

William & Mary Bill of Rights Journal

Volume 3 (1994)
Issue 1

Article 3

August 1994

Rethinking the Jury

Phoebe A. Haddon

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Criminal Procedure Commons](#)

Repository Citation

Phoebe A. Haddon, *Rethinking the Jury*, 3 Wm. & Mary Bill Rts. J. 29 (1994),
<https://scholarship.law.wm.edu/wmborj/vol3/iss1/3>

Copyright c 1994 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

RETHINKING THE JURY

Phoebe A. Haddon*

“In the ideal world perhaps we’d like most decisions to be made by juries.”¹

I. INTRODUCTION

The civil jury² has often been cast as the quintessential democratic institution, but its practical value in promoting justice has also been questioned.³ A metaphor for citizen participation in legal decision-making, the modern civil jury enjoys a visible but often marginalized role in the administration of justice. The symbolic commitment to the presence and

* Professor of Law, Temple University School of Law. B.A., Smith College; J.D., Duquesne Law School; LL.M., Yale Law School. I would like to thank my colleagues, particularly those who critiqued a rougher first draft, at the Fourth Annual Critical Race Theory Workshop in 1992, for their assistance and helpful comments after reading earlier versions of this Article. Thanks especially to: Peggy Davis, Lani Guinier, David Kairys, Michael Libonati, Frank McClellan, Joseph Passon, and David Sonenshein. I greatly appreciated the support and research assistance of Gicene Brignola, Doneene Keemer Damon, Debora Fliegelman, Jeanmarie Martinko, and Stephanie Montgomery.

¹ Professor Mari Matsuda, Georgetown University Law Center, Comment at Fourth Annual Critical Race Theory Workshop, Mercy Center, Connecticut (June 3, 1992).

² This Article concerns the civil jury as a decision-making device of the American judicial system. There are, of course, other civil dispute resolution mechanisms, public and private, which have been considered, but none has been accepted in this country like the judge and jury method. *See, e.g.*, CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY 6-8 (1962) [hereinafter JOINER, JUSTICE AND THE JURY]. The right to a jury trial is enshrined in the Seventh Amendment to the Federal Constitution and in most state constitutions. This Article does not consider how those state provisions have been read nor does it concern particular problems confronting states.

³ *See generally, e.g.*, JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1973) (describing realists’ critique of American judicial system, particularly jury trials, the legal profession, and juries); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 4 & n.2 (1966) (sampling of responses to now famous Chicago Jury Project); THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW (Rita J. Simon ed., 1975) (differing perspectives on the jury system through contributing essays) [hereinafter JURY SYSTEM]; Dale W. Broeder, *The Functions of the Jury: Facts or Fictions*, 21 U. CHI. L. REV. 386 (1954) (criticizing juries’ fact finding function and policy making role, and generally questioning juries’ capacity for rendering good decisions given rules and procedures).

participation of lay people in the justice system runs deep.⁴ In a world focused on efficiency and reason, however, the desirability of using this "transient, ever-changing, ever-inexperienced group of amateurs"⁵ has been challenged by the presumed value of leaving the determination of justice to a cadre of legal professionals.⁶

This Article considers whether we sufficiently appreciate the opportunities flowing from community participation in the civil justice system. It asks what function juries can perform in meting social justice through adjudication. The Seventh Amendment mandates their presence in certain cases,⁷ and its inclusion among the first amendments to the Constitution indicates that, at least at the framing of the Constitution, and earlier, juries were perceived as significantly contributing to the just resolution of civil claims of right.⁸ Indeed the jury was seen not only as a buffer against unsympathetic government and power-wielding citizens, but also as the repository of community knowledge, distinguishable from

⁴ Public acceptance of the jury trial runs high, at least as most surveys reflect. See *Most Jurors Would Want Their Own Case Heard by a Jury, Not a Judge*, NAT'L L.J., Feb. 22, 1993, at S15. At a recent symposium on the jury sponsored by the Brookings Institution and the American Bar Association, this perception was confirmed. See Report from an American Bar Association/Brookings Institution Symposium, *Charting a Future for the Civil Jury System*, 2-3 (1992) [hereinafter *Charting a Future*]. The participants of the symposium, however, concluded that for reasons of "turf and tradition," lawyers and judges tend to be condescending to jurors, and that as a result, the system leaves jurors "underpaid and underappreciated." *A Call for the Jurors to Take Bigger Roles in Trials*, N.Y. TIMES, Jan. 1, 1993, at A19 (discussing the symposium report); see also Gerald Torres & Donald P. Brewster, *Judges and Juries: Separate Moments in the Same Phenomenon*, 4 LAW & INEQ. J. 171 (1986) (commentary concerning minimizing effect of motion practice and procedural rules). In his Chicago Jury Project, Harry Kalven, Jr. reports that 70% of the public favored jury trials. See JOINER, JUSTICE AND THE JURY, *supra* note 2, at 65 (citing HARRY KALVEN, JR., Report On The Chicago Jury Project, in CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 155-74 (Alfred F. Conard ed., 1955), reprinted in JOINER, JUSTICE AND THE JURY, *supra* note 2, at 201-14); see also *Powers v. Ohio*, 499 U.S. 400, 406-07 (1991) (quoting authorities on the value of citizen participation).

⁵ KALVEN & ZEISEL, *supra* note 3, at 4.

⁶ *Id.*

⁷ U.S. CONST. amend. VII.

⁸ See *infra* notes 69-88 and accompanying text. Most commentators agree that the Framers' failure to include a civil jury trial guarantee was not due to lack of support for the right to a jury trial. See, e.g., Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 656 (1973); see also THE FEDERALIST No. 83, at 521 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[F]riends and adversaries of the plan of the convention . . . concur at least in the value they set upon the trial by jury.").

the legal expertise of the judge. The jury's value in securing a community connection to law and facilitating the accomplishment of justice, though firmly rooted in Anglo-American history, has not always been affirmed in recent reform measures, such as modern rules concerning evidence, motions and other procedures,⁹ and proposals for specially qualified juries.¹⁰

For people of color, the role of juries has peculiar equivocal significance. People of color are aware of the democratic symbolism of the jury as "preserv[ing] liberty by wresting 'the law' from the experts."¹¹ People of color are also conscious, however, that the "firm rootings" of the jury in the American past did not include representation of women, blacks, or Indians,¹² and that unrepresentative jury decisions have frequently underscored their marginalized status.¹³ Indeed the reprieve of no jury has been seen as an advantage for people of color: jury decision-making on more than one occasion, after all, has confirmed that the political majority devalues the worth of the lives and dignity of outsiders.

⁹ See, e.g., FED. R. CIV. P. 49(a), 50, 59(a). Commenting on the "narrow conventional function" of the civil jury, Gerald Torres and Donald Brewster have observed that "[t]he jury 'instruction,' the rules of evidence, and the interpretation of law versus the finding of fact all limit the scope of the jury's legitimate function." Torres & Brewster, *supra* note 4, at 180; see, e.g., LEON GREEN, JUDGE AND JURY 375-94 (1930) (discussing equivocal role jury played in history); Broeder, *supra* note 3, at 396-97 (describing marginalization through motion practice and procedural rules); see also Edmund M. Morgan, *The Jury and the Exclusionary Rule of Evidence*, 4 U. CHI. L. REV. 247 (1937) (providing example of minimization in criminal context). Torres and Brewster, however, recognize the potentially more minimizing effect of language of courts and commentators used to characterize the civil jury, words and phrases like "capricious," "unpredictable," "easily swept by emotion," and, "not given to hard logical thinking"—words and phrases commonly used to characterize women. Torres & Brewster, *supra* note 4, at 181 & n.44 (citing Carrie J. Menkle-Meadow, *Portia in a Different Voice: Speculations on A Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 49 (1985) (asking the question, "Is the judge 'male,' the jury 'female?'"")).

¹⁰ See, e.g., William V. Luneberg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887 (1981).

¹¹ Torres & Brewster, *supra* note 4, at 176. The authors, however, distinguish between the function of the jury as icon and as symbol. "The icon is the receptacle of the past . . . the symbol . . . has its being in the future." *Id.*

¹² Harold M. Hyman & Catharine M. Tarrant, *Aspects of American Trial Jury History*, in JURY SYSTEM, *supra* note 3, at 25. But see *infra* note 45 (Thayer's allusion to the inclusion, in some cases, of Indian jurors in Massachusetts).

¹³ See, e.g., Isabel Wilkerson, *Middle-Class but Not Feeling Equal, Blacks Reflect on Los Angeles Strife*, N.Y. TIMES, May 4, 1993, at A20.

Recently, feminists¹⁴ and critical theorists¹⁵ have challenged as impoverished the concept of community participation that is reflected in the conventional liberal-pluralist interest group model of politics; their critiques challenge us to consider whether the jury, reconceived, might better serve even an outsider's interests in achieving social justice. This Article explores whether we can bring about a more responsible community role in adjudication, fulfilling the deliberative and consensus-reaching objectives which distinguish the jury from other players in the civil justice system.

A number of ideas can be explored in determining whether juries might be better constructed and utilized. As we consider the possibilities for a more meaningful community role in the resolution of socially significant disputes about competing rights, we test how far a commitment to dialogue and storytelling extends. As citizens, we can benefit from reflecting upon the extent to which conclusions about the dangers of jury decision-making are a product of traditional assumptions about the appropriate adjudicatory hierarchy and of our unwillingness to take the citizen's role in adjudication seriously. Pertinently, what we have identified as shortcomings of citizen participation may be attributable to the responsible way citizens have been asked to function in adjudication and to the rise in power of judges. The changes we envision in the jury's representative and deliberative function and decision-making role can give new meaning to the democratic participatory process.¹⁶ A reshaping of our understanding of representation and its link with accountability for juries can result in a more meaningful citizen response to disputes and can lead to a just resolution of claims.

What form could a reconception of the jury's function take? To develop a response, this Article will first explore the historical development of juries, tracing the institution from its beginnings in England, to the establishment of a constitutional guarantee in the United States, and to the consequent increase in judicial control and discretion. It will then explore the characteristics traditionally offered in support of jury participation and those offered in responses that suggest that jury decision-making is of

¹⁴ See, e.g., Robin West, *The Supreme Court 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); see *infra* notes 295-332 and accompanying text.

¹⁵ See, e.g., IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

¹⁶ A similar trend is occurring in terms of legislative decision-making and the participation of minorities through proportionate representation. See, e.g., Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1480 (1991) [hereinafter Guinier, *No Two Seats*].

limited value, identifying competing visions of justice reflected in a reconceived model of adjudication.

I will argue that presently a preference exists for judicial decision-making that reflects distrust of the citizen's capacity in a pluralistic society to overcome self-interest and prejudice. Drawing upon feminist and communitarian observations about community representation and responses to the liberal model of adjudication,¹⁷ including the central position of courts in articulating and protecting public values,¹⁸ the Article will identify the benefits of reconceiving citizen participation in creating and applying the rule of law. In particular, this Article emphasizes meaningful representation, accountable deliberation, and communication as necessary characteristics of socially just, collective decision-making. It will assert that mechanisms which promote the development of these qualities can allay some of the concerns about jury prejudice, parochialism, and self-interest often expressed by those who distrust jury decision-making. The Article explores the possibility of a more authentic citizen decision-making role in adjudication. It posits that the interests of litigants and society can be served by providing for meaningful communication among legal and lay decision-making participants.

II. ORIGINAL FOUNDATIONS OF THE JURY—THE NEED FOR COMMUNITY KNOWLEDGE

The jury as a recognizable institution dates back at least to the twelfth century.¹⁹ Historians who have attempted to piece together its beginnings are not in agreement, but often attach significance to evidence of early use of lay decision-makers in support of their own theories about the proper jury role.²⁰ The historical foundations of the jury are useful to review because they suggest that active community participation in legal decision-making is consistent with the jury's institutional origins. Although we have become committed to a model of adjudication that responds to commercial

¹⁷ See *infra* notes 295-359 and accompanying text. See generally Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1 (1989) (discussing a number of these writings); Sherry, *supra* note 14, at 580-616 (discussing communitarian quality of Justice O'Connor's opinions).

¹⁸ See *infra* notes 214-88 and accompanying text.

¹⁹ See James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 249 (1892).

²⁰ Compare JOINER, JUSTICE AND THE JURY, *supra* note 2, at 39-42, 47 (fact finder from the beginning) with Thayer, *supra* note 19, at 249, 251-55, 265-72 (foundations in inquisition) and Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 998-99 (1987) (discussing judicial wresting of control). See *infra* notes 55, 63.

desires for predictability and reform and is focused on efficiency and judicial expertise,²¹ history bears witness to other interests of justice that were served by the community's presence, including access to local knowledge. This history invites us to consider whether similar interests can be served by a representative jury which can respond to the needs of a diverse society.

Founded in times when the judicial process was primitive and society was more homogeneous, the jury's primary purpose was to bring community knowledge relevant to the resolution of local disputes.²² Later, as distrust of government, including powerful judges, emerged as a community concern, citizens viewed the jury as a buffer against tyranny,²³ protecting the liberty of powerless individuals from the rulings of the elite decision-makers. The modern tendency to limit the jury function and consequently allocate additional power to the judge was fueled by a desire to promote efficiency and rationality.²⁴ Post-modern skepticism about impartial judgment, however, supports a reconsideration of the value of decision-making by a collective of diverse community representatives engaged in discourse about public controversies.²⁵ A representative jury, guided by rules that promote dialogue among judge and jury and which

²¹ See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, at 27-28 (1977); FRANK, *supra* note 3, at 108-45; Broeder, *supra* note 3, at 402-03; see also *In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069, 1086 (3d Cir. 1980) (stating that due process considerations outweigh seventh amendment guarantee when, because of complexity, "jury will not be able to perform its task of rational decision-making with a reasonable understanding of the evidence and the relevant legal standards"); *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54, 60 (2d Cir. 1948) ("[The] jury can contribute nothing of value so far as the law is concerned [and] has infinite capacity for mischief."), *cert. denied*, 335 U.S. 816 (1948).

²² Justice Seymour Simon, Keynote Address at the Allerton House Conference Proceedings on Civil Jury Trial in Illinois (May 17, 1984), in 73 ILL. B.J. 140, 140-41 (1984).

²³ JOINER, JUSTICE AND THE JURY, *supra* note 2, at 24-25; see *supra* note 67.

²⁴ E.g., Subrin, *supra* note 20, at 1000-02; see, e.g., Martin Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123, 126-27 (1985) (arguing that unpredictability is introduced into trial process by jury decision-making, impairing efficiency and integrity of process; jury's role should be limited "to increase predictability, efficiency and fairness of the trial process"); William H. Wicker, *Special Interrogatories to Juries in Civil Cases*, 35 YALE L.J. 296, 296 (1926) (stating that economic interests in earlier times were relatively simple).

²⁵ See, e.g., Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and Hope of Plural Justice—Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. 993, 993 n.2 (1991) (quoting E.P. THOMPSON, *THE POVERTY OF THEORY AND OTHER ESSAYS* 8 (1978), concerning other kinds of "knowledge-production" which challenge the conclusiveness of academic thought).

encourage deliberation by jurors, can serve the interests of society and the administration of justice.²⁶

A. Norman Practice—Drawing on Community Knowledge

Like other historians,²⁷ James Thayer, in his treatise on evidence²⁸ and in a series of articles concerning the development of the jury trial,²⁹ traces the origins of the English jury to a practice of the Normans which was brought to England at the time of the Conquest.³⁰ By the twelfth century, the use of lay witnesses was well established in England.³¹ The Norman practice of inquisition involved the judge summoning a number of members of the community, selected by him as presumably having knowledge of the facts in question.³² These community members were each required to promise to declare the truth on the question put to them by the judge. The inquiry or “method of proof”³³ was not only a means of ascertaining facts but also a method of resolving controversy by a “trial” at which “taxes [were] laid, services exacted, personal status fixed; on the sworn answer of selected persons of a certain neighborhood.”³⁴ As community members with information relevant to the dispute, the summoned neighbors offered testimony concerning personal knowledge about the region and people in it upon which judgment by the judge was

²⁶ *Id.* at 997. (“The experience of justice is . . . the sense that we have participated in the system that both defines and creates it.”).

²⁷ E.g., MAX RADIN, *HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY* (1936); ARTHUR T. VANDERBILT, *JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION* (1956).

²⁸ JAMES B. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 85 (1898).

²⁹ See Thayer, *supra* note 19, at 249 (Part I, locating jury’s origins in the public administration practice of the Normans inherited from Norman Kings and brought to England at the Conquest, and tracing the emergence of trial by jury as we recognize it from limited opportunities for inquisition and recognition); *id.* at 295 (Part II, describing development of jury selection procedures, distinctive jury and witness functions, and receipt of information or evidence); *id.* at 357 (Part III, concerning methods of controlling the jury through the law of evidence).

³⁰ *Id.* at 249.

³¹ *Id.* at 250.

³² *Id.* at 250-60.

³³ *Id.* at 256. Thayer finds historical references to the procedure of summoning witnesses selected by a public officer as “inquisition” and “recognition.” He views them to be aspects of the same thing, a developing mode of trial available on particular questions by grace of the King. In Thayer’s view, references to “inquisition” denote the inquiry and to “recognition” denote the answer. See *id.* at 256-57.

³⁴ *Id.* at 250.

based. This progeniture of trial by jury was the only process available through the royal courts.³⁵

Eventually, community witnesses who were compelled to take an oath and respond, based on their own knowledge, were available by ordinance in many actions.³⁶ Written accounts from the twelfth century reveal that courts assembled neighborhood men and gave judgment based upon the statement of those men chosen to swear.³⁷ Thus, for example, in the reign of Henry II, Justice Glanville describes that on complaint by the King, the county "assembled."³⁸ Twenty-four of the oldest men were chosen to answer on oath, vouching for the sincerity of the party for whom they were called.³⁹ According to a description of one ordinance, four knights of the county and neighborhood were to be summoned to choose twelve others of the same neighborhood who were questioned to determine whether any of them were ignorant of the fact at issue.⁴⁰ If so, they were rejected and others chosen until twelve agreed on one side or the other.⁴¹

B. *Ensuring Accountability of the Community Witnesses*

Disagreement among neighbors commissioned to testify about their community raised concerns of accountability. The knowledge required of those summoned was drawn from their own perception, what they had been told by ancestors, or other communications which they could trust as fully as their own knowledge.⁴² In the earliest uses of the community witnesses, if there was disagreement among neighbors about their recollections, others were added until twelve agreed.⁴³ However, twelfth

³⁵ See JOINER, JUSTICE AND THE JURY, *supra* note 2, at 40 ("In the twelfth century, statutes were enacted expanding the right of individuals to have questions aired before the king."); Thayer, *supra* note 19, at 256-62 (describing ordinances). In contrast to proceedings under the royal ordinances, in circumstances where the ordinances and jury trial did not extend, the older modes of settling disputes, ordeal and one-sided formal proof, continued. See *id.* at 258-61; *infra* note 56.

³⁶ Thayer, *supra* note 19, at 261.

³⁷ *Id.* at 254.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 261.

⁴¹ The twelve knights could say which of the parties had a greater right or merely set forth the facts so that the justices could say it, akin to a special verdict. *Id.* Of some significance, this ordinance provides punishment for false swearing of the jurors, including loss of personal property and imprisonment. *Id.*

⁴² *Id.*

⁴³ *Id.*

century ordinances included provisions for punishment for the "false swearing" of such persons, including the loss of personal property or imprisonment, and infamy.⁴⁴

By the time of the Magna Carta, a trial by jury as of right accompanied new writs and forms of actions available in civil cases as well as, by the 1300s, in criminal cases.⁴⁵ Originally no instructions were given to the jurors; rather, they were expected to arrive at the verdict without outside direction, sometimes going without water and food until they reached agreement.⁴⁶ Later judges exerted greater control by charging the jury and having them reconsider their verdict, and by fining or threatening attaint to induce a resolution.⁴⁷ By writ of attaint, a second jury could review the first jury's verdict for corruptness or false-swearing, and the second jury's determination that perjury occurred could prompt severe penalties against the first jury.⁴⁸

Even after juries began to hear testimony from other witnesses and were presented with documentary evidence, and despite efforts by the

⁴⁴ *Id.* A determination of whether a jury had entered a corrupt or false verdict was made by another jury in a proceeding initiated by writ of attaint. *Id.* at 364-65. In that proceeding, the original parties and also the first jury were parties, and a larger jury composed of knights and others passed again on the same issue as in the original proceeding. *Id.* at 366. Thayer concludes that attaint juries were initially permitted only by the favor of the King but later by ordinances within the discretion of judges. *Id.* at 369-75.

⁴⁵ *Id.* at 265-73. Early juries could not be considered "representative" of the community; they were selected based on (a) loyalty to the crown, (b) reputed honesty, and (c) familiarity with local conditions. JON M. VAN DYKE, *JURY SELECTION PROCEDURES* 13 (1977). Later, special juries or blue ribbon juries of landowners heard particularly complex cases. *Id.*; see also Thayer, *supra* note 19, at 297-305, 361-64 (discussing how jury was informed and describing the gradual addition of other forms of knowledge, such as the introduction of other witnesses).

Thayer also observes that in some circumstances, judges had the power to select those especially qualified for a given service because they were engaged in particular trades. For example, a jury of merchants might be retained to try an issue between two merchants, touching merchants' affairs. *Id.* at 300. Thayer adds, "it is interesting to notice that two centuries ago the Puritans of our Plymouth Colony used now and then, out of policy, when they were trying a case relating to an Indian, to add Indians to the jury, as in a criminal case in 1682." *Id.* at 307 & n.1 (citing Plym. Col. Records, vi. 98).

⁴⁶ See Thayer, *supra* note 19, at 376; JOINER, JUSTICE AND THE JURY, *supra* note 2, at 156-57.

⁴⁷ See Thayer, *supra* note 19, at 364-77; John A. Phillips & Thomas C. Thompson, *Jurors v. Judges in Later Stuart England: The Penn/Meade Trial and Bushell's Case*, 4 LAW & INEQ. J. 189, 210, 214-17 (1986).

⁴⁸ See *supra* notes 44-45; Thayer, *supra* note 19, at 370-74. Bushell's Case, 124 Eng. Rep. 1006 (P.C. 1607), ended the practice of punishing jurors for returning verdicts against the evidence. *Id.*

Tudors and Stuarts to influence the outcome of cases by punishing juries for corruption or false verdicts,⁴⁹ the notion that the jury could make a decision based on the knowledge of its members persisted.⁵⁰ In 1670, in *Bushell's Case*, the court reaffirmed the independence of decision-making by the jury, distinguishing jury corruption from "independence of mind."⁵¹ The jury's independence, in Chief Justice Vaughan's view, was found in its knowledge about the community from which it was drawn.⁵² Because jurors could decide a case on the evidence presented in court or from their private knowledge, Chief Justice Vaughan reasoned that the jury could not be punished for refusing to follow a judge's directions.⁵³ Attaint could be used for dishonesty, but not for a verdict which was the product of jurors' independent judgment.⁵⁴ After *Bushell's Case*, judges who disagreed with a jury verdict could no longer punish the jury; avoiding that limitation, judges began to set aside verdicts and grant new trials based on procedural and evidentiary error.⁵⁵

⁴⁹ See Thayer, *supra* note 19, at 364-83; JOINER, JUSTICE AND THE JURY, *supra* note 2, at 156.

⁵⁰ Pamela J. Stephens, *Controlling the Civil Jury: Towards a Functional Model of Justification*, 76 KY. L.J. 81, 85 (1987). See Thayer, *supra* note 19, at 365-75. In part, the notion persisted because of the reluctance of attaint jurors to find the original jurors guilty because of the harshness of their punishment for this offense. *Id.* at 373.

⁵¹ *Bushell's Case*, 124 Eng. Rep. at 1006. Thayer concludes that "[t]wo things stand out prominently in Vaughan's opinion in *Bushell's Case*: 1. The jury are judges of evidence. 2. *They act upon evidence of which the Court knows nothing*; and may rightfully decide a case without any evidence publicly given for or against either party." Thayer, *supra* note 19, at 383.

⁵² *Bushell's Case*, 124 Eng. Rep. at 1012.

⁵³ *Id.* at 1013.

⁵⁴ Vaughan stated that the verdict is "not an act ministerial, but judicial . . . not finable, nor to be punisht, but by attaint." *Bushell's Case*, 124 Eng. Rep. at 1014. As the jury are judges of the facts, a disagreement with the judge as to the findings of fact cannot be penal. *Id.*

⁵⁵ Thayer, *supra* note 19, at 384-88. To justify the granting of a new trial without infringing jury independence, judges required jurors to state publicly in court and under oath if a verdict was given on private knowledge and not on the evidence in court. Jurors rendering a verdict on such private knowledge were required to be sworn as witnesses. *Id.* at 386-87. Thayer concludes that the rise in judicial oversight of juries and control by the judiciary of the process of introducing evidence relates directly to the historical shift from recognizing the jury as appropriately having private knowledge upon which to render a verdict, to emphasizing the notion of juror impartiality. See *id.* at 387-88; *infra* notes 57-63 and accompanying text.

C. Re-allocation of Power to the Judge

Bushell's Case notwithstanding,⁵⁶ by the fifteenth century the power of the judge and jury had shifted. By that time, judicial experience and expertise replaced community knowledge as the center of litigation authority.⁵⁷ Trial practice was concerned with eliciting witness testimony and exhibits;⁵⁸ increasingly, juries were designated as impartial bodies, having evolved from "active knowers of local events to passive receivers of evidence made available to them only in court."⁵⁹ Courts developed rules restricting jury consideration to evidence deemed by the judge to be

⁵⁶ Chief Justice Vaughan's ruling in *Bushell's Case* has been characterized by modern historians as "willfully anachronistic" in its reasoning about the jury's independence. Phillips & Thompson, *supra* note 47, at 216 (quoting John Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 298 (1978)). Phillips and Thompson place the legal action in the political context of struggle against the abusive assertion of power by the King. *Id.* at 192-94, 221-27.

⁵⁷ See generally Mirjan R. Damaska, *How Did It All Begin?*, 94 YALE L.J. 1807 (1985) (reviewing HAROLD J. BERMAN, *THE LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983), which traces the role of canonists in developing legal traditions, concluding that a turning point was the thirteenth century). Damaska points out that:

[A]n independent force that shaped legal institutions of Europe in a style different from the one disseminated by the Church . . . can be discerned in patterns of judicial organization [In] Northern Europe . . . the tribunal remained divided between judgment-finders and the judge as convenor [sic] and enforcer. Only the function of judgment finders changed: Rather than relying on divine expertise (ordeals), they were expected to arrive at a verdict by their reason and good sense. This institution, given various names in different places . . . is the jury [T]he judicial function was in the hands of the judge who only 'took the facts' from the jury. But because the ascertainment of the truth was of the essence of *officium judicis*, it would seem . . . that the nearest analogue . . . was our jury.

Id. at 1819-20. Damaska notes that appeals were not available until the nineteenth century. He points out that:

In a single-level system of adjudication, lawyers are exposed to the dense texture and minutiae of individual cases, whereas in higher reaches of judicial authority particulars are never fully perceived and human drama is muted. It is therefore easier for tone-setting higher authority to concentrate in broader ordering schemes within which edited cases and problems can consistently be fitted.

Id. at 1820.

⁵⁸ Thayer, *supra* note 19, at 251.

⁵⁹ Phillips & Thompson, *supra* note 47, at 220 n.167 (quoting John Murrin, *Magistrates, Sinners and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England*, in SAINTS AND REVOLUTIONARIES 152, 155 (David Hall et al. eds., 1984), concerning Tudor era developments).

competent and relevant.⁶⁰ The judge resolved questions of admissibility, competency, and privilege.⁶¹ The law on evidence was considered to be within the expertise or competence of legal professionals.⁶² For that reason, jury instructions, which were earlier available only by jurors' request, for their edification, became required to be heard, and the jury's failure to follow the judge's instructions, or its return of a verdict against the weight of evidence became convenient grounds for overturning jury verdicts.⁶³ The judge through post-verdict remedies could therefore subvert a jury's unsatisfactory verdict, thereby diminishing the independent role of the jury.⁶⁴ These developments in law can be understood as part of a struggle between judges and juries over decision-making authority,⁶⁵ and as part of a larger political conflict in England about the exercise—or abuse—of power by the King.⁶⁶

⁶⁰ JOINER, JUSTICE AND THE JURY, *supra* note 2, at 155.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 161. Joiner, however, argues that the power of a judge to set aside verdicts for insufficient evidence or because the verdict was harsh arose from a desire to save the jury system. *Id.*

⁶⁴ See, e.g., Phillips & Thompson, *supra* note 47, at 227 (motions for new trial and motion for arrest of judgment available to impose "a rational control on jury trial") (quoting JOHN H. BAKER, AN INTRODUCTION TO ENGLISH HISTORY 127 (2d ed. 1979)); Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1914-15 (1966); cf. Torres & Brewster, *supra* note 4, at 184 (stating that the judge imposes instructions on the jury to make it more judge-like; the judge tells the jury what it can know, and its understanding must be made to conform to what the law says it can understand).

⁶⁵ See Torres & Brewster, *supra* note 4, at 173. Although acknowledging that "[t]he jury box is where the people come into the court," the authors characterize the jury as "quasi-democratic," noting that juries arose in a "nondemocratic culture," *id.*, and that early juries were limited by property qualifications "intended to secure the 'best of the country' to act in their 'advisory' role to validate the actions of the courts. *Id.* It was only when juries ceased bringing in the proper verdicts that the tension between the positive law and the political culture was highlighted." *Id.* at 173 n.15. See *supra* note 45; see also Phillips & Thompson, *supra* note 47, at 189 & n.1. (stating that sixteenth and seventeenth century reforms aimed at suppression of the jury as far as possible in civil cases through threats of and actual punishment, and by introduction of a breed of authoritative judges); *id.* at 224-25 (in whom the right to decide the outcome of trials should be vested is ultimately a question of public trust). Phillips and Thompson suggest that the issue of inequality of judge and jury was ultimately camouflaged by the artificial law/fact distinction of functions. *Id.* at 229; see Weiner, *supra* note 64, at 1886 (arguing that "law" and "fact" determinations are labels masking decision to submit certain questions to judges and others to juries).

⁶⁶ See Phillips & Thompson, *supra* note 47, at 224-27.

D. *The Jury as a 'Bulwark Against Injustice'*⁶⁷

There is evidence that, like their British commoner counterparts,⁶⁸ the Pre-Revolutionary American colonists' distrust of government⁶⁹ extended to courts. Colonists consequently perceived community representation in court through juries to be critical.⁷⁰ Although court procedures in the individual colonies varied, colonial Americans acted on a common principle: that every person—at least, every white man—had a right to a jury trial.⁷¹ “At a time when judges were dependent instruments of the crown, a jury of one's peers and neighbors seemed to be a promising bulwark against the tyrannous enforcement of the law.”⁷²

To the colonists, judges and juries were more or less co-equals in the judicial process.⁷³ Conceived as “a local agency of self-government,”⁷⁴ juries were seen as the “repository of the people's sense of justice, reason, and fair play.”⁷⁵ They “were lauded as spokesmen for the common sense and shared ethics of the citizenry.”⁷⁶ This view of the importance of community participation extended beyond the colonists' rhetoric about colonial domination. After the Revolutionary War, the original states provided for continued use of jury trials in their state

⁶⁷ W.S. Martin, *The Role of a Jury in a Civil Case*, in JURY TRIALS: SPECIAL LECTURES ON THE LAW SOCIETY OF UPPER CANADA (1959), reprinted in JOINER, JUSTICE AND THE JURY, *supra* note 2, at 142-43. Juries were also seen as a “bulwark against the tyrannous enforcement of the law[s by the British government] administration and its judges.” Hyman & Tarrant, *supra* note 12, at 27 (discussing Zenger litigation).

⁶⁸ See Torres & Brewster, *supra* note 4, at 187-88.

⁶⁹ See Hyman & Tarrant, *supra* note 12, at 28-29. The distrust of courts by colonists is not surprising considering the view of common folk in England concerning judges and their connection with the King's abuse of power. See Phillips & Thompson, *supra* note 47, at 225-26 (describing the House of Commons' efforts to restrain behavior of judges).

⁷⁰ See Hyman & Tarrant, *supra* note 12, at 28-29.

⁷¹ *Id.* at 24. Blacks and Indians did not enjoy opportunities to be jurors or to offer self-defensive testimony in states with slave property codes, and jury service almost universally depended on property ownership. *Id.* at 25; see also *supra* notes 45, 64 (relating historical fact that juries lacked representative quality).

⁷² Hyman & Tarrant, *supra* note 12, at 27-28.

⁷³ Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 173 (1964).

⁷⁴ Morris Arnold, *Societal Versus Official Law*, 38 STAN. L. REV. 265, 270 (1985) (book review).

⁷⁵ William Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 731 (1981).

⁷⁶ *Id.* at 734.

constitutions, by statute,⁷⁷ or simply by continuation of the practices that had applied before the break with England.⁷⁸

E. *The Seventh Amendment Guarantee*

In light of popular sentiment favoring the civil jury, it seems surprising that the original Constitution did not contain a provision for guaranteeing trial by jury in civil disputes. The exclusion of such a guarantee was sufficiently of concern to anti-federalists that they argued that an amendment was absolutely necessary for their support of the document.⁷⁹ For them, protection against class bias was a principal reason for insisting upon a jury trial guarantee in the Constitution, in part because of bitter experiences with jury-less courts used by the British to circumvent colonists' claims.⁸⁰

Drawing on popular distrust of government, anti-federalists were able to garner opposition to the Federal Constitution by emphasizing the absence of a bill of rights, and in particular, the lack of a guarantee of a civil jury trial.⁸¹ From anti-federalist literature, it appears that for many citizens the jury institution engendered feelings of empowerment.⁸²

⁷⁷ *Id.*

⁷⁸ Wolfram, *supra* note 8, at 655 n.49. There are few published materials concerning the question of the trial practices of the states under their guarantees of civil jury trial in the revolutionary constitutions adopted by the states beginning in 1776. *See id.* at 652 and accompanying notes.

⁷⁹ *See id.* at 670-71.

⁸⁰ *Id.* (discussing juryless courts used by the English).

⁸¹ Wolfram, *supra* note 8, at 669. Public reaction was intense. "[T]he ratification process brought to light strongly felt popular beliefs about government and its relationship to the person in the street and the importance of the civil jury in preserving that relationship." *Id.* at 657, 658-59, 660-62. Hamilton did admit that "it is, in most cases, under proper regulation, an excellent method of determining questions of property; and . . . entitled to a constitutional provision in its favour, if it were possible to fix the limits within which it ought to be comprehended." THE FEDERALIST NO. 83, *supra* note 8, at 564.

The original Constitution has been described as a "triumph of liberalism," reflecting the Lockean individualism philosophy often associated with Madison rather than the communitarian focus embraced by anti-federalists like Thomas Jefferson. Sherry, *supra* note 14, at 591.

⁸² Wolfram, *supra* note 8, at 671; *see* Hyman & Tarrant, *supra* note 12, at 29. There are other plausible explanations for the strong support of the jury, viewed from this historical posture. James Wilson argued, for example, that juries were a better agency for fact-finding because jurors heard testimony in the presence of persons testifying and thus could judge the truth by observing the countenance of the witness. Wolfram, *supra* note 8, at 671 n.86. Jurors are often acquainted with the characters of the parties and the witnesses, and thus the whole cause can be brought within their knowledge and view. *Id.*

Colonists often viewed the jury as a means of controlling judicial discretion and restraining judges' arbitrary tendencies.⁸³ Some colonists, for example, distrusted separate equity courts because they represented unbridled power of the King and caused needless delay and expense in the resolution of claims.⁸⁴ The jury was thought necessary to check class-based instincts of the judges.⁸⁵ Colonists assumed that judges would identify with the rich, and neglect the interests of the poor unless the poor were given a voice through the jury verdict.⁸⁶ Thus a theme of the jury guarantee debate was to provide a forum for the citizen to protect himself against unfriendly government, including the judge.⁸⁷ The anti-federalist movement to secure a jury trial right by constitutional amendment was built on the belief that jury deliberation would effectuate a result different from that likely to be obtained even by an honest judge sitting without a jury.⁸⁸

A full appreciation of the effort to realize a constitutional jury trial guarantee, however, should take account of opposition to it. The Federalists argued that jury trials did not provide sufficient flexibility in handling disputes and that they overlooked commercial interest in certainty.⁸⁹ Moreover, although the jury system was revered as an institution at the time of the Revolution, some of the unique features of jury decision-making had already fallen away by the time of the Constitutional Convention.⁹⁰ Judicial discretion available at equity and in admiralty

Five reasons were offered by the anti-federalists in favor of a jury trial: the protection of debtor defendants; the frustration of unwise legislation; the overturning of the practice of courts or vice-admiralty; the vindication of the interests of private citizens in litigation with the government; and the protection of litigants against overbearing and oppressive judges. *Id.* at 670-71. A premise that underlies every one of these reasons was to achieve results from jury-tried cases that would not be forthcoming from trials conducted by judges alone, either because the judge would not or could not reach the result. *Id.*

⁸³ Subrin, *supra* note 20, at 928 & n.105.

⁸⁴ *Id.* at 909, 926 & n.90. Colonists considered the admiralty court, which did not require juries, one of the most abrasive aspects of imperial rule. See Hyman & Tarrant, *supra* note 12, at 29.

⁸⁵ Subrin, *supra* note 20, at 928 (citing WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 20-21 (1975)).

⁸⁶ Wolfram, *supra* note 8, at 696.

⁸⁷ The interest in requiring juries to sit in civil cases was a check on legislative as well as judicial excesses. *Id.* at 653.

⁸⁸ See *supra* note 82.

⁸⁹ See *supra* note 8.

⁹⁰ See Hyman & Tarrant, *supra* note 12, at 26-27, 31-33, 37.

jurisdiction offered litigants opportunities which were of value to the Federalists and to other colonists concerned with commercial growth.⁹¹

Particularly in light of recent rekindled interest in eighteenth century civic republicanism⁹² by legal and political scholars,⁹³ it is also important to consider competing conceptions about citizen participation in the pre-constitutional debate concerning the structure of government and decision-making authority. While James Madison, drawing upon English liberal theory, often emphasized in his writings the private interests and self-promoting motivations of individuals,⁹⁴ an alternative view of citizen participation in government, often attributed by modern liberal republicans to Thomas Jefferson, was of a citizenry capable of deliberating in order to reach consensus about the common good.⁹⁵ It can be argued that jury participation in decision-making theoretically exemplifies the republican ideal of citizen access and control of government. It appears, however, that by the time of the Constitution's framing, there was some disillusionment even among republicans like Jefferson about the capacity for ordinary citizens to sustain a public-spirited, virtuous posture.⁹⁶ Thus the inclusion of a criminal but not a civil jury trial guarantee in the original Constitution can be seen as Madison's triumph and a turn away from identifying juries as a source of defining the common good.⁹⁷ The lack of a guarantee in the original document, and the subsequent ambiguity in the amendment that was offered, confirm that an instrumental conception of law⁹⁸ had begun to emerge between the Revolutionary period and the Constitutional

⁹¹ See *id.* at 33; see also HORWITZ, *supra* note 21, at 26-28 (shift in nineteenth century courts to instrumental conception of law in support of commercial interests). The principal argument offered by Federalists for not having a constitutional guarantee was the great diversity among the colonies of methods, procedures, and standards in jury selection and use of the jury trial. Hyman & Tarrant, *supra* note 12, at 30. Pre-Revolutionary colonists, however, had remarkable unity in their view that the jury was an important common law right. *Id.*

⁹² See *infra* notes 333-58 and accompanying text.

⁹³ See Kahn, *supra* note 17, at 7-43.

⁹⁴ See Wolfram, *supra* note 8, at 685-87; Sherry, *supra* note 14, at 558-62.

⁹⁵ See Sherry, *supra* note 14, at 558-62.

⁹⁶ Wolfram, *supra* note 8, at 703; Sherry, *supra* note 14, at 557-58.

⁹⁷ A well ordered constitution required a balance of powers to check the tendency toward tyranny and corruption; an unvirtuous citizenry could not be relied upon to do so. [A]bandoning virtue as the basis of good government, the framers also shifted the purpose of government from perfecting human virtue to promoting individual desires.

Sherry, *supra* note 14, at 559.

⁹⁸ See HORWITZ, *supra* note 21, at 27-29 (discussing developing instrumental conception of the law in nineteenth century).

framing, affecting the view of ratifying legislatures about the issue of jury control.⁹⁹

F. *The Limits of Constitutional Support for Jury Participation*

Without much debate, Congress and the state ratification conventions¹⁰⁰ approved the Seventh Amendment. The approved language states:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise examined in any Court of the United States, than according to the rules of the common law.¹⁰¹

The amendment addresses some of the colonial fear that a civil jury trial right could be easily undermined without some acknowledgement of it in the Constitution. But the language of the amendment leaves unclear the extent of commitment to community participation. It recognizes the “right of trial by jury” in “suits at common law” but leaves unanswered how to determine which suits are “at common law.” Particularly in question is whether the amendment’s language should be read to extend the guarantee to new actions not established at the time of the framing.¹⁰² This

⁹⁹ See *id.*

¹⁰⁰ Wolfram, *supra* note 8, at 660 n.60, 730.

¹⁰¹ U.S. CONST. amend. VII.

¹⁰² Wolfram, *supra* note 8, at 640-42, 660-61. In *United States v. Wonson*, 28 F. 745 (D. Mass. 1812) Justice Story stated:

Beyond all question, the common law [referred to in the Seventh Amendment] is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.

Wolfram, *supra* note 8, at 641. *Wonson*, however, has been criticized for artificially defining doctrinal categories—common law or equity—on which judges rely in interpreting what are jury trial rights. See *id.*

In *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830), Justice Story defined the clause, “suits at common law” as “not merely suits which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . .” *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (citing *Parsons*, 28 U.S. at 446). That characterization has remained the bedrock of interpretation of the Seventh Amendment, settling that the right extends beyond the common-law forms of action recognized at the time of the amendment’s enactment in 1791. See, e.g., *Curtis*, 415 U.S. at 193. As a consequence of Story’s construction, the meaning of the seventh amendment right has often turned on arbitrary considerations of whether the question has historically been for the judge or the jury to

ambiguity casts doubt on the issue of the Constitution's affirmative support for a continuing role for the civil jury. To be sure, the Supreme Court has voiced a federal policy favoring civil jury decision-making,¹⁰³ but it also continues to read the amendment as referring to English common law in 1791 as the point of demarcation for preserving the right.¹⁰⁴ It can be argued that the Supreme Court has taken an interpretive stance that does not connote ambivalence: it has not read the Seventh Amendment in a completely wooden fashion, defining suits where the civil jury trial is guaranteed by rigid reference to the practice of English courts in 1791,¹⁰⁵ when the amendment was adopted. Nor has it used a functional approach in response to the question whether the Seventh Amendment requires jury participation for the resolution of a particular kind of issue.¹⁰⁶

decide—the “law” or “fact” distinction—or whether the rights asserted or relief sought were “legal” or “equitable” at the time of the constitutional framing. *See, e.g.,* Weiner, *supra* note 64, at 1918-27 (criticizing the categories of law and fact as inadequate today and arguing for a policy consideration of the competency of juries, need for predictability, and uniformity to drive the issue whether a judge or jury should decide an issue).

¹⁰³ *See, e.g.,* Simler v. Conner, 372 U.S. 221, 222 (1963) (finding an historic federal policy with continuing strength); *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.* 369 U.S. 355, 360 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942) (calling jury a basic and fundamental feature of our system of jurisprudence).

¹⁰⁴ *See supra* notes 56-78 and accompanying text (concerning diminishing role of juries); Weiner, *supra* note 64, at 1892-93. Discussing the determination of whether judge or jury should decide an issue, Weiner notes that the English courts did not begin recognizing the concept of negligence as an independent basis of tort liability until the nineteenth century; thus the historical approach should result in no jury participation in the determination whether a party's conduct complied with that of the reasonably prudent man. *Id.*

¹⁰⁵ *See, e.g.,* Martin Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision-making*, 70 NW. U. L. REV. 486 (1975) (preferring pure and strict historical approach). Cases exist, however, that provide authority for denying a jury trial right because the proceeding was not known to the common law. *See, e.g.,* *NLRB v. Jones & McLaughlin Corp.*, 301 U.S. 1, 48-49 (1937); *cf. Dimick v. Schiedt*, 293 U.S. 474, 487 (1935) (affirming common law right of trial judge to vary jury damage awards). It has sometimes been argued that the Court's more expansive reading of the clause clashes with expressions of Congress that seek to limit the scope of jury trial by statute. *See Note, Congressional Provision for Nonjury Trial under the Seventh Amendment*, 83 YALE L.J. 401 (1973); *Loether*, 415 U.S. at 189. *But see supra* note 91.

¹⁰⁶ In a footnote in *Ross v. Bernard*, 396 U.S. 531 (1970), the Court proposed a three-part inquiry to determine the “legal” nature of a claim: (1) the pre-merger custom with reference to such questions; (2) the remedy sought; and (3) the practical abilities and limitations of juries. *Id.* at 538 n.10. Whereas the language in this characterization suggests that the Court is willing to balance concerns, including its assessment of the shortcomings of lay participation in particular cases, that reading has yet proven acceptable. *See, e.g.,* *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (Stewart, J., dissenting

Its approach seems to reflect acceptance of an historical "remedial hierarchy"¹⁰⁷ or preference for legal remedies over equitable relief.¹⁰⁸ But even that preference does not necessarily connote sympathy for all the underlying values of a jury trial guarantee¹⁰⁹ or support for a prominent jury role in decision-making.¹¹⁰

There are alternative readings of the constitutional guarantee available which would more forcefully favor community participation. For example, a reading of the reference to "common law" in the amendment to mean the process of legal development of actions, rather than as a reference to the particular state of the common law at the time of the framing, would extend the jury right farther—even to cases which would not be considered

from view that jury right should arise in this essentially equity suit); Redish, *supra* note 105, at 517-26; *see also In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069, 1079-80 (3d Cir. 1980) (complexity of case is a concern expressed in Ross' three-pronged consideration, including recognition of practical ability and limitations of jury). This proposed functional approach to the question whether the Seventh Amendment requires a jury trial in a particular kind of case may suggest a preference for contracting the jury's role based on the federal judge's view as to whether the jury ought to be involved in particular cases.

¹⁰⁷ *See, e.g.,* Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 749-50 (1982) [hereinafter Fiss, *Objectivity*].

¹⁰⁸ *See* Douglas Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 358 (1981).

¹⁰⁹ Wolfram, *supra* note 8, at 648 n.33 (noting David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachel v. Hill*, 85 HARV. L. REV. 442, 457-58 (1971), and its view that the jury trial is a drag on judicial administration, results in inflated damage awards, and should be avoided except where compelled); *see also Ross*, 396 U.S. at 544-45 (Stewart, J., dissenting).

¹¹⁰ The Court has, of course, expressed a policy in favor of trial by jury. *See Simler v. Conner*, 372 U.S. 221, 222 (1963) (finding a "federal policy favoring jury trials is of historic and continuing strength"); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942) (stating the "right of jury trial in civil cases at common law is a basic and fundamental feature of our system").

In contrast, however, the Court has read the Sixth Amendment, which buttresses the criminal trial venue provision of Article III, § 2, cl. 3, and requires trial by jury of the state and district wherein a crime shall have been committed, as not tied to some historical meaning. *See Marjorie Schultz, The Jury Redefined: A Review of Burger Court Decisions*, 43 LAW. & CONTEMP. PROBS. 8 (1980).

An explanation for the different treatment of the civil jury and criminal jury trial guarantees may be historical, traced back to the struggle for power between judge and jury at issue in *Bushell's Case*. *See supra* notes 51-55 and accompanying text; Torres & Brewster, *supra* note 4, at 180 (criminal and civil jury are political cousins); *see also* Nicholas Blake, *The Case for the Jury*, in *THE JURY UNDER ATTACK* 140 (Mark Findlay & Peter Duff eds., 1988) (origins of criminal jury trial lie deep in political crisis and at every moment of political crisis in English history its importance has been emphasized).

functionally similar to those actions recognized at the constitutional drafting.¹¹¹ More importantly, however, despite the fact that the Court has been willing to recognize a policy of promoting the jury trial right in cases, particularly where legal and equitable relief has been sought,¹¹² the Court's reasoning sometimes reveals a lack of confidence or at least some hesitancy in promoting lay participation.¹¹³ This resistance concerning the role of lay participants, however, is not clearly discernible from Supreme Court cases interpreting the Seventh Amendment and affirming the federal policy favoring juries. Verbal support for the jury right expressed in Supreme Court opinions interpreting the Seventh Amendment¹¹⁴ conflicts with the allocation of power between judge and jury reflected in Supreme Court-adopted rules concerning the removal of cases from the jury's disposition and the exercise of discretion in judges.¹¹⁵ Similar to the earlier historical displacement of distinctive jury decision-making features and the diminution of its independence,¹¹⁶ the American jury role has become

¹¹¹ Subrin, *supra* note 20, at 937, 939.

¹¹² See, e.g., *Beacon Theatres*, 359 U.S. at 500. The Court preserved the right to a jury trial despite the fact that an injunction had been filed first. See John C. McCoid, II, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1, 24 (1967) (suggesting that there is pro-jury bias in the Constitution); *supra* notes 103-05.

¹¹³ For example, in *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958), the Court concluded that a question must go to the jury *unless* the state practice of assigning factual issues to the judge has been authorized as an integral part of a "special relationship" created by the statute. *Id.* at 536. In *Walker v. New Mexico & S. Pac. R.R.*, 165 U.S. 593 (1897), judgment was entered for defendant on special findings of the jury, inconsistent with the general verdict. The Supreme Court affirmed, stating that a legislated change of the form in which a verdict may be rendered, giving primary force to special answers, was consistent with the right of trial by jury. *Id.* at 596. ("The Seventh Amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed or which question of fact are to be submitted to a jury.").

Justice Brandeis, in *Ex Parte Peterson*, 253 U.S. 300 (1920), reasoned that "the Seventh Amendment . . . does not require that old forms of practice and procedures be retained New devices may be used to adapt the ancient institution to present needs and to make it an efficient instrument in the administration of justice." *Id.* at 309-10; see *supra* notes 103-05.

¹¹⁴ See *supra* note 103 and accompanying text.

¹¹⁵ See *infra* notes 230-36 and accompanying text; Subrin, *supra* note 20, at 944-50, 998-1000.

¹¹⁶ See *supra* notes 56-66 and accompanying text. I have emphasized that the distinctive feature of the jury was local knowledge and that a struggle for greater control and concern about accountability led judges to assert power over the jurors, resulting in an unequal partnership, diminished independence, and ultimately, marginalized significance of juror participation.

marginalized, its presence a symbol of popular assent to the law.¹¹⁷ Its continued existence represents a fundamental conflict between reason and will that is present in American law.¹¹⁸ Moreover, preoccupation with impartiality, certainty, and efficiency, rather than representation, limits the potential for community participation in the systematic development of legal norms.

Founding liberal democratic premises disparage the potential for private individuals collectively to do more than pursue purely personal ends,¹¹⁹ and concerns about impartiality, certainty, and efficiency support decision-making by experts. Feminist and critical theories, however, offer insights which provide a means to critique the marginalization of juries and can support a counter vision of a meaningful lay decision-making role in adjudicating disputes. These theories emphasize the value of decision-making which is the product of diverse, deliberating bodies.¹²⁰ In Section III of this Article, I will attempt to identify the distinctive decision-making benefits of the jury which I believe should be considered in an assessment of the present adjudicatory framework. I then will challenge the present preference for the expert and impartial decision-maker, utilizing feminist and critical theory arguments to support my view that in a diverse society, a representative jury can play a useful role in the social construction of truth and can effectuate justice in the resolution of disputes. I will offer evidence that the Supreme Court has been more concerned with impartiality than representation, blunting the decision-making potential of juries. Finally, I present ideas for promoting community participation through the jury.

Notably, in England and other countries in the twentieth century United Kingdom, the civil jury has not flourished. See Patrick Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Power*, 56 TEX. L. REV. 47, 47 n.1 (1977) (offering British commentary on loss of civil jury). Some commentators in the United States support reading the civil jury trial guarantee narrowly, emphasizing the drag on judicial administration. See, e.g., Shapiro & Coquillette, *supra* note 109.

¹¹⁷ See Torres & Brewster, *supra* note 4, at 184-86 (stating that the system needs the assent of the community to function and needs it for legitimacy, and yet, it fears the real power of the community; jury is the symbol of democratic legitimacy).

¹¹⁸ See Kahn, *supra* note 17, at 1 (arguing that there exists a cycle of constitutional theory responding to the competing preferences for reason and will found in the Constitution).

¹¹⁹ *Id.* at 18-19; cf. Sherry, *supra* note 14, at 592 (suggesting that the "Constitution, especially in light of subsequent interpretations in the liberal tradition, is a quintessentially masculine document."); Frank Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 57 (1986) ("[The Constitution] so obviously charts not a participatory democracy but a sovereign authority of governors—representatives—distinct from the governed.").

¹²⁰ See *infra* notes 295-332 and accompanying text.

III. THE CASE FOR JURY DECISION-MAKING

What are the distinctive values of civil jury decision-making? Often "[e]nthusiasts of the jury have tended to lapse into sentimentality and to equate literally the jury with democracy,"¹²¹ without more clearly delineating what are decision-making qualities and distinguishing truth-determining features which justify its use.¹²² Litigators, even when supportive of the jury guarantee, often cast jurors as pawns in a litigation game.¹²³ Conscious that prejudice in their communities runs high, citizens, when asked, express serious doubt about whether the jury promotes socially just results in civil trials; yet they also respond that they want juries to decide their cases.¹²⁴

There is much disagreement about whether and how the jury serves the interests of social justice in civil litigation. Legal commentators who favor its use emphasize the importance of the community's *presence* in legal decision-making¹²⁵ and the significance of the collective's expression of popular will. Critics who are more skeptical of the community's decision-

¹²¹ See KALVEN & ZEISEL, *supra* note 3, at 5.

¹²² *Id.* Kalven and Zeisel provide little explanation for their conclusions about the distinctive quality of jury decision-making, though they do point to the fact that juries and judges reach similar results, utilizing different reasoning. *Id.*

¹²³ See C. Garrison Lepow, *Deconstructing Los Angeles or a Secret Fax from Magritte Regarding Postliterate Legal Reasoning: A Critique of Legal Education*, 26 U. MICH. J.L. REF. 69, 75-77 (1992) (post modern critique of the Rodney King verdict placing responsibility on legal education for lawyers presenting video tape of blows to Rodney King as insufficient evidence to convict officers for assault). Cynical perspectives of litigators on the value of juries include recognizing the jury's potential for manipulation and proposing strategies aimed at avoiding or taking advantage of jury confusion or prejudice about a case. See, e.g., Donald E. Vinson, *What Makes Jurors Tick?: The Basis for Winning Your Case*, TRIAL, June 1988, at 58 (arguing that jurors make decisions early in case, immediately fixing on a few premises); Thomas A. Demetrio, *Should Juries Decide Complex Cases?*, TRIAL, Aug. 1985, at 44 (postulating that jury is as well suited for complex matters as individual judges); John D. Mooy, *Tell the Jury*, THE DOCKET, Summer 1990 (offering story-telling pointers, including how to establish eye contact to win over the jury); cf. Michael Saks, *Blaming the Jury*, 75 GEO. L.J. 693 (1986) (observing that little is known empirically about how juries reach their decisions and arguing that, based on what we do know, we inappropriately blame them for certain litigation consequences). Jerome Frank provided perhaps the most scathing account of jury manipulation in his book *Courts on Trial*, *supra* note 3, at 108-25. According to Frank, the jury tries the lawyers. *Id.* at 121. But see *infra* note 127.

¹²⁴ See *Most Jurors Would Want Their Own Case Heard by a Jury, Not a Judge*, NAT'L L.J., Feb. 22, 1993, at S15; see also *Georgia v. McCollum*, 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring in the judgment) (noting a public perception of racism in jury decision-making).

¹²⁵ See, e.g., *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991).

making role¹²⁶ disparage the capacity of the jury to grasp the legal issues or move beyond individual self-interest,¹²⁷ often questioning whether there should be any policy-making or law-making function for the jury.¹²⁸ Many critics argue that the jury is expensive,¹²⁹ unpredictable, and inefficient as well as incompetent.¹³⁰

Essentially the competing arguments concerning the civil jury trial guarantee suggest that there are differing conceptions of social organization and its impact on law. One view stresses the importance of community and shared values and beliefs, conceiving the community as potentially greater than the number of its constituents and treating positive law as but one of the ways to find expression of community values.¹³¹ An alternative view emphasizes the more formal process of law making; law becomes not so much a reflection of shared social values as the product of procedures adopted by the individual or group in control of law-making.¹³²

Preferring the first conception, I seek to identify what is significant about jury decision-making as distinguished from decision-making by judges and legislators. This significance historically was located in the

¹²⁶ See FRANK, *supra* note 3, at 116.

¹²⁷ See, e.g., *id.* at 123-24; Broeder, *supra* note 3, at 395, 415, 424; Fleming James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949). Frank's critique is more pertinently concerned with the perversion of the truth-finding mission by the adversary system than with identifying the jury as the culprit.

¹²⁸ See FRANK, *supra* note 3, at 113-14; Kotler, *supra* note 24, at 127, 161-69; Broeder, *supra* note 3, at 389.

¹²⁹ Actual numbers challenge this proposition: it costs \$200 million to run the entire federal court system; of this, 9% is allocated for jury costs. Philip H. Corboy, *From the Bar, in JURY SYSTEM*, *supra* note 3, at 193 n.22; see also Higginbotham, *supra* note 116, at 47 n.1 (acknowledging criticisms of jury leveled by Justice Burger and referencing British experience).

¹³⁰ See, e.g., GREEN, *supra* note 9.

¹³¹ Gerry Maher, *The Verdict of the Jury*, in *THE JURY UNDER ATTACK*, *supra* note 110, at 40, 52-53:

The first, community, type of group treats law not as the outcome of a formal process but as the reflection of community values [L]aw is not sharply differentiated from other spheres of social values, such as morality. Law is but one expression of community values. The typical mode of law on this model is custom or common law in the sense of community law articulated but not created by judges.

Id. at 53.

¹³² By contrast, law in the second form of social organization is the product of some formal process of law making, which reflects not so much social values as the procedures adopted by the individual or group in control of law making. In this model, the paradigm type of law is legislation; legislation is law not because of its substantive content or its coherence with social values but because of validity in terms of mode of origin.

Id.

capacity of members of the jury to provide local knowledge from experience and community connection, knowledge unavailable to the judge or other expert. It can be argued that the significance of jury decision-making today can be drawn from an understanding that truth is socially constructed and that the interchange of views of members of diverse communities not only meaningfully contributes to the derivation of truth, but that the interchange can be important for the many communities to feel a part of the larger lawful enterprise.

In our multicultural society of often estranged individuals and communities, jury duty can be a useful opportunity for citizens to come together in a public setting which promotes exchange. Jury deliberation can be a time for the exercise of authentic self-government by ordinary citizens who, through conversations, expose their differences and provide opportunities for others to understand them.¹³³ Jury decision-making need not pale against either a model of political majority rule or expert decision-making by judges. Rather, the jury can be distinguished by its small-group, collective capacity to explore competing or emerging normative understandings and to achieve consensus through deliberation. Consensus reached by the group of individual jurors representing diverse communities who have engaged in dialogue is important since through their deliberation these participants can learn from and about each other.¹³⁴ In short, jury deliberation can help individuals through their resolution of public controversies to realize the meaning of citizenship, thereby claiming a role in government.¹³⁵

¹³³ The jury can be thus understood as providing nourishment for the citizen in the give and take of deliberation concerning a public controversy. Cf. Michelman, *supra* note 119, at 71-72 ("judge represents . . . self-government to the community and the self-government of the judge is constituted by the . . . judicial act"). By participating in a civil jury trial, citizens have a chance to enter the public realm, bringing "'one of the ordinary men standing around' into a more intimate relation with government." G.K. Chesterton, *Twelve Men*, in *Tremendous Trifles*, quoted in Edwin Kennebeck, *From the Jury Box*, in JURY SYSTEM, *supra* note 3, at 239.

¹³⁴ See, e.g., Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1862 (1987) [hereinafter Minow, *Interpreting Rights*].

¹³⁵ In *Traces of Self-Government*, Frank Michelman reasons that participation in government is a positive good, a kind of happiness that can be found nowhere else. See Michelman, *supra* note 119, at 57. Michelman is skeptical about public happiness but says that practical reason—civic virtue's epistemological premise—understood as discussion which when all engage "reveals" superior values, appears totalist to modern sensibility, but that practical reason is a role we can attribute to the Supreme Court, which represents to us the possibility of practical reason through "practical knowledge, situated judgment, dialogue and civic friendship." *Id.* at 25.

A. *The Value of Juries*

Debate about the jury has centered on five principal areas of disagreement about its strengths: (1) its law-legitimizing features; (2) its role as "little parliament"; (3) its truth-determining and decision-making competency; (4) its ability to foster good citizenship; and (5) its educational value. In the following sections, I will present competing arguments concerning the benefits of jury decision-making related to these areas and suggest how a model which emphasizes the representative and deliberative, participatory potential for juries strengthens the case for the jury.

1. *Legitimacy*

The jury has been said to forge public acceptance of court decisions by legitimizing them.¹³⁶ This legitimacy feature holds great promise, particularly if the jury can reflect the social makeup of society, in light of the explosion of common law and statutory rights in the late twentieth century.¹³⁷ Traditionally, the legitimizing function has had two aspects. First, the fact of popular participation through the jury makes tolerable certain decisions which the litigants or the public would otherwise find unacceptable, because the jury verdict is seen as the product of the group, and thus the legitimacy of the result is supported in a manner that might not be attainable if one person, the judge, decides.¹³⁸ Second, the transitory nature of the jury,¹³⁹ though often characterized as a weakness of the jury system, can also protect the court: the jury can serve "as a sort of lightning rod for animosity and suspicion which might otherwise be directed on the judge."¹⁴⁰

This account, emphasizing two legitimizing features of the jury, however, minimizes the creative, deliberative possibilities of decision-making by the collective. Historically, proponents of this account have made use of the no-name, "black-box"¹⁴¹ quality of jury decision-making

¹³⁶ See *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991).

¹³⁷ See JOINER, JUSTICE AND THE JURY, *supra* note 2, at 9-13, 25-35; see also West, *supra* note 14, at 91 (juror's capacity and responsibility for the outcome of the case are all necessary contributions, rather than impediments, to the vitality of a liberal, participatory society).

¹³⁸ KALVEN & ZEISEL, *supra* note 3, at 7.

¹³⁹ See *infra* note 212 (recapturing the view of Dean Griswold of Harvard Law School in the 1962-63 annual report, as reported in KALVEN & ZEISEL, *supra* note 3, at 5).

¹⁴⁰ KALVEN & ZEISEL, *supra* note 3, at 7.

¹⁴¹ See e.g., Charles P. Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 151 (1952); James, *supra* note 127.

which implies that no one need assume responsibility for decisions.¹⁴² Perhaps as a consequence of this irresponsibility, to protect the independence of the jury but limit its abuse, we developed procedures to circumscribe the areas where the jury's impact could be felt.¹⁴³

The transient, informal nature of the jury could be looked upon as an extraordinary opportunity for individuals who are normally preoccupied with the mundane, private affairs to "redefine as private *citizens*, our collective identity,"¹⁴⁴ while recognizing that no citizen can live a wholly public political life.

In support of that conception of the community's role, we could, in fact, explore ways of making the jury more accountable for its decisions.¹⁴⁵ One means, one which is connected with the desirable objective of having the decision-making be a product of the diverse views of the citizenry, is to permit those with minority views to feel confident to challenge the assumptions and perspectives of the majority.¹⁴⁶

2. *Little Parliament*

The jury is often characterized as "a little parliament,"¹⁴⁷ protecting the public against tyranny, or, in modern times, abuse of government. That characterization suggests that the jury device is useful to ensure that we are governed by the spirit of the law and not merely its letter;¹⁴⁸ but it also implies that, like the legislature or other politically motivated institution, in the jury lies the propensity for self-interested decision-making.¹⁴⁹ This view minimizes the fact that the jury's peculiar value lies in its capacity for dialogue and deliberation. The capacity to arrive at socially acceptable

¹⁴² See Curtis, *supra* note 141, at 159; cf. West, *supra* note 14; see *infra* notes 333-58 and accompanying text.

¹⁴³ See *supra* notes 55, 60-65, 113 and accompanying text; *infra* note 230 and accompanying text.

¹⁴⁴ Kahn, *supra* note 17, at 21 (citing Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984)).

¹⁴⁵ See *infra* notes 360-440 and accompanying text.

¹⁴⁶ See *infra* notes 361, 369. Studies show that minority participants feel more comfortable offering their views and challenging others where they are not lone representatives. E.g., Joan B. Kessler, *The Social Psychology of Jury Deliberations*, in JURY SYSTEM, *supra* note 3, at 83-85 (citing research on juries).

¹⁴⁷ The label was coined by Patrick Devlin, who commented: "The jury's sense is the parliamentary sense. No tyrant could afford to leave a subject's freedom in the hand of twelve of his countrymen. The jury is more than an instrument of justice, more than one wheel of the constitution, it is the lamp that shows that freedom lives." PATRICK DEVLIN, TRIAL AND JURY 164 (1956).

¹⁴⁸ See, e.g., Curtis, *supra* note 141, at 157, 159.

¹⁴⁹ ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

resolution of disputes is enhanced by the presence of multiple perspectives. But I also stress the importance of fostering accountability through exchange between jurors and other participants in the litigation process. Thus, rather than limit the jury function, we should seek ways to expand its contribution, by giving it more of an interactive, participatory role in legal decision-making.¹⁵⁰ The fact that the jury is not electorally accountable should not be a reason for marginal treatment,¹⁵¹ or for its decision-making to be viewed as effectuating "justice beyond law."¹⁵² The resolution of factual controversy and application of law supported by knowledge communicated by jurors in the exchange of life experiences and reflections of jurors is law making.¹⁵³

3. *Truth-Determining and Decision-Making Competency*

Much of the criticism about jury participation concerns issues of competency. Critics focus on the superior intelligence of the judge, her training, discipline, and social experience in handling other cases,¹⁵⁴ and conclude that the jury is superfluous or, by comparison with other expert decision-makers, incompetent.¹⁵⁵ Earlier this century, some legal realists depicted jury decision-making as irrational and manipulable, sometimes reflecting shifts in norms while often not consciously appreciating such normative turns.¹⁵⁶ A reconceived jury model not only must more fully underscore the peculiar deliberative function of the jury, it must also respond to charges of unpredictability.

In addition to disagreeing with the view held by legal realists, that the jury is an irrational group with limited potential for contribution, I question the importance placed on predictability which generated the critique of juries and which led to a preference for other expert decision-

¹⁵⁰ See *infra* notes 179-82, 425-40 and accompanying text.

¹⁵¹ See Kotler, *supra* note 24, at 134.

¹⁵² *Id.*

¹⁵³ See *United States v. Levine*, 83 F.2d 156, 157 (2d Cir. 1936) ("[T]he verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premiss, but really a small bit of legislation ad hoc, like the standard of care.").

¹⁵⁴ KALVEN & ZEISEL, *supra* note 3, at 8. Compare Fiss, *Objectivity*, *supra* note 107 (describing judge as disciplined and neutral) with Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1929 (1988) (discussing exposure of judge to human experiences of others) and T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1061 (1991) (discussing Court's handling of *Richmond v. Croson*, 488 U.S. 469 (1989)).

¹⁵⁵ Even Kalven and Zeisel justify the jury's function by equating its decision-making with the judges they polled. See KALVEN & ZEISEL, *supra* note 3, at 8, 116.

¹⁵⁶ See, e.g., GREEN, *supra* note 9; James, *supra* note 127.

makers. Lay persons are able to view the context of the controversy with freshness lost to the experts and with insight built on cultural and social knowledge. There is a significant role for the community both in the interpretation of law¹⁵⁷ and in delineating the application to a controversy of generally recognized legal standards. A focus on scientific—professional—expertise ignores the reality that bias arises out of any human's personal experience and can accumulate over the course of time.¹⁵⁸ Through dialogue among diverse community members, bias can be exposed and checked.¹⁵⁹ A focus on lay decision-making potential reaffirms the value of the personal perspective which, when offered through dialogue with other community representatives, can blunt bias. Deliberation by a representative jury drawn from a cross-section of the community,¹⁶⁰ provides special meaning and insight. Of course, this conclusion contests the legal realists' premise of scientifically derivable and objective truth, instead viewing the resolution of disputes as social and the claim of neutrality in law as contestable.

4. Citizenship

Among the recognized advantages of jury participation is that it provides an important civic experience for citizens.¹⁶¹ For many citizens, jury duty may be their only experience with the law and government

¹⁵⁷ Kalven found "two legal cultures" but found a high degree of agreement on civil verdicts, as well as criminal ones, although the jury and judge did not necessarily agree on the premises leading to the verdicts. KALVEN & ZEISEL, *supra* note 3, at 152-53. Kalven used the agreement on verdicts as evidence of the strength of jury decision-making. *Id.* at 498. My emphasis on the distinctive role of juries and the value of exchange about difference would lead to a closer examination of the premises for the verdict than the actual verdicts. One might consider, for example, whether there are opportunities for exchange among the judge and jury to elucidate the premises of their decision-making. See Zenon Bankowski, *The Jury and Reality*, in THE JURY UNDER ATTACK, *supra* note 110, at 10.

¹⁵⁸ Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945 (1988); see also Resnik, *supra* note 154 (describing gender and class hierarchy of trial court environment which affects decision-making); Arlene Sheskin, *Trial Courts on Trial: Examining Dominant Assumptions*, in COURTS AND JUDGES 77 (James A. Cramer ed., 1981) (describing courtroom hierarchy, affecting decision-making).

¹⁵⁹ See YOUNG, *supra* note 15, at 184-87.

¹⁶⁰ JOINER, JUSTICE AND THE JURY, *supra* note 2; see *infra* notes 370-424 and accompanying text.

¹⁶¹ KALVEN & ZEISEL, *supra* note 3, at 7; Higginbotham, *supra* note 116, at 59.

beyond the exercise of a local or federal vote.¹⁶² Thus the opportunity for citizens through jury participation to come together and “enter into the heart of a public matter”¹⁶³ should not be lost. Ideally the jury institution can afford diverse citizens the chance to join other citizens in a common enterprise that can be transformative.¹⁶⁴ In my view, that enterprise is concerned with achieving an approximation of truth through the exchange of ideas by diverse people, thereby meting social justice.¹⁶⁵

The reality is, however, that exposure to jury duty at present is often disenchanting and causes citizens to lose confidence in the administration of justice and to be cynical about their role.¹⁶⁶ The disenchantment experienced by citizens may in part be the result of the failure of the other principal participants to communicate with the community’s representatives with civility¹⁶⁷ and in an engaging way.¹⁶⁸ It can stem from a sense of alienation—of not meaningfully being a part of the system of administering justice.¹⁶⁹ Through orienting instructions given by the judge, and other information made available by the judge at the outset of trial, including efforts to educate jurors about the function of all the actors and

¹⁶² See, e.g., KALVEN & ZEISEL, *supra* note 3, at 7; JOINER, JUSTICE AND THE JURY, *supra* note 2, at 24-25; *Charting a Future*, *supra* note 4, at 29; see *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2077 (1991).

¹⁶³ Kennebeck, *supra* note 133, at 239.

¹⁶⁴ *Id.* at 240. Kennebeck suggests that authorities ought to give greater emphasis and publicity to the sense of participation that even non-eventful trials can give to citizens. *Id.* at 249. He characterizes voir dire as a competition the potential juror would not like to “lose”—i.e., to be turned down. *Id.* at 238. Alexis de Tocqueville viewed the jury as a kind of school for citizens. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 285-87 (Francis Bowen & Phillips Bradley eds., & Henry Reeve trans., Alfred A. Knopf 1956) (1st ed. 1835). I have in mind not an assimilating model, but one respecting the strengths of difference in the give and take of exchange. See also Michelman, *supra* note 119, at 22 (discussing Sunstein and the notion reflected in classical republican theory of public happiness and the view that “[p]articipation in government [is] a positive good, providing a kind of ‘happiness’ that can be found no where else”); HANNAH ARENDT, *ON REVOLUTION* (1963) (viewing citizens as participants in public affairs).

¹⁶⁵ See Minow, *Interpreting Rights*, *supra* note 134, at 1862.

¹⁶⁶ *Id.*; see also Kennebeck, *supra* note 133, at 241; *Charting a Future*, *supra* note 4; Jan Hoffman, *New York Casts for Solutions to Gaping Holes in Juror Net*, N.Y. TIMES, Sept. 26, 1993, at A1; Jan Hoffman, *Jurors Tell Tales of Woe and Outrage*, N.Y. TIMES, Nov. 5, 1993, at B3 (describing complaints of uncivil and dismissive treatment of jurors in court proceedings and jury selection process).

¹⁶⁷ See, e.g., Kennebeck, *supra* note 133, at 238-48; *Charting a Future*, *supra* note 4, at 23-24.

¹⁶⁸ See Howard Varinsky & Laura Nomikos, *Post-Verdict Interviews*, TRIAL, Feb. 1990, at 64.

¹⁶⁹ Charles W. Joiner, *From the Bench*, in JURY SYSTEM, *supra* note 3, at 166 [hereinafter Joiner, *From the Bench*].

reasons for procedures which may be unfamiliar to lay persons,¹⁷⁰ this feeling can be allayed. These steps which some but not all judges perform, can engage the jury¹⁷¹ and communicate to the other participants the value of the jury's work.¹⁷² Similar to the judge's ability to enlighten and explain matters to the jury through instructions, the attorneys in their arguments and case presentation can enlighten the jury.¹⁷³

Disenchantment among jurors may also be a product of diminished expectations about the quality of the administration of justice, pertinently, the level of representation and case management.¹⁷⁴ Moreover, jurors' images of trials may be largely drawn from fictionalized court-room drama portrayed in movies and television programs.¹⁷⁵ The development of rules and procedures which emphasize the value of active citizen participation in adjudication can both contribute to a more productive role for jurors¹⁷⁶ and can result in a better educated pool of participants. The one-day, one-trial movement, responsive to overburdened caseload conditions can also meet these objectives.¹⁷⁷ Note-taking, question-asking, and even interviewing of witnesses are other reform efforts which promote active participation and interest.¹⁷⁸

Jurors have complained of the passive role that they play in litigation as a principal reason for viewing the experience as tedious and ultimately unappealing.¹⁷⁹ Critics of assertive juror activity like taking notes, asking questions, and interviewing witnesses, however, argue that these steps transform the trial process from an adversarial one to one of inquisition, where

¹⁷⁰ See, e.g., Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials*, 12 L. & HUM. BEHAV. No. 3, 231 (1988); Kennebeck, *supra* note 133, at 240.

¹⁷¹ See Simon, *supra* note 22, at 141 (conference culminating in a jury participation proposal).

¹⁷² JOINER, JUSTICE AND THE JURY, *supra* note 2, at 145-47; see also Minow, *Interpreting Rights*, *supra* note 134, at 1862 (arguing that legal interpretation is an activity engaged in by nonlawyers as well as by lawyers and judges; interpretive activity appeals not to one overriding authoritative community, but instead to people living in worlds of differences; through interpretive activity people summon a sense of potential community membership without relinquishing struggles over meaning and power).

¹⁷³ *Charting a Future*, *supra* note 4, at 15-23.

¹⁷⁴ Kennebeck, *supra* note 133, at 247-48.

¹⁷⁵ See *id.* at 243.

¹⁷⁶ *Id.* at 239-40; see also Warren Wolfson, *Improving the Civil Jury: Some Possible Solutions*, 73 ILL B.J. 140, 145-49 (1984) (proposing concrete recommendations and changes to make jury trials more efficient and useful in the resolution of disputes).

¹⁷⁷ Saks, *supra* note 123, at 701 n.26.

¹⁷⁸ *Charting a Future*, *supra* note 4, at 18-21.

¹⁷⁹ See Heuer & Penrod, *supra* note 170, at 233-37; Simon, *supra* note 22, at 141-42.

the fact investigator becomes combined with the fact-finder.¹⁸⁰ This conclusion preempts an assessment of the benefits which could flow from a power-sharing emphasis on community participation.¹⁸¹ It promotes the image of the trial process as combative and the jury as a group of strangers confronting the judge and litigants in an alien and alienating environment.¹⁸²

Reform measures which emphasize decentralizing control by the judge and power-sharing with the jury build upon the understanding that dialogue and decision-making by lay participants have distinctive value important in adjudication. The citizenship building quality is meaningful if full representation of communities and opportunity for meaningful participation in deliberation by community representatives is promoted.

A focus on nourishing citizenship¹⁸³ through jury participation might be said to reflect an instrumental conception of jury participation which

¹⁸⁰ See, e.g., Heuer & Penrod, *supra* note 170, at 236-39. Although he is known for his criticism of decision-making by the jury, Jerome Frank's criticism of juries is really a challenge to reconsider the use of an adversarial proceeding model as a means of seeking truth. But see John Thibaut et al., *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972) (arguing that adversarial presentation minimizes bias).

¹⁸¹ See Heuer & Penrod, *supra* note 170, at 236-39; Thibaut et al., *supra* note 180, at 297-401 (presenting some empirical support for claim that adversarial presentation combats bias).

¹⁸² JOINER, JUSTICE AND THE JURY, *supra* note 2, at 151. Kennebeck suggests that a problem lies in authorities taking the judicial process and juries for granted. He suggests that there be more explaining during the voir dire and the trial to make jurors feel more intimately and importantly associated with the system:

Taking-for-granted is a natural part of every repetitious enterprise. Doctors, teachers, lawyers, and such all have their routines and their jargon, and are so grooved or tracked into the invariables of their work that they forget how alien much of it may sound or look to an outsider. To many a juror, 'relief' may have something to do with relaxing in an armchair or getting out of tight shoes; 'remedy' suggests aspirin or a Band-Aid. Even 'plaintiff,' and 'defendant,' can become interchangeable in a layman's mind, especially in some of the more hasty and sloppy cases he might have to listen to.

Kennebeck, *supra* note 133, at 245-46.

Kennebeck suggests that an ombudsman be appointed to provide information—i.e., let the jurors know the outcome of cases which they have been partly involved in; receive information about the rights, obligations, privileges, and value of their work; provide literature explaining some of the technicalities of law, including a glossary of jargon phrases and words that could create a public image of desirable and noble work. *Id.* at 248-49. The ombudsman "could perhaps do a little 'buttering up' of the citizen who has been jolted out of his usual schedule and realm of concern." *Id.* at 249.

¹⁸³ Nourishing civic virtue through "participation in government [is] a positive good" which citizens can perform through practical reasoning. Michelman, *supra* note 119, at 22. See ARENDT, *supra* note 164 (characterizing citizens as participants in public affairs).

does not properly focus on the kind of decision-making that directly benefits the individual litigants. Emphasizing this individualistic posture, some critics have also argued that jury service imposes an unfair tax and social cost on those forced to serve.¹⁸⁴

My reconceived model assumes that the citizen has a stake in resolving public controversies.¹⁸⁵ It begins with the proposition that any dispute worth pursuing in court and thus utilizing the resources of the state has a significant public dimension,¹⁸⁶ and that the use of courts for the resolution of disputes is an aspect of self-government which has transformative potential for the citizen and, ultimately, for the law.¹⁸⁷ The jury's civic responsibility, however, extends beyond its principal duty of resolving the dispute for individuals in a particular case.¹⁸⁸ The jury role can be seen as providing the citizen with opportunities to develop a relationship with other citizens and with the state. The significance of adjudication also lies

¹⁸⁴ See Kennebeck, *supra* note 133, at 236 (describing jury experiences including a trial of 13 Black Panther members which lasted eight months, the longest trial in the history of New York State, and which cost two million dollars, and two civic cases of traffic accidents, both with "very low reading on the drama scale").

¹⁸⁵ See *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2077 (1991).

¹⁸⁶ See Owen Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter Fiss, *Forms of Justice*]. Compare Simon, *supra* note 22, at 142 (stating that litigants unable to resolve their own dispute impose on undercompensated taxpayers) with Wolfson, *supra* note 176, at 144 (reporting that trial is the way civilized people resolve differences).

Of course it can be argued persuasively that not every dispute for which private individuals seek resolution has significant public dimensions. I agree with Fiss, however, that this is indicative of the fact that we have misused the resources of the courts and that we should explore alternatives for resolving disputes which do not have a public significance. Fiss, *supra*, at 29-31. Indeed, some disputes can better be resolved in alternative forums (e.g., through pre-trial mediation or arbitration). *Id.* We should encourage such cases that do not raise "public" issues to be removed from the judicial forum or encourage settlement by requiring user's fees.

¹⁸⁷ See Michelman, *supra* note 119, at 65-73 (transformative potential of judges); Minow, *Interpreting Rights*, *supra* note 134, at 1911-13.

¹⁸⁸ See *supra* notes 73-76 and accompanying text. C. Anthony Friloux, *Another View From the Bar*, in THE JURY SYSTEM, *supra* note 2, at 222, states: "Community educational processes have provided little or no real assistance to the public in this very crucial public responsibility." *Id.* In contrast, it can be argued:

[The] Jury should be considered as part of another system, that of the whole trial and fact-finding process. It is from there that it picks up its cues and learns what to do. The juror most often comes to court as someone completely ignorant of the courts and learns from the actual experience of being in court.

Bankowski, *supra* note 157, at 10. Bankowski argues that focusing on merely the interaction of the jury in its deliberations will miss crucial dimensions of the trial. *Id.*

in defining public values¹⁸⁹ and in identifying the interests of the political community in defining rights and obligations of citizens that has effects beyond the boundaries of an individual dispute.¹⁹⁰ This conception reflects the general democratic principle "that people should be represented in institutions that have power over their lives."¹⁹¹

Moreover, the citizens' participation does directly benefit litigants involved in the trial process. The justice-seeking goals of adjudication in a diverse society can be served by recognizing the distinctive capacity of the community's representatives to bring their perspectives to bear on the legal stories presented in court.¹⁹² The value of the jury's participation in terms of enhanced administration of justice lies in the jury's size, limited life, and deliberative quality. Finally the jury's truth-defining function should be understood in terms of its members' distinctive capacity to engage in the social construction of truth.

¹⁸⁹ Fiss, *Forms of Justice*, *supra* note 186, at 5-6.

¹⁹⁰ See *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085-86 (1991); *cf. id.* at 2094-95 (O'Connor, J., dissenting). Owen Fiss says that some disputes may not be public enough; that there are other dispute resolution mechanisms for deciding disputes that have no public relevance. Fiss, *Forms of Justice*, *supra* note 186, at 30. He recommends the use of arbitration to resolve disputes which "may not threaten or otherwise implicate a public value." *Id.* Use of the judge's (and jury's) time on purely private disputes—private because only the interests and behavior of the parties to the dispute are at issue—is an extravagant waste of resources and such disputes should be handled by arbitrators. I would use a broader approach, recognizing the interest of the citizens as jurors to come together and participate in the decision-making relating to some issues, but would agree that problems more pertinently to be resolved in a non-adversarial way should be relocated. This may be true as well for certain disputes concerning matters any person has a right to exclude others from. The public/private distinction, however, has troublesome connotations in the liberal tradition because historically it oppressed and excluded rather than respected some social groups and their views. See YOUNG, *supra* note 15, at 119-21 (inviting a reconception of "public" and "private"); Robert M. Cover, *The Supreme Court, 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) [hereinafter Cover, *Nomos and Narrative*] (contrasting meaning-giving communities with the legal community).

¹⁹¹ Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705; see also YOUNG, *supra* note 15, at 156-91 (politics of difference, focusing upon rather than being blind to difference among groups, promotes equality).

¹⁹² See JOINER, JUSTICE AND THE JURY, *supra* note 2; see also Carol Heilbrun & Judith Resnik, *Convergences: Law, Literature and Feminism*, 99 YALE L.J. 1913 (1990) (law as literature); Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Stephanie M. Wildman, *Implied Assumption of a Reasonable Risk: Much Ado About Nothing or Radical Departure in California Law?*, S.F. BARRISTER, Apr. 1993, at 3, 6.

5. *Education about Differences*

The jury's coming together can have an impact on the ability of its members and other participants in the trial—including the judge—to perceive differences among themselves and to reflect upon whether those differences have social significance affecting judgment.¹⁹³ My construction of the arguments favoring jury participation has emphasized that the involvement of citizens with different perspectives,¹⁹⁴ in resolving public disputes, including their opportunity to converse and to deliberate, has educational potential both in and beyond the particular trial. That educational potential arises from evaluating the stories of the parties and their witnesses, from voir dire,¹⁹⁵ and from evaluating the other jurors by reflecting on their capacity for judgment.¹⁹⁶

The jury has the potential, moreover, for causing the judge to reflect upon whether his responses are drawn from a too narrowly situated perspective, and to benefit from the alternative social experiences offered by the jury-participants. Another aspect of the jury's role has to do with exposing the judge and other professionals to their insulation and to the effects of repetition experienced by these experts.¹⁹⁷ This proposition reflects the view that "[w]e come to know who we are—our authentic selves, what sort of person we want to be, and what we should want—only through deliberation and dialogue with others."¹⁹⁸ A civic objective of reconceiving the jury, emphasizing its representative potential can be cultural exchange benefitting traditional dispute resolution objectives but also contributing to the fertilization and growth of normative understandings affecting other participants.¹⁹⁹

B. *Concerns about Costs*

A cluster of criticisms about the jury centers on expense and efficiency. Critics argue that the jury is expensive and contributes to delay in civil litigation, in addition to the social tax placed on citizens mentioned

¹⁹³ See *infra* notes 303-06 and accompanying text (feminist discussion exposing fact of difference can affect the outcome of decisions); Sherry, *supra* note 14, at 604-13.

¹⁹⁴ Bankowski, *supra* note 157, at 8.

¹⁹⁵ See *id.*; *infra* notes 416-23 and accompanying text.

¹⁹⁶ See Kennebeck, *supra* note 133, at 244 (describing the "sizing up" of other jurors and interaction with them; he asks himself questions as if conducting voir dire).

¹⁹⁷ *Id.*

¹⁹⁸ Ronald Kahn, *Pluralism, Civic Republicanism and Critical Theory*, 63 TUL. L. REV. 1475, 1479 (1989) (quoting MICHAEL PERRY, *MORALITY, POLITICS, AND LAW* 153 (1988)).

¹⁹⁹ See YOUNG, *supra* note 15, at 236-41.

above.²⁰⁰ Data suggest, however, that expense for juries presently pales in comparison to costs associated with judicial resources.²⁰¹ It is true that court dockets have become more and more crowded,²⁰² and that jury trials are often longer than trials by judge.²⁰³ The available data, however, simply do not support the argument that jury trials delay the resolution of cases.²⁰⁴ This is because of the tendency of judges to postpone the reaching of judgment in order to accommodate other scheduling matters when the judge is acting as the fact-finder.²⁰⁵ Moreover, the costs associated with the judge's time are far greater than costs associated with jury selections and deliberation.²⁰⁶

The efficiency argument is more problematic. Many critics argue that the use of jury deliberations is inefficient because of inconsistent verdicts and awards and because there are experts who would tend to base their conclusions on law. Although efficiency is a concern which cannot be ignored in the face of increased caseloads and other administrative concerns of courts,²⁰⁷ it is my argument that other justice considerations have been lost or not amply appreciated in a single-focused quest for certainty or undue preoccupation with efficient resolution of disputes by courts.²⁰⁸ The consideration of benefits and costs, moreover, should be made by focusing on a participatory model of the jury which more fully takes account of the social and political values of the jury, as discussed above.

²⁰⁰ Compare Higginbotham, *supra* note 116, at 55 (defending jury trials as valuable and a good use of resources) with Shapiro & Coquillette, *supra* note 109, at 457-58 (arguing that seventh amendment jury trials are a drag on judicial administration, result in inflated damage awards, and should be avoided except where compelled).

²⁰¹ See Higginbotham, *supra* note 116. Replacing the jury panels with panels of judges or other experts would engender greater expense. See also Simon, *supra* note 22 (noting that delays in timing after request for jury trial could be eliminated).

²⁰² See, e.g., Simon, *supra* note 22 (jury trials are not the cause of the court system backlog; the delay precedes jury trial and can be eliminated); see *supra* notes 190, 196 (distinguishing cases which should be tried from other alternatives for dispute resolution).

²⁰³ See JOINER, JUSTICE AND THE JURY, *supra* note 2, at 222-33.

²⁰⁴ See Higginbotham, *supra* note 116, at 55; JOINER, JUSTICE AND THE JURY, *supra* note 2, at 232-33; *supra* notes 201-02.

²⁰⁵ See Higginbotham, *supra* note 116, at 55.

²⁰⁶ See *id.*

²⁰⁷ See *supra* notes 186-90; see, e.g., Higginbotham, *supra* note 116, at 47 n.1, 58-60 (principle objective of the court is to dispense justice, not to dispatch business).

²⁰⁸ There are studies suggesting that more accurate decision-making is achievable through small group deliberative bodies than by a single individual. See JOINER, JUSTICE AND THE JURY, *supra* note 2, at 27. The cost of juries pales in comparison with, for example, a panel judge structure for decision-making or the use of other groups of experts. See *supra* notes 186, 190, 201.

A commitment to more than lip service to the jury recognizes that the jury's special role and competence most clearly rests on its ability to provide a larger human-interactive dimension to legal decision-making.²⁰⁹ A conception of the jury which emphasizes the value of deliberation by a representative body and the dialogic potential for determining truth²¹⁰ responds to the post modern claim that there is no objective right answer and conclusion that impartial decision-making is not achievable.²¹¹ The critics' contentions that the jury's role is of limited importance, if not superfluous, in modern civil litigation²¹² should be assessed against a reconstructed jury model of participation by representative citizens. My jury model emphasizes the peculiar deliberative quality of this small group device, to be contrasted with decision-making of the lone judge and the politically motivated legislature,²¹³ and underscores some potential for accountability through the give and take of communication among a truly representative body. My jury model should also take account of practical means for holding jurors accountable for their deliberative action. My support for a consensus driven, participatory decision-making model builds

²⁰⁹ Emily Stipes Watts, *American Literature*, in JURY SYSTEM, *supra* note 3, at 175 (finding a major theme in American literature to be the "Hero," an individual who is a creator of his personal history, confronting "the alien tribe," often depicted as the jury). The jury is depicted as the "other . . . those people up in the hills" with impartiality compromised by a myriad of factors including racial and regional prejudice, and ignorance. *Id.* at 176. This suggests not only symbolic isolation but a profound mistrust of the jury system captured by the American writer.

²¹⁰ See Bankowski, *supra* note 157.

²¹¹ See YOUNG, *supra* note 15, at 113-14.

²¹² Kalven and Zeisel point out that Dean Griswold in his 1962-63 annual report to the Harvard Law School recommended among other things that the jury be abolished in civil trials, arguing that "[t]he jury trial at best is the apotheosis of the amateur. Why should anyone think that 12 persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?" KALVEN & ZEISEL, *supra* note 3, at 5 (citing HARVARD LAW SCHOOL, DEAN'S REPORT 5-6 (1962-63)). An American Bar Association Journal article published in 1924 reported:

Too long has the effete and sterile jury system been permitted to tug at the throat of the nation's judiciary as it sinks under the smothering deluge of the obloquy of those it was designed to serve. Too long has ignorance been permitted to sit ensconced in the places of judicial administration where knowledge is so sorely needed. Too long has the lament of the Shakespearian character been echoed, "Justice has fled to brutish beasts and men have lost their reason."

Bruce G. Seville, *Trial by Jury: An Ineffective Survival*, 10 A.B.A. J. 53, 55 (1924).

²¹³ See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) [hereinafter Guinier, *Black Electoral Success*]; Guinier, *No Two Seats*, *supra* note 16, at 1485-87; Aleinikoff, *supra* note 154.

on the proposition that the community can serve as an effective buffer between the "rule of law" and individual self-interest if there is deliberation and judgment, and that a sense of responsibility can be fostered by community representatives exchanging experiences and considering competing community perspectives. I also acknowledge the need for holding jurors accountable for their deliberative action. The reconceived jury model emphasizes, rather than disparages, the transient, human interactive potential of the jury institution, positing that the exchange of diverse views can result in better resolution of individual controversies.

An understanding of the interests which were recognized and served in a shift away from power sharing by lay and professional participants in adjudication can be helpful in considering the values potentially served by a reconception of the jury institution. In Section IV, I offer some observations about how that shift has been justified in the twentieth century.

IV. MARGINALIZATION OF COMMUNITY PARTICIPATION IN LITIGATION

Commentators have observed that the institutional role of the American jury was limited as a result of the assertion of decision-making authority by judges in the nineteenth century and an increased preference of legal professionals for the equity model of adjudication.²¹⁴ By the early nineteenth century, judges had begun to restrict the role of the jury, much as had been done earlier in England.²¹⁵ Court decisions challenged the jury's authority to decide issues of law,²¹⁶ and lawyers and judges crafted rules of evidence which controlled what juries heard.²¹⁷ The judge, by interpreting which issues were "factual" and thus within the province of the jury, and which issues were "legal," and thus without its disposition,

²¹⁴ See Subrin, *supra* note 20, at 940.

²¹⁵ See HORWITZ, *supra* note 21, at 27-28. In the earlier nineteenth century, "law" was predominantly judge-made. Legislators, however, began to play an increasing role in law-making, including passage of laws regulating court procedure, prompting a response by courts. See Subrin, *supra* note 20, at 931.

In England in the twentieth century, the jury was actually done away with in civil trials for the most part, first as war means and later for efficiency. Although it can be said that the marginalization of juries in the United States is a step in that direction, some commentators have sought to distinguish the institution in the United States and argue that the same fate will not occur in the United States. See JOINER, JUSTICE AND THE JURY, *supra* note 2, at 59-63. My argument is not that we must have juries in every case but that we should utilize the jury in a way that takes advantage of its unique contribution, attributes, deliberation, representation, and potential for accountability.

²¹⁶ See Wolfram, *supra* note 8, at 644; Subrin, *supra* note 20, at 929.

²¹⁷ Wolfram, *supra* note 8, at 644.

could set aside jury verdicts as contrary to the law.²¹⁸ Through the exercise of this interpretive power and assertion of procedural limitations on jury decision-making,²¹⁹ the judiciary assured that the jury's decision-making impact was contained.

The emerging conception of the jury is that of a passive instrument of the court,²²⁰ acting upon factual evidence marshalled by the professionals of the court—judges, lawyers, and experts.²²¹ The extension of equity and admiralty jurisdiction in the nineteenth century also placed whole issues of cases beyond the reach of juries, transforming “what had been questions for the community into questions for lawyers and judges.”²²² These changes served commercial interest in predictability,²²³ but also reflect a rise in professionalism, favoring the decision-making of experts²²⁴ and devaluing community knowledge.

The scholarship of realists also shaped the understanding of the role of judge and jury.²²⁵ Legal realists unpacked the artificial lines between law and fact²²⁶ developed in the case law of the nineteenth century, describing the powerful control of the decision-making elite,²²⁷ and acknowledging that judicial decision-making, like executive and legislative decision-

²¹⁸ See Judith Resnik, *Tiers*, 57 CAL. L. REV. 837 (1984) (arguing that the ability to distinguish law from fact has systematic effects on the kinds of litigants who win or lose lawsuits at the appellate level).

²¹⁹ Thus the trial court can direct a verdict, can grant judgment notwithstanding the verdict, and can grant a new trial. To a lesser extent, the judge can also utilize instructions and evidentiary rulings to control the jury. Additionally, the court may provide for special verdicts or interrogatories. See, e.g., Doug Rendleman, *Chapters of the Civil Jury*, 65 KY. L.J. 769 (1977); Broeder, *supra* note 3, at 396-99.

²²⁰ Morris S. Arnold, *Societal Versus Official Law*, 38 STAN. L. REV. 265, 270 (1985) (book review).

²²¹ See Subrin, *supra* note 20, at 923-24.

²²² *Id.* at 923 (discussing Blackstone's disassociation of rights, wrongs, and methods of enforcement from the social and economic political environment); see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 222, 227-34 (1979).

²²³ See HORWITZ, *supra* note 21, at 143.

²²⁴ *Id.*

²²⁵ See generally, e.g., FRANK, *supra* note 3; GREEN, *supra* note 9; James, *supra* note 127.

²²⁶ See, e.g., James, *supra* note 127, at 668 n.4.

²²⁷ Green argued that there had occurred relaxation of control by trial courts, but with an increase in control by appellate courts. GREEN, *supra* note 9, at 375-84. See James, *supra* note 127, at 669-87 (theoretical allocation of functions between judge and jury not followed in fact, in part because of control by judges.); see also, e.g., Weiner, *supra* note 64, at 1918-38 (more recent effort to provide better ground for allocating decision-making responsibility than law/fact distinction, focused on law application function for jury).

making, is "political."²²⁸ But realists disfavored the use of the jury, favoring legal reform to be effectuated by experts—the judges and other professionals.²²⁹ The realist movement saw law as a developing science and experts as the appropriate participants in the productive enterprise.²³⁰ The movement offers an hierarchical conception of adjudication with judges on top, limiting deviant community response. For some realists, the preference for professional decision-makers was justified by the Anglo-American commitment to an adversarial litigation model in which winning is determined by whomever figuratively hits the hardest in the litigation arena; the truth-finding mission is confined to the boundaries of the courtroom game with rules defined and best understood by the experts.²³¹ This adversarial model is both individualistic²³² and skeptical of lay capacity to render judgments based on an understanding of the law.²³³ Both

²²⁸ Philip B. Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts 'To Say What the Law Is,'* 23 ARIZ. L. REV. 581, 583 (1981).

²²⁹ See LAURA KALMAN, *LEGAL REALISM AT YALE 1927-60* (1986); James, *supra* note 127, at 681 (describing what judge and jury do and the critical role played by the judge in determining what evidence will become before the jury); Hans Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227, 229 (1972); see also HAROLD D. LASSWELL, *POWER AND PERSONALITY* 14 (1948) (focusing on role of judge).

²³⁰ The Federal Rules of Civil Procedure can be seen as mirroring this skepticism. The rules, often emulated by state procedures, significantly increase judicial power and discretion in the management and disposition of cases, with resulting diminution of power of juries. Subrin, *supra* note 20, at 913-24 (stating that the majority of rules are pro-judge). Subrin argues that the Enabling Act of 1934 provided for the formulation of the procedural rules by the Supreme Court and the Advisory Committee, an elitist group, rather than Congress or state legislatures, empowering the judge at the expense of juries. *Id.* He also describes the proponents of the rules themselves as wanting to be judges and worshipping the hierarchy of power reflected in the rules. *Id.*; see, e.g., Robert G. Johnston, *Jury Subrogation Through Judicial Control*, 43 LAW & CONTEMP. PROBS., Autumn 1980, at 24; Doug Rendlemen, *Chapters of the Civil Jury*, 65 KY. L.J. 769 (1977).

Significantly, the rules have been viewed as the work of jurists and an advisory committee made up of lawyers whose conscious project was to borrow from equity norms and attitudes about adjudication which emphasized the judge's discretion and capacity of experts. Another agenda has been identified as returning lost power and prestige to the judges. For example, Federal Rules proponent Roscoe Pound said in a speech: "Everything which tends to restore the judiciary to its true position, which tends even in slight manner to give to it in the eyes of the public those long lost attributes of dignity, authority, and eminence which belong of right to the common law judges, is opportune and welcome." Subrin, *supra* note 20, at 944-45.

²³¹ FRANK, *supra* note 3; see Curtis, *supra* note 141, at 150.

²³² See West, *supra* note 14.

²³³ See William M. Marston, *Is the Jury Ever Right?*, 9 FLA. L.J. 554 (1935); see also Curtis, *supra* note 141, at 165 (discussing the fact that note-taking is not allowed and instructions are confusing, as indicating society does not expect the jury to understand the law). Curtis argues that the jury is kept ignorant in order to permit its intuitive sense to

these characteristics serve to minimize the value of a deliberative body of lay persons and to question the necessity for community participation in adjudication.²³⁴ Much of the ambivalence about juries concerns a liberal commitment to maintaining an impartial "rule of law" while preserving the opportunity for equitable intervention by the judge. The emergent image²³⁵ of the modern judge is one who is not only responsible for ensuring faithfulness to the letter of the law—common law or, more likely, an expression of political will²³⁶—but also, through interpretation and through application of principles of equity, has the capacity to wield great law-making power. This image casts further doubt about the necessity for community participation in legal decision-making.

*Brown v. Board of Education*²³⁷ evokes this paradigm. Justification for the enlarged significance of the trial judge's role in the era of "exploding rights and expanding remedies"²³⁸ begun by *Brown*,²³⁹ drew upon "traditional attributes of equity power," characterized by "a practical flexibility in shaping its remedies."²⁴⁰ Though useful in this "public law litigation,"²⁴¹ many commentators have cautioned that this use of judicial

operate, avoiding the harsh results of law. "The law calls in a jury not only when it lacks confidence in its judges, but when the law lacks confidence in itself." *Id.*

²³⁴ The jury was seen by some realists as "antiquated, unscientific, and inherently absurd." James, *supra* note 127, at 685 (citing CARL L. BECKER, *FREEDOM AND RESPONSIBILITY IN THE AMERICAN WAY OF LIFE* 82 (1945)). Jerome Frank called decision-making by a jury "capricious, unregulated [and] discretionary," emphasizing its temporary existence. Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 27-28 (1931) (Frank uses an ethnically focused, disparaging term, "cadi" or "oriental" justice to describe jury decision-making).

²³⁵ The image to which I refer is one principally created by scholarship concerned with the question of the legitimacy of adjudication and the authority of judicial decision-making in a democracy. See, e.g., Fiss, *Objectivity*, *supra* note 107; Fiss, *Forms of Justice*, *supra* note 186; Cover, *supra* note 190; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

²³⁶ GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 163-66 (1982).

²³⁷ 347 U.S. 483 (1954); 349 U.S. 294 (1955).

²³⁸ Gerald Gunther, *Commentary: Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 WASH. U. L.Q. 817.

²³⁹ See ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 7 (1970).

²⁴⁰ See *Brown*, 349 U.S. at 300. A change in the identity of courts has resulted because trial judges have been willing to utilize their equitable powers to address social problems such as desegregation, and Congress has passed federal statutes recognizing new claims and making available equitable relief to resolve intractable problems like the pollution of the environment.

²⁴¹ See, e.g., Fiss, *Objectivity*, *supra* note 107; Colin S. Diver, *The Judge as Political Pawnbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979). By structural or public law litigation, I refer to cases often involving public institutions that are concerned with the vindication of broad statutory and constitutional

power to effectuate systemic change raises questions about the legitimacy and competence of the court.²⁴² While the equity focus has been lauded as opening a "new rights frontier,"²⁴³ it is a fact that in all forms of injunctive litigation, great power is vested in the trial judge in defining rights. Moreover, appellate courts have accorded wide discretion on the part of trial courts in determining a strategy for relief. Where adjudication has touched upon fundamental areas of social concern or has been used to effect structural change, the image of the lone judge rendering judgment and providing relief has proven troublesome, for many, raising the "countermajoritarian problem."²⁴⁴ The model of the judge relying on experts to formulate a response to social conditions which are determined by the judge to have violated public norms²⁴⁵ is elitist and reinforces the notion that the community's decision-making role is expendable or, at best, marginal.²⁴⁶ A legacy of the era of exploding rights is the equity model of adjudication which justifies the trial judge's competency and authority to recognize broad claims of social and political inequalities in a multi-cultural society and to tailor remedies to vindicate these claims of right. Early twentieth century images of the judge, alone and isolated in his decision-making, have been helpful in establishing the competency of judges to assume this law-making role. The judge as decision-maker is

claims. See Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991); Fiss, *Forms of Justice*, *supra* note 186; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Robert E. Buckholz, Jr. et al., Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978). Much of the focus of scholarship concerning this kind of litigation concerns establishing constitutional authority for the judge's exercise of decision-making power in the definition of public norms, see Fiss, *Objectivity*, *supra* note 107, and the boundaries of the normative theory of public remedial process, particularly continued judicial involvement in implementing the public norms necessitated by the remedial process. See Sturm, *supra*; Chayes, *supra*, at 1282.

²⁴² See Gunther, *supra* note 238 (describing legitimacy issues associated with the establishment of rights and competency issues concerning institutional expertise and effectiveness associated with remedies).

²⁴³ *Id.*; see Sturm, *supra* note 241.

²⁴⁴ See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16-22 (1962).

²⁴⁵ Fiss emphasizes the necessity for discretion to choose the strategy which can effectuate the norm and contends there is no one right strategy or remedial position; the exercise of negotiating with the parties and the community is political and threatens the independence of the judge so important for Fiss' justification for the judge's participation in structural litigation. See Fiss, *Objectivity*, *supra* note 107; cf. Sturm, *supra* note 241 (calling for a community role at the remedial stage); Diver, *supra* note 241 (discussing the judge involved in political power negotiation).

²⁴⁶ A town meeting concept is used in Stephen C. Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244 (1977).

seen as rational, expert, and distanced, qualities which not only make him capable to make judgment on substantive issues of law but which have increasingly afforded him the right to exercise discretion and to use an arsenal of procedural tools to effectuate justice through creative remedies and protracted supervision.²⁴⁷ This conception of a guardian judge, blended with the other worldliness of chancery,²⁴⁸ was enhanced by the story of *Brown* written by constitutional theorists and other scholars,²⁴⁹ to justify the exercise of power by the judge in structural and other public-focused litigation.²⁵⁰ In this story, the traditional conception of adjudication²⁵¹ as dispute resolution has been replaced with a conception of adjudication as interpretation.²⁵² The judge assumes an active role in defining public values because of his institutional independence²⁵³ and because of his ability to engage in a dialogue with the other experts and participants in the litigation process in his opinions and other rulings.²⁵⁴ The judge's decision-making legitimacy, according to this liberal reasoning, stems from his capacity for objectivity, the result of disciplining rules authorized by the professional community of which he is a member, and which define his role.²⁵⁵

This equity model of judicial decision-making to address broad social wrongs²⁵⁶ has been useful to support adjudication rather than decision-

²⁴⁷ See Sturm, *supra* note 241, at 1399-1403.

²⁴⁸ See, e.g., Chayes, *supra* note 241.

²⁴⁹ See e.g., Gunther, *supra* note 238; Fiss, *Objectivity*, *supra* note 107; Fiss, *Forms of Justice*, *supra* note 186; see also Kahn, *supra* note 17 (offering critique of Fiss's analysis).

²⁵⁰ Today the image often presented is that of an administrator of a judicial bureaucracy; the judge is still divorced from the litigants but struggles as case manager to impose efficiency and rationality in the management of cases. Other scholars have recognized the awesome power of courts engaged in the articulation and enforcement of rights in critiques of rights and responses thereto. See, e.g., Minow, *Interpreting Rights*, *supra* note 134 (establishing interpretation as a theory of judicial action in response to the rights critiques).

²⁵¹ E.g., Fiss, *Forms of Justice*, *supra* note 186 (discussing Lon Fuller's conception of adjudication).

²⁵² *Id.*

²⁵³ See *id.* (stating that the courts are the institutionalization of the third party, the stranger).

²⁵⁴ According to Fiss, the "dialogic quality" of the process includes the obligation to confront grievances, to listen to the broadest range of persons and interests, and to "painstakingly justify" and to assume responsibility for his decisions. *Id.* "The term 'dialogue' is simply meant to suggest a rationalistic or communicative process in which the judge listens and speaks back." *Id.*

²⁵⁵ Fiss, *Objectivity*, *supra* note 107, at 744-45.

²⁵⁶ See Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1979) (finding antecedents for

making by one of the "majoritarian branches"²⁵⁷ to protect the liberty and equality interests of the disempowered.²⁵⁸ In response to the "counter-majoritarian" challenge to judicial decision-making of such broad social or public significance, judges have been characterized as functionally capable of expressing "public values,"²⁵⁹ distinguishable from their own subjective desires, which political participants are often incapable or unwilling to do because of self-interest, parochialism, and prejudice.²⁶⁰ This construction of decision-making authority is one-dimensional and begs the question of political legitimacy.²⁶¹

The rights-declaring and remediating roles are also justified by the attributes of the judicial function, including judicial respect for process,²⁶² and the qualities of independence²⁶³ and, pertinently, the capacity for dialogue.²⁶⁴ Instrumental judgments concerning which remedial choices appropriately give meaning to or actualize public values can, however, destroy the independence and institutional boundaries that legitimate the

institutional litigation in the nineteenth century equity and receivership cases or antitrust and bankruptcy cases of the early twentieth century).

²⁵⁷ Fiss, *Forms of Justice*, *supra* note 186, at 9.

²⁵⁸ Kahn, *supra* note 17, at 48 (questioning rules as providing political legitimacy of adjudication).

²⁵⁹ Fiss, *Forms of Justice*, *supra* note 186, at 2. "The task of the judge is to give meaning to constitutional values, and he does that by working with the constitutional text, history, and social ideals. He searches for what is true, right, or just. He does not become a participant in interest group politics." *Id.* at 9.

²⁶⁰ Fiss argues that the public values are found in the Constitution but are capable of different meanings and all of us play a role in the process of giving those values specific meaning because of their pervasive impact. *Id.* at 2. The focus of Fiss's work, however, is to provide support for a judicial role of giving meaning to the public values through adjudication, principally of the structural kind, i.e., the judiciary confronting state bureaucracies and restructuring them to eliminate a threat to those values posed by the present organizational arrangement. *Id.*

²⁶¹ See Kahn, *supra* note 17, at 47-55, 60. Fiss acknowledges that judges are well advised to look to political receptivity of the interpretive products of adjudication. See Fiss, *Objectivity*, *supra* note 107, at 760; Kahn, *supra* note 17, at 50; cf. Minow, *Interpreting Rights*, *supra* note 134, at 1862 (discussing multiple interpretive communities). During the reconstructive tasks, federal judges discovered what the task required and adjusted traditional procedural forms to meet the felt necessities. "Legitimacy was equated with need, and in that sense, procedure became dependent upon substance." Fiss, *Forms of Justice*, *supra* note 186, at 3. See Gunther, *supra* note 238; Kurland, *supra* note 228.

²⁶² See Fiss, *Forms of Justice*, *supra* note 186.

²⁶³ *Id.* at 13.

²⁶⁴ *Id.*; see also Michelman, *supra* note 119, at 71 (discussing community influence on judicial decision-making). See generally Kahn, *supra* note 17, at 34-35 (contrasting nihilism and republican forms of government).

judicial exercise of power. Judicial discipline through the adherence to and respect for procedure has become a predominant concern in the equity model of decision-making,²⁶⁵ because it permits a functional identification of the decision-making with judging. Thus the conception of the lone and distant guardian judge not only is posed as consistent with the modern equity norm of discretion, it helps legitimate the exercise of judicial power and is associated with the "traditional liberal distrust of [the] state and community."²⁶⁶ Such a conception challenges the authority of the larger community to participate meaningfully in litigation of significant public dimensions²⁶⁷ and can have the result of trivializing that community's role even in more traditional adjudication.²⁶⁸ It poses the problem of who decides as a choice of reason versus will,²⁶⁹ devaluing the meaning-generating, interpretive function of dialogue in a multi-cultural society²⁷⁰ and minimizing the significance of members of social communities participating in the creation and maintenance of law.²⁷¹

It seems that the "American partiality to an individualist ideology"²⁷² has been translated into a paradigm of court decision-making by judges who are autonomous and isolated. Yet the "paradox of judge made law

²⁶⁵ See Fiss, *Objectivity*, *supra* note 107, at 747.

²⁶⁶ See West, *supra* note 14, at 45. Ironically, in the liberal model the judge is seen as distinguished from the state although his interpretive legitimacy may be merely a function of the state's monopoly of coercive power. See Cover, *supra* note 190.

²⁶⁷ See Kahn, *supra* note 17, at 16-18 (Bickel's justification that in constitutional areas the people and "the people" were two different conceptions and that the Court has authority to define public values in the Constitution).

²⁶⁸ Fiss, for example, makes a distinction of the judge's role to define public values, asserting that the role denotes the meaning of adjudication and not the settling of private disputes. See Fiss, *Forms of Justice*, *supra* note 186.

²⁶⁹ See Kahn, *supra* note 17, at 17-18.

²⁷⁰ Fiss and Michelman refer to the capacity for dialogue among judges as authority for decision-making. See Fiss, *Forms of Justice*, *supra* note 186, at 13; Michelman, *supra* note 119, at 69. Fiss identifies as an attribute of the judge's function the capacity to hear from other community members. Fiss, *Forms of Justice*, *supra* note 186, at 13. Recognizing that judges can be isolated from communities because of their backgrounds or as a practical result of maintaining distance, Resnik urges judges to listen and talk to others. Resnik, *supra* note 154, at 1944. Although these suggestions recognize the problem of isolated or situated decision-making, the effort to draw upon unrepresented perspectives is limited. These descriptions do not seem to envision interactive exchange among communities engaged in interpretive activity, nor do those descriptions imply an expanding membership of community that is contemplated in this reconceived model of jury participation.

²⁷¹ But see, e.g., Minow, *Interpreting Rights*, *supra* note 134 (describing roles of interpretive communities other than court); Cover, *supra* note 190 (same); Michelman, *supra* note 119 (same).

²⁷² Sherry, *supra* note 14, at 562.

. . . in a democracy’’²⁷³ has captured the imagination of legal writers of all philosophical persuasions.²⁷⁴ Often in literature concerning this problem, the alternatives posed have been principled decision-making by the judge, himself, or self-interested community participation, usually characterized as majority vote of an interest-motivated legislature.²⁷⁵ With few exceptions,²⁷⁶ writing about the “countermajoritarian problem” of judicial decision-making has failed to take account of the potential for group deliberation and consensus in jury decision-making, much less the value of community involvement in the policy making or law making function of adjudication.

Consistent with the image of adjudication offered by *Brown*, people of color and other disempowered groups, at least until recently,²⁷⁷ have accepted the judge as guardian, a bulwark against the majority’s exercise of (democratic) will. But cases after *Brown* which underscored the inherent limitations and ambiguities of effectuating equality in a colorblind fashion have led some writers to question the capacity of judges to move beyond their own elitist experiences.²⁷⁸ Ironically, the traditional justifications offered in support of judicial decision-making by some scholars²⁷⁹—such as principled decision-making and dispassionate meting of justice—have been challenged as contributing to continued subordination of the interests of people of color and other outsiders.²⁸⁰ Critics have challenged the liberal theory which justified judicial exercise of power to create rights, arguing that liberalism does no more than obscure the continuation of social subordination.²⁸¹ They argue that judicial decision-making is never merely “structured”—rule focused—but always “situated”—context focused²⁸²—and often it consciously or unconsciously discounts the interests of those

²⁷³ Anthony Lewis, *Foreword* to ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* at viii (2d ed. 1978).

²⁷⁴ See generally Kahn, *supra* note 17 (discussing a number of these writings).

²⁷⁵ See ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956).

²⁷⁶ See, e.g., Sturm, *supra* note 241; Note, *Practice and Potential of the Advisory Jury*, 100 HARV. L. REV. 1363 (1987). The characterization that law making is vested in the legislature, and to a lesser extent in the judiciary, challenges a law making function for a jury which need not reflect popular will. See generally Kahn, *supra* note 17; Kotler, *supra* note 24.

²⁷⁷ See *infra* notes 280-372 and accompanying text.

²⁷⁸ See, e.g., Resnik, *supra* note 154, at 1928-40; Aleinikoff, *supra* note 154, at 1083-91, 1100-07.

²⁷⁹ E.g., Fiss, *Objectivity*, *supra* note 107.

²⁸⁰ See, e.g., West, *supra* note 14, at 45.

²⁸¹ See YOUNG, *supra* note 15.

²⁸² Catherine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1728 (1990).

who have a different story to tell.²⁸³ Thus a blend of structured and situated decision-making is not only realistically all we can hope for, but may be preferable, provided that the stories told include those of people who are presently absent or silenced, and that they are heard by people who can understand them and can help others to do so.²⁸⁴

Concerned about this danger of community disconnection and isolation of judges, some writers have contemplated how to provoke dialogue, create empathy, and otherwise engage judges more fully in a process of understanding the multitude of perspectives which can emerge in the courtroom and appreciating their capacity for validating one view over others.²⁸⁵ Although commentators have argued that the judge should be more accountable to the constituencies affected by his judgment,²⁸⁶ a more prevalent concern is that before judgment, a judge should have the opportunity to obtain knowledge about the competing perspectives without succumbing to prejudgment or identifying with one view, undermining the respect for his decision-making.²⁸⁷ Most often the protections proposed rest on reinforcing judicial distance rather than considering the need for increased involvement by community representatives.²⁸⁸

The jury is a device that can be useful for courts to determine truth by reference to the perspectives of many and to communicate truth back to the larger community. People of color and political outsiders, however, have not often promoted the alternative of more prominent decision-making by the jury. The risk of introducing majority bias and hostility through the jury, confirmed all too well in the acquittal of police in the criminal action in connection with the Rodney King beating in Los Angeles,²⁸⁹ has led minorities to concentrate on establishing theories about

²⁸³ See, e.g., Kenneth L. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957 (1988); see also White, *supra* note 192 (discussing the law's response to gender and minority inequalities).

²⁸⁴ Wells, *supra* note 282; Resnik, *supra* note 154, at 1940. In this light, the conservative strategy of judicial selection, which minimizes the need for diversity not only preserves the interests of the majority, it reflects outright hostility to evenhanded justice.

²⁸⁵ See, e.g., Resnik, *supra* note 154, at 1929; Cain, *supra* note 158, at 1948.

²⁸⁶ Sturm, *supra* note 241; Note, *supra* note 276. I use the masculine pronoun to reflect the fact that most judges are male and that the liberal model has been characterized as male in orientation and thinking, reflecting the absence of women in the legal profession. See, e.g., Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Sherry, *supra* note 14.

²⁸⁷ Fiss, *Objectivity*, *supra* note 107, at 103 n.299.

²⁸⁸ See Diver, *supra* note 241; Sturm, *supra* note 241, at 1359 (describing dangers of connection with community).

²⁸⁹ See David Gonzalez, *Preparing a Neighborhood for a Grand Jury Decision*, N.Y. TIMES, Aug. 15, 1992, at A23 (reporting plight of Dominicans in Washington Heights); see, e.g., Anna Quindlen, *Across the Divide*, N.Y. TIMES, May 3, 1992, § 4 at 17

rights for judges to impose along the paradigm of *Brown*, and perhaps to pursue political alternatives which insulate us from subordination by a hostile—or, at least, self-interested—exercise of majority will.²⁹⁰

V. CRITIQUE OF THE EQUITY/RIGHTS LIBERAL MODEL

Recent scholarship of feminists and communitarians challenges the liberal faith which cedes authority to the judge,²⁹¹ or at least focuses on the need for dialogue with others. I refer to that literature in an effort to support the jury's role in resolving disputes and promoting public values in an increasingly diverse and fractured social and political community. But even in feminist and communitarian scholarship which posits a need for dialogue,²⁹² or some role for the jury,²⁹³ there has been little effort to rethink the jury function or to offer a theory which makes better use of its decision-making potential. In their critique of liberal theory and traditional legal methods, feminists and communitarians, often for different reasons, challenge the rights-centered, individualist posture of "legal liberalism."²⁹⁴ Their arguments raise the prospects for a meaningful role for juries because of their dialogic and deliberative potential, though there has been little focus on this practical potential. On the other hand, critical scholarship, particularly critical race theory writing concerned with establishing a representative participatory model for political decision-making, provides some support for building a more authentic participatory model of the jury, emphasizing the qualities of community representation and deliberation. Drawing upon the value of situated perspective and

("here's what came before [video tape started rolling]: Ronald Reagan, Willie Horton, rotten schools, no jobs, . . . David Duke. Years and years of rags and racism . . ."). On the other hand, the decision-making of a representative jury presents the risk of judgment that is contrary to the majority perception of law and justice. See *Jury Verdict Calms Community*, N.Y. TIMES, Oct. 19, 1993, at A1 ("Some people clearly disagree with the verdicts that have been read. Some are pleased. Some think the verdicts do not amount to justice, but justice is not perfect.").

²⁹⁰ See, e.g., Guinier, *Black Electoral Success*, *supra* note 213, at 1122-23 & nn.218-19; West, *supra* note 14. There has, however, been recognition that the jury process can be most responsive to the needs of black litigants when the jury roles reflect the majority African-American urban population. Guinier, *No Two Seats*, *supra* note 16, at 1433.

²⁹¹ Resnik, *supra* note 154, at 1904 (documenting partiality of racial and sex-biased views); see also Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 45 (1987) (ascribing partiality to rules of judgment); cf. Resnik, *supra* note 154, at 1941 (judges lack the capacity to find social facts, consider competing solutions and facilitate negotiations.).

²⁹² E.g., Resnik, *supra* note 154.

²⁹³ E.g., Sturm, *supra* note 241, at 1361.

²⁹⁴ West, *supra* note 14, at 46.

community connection found in the feminist and modern civic republican literature, I shall attempt to respond to some of the concerns about the changing institutional role of courts and resulting disfavor of community participation discussed above, by recasting the function of the jury. Lastly, I shall offer some suggestions for responding to concerns about accountability.

A. *Feminist Responses to Legal Liberalism*

There are a great variety of views expressed in women's writing critiquing the liberal model of adjudication; therefore, I, like others, am concerned about making generalizations concerning the methodology and agenda of such a diverse scholarly movement.²⁹⁵ It is the case, however, that a substantial contribution of feminist scholarship²⁹⁶ has been the acknowledgment that law making by courts has contributed to the oppressed and unequal status of outsiders—groups, like women, whose experiences of exclusion confirm the bias of existing legal doctrine.²⁹⁷ Feminists utilize the social fact of difference and identify the social and political consequences of group membership in their critique of law.²⁹⁸

²⁹⁵ See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

²⁹⁶ By "feminist" scholarship I mean writing that uses gender as a central focus of analysis, recognizes the social inequality of men and women, and sees the elimination of that inequality to be a crucial social objective, one requiring fundamental change. See Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990) [hereinafter Rhode, *Feminist Critical Theories*]; Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Changes*, 100 YALE L.J. 1731, 1735-36 (1991) (feminism means "a commitment to equality between the sexes . . . [and] to gender as a focus of concern and to analytic approaches that reflect women's concrete experience[s]") [hereinafter Rhode, *No Problem*]; see also Sherry, *supra* note 14, at 582-83 (noting that gender-based differences are not universal but "likely enough" that exclusion of women in the legal system has had a profound effect on its development). Sherry attempts to distinguish feminine writing from feminist scholarship, noting that feminists have a political agenda. *Id.* at 583.

²⁹⁷ See Bartlett, *supra* note 286, at 831-34; Sherry, *supra* note 14, at 580.

²⁹⁸ Bartlett, *supra* note 286, at 832. Bartlett draws four identifiable feminist methods, including her own amalgam. The methods are: (1) asking the woman questions; (2) applying practical reasoning; (3) effecting consciousness-raising; and (4) applying positional analysis. *Id.*

Because of the problem of not taking proper account of differences, particularly differences of political and social outsiders, some feminists prefer "contextual determinations" rather than "rigid, bright-line rules." See Sherry, *supra* note 14, at 605 (discussing feminist quality of Justice O'Connor's opinions). This preference for contextual determinations has also been characterized as communitarian; however, as Bartlett points out, some feminists, and some critical race theorists, are concerned about the danger of

Feminist theory challenges the notion that missing perspectives in law can be accounted for by generalizing from the experiences of others, particularly those who have been socially or economically privileged: those who have not experienced oppression have difficulty recognizing it.²⁹⁹ Some feminists have been criticized for failing in their own writing to take account of differences among women, particularly differences of class, sexual preference, and race, thus replicating the problems they identify.³⁰⁰ Feminist theory, however, has the potential to expose truths about the legal tradition's effect on other categories of outsiders³⁰¹ by drawing on the personal experiences of diverse women and integrating those experiences with theory.³⁰²

unchecked power and prejudice, favoring the development of more formal rules, which can be said to be more responsive to the interests of the disempowered, over flexibility. See Pat Williams, *Alchemical Notes*; Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 305 (1987) (stating that informal decision-making offers little hope of curbing racism); Christopher Edley, Jr., *Legal Reform and the Poor: Some Questions*, WASH. POST, Jan. 16, 1984, at A11 ("[I]f 'informal' means that rules and statutes can be bent in order to do what's 'fair' in the specific dispute, what becomes of whatever protections the less powerful party might have had from the rigid laws and procedures?"). Bartlett, *supra* note 286, at 852 n.85; see also Guinier, *No Two Seats*, *supra* note 16, at 1443-44 ("The more informal the setting and the less regulated the conduct, . . . the more likely are blatant 'microaggressions' [sic] against minority victims."). "'Microaggressions' are subtle, minor, stunning automatic assaults . . . by which whites stress blacks unremittingly and keep them on the defensive, as well as in a psychologically recused condition." *Id.*

²⁹⁹ See Sherry, *supra* note 14, at 581 n.169. As Justice Douglas said in *Ballard v. United States*, 329 U.S. 187, 193-94 (1946), "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables." *Id.*

³⁰⁰ See, e.g., ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (Beacon Press 1988); Harris, *supra* note 295; Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 539-46.

³⁰¹ See, e.g., Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157 (1985). Bartlett, for example, challenges feminists to use "the 'woman' question as a model for deeper inquiry into the consequences of overlapping forms of oppression," by asking a "far-reaching set of questions . . . : what assumptions are made by law (or practice or analysis) about those whom it affects? Whose point of view do these assumptions reflect? Whose interests are invisible or peripheral? How might excluded viewpoints be identified and taken into account?" Bartlett, *supra* note 286, at 848.

³⁰² Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (discussing practice and theory dialectic); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (valuing the perspective of the victim).

Liberal feminists³⁰³ seek the inclusion of additional information before decision-making in order to minimize mistaken assumptions about women and other outsiders which undervalue their significance.³⁰⁴ A more radical enterprise of some feminists is transformative: by offering the missing stories of women, they hope to expose the "social construction of reality through which factual or rational propositions mask normative constructions."³⁰⁵ Since their purpose is to uncover the gender-based subordination in law, the methodology is useful to unmask other kinds of hegemony.³⁰⁶

Because women have not been included in the mainstream of decision-making, the legal structure has considered social experiences from a "one-sided perspective of a single gender";³⁰⁷ feminists argue that there is a resulting distorted tension between autonomy and connection in the legal structure.³⁰⁸ Integration of the feminine and other outsider perspectives can alleviate this tension in modern liberalism. Feminists particularly value reasoning from personal experience, arguing "that reasoning from context allows a greater respect for difference and for the perspectives of the powerless."³⁰⁹ Feminist practical reasoning "gives rationality new meanings . . . [because it] acknowledges greater diversity in human experiences."³¹⁰ This kind of practical reasoning is in contrast to the development of universal principles and generalizations that is usually associated with traditional legal decision-making. Feminists object that such universalizing obscures the truth of the experiences of outsiders and their communities. Moreover, as some feminists emphasize, we live not in one but many overlapping communities; valuable knowledge is obtained by exploring differences³¹¹ and identifying common experiences and

³⁰³ See, e.g., Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85).

³⁰⁴ Bartlett, *supra* note 286, at 863.

³⁰⁵ *Id.* at 871 n.175; see YOUNG, *supra* note 15, at 119 (stating that liberal feminists see law's purpose as protecting individual liberty in public domain; whereas in private, an individual's "freedom" to pursue her own ends may continue subordination).

³⁰⁶ See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); see also Minow, *Interpreting Rights*, *supra* note 134, at 1861 n.5 (offering conception of interpretivists project which includes a struggle "with and against established patterns of power and authority.").

³⁰⁷ Sherry, *supra* note 14, at 581 & n.170 (citations omitted).

³⁰⁸ *Id.* at 582.

³⁰⁹ Bartlett, *supra* note 286, at 849.

³¹⁰ *Id.* at 857; see White, *supra* note 192, at 50.

³¹¹ See Minow, *Interpreting Rights*, *supra* note 134, at 1875-78.

patterns which can be drawn from sharing many stories about life events.³¹² Because feminists are committed to the view that "the personal is the political,"³¹³ they believe that knowledge obtained from these stories can challenge established patterns of power and authority.

Feminists have expressed concern about the effect of disconnection of judges resulting from the liberal requirements of impartiality and objectivity.³¹⁴ Both the discipline of distance, which the liberal equity/rights model requires to preserve impartiality in decision-making,³¹⁵ and the reliance of traditional legal reasoning on generalizing to abstraction, cause judges to be separated from human constituencies as they disengage themselves from the context of legal controversy.³¹⁶ Conversations with other community members minimally can prick the judge's conscience and provide him with valuable knowledge which is otherwise unavailable to him in his isolated and privileged position.³¹⁷ At best, it can expose the gendered and otherwise biased construction of reality that perpetuates subordination.³¹⁸

It is true that liberal theorists have also emphasized dialogic opportunities for judges. They characterize opinions of courts as subject to review by other judges, other legal professionals, and available to the public, and therefore ascribe to them dialogic qualities necessary to fulfill the common law requirements of justifying decisions.³¹⁹ They emphasize

³¹² See Sherry, *supra* note 14, at 589 (discussing literary criticism's reflection on this tension and recognition of women's focus on context); Resnik, *supra* note 154; Cain, *supra* note 158.

³¹³ Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613, 614 (1986); see Sherry, *supra* note 14, at 583 (distinguishing feminist from feminine writing). This saying emphasizes that the feminist context-focused vision is ultimately and irreducibly a political vision.

³¹⁴ See Resnik, *supra* note 154, at 1884-86.

³¹⁵ See *supra* note 250-66 and accompanying text.

³¹⁶ Feminists have attempted to show how this distance and disconnection results in decision-making that is biased. See Resnik, *supra* note 154, at 1944. More importantly, the distanced posture allows the decision maker to avoid personal responsibility for the consequence of his acts. See West, *supra* note 14; Sherry, *supra* note 14.

³¹⁷ Resnik, *supra* note 154. But see Minow, *Interpreting Rights*, *supra* note 134, at 1906-11 (stating that conversation can be silenced or distorted by judicial power and that there is doubt whether judges learn from the exercise).

³¹⁸ Rhode, *No Problem*, *supra* note 296, at 1736. "The law provides a crucial structure in which ideologies of denial are reflected and renegotiated. By looking at how legal decision makers look at gender, we may gain a clearer sense of how social inequalities are discounted, legitimated, and ultimately resisted." *Id.*

³¹⁹ See, e.g., BICKEL, *supra* note 239; CALABRESI, *supra* note 236, at 164-66 (dialogic role); DWORKIN, *supra* note 235; FISS, *Forms of Justice*, *supra* note 186.

the give and take of the existing adjudicatory and deliberation process³²⁰ and of the process of review.³²¹ These opportunities, however, seem impoverished, in part because they are inhibited by the liberal disciplining process discussed above. This process values distance and thus inhibits judges from reaching beyond the boundaries of their elite and privileged world. The conversations envisioned by liberal theorists thus are not the educative exchanges between diverse social equals theoretically anticipated by feminists in their conception of dialogue.³²²

As interpretivists, feminists are often concerned about privileging the authority of one discursive community over another.³²³ Thus although some feminists argue for ensuring that judicial appointments reflect the diversity of society,³²⁴ or that practical reasoning gets taken into account through the work of increasing numbers of women lawyers,³²⁵ feminist theory would seem to challenge the notion that in their work, judges or other professionals drawn from elite surroundings can possess the knowledge available to, or acquire and maintain the perspective of, outsiders. Rather, a more interactive or relational communicative model of adjudication seems to be more consistent with feminist theory.

In light of the dangers of judicial disconnectedness and distance, and the exclusive nature of traditional rationality in liberal jurisprudence identified by feminists, it seems appropriate to consider the practical means of drawing other people into the interpretive project of adjudication in order to take account of different perspectives. A representative jury can perform this role without essentializing³²⁶ a difference, or privileging³²⁷ any position. The jury's ability to interact with the judge and to deliberate can complement the judge's decision-making role, anchoring her authority.³²⁸

³²⁰ See Michelman, *supra* note 119. Practical reasoning is attributed by Michelman to justices of the Supreme Court through practical knowledge, situated judgment, dialogue, and civic friendship. *Id.*

³²¹ *Id.*

³²² See, e.g., Minow, *Interpreting Rights*, *supra* note 134. Literature concerning the public law or structural injunction emphasizes the dialogic possibility of community representatives and their participation which fosters acceptance of decision-making, particularly at the remedial stage. See Sturm, *supra* note 241.

³²³ See, e.g., Minow, *Interpreting Rights*, *supra* note 134.

³²⁴ See, e.g., Resnik, *supra* note 154, at 1928.

³²⁵ Bartlett, *supra* note 286.

³²⁶ See, e.g., Harris, *supra* note 295, at 585 (challenging unitary concept of woman); see also Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988) (reporting a similar challenge).

³²⁷ See Bartlett, *supra* note 286, at 874 & nn.194-95.

³²⁸ Minow, *Interpreting Rights*, *supra* note 134, at 1864.

Juries, properly constructed, can be the means of ensuring that other voices are not only present but contribute to the social construction of truth. The use of representative community participation in decision-making of courts confirms that knowledge is constructed from social contexts and understood through experience and is neither "out there," nor inevitable.³²⁹ It draws from feminist theory the understanding not only that peculiar knowledge is available to political outsiders and is pertinent to adjudication of rights, but also that the interaction of diverse community members promotes social growth for all.³³⁰ In the process of "[sharing]

³²⁹ See Bartlett, *Feminist Method*, *supra* note 286, at 887 (finding central to the concept of positionality the assumption that although partial objectivity is possible, it is transitional, and therefore must be continually subject to the effort to reappraise, deconstruct, and transform). But see Michelman, *supra* note 119, at 23-24. Michelman attributes the quality of practical reasoning to judges and looks to the Supreme Court through practical knowledge, situated judgment, dialogue, and "civic friendship" to engage in what we can understand as self-government. *Id.* For him, although other communities are engaged in interpretive activity, it is only the Court that has the capacity to practice the civically virtuous activity of giving meaning to public values through sustained deliberation and discourse. *Id.*

I envision the jury in its deliberative function and in its interaction with other participants in adjudication to be capable of the practice which Michelman describes, and argue that there is capacity for greater meaning flowing from communication among diverse members of the group. See Aleinikoff, *supra* note 154, at 1066. Compare Daniel Goleman, *Jurors Hear Evidence and Turn It into Stories*, N.Y. TIMES, May 12, 1992, at C1 (offering studies of process of constructing story by jurors and noting that view of police is different for whites than blacks) with Arlene Sheskin, *Trial Court on Trial: Examining Dominant Assumptions*, in COURTS AND JUDGES 95-101 (James A. Cramer ed., 1981) (noting class and racial bias of courtroom actors and that social and class distinctions affect how these actors relate to and make decisions about litigants).

³³⁰ Minow, *Interpreting Rights*, *supra* note 134, at 1911-13. Much of the focus of dialogic theory relating to courts refers to the capacity of judges to communicate among themselves; see *supra* notes 254, 259, 260-61, 270; *infra* notes 348, 350, 358 (discussing Fiss's view of dialogue and Michelman's conception of the Supreme Court engaged in discourse); see Kahn, *supra* note 17, at 28-37, 47-55; Michelman, *supra* note 119, at 60 (challenging Bruce Ackerman's portrayal of the people engaged in civic-minded discourse). Michelman's article centers on the capacity for elites like judges to talk among themselves. This effort to locate the discursive activity in the judicial community is understandable because of the qualities of reason and authority which liberal theory has long recognized. It fails, however, to respond adequately to the feminist concern for inclusion of multiple perspectives. Even the movement for diversity among judges would not fully address that concern because of their elite status and lifestyle. See Resnik, *supra* note 154, at 1934-40; Cain, *supra* note 158, at 1952; see also Minow, *Interpreting Rights*, *supra* note 134, at 1906 (normative dimension of litigants and judges engaged in rights rhetoric; legal discourse creates a shared world within the courtroom).

Some judges have pointed out that they learn from reflecting upon jury decisions. See, e.g., Joiner, *From the Bench*, *supra* note 169, at 146-47. But even their descriptions fail to capture the interactive potential described by interpretivists like Minow. In part, this

normative commitments through conversation,"³³¹ there is sharing of power that has the potential for addressing social and legal subordination.³³² Central to the consideration of whether it is possible to establish such a power-sharing vision of adjudication are the dangers of unbridled and arbitrary exercise of will and the expression of "mere" private interests and prejudices, concerns that led to the modern allocation of power in the judge. Recently constitutional and other legal theorists have concerned themselves with establishing a conception of community which can respond to some of these concerns.

B. *Communitarian Responses*

A "rights-centered" liberal model of adjudication has been criticized as unduly promoting individual autonomy without adequately taking account of the concerns of the community.³³³ Communitarians see citizens as individuals of the state who through dialogue arrive at decisions which reflect their responsibility toward their community. Communitarians argue that liberalism inappropriately exalts the interests of the individual, or interest group, over that of the whole. Communitarian responses, politically connected with both the left and right,³³⁴ offer participatory decision-making models which challenge a lone judge's capacity for defining public values.

Conservative communitarians define the community and its values by the preferences of the majority. Thus although communication among citizens is important, minority group interests which diverge from the majority are to be submerged to benefit the public good.³³⁵ Feminist

may be reflective of the inequalities of the participants and of the overarching need to maintain order, and hierarchy, in the courtroom. *See* Sheskin, *supra* note 329, at 90-101 (arguing that class and social dynamics of trial court environment skew decision-making). A representative model as described below would attempt to take fuller advantage of the opportunities for learning and constructing truth by all the participants in decision-making, when acknowledging the dangers of bias. *See infra* notes 407-40 and accompanying text.

³³¹ Minow, *Interpreting Rights*, *supra* note 134, at 1907.

³³² "Language, accompanying power, enables the powerless to challenge power." *Id.* at 1904.

³³³ West, *supra* note 14, at 61; *see* Sherry, *supra* note 14, at 546 (describing modern paradigm as encompassing a system of abstract rules that recognize both the priority of the individual and the likelihood that diversity will engender dispute; "Rights are the perfect mediating mechanism for a collection of individuals whose aims are essentially in conflict.").

³³⁴ *See* West, *supra* note 14, at 62.

³³⁵ *See* Fred Strasser, *Searching for a Middle Ground*, NAT'L L.J., Feb. 3, 1992, at 1 (noting that communitarians challenge law's injection of its rights language into politics; traditional individual rights supporters view communitarian ideas as "no more than

theory, which rejects the notion of one community, is concerned about the oppression of views or privileging the views of one community over another's perspective. Feminist theory therefore questions the "enforced homogeneity"³³⁶ of a conservative communitarian response because it does not take full measure of the communicative potential of all human beings and thereby duplicates the shortcomings of traditional majoritarian theory.

In contrast are the communitarian ideas of the modern civic or "liberal" republicans whose scholarship proposes to rediscover the meaning of civic republicanism.³³⁷ Not only is the traditional liberal faith in the individual questioned as the foundation of the Constitution but so is the liberal rights model's preoccupation with individual private interests.³³⁸ Republicanism's animating feature is the principle of civic virtue, defined as the "willingness of citizens to subordinate their private interests to the general good."³³⁹ Modern civic republicans have identified in the constitutional framing a kind of classical republican faith in communal life and dialogue to produce shared values of the American society.³⁴⁰

Modern republicans view the cultivation of the public spirit as a principle responsibility of government.³⁴¹ They believe that through deliberation and dialogue the public-spirited collective can identify shared values.³⁴² They therefore reject the traditional liberal belief that the

warmed-over majoritarianism"); cf. Sherry, *supra* note 14, at 555 ("[O]nly where the object of government is to promote individual goods and interests can diverse, idiosyncratic value system be accommodated. . . . [A]n important object of republican government is the structuring of . . . a common value system for citizens and their community.").

³³⁶ Sherry, *supra* note 14, at 614.

³³⁷ Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) [hereinafter Sunstein, *Republican Revival*]; see, e.g., Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986) [hereinafter Sunstein, *Legal Interference*]; Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Michelman, *supra* note 119; see also Ackerman, *supra* note 144 (ascribing to the people self-governing "moments" when they shift from self-interest to practicing civic virtue).

³³⁸ See Sunstein, *Republican Revival*, *supra* note 337; see also West, *supra* note 14, at 53 (criticizing Supreme Court's disavowal of the substantive cornerstone of "legal liberalism" that the Constitution protects nonpositive individual rights against excessive majoritarianism). But see Michelman, *supra* note 119 (focusing on judge's role).

³³⁹ Michelman, *supra* note 119, at 18.

³⁴⁰ *Id.* at 19.

³⁴¹ *Id.* at 21; see also Kahn, *supra* note 17, at 28-37 (offering critique of Michelman's analysis).

³⁴² The shared values are ones for the good of the whole, not for the well-being of others, nor even for the aggregate of all individual members' well being. See, e.g., Sunstein, *Republican Revival*, *supra* note 337, at 1539.

legislature or other citizen representatives can only make decisions reflecting selfish group interests rather than the common good.³⁴³ “[R]epublicanism finds its primary purpose to be the definition of community values and the creation of public and private virtue necessary for societal achievement of those values.”³⁴⁴

Pertinently, modern civic republicans attempt to distinguish the modern version of the republican tradition from the classical one which was built upon a model of citizen-government by an elite, anti-egalitarian, property-owning, homogeneous and closely connected social community.³⁴⁵ The modern deliberative potential is found in practical reasoning which can be used to settle social issues about which members of our multi-cultural society differ.³⁴⁶

Modern republicanism purports to be built upon the idea that even in multicultural society, public good can be defined through exchanges by politically responsible, equally participating and communicating citizens who can achieve consensus.³⁴⁷ Yet for most republicans, the public role of the civic-minded citizen-representatives is distinguishable from the

³⁴³ *Id.* at 1544.

³⁴⁴ Sherry, *supra* note 14, at 551. Compare, e.g., Sunstein, *Republican Revival*, *supra* note 337, at 1546 with Michelman, *supra* note 119, at 4 and Michelman, *supra* note 337, at 1531. Cass R. Sunstein believes that this virtue is obtainable by a deliberative, participatory process of politics. Sunstein, *Republican Revival*, *supra* note 337, at 1546-47. For Michelman, at least in his initial republican work, judges are the citizens who engage in the sustained activity of deliberation and dialogue which leads to the articulation and enforcement of shared values. Michelman, *supra* note 337, at 1525.

³⁴⁵ Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988); Michael Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651 (1988); Sherry, *supra* note 14, at 555-56; see also YOUNG, *supra* note 15, at 12 (politics of difference, particularly group representation, promotes equality); Guinier, *Black Electoral Success*, *supra* note 213, at 1092-93 (questioning capacity for deliberation without equality of participants). The classical model is of an “aristocracy of talent, for whom the tasks of government should, in everyone’s interest, be reserved.” Michelman, *supra* note 119, at 20. The classical justification is that persons not economically independent or secure cannot be trusted to set the public good above their own immediate needs or to make honest deliberative judgment against wishes of patrons. *Id.*; see Kahn, *supra* note 17, at 82 (noting the problem that sustained deliberation for the public good interferes with the private attainment of interests by citizens). A jury’s transient nature would seem to address this problem. See *supra* notes 138-46 and accompanying text.

³⁴⁶ Sunstein, *Republican Revival*, *supra* note 337, at 1554-55; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-32 (1985-86) [hereinafter Sunstein, *Interest Groups*].

³⁴⁷ See *supra* note 345.

mundane private activity of individuals struggling to survive in a multicultural society.³⁴⁸

Modern republicans believe that the articulation of values and transcendence of self-interest is possible if the process provides for deliberation and dialogue among a civically-motivated group of citizens. An essential problem for modern republicans, however, is where to locate this community of discourse,³⁴⁹ among judges in the courts,³⁵⁰ among political representatives in the legislature,³⁵¹ or among the people.³⁵² For feminists and others who believe in the truth-seeking potential and interpretive enterprise of exploring differences, it becomes important for the discursive activity to be carried on not in one privileged community but in many discursive communities.³⁵³ Locating the discursive activity in an elite community of judges or legislators does not adequately respond to the feminist concern about inclusive decision-making and the danger of subordinating outsider views; in fact, it seems to substantiate the claim that the modern civic republicans are elitist, like the classic republicans.³⁵⁴

³⁴⁸ Both Ackerman and Michelman talk concretely about a dialogic role of people in their private lives but for neither is the generation of public values by the people a sustained enterprise. See *supra* notes 330, 338; Michelman, *supra* note 119, at 19.

³⁴⁹ See Kahn, *supra* note 17, at 6, 37-39 (Michelman has a republican court controlling a nonrepublican legislature; Sunstein has a republican legislature facing a nonrepublican court).

³⁵⁰ "[T]he courts, and especially the Supreme Court, seem to take on as one of their ascribed functions the modeling of active self-government that citizens find practically beyond reach." Michelman, *supra* note 119, at 74; see also Fiss, *Forms of Justice*, *supra* note 186, at 13 (noting the dialogic capacity of judges); cf. Michelman, *supra* note 337, at 1529. Unlike Sunstein, and more like Ackerman, Michelman focuses on "the practice of dialogic self-government . . . [which] appears in . . . constitutional practice," but he locates civic engagement in the judiciary. Michelman, *supra* note 119, at 60. He concludes:

[W]e do not write the story unless we happen to be justices. It is they who are finally envisioned as the active practical reasoners and ethical self-governors. The Court at the last appears not as *representative* of the People's declared will but as *representation* and trace of the People's absent self-government.

Id. at 65.

³⁵¹ Sunstein, *Republican Revival*, *supra* note 337, at 1558-60; Sunstein, *Interest Groups*, *supra* note 346, at 41.

³⁵² Ackerman, *supra* note 144.

³⁵³ See, e.g., Minow, *Interpreting Rights*, *supra* note 134, at 1862.

³⁵⁴ See, e.g., Fitts, *supra* note 345, at 1660. Even Sunstein's identification of the legislature as the dialogic community is problematic since his theory of political decision-making depends at once on judicial deference to the political decision-making and on assuring representation and a process for assuring deliberation. Without a reconception of political equality, skepticism remains about whether women, blacks, and other traditional

Civic responsibility entails understanding that in their public deliberation, citizens are "responsible to and for the community."³⁵⁵ That understanding is created through dialogue and deliberation but is made possible because of the capacity of citizens to sympathize with other community members and to feel morally responsible for the social circumstances of others because they make choices which affect citizens. The practical reasoning described by feminists can be of importance here. Through the sharing of their own experiences, representatives of communities can both explore differences and arrive at commonalities through communal talk, and thus "through discourse [the] common values are revealed and maintained."³⁵⁶

Republican theory is attractive because it presses us to imagine a process for community participation in which dialogue helps to mold individual or group values as well as values for the community.³⁵⁷ The republicanism revival, however, seems not to have survived criticism that only elite members of society can have membership in the envisioned self-governing community because only they are capable of engaging in sustained and reasoned, self-constitutive dialogue.³⁵⁸

outsiders will be included or continue to be outside the community of decision-makers. Bell & Bansal, *supra* note 345, at 1613.

³⁵⁵ West, *supra* note 14, at 91.

³⁵⁶ Kahn, *supra* note 17, at 3.

³⁵⁷ *Id.* at 37.

³⁵⁸ See Fitts, *supra* note 345, at 1652; Kahn, *supra* note 17, at 37. Bruce Ackerman, among the scholars associated with the modern republican scholars, does acknowledge a role for "the people" during "constitutional moments" in history. See Kahn, *supra* note 17, at 27 & n.117. He distinguishes those momentary self-governing activities from other times when the people are engaged in normal, self-interested politics. *Id.* Michelman, in contrast, locates the meaning-giving dialogic enterprise in the community of members of the Supreme Court. See Michelman, *supra* note 119, at 20. He, like others, criticizes Ackerman's romantic conception of the people rising to the constitutional occasions and finds no way of distinguishing the moments when the people shift their attention from self-interest to civic virtue. *Id.* at 62. The criticism that sustained practice of civic virtue seems unrealistic for "the people," as a normal course of life seems well taken, but the occasional practice of individuals acting as civically responsible jurors would not be unrealistic. The problem remains of ensuring that citizens in their capacity as jurors do exercise that virtuous stand. I argue that in addition to procedures which affirm the power-sharing relationship of judge and jury decision-making, procedures that foster authentic representation of groups and procedures which provoke, not submerge, a consciousness of difference, combined with greater interaction with the professionals, would help. See also Kahn, *supra* note 17, at 17, 37 (noting Ackerman's republican politics and Michelman's republican court); BICKEL, *supra* note 244, at 25-26 (stating "[j]udges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.").

And yet why is this so? I imagine the jury as an institution capable of providing the opportunity for self-government to the broadest segment of our multicultural society. The jury can become an institutional model of community that mediates the conflict between the traditionally privileged authority of legal reason and the majoritarian-focused expression of popular will. The device of the jury can bring citizens together to define values through dialogue. The dialogue of a representative jury can press citizens to more fully accept responsibility for their decision-making, provided that there are procedures which not only ensure that its members represent identified groups within the community but that in its dialogue and deliberation, the jury confronts the social consequences of human differences.³⁵⁹

VI. A RECONCEIVED MODEL OF JURY DECISION-MAKING

More meaningful citizen participation in adjudication, through a restructuring of the jury function, should emphasize the need for authentic representation,³⁶⁰ meaningful communication, and deliberative accountability. This conception acknowledges the limitations of a lone decision-maker and holds some confidence in the human capacity for interchange which can contribute to the social construction of truth both at trial and within the collective.³⁶¹ Significantly, it recognizes a public stake in the

³⁵⁹ The juror's responsibility for his fellow citizen, and responsibility to reach the morally right decision, is precisely what defines the juror as citizen; it is central rather than peripheral to his humanity and his social being. In turn, the juror's capacity for empathy and sympathy, far from being distractions from principled, rational, objective moral decision making . . . is precisely what enables morality. That capacity gives the juror a stake in the affairs of others and makes him care about the consequences of his decision. The juror's capacity, . . . and his responsibility for the outcome are all necessary contributions, rather than impediments to the vitality of a liberal, participatory, and non-apathetic society.

West, *supra* note 14, at 91.

³⁶⁰ Representation here does not take its meaning from an electoral model in the sense that the juror acts as agent on behalf of her constituent group. Rather, the juror's representative status has symbolic meaning, relating to the cultural and social connections which she experiences. See Aleinikoff, *supra* note 154, at 1083 n.106 (stating that group-consciousness not intended as suppressing the diversity within groups); Trina Grillo & Stephanie Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -isms)*, 1991 DUKE L.J. 397 (explaining intersectionality of racism and sexism); cf. HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* (1967).

³⁶¹ Research concerning small group deliberation suggests that a theoretical ability to effectuate meaningful exchange among a diverse group can be compromised by prejudice and unfair influence of individuals holding majority viewpoints. See, e.g., KALVEN & ZEISEL, *supra* note 3, at 462 (arguing that substantial representation of minority viewpoint is necessary at beginning of deliberation in order to be influential); SAUL M. KASSIN &

decision-making process and assumes that because that stake is shared by all citizens, measures to increase participation are warranted.³⁶² It looks to increase the participation of those who have some stake by taking affirmative steps to effectuate the representativeness aspiration by identifying appropriate procedures that promote the values of deliberation and dialogue.³⁶³ The promotion of these values entails some effort to foster

LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 197 (1988) (stating that the presence of an ally can determine whether minorities withstand pressure). Although it seems clear from empirical data which exists about juries and small group decision-making that token representation leads to the diminished influence of minority viewpoints, there is less clarity about whether the influence is affected by relative or absolute size of minority representation. Compare KALVEN & ZEISEL, *supra* note 3 and KASSIN & WRIGHTSMAN, *supra* with, e.g., Rosabeth Kanter, *Some Effects of Proportion on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965 (1977) (stating that proportions are critical in shaping interaction); Solomon E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in READINGS IN SOCIAL PSYCHOLOGY 2 (G. Swanson et al. eds., 1952) (relative size).

Empirical data do seem to suggest that prejudice breeds lack of cooperation and disproportionate influence of majority group members because of perceived superiority—by them and perhaps, by the minorities. KASSIN & WRIGHTSMAN, *supra*, at 179. From that data, certain significant environmental factors emerge: (1) minorities need allies; token representation defeats the capacity for influence or meaningful participation in the exchange; and (2) effective deliberation is not fostered in majority-rule settings. See, e.g., REID HASTIE ET AL., *INSIDE THE JURY* 229-30 (1983); KASSIN & WRIGHTSMAN, *supra*, at 203-04; Charlan Nemeth, *Interaction Between Jurors as a Function of Majority v. Unanimity Decision Rule*, 7 J. APPLIED SOC. PSYCHOL. 38 (1977); see also *Apodaca v. Oregon*, 406 U.S. 404, 412-14 (1970) (stating that minority group representation on a jury may simply be outvoted).

For a collection of authorities concerning effects on the deliberation ideal in the context of the issue of effectuating effective black representation in local politics, see Guinier, *Black Electoral Success*, *supra* note 213, at 1116-23; see also DAVID KAIRYS, *THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE* 31-40 (1975) (offering concrete proposals).

³⁶² It could be argued of course that the public's interest extends beyond the citizens to all members of society. In part, the difficulty of defining the members of society who should participate is that there is no one community—unless it is the political community—envisioned when we speak of “the public.” I have attempted to argue that a reason for making the case for increased participation is that “the public” has some stake in the resolution of even private disputes that benefit from the use of public resources and for which courts have through the application of law identified controlling public values. I have used “citizen” to connote those members of society who are likely to benefit—or lose—from the identification of those values.

³⁶³ This conception of legal decision-making responsibility avoids identifying an elite governing entity and imposing on ordinary citizens the “authoritarian, external rule.” Kahn, *supra* note 17, at 40. Although the Supreme Court has in the context of considering the state action requirement of a fourteenth amendment peremptory challenge noted the

equality among participants in order to ensure their willingness to share information and to engage in good faith interaction.³⁶⁴ Ultimately, this conception imagines the possibility of integrating reason and will: the possibility of “the ability of reason to persuade and of will to be persuaded”³⁶⁵ through a more meaningful sharing of decision-making power by judge and jury.³⁶⁶

This proposal attempts to provide a “reconciliation of the modern and classic paradigms in adjudication.”³⁶⁷ I have argued that a richer community conception is possible and can better effectuate justice than is possible under the present rights-centered liberal model of adjudication. This argument is based on the premise that community participation in decision-making by itself has value,³⁶⁸ a premise that the feminist and communitarian critiques of the liberal model of adjudication support. I have also argued that the history of juries and the rise in power of the trial judge reflects a tendency to marginalize the citizen’s role in the resolution of public disputes which should be reconsidered. In this section I shall

important role that citizens play in the civil trial and commented on the necessity for public confidence in the system, it has not focused on the value of dialogue or described what is meaningful participation in decision-making as a part of the seventh amendment right. *See* *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085-87 (1991).

³⁶⁴ This discussion centers on the promotion of these values in the jury context itself and is not concerned with external considerations of how these values can be fostered further. For example, meaningful communication could be enhanced by providing better education for citizens generally, but that is a matter outside the purview of this Article. Earlier, however, I referred to the benefits of informing the jury about its decision-making role and about its relationship to other participants as a relevant educational consideration because it provides a means of more fully engaging jurors in their particular meaning-giving enterprise. *See supra* notes 174-78, 188-91 and accompanying text.

³⁶⁵ Kahn, *supra* note 17, at 9.

³⁶⁶ For discussions of courts as having a representative role in a democracy, see Kahn, *supra* note 17, at 23; Fiss, *Forms of Justice*, *supra* note 186, at 2; *supra* notes 187-91 and accompanying text.

³⁶⁷ Sherry, *supra* note 14, at 589. It avoids the problem of freeing the elite governing entity while imposing on ordinary citizens authoritarian external rule. Kahn, *supra* note 17, at 40.

³⁶⁸ I subscribe to the view that there is intrinsic value in attempting to achieve full membership in the decision-making community. *See supra* notes 157-60, 360-67; *see also* Sherry, *supra* note 14, at 594-601 (tracking Justice O’Connor’s concern for outsiders from the political community membership in cases like *Lynch v. Donnelly*, 465 U.S. 668, 688 (O’Connor, J., concurring) (sending a message that outsiders are full members of the political community)). *But see* Aleinikoff, *supra* note 154, at 1078 (discussing Justice O’Connor’s position in affirmative action cases).

I also agree with the notion that “[p]ositive freedom cannot be achieved by compliance with a set of authoritative rules, even if they emerge from someone else’s dialogue.” Kahn, *supra* note 17, at 33.

consider whether some of the acknowledged dangers of participation—self-interest, prejudice, and parochialism of the members of the jury—can be addressed through this reconceived model.³⁶⁹

A. *Authentic Representation*

As critical race theory scholars have emphasized, in our multicultural society no alternative for decision-making can provide the basis for meaningful exchange without a reconceptualization of political and social equality, fostering respect.³⁷⁰ The requirement of representativeness in this reconceived model of adjudication responds to the need for individuals to see others as social and political equals and responds to the desirability of proportional power in decision-making. This requirement, however, is not primarily focused upon achieving popular consent to the decision-making by courts, although I believe that participation of citizens can ground the authority of adjudication in a manner not possible under the present model.³⁷¹

The significance of a requirement of representativeness lies in promoting the interpretive capacity of individual jurors in deliberation and through communication with judges and other legal professionals. An emphasis on representativeness in participation can respond to the problem of unchecked power by the judge and the danger of group-focused

³⁶⁹ I believe that the possibility for more meaningful decision-making participation is possible but that there has been insufficient study of how small groups and in particular juries deliberate. Much of the data concerning juries were developed at earlier times in our history and are in conflict. See, e.g., Cookie Stephan, *Selective Characteristics of Jurors and Litigants: Their Influences on Juries' Verdicts*, in *THE JURY SYSTEM*, *supra* note 3, at 97, 115; Sarah McCabe, *Is Jury Research Dead?*, in *THE JURY UNDER ATTACK*, *supra* note 110, at 27; see *supra* notes 121-35 and accompanying text. Data about gender and difference are limited and contradictory. See *supra* notes 361, 369; KALVEN & ZEISEL, *supra* note 3, at 195; Stephan, *supra*, at 105-09, 113-15; Edmond Costantini et al., *Gender and Juror Partiality: Are Women More Likely to Prejudge Guilt?*, 67 *JUDICATURE* 120, 122, 126-27 (1983-84). Most importantly, legal analysis of the social science data is undeveloped. See Guinier, *Black Electoral Success*, *supra* note 213, at 1120 n.202.

³⁷⁰ See Guinier, *Black Electoral Success*, *supra* note 213; Guinier, *No Two Seats*, *supra* note 16; Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 *STAN. L. REV.* 1 (1991); Gary Peller, *Race Consciousness*, 1990 *DUKE L.J.* 758; see also Aleinikoff, *supra* note 154, at 1109 ("First, whites must see blacks in positions of power, authority, and responsibility . . . [s]econd, whites must begin to recognize and credit self-definition by subordinated groups.").

³⁷¹ See Kahn, *supra* note 17, at 9-18 (1989) (challenging Bickel's focus on lack of consent in adjudication as reflective of the counter-majoritarian difficulty); *id.* at 23-24 (arguing that it is not universalism of participation and assent, but quality of political life that distinguishes constitutional from mundane politics).

prejudice by making better use of the social and intellectual processes by which individuals and groups engage in meaningful exchange of ideas, deliberate, and achieve consensus.³⁷² To address the problems of self-interest, parochialism, and prejudice, however, this model must take account of how difference is presently devalued as well as how valuing difference—through a focus on representativeness—can avoid such problems. In this section, I consider present factors that constrict and constrain voices from being heard and make some suggestions about how those restrictions can be alleviated, and dialogue promoted.

1. *The Fair and Impartial Jury Requirement*

Both in civil as well as criminal cases where the controversy relates to jury selection, impartiality has been a concern.³⁷³ The Supreme Court has not recognized a fundamental requirement of a representative jury,³⁷⁴ although there is language in Supreme Court cases defining a right to trial

³⁷² See, e.g., Minow, *Interpreting Rights*, *supra* note 134, at 1862 (discussing interpretive enterprise of communities); Aleinikoff, *supra* note 154, at 1061 (critiquing color-blind and offering color-conscious political strategy for justice). The issue of how and whether diverse groups working in an informal and fairly intimate environment can engage in meaningful deliberation and reach consensus deserves more study, but data suggest that minority influence will be compromised in some environments. See *supra* notes 361, 369.

³⁷³ Although the Sixth Amendment speaks of impartiality in its language, the Seventh Amendment does not. The concept of fairness and impartiality, however, has been seen as implicit in the concept of a jury. Compare *Batson v. Kentucky*, 476 U.S. 79 (1986) with *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991). In *Batson*, the Court located in the Fourteenth Amendment three pertinent bases for disallowing racially-based peremptories: (1) the right of the defendant “to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria”; (2) the right of a member of the community not to be assumed incompetent for and be excluded from jury service on account of his race; and (3) the need to preserve “public confidence in the fairness of our system of justice.” *Batson*, 476 U.S. at 85-87; see also *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (stating that representative charter of the jury must be maintained to guarantee “diffused impartiality”; participation is critical to public confidence). The Supreme Court has extended the *Batson* rule to gender-based peremptory challenges in *J.E.B. v. T.B.*, 1994 WL 132232 (U.S. Apr. 19, 1994); see also *Pemberthy v. Beyer*, Nos. 92-5633, 92-5641, 1994 U.S. App. Lexis 4603 (3d Cir. 1994) (equal protection does not prohibit trial attorney from peremptorily challenging potential jurors because of Spanish-speaking ability despite correlation between Spanish-speaking and Latino ancestry).

³⁷⁴ See, e.g., *Peters v. Kiff*, 407 U.S. 493 (1972). In the federal system, Congress has established the qualifications for jury service and the procedures for selection, requiring each district to adopt a plan for locating and summoning eligible jurors to the court. See 28 U.S.C. §§ 1863-1865 (1982). The plan must implement statutory policies of random juror selection from a fair cross-section of the community. 28 U.S.C. § 1861 (1982).

by an impartial jury which suggests that representativeness is of some concern.³⁷⁵ In cases where impartiality of the jury has been questioned in the context of a criminal prosecution, the Court has said that the Sixth Amendment requires a "fair and undistorted chance" that the petit jury "represent a fair cross-section of the community . . . [but] not that the possibility will ripen into actuality."³⁷⁶

In a few Supreme Court cases and decisions by some state courts,³⁷⁷ the cross-sectionality of venire members has been a concern. The Sixth

³⁷⁵ See *Duren v. Missouri*, 439 U.S. 357, 362 (1979); *Taylor*, 419 U.S. at 530; *Williams v. Florida*, 399 U.S. 78, 100 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 157 (1968).

Taylor has been interpreted as implying that "the rationale behind [the] representative cross-section rule suggests that an impartial jury is one in which group biases have the opportunity to interact." Comment, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1733 (1977). This approach has been criticized by some commentators. See, e.g., James M. Druff, Note, *The Cross-section Requirement and Jury Impartiality*, 73 CAL. L. REV. 1555, 1585 (1985).

In *Batson*, the Court observed:

[T]hough the Sixth Amendment guarantees that the petit jury will be selected from a pool of names representing a cross section of the community, *Taylor v. Louisiana* . . . , we have never held that the Sixth Amendment requires that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." . . . Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such impossibility is illustrated by the Court's holding that a jury of six persons is not unconstitutional.

Batson, 476 U.S. at 85 n.6.

³⁷⁶ *McCray v. Abrams*, 750 F.2d 1113, 1128-29 (1984). In *Duren*, 439 U.S. at 357, the Court said that at the venire member selection stage—in contrast with the petit jury selection stage—the representation of "cognizable groups" is required to be "fair and reasonable in relation to the number of such persons in the community." *Id.* at 364. This requirement is concerned with the recognized constitutional requirement of randomness which is designed to prevent a systematic scheme leaving the defendant vulnerable to the state. In *Akins v. Texas*, 325 U.S. 398 (1945), the Court stated that by compromising the representative quality of the jury, discriminatory selection procedures "make juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities." *Id.* at 408. Yet the Court concluded, "The number of our races and nationalities stands in the way of evolution of such a conception" of a right to have the petit jury be composed in whole or in part of persons of his own race pursuant to the Fourteenth Amendment. *Id.*; see *Batson*, 476 U.S. at 85 & n.6 (1986) (stating that the Sixth Amendment guarantees petit jury will be selected from a pool of names representing a cross-section but not that petit jury "actually chosen must mirror the community and reflect the various distinctive groups in the population") (citing *Taylor* 419 U.S. at 538).

³⁷⁷ See, e.g., *Taylor*, 419 U.S. at 522; *Peters v. Kiff*, 407 U.S. 493 (1972); *United States v. Guzman*, 337 F. Supp. 140 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 1245 (2d Cir. 1972); *People v. Wheeler*, 583 P.2d 748 (Cal. 1978).

Amendment, however, has not been read to require any action to assure that the representative character of the venire is carried over to the petit jury; the Constitution has been read as simply prohibiting the systematic elimination of the possibility of such a carry-over.³⁷⁸ Similarly, neither the fourteenth amendment equal protection right of the criminal defendant, the civil litigant, nor the citizen's interest³⁷⁹ in participating in the administration of justice recognized in the Fourteenth Amendment, has led the Court primarily to value representativeness at either the venire member selection stage or the voir dire stage, except as a means of achieving impartiality.³⁸⁰ And even that aspiration has been compromised at the voir dire stage.³⁸¹

³⁷⁸ *Batson*, 476 U.S. at 79 n.6; see *Swain v. Alabama*, 380 U.S. 202, 209 n.5 (1966). Not even a challenge based on group affiliation would compromise fairness since all groups are subject to similar challenge. *Id.* at 221. Only when it can be shown that the peremptories are used to a group's disadvantage over a significant period of time will a particular discrepancy be held to reflect a systematic flaw and therefore be considered impermissible. *Id.* at 224. The effect of *Swain*'s standard is that to show a denial of right and opportunity to participate in the administration of justice, a challenger must show that peremptory challenges have disqualified a cognizable group in case after case; virtually no cases were successful in mounting the requisite proof of systemic discrimination and surviving a response by the challenged respondent. See *McCray*, 750 F.2d at 1120 n.2 (citing examples of the courts refusing to acknowledge improprieties in government use of peremptory challenges to remove large numbers of black jurors).

³⁷⁹ See *Kiff*, 407 U.S. at 493 (allowing defendant to bring a fourteenth amendment action to protest exclusion of any cognizable group in selection procedures).

³⁸⁰ See 28 U.S.C. § 1861 (1982) ("[L]itigants . . . have the right to . . . petit juries selected at random from a fair cross section of the community . . ."). Most of the cases dealing with the "fair cross section requirement" arise in the criminal context. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (recognizing that a defendant's right to a jury reflecting general demographic patterns was extended in *Taylor*, 419 U.S. at 522, in which the Supreme Court declared that a defendant has a fundamental interest to have present in venires, panels, or lists from which petit juries are drawn, a fair cross-section of the community); see also *Ballard v. United States*, 329 U.S. 187 (1946) (reversing conviction where all-male jury reflected systematic exclusion of women); *Glasser v. United States*, 315 U.S. 60, 85-86 (1942) (stating that jury cannot be an organ of any special group or class); *Smith v. Texas*, 311 U.S. 128, 130 (1940) (holding that state policy systematically excluding blacks from jury service violates equal protection of Fourteenth Amendment because the resulting jury is not a body truly representative of the community).

³⁸¹ See *Akins v. Texas*, 325 U.S. 398, 403 (1945) (reasoning that "[t]he number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal protection); *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880) (recognizing that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race"). The Court has concluded that the defendant has a right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. *Batson*, 476 U.S. at 79 (citing *Martin v. Texas*, 200 U.S. 316, 321 (1906); *Ex Parte Virginia*, 100 U.S. 339, 345 (1880)). But even in the cases that have relaxed the proof

*Batson v. Kentucky*³⁸² loosened the requirements of proof of a systematic elimination of a "cognizable group"³⁸³ necessary in a fourteenth amendment challenge of a prosecutor's use of peremptories. In *Batson*, neither cross-sectionality nor even petit jury impartiality was characterized as a fundamental value. Rather, the harm to the jurors and the larger community flowing from the use of peremptory challenges targeting blacks was that a person's race simply "is unrelated to his fitness as a juror,"³⁸⁴ and purposeful exclusion of blacks "undermine[s] public confidence in the fairness of our system of justice."³⁸⁵

The significance of this reluctance to speak in terms of cross-sectionality or representativeness may be underscored by the fact that the Court in *Batson* chose to reconsider *Swain v. Alabama*,³⁸⁶ a fourteenth amendment case, rather than to rely on the sixth amendment arguments briefed by the *Batson* parties in the challenge of racially focused peremptories.³⁸⁷ The Court based its ruling on the necessity of eradicating purposeful racial discrimination in the selection of the jury and concluded

required to show that peremptory challenges are discriminatory and therefore violate equal protection, the courts have reaffirmed that the prosecutor or party litigant can respond to a challenge of his peremptory exercise with non racial-based reasons for the challenge. See Druff, *supra* note 375 (noting a preference for peremptory challenges due to procedural heritage reflected in mere requirement that prosecutor offer any race-neutral ground). See *Pemberthy v. Beyer*, Nos. 92-5633, 92-5641, 1994 U.S. App. Lexis 4603 (3d Cir. 1994). Refusing the challenge in a habeas proceeding, the Third Circuit Court of Appeals nevertheless provided some guidelines for trial courts to consider whether the requisite "race-neutral" ground for excluding Spanish language speakers exists. *Id.*

³⁸² 476 U.S. 79 (1986).

³⁸³ A cognizable group, according to the Supreme Court, can be one singled out for distinctive treatment in the past, *Hoyt v. Florida*, 368 U.S. 57, 60 (1961), or one which "displays distinctive qualities of human nature and varieties of human experience," or has unique perspective on events. *Peters v. Kiff*, 407 U.S. 493, 503 (1972). YOUNG, *supra* note 15, at 29 (noting that in a participatory democracy, social and racial groups can be distinguished from interest groups).

³⁸⁴ *Batson*, 476 U.S. at 87 (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)); see also *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (condemning race stereotypes); cf. YOUNG, *supra* note 15, at 156-91 (defining the need for acknowledging differences and social and racial group identities); Aleinikoff, *supra* note 154, at 1072-1195 (comparing strategies of colorblindness and color-consciousness in a color-conscious world).

³⁸⁵ *Batson*, 476 U.S. at 87.

³⁸⁶ 380 U.S. 202 (1966).

³⁸⁷ See *Batson*, 476 U.S. at 109 (Stevens, J., concurring); *id.* at 112 (Burger & Rehnquist, JJ., dissenting). But see *Holland v. Illinois*, 493 U.S. 474 (1990) (Sixth Amendment did not restrict the exclusion of a racial group at the peremptory challenge stage); *Powers v. Ohio*, 499 U.S. 400 (1991) (deciding that a racial exclusion challenge could be made on equal protection grounds).

that a racially motivated challenge of a venire member violated a defendant's right to equal protection because it denied him the protection that a trial by jury is intended to secure.³⁸⁸ For the criminal defendant, the *Batson* Court said that the protection the Constitution secures is to have a venire "indifferently chosen,"³⁸⁹ and free of racially motivated arbitrary exercise of power by the prosecutor and judge.³⁹⁰

A concept of representative participation of citizens is only weakly reflected in *Batson* through the reaffirmation of a randomness requirement at the venire membership selection stage; at the petit jury selection stage, however, randomness remains susceptible to compromise, subject to the discretion of the judge.³⁹¹ Yet, as Justice Marshall observed in his concurrence in *Batson*, arbitrary striking of venire members through peremptories offends the interest in diversity in the jury.³⁹² It seems somewhat ironic that in its effort to respond to the "principle of governmental non-oppression" which Justice White identified in *Duncan v. Louisiana*³⁹³ as underlying the right to trial by jury, the Court decided to preserve most peremptory challenges and to increase judicial control over the jury composition.³⁹⁴

³⁸⁸ *Batson*, 476 U.S. at 86 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880): "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.").

³⁸⁹ *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *349-50 (Thomas M. Cooley ed., 1899)).

³⁹⁰ *Batson*, 476 U.S. at 86.

³⁹¹ Under the approach in *Batson*, counsel must offer some race-neutral response to a peremptory challenge. See *id.* at 106. (Marshall, J., concurring).

³⁹² *Id.* at 105 (Marshall, J., concurring). See *Conner v. Robinson*, 415 N.E.2d 805, 809-10 (Mass. 1981); *People v. Rousseau*, 129 Cal. App. 3d 526, 536-37 (Cal. Ct. App. 1982) (noting cases demonstrating the ability of peremptory challenges to evade anti-race discriminatory directive); *supra* note 381.

A preferable approach is to abolish peremptory challenges and to focus on fostering authentic representation. An individual juror who evidences a predisposition favoring a party can be excused for cause. Impartiality in the sense of openness to the exchange of views—though not necessarily indifference—is best otherwise accomplished by assuring that the venire members authentically represent the society. See Nicholas Blake, *The Case for the Jury*, in *THE JURY UNDER ATTACK*, *supra* note 110, at 140, 154-59 (recounting British criminal trial experience).

³⁹³ 391 U.S. 145 (1968).

³⁹⁴ Cf. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1978) (Rehnquist, J., dissenting) (stating that right of trial by jury is "too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary").

Nor have cases following *Batson*, including *Edmonson v. Leesville Concrete Co.*,³⁹⁵ a civil case challenging a private litigant's use of peremptories to exclude jurors on account of race,³⁹⁶ moved beyond the *Batson* equal protection analysis.³⁹⁷ While the Court has been willing to reject the use of peremptory challenges for purposeful discrimination in the petit jury selection stage in a variety of cases, its disposition does not affirmatively support cross-sectionality or representativeness as a means of achieving a fair and impartial jury. Even the interest in impartiality is seen as subject to some accommodation of other procedural customs found within that system,³⁹⁸ including the common-law tradition of peremptory challenges.³⁹⁹ Although impartiality in the sense of unimpeded participation of diverse citizens in government continues to be part of the rhetoric of cases,⁴⁰⁰ decisions reflect greater interest in procedures which ensure indifference and detachment of the jurors,⁴⁰¹ than in an ideal of representa-

³⁹⁵ 111 S. Ct. 2077 (1991). The Court rejected the lower court's reasoning en banc that there was not the requisite state action in a private litigant's use of peremptory challenges, concluding that "[i]f a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race-neutrality." *Id.* at 2085. See *Terry v. Adams*, 345 U.S. 461 (1953) (plurality) (stating that the machinery for choosing officials becomes subject to the Constitution's constraints). The Court made only passing reference to the Seventh Amendment, noting that the Constitution commits the trial of facts to jury. *Edmonson*, 111 S. Ct. at 2085.

³⁹⁶ See *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (holding that equal protection clause prohibits defendant from engaging in purposeful discrimination through exercise of peremptory challenges); *Powers v. Ohio*, 499 U.S. 400 (1991) (stating that criminal defendant may object to race-based exclusion of jurors through exercise of peremptory challenges whether or not defendant and excluded jurors share same race).

³⁹⁷ See *Edmonson*, 111 S. Ct. at 2080 (holding that private litigant in civil case may not use peremptory challenges to exclude jurors on account of race because of impropriety of racial bias in the courtroom); *Powers*, 499 U.S. at 400 (holding that criminal defendant regardless of his or her race may object to a prosecutor's race-based exclusion of persons from the petit jury). In *Edmonson*, the Court emphasized that "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." *Edmonson*, 111 S. Ct. at 2087; see *supra* note 373.

³⁹⁸ See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

³⁹⁹ See *Edmonson*, 111 S. Ct. at 2093 (O'Connor, J., dissenting) ("[T]here are peremptory challenges, and always have been."); *Holland v. Illinois*, 493 U.S. 474, 481 (1990); *Batson*, 476 U.S. at 98-99.

⁴⁰⁰ See *Edmonson*, 111 S. Ct. at 2088.

⁴⁰¹ See *United States v. Wood*, 299 U.S. 123 (1936) (stating "mental attitude of appropriate indifference"); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) ("Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case.").

tive citizens participating in the construction of justice.⁴⁰² The Court's ambivalence about representativeness of juries even when it purports to focus on impartiality suggests that other interests animate the Court's disposition. First is the Court's preference for a process-based response to challenges concerning adjudication rather than identification of principles or values related to that decision-making alternative.⁴⁰³ Second is the Court's overriding concern about neutrality or indifference rather than perspective,⁴⁰⁴ in part a product of the color-blind posture which is now imbedded in fourteenth amendment rhetoric.⁴⁰⁵ There is real skepticism

⁴⁰² In *Holland*, 493 U.S. at 477, the majority treated impartiality as the sole end of a fair cross-section requirement. See Druff, *supra* note 375 (discussing sixth amendment and fourteenth amendment criminal guarantees).

In *Peters v. Kiff*, 407 U.S. 493 (1972), the Court held that the systematic exclusion of any cognizable group is objectionable because it excludes a "perspective on human events that may have unsuspected importance in a jury's decision." *Id.* at 503-04. In *Taylor v. Louisiana*, 419 U.S. 522 (1975), this conception was cast as a procedural condition: impartiality of juries—but not jurors—is unobtainable in an unrepresentative body. *Id.* at 529 n.7. The Court's rulings on peremptory challenges and the requirement of impartiality of jurors distorts and sometimes destroys the meaning of the cross-section principle in the interest of juror impartiality. *Id.* See Druff, *supra* note 375, at 1558 n.11; cf. *Edmonson*, 111 S. Ct. at 2095 (Scalia, J., dissenting) ("Both sides have peremptory challenges, and they are sometimes used to *assure* rather than to *prevent* a racially diverse jury."). Compare *Rubio v. Superior Court*, 593 P.2d 595 (Cal. 1979) (using a dual prong standard requiring not only that group share a common perspective but that only members of the group can represent this perspective) with *id.* at 603 n.1 (Tobriner, J., dissenting) (majority's exclusion of ex-felons and resident aliens from jury service based on view that exclusion of a group does not violate Constitution unless it is shown no other group adequately represents its perspective has no basis).

⁴⁰³ See Druff, *supra* note 375, at 1592 (discussing the Court's focus on procedural heritage of adjudication).

⁴⁰⁴ See *Georgia v. McCollum*, 112 S. Ct. 2360 (1992) (Thomas, J., concurring). Agreeing with Justice O'Connor's dissent, Justice Thomas found that in light of existing prejudice, securing the representation of others of the defendant's race may help to overcome bias, providing defendant with a better chance of a fair trial. *Id.* at 2360. Some judges acknowledge the social reality of racial and other group-based subordination but find undesirable affirmative governmental efforts to address it in a conscious way. Compare *id.* at 2365 (Scalia, J., dissenting) (recognizing the disadvantaged position in which minorities are placed without the opportunity to use race-based peremptory challenge of jurors) with *Richmond v. Croson*, 488 U.S. 469 (1989) (Scalia, J., concurring) ("The difficulty of overcoming effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects which is the tendency, fatal to a nation such as ours, to classify and judge on the basis of their skin.").

⁴⁰⁵ See *Edmonson*, 111 S. Ct. at 2088 ("[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. . . . By the dispassionate analysis which is its special distinction, the law dispels fears and preconceptions respecting racial attitudes.").

among the Supreme Court Justices about recognizing racial and social groups and their dialogic potential.⁴⁰⁶ The Court's color-blind approach in the peremptory challenges cases ultimately undermines the potential creative capacity of the jury. Preferring to save a common law procedure, the Court utilizes the indifference rationale which subverts the value of perspective in the deliberation of the jury. The Court marginalizes the dialogic enterprise by diminishing the role of cognitive and cultural differences which is at the heart of a representational model.

A jury model concerned with maximizing the dialogic participation of citizens would focus on ways of promoting authentic representation of racial and social groups to increase awareness of difference in the ways we approach the world. Like the search for witnesses capable of communicating local knowledge in the early days of the jury, a modern conception of the jury in a heterogeneous society envisions social and political equals engaged in the exchange of world views in the process of

There is, of course, already some group-consciousness injected in a system concerned at the venire level with cross-sectionality. *See, e.g., Duren v. Missouri*, 439 U.S. 357, 359-60 (1979); *Taylor*, 419 U.S. at 529 n.7. Whereas *Duren* requires as a second prong that a challenger demonstrate that the group excluded is a "cognizable one," the challenges have been mostly limited to traditional groups like race. *See Druff, supra* note 375 (noting *Taylor's* implication that a representative cross-section standard is designed to foster representation of difference in juror attitudes or group bias would be difficult to effectuate particularly at the stage of voir dire since distinguishing a permissible group bias from an impermissible specific bias is far simpler in theory than in practice).

Critical theorists have critiqued the tendency to seek race neutrality in the face of social implications of race:

The meaning of race has been grafted onto other central cultural images of progress so that the transition from . . . race consciousness to race neutrality mirrors movement from myth to enlightenment, from ignorance to knowledge . . . and most importantly, the historical self-understanding of liberal society as representing the movement from status to individual liberty.

Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 774; *see also* Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (providing race focus to explain why decisions do not promote equality).

⁴⁰⁶ *See* Comment, *The Cross Sectionality Requirement and Jury Impartiality*, 91 COLUM. L. REV. 1060, 1076 ("[T]he allure of color blindness is strong . . . [I]t fits with liberal, individualistic principles that each person should be assessed on individual merits, not upon the basis of group membership."); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1782 (1977) [hereinafter *Limiting the Peremptory Challenge*] ("[I]t is at best simplistic to assume that every petit juror has a group bias based on immutable characteristics such as race or sex that is strong enough to affect her vote but weak enough to be swayed by deliberating with other jurors.").

deliberation.⁴⁰⁷ This can only be accomplished by more aggressively pursuing a cross-sectional requirement at the venire selection stage but also can be enhanced by recognizing that group-conscious choices during that stage and subsequent stages of the selection process may be necessary.⁴⁰⁸ A preoccupation with developing a "neutral" selection process, including a color-blind and gender-neutral focus, not only devalues the significance of social differences, but it can preclude the possibility of meaningful exchange and the sharing of decision-making power.⁴⁰⁹ Other facets of the present system which are at odds with this representative model will be discussed below.

2. Sources of Jurors

Voter registration lists generally have been accepted by courts as an adequate juror source except where cognizable groups are inadequately reflected on the lists.⁴¹⁰ Clearly, voter lists are not complete or represen-

⁴⁰⁷ See *supra* note 45 (discussing the lack of representativeness of earlier juries when the community was more homogeneous); Minow, *Interpreting Rights*, *supra* note 134, at 19.

⁴⁰⁸ See *Duren*, 439 U.S. at 364. Challenging cross-sectionality requires a showing that (1) the excluded group is "distinctive"; (2) its representation is unfair and unreasonable relative to its representation in the community; and (3) the discrepancy is the result of systematic exclusion in the selection process. *Id.* Whether a group is cognizable can be defined not only in terms of whether the group historically has been singled out for distinctive treatment, but also in terms of whether the group has distinctive qualities of human nature, varieties of human experience, or distinctive perspective on events. See *Hoyt v. Florida*, 368 U.S. 57, 60 (1961); *Peters v. Kiff*, 407 U.S. 493 (1972); *Ballard v. United States*, 329 U.S. 187, 193-94 (1946) (Douglas, J., stating that the sexes are not fungible). Cases recognizing different groups include *Peters*, 407 U.S. at 493 (race); *Taylor v. Louisiana*, 419 U.S. 522, 522 (1975) (sex); *State v. Plenty Horse*, 184 N.W.2d 654 (S.D. 1971) (national origin); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 223 (1946) (economic status); and *Juarez v. State*, 277 S.W. 1091 (Tex. 1925) (religion).

⁴⁰⁹ Neil Gotunda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 53-62 (arguing that social subordination of racism is not erased in a color-blind approach); Aleinikoff, *supra* note 154, at 1094-95 (stating that whites must appreciate the partiality of their world view and accord to non-majority groups the same nonreductionist respect they accord themselves).

⁴¹⁰ In the federal system, 28 U.S.C. §§ 1861-1874 (1982), provide that district courts must adopt a plan for locating and summoning to the court eligible prospective jurors, *id.* § 1863, implementing statutory policies of random juror selection from a fair cross-section of the community, *id.* § 1861, and the non-exclusion on account of race, color, religion, sex, national origin, or economic status. *Id.* § 1862. The statute details that voter lists are to be used as a source of participants, *id.* §§ 1863(b)(2), 1869(c), and states that supplementation of the voter registration list is required when the lists deviate substantially from the community's overall demographic patterns. *Id.* § 1863(b)(2). See *California v.*

tative reflectors of some communities.⁴¹¹ Case law, however, does not recognize a right to have a particular group represented on a venire or petit jury; case law only recognizes the assurance that no group will systematically be excluded.⁴¹² Random quirks of non-representation are not colorable, though for some groups the random selection of the venire, in conjunction with underrepresentation on source lists and exemptions and excuses permitted by the courts, leaves little likelihood of authentic representation.

A challenge must demonstrate that a venire composition used a systematic procedure to exclude candidates—i.e., not a “random quirk.”⁴¹³ Generally this means a challenger must not only uncover a significant underrepresentation in one instance but in a number of venires to succeed. It can thus be argued that a cross-sectional venire here, too, is compromised by a judicial desire for “procedural detachment.” An approach which leaves unaddressed underrepresentation is likely to undermine public confidence in the fairness of the process and is at odds with a representational model.⁴¹⁴ Though perhaps administratively inconvenient⁴¹⁵ the

Harris, 679 P.2d 433 (Cal. 1984), *cert. denied*, 469 U.S. 965 (1984); *Duren*, 439 U.S. at 365 n.23.

⁴¹¹ See, e.g., VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 53-54 (1986); David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776, 805 (1977) (researchers have found that voting lists are not a cross-section of the community because they are drawn from mainly middle and upper income population groups). It can be argued that peremptory challenges are one way to respond to the problem that jury selection procedures do not produce a cross-section of the community representative in race and sex. The race-neutral posture of cases after *Batson* can affect this strategic use of group-consciousness to protect representation as likely as to attack the subordinating or demeaning use of race against minorities. See, e.g., *Batson*, 476 U.S. at 103-05 (Marshall, J., concurring); *id.* at 109 (Stevens, J., concurring); see also Mark McDonald, *Why Few Latinos Serve on Juries: Only 1 in 5 Register to Vote*, PHILA. DAILY NEWS, Aug. 14, 1990, at 13 (describing gross underrepresentation felt by community to deprive them of justice in criminal trials); Druff, *supra* note 375, at 1563 n.41 (noting that the category of people failing to register is not cognizable, according to courts but often courts confuse the non-cognizability of the non-voting group with other characteristics which could lead to a conclusion of cognizability).

⁴¹² See *Taylor*, 419 U.S. at 538. A fortuitous deviation does not constitute a violation. *Swain v. Alabama*, 380 U.S. 202, 208-09 (1965). In theory the failure to supplement voter registration lists which deviate from a community's overall demographic patterns can amount to a systematic exclusion. See Druff, *supra* note 375, at 1563 n.42 (noting that few cases have resulted in a quashed jury on this ground).

⁴¹³ See *Duren*, 439 U.S. at 366; *Foster v. Sparks*, 506 F.2d 805, 811 (5th Cir. 1975) app. at 811 (study by Walter P. Gewin entitled: *An Analysis of Jury Selection Decisions*).

⁴¹⁴ See Kairys et al., *supra* note 411.

⁴¹⁵ *Holland v. Illinois*, 493 U.S. 474, 478 (1990) (Scalia, J., reaffirming that the cross-sectionality requirement of the Sixth Amendment is subject to legitimate state interests;

relative ease of supplementing voter registration lists with other sources of citizens names, such as drivers license lists or school rolls, would suggest that concrete means exist to foster inclusion of underrepresented groups.

3. *Voir Dire*

In the federal system and many state systems, the trial judge exercises substantial control over voir dire.⁴¹⁶ It is the judge who determines the range of information that may be discovered about a member of the venire, and thus the judge has great influence over challenges for cause as well as peremptory challenges.⁴¹⁷ As importantly, the judge has the capacity through this power to ensure that “a relation, if not a bond of trust, with the jurors is established.”⁴¹⁸ The Supreme Court in the peremptory challenge cases has expressed concern about the invidious way exclusion of a juror on the basis of race severs that relation of trust,⁴¹⁹ mindful of the possibility of transforming juror detachment into bias. I have suggested, however, that a court’s preoccupation with juror detachment can result in the devaluation of the deliberative and dialogic value of the representative jury. I would argue that voir dire—literally “truth talk”—should include an opportunity for lawyers and judges to sensitize jurors about differences among decision-makers and about the social context of the case. The purpose is to affirmatively encourage a communicative environment.

administrative inconvenience or cost thus may affect a decision to supplement the jury source); see Druff, *supra* note 375, at 1582-85; see also McDonald, *supra* note 411, at 13. Resistance to using supplemental juror source lists may reflect bias on the part of administrators against recognizing a jury right to a social or racial group whose members demonstrate a lack of civic interest by failing to qualify or maintain qualifications for voting. Cf. Druff, *supra* note 375, at 1563 n.41 (discussing problem of confusing social groups’ characteristics with non-voting characteristic for purpose of determining cognizability). In Philadelphia, where the representation on venire is minimal, reflecting the fact that only one in five Latinos vote, the Jury Commissioner rejected the proposal to use driver’s license information, saying, “We don’t need more names. . . . And in all my years I’ve never heard Spanish people say there’s a problem here.” McDonald, *supra* note 411, at 13 (gross underrepresentation of Latinos in jury selection in Philadelphia).

⁴¹⁶ See FED. R. CIV. P. 47; see also *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (finding the state action requirement satisfied in part because of judicial role at voir dire).

⁴¹⁷ As Justice Kennedy acknowledged in *Edmonson*, by overseeing the exclusion of jurors for cause, the trial judge influences which jurors remain eligible for peremptory challenges. *Edmonson*, 111 S.Ct. at 2084. Additionally, in cases involving multiple parties, the trial judge decides how peremptory challenges are allocated among the litigants. *Id.*; see *supra* note 381.

⁴¹⁸ *Id.* at 2087 (quoting *Powers v. Ohio*, 499 U.S. 400, 413 (1991)).

⁴¹⁹ E.g., *id.* at 2088.

As was discussed above, a representative jury model favors the abolition of peremptory challenges because peremptory challenges distort the cross-sectionality objective.⁴²⁰ The color-blind reasoning for distinguishing race-based peremptory challenges from others, focusing on jury detachment and indifference, marginalizes the communicative effort.

I would promote voir dire to preserve the cross-sectionality potential of the venire. Because “seats alone do not enfranchise,”⁴²¹ a challenge for cause should be able to be lodged where there is demonstrable prejudice which would likely render the venire member incapable of engaging in the deliberation of the case and reaching judgement. Such a participant would impair the participatory focus of the representative model. A challenge for cause under a demonstrable prejudice standard would also be reviewable.⁴²² It is distinguishable from social or racial affiliation or sense of predisposition.⁴²³ A conclusion about a challenge for cause should consider the communicative and deliberative goals of the representative model.⁴²⁴

B. *Communication Among Decision-Making Participants*

I have argued that a preoccupation with fostering a “neutral” and detached process of decision-making can subvert the interest of creative, deliberative dialogue and undermine respect for difference upon which

⁴²⁰ Presently, peremptory challenges are provided for in 28 U.S.C. § 1870 (1982), and federal court. Peremptory challenges, however, are not self-executing, a factor that was used in support of the Court’s conclusion that the state action requirement is met in the use of racially focused peremptories in the civil context. *See Edmonson*, 111 S. Ct. at 2077. The Supreme Court has recognized that peremptory challenges may be withheld altogether without impairing the constitutional guarantee of the impartial jury and a fair trial. *Georgia v. McCollum*, 112 S. Ct. 2348, 2358 (1992) (citing *Frazier v. United States*, 335 U.S. 497 (1948) and *United States v. Wood*, 299 U.S. 123 (1936)). *But see Ross v. Oklahoma*, 487 U.S. 81 (1988) (stating that peremptories are useful to cure erroneous refusals by the trial court to excuse potential jurors for cause); *supra* notes 382-409 and accompanying text.

⁴²¹ Guinier, *No Two Seats*, *supra* note 16, at 1416.

⁴²² *See Druff*, *supra* note 375, at 1592 (advocating maximizing meaningful review of challenges).

⁴²³ *See e.g.*, Edmond Costantini et al., *Gender and Juror Partiality: Are Women More Likely to Prejudge Guilt?*, 67 JUDICATURE 120, 123 n.6, 126-27 (1983-84) (noting that women show greater propensity to prejudge but it need not ultimately affect their decision; for example, jury’s deliberative process tends to impact differently on men than women).

⁴²⁴ *See Limiting the Peremptory Challenge*, *supra* note 406, at 1733 (arguing that the representation of differences in attitudes is precisely what representative cross-sectional standard elaborated in *Taylor* is designed to foster).

political and social equality can be built. I have suggested that it is necessary for judges to encourage a communicative role in voir dire as well as other stages of the proceedings.⁴²⁵ A representative model favors interaction of the decision-making participants as a means of exposing competing world views. This interaction has self-defining as well as larger social significance.⁴²⁶ The value of meaningful communication can be reflected in two contexts: (1) the potential for increased interaction among the judge and lawyers; and (2) the potential for exchange among the jurors.

1. Interaction Among Judge, Lawyers, and Jurors

As was acknowledged earlier⁴²⁷ juror dissatisfaction often relates to the lack of a sense of full participation in the decision-making process. Empirical evidence concerned with the effects of implementing procedures which would engage judges, jurors, and lawyers in a more interactive way in the trial process is limited⁴²⁸ but does suggest that jury satisfaction with the process is increased with greater interaction and understanding of the respective roles.⁴²⁹ Moreover, there is some evidence that increased interaction among participants can prevent preconceptions from affecting verdicts.⁴³⁰

⁴²⁵ Presently, communication aimed at sensitizing jurors to the social context of the case is not favored because "[j]ustice must not be based on racial sympathy or animosity." *Stanton v. Astra Pharmaceutical Prods.*, 718 F.2d 553 (3d Cir. 1983) (finding that the opening statement improperly "reached the question of plaintiffs' race"). The court in *Astra* found objectionable the plaintiffs' lawyer saying:

[W]e were concerned about the effect of having black people come to an area where there are not many black people and expecting to get justice from a jury which is mostly white people. We decided to confront this issue and we asked you the questions this morning [in voir dire], and we were really pleased with the responses that we got and we think that this is an impartial jury and everyone here has sworn that they will try this case not on the basis of passions, or prejudice, or economic basis, but on the basis of facts and the law.

Id. at 578-79.

⁴²⁶ See *supra* notes 161-64 and accompanying text; Aleinikoff, *supra* note 154.

⁴²⁷ See *supra* notes 166-173 and accompanying text.

⁴²⁸ See Heuer & Penrod, *supra* note 170, at 232 (commenting on recent research conclusions concerning juror note-taking, juror question-asking, and judicial precharge prior to the presentation of evidence).

⁴²⁹ *Id.*

⁴³⁰ See F. Gerald Kline & Paul H. Jess, *Prejudicial Publicity: Its Effect on Law School Mock Juries*, 43 JOURNALISM Q. 113 (1966) (stating that use of extensive voir dire, particularly strong instructions from trial judge, the court setting good juror images, effective lawyers, and jury's deliberation process may all prevent preconceptions from working their way to verdict).

Because increased interaction among the participants can foster equality that is necessary for meaningful dialogue and deliberation, further study of the possibilities seems warranted.⁴³¹ A source of concern is the shift in the process from an adversarial to inquisitorial posture, creating a possible opportunity for biased decision-making.⁴³²

2. *Deliberation Among Jurors*

The value of meaningful juror deliberation is at the heart of the representative model. The creative opportunity lies in the ability of social and political equals with divergent views to construct truth through the give and take of the deliberative process. Theoretically, the process of deliberation is a "process through which biases of individual jurors are exposed and isolated or controlled."⁴³³

A representative model favors the greatest amount of diversity to meet the goals of this process. The argument is that notwithstanding the identity of the litigants, society—and other jurors—can be deprived of the influence of jurors who reflect a particular perspective or world-view and who are absent from deliberation. A litigant who does have a similar social identity is deprived of the influence and knowledge of that missing segment which can most empathize with and understand her during the deliberative process.

What is not fully appreciated without further study empirically or in the effectuation of a representative model is whether bias which blunts meaningful deliberation because participants are not equally able to influence decision-making can be tempered. This representative model values perspective but assumes that there is human capacity for consensus and discursive agreement among disparate communities, assumptions which have been theoretically but not empirically founded.⁴³⁴ What is clear is that jury deliberation requires sustained communication among social equals who are respectful of each other and confident of support of allies.

⁴³¹ See, e.g., Michael A. McLaughlin, *Questions to Witnesses and Notetaking by the Jury as Aids in Understanding Complex Litigation*, 18 NEW ENG. L. REV. 687, 697-98 (1982), quoted in Heuer & Penrod, *supra* note 170, at 237 ("[R]ather than an indifferent battle of legal minds with jurors as mere spectators, a trial is above all a search for truth . . . while justice is blind, jurors need not also be.").

⁴³² Proponents of the adversarial process contend that it produces fairer and more accurate decisions than does inquisitorial investigation. John Thibaut et al., *supra* note 180, at 401 (stating that an experiment lends support to proposition that adversary presentation can counteract bias). Critics respond that the adversary system promotes gamesmanship rather than truth. See FRANK, *supra* note 3, at 90-102.

⁴³³ JOINER, JUSTICE AND THE JURY, *supra* note 2, at 26-27.

⁴³⁴ See *supra* note 361 for a discussion of some research.

The present jury model does not fully take account of these characteristics.⁴³⁵

C. *Deliberative Accountability*

A reconception of the jury, focused on expressing rather than submerging difference, depends to a great extent on the willingness of participants to engage in meaningful deliberation aimed at achieving social justice. I have argued that authentic representation of citizens in the jury process can promote justice in decision-making.⁴³⁶ Ensuring the opportunity for expression rather than submergence or assimilation of views can make more meaningful deliberation. Deliberation, itself, is designed to promote

⁴³⁵ Much is known about the communicative environment of small groups that would suggest that a representative model could eliminate some of the danger of self-interest, parochialism, and prejudice. For example, empirical study suggests that for a minority perspective to be valued—that is, able to influence a deliberative body—the minority group member needs allies from the outset of deliberation. See KASSIN & WRIGHTSMAN, *supra* note 361, at 197; KALVEN & ZEISEL, *supra* note 3, at 463. To effectuate meaningful deliberation the representative model would require more than mere token representation. See also Rosabeth Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965 (1977) (stating that token women are entrapped in socially-defined roles); B. Beckman & Harriet Aronson, *Selection of Jury Foremen as a Measure of the Social Status of Women*, 43 PSYCHOL. REP. 475 (1978) (stating that women are more deferential than men in jury deliberation).

According to results of small group decision-making research, unanimous juries of 12 rather than six are potentially more effective at creating an opportunity for dialogue, including those with minority viewpoints, and achieving consensus. Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971); see *Williams v. Florida*, 399 U.S. 78, 102-03 (1970) (holding that jury of six persons is not unconstitutional). In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court acknowledged that the sixth amendment guarantees could not contemplate a “concept of proportional representation” to the petit jury as illustrated by the Court’s holding in *Williams*. *Id.* at 85 n.6.

It is certainly doubtful, given the present efficiency-prone, color-blind, and gender-neutral judicial posture, that such steps to effectuate meaningful deliberation would be taken. See *supra* note 361; YOUNG, *supra* note 15, at 187 (stating that group representation of group experiences, perspectives, and interests is sometimes more, sometimes less than proportional representation); cf. *Batson*, 476 U.S. at 105-08 (Marshall, J., concurring) (noting the problem of confronting one’s own racism and prejudice in addressing the claims of others).

⁴³⁶ See YOUNG, *supra* note 15, at 184-87 (arguing that group representation, distinguished from interest group representation: (a) better assures procedural fairness in setting the agenda and hearing opinions; (b) assures a voice for the oppressed and the privileged; (c) encourages expression of individual and group needs; and (d) promotes just outcomes because it maximizes social knowledge). *Id.*; see *supra* notes 370-424 and accompanying text.

justice, as contrasted with self-interested decision-making, which does not require the justification of positions by claimants, though it is dependent on sustained discussion of equals.⁴³⁷ In addition there are other possibilities for holding community representatives more accountable for their actions as citizen representatives.⁴³⁸ Through interaction with the jury, as described above, judges and lawyers can ensure that the jury confronts its own decision-making responsibility.⁴³⁹ In some circumstances, this alternative is subverted because citizens are not made to understand the results of deliberation by focusing on the human connections of the case.⁴⁴⁰

Finally, normative principles can ultimately determine whether jury decision-making is the product of prejudice outside the boundaries of justice. A normative principle of color-blindness or gender-neutrality does little to promote justice. A reconceptualization of the civil jury, promoting citizen participation, must take account of differences in a realistic, and I would argue, a constructive way. It entails, however, a rethinking of our concept of equality.

⁴³⁷ See, e.g., Sunstein, *Republican Revival*, *supra* note 337; Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (contrasting liberal politics of self-interest from liberal republican model of discourse).

⁴³⁸ Resnik, *supra* note 154, at 1929; see, e.g., M.H. Hoeflich & Jon G. Deutsch, *Judicial Legitimacy and the Disinterested Judge*, 6 HOFSTRA L. REV. 749, 750 (1978); Subrin, *supra* note 20, at 999 (noting that the abstraction of document-driven litigation contrasts with trial's "spontaneous story").

⁴³⁹ Sherry, *supra* note 14, at 611 (recognizing responsible decision-making as a virtue in itself and as relational; an aware jury is in a position to be merciful and compassionate and not simply to enforce rights but to understand their duty to act in a just manner); see, e.g., *Caldwell v. Mississippi*, 472 U.S. 320, 342-43 (1985) (O'Connor, J., concurring); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (invalidating statute concerning precluding family background and personal history considerations as mitigating circumstances in defendant's conviction); see also West, *supra* note 14, at 85-93 (discussing judicial influence on juries).

This notion of accountability through interaction extends to the judge as well as to the jurors. "I want my judges to have the experience of explanation before another who holds power. . . . I want the dialogic experience to inform us about what qualities lead us to unfair judgment." Resnik, *supra* note 154, at 1935. See Subrin, *supra* note 20, at 999 (discussing "counterforce of several lay people to the single, powerful, trial judge"); cf. Hyman & Tarrant, *supra* note 12, at 36 (noting that personal liberty laws in response to fugitive slave laws of some free states involved juries, providing for fact-finding as to whether the person was the runaway; court decisions like *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), narrowed this option).

⁴⁴⁰ See *supra* notes 374-82 and accompanying text (describing dispassionate justice).