for the best jurors.¹¹⁸ As Jon Elster argues, however, history is littered with failed attempts to select *for* the right decision-makers.¹¹⁹ In the jury context, we make do with procedures for keeping jury deliberations fair, no matter who is doing the deliberating. In this section, I argue that designing juries to be diverse is crucial to minimizing errors due to bias.¹²⁰

a. Actual Jury Deliberations

As opposed to studies of groups in the business world, we have few opportunities to examine deliberation on real juries.¹²¹ However, a pilot program in Arizona permitted researchers both to videotape juror deliberations in 50 civil trials and to interview 1,385 jurors in 172 civil jury trials.¹²² Although researchers did not specifically study the influence of jury composition on deliberations, their data illumines general features of deliberation. On the one hand, nearly half of the interviewed jurors¹²³ reported forming opinions and

118. Consider, for instance, Jason Solomon's observation that the "best way to maximize cognitive diversity is to have a variety of occupational and educational backgrounds in the jury." Solomon, *supra* note 33, at 1368.

119. ELSTER, *supra* note 11, at 6, 7, 13.

120. In voir dire, we do try to weed out biased candidates, but detection is difficult because persons may be unaware of their own biases and would be reluctant to acknowledge them at any rate. Diversity on juries serves to do what voir dire cannot: let imperfectly impartial persons work together to neutralize bias.

121. Kalven and Zeisel set out to audiotape actual jury deliberations, but Congress responded by passing an anti-eavesdropping statute applicable to federal juries. With rarity, some states have permitted an actual criminal jury deliberation to be recorded. See, e.g., *Frontline, Inside the Jury Room* (PBS television broadcast April 8, 1986) (depicting recorded deliberations in a Wisconsin criminal jury trial).

122. The pilot study was in connection with a rule change in Arizona that permitted jurors to discuss the evidence during breaks in trial, provided all were present. Valerie P. Hans et al., *The Arizona Jury Reform*, 32 U. MICH. J.L. REFORM 349, 351-52 (1999). The purpose of the studies was to ascertain the effects of the rule change. In the studies, researchers were able to compare reports from actual jurors instructed that they were permitted to discuss the evidence and reports from jurors instructed under the old rule to refrain from such discussions. For a study of the interviews, see Hannaford et al., *supra* note 98, and Hans et al., *supra*. For studies of the recorded civil jury deliberations, see Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003) [hereinafter Diamond et al., *Juror Discussions*]; see also Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537 (2012) [hereinafter Diamond et al., *Jury Deliberations*].

123. For problems inherent in relying on recall and self-reports about deliberation from jurors interviewed after the fact, see Barbara O'Brien et al., *Ask and What Shall Ye Receive?*

leaning one way by the close of evidence.¹²⁴ On the other hand, over 95% of jurors reported that they changed their minds at least once about how they were leaning.¹²⁵ Over 20% attributed their change of minds to discussions with other jurors during trials and nearly 40% overall changed their minds during final deliberation.¹²⁶

Taking note of an earlier mock jury study that dismissed deliberation as having little effect on jurors' verdict preferences,¹²⁷ the researchers were struck by interview reports highlighting shifts in individual opinions after group discussion.¹²⁸ They hypothesized that their different assessment of the importance of group discussion might be due to the Arizona jurors having been selected "from a far more diverse jury pool" than was true of the "homogeneous and unrepresentative demographic characteristics" of those recruited for the earlier mock study.¹²⁹

Turning from interview data to the recordings themselves, researchers set out to test whether the rule change (permitting jurors to discuss the evidence during trial breaks) contributed to greater group understanding of the testimony.¹³⁰ Content analysis revealed that large amounts of time were spent on "fact exchanges" (e.g., When did the independent medical exam occur?) or on "inference exchanges" (e.g., If the other car swerved to the right, then how could the damage have been only to the left bumper?).¹³¹ Such content corroborated long-standing hypotheses that jurors are not passive recipients of testimony, but rather they actively engage during trial in trying to draw inferences that will weave the facts into a persuasive narrative or story.¹³² When given the opportunity to discuss the evidence even before formal deliberations, jurors

A Guide for Using and Interpreting What Jurors Tell Us, 14 U. PA. J.L. & SOC. CHANGE 201, 204-07 (2011).

124. Hannaford et al., *supra* note 98, at 637 fig.1.

125. *Id.* at 636.

126. *Id.* at 638.

127. *Id.* at 678 n.7 (citing H. P. Weld & E. R. Danzig, *A Study of the Way in Which a Verdict is Reached by a Jury*, 1940 AM. J. PSYCHOL. 518).

128. *Id.* at 652.

129. *Id.* at 650-51.

130. The sample included twenty-six motor vehicle cases, seventeen miscellaneous tort cases, four medical malpractice cases, and three contract cases. *See* Diamond et al., *Juror Discussions*, *supra* note 122, at 19.

131. *Id.* at 42.

132. *See, e.g.*, HASTIE ET AL., *supra* note 78, at 22-23 (summarizing the story model).

began working together on constructing that story and on influencing one another through information exchanged.¹³³

To my knowledge, no similar study of actual recorded criminal jury deliberations exists. But we do have a large archival and interview project about deliberations in death penalty cases from the Capital Jury Project referred to in Part II.B.1. Interviews with 1,155 jurors who served on 340 death penalty trials showed pronounced differences between white and black jurors during the sentencing phase of deliberations, with the sharpest differences separating black male and white male jurors. Among the differences were (1) assessments of the crime itself on a rating scale from vicious to not cold-blooded, (2) assessments on how much the victim suffered, (3) lingering doubts from the guilt phase re-expressed, (4) predisposition to thinking of death as the only appropriate sentence, (5) view of the defendant as a future danger versus seeing him as remorseful, and (6) openness to considering mitigating circumstances.¹³⁴ These differences no doubt explain why death versus life recommendations vary so much with the racial composition of capital juries, as we reviewed in Part II.B.1.¹³⁵

b. Mock Jury Deliberations

As opposed to observations of real juries, mock jury studies have the advantage of being able to control for jury composition. The most complete recent study comparing the deliberative performance of diverse and homogeneous juries was reported by Sommers in 2006.¹³⁶ With the cooperation of a local court, Sommers recruited

133. One of the concerns with permitting early discussion is that it might lock jurors into a premature decision, before all the evidence is in. See Diamond et al., *Juror Discussions*, *supra* note 122, at 48-67 (finding little distortion through precommitment).

134. See Bowers et al., *supra* note 63, at 244-59; see also Bowers et al., *supra* note 12, at 1513.

135. For a smaller study of criminal jury deliberation based on post-trial interviews with Los Angeles jurors who served on noncapital criminal trials, see Marder, *supra* note 14, at 700 (finding that jurors from gender diverse panels reported less hostility, more thoroughness, and more satisfaction than reported by jurors on non-gender diverse panels; racial composition did not appear to have discernible effects).

136. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 597-612 (2006).

members from the actual jury pool to serve as mock jurors. He varied the composition of each mock jury, so that half were all-white and half had four white and two black members. Each panel watched a video summary of a trial of a black defendant charged with sexual assault.¹³⁷

Sommers concentrated on differences in the behavior of white (majority) jurors when they were placed on diverse as opposed to homogeneous juries. Working from a hypothesis that the mere *expectation* of deliberating on a mixed panel might change the initial verdict preferences of participants, Sommers confirmed that whites placed on diverse panels were already, even prior to deliberation, less likely to form an initial guilty preference than were whites on homogeneous panels.¹³⁸

This finding made sense when considered in light of Sommers's previous findings that white bias against black defendants becomes muted in cases in which race is a salient issue in the case. Apparently, *any* case becomes race salient for a white juror by the mere knowledge that she or he will end up deliberating the evidence on a racially mixed jury. Basic norms against bias are triggered in individual white jurors even before deliberation begins—if they are hearing the evidence sitting on a racially mixed panel.¹³⁹ Once such a norm shift occurs, the white jurors on mixed panels processed the evidence with more care and less bias, at least as measured in terms of demonstrable misstatements of fact or failures of recall.¹⁴⁰

This norm-shifting effect should be distinguished from a second benefit of diverse juries, an epistemic or error-catching benefit more directly attached to differences in *information exchange* during deliberations.¹⁴¹ As expected, black jurors made references to issues

137. *Id.* at 601-03. Part of the experiment confirmed earlier findings by Sommers and Ellsworth that white participants start with less bias against black defendants in cases in which race is a salient issue. In this study, Sommers made race salient for half of the panels by specifically asking about race during voir dire. *Id.* at 601. Sommers reported that mock jurors who underwent the race-salient voir dire were less likely to vote guilty prior to deliberations. *Id.* at 603 fig.1.

138. *Id.* at 603, 605-07.

139. *Id.* at 607.

140. *Id.* at 606-07.

141. A theory of "information exchange" should not be confused with a theory about "information aggregation" of the sort implicit in Condorcet's Jury Theorem. As we saw, the Condorcet theorem depends on simply adding up the independently arrived at votes of

that put possibilities of bias on the table for discussion. But it was the *white* jurors on diverse panels who were responsible for making exchange of information and perspectives different than what it was on the homogeneous panels.¹⁴² White jurors serving on racially mixed panels were the most likely to bring up concerns about racial profiling, police behavior, or prejudice against black defendants.

In other words, the enriched information exchange was not due solely to remarks made by African-American jurors—as if there was some “monolithic ‘minority experience’” African-Americans were there to educate whites about.¹⁴³ Instead, the very presence of two African-American jurors on a six person panel transformed the behavior of white jurors, motivating *them* to initiate conversations about whether extraneous racial factors had tainted the evidence. To use one of Gerken’s favorite metaphors, white jurors “turned the tables” on themselves, considering the evidence from the minority point of view even when they were a four to two majority.¹⁴⁴

Putting the broader exchange of information together with norms that trigger an anti-bias alert in white jurors, deliberations on racially diverse groups were “more thorough and competent” than deliberations on homogeneous ones, as measured in any number of ways.¹⁴⁵ Diverse groups deliberated longer (50.67 minutes compared to 38.49), discussed more case facts (30.48 to 25.93), committed less factual inaccuracies (4.14 to 7.28), left fewer inaccurate statements uncorrected (1.36 to 2.49), cited to more pieces of evidence they considered missing (1.87 to 1.07), raised a greater number of race-related issues (3.79 to 2.07), made more mentions of racism (1.35 to

individuals. *See supra* text accompanying note 112. By contrast, a theory of information exchange suggests that a jury verdict will have more democratic legitimacy, and perhaps more accuracy, when reasoned communication of information and perspectives changes the votes to be had. For the differences between legitimacy and accuracy of verdicts, see *infra* Part II.B.3. For examples of information exchange observed in the recorded Arizona civil juries, see Diamond et al., *Juror Discussions*, *supra* note 122, at 42-48.

142. Sommers, *supra* note 136, at 606.

143. *Id.* at 608. For this reason, the Sommers study of deliberation does not support essentialist claims about group identity. In ways Gerken would appreciate, whites ended up expressing so-called “black” concerns about racial profiling and the like.

144. *See* Gerken, *supra* note 1, at 1142.

145. Sommers, *supra* note 136, at 608.

0.93), and had fewer objections when racism was mentioned as relevant (22% of the time to 100%).¹⁴⁶

3. Diversity and Legitimacy

I defer to the conclusion of this Article whether the Sommers data shows that heterogeneous juries reach more “accurate” or “correct” verdicts than homogeneous juries.¹⁴⁷ What we even mean by calling a verdict “correct” is complicated, as juries do more than find facts but must interpret the facts to decide, in a criminal case, whether they constitute the “malice” that distinguishes murder from manslaughter or, in a civil case, whether the defendant’s conduct is “egregious” enough to warrant punitive damages. In civil cases involving damage awards, as Jason Solomon notes, the measure of a correct answer is debatable.¹⁴⁸

Legitimacy, however, is not the same thing as accuracy, and we should consider the effects of jury composition on the former. As Solomon pointed out in considering the civil jury, the concept of legitimacy has both a sociological and a normative component. Sociological legitimacy is basically the empirical claim that the jury bolsters public confidence in the fairness of the civil justice system.¹⁴⁹ Because an important goal in any legal system is that the law be politically acceptable and capable of generating “voluntary

146. *Id.* at 605 tbl.2; *see also* Levinson, *supra* note 56, at 414-15 (describing how diverse juries exhibit superior memory recall).

147. *See infra* text accompanying notes 324-40. Sommers does suggest that there are better or worse ways to process information and that service on diverse panels had positive effects on the cognitive performance of white jurors. Sommers, *supra* note 136, at 606-07. But he does not attempt to assess whether the verdicts rendered on the diverse panels were more “correct” than those reached on all-white panels, noting instead elsewhere that “[b]etter” is an elusive concept when it comes to jury decisions, for which a gold standard typically does not exist.” Sommers, *supra* note 115, at 95. Interestingly, there turned out to be no significant differences—little second-order diversity—among the panels when it came to likelihood of convicting or acquitting. Sommers, *supra* note 136, at 604 tbl.1. As Rose has noted, the “disconnect” between the demonstrated effects of race during deliberations and its apparent lack of effect on final verdicts is intriguing. *See* Rose, *supra* note 44, at 134-35.

148. Solomon, *supra* note 33, at 1367 n.182.

149. *Id.* at 1370.

compliance,”¹⁵⁰ any contribution of the civil jury to perceptions of the law as fair would be an important political function.¹⁵¹

Normatively, the concept of legitimacy goes beyond public perceptions and depends on law having the moral and democratic authority to claim our consent to it.¹⁵² Ideally, that moral basis for obeying law should be sturdy enough to justify why we are obliged to obey the law—to obey jury verdicts—even when they go against our preferred outcome.

When it comes to promoting public confidence in trials (sociological legitimacy), some scholars single out the civil jury as having special problems, noting declines in its use, the political popularity of tort reforms, surveys that have most Americans agreeing that “plaintiffs get too much” from juries, and a general sense that “faith in the civil jury appears to be falling.”¹⁵³ Not everyone agrees with this assessment. A recent poll found that 64% of respondents favored leaving juries to decide civil lawsuits, as opposed to only 27% preferring bench trials.¹⁵⁴ The same study showed an overall high level of confidence in the civil justice system as a whole.¹⁵⁵ Rather than arbitrate this dispute,¹⁵⁶ though, I turn to studies that show diverse juries do more to generate public confidence than homogeneous juries do. Ellis and Diamond report a California

150. Kahan et al., *supra* note 43, at 884.

151. See Ellis & Diamond, *supra* note 13, at 1039-40 (citing to studies showing that “people are more willing to accept decisions and to adhere to agreements over time when they perceive those decisions as having been produced by fair procedures”).

152. Kahan et al., *supra* note 43, at 884.

153. Solomon, *supra* note 33, at 1372-74; see also Jeffrey Abramson, *The Jury and Popular Culture*, 50 DEPAUL L. REV. 497, 515 (2000) (citing to studies showing that 80% of jurors interviewed thought there were too many frivolous lawsuits). *But see* Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1507-08 (2003) (refuting accuracy of perception that juries are pro-plaintiff and anti-business).

154. DRI, THE DRI NATIONAL POLL ON THE CIVIL JUSTICE SYSTEM 1, 3-5 (2012), <http://www.dri.org/contentdirectory/public/polls/2012%20DRI%20survey%20analysis.pdf>.

155. *Id.* at 4; see also Shari Seidman Diamond & Mary R. Rose, *Real Juries*, 1 ANN. REV. L. & SOC. SCI. 255, 258 (2005) (citing to a 2004 Harris interactive poll showing high citizen regard for jury duty).

156. The dispute seems evidence of what Laura Gaston Dooley refers to as the “bipolar presence” the civil jury “has in the popular consciousness,” revered as an iconic democratic institution but reviled “as an agent of arbitrary injustice.” Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 325 (1995).

survey in which two-thirds of respondents “agreed that the decisions reached by racially diverse juries are more fair than decisions reached by single race juries.”¹⁵⁷ And they ran a confirming mock jury study that showed circumstances in which ratings of trial fairness were more favorable when the jury was heterogeneous rather than homogeneous.¹⁵⁸ Participants were given a summary of a shoplifting trial with a black defendant.¹⁵⁹ Four different scenarios were constructed involving not guilty or guilty verdicts rendered by homogeneous or heterogeneous juries.¹⁶⁰ When the observers were asked to rate the fairness of trials resulting in not guilty verdicts, their ratings did not vary with the racial composition of the jury.¹⁶¹ When the verdict was guilty, however, participants rated the trial as significantly more fair when the jury was heterogeneous.¹⁶²

It is worth pausing to consider why the cross-sectional jury inspires more confidence in jury verdicts than Gerken’s alternative of legitimation through different groups taking turns being the dominant faction on some jury. What jurors do is opaque, whereas who they are, in group identity terms, is more transparent and public. This factor of visibility, the ability of competing groups to see persons such as themselves on the jury, fits with what research on procedural justice tells us is a crucial characteristic that makes people perceive a process as fair: that the decision maker be identifiable as neutral.¹⁶³ The visible representativeness of the cross-sectional jury speaks to that neutrality in circumstances in which the “black box” surrounding jury deliberations keeps us from knowing what actually is said.¹⁶⁴

157. Ellis & Diamond, *supra* note 13, at 1039 (internal quotation marks omitted); *see also* Diamond et al., *supra* note 44, at 425 (observing that jury composition is perceived “as a proxy for the fairness of a trial”).

158. Ellis & Diamond, *supra* note 13, at 1043-48.

159. *Id.* at 1044.

160. *Id.*

161. *Id.*

162. *Id.* at 1048.

163. *Id.* at 1040-41.

164. Or at least it does if jurors do not see themselves—and are not seen by the public—as there to represent constituencies. Elsewhere I have emphasized the danger that the concept of “visible representativeness” or “mirror-image” representation can have unfortunate spillover effects if it communicates to jurors and the public that the juror role is to be a representative of the partisan sort. *See, e.g.*, ABRAMSON, *supra* note 14, at 140. But this need not occur. Hospitals, for instance, put together teams of specialists to mull over the best

By contrast, Gerken's case for second-order diversity rests on the democratic benefit of making the *non-neutrality* of juries visible for all to see simply by looking at who is the numerically dominant faction.¹⁶⁵ The above research suggests that second-order diversity might have delegitimizing effects on public confidence in jury verdicts.

It is the threat to the *moral or democratic* legitimacy of jury verdicts, however, that most concerns me about Gerken's rejection of even the aspiration to recruit for cross-sectional juries. Advocates of both first- and second-order diversity can agree that the democratic legitimacy of jury verdicts requires equal respect for the input and views of all jury-eligible citizens. Gerken seems to be suggesting that individual jury trials frequently do not meet this egalitarian norm and that we can practice it only in the aggregate. But litigants do not go to trial before aggregates of juries. Legitimacy requires a more individualized conception of justice.

The merit of the cross-sectional ideal—of getting as close to practicing it as we can—is that it gives moral and democratic grounding to recognizing any one jury as “standing for” or “standing in” for the community. In cross-sectional jury selection, every group has equal opportunity for its members to be on any particular jury, relative to their percentage of the population. All are invited to participate in a procedure that is visibly fair precisely because of the equality of invitation. To the extent we achieve cross-sectionality, “jury deliberation performs its greatest function” in promoting democratic legitimacy in those parts of the community that did *not* have the verdict go its way.¹⁶⁶ When a group has visible representatives present in those deliberations, they can then be morally bound by the results. They “can be expected to see the law as *theirs*” because it “arises from a *process* that shows due respect” for their

treatment options for a patient. Such team approaches probably do not communicate to the patient that the recommendations are a mere aggregation of the voting preferences of the specialists. Presumably, the visibly representative nature of the team gives the patient confidence that a range of options have been weighed. This example was mentioned to me some years ago by the political philosopher Alan Wertheimer.

165. It bears repeating here that Gerken is not committed to group identity fissures opening up on any particular jury. But she does think cracks open up enough to make it worth our while to pay attention to jury compositional issues.

166. Kahan et al., *supra* note 43, at 886.

arguments, and hence for their experiences and identities.¹⁶⁷ Whatever legitimacy second-order diversity creates in the aggregate, it does not give moral grounding to the deliberations of any particular jury.

Granted, random selection is not designed to produce cross-sectional representation on each and every jury. But the legitimacy of any one jury that fails to be a microcosm of the community is not forfeited, so long as community members had a fair and equal opportunity to be recruited onto that jury.¹⁶⁸ This is the democratic norm housed in the principle of cross-sectional jury selection.¹⁶⁹ It remains an important one to pursue even if we are bound to fall short of practicing it perfectly.

III. THE POSITIVE CASE FOR SECOND-ORDER DIVERSITY

In the previous section, we reviewed arguments for diversity's contribution to jury deliberation. Diversity (1) creates a normative set of expectations that prod jurors individually to process the evidence with more care, (2) widens the information and perspectives exchanged, (3) generates public confidence in verdicts, and (4) supports the democratic and moral legitimacy of jury decisions. Gerken is a skeptic about these benefits. But her positive case on behalf of second-order diversity can stand independently of her critique of first-order diversity. It may be, for instance, that second-order diversity among juries brings democratic benefits above and beyond those I have suggested we get by pursuing cross-sectional representation on particular juries. I proceed in this section to consider four arguments on behalf of second-order diversity.

A. *Benefits to Jurors*

Gerken's defense starts by locating benefits to the jurors themselves—their power, participatory opportunities, education, civic sensibilities, and the like.¹⁷⁰ These benefits are said to accrue

167. *Id.*

168. Gerken, *supra* note 1, at 1178.

169. *Id.*

170. *See id.* at 1191 (describing jury service as an “educative experience” or as an

to jurors best when they take their turn at the head of the table, participating on juries as part of the controlling group.¹⁷¹

The benefits flowing to jurors *are* important to our democracy and it took long, hard-fought battles to overcome discriminatory obstacles to establish an equal opportunity to serve as jurors.¹⁷² Today, jury duty is “one of the basic rituals by which Americans confirm their participation in society.”¹⁷³ What was at stake in those movements, however, was not just the “liberty” interest of citizens to be jurors; it was the importance of equality in bearing the obligations, and responsibilities of citizenship. By joining with other scholars to accomplish a paradigm shift in jury studies—from the traditional focus on the legal rights of litigants to a new concern for the political rights of jurors themselves¹⁷⁴—Gerken leaves behind the peculiar ways in which jury duty is a surviving example of what Jeremy Waldron calls “responsibility-rights.”¹⁷⁵

Consider, for instance, a design feature of jury selection that Gerken does not especially concentrate on: the use of a draft.¹⁷⁶ Citizens have voting rights, but they have no responsibility to exercise them. Jury enfranchisement is different—it is an involuntary obligation, a duty we impose on all eligible citizens. The military draft once spoke not to the “liberty” of citizens but rather to their obligations and to the dignity and the respect we should accord those in service. Likewise, the obligatory nature of jury duty speaks to the importance of imbuing in jurors an understanding

“empowering” political experience).

171. *Id.* at 1142.

172. *See, e.g.*, LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 136 (1998).

173. *Id.* at 128.

174. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 93-94 (1998); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995); *Re, supra* note 35, at 1581-82; Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 727 (1992).

175. Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1116 (2011); *see also* Robert P. Burns, *The Dignity, Rights, and Responsibilities of the Jury: On the Structure of Normative Argument*, 43 ARIZ. ST. L.J. 1147 (2011).

176. To be fair, Gerken pays close attention to the jury as a “forced” experience. *See* Gerken, *supra* note 1, at 1152-58. But she concentrates on how such an experience does or does not benefit jurors democratically, and does not in my judgment adequately describe a design geared toward jury duty as a *responsibility*. *Id.*

that it is not their own rights but those of others they are responsible to defend.¹⁷⁷ This formulation may not be quite correct—it is more the dignity of justly defending the rights of others by exercising and not shirking the equal liberty to be a juror.

When so many of us seek ways to avoid jury duty, the dignity of the office suffers.¹⁷⁸ I suspect that Gerken's rather full-throttled defense of the jury as a political institution, if widely accepted, would further erode any collective sense of moral responsibility for the well-being of the office. If Gerken is right that second-order diversity is all about rotating power and control among competing groups, then the right becomes untethered to any *moral* conception of why we trust ordinary persons to use that power responsibly.

In the civil jury context, striking a balance between the rights and responsibilities of jury service has been a politically fraught task. As Laura Gaston Dooley has shown, the rise of judicial controls over civil juries, such as directed verdicts,¹⁷⁹ judgments notwithstanding the verdict,¹⁸⁰ and judgments as a matter of law¹⁸¹ was motivated by radical mistrust of the ability of ordinary persons to discharge their moral responsibilities.¹⁸² Criminal juries enjoy greater protection against these forms of judicial reversals, largely because the Double Jeopardy Clause makes any not guilty verdict final.¹⁸³ But courts may reverse civil verdicts, or reduce damage awards, whether they favor plaintiffs or defendants. Given the long history of judicial

177. See Waldron, *supra* note 175, at 1124-25.

178. The struggle to balance the right and responsibilities of jury duty is long-standing, going back to colonial Virginia laws enacting punishments for tobacco farmers who failed to show for jury duty. See ABRAMSON, *supra* note 14, at 249.

179. See, e.g., *Galloway v. United States*, 319 U.S. 372, 373 (1943) (upholding the constitutionality of directed verdicts).

180. See, e.g., *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 661 (1935) (upholding constitutionality of judgments notwithstanding the verdict).

181. Since 1991, the Federal Rules of Civil Procedure have used the generic term “judgment as a matter of law” to describe both directed verdicts and judgments *non obstante veredicto*. See FED. R. CIV. P. 50(a)-(b).

182. Dooley, *supra* note 156, at 334.

183. It is often said that criminal jurors enjoy the “raw power” to disregard the evidence and to nullify the law in order to acquit. See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1142-43 (D.C. Cir. 1972). Even if jury nullification is not a legal right of jurors, see *id.* at 1132, courts have no authority to reverse acquittals when jurors choose to nullify. *Id.* Although civil jurors have not been granted the express equivalent of a “raw power” to nullify, there is some evidence that they possess that power nonetheless. See Noah, *supra* note 33, at 1608-18.

mistrust of civil juries that Dooley documents, we should be careful with describing jury duty in the sort of political terms that Gerken tends to use. Gerken's core argument—that variation in jury verdicts should be valued *on account of*, and not *despite*, the jury compositional differences driving at least some variations in verdicts¹⁸⁴—could provide cover for further judicial backlash against civil juries.

B. The Advantages of Aggregation

As Gerken readily concedes, the isolated experiences of a few persons on a single jury—a body never to be convened again—are too fleeting and invisible to diffuse power in society or turn the tables on the majority.¹⁸⁵ In the aggregate, however, minorities come to have a say on “what the ‘law’ is—or ought to be”¹⁸⁶—even when, as a matter of legislative representation, “they lack the power to ‘author’ the law itself.”¹⁸⁷ This is because this very thing—“the law”—is the editorial product that “emerges from the collective decisions of many juries.”¹⁸⁸ Standing back, we get “a richer picture of the views of the community as a whole,” by comparing the verdicts rendered on occasion by minority-controlled juries with the decisions from majority-controlled juries.¹⁸⁹

But it is not apparent where we go to get this “kaleidoscopic” or birds-eye view of the range or pattern made by discrete jury decisions. Gerken speaks of the way the jury system gives the “minority a chance to call attention to themselves and their views”¹⁹⁰ and to “engage in the type of agenda setting that is usually difficult for those outside the political mainstream to achieve.”¹⁹¹ Putting aside whether it is a good thing for jurors “to call attention to themselves and their views,”¹⁹² it is difficult to understand the

184. Gerken, *supra* note 1, at 1165.

185. *See id.* at 1181.

186. *See id.* at 1166.

187. *See id.* at 1127.

188. *Id.* at 1137-38.

189. *Id.* at 1161.

190. *Id.*

191. *Id.* at 1162.

192. *Id.* at 1161.

mechanism Gerken has in mind that would publicize all these various jury data points. She frequently uses the term “visibility” to describe how minority control over one jury publicizes a dissenting viewpoint—usually lost in the shadows—and makes it available for subsequent juries to consider.¹⁹³ Nonetheless, subsequent jurors may know little about previous juries, both what they decided and who was on those juries.

Typically, we do not keep track of a jury’s group composition and we rarely are privy to whether groups split on first ballots or straw votes.¹⁹⁴ In short, Gerken assumes an unavailable information source and imagines what we do not have—an ongoing public conversation about what different juries, composed in different ways, decide.¹⁹⁵ As Gerken acknowledges, “the form a jury decision takes limits its effectiveness in promoting visibility.”¹⁹⁶ In practice, “members of the community may not know enough about the case to understand what the verdict signific[d] to those who rendered it.”¹⁹⁷

Throughout her article, Gerken contrasts the high visibility achieved by election results with the lesser visibility of jury verdicts. Even she is lukewarm about whether second-order diversity can deliver the sort of democratic benefits that depend on letting minorities use the jury system to publicize their different norms and perspectives.

C. Bargaining in the Shadow of Jury Verdicts

Gerken’s strongest argument for why jury verdicts matter in the aggregate is that decision makers—be they prosecutors considering

193. *Id.*

194. *See, e.g.*, Samuel R. Gross, *Race, Peremptories, and Capital Jury Deliberations*, 3. U. PA. J. CONST. L. 283, 295 (2001) (discussing the difficulties of drawing any lessons about a death-sentence given in a particular case to a black man for killing a white victim because “[w]e do not know the race of jurors who served (let alone of those who were excused), or how they interacted with each other, or how they reached their decision”).

195. *See id.* at 289 (compiling the difficulties of determining the influence of racial composition on final verdicts in capital cases and explaining that necessary “information is not sitting around on the shelves. . . . [I]t has to be found, at great cost. Just determining the race of the potential jurors in any large sample of cases is very difficult.”).

196. Gerken, *supra* note 1, at 1168.

197. *Id.*

a plea bargain or civil plaintiffs deciding whether (or where) to exercise their rights to jury trial—make these decisions partly on the basis of what juries have previously decided in the small number of cases that go to trial.¹⁹⁸ But as I have previously argued, and as Gerken acknowledges, both first- and second-order diversity are relevant to these decisions.¹⁹⁹ Plaintiffs or prosecutors *may* be sufficiently risk averse so that what second-order diversity makes possible—drawing an outlier jury—affects how they make choices. In that circumstance, Gerken would be right that second-order diversity permits groups that dominate only a few juries to exert more general influence on the strategic choices of plaintiffs and prosecutors. If these actors are less risk averse, though, they may be influenced mostly by what first-order diversity tells them “the law” is, as likely applied by a jury that mirrors a cross-section of the community.²⁰⁰

D. Cross-Over Participatory Experiences as a Form of Civic Education

Among second-order diversity’s chief benefits are the “eye-opening” lessons that members of majority groups are said to draw when the tables are turned on them and they must participate as part of a numerical minority for a change.²⁰¹ Gerken is optimistic that, although this is not an experience that majorities would choose for themselves, they will come away from jury duty with greater appreciation for what it is like to be a minority, with “reduce[d] complacency” about the costs majority decisions impose on minorities,

198. *Id.* at 1138 n.101.

199. *Id.*; see also *supra* note 110.

200. Consider a well-known example of “jury shopping” in patent infringement cases. The small town of Marshall, Texas, has emerged as a favored venue because juries there favor patent holders in 78% of cases. The jury pool in Marshall, compared to larger population centers, does not produce a good deal of second-order diversity, and so the odds of drawing an outlier jury are not great to begin with. That may be part of the attraction. But what plaintiffs are responding to, in marking cases for trial in Marshall, is based on what a jury that “looks like” Marshall has done in the past. Julie Crewell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES, Sept. 24, 2006, at BU1.

201. Gerken, *supra* note 1, at 1142.

and with greater willingness to see matters from the minority point of view.²⁰²

In part, this is an odd argument for Gerken to make because she is at pains to stress that she is mostly describing our current practices, which already include majorities sometimes serving on predominantly minority juries. But if majority members are already receiving the “sensitivity training” that turning the tables on them is said to provide,²⁰³ then why, in Gerken’s own judgment, are they so unwilling to listen to minority arguments when they return to numerical superiority on other juries?²⁰⁴ Presumably, these are other individuals—not those who got an egalitarian education from jury duty. But then the benefits seem scattered and coincidental.

At any rate, it is an open question whether majorities draw or communicate these enlightened, egalitarian-reinforcing lessons from serving on minority-dominated juries. Even Gerken concedes that a reactionary backlash could set in.²⁰⁵ To the extent the public concludes that minorities seize occasions to exercise “control”²⁰⁶ over jury verdicts when they can, majorities on future juries might respond in tit-for-tat fashion, less willing than ever to think minority arguments are based on evidence, more dismissive of holdouts, and ready to flex their own majoritarian muscle. Prosecutors might follow by redoubling efforts to use peremptory challenges to reduce the number of minorities on juries. Judges might strike more minority jurors for cause, or at least permit greater latitude during voir dire to explore same-race bias. Presumably, these would *not* be the lessons jury trials would teach were they exercises in deliberative democracy. But what second-order diversity makes visible for Gerken, above all else, is essentially the politics of who is in charge. If this is so, it is difficult to see why the variation of verdict with jury composition would not aggravate group conflict and polarize jurors into stereotypical ways of regarding each other’s participation.

202. *Id.* at 1163.

203. *Id.* at 1150.

204. *See id.* at 1191.

205. *Id.* at 1165, 1168-69.

206. *Id.* at 1124, 1164.

Here we come to one of the most interesting parts of Gerken's thesis. She acknowledges that second-order diversity may in fact *exacerbate* group conflict by *exposing* it, making it transparent, bringing it to the fore.²⁰⁷ For Gerken, this still counts as a democratic benefit—a contribution of the jury system to making politics confront issues that otherwise get lost in majoritarian-controlled institutions.²⁰⁸ This sort of benefit, however, needs to be weighed carefully against the potential loss to the legitimacy of jury verdicts in a society convinced they are but expressions of group conflict. Again, it is difficult to see how minorities are served by teaching majorities to regard jury verdicts as expressions of group conflict.

In a manner of speaking, we have been here before. On the day following the acquittal of O.J. Simpson in 1995, the *Wall Street Journal* ran a front page article claiming that predominantly black juries in major American urban areas, including the Bronx; Washington, D.C.; and Wayne County (Detroit), were remarkably acquittal prone, compared to the national average.²⁰⁹ The reporters suggested that African-American jurors were in revolt, engaged in acts of jury nullification against the evidence and the law, and used dominance on juries in their neighborhoods to exercise a form of black power. To back up this conclusion, they cited a then-famous article by Professor Paul Butler urging African-American jurors to engage in open acts of jury nullification.²¹⁰ And even though Butler's plea for nullification was limited to victimless crimes—principally drug offenses²¹¹—the *Wall Street Journal* implied that the predominantly black jury in the Simpson trial was willing to nullify in a case of double murder.

Not surprisingly, in the wake of media frenzy over the Simpson verdict, proposals were floated to deal with an alleged breakdown of the jury system, including calls from the California District Attorneys' Association for abolition of the unanimous verdict as a way to

207. *Id.* at 1165.

208. *Id.* at 1165 n.181 (asking the normative question whether “a healthy system requires the submergence or acknowledgment of evidence of group conflict”).

209. Benjamin A. Holden et al., *Color-Blinded?: Race Seems to Play an Increasing Role in Many Jury Verdicts*, WALL ST. J., Oct. 4, 1995, at A1.

210. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 680 (1995).

211. *Id.* at 715.

deal with the potential of one or two unreasonable holdouts to hang entire juries.²¹² Who were these irrational holdouts? In 1997, *The New Yorker* ran a piece by Jeffrey Rosen, which presented anecdotal evidence from Washington, D.C. that these holdouts were most likely to be angry or religiously zealous African-American women.²¹³

Gerken acknowledges that the visibility of a few cases can raise a public outcry, especially if all that is “visible” to the public is the purported difference minority dominance on the jury made to the verdict.²¹⁴ Perhaps for that reason, she is cautious on the subject of jury nullification and does not particularly endorse it.²¹⁵ At first this reluctance seems odd.²¹⁶ After all, Gerken thinks it is entirely legitimate for juries to send political messages, and she cites approvingly to studies showing the “large number[s] of cases in which jurors used their verdict to send a message about a broader political and social issue.”²¹⁷ The problem with jury nullification is that the messaging is “opaque,” rather than transparent.²¹⁸ The black box of a general verdict means that we never know for sure whether a jury is nullifying and, if so, for what reasons.

But walking a tightrope between advocating political messaging by juries and yet rejecting nullification, as an “unwieldy instrument of legal reform,”²¹⁹ is a difficult stunt. One might, instead, throw in one’s lot with the Fully Informed Jury Association or other groups seeking to make nullification *more* visible.²²⁰ The question left

212. CAL. DIST. ATTORNEYS ASS’N, NON-UNANIMOUS JURY VERDICTS: A NECESSARY CRIMINAL JUSTICE REFORM 6-10 (1995).

213. Jeffrey Rosen, *One Angry Woman*, THE NEW YORKER, Feb. 24, 1997, at 54.

214. Gerken, *supra* note 1, at 1165.

215. *See, e.g., id.* at 1168 n.198.

216. For instance, other legal scholars who share Gerken’s concerns about minority subordination on juries have specifically referred to jury nullification as one way in which “jurors resist their subordination.” *See* Gerald Torres & Donald P. Brewster, *Judges and Juries: Separate Moments in the Same Phenomenon*, 4 LAW & INEQ. 171, 184 (1986).

217. Gerken, *supra* note 1, at 1168 n.198 (internal quotation marks omitted) (citing Mark Curriden, *The American Jury: A Study in Self-Governing and Dispute Resolution*, 54 SMU L. REV. 1691, 1694 (2001)).

218. *Id.* at 1168-69 n.199 (citing approvingly to a critique of advocacy of nullification as a form of racial protest in Andrew O. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 127 (1996)).

219. Gerken, *supra* note 1, at 1168-69.

220. Purpose, FULLY INFORMED JURY ASS’N, <http://fija.org/about/fijas-purpose/> (last visited Jan. 29, 2014).

dangling off the tightrope is why, if political messaging is one of the benefits of second-order diversity, the power of a few minority hold-outs to use nullification to hang a majority-controlled jury is not one of the benefits of first-order diversity.

E. Impartiality

In the end, Gerken's defense of second-order diversity comes down to an argument about the proper meaning of impartiality in the jury context. Like Gerken, defenders of first-order diversity acknowledge that traditional notions of impartiality rest on the fiction that individuals can check all their cultural baggage at the jury room door.²²¹ No one juror is ever some disembodied agent of pure reason; everyone edits the law from some perspective. But advocates of mirror-image representation believe that *juries* are capable of achieving a kind of impartiality that individuals cannot achieve alone. They call this "diffused impartiality"—the result of a process in which the norms and preconceptions of some are balanced and informed by the competing norms of others.²²² Gerken, however, offers two objections to diffused impartiality. The first is that it requires more balance on each jury than the law descriptively requires.²²³ The second is that even accomplishing mirror-image representation would still leave the dominant faction in control, as opposed to achieving the kind of Madisonian "checks and balances" that the theory of diffused impartiality requires.²²⁴ Thus, for Gerken, doctrines of impartial justice stand in the way of recognizing that every jury verdict is political or "partial," in the special sense of representing or reflecting "a fraction of the whole."²²⁵ Gerken distinguishes this kind of partiality, which she finds both inevitable and valuable, from a different kind of partiality shown

221. See Janet Bond Aterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1030 (2008).

222. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citing the "broad representative character of the jury" as an "assurance of a diffused impartiality").

223. See, e.g., Gerken, *supra* note 1, at 1115-16; see also *supra* note 27 and accompanying text.

224. See, e.g., Gerken, *supra* note 1, at 1125.

225. *Id.* at 1166.

when a jury is prejudiced and biased.²²⁶ In other words, there could be alternative explanations as to why two different juries render different verdicts. The variation might be evidence that one of the juries was biased, but it could also simply reflect the way each and every jury's editorializing reflects the community norms represented by the groups dominating each jury.²²⁷ The latter kind of "partiality" of each jury verdict—and thus the potential variation among jury verdicts—is politically valued by Gerken for giving minorities control over some subset of jury panels generated through the random selection lottery.

Gerken's view is at once reasonable and overstated. Consider, for instance, an argument made by Catharine Wells about what it means for a civil jury to be objective.²²⁸ Wells noted just how deeply normative and value-laden a tort jury's inquiry is into whether a defendant failed to exercise "reasonable care."²²⁹ Like Gerken, she accepted that the community may well be divided in its normative viewpoints about standards of care.²³⁰ But the jury still has a paramount obligation to resolve the dispute as objectively as possible.²³¹ It does this best not by aggregating individual opinions but by trying to deliberate to a consensus over the proper norm.²³² To the extent that a jury containing "a cross section of normative viewpoints" is able to achieve consensus, that verdict can be justified as "locally objective."²³³ It is not necessarily objective in any universal or deeply epistemological sense. From a pragmatic point

226. For a similar distinction, see Ellis & Diamond, *supra* note 13, at 1035.

227. Gerken, *supra* note 1, at 1166. Gerken treats the all-white jury as a special case when it comes to her usual willingness to live with the luck of the random selection lottery. *Id.* at 1178-79. She does not say that an all-white jury is necessarily prejudiced but suggests that it still may be too partial to be acceptable. *Id.* But if this is so, then even Gerken wants the safety-valve that only some theories of first-order diversity permit. And, because on her own data minorities are not likely to be effectively represented on juries when they occupy only one or two seats at the table, she may need to fall back on some notion of cross-sectional jury selection more than at first appears.

228. Wells, *supra* note 2, at 2408-10.

229. *Id.* at 2388 (describing the jury's considerable discretion in "decid[ing] the ultimate normative questions" that negligence cases raise about duties of care).

230. *Id.* at 2393-95 (stating that juries are not impersonal decision makers but engage in viewpoint-dependent inquiry from a diverse set of vantage points).

231. *Id.* at 2408.

232. *Id.* at 2408-09.

233. *Id.* at 2409.

of view, however, the cross-sectional composition of the jury underwrites the democratic authority of *that* jury to locate through deliberation what *that* community's local norms are in *that* case.

Gerken concedes—indeed she insists on conceding—that second-order diversity does not give democratic legitimacy to any one jury's verdict. It is the aggregate product that enhances our democracy. But then she has no answer to why any one jury's verdict is “locally objective.” To Gerken, that is the point—jury verdicts one by one are always partial and political. To my mind, this is the problem. We have a defense of the jury as a political institution in the aggregate that does not justify the individual jury as an adjudicative institution at all.

IV. CIVIL JURIES: A VARIATION ON VARIATION?

The civil jury provides a stern test for Gerken's defense of variation among verdicts as a democratic virtue, not vice. Critics of the civil jury tend to take the opposite view, singling out variation as damaging to both the adjudicative and political functions of the civil jury. On the adjudicative side, some of the most severe criticism is directed at the apparent arbitrariness in punitive damage awards from one jury to the next.²³⁴ But critics of the civil jury see inconsistency of verdicts as a problem across a host of case types.²³⁵ Far from steadying the swings of the pendulum, one study shows deliberation about monetary awards is itself a source of erratic swaying caused by little more than rhetoric.²³⁶

234. See, e.g., Schkade et al., *supra* note 2, at 1145 (explaining that punitive damage awards are “pervaded by a degree of unpredictability and variance, resulting in apparent arbitrariness, as the similarly situated are treated differently”); see also Diamond et al., *supra* note 43, at 318 (describing “high variability” in pain and suffering awards); Schkade et al., *supra* note 2, at 1145-46 (citing to a study of pain and suffering cases showing 60% of awards are based on “noise” rather than objective factors and to a separate study of sexual harassment cases failing to find any connection between case characteristics and damages awarded); Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 480 (1998) (explaining that in mass tort litigation, “variability in trial outcomes—even assuming that the underlying facts are identical—may be significant”). *But cf.* Diamond & Rose, *supra* note 155, at 264-65 (providing explanations of variance in damage awards).

235. See, e.g., Bornstein & Rajki, *supra* note 68, at 143 (finding that liability judgments in products liability mock trials varied according to juror race).

236. See Schkade et al., *supra* note 2, at 1172-73. The Schkade study found that group

On the political side, variation is criticized for clouding, rather than clarifying, what the jury system is saying about the important normative questions that lurk within even ordinary tort cases.²³⁷ In negligence cases, the civil jury illustrates Gerken's point about the editorial discretion juries have to interpret what the legal standard of "ordinary" or "reasonable" care requires in concrete circumstances.²³⁸ In product liability cases, the jury is instructed that a product is "unreasonably dangerous" if it contains dangers beyond those that an "ordinary consumer" with "ordinary knowledge common to the community" would contemplate when using the product.²³⁹ In all punitive damage deliberations, the question is whether the defendant's conduct was "egregious" enough to warrant punishment and if so, what dollar amount suffices to express the community's moral condemnation.²⁴⁰ These examples show, in Solomon's words previously quoted, that the political power of the jury is "unusually high" in tort cases²⁴¹ even though we more readily relate to the criminal jury as a political institution.²⁴²

deliberation on punitive damages irrationally inflated, sometimes dramatically, amounts awarded above the median amount individuals favored prior to deliberation. *Id.* at 1140-41. The authors could find no reasoned basis for this inflationary effect of deliberation and attributed it to a rhetorical dynamic that upped the ante, so to speak, among jurors who individually came into discussion favoring *some* punitive damages. Among such individuals, the rhetorical advantage shifted to the argument that only large awards delivered the intended punishment. *Id.* at 1161. Although the authors did not set out to study whether diversity might mitigate the negative effects of deliberation on consistency of awards, they did note that "moral judgments about personal injury cases are very widely shared over diverse communities and demographic categories." *Id.* at 1173. Surprisingly, even "shared moral judgments do not produce predictable dollar awards." *Id.*

237. See, e.g., Solomon, *supra* note 33, at 1380 ("[A] formulation and application of a norm in a particular case ... is a decision by a particular jury that could be contradicted by a different jury in the next courtroom on quite similar facts involving the very same defendant.").

238. See *supra* note 34 and accompanying text.

239. RESTATEMENT (SECOND) OF TORTS § 402A cmts. h-i (1964).

240. Diamond & Rose, *supra* note 155, at 264 ("Punitive damages ... aim at punishing conduct that is highly egregious and not part of acceptable business practice.").

241. Solomon, *supra* note 33, at 1335.

242. See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). One reason that the civil jury is a less visible political institution is that about 75% of all civil trials are tort cases and of those, about two-thirds involve automobile accidents or premises liability. See Devine et al., *supra* note 95, at 702; see also Hannaford et al., *supra* note 98, at 641 (describing a sample of 172 cases in Arizona, in which there were 73 automobile tort cases, 20 premises liability cases, 8 medical malpractice cases, 10 products liability cases, 26 miscellaneous tort cases, 22 contract cases, and 13 "other" or "unknown" cases). One can doubt that "the[se] kinds of issues

If the civil jury is to discharge the political function of bringing community norms to bear on the law that governs daily transactions, then at least the following must be true. First, there must be “community” norms to represent. Jason Solomon and others have raised doubts about whether the jury is “backstopped” any longer by a community in the normative sense.²⁴³ Second, the jury must have the democratic credentials and knowledge to discover and to represent the community’s norms, assuming they are there to be found. Here too Solomon has raised questions about whether juries have the needed democratic pedigree or knowledge.²⁴⁴ Third, the jury functions well as a democratic institution only if it finds and applies those norms consistently.

In this Article, I pursue only the issue of inconsistent verdicts, leaving aside for another day the arguments Solomon and others have made about other difficulties facing the civil jury as a political institution. I single out inconsistency because it is the issue most problematic for Gerken.

... [are] the ones that are most important for citizens to be engaged in,” Solomon, *supra* note 33, at 1381, especially compared to the important issues of self-governance that juries dealt with at the time of the Founding, including setting land-use policy and collecting taxes. *Id.*

243. Paul Carrington has argued that

any contemporary assessment of the [civil] jury ought take account of the reality that “community” in America is a pale imitation of the social condition that gave rise to the ... jury ... and [that] the conception of a verdict as an expression of community morality is simply in most places quaint.

Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 42. Solomon makes a similar point regarding the contemporary vitality of the ideal of “local self-rule” that historically made the jury a valued democratic institution. He notes that jury selection is based on a geography that makes the county the relevant community for self-governance but he doubts that there is much descriptive reality or normative appeal anymore to leaving counties free to govern themselves according to “local” standards about drunk driving, product safety, and medical malpractice. Not only are norms in these contexts unlikely to be local but practically speaking, to take one example, “manufacturers cannot make different product designs and tailor different warnings to different counties.” Solomon, *supra* note 33, at 1379-80.

244. Solomon points out that juries are often rather unrepresentative of the community and that elected or even appointed judges might have competing credentials to represent the community. Solomon, *supra* note 33, at 1359-61. He also raises questions about the supposed “epistemic” advantage jurors have through local knowledge about what a community’s norms are. For example, though medical malpractice lawsuits do turn on normative inquiry into standards of care, lay jurors seldom have any particular knowledge about those standards. *Id.* at 1384-85.

Gerken sets out to defend variation in verdicts as helping, rather than hindering, the jury's discharge of its political functions. But she is not committed to defending verdict variation in all its forms. She has in mind a particular sort of variation tied to differences in jury composition. If and when we find out that verdict differences correlate with differences in the group composition of juries, we have stumbled upon something important about the state of our democracy.²⁴⁵

Conceivably, second-order diversity has greater effects on criminal cases than civil trials. On the criminal side, a paradigmatic case of variation is the saga of the trials of four white Los Angeles police officers accused of beating Rodney King, an African-American suspect. When a change of venue moved the trial in 1992 to a mostly white county, and a jury there without any African-American members failed to convict the officers on any charges, commentators wondered whether the verdict would have been the same had the change of venue been denied and the officers tried before a multi-racial jury in Los Angeles.²⁴⁶ A partial answer to the query came in a subsequent federal trial, when a multi-racial jury convicted some of the same officers on civil rights charges stemming from the same incident.²⁴⁷

Similar concerns about demographic composition certainly arise on the civil side.²⁴⁸ For instance, a study of jury selection in over 300 trials in Cook County showed that the most significant predictors of which jurors would be peremptorily challenged "were whether the juror was black or female and his or her socioeconomic status."²⁴⁹ But I suggest that the paradigmatic case of civil jury variation is about individual idiosyncrasies rather than group identities. For instance, in the Schkade study's critique of civil jury inconsistency, the authors found that little of the variation could be attributed to factors such as geography, race, gender, education, age, or wealth. Instead, "[d]ifferent demographic groups ... produced very similar

245. Gerken, *supra* note 1, at 1161, 1173.

246. See, e.g., ABRAMSON, *supra* note 14, at 20.

247. *Id.* For a summary statement of this concern, see King, *supra* note 11, at 63-64.

248. See *infra* Part IV.A for a detailed discussion of one case raising these concerns.

249. Diamond et al., *supra* note 44, at 440; see also Rose & Vidmar, *supra* note 68 (explaining the rise of the phrase "Bronx jury" to describe the supposed pro-plaintiff views of minority jurors in civil cases).

average evaluations.”²⁵⁰ The authors specially noted that moral judgments about accidents are widely shared across groups and that one would not expect second-order diversity therefore to be the explanation for variations in verdicts.²⁵¹ Instead, even when jurors shared normative moral judgments, they varied erratically in how to express those judgments in dollar terms.²⁵²

The paradigmatic case of civil jury inconsistency is two juries with similar group compositions rendering different verdicts in two pain and suffering cases that seem similar in their facts. In one case, the most persuasive juror turns out to be a person whose brother suffered tremendous pain after an automobile accident due to soft tissue damage but who was considered a malingerer since the accident left no visible injuries. But from the same jury pool, the same day, a juror with such views is absent and the most persuasive juror turns out to be someone committed to the view that people file false claims after automobile accidents.²⁵³

As to cases such as these, their unpredictability offers little of Gerken’s democratic benefits, since outcomes hinge on purely personal differences among jurors that “don’t arise from their defining group commitments” or from a distinctive world view accompanying group identity.²⁵⁴

Is the problem of variation in civil cases different than it is in criminal juries when it comes to jury composition and the alleged benefits of living with different groups taking turns having the power to control outcomes? Gerken’s attitude here is experimental: jury trials are like “little laboratories” running all the time, and we will find out, in the aggregate, “which group divisions ‘matter’ for the purposes of composing the jury [and whether] the nature of the case—civil versus criminal ...—affect[s] how th[o]se divisions play out.”²⁵⁵ In other words, we will find out whether variation in civil jury verdicts is democratically informative or whether it is just picking up noise.

250. Schkade et al., *supra* note 2, at 1156.

251. *Id.*

252. *Id.*

253. I have adapted this example from Ellis & Diamond, *supra* note 13, at 1035.

254. Kahan et al., *supra* note 43, at 886.

255. Gerken, *supra* note 1, at 1176, 1173.

In that experimental spirit, I compare two civil trials. The first was an attempt to use the civil jury to set norms for police use of force during car chases. The second was an attempt to use the jury to resolve the allegations of hundreds, perhaps thousands, of hemophiliacs that they had contracted HIV on account of the defendant pharmaceutical companies' negligence in screening blood-clotting solids they supplied the hemophiliac population. Interestingly, courts in both cases resisted the civil jury's role, partly from fear that jury verdicts would introduce too much inconsistency into areas that needed uniform and predictable results.

A. *Scott v. Harris: Diverse Attitudes Toward the Police*

Norms governing police behavior are set by many institutions: police departments, civilian review boards, elected officials, judges, and—somewhat surprisingly—juries. For instance, pursuant to 42 U.S.C. § 1983, plaintiffs can seek jury trials, and damage awards, to redress violations of their Fourth Amendment right to be free from “unreasonable” searches and seizures.

A well-studied Supreme Court case raises fundamental issues about civil jury decision making in these sorts of civil liberties cases. In *Scott v. Harris*, the plaintiff was injured and left a permanent quadriplegic following a high-speed car chase.²⁵⁶ The chase ended when the pursuing police officer used his bumper to push the driver's car off the road, causing it to crash. The police maneuver effectively constituted a “seizure” for Fourth Amendment purposes and the plaintiff alleged his constitutional right against an “unreasonable” seizure was violated by what amounted to a decision to use potentially deadly force to terminate a car chase. The entire episode was videotaped and the videotape was entered into evidence.²⁵⁷

The Supreme Court found the defendant entitled to summary judgment after viewing the videotape and finding that no “reasonable jury” could view the videotape and think the facts supported plaintiff's allegations of excessive force.²⁵⁸ In the words of the Court,

256. 550 U.S. 372, 375 (2007).

257. *Id.* at 374-81.

258. *Id.* at 380. For a collection of cases in which courts have used the “no reasonable jury” standard to reverse jury verdicts, see Dooley, *supra* note 156, at 340 n.66.

the videotape “speak[s] for itself” in showing that the plaintiff initiated the episode by fleeing police at speeds exceeding eighty-five miles per hour down two-lane roads, and by evading a police trap by colliding with a pursuing police car in a parking lot, and speeding off again.²⁵⁹ The videotape captures, for any reasonable viewer the Court maintained, a “frightening” car chase that posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.²⁶⁰ Because there could be no “genuine dispute as to those facts” for a jury to decide,²⁶¹ the Court ruled as a matter of law that “[a] police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”²⁶²

Concurring, Justice Breyer urged interested readers to view the videotape of the car chase, posted for a time on the Court’s web site, and to judge for themselves why no “reasonable jury” could have found the police used excessive force.²⁶³ Dan Kahan and a group of researchers took up this invitation by showing the footage to a diverse national sample of about 1350 Americans.²⁶⁴ Contrary to the Court’s decision, the study showed that the videotape did not “speak for itself,” but said different things to different viewers.²⁶⁵ Though a “very sizable majority” of the sample saw what the Court saw, a minority perceived a chase in which the dangers to the public were not great enough to justify the use of deadly force.²⁶⁶ Those dissenting were not a random collection of individuals but “were connected by a core of identity-defining characteristics.”²⁶⁷ For instance,

259. *Id.* at 378-79 & n.5.

260. *Id.* at 380.

261. *Id.*

262. *Id.* at 386.

263. *Id.* at 387 (Breyer, J., concurring).

264. Kahan et al., *supra* note 43, at 854.

265. *Id.* at 864-69. The Kahan study might be compared to what actually happened in the trial of the police officers accused of beating Rodney King. *See supra* text accompanying notes 246-47. That episode had been videotaped and widely televised prior to trial. A vast majority of persons who saw the footage thought the police were guilty, but at actual trial, the footage was shown in slow motion, and the jury concluded that it saw a dangerous suspect never quite under police control during the entire episode.

266. Kahan et al., *supra* note 43, at 879.

267. *Id.*

African-Americans and women tended to see the facts in a more pro-plaintiff direction. So did low-income workers, residents of the Northeast, and individuals who characterized themselves as liberals and Democrats.²⁶⁸

In essence, the authors found that the cognitive processes we bring to bear on fact perception are often value-laden.²⁶⁹ Thus, people who shared a cultural orientation that values hierarchical relations and disapproves challenges to authority were likely to see the tape as the Court saw it. Their factual perceptions were filtered through their individualistic world view in which the driver's culpability in speeding and fleeing the police was a core norm ("He got what he deserved"). By contrast, people whose cultural profile was marked by egalitarian norms were more likely to see a tape in which the police abused their power (they could have aborted the search rather than resorting to deadly force).²⁷⁰

The Court's granting of summary judgment certainly maximized the uniformity of norms governing the use of deadly force during car chases.²⁷¹ Indeed, the Court concluded its opinion by announcing a "per se" rule that made it "objectively reasonable" for the police to use deadly force to terminate any high-speed chase creating dangers to the public.²⁷² But the Kahan study showed that the Court was simply preferring the cognitive processing of the facts of one "cultural type" personality over those of others. Granting summary judgment was tantamount to saying that the views of certain subcommunities were simply "unreasonable."²⁷³

Gerken could certainly invoke the Kahan study as support for the variation from jury to jury that second-order diversity gives us. Because a "very sizable majority" held to a cultural worldview that saw the police acting reasonably, the divergent views of the minority would be lost or subordinated to the majority faction on cross-sectional juries that ultimately tip toward the median juror.

268. *Id.* at 841.

269. *Id.* at 879-80.

270. *Id.*

271. The Court did not use the term "second-order diversity," but it does not seem a stretch to read into the Court's decision a concern that the constitutional standard governing police use of force might vary from community to community.

272. *Scott v. Harris*, 550 U.S. 372, 386 (2007).

273. *Kahan et al.*, *supra* note 43, at 881.

But Gerken may be too quick to view the position of minorities on juries through the simple lens of domination and subordination. As in elections, there is such a thing as “loser’s consent” in a democracy: verdicts, like elections, can have democratic legitimacy for the losing side so long as the procedure for making the decision gives fair hearing to the competing views of citizens.²⁷⁴ The Court’s granting of summary judgment short-circuited the democratic process by denying dissenting communities a role in the process at all. Though Gerken, as opposed to the Court, favors leaving these decisions to juries, she thinks cross-sectional juries are dismissive of minorities in their own ways.

The question of whether groups can better resolve normative disputes about police use of force through a system of second-order diverse juries or a system making most juries first-order diverse is not a question the authors of the Kahan study set out to answer.²⁷⁵ Still, it is worth noting the many places where they refer to cross-sectionality as a core credential that gives democratic and moral legitimacy to jury verdicts. Heterogeneity “afford[s] a factfinding role to citizens from diverse subcommunities,” creating a participatory space where citizens “interact[] with others whose understandings of social reality differ from theirs ... thus learning that their own understandings, and hence their views of the facts, are partial.”²⁷⁶ This lesson—which the authors call “cognitive liberalism” or coming to respect differences in factual perception—“might cause jurors of diverse identities to converge on a common view of the facts.”²⁷⁷ It may be, for instance, that minorities prove persuasive because they hold their opinions about what the videotape shows with more *intensity*. It may be that they exchange information that provokes discussion about the reasonableness of the fear of being stopped by the police.²⁷⁸ Factors such as intensity and information

274. *Id.* at 885-86 & n.144.

275. At one point, the authors do reference Gerken to suggest that “the prospect that jury decisionmaking [on police use of force] might result in nonuniform verdicts” is not necessarily a bad thing for democracy. *Id.* at 890 n.161.

276. *Id.* at 884-85.

277. *Id.*

278. *See id.* at 860-61.

exchange challenge Gerken's frequent characterization of minority influence on cross-sectional juries as weak.²⁷⁹

Even if the minority view did not prevail after deliberation, there is democratic difference between the Supreme Court's disdain for the civil jury's role in setting standards for police use of force, and the legitimacy that comes from setting those norms in a forum where diversity of viewpoints and experiences with police were raised and mulled over.²⁸⁰

For our purposes, it is instructive that Kahan and his colleagues regarded *Scott v. Harris* as an exceptional civil jury case turning on group identity factors.²⁸¹ In their judgment, "most—probably the overwhelming majority—of the cases" in which judges grant summary judgment, after finding no genuine issues of fact for a jury to resolve, are rightly decided.²⁸² This is because the paradigmatic case is one in which courts do not shut out from democratic participation members of a group who share a "distinctive understanding of social reality."²⁸³ To be sure, there will inevitably be scattered individuals who might view the facts differently than a court did in granting summary judgment. But so long as these individuals are "mere outliers" and not representative of an identifiable subcommunity, the granting of summary judgment does not offend democratic procedure in the ways it did in *Scott v. Harris*.²⁸⁴

In this Section, we have seen that Gerken's categories of first-versus second-order diversity can help illumine what is at stake in a case setting norms for police use of force. But much of the debate over the civil jury as a political institution turns on variations in verdicts that may not reflect group composition issues at all. I turn to such a case.

279. *See id.* at 886.

280. *See id.* at 904.

281. *See id.* at 860-62.

282. *Id.* at 886.

283. *Id.*

284. *Id.* (explaining that "statistical outliers are inevitable" but it is not the jury's function to represent them).

B. Mass Torts: Hemophiliacs and HIV

Beginning in the 1980s, mass tort litigation thrust the civil jury into one of its more prominent, even if shadowy, political roles.²⁸⁵ One close follower of mass tort litigation notes that not a single plaintiff has asked for a bench trial of the issues,²⁸⁶ and a number of companies have either settled from fear of going before juries²⁸⁷ or else gone into bankruptcy during or in anticipation of a jury trial.²⁸⁸

Some praise the use or threat of civil jury trials to deter harmful activities, in light of the failure of regulatory agencies to adequately police hazards creating mass torts.²⁸⁹ Others see the spread of mass tort litigation as “overdetering socially beneficial activity by making recovery too easy” before juries,²⁹⁰ who are sometimes misled by junk science²⁹¹ and who, in any case, are not equipped to resolve even genuine issues of causation.²⁹² For our purposes, however, the most relevant criticism is that important economic and social decisions—sometimes going to the very fate of entire industries—are left to the different decisions of different juries.²⁹³ This

285. See Schuck, *supra* note 234, at 482 (citing to examples including litigation over asbestos, silicone gel breast implants, Agent Orange, Bendectin, and the Dalkon Shield).

286. *Id.* at 490.

287. *Id.* at 479 (“[E]ven the credible threat of a jury trial can induce mass tort defendants to settle before trial.”); *id.* at 482 (noting that most mass tort cases never go to trial but are either dropped or settled).

288. See *id.* at 480. Companies that have filed for bankruptcy include almost all manufacturers of asbestos, A. H. Robbins (Dalkon Shield), and Dow Corning (silicone gel breast implants). See *id.* at 489 n.47.

289. “Weaknesses in the FDA’s regulatory process ... contributed to the incidence of mass injuries. For example, medical devices, which until 1976 were not subject to FDA review, are well represented in mass tort litigation.” RAND CORP., UNDERSTANDING MASS PERSONAL INJURY LITIGATION (2013), available at http://www.rand.org/pubs/research_briefs/RB9021/index1.html; see also Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 952 (1995) (noting the absence of or delayed regulatory action on asbestos, the Dalkon Shield, DES, Agent Orange, auto safety, and tobacco).

290. Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 596 (1993).

291. Schuck, *supra* note 289, at 942 (noting that juries may be misled by “easily manipulated scientific evidence”).

292. Schuck, *supra* note 234, at 500-02.

293. See *id.* at 485 (“[V]ariability in outcomes for cases that appear similar on their facts ... should trouble any system of justice that aspires to rationality, fairness, and predictability.”).

strikes many as a poor way to set important public policies, especially because jurors are rarely obliged to disclose their reasoning on crucial issues about negligence or causation.²⁹⁴ Peter Schuck notes that, in silicone gel breast implant litigation, most juries ruled in favor of the defendants, but even a string of defense victories was interrupted by some juries awarding large damages to some plaintiffs.²⁹⁵ He cites Judge Jack Weinstein as observing similar outcome variations in asbestos claims filed by former workers at the Brooklyn Navy Yard.²⁹⁶ No obvious factual or legal differences explained the variations in verdicts.²⁹⁷

In the face of this unpredictability, plaintiffs and defendants jockey for strategic advantage.²⁹⁸ Defendants especially have economic incentives to avoid jury trials altogether. Winning most cases is not enough when losing even one or a few can threaten them with bankruptcy.²⁹⁹ The logic of their position is thus to “prefer[] even a bad settlement” to the risk of “not merely ... an adverse outcome, but ... a truly catastrophic one.”³⁰⁰

I take it that Gerken is not committed to defending this sort of variation in verdicts, at least absent a pattern that informs us of important differences in the way subcommunities respond to mass torts. In fact, her categories help us understand what is so bothersome about *some* variations in verdicts. Suppose, for instance, that the best predictor of how any given jury decides a mass tort case is

294. See Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 527-28 (1998).

295. Schuck, *supra* note 234, at 484-85.

296. *Id.* at 484.

297. *Id.* Of course, as my colleague Professor Patrick Woolley commented in response to an earlier draft of this Article, the problem of variation in verdicts is hardly unique to jury trials. Judges in bench trials might well decide the same case differently. Email from Patrick Woolley, Professor of Law, Univ. of Texas Sch. of Law, to author (Nov. 16, 2013) (on file with author).

298. Schuck, *supra* note 234, at 483-87.

299. See *id.* at 484-85.

300. *Id.* at 485. While agreeing that mass tort litigation may threaten defendants with severe economic consequences, Patrick Woolley notes the many strategic advantages defendants enjoy during the course of litigation. These typically include not only better financing and information but also rules of estoppel that move defendants to settle strong cases, even at a premium, and to litigate comparatively weak cases first. See email from Patrick Woolley, Professor of Law, Univ. of Texas Sch. of Law, to author, *supra* note 297.

the skill of the plaintiff's attorney.³⁰¹ That would mean even two first-order diverse juries behave idiosyncratically and that the so-called median juror position is itself unpredictable and erratic. This sort of variation is far removed from the diversity of verdicts attributable to diversity in jury composition that Gerken means to defend. A considerable benefit of Gerken's categories is that they let us distinguish the variation in the way persons from *different* subcommunities viewed the car chase videotape in the Kahan study from the variation in lawyering skill that might explain why two juries that "look like the community," and hence are *similarly* composed, reach different verdicts in cases about silicone gel breast implants.

In mass tort litigation, courts sometimes seek to lessen variation by certifying plaintiffs as a class entitled to have all, or only parts, of their common claims decided before one jury.³⁰² But this method may heat up opposition to the civil jury because class actions take litigants out of the frying pan—where they are exposed to different juries reaching different verdicts—only to put them in the oven, where they are exposed to one jury controlling thousands of claims.³⁰³ Chief Judge Posner of the Seventh Circuit is a principal spokesperson for the view that use of class actions in mass tort litigation comes close to being a form of legal blackmail that forces defendants to settle even in circumstances in which they have no legal liability.³⁰⁴ And though he notes that this sort of thing "can happen in our system of civil justice ... without violating anyone's legal rights,"³⁰⁵ he has argued for his own version of how best to take advantage of the second-order design of our jury system, even while limiting some of the variations that Gerken might find democratically valuable (but that Judge Posner finds economically irrational).

Consider, for instance, claims brought on behalf of hemophiliac patients who contracted the HIV virus after receiving contaminated

301. Schuck suggests that differences in plaintiff attorney skill may well explain some observed variations in outcomes. Schuck, *supra* note 234, at 485. The same is true in criminal trials. See *Williams v. Taylor*, 529 U.S. 362, 398-99 (2000) (overturning conviction due to ineffective assistance).

302. Schuck, *supra* note 234, at 495.

303. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

304. *Id.* at 1299.

305. *Id.* at 1300.

blood-clotting solids supplied by the defendant pharmaceutical companies.³⁰⁶ The trial judge had certified the plaintiffs as an issue class for the purpose of litigating in one trial the common issue of defendants' negligence.³⁰⁷ Judge Posner, however, decertified the class, finding a better "alternative exists of submitting [the matter] to multiple juries constituting in the aggregate a much larger and more diverse sample of decision makers."³⁰⁸ As opposed to a unitary class action, Judge Posner preferred leaving the question of whether defendants had committed a mass tort against the hemophiliac population to "a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions."³⁰⁹

Of course, with multiple trials we are back to the costs of living with variation from one jury trial to the next; the defendants will win some and lose some. Over many cases, though, a pattern will result that "reflect[s] a consensus, or at least a pooling of judgment, of many different tribunals."³¹⁰

The phrase "pooling of judgment" is interesting and very un-Gerken like. For Gerken, the merit of second-order diverse designs is that they do not always reflect a consensus or "pooling of judgments"—they sometimes let a particular jury shake things up by taking an outlier position. Judge Posner did not use terms such as first- or second-order diversity, so it is difficult to know how much he factored into his analysis the risk of drawing an outlier jury. But he noted that some information already existed about how juries were responding to the hemophiliac claims. Of the 300 lawsuits pending against the defendants, thirteen had already gone to trial

306. *See id.* at 1296.

307. *Id.* at 1297. The trial judge had in mind a bifurcated procedure, allowable under Fed. R. Civ. P. 23(b)(3). The issue class would resolve the issue of defendants' liability. If defendants were found liable, then individual plaintiffs could pursue individual claims in subsequent trials before different juries. Evidence of comparative negligence could defeat or lessen any one plaintiff's claim, as could evidence that the defendant's negligence was not the proximate cause of the plaintiff's injuries. *Rhone-Poulenc*, 51 F.3d at 1296-97, 1303.

308. *Id.* at 1300, 1304.

309. *Id.* at 1299. For another procedure, known as "stratified sampling," that was attempted but disallowed in the course of asbestos litigation, see *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 653, 657, 659-67 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998); see also Bone, *supra* note 290, at 595-96.

310. *Rhone-Poulenc*, 51 F.3d at 1299-1300.

and the defendants had won twelve.³¹¹ Judge Posner was well aware that thirteen cases that happen to have gone to trial first were not necessarily a representative sample, but he regarded the figures as giving the parties some basis on which to calculate how they were likely to fare overall in the 300 pending cases.³¹² In fact, he extrapolated to an estimate that plaintiffs were on track to win 25 of the 300 cases.³¹³

Judge Posner acknowledged that this estimate was rough.³¹⁴ But his point seemed to be that parties can make rational litigation choices, despite the likely differences among jury verdicts. By contrast, a class action lawsuit amounted to the aforementioned legal blackmail or a crap shoot in which all bets would be off.³¹⁵

It is interesting to see how differently Judge Posner and Heather Gerken factor second-order diversity into their attitudes toward the jury. For Gerken, the merit of second-order diversity is that it deprives majority groups from being able to count on the jury system to shore up their dominance.³¹⁶ For Judge Posner, the unitary class action is sometimes a far larger threat to stability of expectations and economic rationality than having to live with second-order diversity. Second-order diversity is almost a cost of doing business, especially when a pattern of favorable prior decisions cabins the effects of even a few outlier verdicts.³¹⁷

311. One of the problems that plaintiffs faced was that many of them contracted the HIV virus *before* the existence of the virus was widely known. To get around this issue, they proposed a novel theory of liability. Had the defendants used reasonable care to screen their blood solids for the *known* risk of Hepatitis B, they would have “serendipitously” been screening early on for the HIV virus. *Id.* at 1296.

312. *Id.* at 1298.

313. *Id.*

314. *Id.* To the extent the defendants avoided going to trial early in the cases strongest for the plaintiffs, their record in winning early rounds of comparatively weak cases provides little basis for extrapolating as to how many future cases plaintiffs might yet win. I owe this observation to Professor Woolley. See email from Patrick Woolley, Professor of Law, Univ. of Texas Sch. of Law, to author, *supra* note 297.

315. *Rhone-Poulenc*, 51 F.3d at 1298-99.

316. See, e.g., Gerken, *supra* note 1, at 1104 (favorably regarding second-order diversity design’s contribution to “destabilizing” existing hierarchies).

317. For instance, Judge Posner compares his estimate that the defendants’ then current won/lost ratio extrapolates to a potential liability of “perhaps no more than \$125 million” to the potential of a class action to expose defendants to “\$25 billion ... (and conceivably more) and with it bankruptcy.” *Rhone-Poulenc*, 51 F.3d at 1298.

This brief review of mass tort litigation illustrates one other issue. For Gerken, a chief democratic benefit of second-order diversity is the opportunity it gives to dissenting groups to publicize their views by controlling some subset of verdicts.³¹⁸ But the benefit is difficult to make out in mass tort trials, even though variation in verdicts is abundant. The problem is the benefit matures only in the light of day, only if the verdict makes “visible” what different groups think about corporate responsibilities to mass tort victims. That visibility, however, is lacking; we rarely get to peek inside the black box and see what is going on.³¹⁹ Perhaps further research will clarify whether important political messages are being sent when juries differ in their reactions to plaintiffs bringing mass tort lawsuits.³²⁰ But a theory that crucially depends on verdicts as message senders is hard to fit with the overall design of the system to hide what goes on inside the jury room. No jury has to publish its reasoning;³²¹ indeed, there is no requirement that jurors even agree on their reasons.³²² If juries are the “little laboratories” that Gerken considers them to be, running all sorts of democratic experiments by varying jury composition, the test results from mass tort litigation remain unclear.³²³

CONCLUSION

Throughout *Second-Order Diversity*, Gerken contrasts the “political” and “truth-finding” functions of the jury.³²⁴ The traditional

318. Gerken, *supra* note 1, at 1104.

319. *See id.* at 1183.

320. Research to date casts doubt on whether second-order diversity explains inconsistencies in many tort cases. *See, e.g.,* Schkade et al., *supra* note 2, at 1173 (noting that “moral judgments about personal injury cases are very widely shared over diverse communities and demographic categories” and yet verdicts vary); *see also* Diamond et al., *supra* note 43, at 306 (noting that background characteristics of jurors explain only a small percentage of the observed variations in verdicts in a mock asbestos trial).

321. Jason Solomon has argued that juries do not fit the ideals of deliberative democracy precisely because they never have to state publicly the reasoning behind their verdicts. Solomon, *supra* note 33, at 1365-66.

322. Woolley, *supra* note 294, at 529-30.

323. For suggestions that interrogatories and special verdicts could clarify the reasoning behind verdicts, *see id.* at 542. But requiring answers to detailed interrogatories could prevent a jury from reaching a verdict. *See id.* at 531.

324. Gerken, *supra* note 1, at 1136 n.97 (“[W]e tend to resist the notion that juries

emphasis on the jury as neutral truth-finder, she argues, stands in the way of embracing the contributions the jury makes to disbursing the “editorial” power to say what the correct verdict under law is in a particular case.³²⁵

Gerken’s views are in line with those who question whether there is any independent or external standard of truth or accuracy or justice against which to measure much of what juries do. As the philosopher Jon Elster puts it about civil damage awards in particular, “there is not even an independent criterion for the correct outcome.”³²⁶ The same could be said about capital death sentencing: although we have a sense of fair procedures that juries should follow in choosing between life and death, we do not know which choice is the “right” one to make.³²⁷

For Gerken, every jury verdict, one by one, is a political act precisely because there is no static truth out there for juries to find and no law mechanically to apply; there is only a democratically constructed justice that emerges when different groups take turns editing the law from their partial perspectives.³²⁸

There is much to recommend Gerken’s strong views on the jury as a political institution. Even after a decade, *Second-Order Diversity* remains a fresh and brilliant conceptual analysis of the different senses in which we use the term “diversity” when trying to describe the democratic theory the jury is designed to live out. I have argued, however, that her contrast between the jury’s political and adjudicative functions is too stark. I am inclined to agree with the gist of what I believe to be John Rawls’s only reference to juries in *A Theory of Justice*. For Rawls, trials are best understood as examples of “imperfect procedural justice”: there *is* an external standard of what counts as the correct verdict, but no procedure is so perfect as to guarantee the right result.³²⁹ If there did exist such a perfect procedure for reaching just results, we should do away

represent a strategy for diffusing power rather than for finding truth.”).

325. “[T]he suggestion that juries are editing rather than merely applying [legislated] mandates runs counter to the role we expect juries to play within the system.” *Id.*

326. ELSTER, *supra* note 11, at 17.

327. See, e.g., Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 161-63 (2004).

328. See Gerken, *supra* note 1, at 1126-27.

329. JOHN RAWLS, *A THEORY OF JUSTICE* 74-75 (Harvard University Press rev. ed. 1999).

with the jury system posthaste and use the alternative.³³⁰ But in the absence of what Rawls calls “perfect procedural justice,” we rely on the procedures of jury trial, imperfect though they be.³³¹

Of course, there are cases, and there are cases. In some instances, there does not seem to be an external standard of the sort Rawls imagines. For instance, we have no litmus paper to test when a given act turns from the lighter color of manslaughter to the darker color of murder. And we have no objective measure for what makes a manufacturer liable for a product design that creates risks beyond those an “ordinary consumer” with “ordinary knowledge” would already know about. Still, this does not mean that there is not a “truth” in regard to whether the manufacturer deliberately suppressed in-house reports of hidden dangers or whether DNA exonerates an accused.

Gerken offers a global endorsement of the political nature of jury decision making when a more qualified assessment is called for. She illumines the many instances in which juries edit according to norms that may or may not be shared among groups. But she tends to sweep all of the jury’s functions into the editorial/political category, with little room left for anything but political behavior in the jury room. I am inclined to believe, although here I speculate, that Gerken views the jury as one example among many showing that nothing is ever quite as beyond politics as it seems.

In this regard, let me revisit the Kahan study of the effects of group identity on reactions to a videotaped car chase.³³² The authors

330. “There is no general test for the accuracy of criminal convictions. If there were, we would use it at trial.” Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 175 (2008).

331. As Rawls explains:

The desired outcome is that the defendant should be declared guilty if and only if he has committed the offense with which he is charged. The trial procedure is framed to search for and to establish the truth in this regard. But it seems impossible to design the legal rules so that they always lead to the correct result. The theory of trials examines which procedures and rules of evidence, and the like, are best calculated to achieve this purpose consistent with the other ends of the law. Different arrangements for hearing cases may reasonably be expected in different circumstances to yield the right results, not always but at least most of the time.

RAWLS, *supra* note 329, at 74-75. But see ELSTER, *supra* note 11, at 17-18 for an alternative application of Rawls’ theory of justice to juries.

332. *See supra* Part IV.A.

maintained that differences in background affected not only the *evaluation* of facts, but also the sheer act of *perception*.³³³ This conclusion should be questioned. To be sure, members of subcommunities differed on the ultimate value-laden issue of whether the police used excessive force.³³⁴ But the differences were not over what speed the plaintiff's car was going, whether the highway was divided, how many minutes the chase lasted, or how many other motorists or pedestrians were passed during the chase's duration. The differences were over whether even the agreed upon facts constituted a sufficient "danger" to justify the police decision to end the chase with potentially deadly force.³³⁵ The authors tended to regard the issue of whether the videotape showed a "dangerous" chase to be a factual perception issue, but it seems better to regard it as a mixed question of fact and law, going to whether the danger "seen" was great enough to make the police use of deadly force reasonable.

It is the mixed fact/law nature of so many jury inquiries that makes Gerken's rejection of the "jury is merely mechanically applying the law" in favor of the "jury is a political editor of the law" a powerful and welcome revisionist account. But revisions work best when they salvage something from what they overthrow.

I have argued for salvaging some role for the jury to play as a truth-finding body. Rawls expresses his claim about the truth in jury verdicts carefully. He does not say the ideal end is for juries always to get it right but rather that we design trial procedures to minimize erroneous convictions or lessen incorrect findings of liability.³³⁶ We put the burden on the state in criminal trials and on plaintiffs in civil trials to underscore the importance of getting it right in this regard.³³⁷

333. See Kahan et al., *supra* note 43, at 860-61.

334. *Id.* at 903.

335. *Id.*

336. See RAWLS, *supra* note 329.

337. The burden of proof, of course, is higher in criminal than in civil trials: "beyond a reasonable doubt" versus "preponderance of the evidence," typically, but sometimes "clear and convincing proof." The difference speaks to the greater importance we attach to error minimization on the criminal side. Even in civil trials, however, the burden rests on a normative preference to distribute errors so as to live with more false no liability findings than more false liability findings. How much error we are prepared to live with, and how best to distribute it, are open questions. See, e.g., *In re Winship*, 397 U.S. 358, 269-72 (1970)

Alongside evidentiary procedures, jury selection procedures are designed to promote accuracy in verdicts. For all their differences, theorists of first- and second-order diversity agree that we rely on the principle of random selection as the best method for stripping government of the power to bias outcomes by biasing who gets on juries.³³⁸ This is an important *negative* contribution to truth-finding. Even if we do not know in a positive sense what the right result is or who the right people are to find it, we do know that bias can seep into results when government is left free to select or to excuse jurors in a discriminatory fashion. As the Supreme Court suggested as far back as 1880, when government restricts jury duty to whites, it has already signaled to a jury so chosen how it should decide the guilt of a black defendant.³³⁹

Advocates of first- and second-order diversity are split over the issue of whether jury composition contributes to the accuracy and impartiality of verdicts in a *positive* sense. Gerken concludes that minority representation on individual juries does little to alleviate the strong “social-psychological” pressure that favors majority control.³⁴⁰ This is why she can view all jury verdicts, considered one by one, as partial and political. But I have suggested, after reviewing the empirical literature on deliberation, two ways in which diversity serves the truth-telling functions of individual juries. First, in an epistemic sense, heterogeneous juries outperform homogeneous juries in exchanging information and perspectives on the evidence, compiling better records when it comes to catching mistakes, filling in blanks, and checking one another’s partialities. The epistemic advantage translates into reason-giving argument, which makes deliberation on cross-sectional juries more dynamic and transformative of preexisting preferences than it is on homogeneous panels. Second, in a democratic sense, the cross-sectional jury enjoys a legitimacy-giving advantage. Juries that “look like” the community have a special claim to stand in for the community, by virtue of their inclusiveness.

(Harlan, J., concurring).

338. Richard Re calls this assuring “institutional impartiality” in our jury selection procedures. See Re, *supra* note 35, at 1586-88.

339. *Strauder v. West Virginia*, 100 U.S. 303, 309-10 (1879).

340. See Gerken, *supra* note 1, at 1125-26.

Though the legitimacy and accuracy of jury verdicts are two different matters, the two tend to come together in the cross-sectional jury. The very credential that legitimizes a jury's verdict—its visibility as a representative of the whole community—is the same credential that adds impartiality to a jury's deliberations. To be sure, that impartiality is diffuse—a product of many minds. But the fact that it takes many minds to approach impartiality is not an argument against the cross-sectional jury as a truth-telling body. It is the definitive argument in favor of diversity on juries. It is also the definitive argument in favor of the jury system as a whole: our oldest standing institution built on the proposition that twelve persons achieve a wisdom in common, no person has alone.