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## Diversity and the Civil Jury

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## DIVERSITY AND THE CIVIL JURY

CHRISTINA S. CARBONE\* & VICTORIA C. PLAUT\*\*

### TABLE OF CONTENTS

INTRODUCTION . . . . .	838
I. CONCEPTIONS OF DIVERSITY IN THE CIVIL JURY CONTEXT . . .	839
II. JURY SERVICE AS A FORM OF POLITICAL, DEMOCRATIC PARTICIPATION . . . . .	843
III. JURIES INCREASE PUBLIC CONFIDENCE AND LEND LEGITIMACY TO VERDICTS . . . . .	850
<i>A. Procedural Fairness and Perceived Legitimacy</i> . . . . .	850
<i>B. Representing a Community's Moral Sense</i> . . . . .	856
<i>C. Increasing Perceptions of Legitimacy Through     Jury Service</i> . . . . .	862
IV. JURY SERVICE AS AN EDUCATIVE OPPORTUNITY . . . . .	865
<i>A. Learning About Political Institutions and Rights</i> . . . . .	865
<i>B. Engaging with and Learning About One's Political     Community</i> . . . . .	867
V. NORMATIVE CONSIDERATIONS AND CONCLUSION . . . . .	880

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## INTRODUCTION

Much focus (and criticism) has been given to the jury's role as fact-finder, including its ability to handle complex evidence, listen to and properly weigh expert and scientific testimony, conduct meaningful and productive deliberations, render appropriate damage judgments, and understand and properly apply instructions on the law.<sup>1</sup> The literature on diversity has also given attention to decision-making processes, the key question being whether more diverse groups render better decisions.<sup>2</sup> Although the competency and accuracy of jury decisions and the decision-making qualities of diverse groups are certainly important, this Article focuses instead on the jury's political functions and the role that diversity has in fulfilling these functions. What are the main political functions of the civil jury, and is jury diversity necessary for the fulfillment of these functions?

In this Article, we explore four of the primary political justifications for the institution of the civil jury, highlighting how jury diversity works to promote its underlying political and civic goals. Part I begins by explaining what we mean by the term "diversity" in the jury context. We adopt the definition of diversity that pervades current jurisprudence, particularly the fair cross-section requirement governing the composition of the jury venire and equal protection claims governing the selection of the jury panel under *Batson v. Kentucky* and its progeny. Part II moves to our analysis of the first of four political justifications for the institution of the civil

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1. For a review, see Shari Seidman Diamond & Mary R. Rose, *Real Juries*, 1 ANN. REV. L. SOC. SCI. 255 (2005); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).

2. See, e.g., SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 23, 47-50 (2007); Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCHOL. SCI. 507, 509 (2004); Katherine W. Phillips et al., *Surface-Level Diversity and Decision-Making in Groups: When Does Deep-Level Similarity Help?*, 9 GROUP PROCESSES & INTERGROUP REL. 467, 475-77 (2006); Samuel R. Sommers et al., *Cognitive Effects of Racial Diversity: White Individuals' Information Processing in Heterogeneous Groups*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1129, 1132 (2008); 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, 606 (2006).

jury commonly found in the literature: jury service as a form of democratic participation. We argue that diversity helps to reflect the voice of the community. Part III discusses a second political justification: the jury's role in increasing the legitimacy of both individual verdicts and the legal system more broadly. Here, we first inquire into the relevance that jury diversity has to perceptions of legitimacy and how different understandings of diversity might moderate this relationship. We then evaluate evidence regarding the link between group identities and divergent viewpoints, an empirical fact lying at the heart of the legitimacy argument. Lastly, we evaluate the capacity of jury service to influence the legitimacy of the jury system from the perspective of those participating as jurors.

Part IV evaluates the final two political justifications of the civil jury, both of which consider jury service an educative opportunity for citizens. First, jury service represents an opportunity to learn about governance, the operation of the legal system, and citizens' rights. Second, jury service presents a unique moment for members of a political community to interact and learn about and from *each other* regarding their lives and viewpoints. Here as well, we demonstrate the central role that diverse juries can play in advancing these two aims. With respect to the first, as with the democratic participation function, we argue that the educative benefits of the civil jury should be made available to all members of society. With respect to the second, we suggest that, notwithstanding the potential for the duplication of social status relations and other negative side effects of intergroup contact within the jury room, diverse juries represent an opportunity for learning across differences, especially when the environment is inclusive. Finally, having evaluated diversity's relevance to the political functions of the civil jury, Part V concludes by offering some normative suggestions on how the efficacy of juror diversity can be increased through structural and other reform efforts.

## I. CONCEPTIONS OF DIVERSITY IN THE CIVIL JURY CONTEXT

What do we mean by "diversity"? People can differ along an almost infinite number of characteristics, but the term diversity has

most commonly been understood in terms of certain social categories (often ones with historical significance in this country), such as race and ethnicity, gender, sexual orientation, and religion.<sup>3</sup> In the jury context, jury diversity is shaped or constrained by the strategies used to generate the venire (for example the use of voter registration and/or driver's license lists), the fair cross-section requirement, and the limitations placed on the exercise of peremptory challenges under *Batson v. Kentucky* and its progeny.<sup>4</sup> Whereas others have commented on the efficacy of these measures in actually producing more diversity on juries,<sup>5</sup> a brief look at these latter two components sheds some light on how diversity is currently conceptualized under the law.

The right to an impartial jury drawn from a fair cross section of the community has mostly been expounded upon in the context of the Sixth Amendment's right to a jury trial in criminal cases,<sup>6</sup> but has been applied to civil cases as well.<sup>7</sup> In order to ensure that juries

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3. Kira Hudson Banks, *A Qualitative Investigation of White Students' Perceptions of Diversity*, 2 J. DIVERSITY HIGHER EDUC. 149, 151-52 (2009) (finding that race and ethnicity were most strongly associated with diversity, though other categories such as gender, sexual orientation, and religion were also mentioned); see also Joyce M. Bell & Douglas Hartman, *Diversity in Everyday Discourse: The Cultural Ambiguities and Consequences of 'Happy Talk'*, 72 AM. SOC. REV. 895-914 (2007) (finding that respondents offered definitions of diversity that often focused on social differences and implicitly saw diversity through a racial lens, though respondents often had difficulty speaking of inequality and oppression). To be sure, the ambiguity surrounding the term "diversity" has been a cause for some concern that its use dilutes or diverts attention from efforts to address racial inequality. For review, see V.C. Plaut et al., *New Frontiers in Diversity Research: Conceptions of Diversity and Their Theoretical and Practical Implications*, in 1 APA HANDBOOK OF PERSONALITY AND SOCIAL PSYCHOLOGY: ATTITUDES AND SOCIAL COGNITION (P. R. Shaver & M. Mikulincer eds.-in-chief, E. Borgida & J. Bargh vol. eds., 2014).

4. 476 U.S. 79 (1986).

5. See, e.g., Sanjay K. Chhablani, *Re-Framing the 'Fair Cross-Section' Requirement*, 13 U. PA. J. CONST. L. 931, 945-49 (2011) (arguing that the fair cross-section requirement is inefficacious "due to the Court's curtailment of the scope of this jurisprudence, the creation of a doctrinal paradox, and the lower courts' conflation of it with the Court's equal protection jurisprudence"); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 178-80 (2005) (arguing that *Batson's* protections are illusory, not only regarding racist or sexist lawyers but also for well-intentioned people who carry unconscious biases).

6. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975).

7. *Thiel v. S. Pac. Co.*, 328 U.S. 217 (1946). Additionally, the Federal Jury Selection and Service Act of 1986 provides that "all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. § 1861 (2012).

serve “as instruments of public justice,” this requirement is designed to create “a body truly representative of the community.”<sup>8</sup> The fair cross-section requirement protects against the exclusion of a “distinctive group” and requires, in part, a showing that “the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community.”<sup>9</sup> In determining what constitutes a distinctive group, some courts have required that (1) “there must be some factor which defines and limits the group”; (2) “there must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience which is present in members of the group”; and (3) “the group must have a community of interest which cannot be adequately protected by the rest of the populace.”<sup>10</sup> The development of this requirement stemmed from a concern about the jury becoming “the organ of any special group or class”<sup>11</sup> or “the instrument of the economically and socially privileged.”<sup>12</sup> In particular, courts were responding to a history of continuing underrepresentation and strategies of exclusion for women, African Americans, and other minorities.<sup>13</sup> This focus on particular groups with a history of marginalization in the United States has continued to shape our understanding of diversity on juries, with a few exceptions.<sup>14</sup>

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Though the Seventh Amendment, which provides for the right to jury trial in certain civil cases, does not apply to states, most states parallel the federal requirements in providing a jury trial right in civil cases.

8. *Smith v. Texas*, 311 U.S. 128, 130 (1940).

9. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

10. *United States v. Guzman*, 337 F. Supp. 140, 143-44 (1972); *see also* *United States v. Test*, 550 F.2d 577 (10th Cir. 1976) (adopting the *Guzman* standard).

11. *Glasser v. United States*, 315 U.S. 60, 86 (1942).

12. *Thiel*, 328 U.S. at 224.

13. Chhablani, *supra* note 5, at 945 (“Thus, after almost two centuries of continuing under-representation of women, African Americans and other minorities on juries, and less than fifteen years after the Court had rejected equal protection challenges to state opt-in statutes, the Burger Court identified a new jurisprudential basis for ensuring that juries did indeed function as voices of the whole community. No longer restricted by the demanding burdens of equal protection analysis, the Court’s ‘fair cross-section’ jurisprudence held much hope for ending the systematic exclusion of women, African Americans, and other minorities from jury service.”).

14. *See Thiel*, 328 U.S. at 224-25 (daily wage earners are a distinctive group); *United States v. Maxwell*, 160 F.3d 1071, 1075-76 (6th Cir. 1998) (age-defined groups are not recognized); *Johnson v. McCaughtry*, 92 F.3d 585, 593 (7th Cir. 1996) (same); *United States*

Just as the fair cross-section requirement can shape the jury venire, *Batson v. Kentucky* and its progeny<sup>15</sup> can shape the composition of empaneled juries by placing limitations on the use of peremptory challenges during jury selection.<sup>16</sup> It does so under the Equal Protection Clause of the Fourteenth Amendment by prohibiting the exercise of peremptory challenges on the basis of a juror's race, ethnicity, gender, or religion.<sup>17</sup> In order to prevail on a *Batson* challenge, a party must first make a prima facie case for discrimination of a member of a group capable of being singled out for differential treatment.<sup>18</sup> The range of cognizable groups under a *Batson*-type challenge is generally more restrictive than that found under the fair cross-section requirement, although some have commented that the two standards have become conflated.<sup>19</sup>

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v. Biaggi, 909 F.2d 662, 676-79 (2d Cir. 1990) (both African Americans and Hispanics are distinctive groups); *United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989) (Jews are a distinctive group); *People v. Garcia*, 92 Cal. Rptr. 2d 339, 343-44 (Ct. App. 2000) (sexual orientation as the basis for a distinctive group); *State v. Villafane*, 325 A.2d 251, 256 (Conn. 1973) (Puerto Ricans are a distinctive group); *State v. Spivey*, 700 S.W.2d 812, 814 (Mo. 1985) (deaf persons not recognized as a distinctive group); *State v. Fulton*, 566 N.E.2d 1195, 1201 (Ohio 1991) (Amish are a distinctive group); *State v. Plenty Horse*, 184 N.W.2d 654, 656 (S.D. 1971) (Native Americans are a distinctive group); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 968 (1998) (noting that although courts will recognize claims for women and ethnic and religious groups, they "just as frequently reject claims on behalf of young people, old people, poor people, deaf people, less educated people, college students, resident aliens, bluecollar workers, professional workers, felons, juvenile offenders, those not registered to vote, those opposed to the death penalty, those affiliated with the National Rifle Association, city residents, and residents of Minneapolis") (citations omitted).

15. 476 U.S. 79 (1986). The *Batson* standard applies to the jury selection process in the civil context. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616-18 (1991); *Ashabraner v. Bowers*, 753 N.E.2d 662, 666 (Ind. 2001); *Alex v. Rayne Concrete Serv.*, 951 So. 2d 138, 148 n.8 (La. 2007); *Zakour v. U.T. Med. Group, Inc.*, 215 S.W.3d 763, 767 (Tenn. 2007); *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 510 n.2 (Tex. 2008).

16. The *Batson* decision counters "a long tradition in some parts of the country of giving African-American citizens an equal opportunity to be *considered* for jury service, but then removing as many African-Americans as possible from the final jury panel through the use of peremptory challenges." Leipold, *supra* note 14, at 947.

17. *United States v. Martinez-Salazar*, 528 U.S. 304, 314-15 (2000) (stating in dicta that ethnic origin is an unlawful basis for exclusion); *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 128-29 (1994) (holding gender as a protected class); *Batson*, 476 U.S. at 88 (holding African Americans as a protected class); *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) (suggesting religion is an unlawful basis for exclusion).

18. *See, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008); *Batson*, 476 U.S. at 94.

19. Chhablani, *supra* note 5, at 947-48 ("[L]ower courts have treated the 'distinct group' requirement of the cross-section requirement as identical to the 'suspect class' requirement

Considering the fair cross-section requirement and the *Batson* line of cases together, these legal provisions generally focus on groups that historically have been excluded from the jury process, particularly racial and ethnic minorities and women. This translates into what has been called demographic diversity, even as doctrinal reasoning often treats demographic characteristics as proxies for viewpoint diversity (or different perspectives and ways of viewing and interpreting the world).<sup>20</sup> Additionally, given the historical development of these doctrines, the laws shaping jury diversity also can be understood in terms of culturally, socially, and historically embedded group differences in power and status.

## II. JURY SERVICE AS A FORM OF POLITICAL, DEMOCRATIC PARTICIPATION

In *Powers v. Ohio*, the Court observed that “with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”<sup>21</sup> Despite common references to jury *duty*, scholars have argued that jury service should nonetheless be conceptualized as a political *right* on par with voting and holding office.<sup>22</sup> As with other democratic institutions, jury service is part of a larger system of checks and balances against the exercise of power. Whereas juries in the criminal context provide a check against the overzealous prosecutor, they restrain judicial arbitrariness or abuses of power in the civil context.<sup>23</sup> Juries also lend a local voice to laws that have been legislatively enacted at broader levels of government. Even without reaching the level of jury nullification, juries are sometimes situated to determine how to fairly apply laws to particular facts, especially when the law incorporates vague standards that require

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of the Fourteenth Amendment.”).

20. See, e.g., *Ballard v. United States*, 329 U.S. 187, 193-94 (1946) (noting that the two sexes are not fungible because “a flavor, a distinct quality is lost if either sex is excluded”).

21. *Powers v. Ohio*, 499 U.S. 400, 407 (1991); see also *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975) (“[S]haring in the administration of justice is a phase of civic responsibility.”).

22. Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 204 (1995).

23. *Taylor*, 419 U.S. 530 at 530 (identifying that one purpose of the jury is to “guard against the exercise of arbitrary power”).

some amount of subjective interpretation. The political voice afforded jury members is arguably more direct than the model of participation typically operating in the voting context. Even the popular referendum process does not afford citizens the chance to be individually heard in the same way they can be during jury deliberations. As Alexis de Tocqueville noted, “[T]he jury puts the people themselves ... on the judge’s bench. So the institution of the jury really puts the leadership of society into the hands of the people.”<sup>24</sup>

Jury service offers citizens an opportunity to participate in what has been called “political society,” defined as a sphere of life separate from either the state or civil society wherein citizens bring the knowledge and interests developed in their civil lives to bear on the actions of the state.<sup>25</sup> Civil juries in particular might be described as performing a quasi-public function. Their verdict has the most direct impact on the parties to the dispute itself (most frequently private entities),<sup>26</sup> though it also arguably has indirect effects that stretch more broadly to affect how other cases are resolved as well as the behavior of corporations and other actors altered as a result of litigation. In what has been called a system of “litigotiation,” “juries provide signals or markers by which legal actors form estimates of what other juries will do and on that basis make decisions and formulate policies about claims, offers, settlements, and trials, and even about preclaim investments in safety, disclosure, and so forth.”<sup>27</sup> Although the number of jury trials relative to the total number of claims is very small,<sup>28</sup> the verdict in

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24. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA: HISTORICAL-CRITICAL EDITION OF DE LA DÉMOCRATIE EN AMÉRIQUE, A BILINGUAL FRENCH-ENGLISH EDITION* 445 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2010).

25. JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 16 (2010).

26. LYNN LANGTON & THOMAS H. COHEN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, NO. NCJ223851, *CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005*, at 4 (2008). In 2005, juries decided almost 70% of the approximately 26,950 civil trials disposed that year. *Id.* at 1.

27. Marc Galanter, *The Regulatory Function of the Civil Jury*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 61, 61 (Robert E. Litan ed., 1993).

28. LANGTON & COHEN, *supra* note 26, at 1. In 2005, the breakdown of civil trials in state courts was approximately 61% tort cases (including 35% motor vehicle, 9.1% medical malpractice, 6.9% premises liability, 2.7% intentional tort, and 1.3% product liability), 33% contract cases (including 4.1% fraud, 1.2% employment discrimination, and 0.9% mortgage

a single case can have a ripple effect that extends the impact of that case well beyond its initial scope in ways that regulate social ordering more generally.<sup>29</sup>

In addition to giving a voice to local communities, jury service is believed to stimulate psychological and behavioral benefits for those who participate. Like the sense of satisfaction and pride that goes along with casting one's vote at the ballot box,<sup>30</sup> jury service can engender a sense of civic pride and support an identity of a public self. Additionally, engagement in democratic participation via jury service can garner a sense of political efficacy—the belief that one is competent to participate and that one's participation matters.<sup>31</sup> This sense of efficacy and reinforced (or perhaps newly found) identity as a political actor can potentially translate into other forms of political engagement and participation.<sup>32</sup> Jury participation can draw into public life and discourse those who are relatively less engaged and alienated, particularly minority groups who have historically been marginalized or are otherwise disenchanting with the legal system.<sup>33</sup>

Some evidence supports these benefits of jury service, with a few exceptions. Survey evidence shows that although responses vary, jurors tend to have positive experiences with their service. A supermajority of jurors from the city and county courthouses in King County, Washington reported their experience was “satisfactory” or better, though those actually getting to serve as sworn jurors reported higher ratings.<sup>34</sup> Among this group, nearly two-thirds rated their experience as “very good” or “excellent,” whereas only 3.6% said their experience was “less than satisfactory.”<sup>35</sup> The majority of those serving on juries likewise reported that their experience exceeded expectations (66%).<sup>36</sup> The quality of a juror's

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foreclosure), and 6% real property cases. *Id.* at 2.

29. See Galanter, *supra* note 27, at 61-62.

30. For example, think of the meaning behind the stickers with the declaration of “I Voted.”

31. GASTIL ET AL., *supra* note 25, at 23.

32. *Id.* at 26 (summarizing the “participation effect, whereby any form of civic engagement is likely to increase future civic participation”).

33. *Id.* at 41.

34. *Id.* at 65.

35. *Id.*

36. *Id.* at 69. Five percent rated the experience as below their expectations, whereas 31%

experience likely affects the degree to which she embraces her identity as a political actor and continues with other forms of engagement.<sup>37</sup>

Jury service has also been shown to affect jurors' sense of political efficacy. For example, jurors who were sworn onto panels showed long-term increased levels of political faith, that is, the extent to which they believe citizens can have a say and influence government.<sup>38</sup> Long-term increases in political self-confidence were also found for jurors who were summoned but dismissed during the voir dire process.<sup>39</sup> The ability of jury service to reinforce a person's political identity also emerged in the open-ended responses when jurors were explaining their levels of satisfaction. A small subset of jurors specifically commented that serving allowed them to fulfill their civic duty and enhanced their sense of citizenship.<sup>40</sup> Importantly, civil trials have been noted not only for "cultivating the civic beliefs of the more politically sophisticated, frequent voters—but also for developing the political self-confidence of less active and informed voters."<sup>41</sup> This finding tends to support the notion that jury service can be a pathway for less engaged citizens to be more included in political life.

Despite the positive attitudes generally associated with jury service, evidence supporting the claim that participation on a jury increases other forms of political participation after service is more mixed. Data from a national study of jurors linking official jury records with voter registration lists showed that those serving on criminal juries were more likely to vote in later elections if they

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said their experience was about what they expected. *Id.*

37. *See id.* at 23.

38. *Id.* at 135.

39. *Id.*

40. *Id.* at 68 (quoting jurors who commented that they were satisfied because "it's an honor to perform my civic duty," it provided the "feeling of performing a civic duty," and that it "was citizenship affirming").

41. *Id.* at 153. However, an earlier study examining juror attitudes in criminal trials at three California courts failed to find overall effects on political efficacy stemming from jury service, with the exception of certain groups (for example, first-time women trial jurors). Paula M. Consolini, *Learning by Doing Justice: Jury Service and Political Attitudes 181-82* (1992) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author). An exception to this exception is that women over the age of fifty did not change their feelings of political efficacy as a result of jury service. *Id.*

were infrequent voters prior to service.<sup>42</sup> This effect, however, was not found among jurors serving in civil trials.<sup>43</sup> In explaining this difference across the criminal-civil contexts, the researchers suggest that “the civil trial’s private function, lower societal esteem, greater degree of complexity, lower juror engagement, and majoritarian decision rule lead us to expect that the civic impact of jury deliberation may be weaker for civil cases than for criminal trials.”<sup>44</sup> Indeed, in a survey of juror attitudes, those involved in a civil trial tended to rate the trial as less interesting than those involved in a criminal case.<sup>45</sup> Jurors’ more positive subjective experiences in criminal trials relative to civil trials seemed to account for increases in post-service voting behavior.<sup>46</sup> In terms of other types of political and civic participation, however, the study found that, in general, “[e]ngaging and satisfying jury experiences tended to produce small positive changes in news media use, public conversation, strategic political action, and community group participation.”<sup>47</sup> Although trial type did not independently account for jurors’ experience overall, jurors in civil cases who were confused during their trials showed decreased levels of public engagement, marking an exception to this generally positive trend of results.<sup>48</sup> The majority of empirical research has focused on individual self-efficacy and engagement, but future research also should turn to the question of whether jury participation increases collective or community efficacy, or a community’s feelings of capability for action.<sup>49</sup>

In addition, and more fundamentally, future research should break down findings by race/ethnicity and other characteristics relevant to jury diversity in order to ascertain whether effects hold

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42. GASTIL ET AL., *supra* note 25, at 46-47.

43. *Id.* at 47. No effect on subsequent voting behavior was found among those jurors who were already frequent voters prior to service, regardless of trial type. *Id.*

44. *Id.* at 38-39.

45. *Id.* at 69.

46. *Id.* at 71.

47. *Id.* at 126.

48. *Id.* at 119.

49. For studies concerning collective or community efficacy, see Albert Bandura, *Exercise of Human Agency Through Collective Efficacy*, 9 CURRENT DIRECTIONS PSYCHOL. SCI. 75 (2000); Stephanie A. Fryberg et al., *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, 30 BASIC & APPLIED SOC. PSYCHOL. 208, 213 (2008).

for members of groups that are differently situated. Because the findings of most studies have not been broken down in these ways, it is difficult to assess whether the potential of jury participation for increasing satisfaction and political and civic participation extends to members of groups that have traditionally experienced underrepresentation on juries.

Generally speaking, to the extent the goal is to involve more of the citizenry in political participation, jury service provides an additional opportunity to give a voice to the people. The voting process as the main mechanism for democratic participation often falls short of desired levels of engagement. In the 2012 presidential election, voter turnout was an estimated 57.5%, meaning that approximately 93 million eligible citizens did not vote.<sup>50</sup> Voter turnout is generally even less during midterm elections; in 2010, only 41.6% of eligible voters cast their ballot.<sup>51</sup> Moreover, voter turnout varies by demographic groups, including income, education, age, and ethnicity. Consistent with previous midterm elections, in 2010 non-Hispanic whites had a voter turnout rate of 49%, compared to 44% for blacks, 31% for Hispanics, and 31% for Asians.<sup>52</sup> While strategies to evade jury service are well-known, the ability to summon citizens by court order provides a mechanism to ensure public participation that is absent from the voting process.<sup>53</sup>

To be sure, systematic obstacles to achieving political participation through jury service exist as well.<sup>54</sup> One example of a structural

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50. Press Release, Bipartisan Policy Ctr., 2012 Election Turnout Dips Below 2008 and 2004 Levels: Number of Eligible Voters Increases by Eight Million, Five Million Fewer Votes Cast (Nov. 8, 2012), *available at* <http://bipartisanpolicy.org/sites/default/files/2012%20Voter%20Turnout%20Full%20Report.pdf>.

51. NONPROFIT VOTE, AMERICA GOES TO THE POLLS 2010: A REPORT ON VOTER TURNOUT IN THE 2010 ELECTION 3 (n.d.), *available at* <http://www.nonprofitvote.org/download-document/america-goes-to-the-polls-2010>.

52. NONPROFIT VOTE, AMERICA GOES TO THE POLLS: VOTER PARTICIPATION GAPS IN THE 2010 MIDTERM ELECTION (n.d.), *available at* <http://www.nonprofitvote.org/documents/2011/11/voter-participation-gaps-in-the-2010-midterm-election.pdf>.

53. Poor enforcement or nonenforcement of court summonses that go ignored arguably undermines the ability to get potential jurors to come to court, though the normative force of the law may still have some effect even in the absence of enforcement.

54. Samuel R. Sommers, *On the Obstacles to Jury Diversity*, 21 JURY EXPERT 1, 3-6 (2009). For a list of recommendations on how to improve juror service, see ROBERT G. BOATRIGHT, AM. JUDICATURE SOC'Y, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS 121-24 (1998), *available at* [http://flcourts.org/gen\\_public/jury/bin/6\\_22tab6\\_3.pdf](http://flcourts.org/gen_public/jury/bin/6_22tab6_3.pdf).

impediment to greater jury diversity is that compiling a master list of eligible jurors from voter registration records and other public records tends to underrepresent lower-income individuals and racial minority groups because of group differences in voter registration rates, mobility, and homeownership.<sup>55</sup> Similarly, jury eligibility requirements, such as English proficiency, financial hardship, and a felony criminal history, tend to disproportionately affect low-income and minority groups.<sup>56</sup> Perhaps as a result of some of these obstacles, empanelled juries differ systematically from their constituents' communities; they are typically better educated, wealthier, older, and more likely to be white.<sup>57</sup> A study examining patterns and predictors of lifetime jury participation found that nonrandom attrition of potential jurors occurred at the summoning and summons response phases of selection.<sup>58</sup>

The relevance of diversity to the political participation function of the jury turns on a normative claim regarding the same principles of inclusiveness and representation found in the voting context. To the extent that voting and other forms of political participation are founded on democratic principles, embodied by the phrase “of the people, by the people, for the people,”<sup>59</sup> institutions—including juries—ought to reflect the diversity of the communities being served. The claim here is not that institutional practices governing jury service are necessarily better at garnering citizen participation than other forms of democratic governance or that they are immune from some of the same pitfalls in terms of reaching all corners of society.<sup>60</sup> Rather, the point is that jury service functions as an additional means of political participation, and ensuring diversity within this system is an important component in adequately reflecting the voice of the community.<sup>61</sup>

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55. Mary R. Rose et al., *Selected to Serve: An Analysis of Lifetime Jury Participation*, 9 J. EMPIRICAL LEGAL STUDS. 33, 35-36 (2012).

56. *Id.* at 36-38; Sommers, *supra* note 54, at 3.

57. Diamond & Rose, *supra* note 1, at 257.

58. Rose et al., *supra* note 55, at 47-49 (finding that after controlling for respondents' age, race and ethnicity no longer predicted the likelihood of jury service).

59. Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863).

60. A 2003-2004 survey conducted on 1380 adults in Texas found that 26% reported prior service on a jury, and a 2007 survey of 1201 adults in California found that 34% reported prior service on a jury. *Id.* at 44.

61. The degree to which jury service draws in part of the population that is not already

### III. JURIES INCREASE PUBLIC CONFIDENCE AND LEND LEGITIMACY TO VERDICTS

The second major political function of the civil jury commonly presented in the literature is that juries confer legitimacy to the judgments rendered in cases. In this Part, we examine three separate questions related to this function. The first question concerns the relevance of diversity to perceptions of the decision-making process. Linking the literatures on diversity ideologies and procedural justice, we argue that the connection between jury composition and perceptions of fairness is contingent on people's preexisting beliefs about the significance group differences have in a case. The second question is about the jury lending the community's sense of morals and justice to individual cases. This Part explores the empirical question of whether different demographic groups actually contribute different viewpoints. What relevance does diversity have in getting a more accurate picture of the community's viewpoints? Whereas the first Section focuses on the question of different *perceptions* regarding group difference and its relevance to verdicts, the second Section explores whether these perceptions are actually true or not. The third and final question is posed from the perspective of those serving on juries: what effect does participation have on citizens' attitudes toward the jury system?

#### A. *Procedural Fairness and Perceived Legitimacy*

In articulating the rationale behind the fair cross-section doctrine, courts have emphasized the importance of representation of all groups within the jury venire to ensuring impartiality on the

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participating in the voting process is not well-known. One study examining predictors of jury service over one's lifetime found that nonvoting behavior was the best predictor of those who had never received a jury summons. *Id.* at 51. This should not come as a surprise given that master jury lists are primarily compiled using voter registration lists and then supplemented by other source lists, such as driver's license lists. Diamond & Rose, *supra* note 1, at 257. For jury service to try and capture a wider group of citizens who are not currently engaged in political participation, efforts should be taken to draw on other source lists that maximize the representativeness of the community (for example, welfare rolls or tax records). *Id.*

jury, with impartiality as the touchstone to having a fair jury.<sup>62</sup> The relationship between impartiality and fairness is captured by what scholars have termed procedural justice or procedural fairness. In short, people will see an outcome as fair if reached through a fair process, even if it is otherwise unfavorable. Across a wide variety of domains, research shows that procedural fairness is an important consideration for people when evaluating their experience.<sup>63</sup> Procedural fairness confers legitimacy on the system, which in turn has been shown to be related to subsequent compliance with that system.<sup>64</sup> Juries arguably contribute to the procedural fairness in civil cases because judgment is passed by a group from outside of the system itself, whose members presumably have no direct stake in the outcome of the case.<sup>65</sup>

The composition of juries also can matter to the perceived legitimacy of the proceedings. To the extent that the jury is dominated by members of a particular group who might skew the results in favor of one party over another, the process by which a verdict is reached will be looked upon with skepticism. Having a jury comprised of people from diverse backgrounds is thought to counter the biases held by any one particular group, thus creating a panel that, when considered as a whole, forms an impartial body.<sup>66</sup> Existing evidence tends to support the claim that jury composition affects perceptions of case legitimacy. A survey conducted after the O.J. Simpson trial showed that 67% of respondents agreed that “decisions reached by racially diverse juries are more fair than decisions reached by single race juries.”<sup>67</sup> Leslie Ellis and Shari Diamond conducted an experimental survey in which jury-eligible adults were asked to judge a criminal case describing either a racially homogeneous jury or a racially heterogeneous jury and a

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62. *Glasser v. United States*, 314 U.S. 60, 83-86 (1942).

63. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 73-74 (2006).

64. *Id.* at 82.

65. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“Community participation in the administration of the criminal law, moreover, is ... critical to public confidence in the fairness of the criminal justice system.”).

66. See Leslie Ellis & Shari Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1033 (2003).

67. Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury De Medietate Linguae*, 4 VA. J. SOC. POL'Y & L. 645, 662, 665 (1997).

verdict that was either a conviction or an acquittal.<sup>68</sup> They found that although the composition of the jury did not matter when the defendant was acquitted, the heterogeneous jury yielded higher ratings of trial fairness than the homogenous jury when the defendant was convicted.<sup>69</sup> In general, then, more racially diverse juries can increase perceptions of the legitimacy of outcomes, at least within the criminal case context. Whether this relationship holds in the civil trial context is unknown, and further research is needed to explore this question.

When it comes to the increased legitimacy and resulting public acceptance of verdicts rendered by juries, jury composition, at times, simply may not matter. That is, to the extent people *perceive* group differences as having substantive significance—regardless of whether they actually do or not—a diverse jury can potentially confer greater legitimacy on verdicts. Conversely, to the extent people perceive group differences as having no substantive significance, the diversity of juries will have no impact whatsoever on the legitimacy and acceptableness of verdicts. The model of diversity<sup>70</sup> endorsed by the perceiver will likely moderate the impact that the composition of a jury has on the legitimacy of a verdict. In other words, the link between jury composition and perceived legitimacy is contingent upon the perceiver's preexisting beliefs about group differences and their significance.

Two kinds of diversity models that have received the widest attention within the psychological literature and that are relevant to the legal doctrines governing jury selection are identity-blind models, such as colorblindness, and identity-conscious models, such

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68. Ellis & Diamond, *supra* note 66, at 1043-45.

69. *Id.* at 1048.

70. We use the term "model of diversity" here to refer to a set of understandings, ideas, and beliefs about the significance and meaning attached to differences in group identity. This is an adaptation of a definition found in the diversity literature: "shared understandings and practices of how groups come together or should come together, relate to one another, and include and accommodate one another in light of the differences associated with group identity." Victoria C. Plaut, *Cultural Models of Diversity in America: The Psychology of Difference and Inclusion*, in *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES* 365, 368 (Richard A. Shweder et al. eds., 2002). Other work has used other terms, such as "interethnic ideologies," to denote approaches to diversity. See, e.g., Christopher Wolsko et al., *Framing Interethnic Ideology: Effects of Multicultural and Color-Blind Perspectives on Judgments of Groups and Individuals*, 78 *J. PERSONALITY & SOC. PSYCHOL.* 635, 635-54 (2000).

as multiculturalism.<sup>71</sup> Colorblindness is premised on the belief that differences among people are superficial and largely irrelevant.<sup>72</sup> Identity-blind models (especially colorblindness) have become prominent within Equal Protection Clause jurisprudence,<sup>73</sup> so it comes as little surprise that it is reflected in the way many have interpreted the *Batson* line of cases. Excluding jurors on the basis of their race, ethnicity, or gender is unlawful because the ability to serve on a jury is a question pertaining to an individual, not a group. From this perspective, jurors are fungible and group identity has little significance in a case. *Batson* presumes that characteristics like race and gender are legally irrelevant to the question of whether a juror can serve.<sup>74</sup>

By contrast, the identity-conscious, multicultural model recognizes that the United States is a pluralist society with different cultures and groups living side by side. Differences are not only acknowledged and viewed as significant, but they are also valued for their potential contributions.<sup>75</sup> There is a belief that differences in ways of thinking are tied to different group identities and that these divergent perspectives have added value when brought together. This multicultural model is reflected in much of the reasoning underlying the fair cross-section requirement, which prohibits the exclusion of distinct groups from the jury venire that share a common thread of attitudes and beliefs that cannot be adequately protected by the general populace. Certain groups (particularly defined along gender and racial/ethnic categories) are believed to share common ways of thinking that are unique from other groups

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71. See, e.g., Victoria C. Plaut, *Diversity Science: Why and How Difference Makes a Difference*, 21 PSYCHOL. INQUIRY 77, 85-90 (2010) (giving an overview of colorblindness and multiculturalism). These two diversity models also parallel the “reasonable person” view and the “cultural diversity” view as articulated by Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 663-78 (2002).

72. Plaut, *supra* note 70, at 372-73.

73. Adopted from language in Justice Harlan’s dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind.”), the colorblind model has been endorsed in more recent equal protection jurisprudence. See, e.g., *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (education); *Adarand v. Peña*, 515 U.S. 200 (1995) (small business contracting); *Shaw v. Reno*, 509 U.S. 630 (1993) (voting); *Richmond v. Croson*, 488 U.S. 469 (1989) (government contracting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (employment); see also Plaut, *supra* note 71, at 85-86.

74. Leipold, *supra* note 14, at 964.

75. Plaut, *supra* note 70, at 381-83.

in society. Ensuring that these differences are represented in the jury pool is important to achieving jury impartiality and, in turn, fairness. This type of diversity model was captured by the Court's opinion in *Ballard v. United States*, when it observed:

The truth is that the two sexes are not fungible ... the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.<sup>76</sup>

Attorneys themselves largely seem to utilize an identity-conscious model when selecting jurors and exercising peremptory challenges, often making assumptions about the implications particular juror characteristics might have on a case.<sup>77</sup>

The link between jury composition and perceptions about the fairness of the process used to reach a verdict likely depends on whether the perceiver employs either an identity-blind or identity-conscious model. The literature suggests that those endorsing an identity-blind model such as colorblindness may vary in their reactions, from very little effect on perceived fairness regardless of whether the jury is diverse to legitimizing verdicts from nondiverse juries.<sup>78</sup> Other identity-blind models, such as assimilationism,<sup>79</sup> could yield similar results. For those endorsing an identity-conscious, multicultural model, a lack of diversity on a jury can potentially signal that an unfair process was used to reach the decision, thereby decreasing legitimacy and acceptance of the outcome. Other identity-conscious models, such as a more critical form of multiculturalism that acknowledges that group differences exist within hierarchical structures of stratification, could also yield skepticism in the face of jury homogeneity.<sup>80</sup>

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76. 329 U.S. 187, 193-94 (1946).

77. Sommers, *supra* note 54, at 4.

78. Eric D. Knowles et al., *On the Malleability of Ideology: Motivated Construals of Color-Blindness*, 96 J. PERSONALITY & SOC. PSYCHOL. 857, 857-69 (2009) (finding that whites with high social dominance concerns utilize colorblindness to justify inequality).

79. Assimilation expects minority groups to conform to the dominant group's ways.

80. See Miguel M. Unzueta et al., *Diversity Is What You Want It to Be: How Social-Dominance Motives Affect Construals of Diversity*, 23 PSYCHOL. SCI. 303, 307-08 (2012) (finding that, unlike anti-egalitarian participants, egalitarian participants did not legitimize low organizational racial heterogeneity); see also Valerie Purdie-Vaughns et al., *Social*

Importantly, different diversity ideologies can be employed and influence individual thought depending on the context.<sup>81</sup> Thus, the significance given to group differences can change from one situation to the next. For example, one might reasonably expect that the relative impact of jury composition on perceived legitimacy will vary by case type. The salient issues in a case will make certain demographic categories represented (or not) on the jury also more salient and important relative to other forms of group difference. The racial makeup of the jury will take on a significance for a case involving a racial discrimination claim whereas the gender makeup of the jury will take on a significance for a case involving a sexual harassment claim. In other instances, jury composition may not inform perceptions of a case at all, such as with motor vehicle or property title disputes, because the relevance of group characteristics to these types of cases is less obvious.<sup>82</sup> Even over time, the larger social context can change when different diversity ideologies come into play. For instance, jury composition probably mattered less in mortgage foreclosure cases prior to the housing crisis than it did after widespread news coverage of banks engaging in predatory lending practices in minority communities.<sup>83</sup>

In thinking about the effect of jury composition on perceived legitimacy, consideration should be given to the mechanism that partially enables this relationship: media coverage and public attention. Criminal cases account for twice as many jury trials as civil cases<sup>84</sup> and receive greater media coverage. Although no systematic study has examined media reporting of jury composition

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*Identity Contingencies: How Diversity Cues Signal Threat or Safety for African Americans in Mainstream Institutions*, 94 J. PERSONALITY & SOC. PSYCHOL. 615, 626 (2008) (finding African Americans' trust in an organization declines with low racial heterogeneity, particularly when the organization claims to be color blind).

81. Plaut, *supra* note 70, at 369.

82. Even here, what seems relevant may depend to some extent on one's position in society: for example, if one of the litigants comes from a minority or underprivileged community.

83. Kate Brumback, *HSBC Sued By Atlanta-Area Counties Over Predatory Lending Claims*, HUFFINGTON POST (Dec. 24, 2012), [http://www.huffingtonpost.com/2012/12/25/hsbc-sued-predatory-lending\\_n\\_2362436.html](http://www.huffingtonpost.com/2012/12/25/hsbc-sued-predatory-lending_n_2362436.html).

84. Of the approximate 150,000 jury trials per year, 65% of them are felony and misdemeanor criminal cases, while only 31% are civil cases. GREGORY E. MIZE ET AL., NAT'L CTR. FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 7 (2007), available at <http://www.ncsc-jurystudies.org/~media/microsites/files/CIS/SOS/soscompendiumfinal.ashx>.

for civil cases, one would suspect that the coverage is much less than for criminal cases.<sup>85</sup> Though this might affect the type and amount of information given to the general public, information about the trial and jury composition is still readily available to the parties involved in the litigation and the jurors themselves.

### *B. Representing a Community's Moral Sense*

The argument linking jury composition to impartiality and, consequently, perceptions of legitimacy hinges upon an empirical question of whether difference actually matters. Although it is clear that the United States is becoming an increasingly diverse nation, do these demographic differences translate in a meaningful way to differences in attitudes and beliefs about the world that might impact a jury's functioning? Jurors are said to serve as a representation and exercise of the moral sense of the community, but to what extent are different sensibilities distributed across the population, thus justifying efforts to ensure that all segments of the community are included in the jury system?

For at least racial and ethnic diversity, there is strong reason to think that racial and ethnic backgrounds are likely related to different attitudes, beliefs, and assumptions about the world. Before even turning to attitude surveys, the structural reality is that certain groups in society are systematically situated differently from others across key domains of life. Despite significant advancement toward racial equality in the United States, racial disparities persist in the areas of wealth and employment, criminal justice, housing, education, and health.<sup>86</sup> To take just a few examples, in 2009 the median wealth of white households was twenty times that of black households and eighteen times that of Hispanic households.<sup>87</sup> Rates of unemployment vary across racial and ethnic groups: in 2011, the rate for non-Hispanic whites was 7.2% compared to 11.5% for Hispanics or Latinos, 14.6% for American Indians and Alaska

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85. An informal search for news articles reporting on jury composition in civil trials by the authors suggests that attention given to these kinds of trials is relatively infrequent.

86. Plaut, *supra* note 71, at 78-80.

87. PEW RESEARCH CTR., WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS, AND HISPANICS (2011), available at [http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report\\_07-26-11\\_FINAL.pdf](http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_07-26-11_FINAL.pdf).

Natives, and 15.9% for blacks.<sup>88</sup> Homeownership likewise reflects group differences, with the homeownership rate among white households (73.5%) being higher than any other group: blacks (43.8%), Hispanics (46.5%), and all other races (55%).<sup>89</sup> Although gaps in educational attainment have narrowed over time, in 2011 there was still a 6% gap between whites and blacks and a 23% gap between whites and Hispanics in terms of having completed high school or the equivalency.<sup>90</sup> These group differences in structural realities implicate differences in the lived experiences of individuals from these groups, informing people's attitudes, beliefs, and assumptions about the world. These differences in viewpoints could affect a juror's approach to a case. As others have pointed out, as a jury undertakes its role in fact-finding and applying the law to the particular facts in a case, they necessarily engage in a process of interpretation.<sup>91</sup> This includes interpretation of subjective and vague standards commonly found in civil cases, such as "reasonable," "substantial," and "due care," as well as judgments regarding the credibility of witnesses.

Survey data also tends to support the claim that people's attitudes and beliefs regarding certain issues are associated with their group identities. A 2008 survey by the Pew Forum on Religion & Public Life found some divergence across different religious groups regarding views about the direction things are going in the United States, levels of attention to politics, political ideology, and attitudes on the size of government.<sup>92</sup> Disparate perceptions of key

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88. BUREAU OF LABOR STATISTICS, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2011, at 1, 3, 5, 6 (2012), available at <http://www.bls.gov/cps/cpsrace2011.pdf>.

89. Press Release, U.S. Census Bureau News, Residential Vacancies and Homeownership in the Second Quarter 2012, at 1, 9 (July 27, 2012), available at <http://www.census.gov/housing/hvs/files/qtr212/q212press.pdf>.

90. U.S. DEPT OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2012, at 114 (2012), available at <http://nces.ed.gov/pubs2012/2012045.pdf>.

91. Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568, 1583 (2007).

92. PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY: RELIGIOUS BELIEFS AND PRACTICES: DIVERSE AND POLITICALLY RELEVANT 3 (2008), available at <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf>. The survey found that although close to 40% of Mormons, Hindus, and Muslims were satisfied with the direction of the country, lower numbers of satisfaction were found among Protestants (27%), Catholics (30%), Unaffiliated (24%), Jews (25%), and Jehovah's Witnesses (10%). *Id.* at 75. Certain groups stood out in terms of who follows government and public affairs most of the

issues across racial/ethnic groups have received the largest attention. A 2012 nationally representative survey found that perceived conflicts between the rich and poor—an issue with potential relevance to suits between individuals and corporations or high-status individuals—were viewed as more of a problem among blacks (69%) and black women in particular (73%) compared to whites (56%) and Hispanics (55%).<sup>93</sup> Relevant to some types of employment discrimination claims, differences also emerged in perceived conflict between blacks and whites: while 54% of blacks and 48% of Hispanics thought the conflict was “very strong” or “strong,” only 39% of whites thought so.<sup>94</sup> Specific to the employment context, another survey found that 82% of whites (including Hispanics) believe that blacks have as good a chance as whites to get any kind of job for which they are qualified, compared to only 49% of blacks.<sup>95</sup> This pattern in attitudes is consistent with evidence that the same events are perceived differently along group lines. When asked about the events surrounding Hurricane Katrina, for example, 71% of black respondents reported they believed that these events showed racial inequality persists, compared to only 32% of whites.<sup>96</sup> This “perceptual segregation” can be attributed to multiple factors related to hierarchical group relations—not only variation in the aforementioned structural realities but also continued physical segregation, access to different information and historical knowl-

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time (Jews—68%; Atheists—61%; Agnostics—63%; and Buddhists—60%) relative to others (Jehovah’s Witnesses—29% and Religious Unaffiliated—41%). *Id.* at 80. In terms of political ideology, Protestants, Catholics, and Mormons are more likely to identify as conservative than liberal whereas Jews, Muslims, Buddhists, Hindus, and unaffiliated individuals are more likely to identify as liberal than conservative. *Id.* at 83. Although Americans across the board are evenly split between preferring smaller or bigger government, certain religious groups had a majority of respondents preferring bigger government (Catholics and Buddhists—51%; Muslims—70%; historically black churches—72%; and Hindus—59%) while others tended to prefer smaller government (Mormons—56%). *Id.* at 100-01.

93. RICH MORIN & SETH MOTEL, PEW RESEARCH CTR., AFTER A HIGHLY PARTISAN ELECTION YEAR, SURVEY FINDS LESS GROUP CONFLICT 3 (2013), available at [http://www.pewsocialtrends.org/files/2013/01/Conflicts\\_FINAL\\_1-10-13\\_new.pdf](http://www.pewsocialtrends.org/files/2013/01/Conflicts_FINAL_1-10-13_new.pdf).

94. *Id.* at 7.

95. Frank Newport, *Little “Obama Effect” on Views About Race Relations*, GALLUP (Oct. 29, 2009), <http://www.gallup.com/poll/123944/little-obama-effect-views-race-relations.aspx>.

96. Press Release, Pew Research Center, Huge Racial Divide Over Katrina and Its Consequences (Sept. 8, 2005), available at <http://www.people-press.org/files/legacy-pdf/255.pdf>.

edge, and divergent motivations to see the world through a color-blind versus race-conscious lens.<sup>97</sup>

Theory and research from cultural psychology provide an additional basis for the claim that members from different groups hold different perspectives and viewpoints. One of the basic understandings within this literature is that cultural contexts and experiences create differences in knowledge and beliefs about the world.<sup>98</sup> A link exists between psychological processes and one's sociocultural context. Studies examining perceptual and cognitive differences between individuals from East Asian and American cultures have found evidence of differences in terms of attention (object versus field), perceptions of control, metaphysical commitments when explaining outcomes (attributions to the person versus situation), reliance on logic versus experiential knowledge, and dealing with contradictions.<sup>99</sup> These cognitive differences would likely have relevance to many of the types of decisions that come before a civil jury. In determining liability in a motor vehicle accident,<sup>100</sup> juries will inevitably be faced with the issue of causation, who had control over the situation, different sources of knowledge, and contradictory testimony as to what happened. Levinson and Peng argue, for instance, that common sense judgments about causation will be shaped by people's different tendencies to view events as linked with either internal factors—for example, stable dispositions and traits—or external factors, including context, environmental influences, and chance.<sup>101</sup> Similarly, different orientations toward independence/individualism and interdependence/collectivism associated with different

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97. Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1106-13 (2008); see also Plaut, *supra* note 71, at 85-90.

98. Richard E. Nisbett et al., *Culture and Systems of Thought: Holistic Versus Analytic Cognition*, 108 PSYCHOL. REV. 291, 291 (2001) (“[T]he considerable social differences that exist among different cultures affect not only their beliefs about specific aspects of the world but also (a) their naïve metaphysical systems at a deep level, (b) their tacit epistemologies, and (c) even the nature of their cognitive processes—the ways by which they know the world.”).

99. *Id.* at 296-303.

100. In 2005, motor vehicle accident cases accounted for over one-third of cases resolved by jury trial. LANGTON & COHEN, *supra* note 26, at 2.

101. Justin D. Levinson & Kaiping Peng, *Different Torts for Different Cohorts: A Cultural Psychological Critique of Tort Law's Actual Cause and Foreseeability Inquiries*, 13 S. CAL. INTERDISC. L.J. 195, 205-11 (2004).

cultures<sup>102</sup> can potentially impact a juror's expectations and interpretations of standards such as due care and the obligations people in society owe to one another—questions that often come up in the context of civil trials. Although many of the studies examining cultural differences tend to compare samples taken from Eastern and Western countries, they also show that samples of Asian Americans tend to fall somewhere in the middle, suggesting that even within the United States differences between groups can still be found.<sup>103</sup> This is consistent with other studies that have demonstrated cultural variation across groups within the United States.<sup>104</sup> Additionally, the large number of immigrants residing in the United States, representing those who have grown up for some length of time in another culture, should be kept in mind when considering the role cultural context plays in shaping people's outlooks on the world.<sup>105</sup>

An additional pattern suggested in the cultural psychology literature involves differences in socioeconomic status. According to a growing line of research, working class contexts—often those marked by attainment of less than a four-year college degree—foster an interdependent model of the self with a focus on maintaining integrity, adjusting the self to one's environment, and connection

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102. See generally HAZEL ROSE MARKUS & ALANA CONNER, CLASH!: EIGHT CULTURAL CONFLICTS THAT MAKE US WHO WE ARE (2013) (arguing cultural differences across gender, race, religion, regions of the country, and other dimensions in independent versus interdependent orientations); HARRY C. TRIANDIS, INDIVIDUALISM & COLLECTIVISM: NEW DIRECTIONS IN SOCIAL PSYCHOLOGY (1995) (suggesting cultural differences in individualist and collectivist values); Hazel Rose Markus & Shinobu Kitayama, *Culture and Self: Implications for Cognition, Emotion, and Motivation*, 98 J. PERSONALITY & SOC. PSYCHOL. 224 (1991) (reviewing psychological and anthropological literature suggesting that different orientations toward relatedness of the self as independent versus interdependent in American and Asian cultures have consequences for modes of thinking, feeling, and motivation).

103. Nisbett et al., *supra* note 98, at 297, 299-301.

104. For a discussion of some of these studies, see Levinson & Peng, *supra* note 101, at 203-04.

105. A report released by the Center for Immigration Studies estimated that, as of 2010, immigrants and their minor children represented one-sixth of the U.S. population. STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, IMMIGRANTS IN THE UNITED STATES: A PROFILE OF AMERICA'S FOREIGN-BORN POPULATION 5 (2012), available at <http://www.cis.org/sites/cis.org/files/articles/2012/immigrants-in-the-united-states-2012.pdf>. In a 2005 California survey, 31% of all respondents were born outside of the United States. DAVID B. ROTTMAN, NAT'L CTR. FOR STATE COURTS, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS pt. 1, at 21 (2005), available at [http://www.courts.ca.gov/documents/4\\_37pubtrust1.pdf](http://www.courts.ca.gov/documents/4_37pubtrust1.pdf).

and similarity to others.<sup>106</sup> In contrast, middle class contexts (those marked by a four-year college degree or more) foster an independent self with a focus on expressing uniqueness and controlling one's environment. Moreover, personal choice, especially as an expression of personal freedom, figures more prominently in middle than working class contexts.<sup>107</sup> As with the aforementioned cultural differences, these class differences could have implications for jurors' expectations and interpretations of standards such as due care and obligations. Additionally, lower socioeconomic status predicts greater tendency toward contextual rather than personal explanations for events, which could influence jurors' judgments of causation.<sup>108</sup>

In reviewing the claim and relevant evidence that different social groups are distinct in terms of the perspectives and viewpoints they bring with them to the jury room, we want to caution against tendencies toward essentializing logics or ignoring the variability existing within groups. It would be a mistake to pigeonhole or tokenize members of minority groups on a jury as representing the views from "their group." It is important to take note of the language used in describing these socio-cultural-cognitive links and the epistemology of the evidence in this area. It is probabilistic. It is based on methodologies that look at and compare average psychological processes across groups or the tendency of attitudes to correlate with certain demographic characteristics. They are not claims or predictions about what any given person from a particular group will think or feel. The point, rather, is that members of a social group tend to share situations, experiences, and communities. These shared sources of knowledge and lived experiences can lead to particular patterns of thought and world views.

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106. Alana Conner Snibbe & Hazel Rose Markus, *You Can't Always Get What You Want: Educational Attainment, Agency, and Choice*, 88 J. PERSONALITY & SOC. PSYCHOL. 703 (2005); Nicole M. Stephens et al., *Choice as an Act of Meaning: The Case of Social Class*, 93 J. PERSONALITY & SOC. PSYCHOL. 814 (2007).

107. Nicole M. Stephens et al., *When Choice Does Not Equal Freedom: A Sociocultural Analysis of Agency in Working-Class American Contexts*, 2 SOC. PSYCHOL. & PERSONALITY SCI. 33, 38-39 (2011).

108. Michael W. Kraus et al., *Social Class, Sense of Control, and Social Explanation*, 97 J. PERSONALITY & SOC. PSYCHOL. 992, 992-94 (2009).

*C. Increasing Perceptions of Legitimacy Through Jury Service*

In addition to how specific verdicts are perceived, much of the emphasis within procedural fairness research has been on how procedural fairness can increase perceptions of legitimacy relating to larger systems and institutions. For example, drawing on interviews with California residents who had a recent experience with legal authorities, Tom Tyler and Yuen Huo found that judgments made during personal experiences—particularly those dealing with process issues—shaped people’s broader views about the legitimacy of the law and legal authorities.<sup>109</sup> Similarly, a survey of Californians found that “[h]aving a sense that court decisions are made through processes that are fair is the strongest predictor by far of whether members of the public approve of or have confidence in California courts.”<sup>110</sup> To the extent citizens perceive the court system as legitimate, such perceptions might make people more likely to utilize these institutions themselves. Claims will not be brought to court if people feel they cannot get a fair shake and that the system does not work. State and national surveys suggest that the American public is only somewhat approving and trusting of state courts.<sup>111</sup> Looking at levels of trust in courts across different social groups, data from one national survey showed that African Americans, and to some degree Hispanics, tend to rate state courts

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109. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 132-35 (2002).

110. ROTTMAN, *supra* note 105, at 6. National survey data similarly found that perceptions that courts use fair procedures were the strongest predictors of favorability toward the courts, and this pattern held across racial and ethnic groups. DAVID B. ROTTMAN ET AL., NAT’L CTR. FOR STATE COURTS, PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY 60 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/201302.pdf>.

111. David B. Rottman, *Public Perceptions of the State Courts: A Primer*, 15 CT. MANAGER 9, 9-10 (2000). In reviewing this body of survey data, negative perceptions of courts focused on

perceived inaccessibility, unfairness in the treatment of racial and ethnic minorities, leniency toward criminals,... a lack of concern about the problems of ordinary people[,]... concern that the courts are biased in favor of the wealthy and corporations[,]... perception[s] of economic-based unfairness in civil cases[,]... [and] concern that political considerations, and especially campaign fund-raising, exerted an undue influence on the judiciary.

*Id.* at 10. On the positive side of things, people tended to think the jury system works, that members of the public are treated with respect, and that judges are honest and fair in deciding cases, well-trained, and protective of individual rights. *Id.*

significantly lower in various aspects of procedural fairness relative to non-Hispanic whites.<sup>112</sup>

Research suggests that jury service can increase these levels of trust in the courts. One study found that sworn jurors experienced increased levels of trust in the jury system that persisted even months after service.<sup>113</sup> The positive effects of jury service on attitudes can be found quite early on in the process.<sup>114</sup> Just comparing the attitudes of jurors who received jury orientation with those who had not yet received it showed that orientation itself increased trust in the jury system for first-time jurors.<sup>115</sup> Though looking only at jurors from criminal cases, a survey and interview study with jurors from three courts in California reported similar findings: whereas 28.5% of jurors thought the jury system worked well or very well prior to service, this number increased to 43.7% after service.<sup>116</sup> Similar increases were found regarding jurors' views of the fairness of the courts—53.8% before compared to 70.1% after service.<sup>117</sup> Not surprisingly, these effects were particularly strong for first-time jurors.<sup>118</sup> A sample of over 8000 jurors in sixteen federal and state courts found that the substantial majority (72-90%) reported favorable attitudes after their jury service, and 63% said their impression of jury service was better after having served than before.<sup>119</sup> Taken together, these numbers suggest that jury service

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112. *Id.* at 12. Consistent with this pattern, African Americans were the most negative about their satisfaction with court performance. *Id.* at 13. Surprisingly, Hispanics actually expressed the greatest satisfaction with court performance across groups, though they tended to fall somewhere in between African Americans and whites on other measures. *Id.* at 13-14.

113. GASTIL ET AL., *supra* note 25, at 135, 137.

114. *Id.* at 132-33.

115. *Id.*

116. Consolini, *supra* note 41, at 166. When jurors were explicitly asked whether their jury service had changed their opinion of the jury system, however, the results were more mixed, with 12.3% reporting a positive change and 11.5% reporting a negative change. *Id.* at 175. Changes in attitudes toward the judicial system more generally were also mixed. Although 20.9% reported some change, 9.5% reported it was negative, whereas 7.2% reported a positive change. *Id.* at 176-77.

117. *Id.* at 168-69.

118. *Id.* at 167-69.

119. Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 285 & n.14 (Robert E. Litan ed., 1993) (citing JANICE T. MUNSTERMAN ET AL., NAT'L CTR. FOR STATE COURTS, THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE (1991)); see also William R. Pabst, Jr. et al., *The Myth of the Unwilling Juror*, 60 JUDICATURE 164, 164 (1976) (finding that among jurors surveyed from eighteen different courts, approximately 90%

could be seen as a potential pathway to increasing people's level of trust in the jury system. Some evidence suggests that certain groups in society, particularly blacks and Latinos, tend to be significantly less positive about the courts compared to other groups.<sup>120</sup> Ensuring jury diversity and reaching out to other segments of the community that are disillusioned or alienated from the legal system might serve to change some of these attitudes through their experiences on a jury. Research has yet to examine this possibility.

Throughout this Section we have discussed the relationship between jury composition and perceptions of legitimacy, but an additional point should be kept in mind whenever arguments about procedural justice are made. Perceived legitimacy does not necessarily equal actual legitimacy. Although the hope is that fair procedures, including a fair and diverse jury, will produce fair outcomes, this causal relationship at times falls apart, and some scholars have documented and cautioned against the formation of a "false consciousness" or an illusion of fairness.<sup>121</sup> Perceptions of a fair jury should not mask unfairness in outcomes stemming from the operation of bias, power dynamics, or systemic inequalities. For example, having a compositionally diverse jury does not guarantee that each person contributed equally to the discussion during the deliberation process. The same group dynamics centered around race, gender, and social status existing in communities could be replicated to some extent within the jury room itself. Additionally, the jury's decision is only one of many process points in a trial, each of which contributes to the overall legitimacy of the outcome. We

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rated their experience either favorably or more favorably than before their service).

120. ROTTMAN, *supra* note 105, at 8; JUDICIAL COUNCIL OF CAL., TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: PUBLIC COURT USERS AND JUDICIAL BRANCH MEMBERS TALK ABOUT THE CALIFORNIA COURTS 27 (2006), available at [http://www.courts.ca.gov/documents/Calif\\_Courts\\_Book\\_rev6.pdf](http://www.courts.ca.gov/documents/Calif_Courts_Book_rev6.pdf).

121. See Cheryl R. Kaiser et al., *Presumed Fair: Ironic Effects of Organizational Diversity Structures*, 104 J. PERSONALITY & SOC. PSYCHOL. 504, 517 (2013); Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. SOC. SCI. 171, 188-93 (2005); cf. Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 902-03 (2011) (finding evidence that lawyers and judges tend to infer nondiscrimination from the presence of certain institutionalized organizational structures even if such structures are ineffective); Kaiser et al., *supra* note 121, at 516 (finding in a series of experiments that the presence of organizational diversity structures such as diversity training or diversity policies leads participants from high status groups to form an illusory sense of fairness, such that they become less sensitive to discrimination experienced by low status group members).

suggest, then, that ensuring full community representation on juries should not end the inquiry of whether the demands of fairness and justice are being met.

#### IV. JURY SERVICE AS AN EDUCATIVE OPPORTUNITY

##### *A. Learning About Political Institutions and Rights*

Many have touted jury service as an educational opportunity to learn about governance and the legal system.<sup>122</sup> In one of his early writings on the jury, Alexis de Tocqueville stated that he “regard[ed] the jury] as one of the most effective means that a society can use for the education of the people,” and that one “must consider it as a free school, always open, where each juror comes to be instructed about his rights.”<sup>123</sup> Jury service is an experiential learning opportunity whereby jurors not only glean previously unknown information about legal proceedings, but they also actually see how the court system operates in practice.<sup>124</sup> This includes both factual information about what roles different court actors fill, what the substantive law is, and how a case proceeds through trial, as well as information that reflects on societal values inscribed within the system, such as how a person gets treated within the system and what rights they are afforded.<sup>125</sup> It also includes both positive and negative aspects about our system.<sup>126</sup>

This type of experiential learning can influence one’s perspectives of the system. While people come into their jury service with existing beliefs, this single personal experience can have a small, but significant political impact.<sup>127</sup> A 2008 Pew survey found that a plurality of the general public reported that what influences their thinking most about government and politics is their personal experiences.<sup>128</sup> In a study of Chicago residents, Tom Tyler found that about 5% of the variance in people’s views about the legitimacy of

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122. Diamond, *supra* note 119, at 284, 299.

123. 2 DE TOCQUEVILLE, *supra* note 24, at 448.

124. See JUDICIAL COUNCIL OF CAL., *supra* note 120, at 19; Consolini, *supra* note 41, at 24.

125. Consolini, *supra* note 41, at 24-25, 91.

126. *Id.* at 124-25, 187.

127. TYLER, *supra* note 63, at 106.

128. PEW FORUM ON RELIGION & PUB. LIFE, *supra* note 92, at 77.

legal authority could be explained by people's most important recent personal experience with police and courts.<sup>129</sup>

Existing survey evidence supports the educative function of the jury. One study of California residents found that although self-reported familiarity with California courts is generally low among the public, reported knowledge of the courts increased most substantially with exposure to the court itself.<sup>130</sup> Indeed, the data suggested that "impressions formed when people are in contact with the courts, however brief, and in the overall context of the courts' business, however minor, persist and supplant information gleaned from the media."<sup>131</sup> Results from focus groups and interviews showed that among other benefits, jurors who served on panels reported a better understanding of the law.<sup>132</sup> Jurors' knowledge of the courts acquired during jury service also seemed related to their levels of trust and confidence in the courts.<sup>133</sup> In a survey of jurors from courthouses in the San Francisco Bay Area, 88.9% said that they learned something from their service, whether neutral, positive, or negative.<sup>134</sup> This educational benefit was more robust among trial jurors than nontrial jurors.<sup>135</sup> Similarly, among jurors surveyed in the Northwestern United States regarding their attitudes toward their service, 13% of those who were never empanelled cited the educational value of jury service as contributing to their positive experiences, and this figure rose to 21% among those who actually served on a panel.<sup>136</sup> Research also suggests that jurors frequently talk about their experience with jury service to

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129. TYLER, *supra* note 63, at 106.

130. ROTTMAN, *supra* note 105, at 11 ("Nearly 80 percent [of Californians] describe themselves as either 'somewhat familiar' or 'not familiar at all' with the California state court system.")

131. *Id.* at 14.

132. JUDICIAL COUNCIL OF CAL., *supra* note 120, at 19. This reflects relative improvements in knowledge about the law and court processes as indicated through juror self-reporting. Understanding of the substantive law as measured by comprehension rates of jury instructions suggests that further improvements can be made in this area. For a review of this literature, see Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589 (1997) (reporting comprehension rates ranging from 13% to 73% depending on the sample and measures used).

133. JUDICIAL COUNCIL OF CAL., *supra* note 120, at 19.

134. Consolini, *supra* note 41, at 9, 124-25 (relying on a sample of jurors pulled from criminal trials).

135. *Id.* at 125.

136. GASTIL ET AL., *supra* note 25, at 66-68.

others, potentially expanding the number of people who receive information about the jury system. One survey found that 96% of jurors reported discussing their jury experience with friends, co-workers, or family members living outside the household at least once or twice.<sup>137</sup>

The relevance of diversity to this political function of the civil jury mirrors the rationale underlying jury service as a form of political participation. The educational opportunity presented by jury service represents a public good to which all members of society ought to have equal access and participation. Although learning about the laws, courts, and government can occur in a number of ways, jury service represents a unique experiential form of learning that cannot be substituted. Removing obstacles that inhibit diversity within the jury pool is key to meeting the democratic requirements of ensuring equal access to this valuable opportunity.

### *B. Engaging with and Learning About One's Political Community*

In addition to jury service being an educative experience about the legal system and workings of government, it also presents a unique educative opportunity to learn about and from other members in one's political community. This argument, which has not received much attention in the jury literature, was suggested in Alexis de Tocqueville's writing on the jury in 1835. Although his primary focus was on jurors learning about their rights and the law, he wrote that "[t]he jury serves unbelievably to form the judgment and to augment the natural enlightenment of [the] people.... [The juror] enters into daily communication with the most learned and most enlightened members of the upper classes."<sup>138</sup> Though he did not elaborate on this point, de Tocqueville perhaps implicitly argued that a distinct benefit arises from the interaction that inevitably occurs between jury members. In his view, rubbing elbows with the best and the brightest exposed one to enlightened views that presumably raised one's own level of wisdom. Although the aristocracy no longer has a monopoly on contemporary juries, we argue

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137. *Id.* at 110-11 (finding also that only 1.3% of the sample reported never talking about their experience with others).

138. 2 DE TOCQUEVILLE, *supra* note 24, at 448.

that everyday wisdom and knowledge can be gleaned from those representing all sectors of society.

In contemporary scholarship, this rationale is captured by John Gastil and his colleagues, who wrote that “it is the experience of deliberating with fellow citizens that gives the jury much of its power, and that underscores the importance of understanding, appreciating, and promoting meaningful public deliberation in modern democratic institutions.”<sup>139</sup> Jury service is differentiated from the voting process as a form of political participation through its deliberative character.<sup>140</sup> Jury service creates a forum for an exchange of ideas between people who do not typically interact with one another. That is, through voir dire, the deliberation process, and informal exchanges between jury members, citizens interact with and learn about a cross section of their community that cuts across social categories typical of one’s usual associates. We argue that this exchange in and of itself is a valuable function of jury service because it can increase awareness and understanding of one’s political community, potentially leading to better relations between citizens and more informed choices. Exposure to conflicting political views and life perspectives has been thought to increase perspective taking, political tolerance, and awareness of rationales underlying one’s own opinion and that of opposing views.<sup>141</sup> Communication across lines of difference can “increase[] awareness of the varieties of human experience that legitimize wide variation in ... values.”<sup>142</sup> This function of jury service is maximized to the extent juries bring together citizens from all sectors of society with differing experiences and viewpoints.

Understanding the way in which jury service presents a unique opportunity for an exchange of viewpoints between members of a political community requires recognition of the relative infrequency of moments of cross-group interactions. Despite efforts during the Civil Rights Era to fight for integration in schools, segregation still plagues America’s educational institutions, limiting the degree to

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139. GASTIL ET AL., *supra* note 25, at 4.

140. *Id.* at 176-79 (contrasting the solitary decision of voting with the collective decision process found on juries).

141. Diana C. Mutz, *Cross-Cutting Social Networks: Testing Democratic Theory in Practice*, 96 AM. POL. SCI. REV. 111, 111-14 (2002).

142. CLYDE Z. NUNN ET AL., TOLERANCE FOR NONCONFORMITY 61 (1978).

which white and minority students learn together in the same classrooms.<sup>143</sup> A study of over 200 school districts released from court desegregation orders from 1991 to 2009 showed a steady increase in school segregation levels.<sup>144</sup> The situation among charter schools proves to be even worse, with half of Latino charter school students attending racially isolated minority schools, in which 90-100% of the students were minority students, and 43% of black charter school students attending extremely segregated minority schools, in which 99% of the students were from underrepresented minority backgrounds.<sup>145</sup> A 2006 study by the Civil Rights Project noted that “of all racial groups, whites remain the most isolated group: the average white student attends schools where more than three quarters (78%) of his or her peers are also white.”<sup>146</sup> Furthermore, school segregation is not limited to just race or ethnicity, but also runs along lines of concentrated poverty and linguistics.<sup>147</sup>

Segregation in schools mirrors segregation patterns in housing. A report based on 2000 Census data concluded that “[d]iversity is experienced very differently in the daily lives of whites, blacks, Hispanics, and Asians” since “whites live in neighborhoods with low minority representation while minorities live in neighborhoods with high minority representation[ ] and limited white representation.”<sup>148</sup> Again, this segregation is not limited to race and ethnicity. A recent Pew Research Center report shows that residential segregation by income has increased during the past three decades, with 28% of

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143. GARY ORFIELD & CHUNGMEI LEE, HARVARD UNIV., THE CIVIL RIGHTS PROJECT, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 4, 8 (2006) (“The average black student attends a school that is 30 percent white and the average Latino student, 28 percent. Asian and American Indian students attend schools with larger proportions of white students, likely due to the fact that their populations are far smaller and less residentially segregated than either the black and Latino populations.”).

144. Sean F. Reardon et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL’Y ANALYSIS & MGMT. 876, 899 (2012).

145. ERICA FRANKENBERG ET AL., CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 4 (2010).

146. ORFIELD & LEE, *supra* note 143, at 8.

147. *Id.* at 4.

148. LEWIS MUMFORD CTR., ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND 1, 3 (2001), available at <http://www.s4.brown.edu/cen2000/wholepop/wpreport/MumfordReport.pdf> (“[T]he average white person in metropolitan [areas] lives in a neighborhood that is 80% white ... [whereas the] typical black individual lives in a neighborhood that is only 33% white and as much as 51% black.”).

lower-income households located in a majority lower-income census tract and 18% of upper-income households located in a majority upper-income census tract.<sup>149</sup> Though the degree of segregation differs by locality, even fairly diverse cities and counties still show striking patterns. For example, the city and county of San Francisco, a place noted for its diversity,<sup>150</sup> has concentrations of minorities in certain neighborhoods. Latinos represent 14% of the city's overall population, but are overrepresented in some areas of the city (for example, Mission—41%; Bernal Heights—29%; Bayview—25%) relative to others (for example, Chinatown—2%; Pacific Heights—4%).<sup>151</sup>

Some evidence of occupational segregation can also be found across racial and ethnic groups. For example, in 2010, 7.1% of Hispanics were employed in the management and business sector, which is comparable to the percentage of blacks (8.7%), but substantially lower than whites (14.8%) or Asians (14.9%).<sup>152</sup> Conversely, the proportion of Hispanics and blacks employed in the cleaning and maintenance sector is higher—9.2% and 5.7%, respectively—than whites and Asians—3.1% and 2.2%,

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149. RICHARD FRY & PAUL TAYLOR, PEW RESEARCH CTR., *THE RISE OF RESIDENTIAL SEGREGATION BY INCOME 1* (2012), available at <http://www.pewsocialtrends.org/files/2012/08/Rise-of-Residential-Income-Segregation-2012.2.pdf>. Although we have not focused on the intersectionality of various social categories, it is important to note the overlapping relationship between many of them, including race and poverty:

Concentrated poverty tracks these rates of segregation: blacks and Hispanics are much more likely to live in neighborhoods with high rates of poverty. According to the most recent analysis available (using Census 2000 data), 69% of the eight million people living in census tracts with the highest poverty rates (above 40%) are black or Hispanic, even though such groups represent only about a quarter of the population.

Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* (Justin D. Levinson & Robert J. Smith eds., 2012).

150. Jed Kolko, *America's Most Diverse Neighborhoods and Metros*, FORBES (Aug. 29, 2013, 11:27 AM), <http://www.forbes.com/sites/trulia/2012/11/13/finding-diversity-in-america/>.

151. See S.F. PLANNING DEP'T, *SAN FRANCISCO NEIGHBORHOODS: SOCIO-ECONOMIC PROFILES* 6, 8, 10, 14, 36, 54 (2011), available at <http://www.sf-planning.org/Modules/ShowDocument.aspx?documentid=8501>. Similarly, blacks represent 6% of the city's population overall, but are overrepresented in several neighborhoods such as Bayview—32%, and underrepresented in others including 1% in the Russian Hill, Marina, Parkside, and Outer Sunset neighborhoods. *Id.* at 6, 8, 34, 52, 56, 64.

152. PEW HISPANIC CTR., *STATISTICAL PORTRAIT OF HISPANICS IN THE UNITED STATES, 2010* tbl.27 (2010), available at [http://www.pewhispanic.org/files/2012/02/Statistical-Portrait-of-Hispanics-in-the-United-States-2010\\_Apr-3.pdf](http://www.pewhispanic.org/files/2012/02/Statistical-Portrait-of-Hispanics-in-the-United-States-2010_Apr-3.pdf).

respectively.<sup>153</sup> Evidence also suggests that, despite declines over time, sex segregation in jobs still persists.<sup>154</sup>

These indicators that U.S. society remains stratified along group lines are all the more striking in light of the rising diversity of the population.<sup>155</sup> Given the level of segregation found in schools, housing, and the workplace, though, it should come as little surprise that social relationships across groups are more limited than one might expect. A 2007 survey asking respondents, “How many of your friends are white/black?” found that a plurality of whites (45%), blacks (35%), and Hispanics (39%) say they have “‘just a few’ friends of a different race.”<sup>156</sup> In their everyday lives people interact very little across class lines as well.<sup>157</sup> Even social media relations divide along group lines.<sup>158</sup> In addition to structural variables like schools and neighborhoods that shape opportunities for interpersonal connections, the principle of homophily also helps to explain the relative infrequency of interactions cutting across different segments of the population. Homophily describes how “contact between similar people occurs at a higher rate than among dissimilar people” and “implies that distance in terms of social characteristics translates into network distance.”<sup>159</sup> In other words, we like others who are like ourselves.<sup>160</sup> Evidence of homophily can even be found for gender, where the sexes are distributed equally in the population and are bound together through kin relationships. For example, one

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153. *Id.*

154. Hervé Queneau, *Is the Long-term Reduction in Occupational Sex Segregation Still Continuing in the United States?*, 43 SOC. SCI. J. 681, 683 (2006); Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241, 245-47 (1993).

155. *2010 Census Shows America's Diversity*, UNITED STATES CENSUS BUREAU (Mar. 24, 2011), [http://www.census.gov/newsroom/releases/archives/2010\\_census/cb11-cn125.html](http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn125.html).

156. PEW RESEARCH CTR., OPTIMISM ABOUT BLACK PROGRESS DECLINES 52 (2007), available at <http://www.pewsocialtrends.org/files/2010/10/Race-2007.pdf>.

157. FACING SOCIAL CLASS: HOW SOCIETAL RANK INFLUENCES INTERACTION (Susan T. Fiske & Hazel Rose Markus eds., 2012).

158. Danah Boyd, *White Flight in Networked Publics? How Race and Class Shaped American Teen Engagement with MySpace and Facebook*, in RACE AFTER THE INTERNET 203, 203-04 (Lisa Nakamura & Peter A. Chow-White eds., 2011) (observing how race and class shaped teens' choice in adopting either MySpace or Facebook as their social networking site of choice).

159. Miller McPherson et al., *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOC. 415, 416 (2001).

160. For discussion on the “similarity-attraction effect,” see DONN BYRNE, THE ATTRACTION PARADIGM 44 (1971).

study of political discussion networks found that 84% of men reported discussing politics only with other men.<sup>161</sup>

In light of these patterns of association, both by proximity and choice, jury service truly represents a unique moment to bring together different segments of the community. To go back to our San Francisco example, one would be hard-pressed to think of another situation where a resident of Bayview (32% black; 56% high school or less educational attainment; per capita income of \$19,484) and a resident of Pacific Heights (81% white; 82% college or graduate/professional degree; per capita income of \$101,257) come together to deliberate on a common issue drawing on their common sense and life experiences.<sup>162</sup> The uniqueness of the opportunity to bring disparate groups together is magnified when one considers that juries are typically drawn from counties comprised of multiple cities, sometimes spanning rural and urban areas.

The opportunity for information exchange among jurors begins during voir dire when the judge or attorneys ask jurors a series of questions that often require revealing personal information.<sup>163</sup> Questions might include past interaction with the legal system, the quality of those experiences, religious or other beliefs which would prevent the person from finding liability or awarding damages, general opinions about civil lawsuits or the legal system, personal experiences that might be relevant to the particular case, opinions about the law governing the case, or any other reasons why they might not be able to serve as a fair or impartial juror.<sup>164</sup> Jurors also give basic background information such as age, place of residence, occupation, and information about family members. Whereas attorneys are motivated to learn about the attitudes and life experiences of jurors and elicit as much information as possible, judges are incentivized due to court constraints to keep voir dire to a minimum, making most of these interactions quite brief.<sup>165</sup> Even though the information is elicited through a question-answer format and there is no direct interaction between jurors, the learning

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161. McPherson et al., *supra* note 159, at 423 (citing ROBERT HUCKFELDT & JOHN SPRAGUE, *CITIZENS, POLITICS AND SOCIAL COMMUNICATION: INFORMATION AND INFLUENCE IN AN ELECTION CAMPAIGN 195-201* (1995)).

162. S.F. PLANNING DEP'T, *supra* note 151, at 8-9, 54-55.

163. DIAMOND, *supra* note 119, at 288-89.

164. Consolini, *supra* note 41, at 36-38.

165. Diamond & Rose, *supra* note 1, at 259.

experience nonetheless begins here and can involve profound issues such as whether people agree with certain laws.

The richest opportunity for an exchange of viewpoints is, of course, during the deliberation process itself. Within the black box of the jury room, jurors can—at least in theory—speak freely with one another and structure discussions as they see appropriate. While the focus of discussions is on the evidence and verdict in the case, jurors draw on their common sense and life experiences in working through the facts and persuading one another of different interpretations. There is some evidence suggesting that jurors do in fact draw upon their personal experiences during deliberations and offer them up to the jury group. In a study of jurors in Seattle, Washington, 43% reported that they spoke about their own experiences during deliberations once or twice and an additional 15% reported that they did so three or more times.<sup>166</sup> Although this sample only included criminal trials, there is little reason to expect a different pattern in civil trials. Some research also suggests that more diverse groups engage in a wider range of information exchange than less diverse groups.<sup>167</sup> Samuel Sommers, for example, studied the effects of racial composition on jury deliberations and found that racially mixed mock juries deliberated longer and had more breadth in terms of substantive content than all-white juries.<sup>168</sup>

Though likely more superficial in terms of the type of information and viewpoints exchanged, more informal opportunities for interaction between jurors can arise during the trial itself, such as when jurors wait together during courtroom breaks and during lunch breaks. Whereas a minority of jurisdictions allow jurors to discuss the case prior to deliberation, most juror conversations are limited to other, non-case-related topics.<sup>169</sup> Still, jurors may very

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166. GASTIL ET AL., *supra* note 25, at 98.

167. See, e.g., Evan Apfelbaum, Katherine Phillips & Jennifer Richeson, *The Value of Diversity: Racially Homogeneous Groups Can Promote an Oversimplified Mindset* (2013) (presented at the annual meeting of the Society for Personality and Social Psychology) (abstract on file with author).

168. Sommers, *supra* note 2, at 604-05.

169. See ARIZ. R. CIV. P. 39(f) (allowing jurors to discuss the evidence among themselves during the trial); Shari Seidman Diamond et al., *Juror Discussions During Civil Trial: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 15 (2003).

well exchange information about their daily lives and provide fellow jury members with some level of insight about themselves.

Thus far, we have described the ways that jury service can potentially facilitate an exchange of information and viewpoints between fellow members of a political community. But the mere fact that exchange takes places does not necessarily mean that only positive effects—as opposed to negative effects—are involved. Jurors could, for example, encounter conflict with others from different groups while serving, perhaps reinforcing preexisting stereotypes or polarizing views, or they could experience anxiety that inhibits effective interaction across group lines. A large literature in psychology highlights the potential for anxiety in intergroup interaction for both low- and high-status group members, along with related physiological effects and depletion of cognitive resources.<sup>170</sup> We also know from a robust literature on implicit bias that stereotypes exert their influence automatically and often without conscious awareness<sup>171</sup> and can be self-fulfilling.<sup>172</sup>

Yet, on balance, the substantial literature on the effects of intergroup contact shows that it can foster interaction and good relations between members of different groups. For example, a meta-analysis of over 700 independent samples found that intergroup contact generally reduces intergroup prejudice and that this effect extends to a broad range of outgroups and contact settings.<sup>173</sup> Additional positive outcomes include reduced anxiety and individual threat, as well as increased levels of empathy, perspective taking, intergroup trust, and perceptions of outgroup variability.<sup>174</sup> A study using data from a representative national survey examined the

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170. For a review, see Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, and Possibilities*, 16 *CURRENT DIRECTIONS PSYCHOL. SCI.* 316, 316-20 (2007).

171. For reviews, see, for example, Curtis D. Hardin & Mahzarin R. Banaji, *The Nature of Implicit Prejudice: Implications for Personal and Public Policy*, in *THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY* 13, 15-16 (Eldar Shafir ed., 2013); Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 *SOC. JUST. RES.* 129, 129-42 (2004).

172. Carl O. Word et al., *The Nonverbal Mediation of Self-fulfilling Prophecies in Interracial Interaction*, 10 *J. EXPERIMENTAL SOC. PSYCHOL.* 109, 109-20 (1974).

173. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 *J. PERSONALITY & SOC. PSYCHOL.* 751, 766 (2006).

174. Thomas F. Pettigrew et al., *Recent Advances in Intergroup Contact Theory*, 35 *INT'L J. INTERCULTURAL RELS.* 271, 275 (2011).

effects of exposure to dissonant political views, finding that those with cross-cutting political networks had increased awareness of legitimate rationales for opposing views and greater political tolerance.<sup>175</sup> Studies examining the effects of diversity in the educational setting have likewise found that interaction across groups fostered a greater motivation to take the perspective of others, more enjoyment learning about the experiences and perspectives of other groups, and greater appreciation of both group differences and commonalities.<sup>176</sup> Positive outcomes stemming from intergroup contact can potentially be realized through both cognitive and affective (or emotional) channels, though the evidence tends to show that affective mechanisms are more important.<sup>177</sup> Less than 5% of the studies included in the meta-analysis found evidence of negative outcomes stemming from intergroup contact, though researchers have noted the need for more research in this area.<sup>178</sup>

Though not essential to obtaining positive effects from intergroup contact, certain situational conditions have been identified and shown to increase the size of these effects.<sup>179</sup> Gordon Allport originally proposed that positive effects of intergroup contact are more likely to result when four features are present: equal status between the groups; common goals; intergroup cooperation; and the support of authorities, law, or custom.<sup>180</sup> Several of these factors are present within the jury context. Members on a jury are united by their common goal of fact-finding and rendering a verdict in the case.<sup>181</sup> Cooperation between jury members is usually a key factor in successfully reaching these goals as they work to listen to and persuade one another, remind each other of the evidence, and work through how to understand and apply the law.<sup>182</sup> In theory a juror can sit back and not engage at all in jury discussions, but most

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175. Mutz, *supra* note 141, at 122-23.

176. Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17, 24, 28-31 (2004).

177. Mutz, *supra* note 141, at 120; Pettigrew et al., *supra* note 174, at 277.

178. Thomas F. Pettigrew, *Future Directions for Intergroup Contact Theory and Research*, 32 INT'L J. INTERCULTURAL REL. 187, 190 (2008).

179. Pettigrew & Tropp, *supra* note 173, at 766.

180. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 280-81 (1954).

181. GASTIL ET AL., *supra* note 25, at 87.

182. *See id.* at 94-95.

jurors take their role and task quite seriously,<sup>183</sup> and the expectation is that all jurors will actively participate during deliberations to reach a verdict.<sup>184</sup> Finally, juror interaction occurs within the context of institutional support and under the authority of the law.

Research also suggests that positive effects are more likely to be realized when the intergroup contact is not superficial.<sup>185</sup> Opportunities to learn about and from other citizens called to jury service can range in terms of length and depth of discussion depending on how far one gets in the selection process. The voir dire process is still potentially quite informative but relatively brief. For those who actually are empaneled and reach the deliberation phase, discussions last as long as it takes to reach a verdict or until a hung jury is declared.<sup>186</sup> The formation of friendships among most jury members is generally not anticipated—deliberations are not dominated by pleasantries and other superficial conversations, but rather focus in a deep and meaningful way on the evidence in the case and opinions about the proper verdict.<sup>187</sup>

Equal status among groups within the situation has also been hypothesized to facilitate the positive outcomes stemming from intergroup contact.<sup>188</sup> In theory, all jurors come into the courtroom on equal footing and having equal status. In practice, though, social status dynamics follow jurors into the deliberation room, thus shaping interactions in important ways.<sup>189</sup> For example, the jury foreperson—who is disproportionately male and high status—often participates more in the discussions and is seen as more

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183. Erin York Cornwell & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 LAW & SOC'Y REV. 667, 680 (2011) (finding high levels of juror engagement during deliberations, with 64% rating their participation a 6 or 7 on a 7-point scale, based on questionnaire data collected from 2000 to 2001 at four sites as part of a National Center for State Courts project).

184. See, e.g., *State Bar of Michigan Juror's Manual*, INGHAM COUNTY, <http://dc.ingham.org/JuryDuty/JurorManual.aspx> (last visited Jan. 20, 2014).

185. Pettigrew et al., *supra* note 174, at 276.

186. Diamond & Rose, *supra* note 1, at 270 (“Most jury cases, both criminal and civil, last only a few days, but a small percentage extend for weeks or even months.”). In 2005, jury trials for civil cases lasted approximately four days on average, with 13% of jury trials being completed within one day. GASTIL ET AL., *supra* note 25, at 76 (finding that civil trials in their study on average lasted over eight days in the courtroom, including six and a half hours in the deliberation room); LANGTON & COHEN, *supra* note 26, at 8.

187. See GASTIL ET AL., *supra* note 25, at 162-63.

188. Pettigrew & Tropp, *supra* note 173, at 752.

189. For a review, see Cornwell & Hans, *supra* note 183, at 689-92.

influential.<sup>190</sup> This person, being chosen to direct the deliberation process, might also take on an implicit level of authority. Additionally, not all groups participate equally during deliberations.<sup>191</sup> A study of actual civil jury deliberations found that male jurors spoke more than female jurors, consistent with the pattern found in previous mock jury studies.<sup>192</sup> Social class and age likewise tend to predict levels of juror participation.<sup>193</sup> Thus, while formal equality might be in place among jurors, equal status at the psychological level may not be reached, thus potentially undermining some of the potential positive outcomes associated with intergroup contact.<sup>194</sup>

Survey and interview data from jurors suggest a variety of experiences during jury service, ranging from positive to negative. In a set of preliminary interviews with jurors, Gastil and colleagues found jurors who described admiration for their fellow jurors and who had bonded as a group.<sup>195</sup> In a larger survey, 13% of jurors who had a positive experience with their service cited the behavior of other jurors and praised their performance.<sup>196</sup> But at the other end of the spectrum, 10% of jurors who were less satisfied with their experience pointed to other jurors who failed to carry out their responsibility as a juror carefully and thoughtfully.<sup>197</sup> Frustration and conflict are likely to be encountered at some point during jury deliberations, but this does not necessarily translate into an overall negative experience.<sup>198</sup> Gastil and colleagues recount one interview

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190. *Id.* at 671.

191. *Id.* at 670.

192. *Id.*

193. *Id.* at 681 (finding that participation increases with educational attainment and that middle-aged jurors tend to participate more than either younger or older jurors).

194. Marilyn B. Brewer & Roderick M. Kramer, *The Psychology of Intergroup Attitudes and Behavior*, 36 ANN. REV. PSYCHOL. 219, 236 (1985) (“It is now recognized, however, that equal status at the structural level does not necessarily correspond to equal status at the psychological level and that it is necessary to take into account both historical status differences and immediate status differences as determinants of intergroup acceptance.”). Also, jury service is nonvoluntary, a factor noted for moderating the occurrence of negative intergroup contact. The lack of voluntariness is, however, perhaps less troubling in the jury context because it generally is not accompanied by the feeling of threat and intergroup competition that is thought to fuel negative contact experiences, such as in work environments. Pettigrew et al., *supra* note 174, at 277.

195. GASTIL ET AL., *supra* note 25, at 27.

196. *Id.* at 68 (quoting one juror who commented that he “served on a jury with many good, sound-thinking people, which was encouraging and enjoyable”).

197. *Id.* at 68.

198. *Id.* at 27.

with a juror who expressed frustration at the different ideas everyone had and felt strongly about, but took this as an indication that people were taking things seriously and ultimately concluded that the process worked.<sup>199</sup> In a systematic study of juror experiences in King County, many jurors described their deliberation process as an exchange of different opinions within the context of a respectful environment.<sup>200</sup>

One question for further examination and research is *how* diverse juries need to be in order to obtain the desired level of exchange needed to achieve the anticipated positive benefits.<sup>201</sup> But perhaps a question that merits greater attention regards the quality of the climate surrounding diversity on juries. In other words, do jury settings foster an inclusive environment where jurors of all backgrounds feel able and compelled to maximally participate?

The organizational psychology literature has paid increasing attention to employee perceptions of organizational climate—including the climate for diversity—and its implications, finding that it predicts turnover, job satisfaction, and group cohesion.<sup>202</sup> Recent research in social psychology suggests several situational factors that can create a negative climate for underrepresented groups. For example, *stereotype threat* can hinder the performance of stigmatized groups by stoking a fear of being seen through, or of confirming, a negative stereotype about one's group.<sup>203</sup> Simply making a group identity salient in a context in which a group is negatively stereotyped—for example, African

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199. *Id.*

200. *Id.* at 94.

201. Whereas previous mock jury studies and research on small groups had found differences in juror participation rates across more or less diverse groups, Cornwell and Hans failed to find such a relationship or even that minority groups tended to participate less overall. The researchers suggested this divergence may be attributable to the fact that the juries included in their study were remarkably diverse, with the average jury including members from at least three different racial or ethnic groups. Cornwell & Hans, *supra* note 183, at 691; see also Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65, 81-82 (2008).

202. Patrick F. McKay et al., *Racial Differences in Employee Retention: Are Diversity Climate Perceptions the Key?*, 60 PERSONNEL PSYCHOL. 35, 45, 53 (2007); Benjamin M. Walsh et al., *A Multilevel Model of the Effects of Equal Opportunity Climate on Job Satisfaction in the Military*, 15 J. OCCUPATIONAL HEALTH PSYCHOL. 191, 192-93 (2010).

203. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995).

Americans and standardized tests—can evoke stereotype threat. Research on *ambient belonging* suggests that cues in the physical environment can signal to potential participants that they do not belong there, for example, masculine cues in math and science environments turning away women.<sup>204</sup> Finally, research on *solo status* suggests that numerical underrepresentation affects the experience of minority groups, especially in evaluative situations.<sup>205</sup> Enhancement of the political functions of the civil jury through diversity may not occur should situational factors such as stereotype threat, ambient lack of belonging, and solo status hinder the participation of nondominant groups. Moreover, situational factors such as these should be considered not only to improve the climate for diversity on juries and jury venires, but also to ensure that the unequal status relations that occur in the broader society are not replicated within these contexts.

Jury diversity is a critical component for the fruitful exchange of viewpoints between members of a political community. To the extent that juries can pull together otherwise disparate segments of the community, there is a greater expansion of one's understanding of the breadth and variety of experiences lived and perspectives held by fellow citizens.<sup>206</sup> Although having a sense of place within this political community is itself a valuable outcome, there is some evidence suggesting that other possible benefits can be obtained from this interaction process, including an increased perspective-taking ability and better relations with those from other groups.<sup>207</sup> As with other educational experiences, jury service can provide an opportunity for cognitive growth and preparation for citizenship within a heterogeneous world.<sup>208</sup> This particular political rationale for the civil jury has received relatively little attention within the

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204. Sapna Cheryan et al., *Ambient Belonging: How Stereotypical Cues Impact Gender Participation in Computer Science*, 97 J. PERSONALITY & SOC. PSYCHOL. 1045, 1045-60 (2009).

205. Denise Sekaquaptewa & Mischa Thompson, *The Differential Effects of Solo Status on Members of High and Low Status Groups*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 694, 704-06 (2002); Denise Sekaquaptewa, Andrew Waldman & Mischa Thompson, *Solo Status and Self-Construal: Being Distinctive Influences Racial Self-Construal and Performance Apprehension in African American Women*, 13 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 321, 326 (2007).

206. See Gurin et al., *supra* note 176, at 32.

207. *Id.* at 28-29.

208. *Id.* at 20.

empirical literature and more research is needed before firm conclusions can be drawn in the jury context. Specifically, some measure is needed as to how much jurors actually take away from their service in terms of learning about fellow members of their political community. While studies to date support the educative value of jury service, there has not been a clear breakdown between learning about the jury and legal systems versus learning about and from fellow jurors. Comments from jurors occasionally cited in existing studies suggest that some jurors learned a lot from the different views expressed during deliberations, but this has not been measured systematically. Nor has research documented how such learning may vary across social groups. Additionally, further research is needed regarding the interaction conditions that tend to optimize the exchange of viewpoints among jurors, including ways of countering some of the situations that might lead to negative contact between jury members.

#### V. NORMATIVE CONSIDERATIONS AND CONCLUSION

In identifying and examining the major political functions associated with the civil jury system, we have argued that jury diversity is relevant to fulfilling or maximizing each of these functions. As a form of political participation, ensuring diversity within the jury pool addresses some of the same concerns about equality and access that arise in the voting context. Fundamental to a democratic system is the idea that all segments of the population are included in the process. It is likely that jury composition influences perceptions of the fairness of the process used in reaching verdicts, which in turn impact the perceived legitimacy of the legal system more broadly.<sup>209</sup> There is reason to believe that, apart from perceptions, a diverse jury is likely to better represent the different perspectives and viewpoints existing in the wider community.<sup>210</sup> Experience participating in jury service can increase jurors' own approval of the jury system and can be seen as a potential pathway to engage those citizens, especially minorities, who may be disillusioned by or alienated from political and legal institutions. Finally,

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209. Sommers, *supra* note 201, at 79.

210. *Id.* at 86.

jury service offers the opportunity for interaction between members of a political community that cuts across lines of difference and typically shape everyday interactions. Ensuring jury diversity is important to facilitating this educational function of the jury and the positive benefits that can result from intergroup interaction.

Being attentive to issues of diversity on juries is important given the shifting demographics of the U.S. population. The conception about the proper composition of a jury has not been, nor should be, a static one. Rather, as articulated early on in the Supreme Court's jurisprudence on jury composition, "Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government."<sup>211</sup> As the makeup of our political community continues to change over time, so, too, must our expectations of what a truly representative jury looks like. Data from the 2010 Census suggests that the population of non-Hispanic whites will peak around 2024 and slowly decrease as the populations of almost every racial minority group increase.<sup>212</sup> Furthermore, members of minority groups are projected to numerically surpass whites sometime around 2043, making the United States a plurality nation.<sup>213</sup> The numbers are even more striking within different regions; in California, the percentage of Hispanics is predicted to surpass non-Hispanics in 2014.<sup>214</sup> Similarly, a recent Pew Forum survey shows the growing religious diversity with the United States "on the verge of becoming a minority Protestant country."<sup>215</sup> Additionally, a recent analysis of national and state population surveys by the Williams Institute suggests that there are

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211. *Glasser v. United States*, 315 U.S. 60, 85 (1942).

212. Press Release, U.S. Census Bureau, U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century From Now (Jan. 17, 2013), available at <https://www.census.gov.edgekey.net/newsroom/releases/archives/population/cb12-243.html>.

213. *Id.* These projections are based, in part, on differential fertility rates across demographic groups, with non-Hispanic whites having children below replacement levels, and the levels of net international migration. According to the latest figures, "[n]et international migration is projected to overtake natural increase as the driver of population growth for the United States in 2032." U.S. CENSUS BUREAU, METHODOLOGY AND ASSUMPTIONS FOR THE 2012 NATIONAL PROJECTIONS 13 (Dec. 12, 2012), available at <https://www.census.gov.edgekey.net/population/projections/files/methodology/methodstatement12.pdf>.

214. Mark Hugo Lopez, *In 2014, Latinos will surpass whites as largest racial/ethnic group in California*, PEW RESEARCH CENTER (Jan. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/01/24/in-2014-latinos-will-surpass-whites-as-largest-racial-ethnic-group-in-california/>.

215. PEW FORUM ON RELIGION & PUB. LIFE, *supra* note 92, at 5.

approximately 9 million adults in the United States who identify as lesbian, gay, bisexual, or transgender.<sup>216</sup>

Several jury system reforms have been suggested to improve participation rates overall by increasing initial turnout for service, improving the quality of experience once at the courthouse, lessening the burden on jurors' lives resulting from service, and providing more information to jurors about the process and their role.<sup>217</sup> Some of these include follow-up mailings and stricter enforcement of no-show jurors, providing clearer instructions about how to defer and the appropriate reasons for deferment, decreasing wait times at the courthouse, assisting with child care arrangements, encouraging more compensation from local employers, and paying jurors more for their time.<sup>218</sup>

Certain reform suggestions specifically contemplate improving jury diversity, including updating and improving source lists to reach well beyond registered voters and those with high mobility rates.<sup>219</sup> Although race-conscious strategies for jury selection are both controversial and of dubious legality, Ellis and Diamond have offered a non-race-based approach of increasing representativeness by weighting the random sampling process based on previous response rates from either political or geographic units within a jurisdiction.<sup>220</sup> Analogous to "rock the vote" type of campaigns, another strategy to foster more diversity on juries is proactive outreach to certain underrepresented communities emphasizing the importance of jury service, making clear that every citizen is capable of serving, and providing information about the process to dispel common myths about jury service.<sup>221</sup> Such a campaign might incorporate strategies demonstrated by social psychological research

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216. GARY J. GATES, THE WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL AND TRANSGENDER? (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.

217. ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS 121-24 (1998).

218. *Id.*

219. Ellis & Diamond, *supra* note 66, at 1053-55; Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 169.

220. *United States v. Ovalle*, 136 F.3d 1092, 1092 (6th Cir. 1998) (finding unconstitutional efforts to use race-conscious means to create a jury pool that was more racially balanced); Ellis & Diamond, *supra* note 66, at 1051-58.

221. See BOATRIGHT, *supra* note 217, at 122.

to successfully influence subsequent behavior, such as obtaining an informal commitment from citizens to respond to jury summonses.<sup>222</sup>

During trials themselves, judges can take steps to facilitate positive interactions and fruitful discussions among jurors. Without intruding on the province of the deliberation room, judges could give a simple instruction to the jury suggesting general expectations about how discussions should proceed. For instance, the judge could emphasize that all jurors are encouraged to participate fully in the discussions, that each juror should be given an equal opportunity to speak, and that while differences of opinion may arise, they should listen and respond to one another with respect.

Taking steps to implement some of these reforms, we hope, will increase the representativeness of jury venires and facilitate meaningful and positive interactions between jurors serving on a panel. As we have argued throughout this Article, diversity's role in many of the political functions fulfilled by the jury system provides justification for investing attention and resources toward these efforts.

Having reviewed the existing evidence on the importance of diversity on juries, we end with a call for more research that decomposes findings by important social characteristics such as race, social class, and gender and that specifically focuses on civil juries. With a few exceptions, most of the theorizing and empirical research regarding the political functions discussed above has involved criminal cases. Though some degree of continuity is expected across case types, there are a number of differences between the contexts that could potentially weaken the justificatory power of these political functions in civil cases. As mentioned previously, civil trials likely receive less attention in the media and public eye, and the extent to which jury composition in particular is reported for these cases is unknown. Some group characteristics, such as race, arguably garner relatively less salience in the civil context, especially when compared to the now well-known pattern

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222. ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 52-97 (4th ed. 2001). Such strategies have recently been successfully utilized in increasing voter turnout during the 2012 presidential campaign. Benedict Carey, *Academic 'Dream Team' Helped Obama's Effort*, N.Y. TIMES (Nov. 12, 2012), <http://www.nytimes.com/2012/11/13/health/dream-team-of-behavioral-scientists-advised-obama-campaign.html?pagewanted=all>.

of minority overrepresentation in the criminal justice system.<sup>223</sup> As others have noted, the greater complexity of evidence, the general lack of a unanimity decision requirement, and the lesser degree of significance attached to civil cases could very well lead to relatively less juror engagement than is found in criminal cases.<sup>224</sup> In light of these distinctions, we advise further direct study of civil trials in order to understand better diversity and the civil jury.

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223. Based on a 2006 survey of the seventy-five largest counties, non-Hispanic whites represented only 29% of felony defendants compared to 45% for blacks and 24% for Hispanics. THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 19 (2010), available at <http://bjs.gov/content/pub/pdf/fdluc06.pdf>.

224. GASTIL ET AL., *supra* note 25, at 38-39.