

In Search of the Post-Positivist Jury

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INTRODUCTION

[Y]ou [the jury] must determine the facts from the evidence received in the trial and not from any other source. A "fact" is something proved directly or circumstantially by the evidence.¹

[L]egal facts are made not born, are socially constructed . . . by everything from evidence rules, courtroom etiquette, and law reporting traditions, to advocacy techniques, the rhetoric of judges, and the scholasticism of law school education²

In *J.E.B. v. Alabama ex rel. T.B.*,³ the Supreme Court held that peremptory juror challenges exercised on the basis of the juror's sex violate the Equal

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1. CALJIC No. 1.00 (5th ed. 1988).

2. CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 173 (1983).

3. 114 S. Ct. 1419 (1994).

Protection Clause of the Fourteenth Amendment. The decision was only the most recent in a series of cases dating from the mid-1980's that have gradually expanded the applicability of equal protection principles to the final and decisive stage of jury selection. The first case in the series, *Batson v. Kentucky*,⁴ held that an African-American defendant in a criminal case can object to the prosecution's peremptory dismissal of African-American jurors when the dismissal is based on race or inferences drawn from race. In subsequent cases the Court extended the rule to criminal cases involving Caucasian defendants and African-American jurors,⁵ to the exclusion of racial minorities in civil cases,⁶ and to the peremptory challenge of African-American jurors by criminal defendants.⁷

The Court's recent interest in jury selection coincides with the popular debate regarding juries that has been fueled by a series of highly publicized and controversial jury trials.⁸ These cases have raised a number of difficult questions about the use of juries,⁹ but none as persistent or divisive as the

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

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

6. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

7. *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

8. It is not coincidental that Los Angeles, the most diverse and polyglot of American cities, has been the scene of the largest number of controversial jury trials, all of which have been closely watched around the country. See, e.g., Alan Abrahamson, *Lyle Menendez Case Ends in a Mistrial; D.A. to Retry Brothers*, L.A. TIMES, Jan. 29, 1994, at A1 (reporting on the trial of Lyle and Erik Menendez for the murder of their millionaire parents); Alan Abrahamson, *Mistrial Declared in Case Against Erik Menendez*, L.A. TIMES, Jan. 14, 1994, at A1 (reporting on the trial of one of the Menendez brothers); Edward J. Boyer & Jesse Katz, *Jury Convicts Denny Defendants on Reduced Charges, Acquits on Others*, L.A. TIMES, Oct. 19, 1993, at A1 (reporting on the 1993 trial of two African-American men for assaulting a truck driver and others at the beginning of the L.A. riots); Andrea Ford & Jim Newton, *Judge Cites "Ample Evidence," Orders Simpson to Stand Trial*, L.A. TIMES, July 9, 1994, at A1 (reporting on the 1994 preliminary hearing into the evidence against O.J. Simpson in the murders of his former wife and her friend); Jim Newton, *2 Officers Guilty, 2 Acquitted*, L.A. TIMES, Apr. 18, 1993, at A1 (reporting on the 1993 trial of the Rodney King defendants on federal civil rights charges); Richard A. Serrano & Tracy Wilkinson, *All 4 in King Beating Acquitted: Violence Follows Verdicts; Guards Called Out*, L.A. TIMES, Apr. 30, 1992, at A1 (reporting on the 1992 state trial of four police officers charged with assaulting Rodney King and the subsequent civil unrest). Other highly publicized recent trials include: the trial of William Keunedy Smith for rape; the trial of Lorena Bobbitt on malicious wounding charges for severing her husband's penis; the 1989 and 1993 trials of a Hispanic Miami police officer charged with homicide in the deaths of two African-Americans; and the 1990 trial of Washington, D.C. mayor Marion Barry on drug charges. See, e.g., *Barry Convicted on 1 Count; Jury Deadlocks on 12 Others*, L.A. TIMES, Aug. 12, 1990, at A1 (reporting on the Marion Barry trial); Anne Gearan, *Lorena Bobbitt Found Innocent; Jury Cites Temporary Insanity*, L.A. TIMES, Jan. 23, 1994, at A1 (reporting on the Bobbitt trial); *Key Events in Case*, L.A. TIMES, Dec. 12, 1991, at A22 (reporting on the Kennedy-Smith trial); Larry Rohter, *Miami Police Officer is Acquitted in Racially Charged Slaying Case*, N.Y. TIMES, May 28, 1993, at 1 (reporting on the trials of the Hispanic Miami police officer).

9. Among the many questions raised by these cases are (1) the effect of a fear of civil unrest on the integrity of jury decision-making; (2) the possible impact of daytime television talk shows on juror evaluations of individual responsibility; and (3) the apparent, systematic pollution of the jury pool by the parties and the media. See *Lozano v. State*, 584 So. 2d 19 (Fla. Dist. Ct. App. 1991) (overturning the conviction of a Hispanic police officer because of, inter alia, the possibility that fear of riots in the event of an acquittal influenced jurors); Bill Boyarsky, *A Cynical Game of Leaks, Denials*, L.A. TIMES, Aug. 10, 1994, at A20 (discussing attempts by attorneys in the O.J. Simpson case to shape public opinion on the merits of the case through leaks to the media); Stephanie B. Goldberg, *Fault Lines*, A.B.A. J., June 1994, at 40 (discussing whether media popularization of psychological theories of excuse

one that has occupied the Court: whether the social identity of a juror is or should be relevant to the juror's performance.¹⁰

Moreover, this public debate regarding jury composition mirrors a larger controversy over how to imagine the American community. The disagreement over definitions of a qualified jury parallels the broader controversy over whether or how far we should publicly recognize and even cultivate cultural difference in society at large.¹¹ At issue is the fundamental question of what it is that constitutes the American identity.¹² Given the historic importance of the jury as both the symbol and embodiment of American democracy,¹³ it is only natural that our collective self-identity crisis should find expression in a reevaluation of how to draw the profile of the jury.

In its decision that the peremptory dismissal of jurors based on gender violates the Equal Protection Clause, the Supreme Court divided 6-3. The majority, through Justice Blackmun, recited the long history of exclusion of women from jury service and concluded that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."¹⁴ The dissenters, in an opinion authored by Justice Scalia, disputed the majority's assumption that a juror's gender is unrelated to her performance, and argued that, because both sides will challenge jurors deemed undesirable, the process as a whole results in no systematic discrimination against anyone.¹⁵

The opinions in *J.E.B.* suggest a deep cleavage among the Justices. Justice Scalia sarcastically accused the majority of following fads rather than the Court's precedents.¹⁶ The majority, in more measured tones, claimed that it was the dissent who was ignoring the law.¹⁷ But while the Court emphatically disagreed on the narrow issue about which it wrote—whether the Equal Protection Clause prohibits gender-based peremptory challenges—the

has influenced juror decisions); Seth Mydans, *A Jury's Trials: Will Memories of Riots Influence a Verdict?*, N.Y. TIMES, Feb. 7, 1993, § 4, at 7 (discussing the possible impact of riots following a state trial on federal jurors considering charges against the same defendants).

10. See, e.g., *McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring) (observing the frequent mention of the racial composition of the jury in press accounts of trials). Not everyone agrees that emphasis on jury composition is a welcome development. See Andrew Kull, *Racial Justice: Trial by Cross Section*, NEW REPUBLIC, Nov. 30, 1992, at 17, 20 (arguing that emphasis on racial composition of juries rests on the "destructive premise" that one person cannot fairly judge another unless he is of the same race).

11. As summed up in two widely used metaphors, the question is whether we should imagine American society as a "melting pot" through which a distinctive American identity emerges from the combination of a variety of cultural and ethnic ingredients, or as a "salad bowl" in which linguistic and cultural diversity is fostered and celebrated. See generally MICHAEL D'INNOCENZO & JOSEF P. SIREFMAN, IMMIGRATION AND ETHNICITY: AMERICAN SOCIETY—"MELTING POT" OR "SALAD BOWL"? (1992) (exploring this tension).

12. For an example of one recent exchange on these issues, see Richard Rorty, *The Unpatriotic Academy*, N.Y. TIMES, Feb. 13, 1994, § 4, at 15, and Richard Sennett, *The Identity Myth*, N.Y. TIMES, Jan. 30, 1994, § 4, at 17.

13. See, e.g., ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 254 (J.P. Mayer & Max Lerner eds., 1966) (1835) ("The jury is both the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule.")

14. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1421 (1994).

15. *Id.* at 1437 (Scalia, J., dissenting).

16. *Id.* at 1436.

17. *J.E.B.*, 114 S. Ct. at 1427-28 n.12.

Justices were in implicit accord on the broader issue that has divided the public: what constitutes a fair and qualified jury. With the possible exception of Justice O'Connor, the entire Court endorsed a vision of juror impartiality according to which the social identity of the juror has no bearing on her performance. For the majority, this conception of impartiality requires the prohibition of gender-based exclusions because, *as a factual matter*, one's gender is unrelated to her performance as a juror.¹⁸ According to the Court, therefore, a peremptory challenge on the basis of (invalid) inferences drawn from the juror's gender does not advance the goal of seating an impartial jury.¹⁹ The dissent reached a different conclusion on the relation between impartiality and peremptory strikes only because it began with a different factual premise. Because gender might influence one's performance as a juror, it is permissible—if not necessary—to dismiss a juror based on gender to prevent the identity of the decision-maker from infecting the decision.²⁰ For both the majority and the dissent, however, impartiality is sexless.

The popular debate over the relation between juror identity and juror judgment has not achieved the same degree of resolution.²¹ This conclusion is evident in the most notorious of recent cases—the prosecution of four white Los Angeles police officers for assaulting Rodney King, an African-American motorist who attempted to evade arrest. The officers' acquittal on state assault charges²² triggered the nation's worst urban violence in this century.²³ The outcome of the case and the violent reaction it touched off were popularly attributed to the removal of the case from ethnically-mixed Los Angeles County to predominantly white suburban Ventura County.²⁴ The view that

18. *Id.* at 1426-27.

19. *Id.*

20. *Id.* at 1438-39 (Scalia, J., dissenting).

21. *See, e.g.*, Carla Rivera, *Majority Say Denny Verdicts Too Lenient*, L.A. TIMES, Oct. 26, 1993, at A1 (reporting that 28% of Los Angeles whites agreed with the verdict in the Denny beating case compared with 51% agreement among blacks).

22. Serrano & Wilkinson, *supra* note 8, at A1. The notoriety of the case resulted from the fact that the beating of Rodney King was filmed by an onlooker and broadcast to television viewers around the country. For a comprehensive review of the evidence presented at the trial, see Roger Parloff, *Maybe the Jury Was Right*, AM. LAW., June 1992, at 7.

23. Greg Braxton & Jim Newton, *Looting and Fires Ravage L.A.*, L.A. TIMES, May 1, 1992, at A1. At least 45 people died during the civil unrest and some 5000 buildings were damaged or destroyed. Louis Sahagun & Carla Rivera, *Jittery L.A. Sees Ray of Hope*, L.A. TIMES, May 3, 1992, at A1.

24. *See* Frank Tuerkheimer, *Forum: The Rodney King Verdict: Why and Where to from Here?*, 1992 WIS. L. REV. 849; Mark Hansen, *Different Jury, Different Verdict?*, A.B.A. J., Aug. 1992, at 54, 55; David Margolick, *The Verdict: Switching Case to White Suburb May Have Decided Outcome*, N.Y. TIMES, May 1, 1992, at A20; Timothy P. O'Neill, *Observer: Wrong Place, Wrong Jury*, N.Y. TIMES, May 9, 1992, at A23; Henry Weinstein & Paul Lieberman, *Location of Trial Played Major Role, Legal Experts Say*, L.A. TIMES, Apr. 30, 1992, at A18; *see also* Adrienne Goodman, *NAACP Head Criticizes Site of King Trial*, L.A. TIMES, Dec. 5, 1991, at B1 (quoting the head of the Ventura County chapter of the NAACP, who predicted after the case was moved to Ventura County that "the officers will win"). *But see* Parloff, *supra* note 22, at 7 (defending the verdict as based on the evidence). For in-depth discussions of jury composition issues raised by the change of venue in the King case from racially diverse Los Angeles County where the crime occurred to the more homogeneous Ventura County, see Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533 (1993), and Note, *Out of the Frying Pan or into the Fire? Race and Choice of Venue after Rodney King*, 106 HARV. L. REV. 705 (1993).

the officers' acquittal resulted from the absence of African-Americans on the jury panel seemed to be confirmed by the conviction of two of the four officers when they were tried the following year for federal civil rights crimes,²⁵ this time in Los Angeles County before a racially mixed urban jury.²⁶ Though hardly of one mind as to what extent race and gender should be taken into account in assembling a fair and impartial jury, there appears to be widespread popular agreement that the Court's embrace of colorblind and sexless jury decision-making is unrealistic.²⁷

The Court's answer in *J.E.B.* to the question of the relevance of group identity to juror qualification is only the latest statement in a long running debate over how to draw the profile of a qualified jury. It signals the current ascendance of one vision of impartiality, defined as individual, psychological, and negative, and the consequent decline of that vision's chief rival, which views impartiality as irreducibly plural, social, and substantive. Although the position taken in *J.E.B.* has always been the dominant view, that decision is remarkable for a number of reasons. First, the triumph of a definition of impartiality which takes the juror rather than the jury as the unit of measure marks a significant departure from the case that is the doctrinal font of *J.E.B.*—*Batson v. Kentucky*.²⁸ Although the precise rationale for the *Batson* decision is obscure, its spirit is decidedly pluralist. Increasing the participation of black jurors *as blacks* was among the principal reasons for the Court's decision to prohibit race-based peremptory challenges. When *J.E.B.* was decided eight years later, the emphasis on expanding jury participation had been transformed to an almost exclusive concern with non-discrimination in selection.

Second and more significantly, the decision in *J.E.B.* is based on premises about the nature of truth and means of acquiring knowledge that are now largely rejected. The Court's belief that it is possible to view events outside of any perspective—gendered, racial, educational—has come to be seen as naïve. Rather, all perception is filtered through preexisting expectations about the world that shape perception as it occurs. Moreover, recent research on juror decision-making confirms that the identity of the decision-maker is inseparable from, and an ingredient in, the decision. The Court's efforts to implement an impartiality stripped of subjectivity are therefore misguided.

25. Newton, *supra* note 8, at A1.

26. The jury consisted of eight men and four women, two of whom were African-Americans and one of whom was Latino. Jim Newton, *Racially Mixed Jury Selected for King Trial*, L.A. TIMES, Feb. 23, 1993, at A1. Though the presence of minority jurors was seen as partially responsible for the different result, there were other significant differences between the two trials that also contributed to the different outcomes. See Jerome H. Skolnick & James J. Fyfe, *A Case for Federal Prosecution*, L.A. TIMES, Apr. 19, 1993, at B7; Henry Weinstein, *Jury Relied Heavily on Tape of King Beating*, L.A. TIMES, Apr. 18, 1993, at A1.

27. See David Margolick, *As Venues are Changed, Many Ask How Important a Role Race Should Play*, N.Y. TIMES, May 23, 1992, § 1, at 7 (discussing proposals to take into account demographics in venue changes, in light of the widespread perception that the transfer to Ventura County of the state trial of the L.A. police officers accused of assaulting Rodney King "ordained its outcome").

28. 476 U.S. 79 (1986).

This Article examines constitutional doctrine regarding juror qualifications in light of current philosophical debates about the process of interpretation and the means of acquiring knowledge. Part I is a broadly drawn discussion of the philosophical views that inform legal conceptions of the ideal factfinder. Current definitions of juror impartiality are rooted in and reflect the Enlightenment belief in the fundamental separability of the subjective mind and the objective world, and the identification of truth with neutral objective reality. Central to this conception of truth is the belief in the possibility of a neutral vantage point purged of subjective distortion. These beliefs, however, have been increasingly called into question. Recent scholarship from a wide range of disciplines argues that all perception is mediated by subjective knowledge structures. Our expectations about the world based on our past experiences and our beliefs about what typically occurs shape our understanding of what we see. Because all knowledge is shaped by a priori beliefs, there is no vantage point entirely outside of any perspective from which the truth of a picture of events can be reliably judged.

Part II traces the influence of these beliefs in constitutional doctrine concerning the qualifications of legal factfinders. The dominant conception of juror qualifications reflects the view that knowledge acquisition is largely passive and that true beliefs are *caused* by the effects produced by the object of belief on a receptive mind. There is, however, a persistent sub-tradition that rejects individualistic definitions of juror qualifications in favor of a "diffused impartiality" that results from the inclusion of a diverse variety of outlooks on the jury. Significantly, the minority position that emphasizes the relevance of the decision-maker's perspective to the decision-making task is the orthodox view in cases where the jury departs from its traditional factfinding role to decide the appropriate sentence in death penalty cases.

Part III argues that juror beliefs and attitudes influence decisions in all types of cases. The discussion focuses on recent research into juror decision-making, which shows that jurors' previously held views about what constitutes an adequate explanation of the litigated event play a central role in their understanding and evaluation of the evidence. These findings bear out the importance of preexisting belief structures in the process of human cognition. The Conclusion briefly comments on various current proposals to change our jury selection procedures.

I. CHANGING VIEWS ABOUT THE FOUNDATIONS FOR KNOWLEDGE

A. The Empiricist Tradition

Our contemporary understandings of the ideal qualifications for judicial factfinders are built on premises that have their source in the Enlightenment. Although our factfinding procedures are the result of a long historical process,²⁹ their present character was largely shaped in the eighteenth

29. See WILLIAM TWING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 1-2 (1985) (noting uncertainty over the beginnings of the law of evidence). For example, some aspects of the law of

century.³⁰ Legal professionals interested in refining the techniques for establishing the truth about historical events in judicial trials were naturally drawn to currently popular philosophical theories about the nature of truth and the methods for attaining it.³¹ As a result, the premises that are the foundation for Anglo-American evidence law are largely those of seventeenth-century British empiricism.³² The assumptions that underlie our factfinding procedures about what there is and how it can be known are directly traceable to the ideas of the leading empiricist thinkers: John Locke, Jeremy Bentham, and John Stuart Mill.³³

The core premise of empiricist thinking about reality and truth is the assumption of a fundamental cleavage between mind and matter.³⁴ Although

evidence, such as rules governing proof of documents, are as old as the jury. 1 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 8, at 607 (1983) [hereinafter WIGMORE, EVIDENCE]. The rest developed unsystematically and largely as isolated responses to particular problems. TWINING, *supra*, at 1.

30. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 2 (1983). John Langbein has linked the development of the law of evidence in the 18th century to the increasing autonomy of the jury from the judge. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 306 (1978) [hereinafter Langbein, *The Criminal Trial*]. By that time the transformation of the role of jurors from witnesses to factfinders was already several hundred years old. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 129-30 (5th ed. 1956); Langbein, *The Criminal Trial*, *supra*, at 306; see also John M. Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J.L. & HIST. 201, 205 (1988) (fixing the date of the transformation as the 17th century, if not substantially earlier). It was not until the latter part of the 17th century, however, that the jury gained substantial independence from the judge. Prior to that time, the judge, through his power to comment on the merits of the case, to terminate a case if the jury's views differed from his own, and to inquire into the jury's reasons before accepting its verdict, "exercised so much influence over the jury that it is difficult to characterize the jury as functioning autonomously." Langbein, *The Criminal Trial*, *supra*, at 285; see also THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800, at 270-71 (1985). It was the decline of these more direct control mechanisms in the period before and after the turn of the 18th century that provided the impetus for the fuller development of evidentiary rules designed to control the jury's decision by restricting what the jury could hear.

31. This theme has been most thoroughly developed by Barbara Shapiro. See BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE (1991) [hereinafter SHAPIRO, BEYOND REASONABLE DOUBT]; BARBARA J. SHAPIRO, PROBABILITY AND CERTAINTY IN SEVENTEENTH-CENTURY ENGLAND: A STUDY OF THE RELATIONSHIPS BETWEEN NATURAL SCIENCE, RELIGION, HISTORY, LAW, AND LITERATURE (1983); Barbara J. Shapiro, "To a Moral Certainty": *Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 HASTINGS L.J. 153 (1986) [hereinafter Shapiro, *To a Moral Certainty*].

32. See William Twining, *Evidence and Legal Theory*, in LEGAL THEORY AND COMMON LAW 62, 70 (William Twining ed., 1986) [hereinafter Twining, *Evidence and Legal Theory*]; William Twining, *The Rationalist Tradition of Evidence Scholarship*, in WELL AND TRULY TRIED 211, 243-46 (Enid Campbell & Louis Waller eds., 1982) [hereinafter Twining, *The Rationalist Tradition*], reprinted & revised in WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 32, 71-74 (1990) [hereinafter TWINING, RETHINKING EVIDENCE]; William Twining, *Some Scepticism About Scepticisms* 11 J.L. & SOC. 137, 149 (1984) [hereinafter Twining, *Scepticisms*], reprinted in TWINING, RETHINKING EVIDENCE, *supra*, at 92, 101; see also SHAPIRO, BEYOND REASONABLE DOUBT, *supra* note 31, at 25-40 (discussing thoroughly the history in this area).

33. Twining, *Evidence and Legal Theory*, *supra* note 32, at 70. For instance, the authors of the first treatises on evidence, writing in the early 18th century, explicitly grounded their discussion in then-current epistemological thought. See GEOFFREY GILBERT, THE LAW OF EVIDENCE I (Garland Publishing Inc. 1979) (1754) (quoting John Locke on the first page); see also Shapiro, *To a Moral Certainty*, *supra* note 31, at 175-76.

34. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 796 (1989). Although this ontological dualism is most closely associated with another Enlightenment thinker, René Descartes,

some form of mind-body dualism has been part of Western philosophy since Plato,³⁵ the dichotomy between subject and object received added significance at the time of the Enlightenment with the development of modern scientific notions of physical causality. During this period people first began to see the world as "causally closed."³⁶ The medieval belief in an essentially "qualitative" universe in which almost anything could exert an "influence" on anything else gave way to a rigorously "quantitative" world stressing mechanical cause and effect over "the essence of material bodies" in explaining phenomena.³⁷ The external objective world of nature came to be seen as a neutral realm of bodies and forces exhibiting discoverable regularities or laws, a realm that was wholly independent of the internal mind.³⁸

The belief in a neutral reality external to the mind and possessed of a form and logic of its own, coincides with a theory of language and reference that assumes a direct and non-problematic correspondence between the world and the categories of thought. According to this "causal" theory of language, there is or can be an exact fit between language and the entities that make up the world because the meaning of words is fixed by the nature of the thing to which they refer.³⁹ The world consists of a fixed and determinable set of self-identifying "natural kinds"; words are simply the names for objects in the world.⁴⁰

According to empiricist thought, although mind and matter inhabit discrete realms, the mind has access to the external world through the senses. Indeed, as their name suggests, the empiricists⁴¹ regarded "experience" acquired by

see RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* 115-16 (1983), the belief in a dualistic world is a pervasive feature of post-Enlightenment Western culture. For instance, unlike some other cultures, we use two kinds of healers, one for the mind and one for the body.

35. Grey, *supra* note 34, at 796. It is not, however, a universal human intuition. One example among many of a non-dualistic world view is the mystical monism of Islamic Sufism. See FAZLUR RAHMAN, *ISLAM* 141-49 (2d ed. 1979).

36. HILARY PUTNAM, *REASON, TRUTH, AND HISTORY* 75 (1981).

37. *Id.* Another author, discussing the change from a qualitative to a quantitative view, wrote: Before Newton was born the "new science" of the century had at last succeeded in rejecting Aristotelian and scholastic explanations expressed in terms of the essences of material bodies. To say that a stone fell because its "nature" drove it toward the center of the universe had been made to look a mere tautological word-play, something it had not previously been. Henceforth the entire flux of sensory appearances, including color, taste, and even weight, was to be explained in terms of the size, shape, position, and motion of the elementary corpuscles of base matter. The attribution of other qualities to the elementary atoms was a resort to the occult and therefore out of bounds for science.

THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 104 (2d ed. 1970).

38. JOYCE APPLEBY ET AL., *TELLING THE TRUTH ABOUT HISTORY* 15-16 (1994).

39. Compare Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?* 41 *STAN. L. REV.* 871, 876 (1989) (defending this view) with PUTNAM, *supra* note 36, at 51-54 (criticizing this view).

40. As A.W. Brian Simpson mockingly described the realist view of language, "[T]he only function of words is to stab at things, after the fashion of kebab skewers." A.W. Brian Simpson, *The Analysis of Legal Concepts*, 80 *L.Q. REV.* 535, 537 (1964).

41. The implications of the belief in a mind-body dualism do not all point in the same direction. The continental European rationalists led by René Descartes used the premise of an ontological separation of mind and matter to elaborate an epistemology that privileged the mind side of the

contact with the external world through the senses as the foundation for virtually all knowledge.⁴² As John Locke, the leading systemizer of Empiricist epistemology, argued in the famous passage from his *Essay Concerning Human Understanding*:

Let us then suppose the Mind to be, as we say, white Paper, void of all Characters, without any Ideas: How comes it to be furnished? Whence comes it by that vast store which the busy and boundless Fancy of Man has painted on it, with an almost endless variety? Whence has it all the materials of Reason and Knowledge? To this I answer, in one word, From Experience: In that, all our Knowledge is founded; and from that it ultimately derives it self.⁴³

dichotomy. For them, the foundations of knowledge are to be found in those rational intuitions that, despite the thinker's earnest efforts, simply cannot be doubted. As Descartes wrote in the beginning of his *Meditations*:

It is now some years since I detected how many were the false beliefs that I had from my earliest youth admitted as true, and how doubtful was everything I had since constructed on this basis; and from that time I was convinced that I must once for all seriously undertake to rid myself of all the opinions which I had formerly accepted, and commence to build anew from the foundation, if I wanted to establish any firm and permanent structure in the sciences. . . . Today, then since very opportunely for the plan I have in view I have delivered my mind from every care [and am happily agitated by no passions] and since I have procured for myself an assured leisure in peaceable retirement, I shall at last seriously and freely address myself to the general upheaval of all my former opinions.

René Descartes, *Meditations on First Philosophy* (1642), in HUMAN KNOWLEDGE: CLASSICAL AND CONTEMPORARY APPROACHES 111 (Paul K. Moser & Arnold Vander Nat eds., 1987).

This "method of doubt" led Descartes to embrace two fundamental truths. Because he could not doubt his own or God's existence, those two beliefs served as the foundation for the elaboration of his entire philosophy. Because of its emphasis on abstract reason, the model for all rationalist knowledge is mathematics. See Deunis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 264 (1992). An example of this style of thought which would be familiar to lawyers is the French Civil Code. See JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 28-30 (2d ed. 1985).

42. D.W. Hamlyn, *Empiricism*, in 2 THE ENCYCLOPEDIA OF PHILOSOPHY 499-505 (Paul Edwards ed., 1967).

43. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 104 (Peter H. Nidditch ed., 1975). Locke goes on to explain that the "experience" which is the fountain of all knowledge derives from two sources. The first, which is the source of most of our ideas, is sensation. The sensations conveyed to the mind from external objects produce our ideas of "Yellow, White, Heat, Cold, Soft, Hard, Bitter, Sweet, and all those which we call sensible qualities." *Id.* at 105. The second source of our ideas is our perception of the internal operation of the mind, or "reflection." From reflection the mind is supplied with another set of ideas that includes "Perception, Thinking, Doubting, Believing, Reasoning, Knowing, Willing, and all the different actings of our own minds." *Id.* at 105.

Locke distinguished between simple and complex ideas. In the reception of simple ideas the mind is mostly passive. "[T]he Objects of our Senses . . . obtrude their particular Ideas upon our minds, whether we will or no." *Id.* at 118. Once supplied with a store of simple ideas, the mind has the power "to repeat, compare, and unite them even to an almost infinite Variety, and so can make at Pleasure new complex Ideas." *Id.* at 119.

The qualities of objects that produce ideas are of two types. Primary or original qualities are "such as are utterly inseparable from the Body, in what estate soever it be." *Id.* at 134-35. Thus, no matter how many times a grain of wheat is divided, each part retains the qualities of solidity, extension, figure, and mobility. The ideas of primary qualities resemble the qualities themselves, and actually exist in the bodies themselves, whether or not they are perceived. *Id.* at 137.

Secondary qualities, by contrast, are not qualities in the objects themselves, but powers to produce various sensations, such as color, sound, and taste. Objects produce sensation through their bulk, figure, texture, and the motion of their insensible parts. *Id.* at 135. Though no less real than primary qualities, secondary qualities bear no resemblance to the ideas they produce. *Id.* at 137.

Having posited external reality as the source and foundation for knowledge, specifying the mechanism by which the world communicates itself to the mind proved something of a problem for the empiricists. Locke proposed that bodies in the world produce ideas in the mind through "impulse."⁴⁴ For example, "a Violet, by the impulse of such insensible particles of matter of peculiar figures, and bulks, and in different degrees and modifications of their Motions, causes the Ideas of the blue Color, and sweet Scent of that Flower to be produced in our Minds."⁴⁵ Clearly, however, crediting "impulses" from "insensible particles" with the generation of sensation does not resolve the issue of how we access the external world, but serves only to flag the problem. Explaining just how "a ghostly mind [can] be linked to the material world through the bodily machine it somehow haunts"⁴⁶ remained an embarrassment to empiricist thought.

Nonetheless, for the empiricists the measure of the adequacy of any inquiry is the extent to which it successfully penetrates and represents the true nature of reality. Accordingly, truth is a correspondence relation between the world and our symbolic descriptions.⁴⁷ Statements are true if they accurately depict the world as it really is. As James Mill, grandfather of John Stuart Mill, summed it up in a nineteenth-century version of Empiricist epistemology, ideas are "copies" of sensations delivered to the mind through the senses.⁴⁸ Or, in John Locke's famous formulation, knowledge is "real only so far as there is a conformity between our ideas and the reality of things."⁴⁹

The primary significance of the empiricists' view for purposes of this Article is its implication for the proper relation between the knower and what is known. Truth, in a realist world, is "objective." A proposition is objective to the extent that it is connected to or *caused by*⁵⁰ an "object," something "out there" detached from the observer.⁵¹ The true representation of the world (and there is only one) is the representation that the world would give *if it could describe itself*.⁵² It follows, of course, that to arrive at truth, the observer must be free from or able to set aside her personal or subjective

44. *Id.* at 135-37. As Locke put the problem,

If, then, external objects be not united to our Minds when they produce Ideas in it, and yet we perceive these original Qualities in such of them as singly fall under our Senses, it is evident, that some motion must be thence continued to our Nerves, or animal Spirits, by some parts of our Bodies, to the Brains or the seat of Sensation, there to produce in our Minds the particular Ideas we have of them.

Id. at 136.

45. *Id.* at 136.

46. Grey, *supra* note 34, at 797.

47. PUTNAM, *supra* note 36, at 49.

48. JAMES MILL, ANALYSIS OF THE PHENOMENA OF THE HUMAN MIND 52 (John S. Mill ed., 1869).

49. LOCKE, *supra* note 43, at 563.

50. See RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 157 (1979).

51. See RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 7 (1990) (observing that objectivity, as the word itself suggests, has traditionally been understood as ontological).

52. RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 194 (1982).

attributes.⁵³ Indeed, objectivity, the complete effacement of the human observer, is the qualification sine qua non for the realist truth seeker. For to the extent that the description reflects the interests, assumptions, goals, or biases of the investigator, it will not be a faithful image of its object, and by hypothesis will be less than true.⁵⁴

The success of the natural sciences, especially Newtonian physics, in identifying an inherent order in the external world and symbolically representing that reality in the precise language of mathematics, induced confidence that the same assumptions and techniques could be usefully employed in other disciplines.⁵⁵ The premises and techniques of natural science came to dominate all realms of inquiry, and the objectivity of the world came to be regarded as a matter of common sense.⁵⁶ The mind was conceived as an essentially passive receiver of impressions from the external world,⁵⁷ a mirror reflecting the image of objective reality.⁵⁸ As Rorty states, "To know is to represent accurately what is outside the mind"⁵⁹

B. The Contextualist Critique

In recent years, the premises of empiricism (or, as it is more commonly called, realism or positivism) have been subjected to sustained attack across all of the disciplines they once held. Some of the leading figures in the history of science,⁶⁰ philosophy,⁶¹ literary studies,⁶² linguistics,⁶³ history,⁶⁴

53. Jeffrey Alexander, *General Theory in the Postpositivist Mode: The "Epistemological Dilemma" and the Search for Present Reason*, in POSTMODERNISM AND SOCIAL THEORY: THE DEBATE OVER GENERAL THEORY 322, 330-31 (Steven Seidman & David G. Wagner eds., 1992).

54. Thus, the preferred perspective of a realist metaphysics is "the God's Eye point of view," PUTNAM, *supra* note 36, at 49, or, as in the title of Thomas Nagel's book, "a view from nowhere." THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986).

55. As Richard Posner observes:

Through perception, measurement, and mathematics, the human mind would uncover the secrets of nature (including those of the mind itself, a part of nature) and the laws (natural, not positive) of social interaction—including laws decreeing balanced government, economic behavior in accordance with the principles of supply and demand, and moral and legal principles based on immutable principles of psychology and human behavior.

Richard A. Posner, *What has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1655 (1990).

56. PETER NOVICK, *THE NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* 524 (1988).

57. As a sociologist from the 1940's put it, "The stars have no sentiments, the atoms no anxieties which have to be taken into account. Observation is objective with little effort on the part of the scientist to make it so . . ." APPLEBY ET AL., *supra* note 38, at 16.

58. RORTY, *supra* note 50, at 12 ("The picture which holds traditional philosophy captive is that of the mind as a great mirror, containing various representations.")

59. *Id.* at 3.

60. See, e.g., KUHN, *supra* note 37.

61. See, e.g., NELSON GOODMAN, *OF MIND AND OTHER MATTERS* (1984); W.V. QUINE, *PURSUIT OF TRUTH* (1990); RORTY, *supra* note 50.

62. See, e.g., TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* (1983); STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

63. See, e.g., GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987).

64. See, e.g., MICHEL FOUCAULT, *THE ORDER OF THINGS; AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (Ronald D. Laing ed., 1970); HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE* (1975); HAYDEN WHITE, *TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM* (1978).

sociology,⁶⁵ and anthropology⁶⁶ have raised doubts about the belief in an unproblematic relation between external reality and the representations by which it is modeled. Common to all of these critiques is a blurring of the once-clear line between the subjective mind and the objective world. The mental mirrors onto which reality is reflected have come to be seen as social artifacts, a product of their time and place.⁶⁷ Or, to adjust the metaphor to accommodate the change, the mind has come to be seen not as a mirror reflecting exact images of reality, but as a lens through which external reality is refracted. While no one denies the value of clearing the mind of presuppositions and looking out into the world to see what is there, mounting evidence suggests that this is not possible.⁶⁸ Observation cannot serve as the bedrock for knowledge, as the Empiricists believed, because human beings lack the kind of direct access to the phenomenal world that an epistemology based on experience requires.⁶⁹ All experience is mediated by preexisting knowledge structures, constellations of assumptions, interests, and purposes that filter and organize perception as it occurs.⁷⁰ And because the minds that take the world

65. See, e.g., PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1967); HAROLD GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* (1967).

66. See, e.g., CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973); VICTOR TURNER, *THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL* (1967).

67. APPLEBY ET AL., *supra* note 38, at 173.

68. The impetus for this change in outlook is open to debate and ultimately not of primary interest for purposes of this Article. Hermeneutics, the favored or occasional rubric of various strands of post-positivist thinking, has ancient roots in efforts to find objective and stable meanings in sacred scripture. One eligible opinion searching for the roots of post-positivist thought in philosophy credits Kant with raising doubts about the intelligibility of the view that the world is composed of self-identifying objects that are captured by language. PUTNAM, *supra* note 36, at 60-64. American philosophical pragmatism has been traced to 19th-century evolutionary thinking, which suggested a functional approach to thinking and knowledge as an evolutionary adaptation to the environment, and 19th-century historicism, which had undermined the belief in a single set of categories for understanding the world through its demonstration of the ubiquity of historical and cultural diversity. Grey, *supra* note 34, at 796-98. The emergence of doubts about the possibility of arriving at objective truth within history has been plausibly linked to the democratization of the profession. See APPLEBY ET AL., *supra* note 38, at 146-59. More important than the origins in the change in view is the ubiquity of the questioning of received views about the foundations for truth.

69. As Charles Sanders Peirce put it:

[T]here is but one state of mind from which you can "set out," namely, the very state of mind in which you actually find yourself at the time you do "set out"—a state in which you are laden with [a]n immense mass of cognition already formed, of which you cannot divest yourself if you would; and who knows whether, if you could, you would not have made all knowledge impossible to yourself?

Grey, *supra* note 34, at 799 (quoting Charles Sanders Peirce, *What Pragmatism Is* (1905), in 5 *COLLECTED PAPERS OF CHARLES SANDERS PEIRCE* 272, 278 (Charles Hartshorne & Paul Weiss eds., 1934)).

70. See generally NELSON GOODMAN, *WAYS OF WORLDMAKING* (1978). In an amusing illustration of the way unarticulated assumptions influence interpretation, Goodman tells the story of a woman who chose a swatch of cloth from an upholsterer's sample book to have her sofa reupholstered. When ordering the material from the textile shop, she emphasized that she wanted the material to be exactly like the sample. When her order was delivered it contained several hundred 2-inch by 3-inch pieces cut with zigzag edges, just like the sample. To the woman's protests, the seller responded that he had kept his employees up half the night cutting the fabric to match the sample. Some months later, in preparation for a party, the same woman went to a bakery and selected a cupcake from those on display, ordering enough for fifty guests. On the date of the party the bakery delivered a single huge cake. In response to the woman's complaint, the proprietor of the bakery said, "You have no idea how much

in are a product of their time and place, their representations of reality are likewise socially conditioned and partial to some degree. Models of the world are never simply prints of a fully formed external reality.⁷¹ Rather, representations of reality are shaped by the values and purposes of their human creators. How the world appears will to some degree be a product of the categories that inform perception.

Thomas Kuhn's *The Structure of Scientific Revolutions*,⁷² perhaps the most influential statement of post-positivist thinking,⁷³ illustrates how subjective belief structures shape perception and knowledge. Kuhn's account reconceptualizes the history of science, thus upsetting the realist view of the authority of fact over theory. The received account, grounded in a metaphysical realism and a correspondence theory of truth, views science as an accumulation of knowledge or a linear progression toward ever more faithful theories about the true nature of the universe. Kuhn relocates the reference point relative to which the history of science is drawn. Instead of telling the story by reference to a supposed mind-independent external reality, Kuhn describes scientific activity in relation to a cultural phenomenon that he calls a "paradigm."⁷⁴

Though not susceptible of simple definition, paradigms are the matrix of assumptions, standards, values, goals, and practices that serve to organize the activity of a particular scientific community. They are not the kind of self-consciously held and contingent theories that *divide* members of, for example, the legal academy, who might organize their research on law around law and economics, critical race theory, or one of several other available frameworks. Paradigms are instead "quite unself-conscious and unquestioned convictions about the way things are."⁷⁵

Paradigms serve both a cognitive function and a normative function. In their cognitive function, paradigms provide the community with its assumptions about the nature of the field of inquiry. They tell working scientists about "the entities that nature does and does not contain and about the ways in which those entities behave."⁷⁶ In their normative function, paradigms provide the scientific communities with a conception of their enterprise and its legitimate problems and standards. They are "the source of the methods, problem-field, and standards of solution accepted by any mature scientific community at any

trouble we went to. My husband runs the textile shop and he warned me that your order would have to be in one piece." *Id.* at 63-64. For an example in which the ambiguity is more patent, see STANLEY FISH, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, in *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES*, *supra* note 62, at 268, 274-77 (discussing a sign hung over a door reading: "PRIVATE MEMBERS ONLY").

71. As evidence that belief influences perception, note that it feels as if we are able to perceive mathematical facts such as the fact that every whole number has a successor. See PUTNAM, *supra* note 36, at 145-46.

72. KUHN, *supra* note 37.

73. The reason Kuhn's book has proven so controversial and influential is that it challenges the premises of realism in the domain where they had been most successful—experimental science.

74. KUHN, *supra* note 37, at 10.

75. NOVICK, *supra* note 56, at 528.

76. KUHN, *supra* note 37, at 109.

given time.⁷⁷ This normative work is performed in a variety of ways. It is done through, among other things, shared values—such as the value of prediction⁷⁸—and through paradigmatic “exemplars”—notable scientific achievements and model experiments.⁷⁹ It is also done partly through cognitive assumptions, which help to specify the outstanding questions and their relative importance, as well as what counts as a permissible solution.⁸⁰ For instance, the seventeenth century’s commitment to the mechanico-corpuscular view of nature gave rise to some new questions and resolved others. The belief that neutral corpuscles could act on each other only through contact directed the attention of scientists to the question of how the motion of particles is altered by collisions.⁸¹ There followed a reinterpretation of well-known observations that Newton embedded in his laws of motion. According to the hypothesis of a mechanical universe, those laws must (and did) explain interactive motion mechanically. Thus, “the corpuscular paradigm bred both a new problem and a large part of that problem’s solution.”⁸²

Most scientific work, what Kuhn calls “normal science,” takes place within a stable paradigm. Kuhn illustrates the essentially closed character of normal science by comparing it to puzzle solving.⁸³ According to Kuhn, what characterizes puzzles—jigsaw puzzles, crossword puzzles—is that there be both an assured solution and a set of criteria or rules which define what counts as a right answer and the permissible steps that may be taken in order to achieve it.⁸⁴ Paradigms, like puzzles, both set the problems and specify the means and range of solutions.⁸⁵ Scientists working within a stable paradigm “check off examples against criteria; they fudge the counter-examples enough to avoid the need for new models; they try out various guesses, formulated within the current jargon, in the hope of coming up with something which will cover the unfudgeable cases.”⁸⁶ What scientists never do is hold the solution up to external reality to assess the fit.

“Extraordinary science” is what occurs during periods of paradigm shift. The most important precondition for a paradigm shift is the availability of an alternative paradigm to replace it.⁸⁷ The choice between two competing paradigms is not, however, accomplished by comparing each to the facts and selecting the one that presents the best fit.⁸⁸ Nor can two competing paradigms be directly compared to each other.⁸⁹ The nature of a paradigm makes both types of measure impossible. For one thing, there can be no test

77. *Id.* at 103.

78. *Id.* at 184-85.

79. *Id.* at 187.

80. *Id.* at 104-05.

81. *Id.* at 104.

82. *Id.* at 105.

83. *Id.* at 36-42.

84. *Id.* at 38.

85. *Id.*

86. RORTY, *supra* note 52, at 193.

87. *Id.* at 77.

88. *Id.* at 145.

89. *Id.*

of which of two paradigms has the greater explanatory power, since the criteria for what passes as a satisfactory explanation are internal to the paradigm.⁹⁰ Furthermore, it is only *within* a paradigm that any facts exist. For example, there can be no direct comparison between an account which describes the world in terms of dephlogisticated air and one which describes the world in terms of oxygen.⁹¹ Both accounts are closed systems in that they define what there is and then generate from those very definitions the tests and measures for identifying and describing it. Even when a subsequent paradigm incorporates the terms and concepts of its predecessor, closer inspection shows that they are in fact using the same terms to label different realities. For example, while both Newtonian physics and Einstein's general theory of relativity used the concept of "space," Newton's concept of space as "flat, homogeneous, isotropic and unaffected by the presence of matter" was completely transformed in Einstein's theory.⁹² As Kuhn observed: "To make the transition to Einstein's universe, the whole conceptual web whose strands are space, time, matter, force, and so on, had to be shifted and laid down again on nature whole."⁹³

Thus, at least according to some interpretations of Kuhn, scientific paradigms construct both the scientific enterprise and the reality that is its object. In describing the transition that occurs when one paradigm is replaced by another, Kuhn invoked analogies to political revolutions which alter "the modes of community life,"⁹⁴ and to visual gestalt switches documented by cognitive psychologists whereby "[w]hat were ducks in the scientist's world before the revolution are rabbits afterwards."⁹⁵ Kuhn further observed:

Lavoisier . . . saw oxygen where Priestly had seen dephlogisticated air and where others had seen nothing at all. In learning to see oxygen, however, Lavoisier also had to change his view of many other more familiar substances. . . . At the very least, as a result of discovering oxygen, Lavoisier saw nature differently. And in the absence of some recourse to that hypothetical fixed nature that he "saw differently," the principle of economy will urge us to say that after discovering oxygen Lavoisier worked in a different world.⁹⁶

Just what Kuhn meant and, more importantly, what if anything is left of objectivity in the post-Kuhnian, post-positivist world, has been the subject of much debate and disagreement.⁹⁷ One view, widely aired in the legal

90. *Id.* at 148.

91. *Id.* at 118, 126.

92. KUHN, *supra* note 37, at 149.

93. *Id.*

94. *Id.* at 94.

95. *Id.* at 111.

96. *Id.* at 118. Kuhn's description of the scientific process is subject to the same qualifications implied by his arguments against the truth claims of science. That is, the history of science, like science, is hermeneutic rather than epistemological, *see* RORTY, *supra* note 50, at 322, and Kuhn's own account of that history is no less dependent upon assumptions and standards that have produced, rather than simply rendered "visible," the paradigm shifts that he now sees.

97. Kuhn has rejected the most far-reaching interpretations of his work. He has forcefully denied the accusations of his critics that his skepticism about the possibilities for identifying a neutral algorithm

community by Richard Rorty and Stanley Fish, concludes that the demise of (what is now called) naïve realism requires the abandonment of any effort to ground knowledge in external reality. Because perception is shaped by the categories of understanding, "[p]erception is never innocent of assumptions, and the assumptions within which it occurs will be responsible for . . . what is perceived."⁹⁸ We may assume that something other than us exists,⁹⁹ but we know it only within the contours of a purely social and historical—a human—apparatus. It is not possible to pierce or transcend our conceptual categories and touch that other directly, because, as is often stated, language and culture "go all the way down." Though one can change interpretive frameworks or move back and forth between frameworks, it is not possible to shed or look beyond one or another culturally specific interpretive matrix. Reality cannot have a form that is its own, much less one that is knowable, because form, like language, is an entirely human creation. Thus, whatever form we attach to reality belongs to us, not to it.¹⁰⁰ As a result, an appeal to "the facts" cannot resolve competing truth claims.

Partisans of this strong form of interpretivism emphasize that while reality does not itself rule out any interpretations as implausible, interpretation is not unconstrained. On the contrary, the range of imaginable constructions of reality is narrowly circumscribed by the interpretive framework of the observer. Rejecting neutral external reality as the arbiter of truth does not mean there are *no* foundations for truth, only that "whatever foundations there are . . . have been established by persuasion, that is, in the course of argument and counter-argument on the basis of examples and evidence that are themselves cultural and contextual."¹⁰¹ Because all perception is dependent on the interpretive apparatus of the observer, truth is invariably relative to a community that shares the same conventions of interpretation.¹⁰² No perspective can claim priority on the basis of privileged access to the truth.

for theory choice inescapably entails an irrational relativism. See BERNSTEIN, *supra* note 34, at 51-108 (discussing the controversy generated by Kuhn's work).

98. STANLEY FISH, *Why No One's Afraid of Wolfgang Iser*, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 78 (1989) [hereinafter *DOING WHAT COMES NATURALLY*].

99. In making this assumption, we put aside the logical possibilities that we are all brains in a vat, that the world was created yesterday complete with memories and fossils, etc.

100. As Stanley Fish puts it, "What can be seen will be a function of the categories of vision that already inform perception, and those categories will be social and conventional and not imposed upon us by an independent world." FISH, *supra* note 98, at 82.

101. STANLEY FISH, *Introduction: Going Down the Anti-Formalist Road*, in *DOING WHAT COMES NATURALLY*, *supra* note 98, at 32.

102. The idea of interpretive communities is most often associated with Stanley Fish. See, e.g., FISH, *supra* note 62. The idea has been aptly described as "a way of speaking about the power of institutional settings, within which assumptions and beliefs count as facts." Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, in *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* 115, 122 (Sanford Levinson & Steven Mailloux eds., 1988).

The only ground on which any point of view can assert superiority is on the basis that it commands the greatest agreement.¹⁰³

Another response to the recognition of the role of the social in the construction of knowledge regards the choice between credulous realism and unmoored relativism as false.¹⁰⁴ This response does not see the demise of a strictly dichotomized view of reality as requiring the total abandonment of the search for objective knowledge, because recognizing that subjective knowledge structures influence perception does not mean that they determine entirely the shape of reality. Despite the fact that we lack direct, pre-linguistic access to the world outside the self, there nevertheless remains a sense in which the world can be comprehended.¹⁰⁵ Objectivity or general theory, however, is not identified exclusively with external reality, but results from an interactive relation between persons and things in the world.¹⁰⁶ The mind neither mirrors an independent external reality nor wholly makes it up; rather, "the mind and the world jointly make up the mind and the world."¹⁰⁷

Whether acknowledging the salience of perspective excludes all possibility of objective knowledge is probably insoluble—at least based upon the current state of our understanding. But for present purposes it is not necessary to choose sides on this issue, since the only point to be made here is one on which both parties to the controversy agree: that the facts never speak for themselves. There is no transcendent perspective, no God's eye point of view, from which the world appears as it really is.¹⁰⁸ Though efforts to apprehend a "decentered" world may not be entirely fruitless, all inquiry proceeds out of a set of socially and historically determined interests and assumptions that more or less shape its final product.

103. See GOODMAN, *supra* note 70, at 139 ("[The] tests for rightness [of descriptions of reality] may consist primarily in showing not that they are reliable but that they are authoritative.")

104. See BERNSTEIN, *supra* note 34; NAGEL, *supra* note 54; POSNER, *supra* note 51; PUTNAM, *supra* note 36.

105. Alexander, *supra* note 53, at 329.

106. APPLEBY ET AL., *supra* note 38, at 259.

107. PUTNAM, *supra* note 36, at xi.

108. For instance, Richard Posner, acknowledging that "objectivity as correspondence to external reality" is not tenable, proposes two weaker senses of the word. "Scientific objectivity" exists if conclusions can be independently replicated. According to Posner, "A finding is objective in [the scientific] sense if different investigators, not sharing the same ideological or other preconceptions (except—maybe a big 'except'—that they would have to share the scientific worldview), would be bound to agree with it." POSNER, *supra* note 51, at 7. The weakest sense of objectivity is "as merely reasonable—that is, as not willful, not personal, not (narrowly) political, not utterly indeterminate though not determinate in the ontological or scientific sense, but as amenable to and accompanied by persuasive though not necessarily convincing explanation." Posner calls this third sense "conversational." *Id.* Stanley Fish has argued that scientific and conversational objectivity are indistinguishable. Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1448-49 (1990) (book review). Whether or not the two are indistinguishable, Posner acknowledges that the two types of objectivity are similar in that both describe an objectivity that is "cultural and political rather than epistemic." POSNER, *supra* note 51, at 26.

II. EMPIRICISM AND THE QUALIFICATIONS OF LEGAL FACTFINDERS

A. *The Premises of Judicial Factfinding*

The Enlightenment belief in the fundamental separability of mind and matter and the independence of the external world is now widely discredited. Skepticism about realist assumptions has not, however, had a significant impact on judicial factfinding.¹⁰⁹ Conventionalist theorizing has had a deep impact on scholarly thinking about legal texts;¹¹⁰ yet it has barely penetrated thinking about facts. As a consequence, the underlying metaphysical assumptions upon which Anglo-American evidence law is built have been regarded as largely unproblematic for two hundred and fifty years.¹¹¹ The predominant attitude is that “[I]aw is what needs to be interpreted, but facts are simply true or false.”¹¹²

109. Twining, *Evidence and Legal Theory*, *supra* note 32, at 61, 69-70; Twining, *The Rationalist Tradition*, *supra* note 32, at 243-47; cf. TWINING, *supra* note 29, at 125 (commenting on Wigmore's concern with the practicalities of proof rather than fundamental questions about epistemology).

110. For a collection of views on the problem of interpretation of legal text, see INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER, *supra* note 102.

111. Twining, *Evidence and Legal Theory*, *supra* note 32, at 61, 69-70; Twining, *The Rationalist Tradition*, *supra* note 32, at 243-47. There has, however, been a recent surge of interest among evidence scholars in basic epistemological questions and the premises of our factfinding system. See, e.g., Ronald J. Allen, *Unexplored Aspects of the Theory of the Right to Trial by Jury*, 66 WASH. U. L.Q. 33 (1988) (observing that while the jury is presumed to operate on a relativist or communitarian theory of knowledge, the epistemology of judges is realist); Ann Althouse, *Beyond King Solomon's Harlots: Women in Evidence*, 65 S. CAL. L. REV. 1265 (1992) (illustrating the contingent and gendered character of the assumptions that underlie relevance determinations through analysis of the King Solomon story); Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107 (1994) (putting forward an antifoundationalist theory of jury decision-making); Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118 (1987) (discussing various alternative understandings of the criminal trial); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993) (arguing for a redefinition of truth that recognizes the impact of jury discrimination in jury decision-making); Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413 (identifying gendered assumptions in evidence doctrine); David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1 (1986) (arguing that a character evidence ban fulfills a “cathartic” function by legitimizing outcomes); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985) (arguing that evidence rules serve to promote the acceptability and stability of jury verdicts); Kim Lane Scheppele, *Facing Facts in Legal Interpretation*, 30 REPRESENTATIONS 42 (1990) [hereinafter Scheppele, *Facing Facts*] (arguing that law and fact are used to construct law and fact); Kim Lane Scheppele, *Just The Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 125 (1992) [hereinafter Scheppele, *Just The Facts, Ma'am*] (observing that “the production of facts as an accomplishment of legal practitioners is only now beginning to be examined”); Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. U. L. REV. 995 (1994) (criticizing the positivist orientation of legal scholarship); Adrian A.S. Zuckerman, *Law, Fact or Justice?*, 66 B.U. L. REV. 487 (1986) (deconstructing the law-fact distinction). The kind of skepticism now being expressed is not, moreover, altogether new. See JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949) (containing a classic statement of legal realist fact skepticism); Charles P. Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150 (1952) (arguing that “trial courts are more usually concerned with conflicting characterizations of the facts than with the facts themselves”).

112. Scheppele, *Facing Facts*, *supra* note 111, at 43. This belief in “[a] combination of cognitive objectivism and moral relativism” is widespread outside of thinking about law. BERNSTEIN, *supra* note 34, at 13. The comment of literary theorist Wolfgang Iser exemplifies this view:

To be sure, the practical difficulty of achieving certain knowledge of legal facts has been more or less consistently acknowledged.¹¹³ Significantly, however, the skeptical tradition, such as it is, has focused primarily on the impediments to arriving at the truth,¹¹⁴ without questioning the coherence of the concept of truth itself. That is, it is recognized that truth is hard to achieve, but rarely doubted that it is out there if we only had the means to discover it. As a result, the virtually unquestioned premises that have informed what William Twining calls the "Rationalist Tradition" of evidence scholarship include the following: (1) "[e]vents and states of affairs occur and have an existence independent of human observation"; and (2) "true statements are statements which correspond with facts, i.e. real events and states of affairs in the external world."¹¹⁵

"My interpretation of the world may well be as much a product of linguistic acts as my interpretation of a literary text, but I maintain that there are substantial differences between the things being interpreted. First, the real world is perceivable through the senses, whereas the literary text is perceivable only through the imagination—unless one believes that reading the words sunset, music, silk, wine, and scent is the same as seeing, hearing, touching, tasting, and smelling the real things. Secondly, all known experience suggests that the real world (uninterpreted) lives and functions independently of the individual observer, whereas the literary text does not. Thirdly, our contact with the real world has immediate physical or social consequences, whereas our contact with the literary text need not, and indeed rarely does have any such consequences."

FISH, *supra* note 98, at 81 (quoting Rudolf E. Kuenzli, *Interview: Wolfgang Iser*, DIACRITICS, June 1980, at 57, 72). Contrary to Iser's position, however, Fish argues that

mediated access to the world is the only access we ever have; in face to face situations or in the act of reading a novel, the properties of objects, persons, and situations emerge as consequences of acts of construction that follow . . . from a prestructured understanding of the shapes any meaningful item could possibly have.

Id. at 80-81.

113. See Twining, *The Rationalist Tradition*, *supra* note 32, at 211, 244 (noting that the "Rationalist Tradition" that has characterized Anglo-American evidence law since the 18th century has recognized that "[p]resent knowledge about past events is typically based upon incomplete evidence; it follows from this that establishing the truth about alleged past events is typically a matter of probabilities or likelihoods falling short of complete certainty.").

114. The leading contemporary statement on the matter is found in Henry M. Hart, Jr. & John T. McNaughton, *Evidence and Inference in the Law*, in EVIDENCE AND INFERENCE 48 (Daniel Lerner ed., 1958). Wigmore's view of the conditions which differentiate a courtroom from a scientific laboratory are contained in JOHN H. WIGMORE, *THE SCIENCE OF JUDICIAL PROOF AS GIVEN BY LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE AND ILLUSTRATED IN JUDICIAL TRIALS* 925-32 (3d ed. 1937). One frequently mentioned obstacle to achieving certainty in judicial trials is that unlike scientific investigation, legal proof deals with unique historical events not susceptible to controlled experimentation. Hart & McNaughton, *supra*, at 44. It has also been recognized that the discovery of truth is not the only value being pursued. Most notably, the ends of the enterprise—dispute resolution—require that disputes be resolved in an immediate and definite way, even if that means that the outcome will invariably be based on something short of certain knowledge. *Id.* at 50-51; WIGMORE, *supra*, at 925-26. Even if judicial factfinders had the leisure to investigate as thoroughly as possible, the importance attached to other social goods involved in the process, including respect for the dignity of the individual, and promotion of certain social relationships, would result in according less than absolute priority to the discovery of truth.

115. Twining, *The Rationalist Tradition*, *supra* note 32, at 244. For a discussion of the various brands of skepticism the Rationalist Tradition has weathered, see TWINING, *RETHINKING EVIDENCE*, *supra* note 32, at 92, and Twining, *Scepticisms*, *supra* note 32, at 285. As Professor Twining recognizes in a note in the reprinted version of his essay, his map of prominent skeptical traditions omits some significant contributors, including Foucault, Geertz, Putnam, Ricour, and Rorty. TWINING, *RETHINKING EVIDENCE*, *supra* note 32, at 134. For a less optimistic view of the possibility of achieving historical

While the formal rules that govern judicial factfinding reflect empiricist assumptions, the premises that inform the rules do not necessarily guide the practice of lawyers. The working understanding of the aims and limitations of judicial proof held by those involved in the process is much more subtle and complex than the premises of the Rationalist Tradition of evidence doctrine.¹¹⁶ Many of those involved in judicial factfinding would agree with Richard Uviller that the scientific treatment of truth about human events as a "flat fact" fails to capture its "plural forms and multifaceted aspects."¹¹⁷ Notwithstanding the realist assumptions that underlie the rules of evidence and procedure, "pragmatism [not realism] is the implicit working theory of most good lawyers."¹¹⁸

This orientation of lawyers is reflected in the widespread belief that a case is won or lost at the jury selection stage.¹¹⁹ Moreover, the importance

truths, see Paul Bergman, *Of Bentham, Wigmore, and Little Bo Peep: Where Evidence Lost Its Way, and a Map for Scholars to Find It*, 66 NOTRE DAME L. REV. 949, 951-52 (1991) (reviewing TWINING, RETHINKING EVIDENCE, *supra* note 32) (observing that our reliance on epidemiological studies to prove that environmental hazards cause human diseases may one day seem as misguided as colonial Salem courts' reliance on evidence of "sick cows" and "lumps of earth in the hearth" to prove witchcraft seems today).

116. The same contrast can be found between scholarly writing about evidence, which betrays Rationalist assumptions, and the much more varied, often skeptical, literature about litigation, legal process, and procedure. See William Twining, *Hot Air in the Redwoods, a Sequel to the Wind in the Willows*, 86 MICH. L. REV. 1523, 1531 (1988). For examples that rely on theories used here, see Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); Albert J. Moore, *Inferential Streams: The Articulation and Illustration of the Trial Advocate's Evidentiary Intuitions*, 34 UCLA L. REV. 611 (1987); and Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989) [hereinafter Moore, *Trial by Schema*].

The contrast between the realist orientation of the rules and the more pragmatist bent of practitioners is nicely illustrated by two contrasting views on the propriety of using the techniques of behavioral science in trials. Professor Victor Gold, whose professional interest has been primarily in the realm of evidence doctrine, criticizes the use of persuasion techniques developed by social scientists on the general ground that such advocacy "induce[s] juries to employ legally irrelevant or improper considerations in their decisionmaking." Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 483 (1987). Professor Alex Tanford, a law professor whose focus is trial practice, and Professor Sarah Tanford, a psychology professor, defend the use of social science in the courtroom, and criticize the assumptions underlying Gold's argument. J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741 (1988). They reject the assumption that a jury can "in good faith put aside its biases and logically choose which evidence and arguments to accept and which to reject," *id.* at 743 (quoting Gold, *supra*, at 501), and instead favor the view that "[i]n a complex task such as deciding on a verdict in a trial, cognitive biases are a natural consequence of the decision process. They serve as a means of simplifying and organizing information, and they reflect the way all persons think." *Id.* at 749.

117. H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1076 (1975).

118. Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1590 (1990); accord Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1811 (1990) (quoting Thomas C. Grey, *supra*, at 1590); see also Allan C. Hutchinson, *The Three 'R's: Reading/Rorty/Radically*, 103 HARV. L. REV. 555, 575 (1989) (reviewing RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989)) ("Legal theorists have learned well from their practicing colleagues."). Admittedly, these comments probably relate to the way lawyers' thinking about law rather than about facts.

119. See, e.g., Herald P. Fahringer, "Mirror, Mirror on the Wall . . .": *Body Language, Intuition, and the Art of Jury Selection*, 17 AM. J. TRIAL ADVOC. 197 (1993) (stating that "experts in the field believe that eighty-five percent of the cases litigated are won or lost when the jury is selected.").

attached to the composition of the jury is grounded in a popular understanding of decision-making that emphasizes the importance of the views and outlooks of jurors to their evaluation and acceptance of the trial evidence. Whether in the form of courthouse folk wisdom or the somewhat more refined version offered by litigation experts,¹²⁰ winning at trial is regarded more as a matter of persuasion than proof. During voir dire attorneys attempt to identify and seat jurors who hold beliefs that allow them to accept the lawyer's version of events as plausible. In addition, lawyers endeavor during voir dire or in opening statements to provide jurors with a framework that is compatible with the trial evidence.¹²¹ Implicit in both strategies is a recognition that preexisting, nonevidentiary beliefs or interpretive frameworks are ingredient in, rather than polluting of, the ultimate decision.¹²²

A contextualist view of the process of belief formation is also apparent in prevalent views among practicing lawyers on how best to organize and present their case. Lawyers resist seeing a case as a series of discrete propositions validated through their connection to real world events. It is an elementary principle of trial advocacy that a successful case must be more than the sum of the individual elements comprising the claim. Documenting the legal requirements with credible evidence is not sufficient. The evidence as a whole must satisfy criteria of acceptability different from simple point-by-point evidentiary verification. The lawyer's presentation must form a coherent "theory of the case" according to nonevidentiary standards of what constitutes an adequate or plausible explanation of the litigated event. As a leading manual on trial technique advises, "[y]ou must integrate the undisputed facts with your version of the disputed facts to create a cohesive, logical position at trial."¹²³ That same manual recognizes that the adequacy of the structure,

Contrary to Mr. Fahringer's claims, there is no such consensus that jury composition is the crucial variable in the trial's outcome. See, e.g., Shari Seidman Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 JUDICATURE 178 (1990) (reviewing research and concluding that the quality of evidence is more important in determining the outcome than the composition of the jury); Michael J. Saks, "Scientific" Jury Selection; *Social Scientists Can't Rig Juries*, PSYCHOL. TODAY, Jan. 1976, at 48 (reviewing research and concluding that the quality of evidence is more important to the outcome of the case than the composition of the jury).

120. See generally Morton Hunt, *Putting Juries on the Couch*, N.Y. TIMES, Nov. 28, 1982, § 6 (Magazine), at 70 (discussing social science trial consultants).

121. See, e.g., Cathy E. Bennett & Robert B. Hirschhorn, *Voir Dire in Criminal Cases: Choosing Jurors to Judge Your Client*, TRIAL, Oct. 1992, at 68 (reviewing aims and techniques of voir dire); Susan E. Jones, *Voir Dire and Jury Selection: Strategies for Success*, TRIAL, Sept. 1986, at 60, 66 (boasting that "[i]f you handle voir dire well, by the time you reach opening statement, you will be preaching to the converted"); Gerry Spence, *A Voir Dire Masterpiece*, TRIAL DIPL. J., Fall 1980, at 8 (including a transcript of a mock voir dire conducted by the author).

122. As support for this and the following paragraph, it should be sufficient to observe that the founder of the successful southern California-based trial consulting firm Litigation Sciences came to the job from the chairmanship of the marketing department at the University of Southern California. See Lori B. Andrews, *Mind Control in the Courtroom*, PSYCHOL. TODAY, Mar. 1982, at 66, 73. For pragmatists there is no disgrace in the fact that the methods for selling soap are so easily adapted to selling jury verdicts. Cf. GOODMAN, *supra* note 70, at 129 (observing in reference to disputes over the validity of one or another scheme of explanatory categories that "what is called for in such cases is less like arguing than selling").

123. THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 9 (1980).

not just the documentation of its parts, determines the persuasiveness of the presentation. Proof is not a matter of instantiating individual elements, but of presenting "the more plausible explanation of 'what really happened.'"¹²⁴

But the skeptical attitude of lawyers has not had a significant influence on the generation of formal factfinding procedures. In the realm of doctrine, the influence of unstated philosophical commitments from the Enlightenment is recognizable.¹²⁵ However suspect they are in the day-to-day workings of the

124. *Id.* This working understanding contrasts with the formal structuring of the jury decision-making task by the rules of proof. Those rules define the decision-maker's task as a series of judgments about whether a set of discrete propositions of fact have been established to some degree of probability. For instance, in a criminal case, the prosecution will be deemed to have satisfied its burden of proof if it has established beyond a reasonable doubt a set of critical features defining criminal liability. These features, defined by the substantive law, include identity, culpability, conduct, circumstances, and result. See MODEL PENAL CODE § 1.13(9) (1962) (defining the elements of an offense to include conduct, attendant circumstance, or result); *id.* § 2.02(1) (requiring proof that the actor acted purposely, knowingly, recklessly, or negligently with respect to all material elements of the offense).

In the decision-making model implicit in the rules of proof, the juror is essentially a "judgmental accountant" whose task is to weight and sum up the evidence to arrive at a bottom line evaluation. See Reid Hastie, *Algebraic Models of Juror Decision Making Processes*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 84 (Reid Hastie ed., 1993); see also Martin F. Kaplan, *Cognitive Processes in the Individual Juror*, in *THE PSYCHOLOGY OF THE COURTROOM* 197, 199 (Norbert L. Kerr & Robert M. Bray eds., 1982). What is significant about this depiction is that it implements an essentially "bottom up" epistemology. Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373, 383, 384 n.35 (1991). According to this view the case is proven by verifying the legal requirements, which is achieved by instantiating them with credible evidence point by point. This is distinguished from a "top down" approach in which the acceptability of the case depends on whether it coheres according to some standards of plausible acceptability.

125. See Mark Cammack, *Evidence Rules and the Ritual Functions of Trials: "Saying Something of Something"*, 25 LOY. L.A. L. REV. 783 (1992) (discussing how evidence rules both construct and utilize realist distinction between law and fact); cf. Seigel, *supra* note 111 (noting the realist orientation of evidence scholarship).

It has, of course, long been recognized that determinations of relevancy questions require importation of extralegal intelligence. At the end of the last century James Bradley Thayer observed that "[t]he law furnishes no test of relevancy. For this, it tacitly refers to logical and general experience." JAMES B. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW* 265 (Augustus M. Kelley Books 1969) (1898). This recognition, however, is not ordinarily thought to be subversive of realist premises. The law's use of extra-legal principles of logical and general experience remains "tacit" precisely because those principles are thought to be so widely accepted and self-evidently true as to be beyond dispute. For example, Wigmore believed the doctrine of "jury notice"—which recognizes the jury's use of nonevidentiary facts—to be "strictly limited to a few matters of elemental experience in human nature, commercial affairs, and everyday life" and to extend only to "matters *notorious and unquestioned*." 9 WIGMORE, *EVIDENCE*, *supra* note 29, § 2570, at 726-28 (emphasis in original). Likewise, Wigmore was sufficiently complacent about the validity of the premises on which relevancy decisions are made to deny that there was anything to be gained from exposing them. 1A WIGMORE, *EVIDENCE*, *supra* note 29, § 27; see also TWINING, *THEORIES OF EVIDENCE*, *supra* note 29, at 146 ("Although [Wigmore was] not a crude positivist, he tended to underplay the extent to which 'evaluating' the evidence is in practice not a matter of estimating likelihoods, but also involves value judgments on the part of adjudicators."). The same confidence in a high level of societal consensus on the tenets of common sense is present today. See TERENCE ANDERSON & WILLIAM TWINING, *ANALYSIS OF EVIDENCE: HOW TO DO THINGS WITH FACTS BASED ON WIGMORE'S SCIENCE OF JUDICIAL PROOF* 369-72 (1991) (noting and criticizing this assumption); see also L. JONATHAN COHEN, *THE PROBABLE AND THE PROVABLE* 275 (1977) ("The main commonplace generalizations [used by jurors] are for the most part too essential a part of our culture for there to be any serious disagreement about them. They are learned from shared experiences or taught by proverb, myth, legend, history, literature, drama, parental advice, and the mass media.").

factfinding process, assumptions rooted in the Enlightenment nonetheless guide the authoritative definition of the project.¹²⁶

B. *The Qualifications for Jurors*

A realist outlook has also dominated constitutional doctrine regarding juror qualification. Today's guiding image of the ideal juror has its source in Enlightenment beliefs about the independence of the objective world and an assumed opposition between the objective world and the subjective mind. True beliefs are those that are connected with and caused by the object toward which they are directed. Bias or other subjective qualities of the factfinder are thought to function instead of or in the face of the facts.¹²⁷

To be sure, this realist tradition has not been unchallenged; an enduring counterdoctrine vindicates the trial lawyer's intuition that subjective characteristics of the decision-maker play an inevitable role in the decision-making task. Moreover, the complex character of the jury's role has prevented the translation of the clean implications of realist assumptions into precisely defined and agreed upon qualifications for jurors.¹²⁸ To take the most obvious point, it is accepted that jurors do more than simply determine the facts.¹²⁹ Even the most narrowly defined conception of the role of jurors

126. See Twining, *Evidence and Legal Theory*, *supra* note 32, at 70 ("The Rationalist Tradition is simplistic; much of specialized evidence discourse postulates one law of evidence, one type of process, one kind of enquiry, and a single purpose or end to litigation.") (emphasis in original).

127. See James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 279-80 (1988) (acknowledging that while "a person's political, moral, social, and economic views . . . are viewed as indispensable qualities of the ideal juror" and should be given full play in making "value rather than factual judgments," "[j]urors should not be permitted to base votes on their biases rather than on the evidence").

128. See Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images and Procedures*, 64 N.C. L. REV. 501, 529 (1986) (noting that the Court has not defined impartiality directly but has subsumed the question under the more general inquiry into the attributes of a constitutionally acceptable jury).

129. Over the past two centuries, the acknowledged function of the jury has been progressively narrowed. Recognizing a broad role for jurors was central to anti-federalist acceptance of the Constitution. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991). The anti-federalists who pressed for a constitutional guarantee of the right to trial by jury regarded the jury as an indispensable protection against the twin deficiencies of centralization of power: remoteness from local conditions and corruption of specialized officials. Though ordinary citizens could not hope to make the law as national legislators, they could modify and adapt it to suit local needs and customs through their role as jurors. *Id.* at 1140, 1187. Consistent with this view, jurors in the 18th century were generally accorded a much more expansive role to decide both law and fact than is true today. Mark D. Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964). Likewise, juries could protect against overreaching or corruption in the exercise of power. Juries not composed of permanent government officials were deemed better able than judges to monitor prosecutorial discretion, and could punish governmental overreaching directly through a civil damage suit against government officials who violated the Fourth Amendment. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 31 (1975) (describing the 1760's case of *Erving v. Cradock* in which a smuggler who had settled with the customs official in admiralty court successfully sued the same official in the common law court for trespass, on the ground that the official's seizure of the contraband under the Navigation Acts violated the Fourth Amendment's protection against unreasonable searches and seizures); JOHN P. REID, *IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION 30-32* (1977) (describing the *Erving* case). It is ironic that the progressive restricting of the jury's role occurred simultaneously with a general expansion of the juror franchise.

recognizes that they supply the tribunal with quasi-legal standards, such as reasonableness, that the law incorporates as standards for judgment.¹³⁰ Indeed, a principal justification for the use of a panel of lay decision-makers, rather than a single professional, is that jurors represent the values of the community and express community values in their decisions.¹³¹ Moreover, the use of juries as legal decision-makers is defended on grounds other than their capabilities as factfinders. Though perhaps not as compelling a justification as it once was, the distrust for professional decision-makers is still cited as a reason for employing juries¹³² and reflects deeply ingrained cultural disinclination for a hierarchical organization of authority.¹³³ Even so, and despite the fact that no one really believes that the type of juror that realist assumptions require actually exists,¹³⁴ the ideal of an independent, detached, and impartial decision-maker is the reference point against which the rules for selecting jurors are judged, rationalized, and extended.

I. Definitions of Constitutional Impartiality

The Sixth Amendment explicitly guarantees the right to an "impartial jury" in criminal cases. Indeed, impartiality is the only defining feature of the jury that is mentioned anywhere in the Constitution.¹³⁵ Whatever additional

130. This infusion of juror values into the decision is reconciled with a realist view of facts as objective by categorizing standards such as reasonableness as a hybrid mixture of objective fact and subjective value.

131. See *Duncan v. Louisiana*, 391 U.S. 145, 156-57 (1968) (recognizing as among the purposes of the jury the granting of the accused "the common-sense judgment of the jury" and citing approvingly the conclusion from a major empirical study of juries that "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed"). Though not officially sanctioned, there is a tacit recognition that it is part of the jury's role to nullify unjust laws or to refuse to apply just laws to reach unjust results. See *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972) (praising the jury's equity-dispensing function while at the same time upholding the refusal to inform jurors that they have equitable powers). The scholarly literature on jury nullification is enormous. Among the leading defenses of the jury's nullification right are William M. Kuntzler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71 (1969), and Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972). For a critical view, see Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976).

132. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (identifying the prevention of government oppression as one purpose of the jury); *Duncan*, 391 U.S. at 156 (stressing the need to protect against "the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"). For an argument that the need to protect the public against judges has lessened over time, see Gobert, *supra* note 127, at 281-82.

133. See MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

134. See, e.g., Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 551 (1975) ("All people have biases and opinions that will inevitably influence their decisions and perceptions, including those on jury duty."); Massaro, *supra* note 128, at 543 ("Everyone has preconceived notions or opinions that incline him or her to decide one way or another."); Hans Zeisel & Shari Siedman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 530-31 (1978) ("[P]rejudice' is not only ineradicable but often indistinguishable from the very values and attitudes of the community that we expect the jurors to bring to the trial.")

135. The Seventh Amendment, which extends the constitutional jury right to civil cases, does not explicitly require impartiality, though the courts have held that the Due Process Clause requires an

characteristics are to be attributed to the institution must be derived from the meaning of the word "jury"¹³⁶ or inferred from some conception of the jury's proper role.¹³⁷

Despite the attention given to the right to a jury at the time the Constitution was drafted,¹³⁸ there is little direct evidence of the original understanding of the requirement that the jury must be impartial.¹³⁹ Nevertheless, in giving content to the constitutional guarantee of an impartial jury, the Supreme Court has not shrunk from definitive sounding formulae, though these pronouncements have not been entirely consistent. The most commonly stated definitions of what constitutes an impartial jury are individual and psychological, rather than social. An especially clear articulation of this standard, which is traceable to the earliest Supreme Court pronouncements on the subject, is contained in a twentieth-century case involving a constitutional challenge to a federal statute that permitted federal employees to serve as jurors.¹⁴⁰ In that case, the Court rejected the argument that the Constitution mandates specific qualifications for jury service or any particular mode of selecting jurors.¹⁴¹ Rather, according to the Court, impartiality is "a state of mind."¹⁴²

The mental attitude to which the law aspires is one of "appropriate indifference."¹⁴³ This definition of impartiality as indifference has been repeatedly invoked in a wide range of contexts. In language from Lord Coke quoted frequently by the Court, a juror must be "indifferent as he stands

impartial tribunal. *See Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *see also Marshall v. Jerrico*, 446 U.S. 238, 242 (1980) (finding that the right to an impartial judge is inherent in the Due Process Clause).

136. *See, e.g., Holland v. Illinois*, 493 U.S. 474, 493-95 (1990) (Marshall, J., dissenting) (arguing that race-based peremptory challenges violate Sixth Amendment "impartial jury" protection not because they result in juries that are partial, but because they produce a body that falls short of a constitutional "jury").

137. *See, e.g., Williams v. Florida*, 399 U.S. 78 (1970) (holding that a six-person jury in a criminal case does not violate the Sixth Amendment because it does not compromise the essential function of the jury, which is to prevent government oppression).

138. The absence of explicit protection of the right to trial by jury in civil cases was a principal focus of anti-federalist opposition to the draft Constitution without the Bill of Rights Amendments. THE FEDERALIST NO. 83 (Alexander Hamilton); Patrick E. Higginbotham, *Juries and the Complex Case: Observations About the Current Debate*, Address Before the 1986 Chief Justice Earl Warren Conference on Advocacy (June, 1986), in THE AMERICAN CIVIL JURY, 1987, at 70.

139. JON VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 46 (1977) ("Little attention was given to the specific meaning of the words 'impartial jury' during the ratification debates, so we cannot say for certain what they meant.").

140. *United States v. Wood*, 299 U.S. 123 (1936).

141. *Id.* at 146.

142. *Id.* at 145; *see also Hopt v. Utah*, 120 U.S. 430, 432 (1887) (defining bias as "'the existence of a state of mind, on the part of a juror, which leads to a just inference in reference to the case that he will not act with entire impartiality'") (quoting § 241 of the act governing criminal proceedings in the Utah Territory).

143. *Wood*, 299 U.S. at 145-46.

unsworne."¹⁴⁴ The Court has also stated that "a juror who has formed an opinion cannot be impartial."¹⁴⁵

In other formulations of the standard, the Court has explicitly linked its conception of juror qualifications to the effective performance of the jury's function. Rather than focusing on an idealized conception of the proper psychological disposition of the juror at the time of selection, these cases emphasize the qualifications which are necessary in order to accomplish the legal system's aims. As Justice Holmes said, "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."¹⁴⁶ The accomplishment of this objective is thought to require something short of absolute indifference in the decision-maker. A juror is impartial so long as she is willing and able to abide by her oath to "conscientiously apply the law and find the facts."¹⁴⁷ This specification of juror qualifications—demanding that decisions be based on the law and the facts—brings the requirements of the Sixth Amendment into line with the demands of due process. Both require "a jury capable and willing to decide the case solely on the evidence before it."¹⁴⁸

The class of cases that adheres most closely to these verbal definitions of impartiality are those involving challenges based on claims that jurors were biased toward one of the parties because of their relation to the parties or the issues and on claims that exposure to extrajudicial information about the case caused jurors to prejudge its merits. In these cases, the Court has found the psychological definition of juror qualifications adequate and has based its decisions about whether a particular extrajudicial influence rendered a juror unqualified on an assessment of the strength of that influence and whether it prevented the juror from reaching a decision based on the law and the facts.

The early case of *United States v. Burr*¹⁴⁹ established the approach for treatment of claims of juror bias based on prejudicial pretrial publicity that remains in effect today. Chief Justice Marshall presided over Aaron Burr's trial for treason. At the trial, Burr's counsel sought to disqualify jurors who, though professing no opinion on Burr's guilt or innocence, admitted knowledge of the facts of the case.

144. *Smith v. Phillips*, 455 U.S. 209, 225 n.1 (1982); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976); *Ristaino v. Ross*, 424 U.S. 589, 596 (1976); *Ross v. Massachusetts*, 414 U.S. 1080, 1081 (1973) (Marshall, J., dissenting); *Ham v. South Carolina*, 409 U.S. 524, 531 (1973); *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971); *Turner v. Louisiana*, 379 U.S. 466, 472 (1965); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Spies v. Illinois*, 123 U.S. 131, 154 (1887); *Reynolds v. United States*, 98 U.S. 145, 154 (1878).

145. *Morgan v. Illinois*, 112 S. Ct. 2222, 2229 (1992); *Irvin*, 366 U.S. at 722; *Reynolds*, 98 U.S. at 155.

146. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907); see also *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) ("[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on . . . other circumstances not adduced as proof at trial.")

147. *Wainwright v. Witt*, 469 U.S. 412, 423 (1985).

148. *Smith*, 455 U.S. at 217.

149. 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692g).

Marshall's ruling on the defense motion challenging the jurors is more revealing of his views about the process of belief formation than most opinions dealing with juror bias. He defined an impartial jury as one "composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it."¹⁵⁰ In describing the state of mind required for a juror to be impartial, Marshall said, "The jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions."¹⁵¹ According to Marshall, the distinction between disabling opinions and preconceptions that do not prevent a juror from serving is based on the degree to which prior opinions will shut out the impact of the testimony:

[L]ight impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but . . . those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him.¹⁵²

By using the words "impress," "force," "resist," "yield," and "combat," Marshall portrayed a mechanical metaphor for the process of belief formation. Beliefs are depicted as "impressions" on the mind. The literal meaning of "impress" is to press, to apply force. An "impression" is "[t]he effect, mark, or imprint made on a surface by pressure,"¹⁵³ like a footprint in the sand or, an example probably more familiar to Marshall, the imprint of a seal in wax. Preconceived opinions that disqualify potential jurors from service are impressions that exist before the trial begins. If those preexisting impressions are "strong and deep," they will resist the force of the trial testimony, which will be incapable of re-forming the mind by producing its own impressions. "Light impressions," though, can be expected to yield to the testimony. Such impressions will give way to the superior force of the testimony. The shape of the juror's conviction will then have been determined entirely by the contours of the law and the testimony, which is the whole aim of the factfinding process.¹⁵⁴

150. *Id.* at 50.

151. *Id.*

152. *Id.* at 51.

153. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 661 (William Morris ed., 1975).

154. The similarity of this depiction to the process of pressing a signet having a raised or incised emblem into hot wax to produce a seal is inescapable. Marshall, moreover, was no doubt familiar with Aristotle's theory of memory, which explicitly relied on a metaphor of the mind as a wax tablet. Memory, according to Aristotle, belongs to the faculty of "sense perception" rather than the faculty of "intelligence." ARISTOTLE, *The Parva Naturalia*, in THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH 436a, 450a (John I. Beare & George R.T. Ross trans., 1931) (1908). It consists of "a picture" created when "perception stamps . . . a sort of impression of the precept [on the mind], just as persons do who make an impression with a seal." *Id.* at 450a-450b. And, like Marshall, Aristotle understood the

More recent decisions rely on different imagery but embody a comparable view of the passive role of the mind in the process of belief formation. The contemporary standard for determining when a juror's exposure to pretrial publicity renders her ineligible to serve on a jury was stated in *Irvin v. Dowd*.¹⁵⁵ Though not as precisely delineated as Marshall's portrayal, the contemporary image of belief formation as reflected in *Irvin* is also based on a mechanical metaphor of displacement. A juror will be deemed impartial notwithstanding her prior knowledge about the case "if the juror can lay aside [her] impression or opinion and render a verdict based on the evidence presented in court."¹⁵⁶ Accordingly, the line between previously held views that are disabling and those that are not depends on how securely those views are fastened in the mind. A juror will not be allowed to serve if she has "such fixed opinions that [she] could not judge impartially."¹⁵⁷ If, however, because of the passage of time, the juror "had let the details of the case slip from [her] mind[],"¹⁵⁸ or if she is capable and affirmatively willing to "put aside earlier prejudice," she will not be disqualified.¹⁵⁹

What is significant about this formulation of juror qualification is that it conceives of true beliefs as caused by the effect of evidence on a receptive mind.¹⁶⁰ By contrast, bias and other subjective tendencies are regarded as impediments to the generation of knowledge from the evidence. Since the theory of our law requires that the juror's conviction "be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print,"¹⁶¹ such influences must be eliminated.

From an interpretivist perspective, this theory of cognition premised on a clean separation between subjective and objective inputs to knowledge is unfortunate for several reasons. On the one hand, the view that bias and evidence operate independently in producing belief has resulted in a wholly unrealistic approach to the problem the Court was addressing—eliminating

impediments to arriving at a true mental picture as deriving from defects in the "receiving surface":

[I]n those who are strongly moved owing to passion, or time of life, no mnemonic impression is formed; just as no impression would be formed if the movement of the seal were to impinge on running water; while there are others in whom, owing to the receiving surface being frayed, as happens to [stucco on] old [chamber] walls, or owing to the hardness of the receiving surface, the requisite impression is not implanted at all.

Id. at 450b.

155. 366 U.S. 717 (1961).

156. *Id.* at 723.

157. *Patton v. Yount*, 467 U.S. 1025, 1035 (1984).

158. *Id.* at 1033.

159. *Id.* at 1034.

160. These decisions are consistent with the contemporary psychological view of the mind imagined as "a central processing device" that is "context and content independent" and "stands over and above, or transcends, all the stuff upon which it operates." RICHARD A. SHWEDER, *THINKING THROUGH CULTURES: EXPEDITIONS IN CULTURAL PSYCHOLOGY* 80 (1991). Shweder rejects this conception of the mind in favor of the view that "the life of the psyche is the life of intentional persons, responding to, and directing their action at, their own mental objects or representations and undergoing transformation through participation in an evolving intentional world that is the product of the mental representations that make it up." *Id.* at 97.

161. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

those inputs to the decision that we deem improper. For instance, in its most recent pretrial publicity decision, the Court left to the juror the determination of whether she was capable of setting aside what she knew.¹⁶² If, as contextualism teaches, cleaving the juror and the evidence is not possible, the Court's solution will not work.¹⁶³ For instance, though a juror might honestly and sincerely accept the judge's admonition to disregard her knowledge of the defendant's inadmissible pretrial confession and base her decision strictly on the evidence introduced in court, her awareness of the confession will inevitably play a role, for what the evidence is will in part be a function of what the juror knows.¹⁶⁴

Moreover, the realist premise that it is possible to eliminate all subjective inputs from the decision distorts the priorities in jury selection. For instance, it is universally agreed that a juror's exposure to pretrial publicity is not a proper basis for her decision and that, other things being equal, a juror who has not read or heard about the case is to be preferred over one who has. There are, however, some cases in which, because of the amount of pretrial publicity, there will be few, if any, potential jurors totally unaware of the facts and the issues.¹⁶⁵ The realist ideal of a juror as a blank slate tends to equate ignorance with impartiality and results in a misguided search for jurors who are ignorant of the facts and the issues on the false assumption that those jurors will be able to decide based entirely on the evidence introduced at trial.¹⁶⁶ Accepting the notion that it is neither possible nor desirable to eliminate subjective juror attributes from her decision leads to a recognition that "extensive voir dire and challenges—permitting attorneys to de-select their way to a panel less representative of the community—may prove a far greater threat to the fundamental fairness of the verdict than exposure to any media coverage."¹⁶⁷

More generally, the Court's realist psychology delegitimizes the role of any so-called "general" or "interpretive bias"¹⁶⁸—the background beliefs

162. *Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991).

163. See, e.g., Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 *LAW & HUM. BEHAV.* 409 (1990) (concluding, based on mock jury studies, that neither judicial admonitions nor jury deliberations are effective in eliminating the effect of exposure to pretrial publicity, but that a continuance has some minimal effect).

164. See Stanley Sue et al., *Biasing Effects of Pretrial Publicity on Judicial Decisions*, 2 *J. CRIM. JUST.* 163, 170 (1974) (concluding, from a mock jury study, that adverse pretrial publicity is not simply another piece of information added to the prosecution's case, but interacts with and affects the jury's evaluation of the evidence to produce a verdict).

165. See, e.g., Maura Dolan, *Impartial Jurors Can Be Found, Court Experts Say*, *L.A. TIMES*, July 9, 1994, at A1 (discussing the problems of finding impartial jurors to serve on the O.J. Simpson case).

166. See Bruce Fein, *Uninformed Jurors Put Justice at Risk*, *USA TODAY*, Feb. 9, 1989, at 8A.

167. Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 *AM. U. L. REV.* 631, 660 (1991).

168. A number of authorities have distinguished "specific" bias, which is case-specific information or relations to the issues or the parties, from "general" bias, which is the broader interpretive framework of the juror. The distinction was apparently first drawn by a student author, Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 *YALE L.J.* 1715 (1977), and was later used by the California Supreme Court as the basis for its rule limiting group-based peremptory challenges. *People v. Wheeler*, 148 Cal. Rptr. 890, 902 (Cal. 1978). For a discussion of the difference between general and specific bias similar to the one presented here, see Brown, *supra* note 111.

deriving from the juror's context and experience through which the juror will interpret the evidence. For if the decision is to be induced by the evidence alone, then extrajudicial social factors have no more role in the decisional process than case-specific information or a stake in the outcome. Indeed, this precise line of reasoning underlies much of the Court's jury selection doctrine.

The individual and psychological conception of juror qualifications is not monolithic. A persistent subtradition has recognized the inevitable role of the social in the decision-making process. Cases that address the constitutionality of smaller and non-unanimous juries, establish the doctrine that juries must be drawn from a representative cross-section of the community, and limit the state's power to exclude jurors opposed to the death penalty from capital sentencing juries, reflect the tension between the ideal of the juror as a neutral template for the evidence and the jury as an assembly of diverse perspectives actively processing the evidence. Recent limitations on the exercise of the peremptory challenge initially seemed to portend the ascendance of a social and pluralist view of jury qualification, but the early promise of those cases has not been realized. Though the tension persists between the view that there are qualitative differences among jurors and the view that jurors are fungible, the recent trend clearly favors the traditional individual and psychological conception of impartiality over one that emphasizes the social and public character of decision-making.

2. Jury Size and Decision Rule

On one hand, the use of juries as legal factfinders seems to implement an epistemology that recognizes the inescapable role of perspective in the factfinding task.¹⁶⁹ Bringing together a group of lay decision-makers to deliberate over the meaning of the litigated event seems at odds with the naïve

169. Brown, *supra* note 111, at 107. Although the very idea of a jury suggests the relevance of perspective and experience, the process by which the jury is selected appears to cut the other way. No one in the legal system actually "picks" trial jurors, despite the common practice of referring to the process of impaneling jurors as "jury selection." The petit jury is arrived at by default; it consists of those who have not been excluded. Consistent with this negative selection mechanism, the qualifications for jurors are all individual and negative. Massaro, *supra* note 128, at 529-30. Furthermore, while the concept of an assemblage of factfinders suggests the importance of diverse perspectives to the factfinding task, the actual makeup of the jury has historically been anything but diverse. See generally HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (1993); VAN DYKE, *supra* note 139.

A variety of causes has contributed to the relative homogeneity of the jury compared to the larger society. Outright exclusion of some groups persisted into the latter half of this century. See VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 52 (1986) (noting that as late as 1966, three states still prohibited women from jury service, and several others greatly reduced the proportion of women on juries through systems of affirmative registration or granting exemptions). The techniques used to generate the source lists of potential jurors still fail to bring in all segments of the society in many jurisdictions. See David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776 (1977); G. Thomas Munsterman & Janice T. Munsterman, *The Search for Jury Representativeness*, 11 JUST. SYS. J. 59 (1986). Finally, the general method of negative selection which permits parties to eliminate those jurors perceived as likely to favor the other side renders the trial jury more homogeneous than the jury pool and the society at large. For a discussion of this phenomenon, see Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 70-71 (1993) (and sources cited therein).

realist belief in a single transcendent perspective from which all events appear equally to any observer¹⁷⁰ and suggests the salience of the values, beliefs, and experiences of the decision-maker to the decision-making task. For if individual perspective were not important—if any honest and fair-minded person willing to examine the evidence and apply the law to the facts of the case would arrive at the same decision—there would seem to be little warrant for using twelve jurors instead of one.

In a series of cases decided in the 1970's, the Supreme Court was forced to address the rationale for the use of panels of lay decision-makers in deciding constitutional challenges to the use of juries of fewer than twelve members and to non-unanimous verdicts.¹⁷¹ The Court's inquiry into the relation between group size and decision rule and jury performance brought it to a recognition of how important diversity of perspective is to the decision-making task. The Court acknowledged the value of the pluralist jury grudgingly and did so only after approving changes which significantly handicap the chances of assembling a diverse panel. Before fully embracing the importance of diversity on the jury, the Court upheld the use of unanimous six-person juries in criminal¹⁷² and civil¹⁷³ cases and authorized non-unanimous verdicts in criminal cases based on a majority of as few as nine jurors on a jury of twelve persons.¹⁷⁴ At least in criminal cases, however, the Court has refused to sanction a reduction of the number of jurors who must agree to the verdict to fewer than six.¹⁷⁵

In ruling on the constitutionality of smaller juries and non-unanimous verdicts, the Court attached little importance to the fact that juries have historically consisted of twelve persons¹⁷⁶ who must unanimously approve

170. See Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 715 (1971) ("The jury system is predicated on the insight that people see and evaluate things differently."). More generally, the adversary system can be viewed as one premised on the value of presenting views of reality "through eyes other than [our] own" by means of the partisan presentation of the parties. Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30, 43 (Harold J. Berman ed., 1971). For commentary on the different epistemological orientations of Anglo-American adversarial procedure and the non-adversarial procedure of continental civil law, see DAMASKA, *supra* note 133, at 75, 123, 160. These differences are brought out more fully in JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977), and SYBILLE BEDFORD, *THE FACES OF JUSTICE: A TRAVELLER'S REPORT* (1961).

171. This flurry of activity on jury size and decision rule was caused by the Court's 1968 decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968), which held that the Due Process Clause of the Fourteenth Amendment extends the Sixth Amendment right to trial by jury to criminal defendants in state courts. The *Duncan* decision opened the door to a series of cases questioning the constitutionality of various state schemes authorizing juries of fewer than twelve persons and non-unanimous verdicts.

172. *Williams v. Florida*, 399 U.S. 78, 86 (1970).

173. *Colgrove v. Battin*, 413 U.S. 149, 156 (1973).

174. *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972) (upholding 10-2 majority verdicts as not violating the Sixth Amendment's right to trial by jury); *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972) (upholding the constitutionality of a 9-3 majority verdict against a due process attack).

175. *Burch v. Louisiana*, 441 U.S. 130, 137 (1979) (invalidating the use of majority decisions in six-person juries); *Ballew v. Georgia*, 435 U.S. 223, 228 (1978) (invalidating the use of a five-person criminal jury under the Sixth Amendment).

176. For a discussion of the origins of the tradition fixing the size of the jury at twelve, see *Williams*, 399 U.S. at 87-90.

of the verdict.¹⁷⁷ The Court concluded that the traditional rule of twelve jurors was a result of "historical accident, unrelated to the great purposes which gave rise to the jury in the first place,"¹⁷⁸ and was similarly dismissive of past practice as a sufficient warrant for preserving the unanimity requirement.¹⁷⁹ Upon finding no decisive evidence of an intent on the part of the Framers to constitutionalize the size and decision rule used at common law,¹⁸⁰ the Court concluded that the constitutionality of these innovations must depend on whether they compromise the proper functioning of the jury.¹⁸¹

In *Williams v. Florida*, in which the Court held that a six-person jury in a criminal case does not violate the Sixth Amendment, the Court reiterated that the purpose of trial by jury is to prevent government oppression.¹⁸² The Court properly recognized that, in order to accomplish this objective, the jury must be large enough to promote group deliberation free from outside intimidation, and that assuring the independence of the jury depended in part on "provid[ing] a fair possibility for obtaining a representative cross-section of the community."¹⁸³ The Court found, however, that the concern that reducing the number of jurors from twelve to six would significantly diminish the cross-section is "unrealistic" as long as arbitrary exclusions of whole classes of jurors is forbidden.¹⁸⁴ The Court also dismissed any relation between jury size and factfinding reliability as self-evidently nonexistent.¹⁸⁵

177. For a discussion of the origins of the unanimity requirement, see *Apodaca*, 406 U.S. at 407 n.2.

178. *Williams*, 399 U.S. at 89-90.

179. *Apodaca*, 406 U.S. at 410. While the historical characteristics of the jury should not be considered to be an exhaustive list of those that the modern jury should possess, the Court's treatment of history is too dismissive. In discounting the importance of historical size, the Court emphasized the absence of evidence of the reasons for settling on twelve as the proper number of jurors. *Williams*, 399 U.S. at 87-90. Admittedly, identifying the historical reason for a rule may provide a good basis for either accepting or rejecting it. For instance, the historical reasons for excluding women from juries are plainly no longer accepted. Furthermore, as Justice Holmes foreefully stated, history is not itself a sufficient basis for preserving a legal rule. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). But as Professor Zeisel points out, there may be more wisdom in the practice of using twelve jurors than the Court recognized:

It might be more than an accident that after centuries of trial and error the size of the jury at common law came to be fixed at twelve. A primary function of the jury was to represent the community as broadly as possible. . . . Twelve might have been, and might still be, the upper limit beyond which the difficulty of self-management becomes insuperable under the burdensome condition of a trial. On this view, twelve would be the number that optimizes the jury's two conflicting goals—to represent the community and to remain manageable.

Zeisel, *supra* note 170, at 712.

180. *Apodaca*, 406 U.S. at 407-10; *Williams*, 399 U.S. at 90-100.

181. *Apodaca*, 406 U.S. at 410; *Williams*, 399 U.S. at 99-100.

182. *Williams*, 399 U.S. at 100 ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.") (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

183. *Id.*

184. *Id.* at 102 (citing *Carter v. Jury Commissioner*, 396 U.S. 320, 329-30 (1970)). The Court attributed the absence of any difference in the representativeness of a six- versus a twelve-person jury to the use of the peremptory challenge. *Id.*

185. *Id.* at 100-01. The Court also rejected the argument that twelve-person juries work to the advantage of criminal defendants because of the greater possibility of a hung jury, stating that this advantage might just as easily accrue to the State. *Id.* at 101. The opinion cited six "experiments" purportedly showing that there is "no discernible difference between the results reached by [juries of six and twelve]." *Id.*

Three years after the *Williams* decision, in *Colgrove v. Battin*, the Court gave similarly short shrift to the claim that the use of a six-person jury in a civil case violates the Seventh Amendment right to a jury trial.¹⁸⁶ In the interim the Court had upheld the use of non-unanimous jury verdicts in criminal cases over challenges based on the Sixth and Fourteenth Amendments. In *Apodaca v. Oregon*,¹⁸⁷ a four-Justice plurality¹⁸⁸ rejected a Sixth Amendment challenge to the use of 10-2 majority verdicts in criminal cases with the conclusory assertion that the unanimity requirement does not "materially contribute" to the exercise of the common sense judgment of a group of lay persons, and therefore does not compromise the jury's function of preventing government oppression.¹⁸⁹ The plurality interpreted the fair cross-section requirement, then grounded in the Fourteenth Amendment, as prohibiting the systematic exclusion of identifiable groups from either the jury panel or the jury, but not conferring a right to have every distinct voice in the community represented on the jury.¹⁹⁰ If, as the Court held, the Constitution does not confer on any segment of society the right to representation on the jury, then it follows a fortiori that the Constitution confers no right not to be outvoted. In any case, the Court said, there is no reason to believe that because a minority viewpoint could be voted down it would also be ignored during deliberations.¹⁹¹

186. 413 U.S. 149 (1973). The Court quoted its statement in *Williams*, rejecting the notion that "the reliability of the jury as a factfinder . . . [is] a function of jury size." *Id.* at 157 (quoting *Williams*, 399 U.S. at 100-01), and concluding that, while much had been written on the effect of reducing the size of juries since the Court's decision in *Williams*, none of the intervening research persuaded the Court to alter its earlier view that there is "no discernible difference between the results reached by the two different-sized juries." *Id.* at 158-59 (quoting *Williams*, 399 U.S. at 101). For a discussion of the studies purportedly relied on by the Court, see Hans Zeisel & Shari Siedman Diamond, "Convincing Empirical Evidence" on the Six Member Jury, 41 U. CHI. L. REV. 281 (1974).

187. 406 U.S. 404 (1972).

188. Only three other Justices joined Justice White's opinion. Justice Powell concurred in *Apodaca* on the ground that while the Sixth Amendment requires unanimity in federal criminal trials, the Fourteenth Amendment does not incorporate the unanimity requirement against the states. See *Johnson v. Louisiana*, 406 U.S. 356, 369-77 (1972) (Powell, J., concurring).

189. *Apodaca*, 406 U.S. at 410-11. The Court's easy approval of the constitutionality of majority verdicts masks its significance. As Professor Zeisel has shown, abandonment of the unanimity requirement is but another means of reducing size, but it is "reduction with a vengeance, for a majority verdict requirement is far more effective in nullifying the potency of minority viewpoints than is the outright reduction of a jury to a size equivalent to the majority that is allowed to agree on a verdict." Zeisel, *supra* note 170, at 722; see also *Johnson*, 406 U.S. at 396 (Brennan, J., dissenting) ("In my opinion, the right of all groups in this Nation to participate in the criminal process means the right to have their voices heard. A unanimous verdict vindicates that right. Majority verdicts could destroy it."); *id.* at 397 (Stewart, J., dissenting) ("Under today's judgment, nine jurors can simply ignore the views of their fellow panel members."). A 10% minority perspective has some chance of influencing the outcome in 65% of ten-member unanimous juries, but that same 10% perspective will be able to influence the outcome in only 11% of twelve-person juries permitting 10-2 decisions. Zeisel, *supra* note 170, at 722-23. This is true because whenever there are fewer than three minority-perspective jurors on a nonunanimous panel, the majority can simply disregard them. *Id.*

190. *Apodaca*, 406 U.S. at 412-13.

191. *Id.* at 413. In *Johnson v. Louisiana*, decided at the same time as *Apodaca*, the Court rejected an argument that a 9-3 majority verdict rule fails to satisfy the requirement of proof beyond a reasonable doubt. 406 U.S. 356 (1972). The Court dismissed as implausible the notion that three votes for acquittal precludes the nine convicting jurors from being persuaded beyond a reasonable doubt, concluding instead that "[a] majority will cease discussion and outvote a minority only after reasoned discussion

Both the rhetoric and the results of the Court's decisions from *Williams* through *Johnson* displays a lack of commitment to the value of diversity as a feature of the jury. When faced with deciding the constitutionality of a five-person criminal jury in 1978, however, the Court adopted a strikingly different tone.¹⁹² Prompted by a wealth of scholarly criticism of its earlier opinions that demonstrated both the effect of a size reduction on the representativeness of the jury and the role of diversity of viewpoint in the decision-making process,¹⁹³ the Court in *Ballew v. Georgia* embraced a vision of jury functioning in which objectivity results from the interaction of diverse elements in the group. In a complete reversal of its position in *Williams* that size reduction does not materially affect representativeness, the Court endorsed the conclusion of the *Williams* critics that reducing the size of the jury from twelve members to six significantly diminishes the chance for

has ceased to have persuasive effect" because the minority persists in voting for acquittal "without having persuasive reasons in support of its position." *Id.* at 361. The Court also rejected the argument that three votes for acquittal out of twelve in itself constitutes a reasonable doubt as to the defendant's guilt, noting that the mere fact "[t]hat rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard." *Id.* at 362. For an enlightening discussion of the relation between social decision rule and proof beyond a reasonable doubt, see MICHAEL J. SAKS, *JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE* 24-27 (1977). Professor Saks argues that instead of fixing the decision rule based on a conceptual choice between an individual and group test for proof beyond a reasonable doubt, the relevant question should be whether reducing jury size reduces the weight of evidence needed for conviction. Since research indicates that a thinner conviction rule raises the possibility of conviction, unanimous decisions should be required.

192. *Ballew v. Georgia*, 435 U.S. 223 (1978). The facts in *Ballew* called attention to the importance of the representativeness of the jury. The defendant was tried before a five-person jury on state misdemeanor charges of distributing obscene material. The charges were based on the defendant's showing of a film entitled *Behind the Green Door* in an adult theater. In deciding whether the film was obscene, the jury was asked to determine whether, "considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." *Id.* at 225 n.2 (quoting GA. CODE ANN. § 26-2101 (1972)). The explicit requirement of application of community standards of decency highlighted the need for a sufficiently large sample of jurors to be able to gauge popular opinion. *Cf.* Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617 (1989) (comparing the "selection" decision asked of jurors in obscenity cases, in which jurors are expected to act as "delegates" of the community by applying community standards regardless of whether those standards are their own, with the "selection" decision made by capital sentencing juries, in which they express their own moral values). This Article argues that there is not as great a difference between these "selection" decisions and the categorization of decisions of determining whether a legal standard is satisfied as our jury selection procedures assume.

193. *Ballew*, 435 U.S. at 231-33. Among the works relied on were SAKS, *supra* note 191; Shari Siedman Diamond, *A Jury Experiment Reanalyzed*, 7 U. MICH. J.L. REF. 520 (1974); Stuart S. Nagel & Marian Neef, *Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict*, 1975 WASH. U. L.Q. 933; William R. Pabst, Jr., *Statistical Studies of the Costs of Six-Man Versus Twelve-Man Juries*, 14 WM. & MARY L. REV. 326 (1972); Zeisel, *supra* note 170; Zeisel & Diamond, *supra* note 186; Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 CASE W. RES. L. REV. 529 (1971). The Court placed greatest reliance on Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975). The Court's use of social science research has been widely criticized. *See, e.g.*, Bernard Grofman, *Jury Decision Making Models and the Supreme Court: The Jury Cases from Williams v. Florida to Ballew v. Georgia*, 8 POL'Y STUD. J. 749 (1980).

minority representation.¹⁹⁴ More significantly, the Court endorsed a view of jury decision-making that regards size and diversity as central to jury functioning. The Court cited research which demonstrated a positive correlation between group size and the quality of decision-making. This research noted that members of larger decision-making groups are more likely to make critical contributions to the discussion, and that larger groups have better collective memories.¹⁹⁵ Most significantly, the Court recognized that juries face complex value-laden choices, and concluded that larger groups enhance the possibility of accurate decision-making because the counterbalancing of individual biases promotes objectivity.¹⁹⁶ The Court also stressed the importance of representativeness as a defining characteristic of the jury wholly apart from any effect minority participation might have on jury decision-making.¹⁹⁷ Although the Court's opinion plainly indicated the superiority of twelve-person juries, the Court reaffirmed its approval of juries of six, but held that five-person juries are unconstitutional.¹⁹⁸

194. *Ballew*, 435 U.S. at 236-37 (citing *SAKS*, *supra* note 191 and *Lempert*, *supra* note 193). Professor Hans Zeisel used a simple statistical illustration to demonstrate that a six-person jury is much less likely to represent minority viewpoints than a twelve-person jury. In a community in which 90% of the population shares a given viewpoint and the remaining 10% have a different viewpoint, approximately 72 of 100 randomly selected twelve-person juries will contain a representative of the 10% minority, while only 47 of 100 six-person juries will include minority representation. Zeisel, *supra* note 170, at 716; *see also* *Colgrove v. Battin*, 413 U.S. 149, 167 n.1 (1973) (Marshall, J., dissenting) ("It is, of course, intuitively obvious that the smaller the size of the jury, the less likely it is to represent a fair cross-section of community viewpoints."); *SAKS*, *supra* note 191, at 90 (plotting the probabilities of minority representation on six- and twelve-member juries); *Lempert*, *supra* note 193, at 669 (conducting a similar analysis).

An empirical investigation comparing eight- and twelve-person juries in four courts in Los Angeles County found that the predicted effect of reducing jury size on the representation of distinctive groups was borne out in practice. The study found that, over the run of all cases, the number of blacks and Hispanics who were placed on juries did not differ when eight-person as opposed to twelve-person juries were used. That is, the percentage of blacks or Hispanics on all twelve-person juries was roughly the same as the percentage of blacks or Hispanics on all eight-person juries. The probability of black or Hispanic representation on a single jury, however, was smaller for the eight-person juries than for the twelve-person panels. G. THOMAS MUNSTERMAN & JANICE T. MUNSTERMAN, A COMPARISON OF THE PERFORMANCE OF EIGHT- AND TWELVE-PERSON JURIES 41-59 (1990).

195. *Ballew*, 435 U.S. at 233.

196. *Id.* at 232-34. The Court supported these general conclusions with research on the relation between group size and the accuracy and consistency of decisions and the frequency of hung juries. *Id.* at 233-36.

197. *Id.* at 236-37. According to the Court, "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Id.* at 237 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

198. *Id.* at 243-44. On the inconsistency between the Court's decision and its rationale, see David Kaye, *And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury*, 68 CAL. L. REV. 1004 (1980). The Court seemed to base its decision to draw the line at six on a statistical study which, according to the Court, "concluded that the optimal jury size [is] between six and eight." *Id.* at 234 (citing *Nagel & Neef*, *supra* note 193, at 946-48, 956, 975). As the authors of the study recognized, and others have pointed out, this conclusion is based on assumptions that are ultimately somewhat arbitrary. *See id.* at 967; Bernard Grofman, *The Slippery Slope: Jury Size and Jury Verdict Requirements—Legal and Social Science Approaches*, 2 LAW & POL'Y Q. 285, 299-300 (1980); Kaye, *supra*, at 1026-29. Moreover, alternative plausible assumptions produce significantly different conclusions. *See id.* at 1028.

The Court subsequently held that 5-1 verdicts in criminal cases violate the Sixth Amendment, principally on the authority of *Ballew v. Georgia* and the principle that "having already departed from the strictly historical requirements of jury trial, it is inevitable that lines must be drawn somewhere." *Burch v. Louisiana*, 441 U.S. 130, 137 (1979).

The opinion in *Ballew* demonstrates the feasibility of a vision of jury functioning that acknowledges the inevitability of differing perspectives and the value of diversity.¹⁹⁹ Though not denying the possibility of achieving objectivity,²⁰⁰ the Court seems to embrace an objectivity based on a plurality of viewpoints. In this view, "[t]he value of consultation is enhanced not merely by the presence of more than one mind but also by the presence of more than one vantage point."²⁰¹ But the Court's holding, approving the constitutionality of six-person juries, casts doubt on the depth of the Court's conviction. For in terms of actual effect, there is little difference between eliminating minority viewpoints through reducing the size of the jury and overt discrimination against minority jurors.

3. The Fair Cross-Section Requirement

In the jury size and decision-rule cases, the Court was forced to acknowledge the role of diversity on juries in order to check an inchmeal obliteration of the institution. Another line of cases, however, has affirmatively embraced representativeness as a necessary feature of the jury. The primary doctrinal expression of the representativeness principle is the requirement that the pool from which the jury is drawn must reflect a representative cross-section of the

199. The view taken in *Ballew* approximates the model of jury function described in REID HASTIE ET AL., *INSIDE THE JURY* (1983). The authors identify a causal relation between the representative cross-section requirement and the performance of the jury's functions of factfinding and legal decision-making. Their research indicates that

increasing the representativeness of a jury panel, at least in a heterogeneous community, tends to increase the variety of viewpoints represented on the panel. Increasing the variety of views, thereby producing a counterbalancing of biases, is likely to affect fact finding. Individuals from a variety of backgrounds are likely to attend to and remember different aspects of the trial evidence, making the jury as a whole remember the total pattern of evidence more completely. A similar argument can be made for the generation of reasonable inferences and the evaluation of witness credibility. A variety of viewpoints expressed during deliberation may also improve the individual juror's application of the beyond reasonable doubt standard of proof. Finally, all of these factors taken together are likely to affect the jury's verdict.

Id. at 9-11.

200. In other words, the measure of jury performance implicit in the Court's opinion is a presumptively existent guilt or innocence, external to the jury, against which the accuracy of the jury's verdict is gauged. See MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* 47 (1994) (commenting on the Supreme Court's jury-size jurisprudence). This view contrasts with the view that the trial renders the defendant guilty, or that the jury, like the ordeal that it replaced, tests the present moral status of the accused. See Harold Garfinkel, *Conditions for Successful Degradation Ceremonies*, 61 AM. J. SOC. 420 (1956); Robert C. Palmer, *Conscience and the Law: The English Criminal Jury*, 84 MICH. L. REV. 787, 793-94 (1986).

In an interesting discussion of the problem of determining the ideal number of jurors and social decision rule for maximizing accurate decision-making, some commentators propose that the standard for verdict accuracy be the verdict at which the citizenry as a whole would arrive were the entire nation able to decide the case. George C. Thomas III & Barry S. Pollack, *Rethinking Guilt, Juries and Jeopardy*, 91 MICH. L. REV. 1 (1992). The authors' choice of agreement as the measure of performance was prompted by a recognition of the practical impossibility of ever knowing what the "true facts" are, not by an acceptance of a conventionalist epistemology, according to which the measure of truth is consensus.

201. Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1209 (1992).

community. This doctrine developed gradually from several constitutional and statutory sources and without any clear vision of the purpose that the requirement is meant to serve. The principle has from the outset been severely limited: It requires at most that the pool of potential jurors be representative of the community, not that the jury itself have any particular composition.²⁰² Though the Court's fair cross-section decisions have at times intimated a broader and more substantive conception of impartiality, in its most recent pronouncement, which rejected the argument that the Sixth Amendment limits the peremptory challenge, the Court has retreated to the more truncated view derived from the assumptions of realist thought.

The origins of the fair cross-section requirement are now commonly traced to *Strauder v. West Virginia*,²⁰³ a case in which the Court struck down a state statute that limited jury service to "white male persons" as a violation of the Equal Protection Clause. The Court's opinion suggested that a number of different rights were at stake. The state law which facially excluded black citizens from jury service violated both the jurors' rights to be free from racial stigmatization,²⁰⁴ and black defendants' rights to trial by a jury of their peers.²⁰⁵ The *Strauder* Court adopted the non-discrimination principle contained in the recently enacted Fourteenth Amendment as the mechanism for accomplishing these objectives.²⁰⁶

The Court first began to give teeth to the prohibition against discrimination in the selection of potential jurors in cases decided in 1935 and 1940.²⁰⁷ In those cases, the Court began to scrutinize critically the explanations given for the absence of African-American venirepersons on the jury panel and to treat de facto underrepresentation as prima facie evidence of discrimination. This shift away from the exclusive emphasis on the motivations of the jury selection officials to a critical examination of the character of the group actually assembled spurred a new understanding of the principle as one of

202. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

203. 100 U.S. 303 (1880). *But see* *Holland v. Illinois*, 493 U.S. 474, 477 (1990) (stating that the doctrine emerged full-blown and unprecedented in 1975 with *Taylor v. Louisiana*).

204. The Court said:

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

Strauder, 100 U.S. at 308.

205. The Court stated:

It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former.

Id. at 309.

206. *Id.* at 310-11; *see also* Massaro, *supra* note 128, at 530-33 (discussing the development of the anti-discrimination principle). On the development of the fair cross-section doctrine generally, *see* James H. Druff, Comment, *The Cross-Section Requirement and Jury Impartiality*, 73 CAL. L. REV. 1555 (1985).

207. *See* *Smith v. Texas*, 311 U.S. 128 (1940); *Norris v. Alabama*, 294 U.S. 587 (1935).

representativeness rather than the purely negative anti-discrimination principle. Indeed, it was during this period that the Court began to couch the rule as one requiring that the jury pool be representative. In *Smith v. Texas*,²⁰⁸ the Court stated that to be an "instrument" of "public justice," the jury must be "truly representative of the community."²⁰⁹ Two years later, in *Glasser v. United States*,²¹⁰ the Court responded to allegations that government jury selection procedures favored members of the League of Women Voters, who had purportedly been indoctrinated in the prosecution's position, and more strongly suggested that representativeness was a necessary characteristic of the jury. The *Glasser* Court held that "the officials charged with choosing federal jurors . . . must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community."²¹¹

As the notion of representativeness as a necessary characteristic of the jury developed, the Court occasionally hinted at an alternative vision of jury impartiality that linked jury qualifications to the requirement that the jury pool be representative. In *Ballard v. United States*,²¹² the female defendant challenged a jury selection regime that intentionally excluded women from the jury lists as a violation of the federal law establishing the qualifications for jury service.²¹³ Writing for the majority, Justice Douglas interpreted the federal law governing juror qualification as designed to "make the jury 'a cross-section of the community' and truly representative of it."²¹⁴ The Court's decision invalidating the selection procedures that intentionally excluded women was based on a belief that female jurors might bring a different perspective to the issues of the case than men. The *Ballard* Court noted that

the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both. . . . To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.²¹⁵

The Court then linked its conception of a woman's perspective to the specific issues in the case, and suggested that female jurors might have viewed the case differently.

In *Peters v. Kiff*,²¹⁶ a three-Justice plurality came close to incorporating diversity of perspective on the jury as a component of impartiality. In *Peters*,

208. 311 U.S. 128 (1940).

209. *Id.* at 130.

210. 315 U.S. 60 (1942).

211. *Id.* at 86.

212. 329 U.S. 187 (1946).

213. Specifically, the petitioner relied on § 275 of the U.S. Judicial Code, 28 U.S.C. § 411 (1940). The statute tied the qualifications of jurors in federal court to the qualifications required by the state where the case was tried, and also prohibited certain types of exclusions, but not exclusions of women. *Ballard*, 329 U.S. at 190-91.

214. *Ballard*, 329 U.S. at 191 (quoting *Glasser*, 315 U.S. at 86).

215. *Id.* at 193-94 (citations omitted).

216. 407 U.S. 493 (1972).

a white defendant challenged his state conviction on the ground that African-Americans were systematically excluded from the grand and petit juries in his case. At the time the appeal was heard, this constituted a clear violation of the defendant's Sixth Amendment rights.²¹⁷ But because the case was tried before the Court had held that the Sixth Amendment was applicable to the states, the defendant's constitutional claim was predicated on the Fourteenth Amendment Due Process Clause.²¹⁸ The question, therefore, was whether the state could try the defendant to a jury that was illegally selected but leave the defendant without any remedy "on the ground that he had in any event no right to a grand or petit jury at all."²¹⁹ In answering that question, the Court recited the well-established rule that due process requires that a decision be made by an impartial decision-maker regardless of the type of tribunal,²²⁰ and held that "due process is denied by circumstances that create the likelihood or the appearance of bias."²²¹

Justice Marshall responded to the State's argument that the white defendant suffered no prejudice in the exclusion of African-American jurors by first observing that racial issues are latent in many cases that do not display racial prejudice on their face.²²² He then went on to rest the representativeness requirement on the broader principle of the importance of perspective in the decision-making process:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be present-ed.²²³

Despite these intimations, the potential for a new conception of jury qualification founded on a broad representation of viewpoints was never fully realized. In *Taylor v. Louisiana*²²⁴ the Court extended the fair cross-section requirement, by then firmly grounded in the Sixth Amendment, to criminal juries in state proceedings. Justice White's opinion for the Court quoted the

217. *Id.* at 496, 500.

218. Because the Court reversed the conviction, it did not decide whether the defendant had stated an equal protection violation. *Id.* at 497 n.5.

219. *Id.* at 501.

220. *Id.* at 501-02.

221. *Id.* at 502.

222. *Id.* at 503.

223. *Id.* at 503-04.

224. 419 U.S. 522 (1975). In *Taylor*, the Court invalidated a Louisiana law which required women to register to serve as jurors. This "opt in" requirement resulted in a drastic underrepresentation of women on jury lists and jury panels. A similar Florida rule had been upheld by the Court in 1961 in *Hoyt v. Florida*, 368 U.S. 57 (1961). The facts in *Hoyt* should have alerted the Court to the reasons for including women on the jury. The defendant was convicted of murdering her husband by an all-male jury. She plausibly argued that a jury including women may have been more sympathetic to her insanity defense, which was predicated on the effects of her learning of his adultery, and his refusal to accept her efforts at reconciliation.

passages from *Peters* and *Ballard* quoted above. Justice White also quoted from a 1946 civil case in which Justice Frankfurter, dissenting from the majority's holding that a selection procedure which systematically excluded day laborers violated federal law, identified the purpose of maintaining the representative character of the jury as assuring "a diffused impartiality."²²⁵ But the Court did not integrate these ideas into a coherent conception of jury qualification. Indeed, it failed to explain why representativeness was required for the jury to function properly beyond its conclusory assertion that a stacked jury pool would undercut the effective performance of the criminal jury's central purpose: preventing the exercise of arbitrary governmental power.²²⁶

The hope that the representativeness principle would become a vehicle for promoting diversity of viewpoints as a central ingredient of jury qualification became considerably more dim with the Court's decision in *Lockhart v. McCree*.²²⁷ In *Lockhart*, the defendant claimed that allowing the prosecution to challenge for cause jurors who expressed an unwillingness to impose the death penalty violated his Sixth Amendment right to a jury drawn from a fair cross-section of the community. The Court stated that, even if it were willing to extend the fair cross-section rule to the petit jury, which it was not, "groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties . . . are not 'distinctive groups' for fair-cross-section purposes."²²⁸ The Court purported to base its decision regarding whether jurors opposed to the death penalty constitute a distinctive group on the purposes of the fair cross-section rule.²²⁹ It is difficult to see, however, how exclusion of a group that results in a jury which, according to the Court's assumption, is biased in favor of the prosecution does not undermine the central purpose of the fair cross-section rule of "'guard[ing] against the exercise of arbitrary power' and ensuring that the 'common sense judgment of the community' will act as 'a hedge against the overzealous or mistaken prosecutor.'"²³⁰ Significantly, linking the definition of a distinctive group for fair cross-section purposes with "some immutable characteristic such as race, gender, or ethnic

225. *Taylor*, 419 U.S. at 530 (Frankfurter, J., dissenting) (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946)). Despite the apparent implication of the language, Justice Frankfurter's position on the merits of *Thiel*, along with other parts of his opinion, contradict any conclusion that he was affirming a principle of diversity of viewpoint as a necessary characteristic of the jury. For example, in *Thiel*, Justice Frankfurter also quoted approvingly the definition of "impartiality" from *United States v. Wood*, 299 U.S. 123, 145 (1936), as "a state of mind." *Thiel*, 328 U.S. at 230.

226. *Taylor*, 419 U.S. at 530. The Court also briefly mentioned two other purposes of the fair cross-section requirement not directly related to the functioning of the jury: the preservation of confidence in the fairness of the criminal justice system, and implementation of our belief that sharing in the administration of justice is a civic responsibility. *Id.* at 530-31.

227. 476 U.S. 162 (1986).

228. *Id.* at 174.

229. *Id.*

230. *Id.* (quoting *Taylor*, 419 U.S. at 530-31).

background²³¹ suggests a non-discrimination principle rather than a conception of jury qualification.²³²

In its most recent decision applying the fair cross-section principle, the Court unambiguously rejected the concept of impartiality as diversity, and the Court re-enthroned the traditional notion of impartiality as an absence of bias. The defendant in *Holland v. Illinois*²³³ appealed his conviction on the ground that the State's peremptory challenges of African-American venire members violated his Sixth Amendment right to be tried by a representative cross-section of the community.²³⁴ The Court, through Justice Scalia, reiterated the rule that the fair cross-section requirement applies only to the venire and not to the petit jury, and proceeded to reject the claim that the fair cross-section doctrine imposes any limitations on the exercise of peremptory challenges.²³⁵ Justice Scalia concluded that the fair cross-section rule is not an independent requirement, but simply serves as a means for achieving impartiality, and furthers that aim by creating a level playing field for the parties to exercise their peremptory challenges.²³⁶

The conclusion does not, as Justice Scalia maintains,²³⁷ follow ineluctably from the fact that impartiality is the only qualification expressly mentioned

231. *Id.* at 175.

232. A violation of the fair cross-section requirement does not, however, require a showing of intentional discrimination. Rather, a prima facie case is established by showing:

(1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979). The Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (codified at 28 U.S.C. §§ 1861-1878 (1988 & Supp. V 1993)), marked a significant milestone by requiring that jury lists be compiled from voter registration lists rather than through the so-called "key man" system that was used in federal courts prior to the passage of the Act. See 28 U.S.C. § 1863(b)(2) (Supp. V 1993). The "key man" system allowed locally prominent individuals to hand pick potential jurors. Carl H. Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A. L. REV. 247 (1973); Note, *The Congress, The Court, and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 VA. L. REV. 1069 (1966). Though voters' lists alone do not produce a truly representative cross-section, their use has been upheld by courts against fair cross-section attacks. HANS & VIDMAR, *supra* note 169, at 53-54. For discussions of the practical difficulties in constructing representative jury lists and proposals for their solution, see Kairys et al., *supra* note 169, and Munsterman & Munsterman, *supra* note 169.

233. 493 U.S. 474 (1990).

234. *Id.* at 477-78. The defendant's decision to base his challenge on the Sixth Amendment rather than the Equal Protection Clause was apparently motivated by doubts about whether he would have standing, as a white person, to assert an equal protection claim. See *Leading Cases*, 104 HARV. L. REV. 129, 169 n.10 (1990). The Court subsequently held that a white defendant does have standing to assert the equal protection rights of a peremptorily challenged African-American juror. *Powers v. Ohio*, 499 U.S. 400 (1991).

235. *Holland*, 493 U.S. at 478-84.

236. *Id.* at 481 ("The fair-cross-section venire requirement assures . . . that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis."). As Professor Nancy King points out, the playing field might not be as level as Justice Scalia assumes. See King, *supra* note 111, at 126 n.244 (citing useful authority).

237. See *Holland*, 493 U.S. at 483 ("The rule we announce today is . . . the only plausible reading of the text of the Sixth Amendment.").

in the Constitution,²³⁸ but from an uncritical acceptance of the assumption that peremptory challenges promote impartiality.²³⁹ The only warrant offered by the Court for this assumption is its dubious claim that peremptory challenges have always been recognized.²⁴⁰

Although the Court never expressly defines a "constitutionally impartial jury," the selection procedures the Court authorizes clearly imply the Court's view of what the jury should be. In not only approving but exalting the peremptory challenge as a mechanism for assembling a qualified jury, the Court unmistakably rejects a conception of impartiality grounded in the interaction of a diversity of perspectives.²⁴¹ For, as the Court recognizes, the selection procedures it approves routinely operate to diminish the representativeness of the jury.²⁴² Rather, the central role the Court assigns to the peremptory challenge in achieving impartiality suggests that an impartial jury is one made up of the theoretically neutral middle.²⁴³ For, according to the Court, the purpose of the peremptory challenge is "'eliminat[ing] extremes of partiality on both sides . . . assuring the selection of a qualified *and unbiased* jury.'"²⁴⁴ In equating impartiality with an absence of bias, the Court plainly

238. In his dissent, Justice Marshall argued that the fair cross-section requirement was not directed toward assuring that the jury be impartial but that the tribunal qualify as a "jury." *Id.* at 493-94 (Marshall, J., dissenting).

239. *Holland*, 493 U.S. at 482 ("One could plausibly argue . . . that the requirement of an 'impartial jury' impliedly *compels* peremptory challenges.") (emphasis in original).

240. *Id.* at 481 ("The constitutional phrase 'impartial jury' must surely take its content from [the] unbroken tradition [of recognition of the peremptory challenge]."). *But see id.* at 518 n.15 (Stevens, J., dissenting) (disputing the majority's claims about the long lineage of the peremptory challenge); Richard D. Friedman, *An Asymmetrical Approach to the Problem of Peremptories?*, 28 CRIM. L. BULL. 507, 508-10 (1992) (stating that prosecution peremptories only recently became the rule in this country during the nineteenth century).

241. *See Brown*, *supra* note 111, at 129-30 (arguing that *Holland* marks a change from prior Sixth Amendment doctrine, according to which impartiality results from a mix of perspectives); *Leading Cases*, *supra* note 234, at 169, 175 (criticizing the Court's "truncated vision of impartiality" and advocating a more "substantive" ideal of juror qualification in which "a group's distinctive perspective is not a 'bias' but a constitutive aspect of the 'commonsense judgment of the community'"); Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 445 (1992) (tracing Justice Scalia's views in *Holland* to his belief that "jurors, like judges, hunt for an objective factual reality"); cf. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 114 (1993) (describing Justice Scalia as "heir to the positivistic legal tradition" and "optimistic about the possibility of value-free factual knowledge").

Justice Rehnquist, who joined the *Holland* majority, has elsewhere expressed a derisive attitude toward the very idea of perspective as an ingredient of legal decision-making. *See, e.g., Taylor v. Louisiana*, 419 U.S. 522, 542 (1975) (Rehnquist, J., dissenting) ("This smacks more of mysticism than of law. The Court does not even purport to practice its mysticism in a consistent fashion—presumably doctors, lawyers, and other groups, whose frequent exemption from jury service is endorsed by the majority, also offer qualities as distinct and important as those at issue here.").

242. *Holland*, 493 U.S. at 480.

243. *See Brown*, *supra* note 111, at 130 (noting the *Holland* Court's failure to recognize that jurors who remain after the exercise of peremptory challenges also have biases); King, *supra* note 111, at 126 (observing that the *Holland* majority seems to imply that elimination of in-group bias would enhance the accuracy of factfinding).

244. *Holland*, 493 U.S. at 484 (emphasis in original) (quoting *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) and *Swain v. Alabama*, 380 U.S. 202, 219 (1965)). The Court's characterization of the peremptory challenge as the means for eliminating partial jurors does not capture its meaning for lawyers, whose aim is "to remove prospective jurors who are perceived as being less favorable in the hope of getting jurors who are more favorable." William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 98 SUP. CT. REV. 97, 126 (1987).

assimilates the Sixth Amendment's fair cross-section doctrine into the traditional realist conception of impartiality as blank indifference.

4. Group-Based Peremptory Challenges

The *Holland* Court refused to interpret the Sixth Amendment as imposing limits on the unrestricted exercise of the peremptory challenge. Instead, the Court exalted the peremptory challenge as the mechanism by which the constitutional requirement of impartiality is achieved. Four years earlier, however, in *Batson v. Kentucky*,²⁴⁵ the Court had imposed limitations on the exercise of the peremptory challenge identical to the limitations requested in *Holland*, but under the Equal Protection Clause. At the time *Batson* was decided, the case seemed to signal a shift toward a more inclusive conception of jury qualification. By limiting the power to exclude minority jurors, the rule fashioned in *Batson* seemed designed to increase the level of minority participation. Subsequent decisions extending *Batson*, however, clearly indicate that the *Batson* rule's principal purpose is to protect affected jurors from invidious stereotyping, rather than to promote a broadly representative jury.²⁴⁶ In shifting the rule's emphasis in favor of the jurors, the Court has rejected the notion that legal decision-making is an inescapably public and social process, and has instead embraced the traditional definition of juror qualification as individual and psychological.

In *Batson*, an African-American defendant challenged his state burglary conviction on the ground that the prosecutor's use of four of six available peremptory challenges to remove all prospective jurors who were African-American violated his Sixth Amendment rights.²⁴⁷ The Court chose to review the prosecutor's conduct under the Equal Protection Clause rather than the Sixth Amendment,²⁴⁸ and found that race-based peremptory challenges

245. 476 U.S. 79 (1986).

246. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) (extending the rule to gender-based challenges); *McCullum v. Georgia*, 112 S. Ct. 2348 (1992) (extending the rule to challenges made by a criminal defendant); *Powers v. Ohio*, 499 U.S. 400 (1991) (extending the rule to prosecutorial challenges of black jurors in cases involving a white defendant); see also Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992).

247. *Batson*, 476 U.S. at 83-84.

248. *Batson* predicated his claim on the Sixth Amendment because the Court's decision in *Swain v. Alabama*, 380 U.S. 202 (1965), seemed to foreclose a successful challenge on equal protection grounds. In *Swain*, the Court held that the Equal Protection Clause prohibits racially discriminatory peremptory challenges, but only if the challenge is exercised simply to keep blacks off the jury, rather than to seat jurors favorable to one's cause. Under *Swain*, to rebut the presumption that a prosecutor had used peremptory challenges for legitimate trial-related reasons and to make out a prima facie case of a constitutional violation, a litigant was required to show that the prosecutor used the peremptory challenge to exclude all blacks from all juries in all cases. *Id.* at 226-27. The fact that this burden was rarely, if ever met, was no doubt influential in persuading the Court to reconsider the issue. See Stephen A. Saltzburg & Mary E. Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 345 (1982). The use of the Equal Protection Clause, with its emphasis on finding a discriminatory purpose for a constitutional violation, contributed to the transformation of the rule. For an argument that the Sixth Amendment is the better basis for the prohibition against race-based peremptory challenges, see Wendy L. Trugman, *The Representative Jury Standard: An Alternative to Batson v. Kentucky*, 23 AM. CRIM. L. REV. 403 (1986).

exercised by the State in criminal cases are unconstitutional. The Court held that once the defendant has established a prima facie case that the prosecutor has struck jurors because of their race, the burden shifts to the prosecutor to come forward with a racially neutral reason for challenging those jurors.²⁴⁹

Like many of the Court's other jury selection cases, the *Batson* decision suffered from a certain indeterminacy of objective. At one point in the opinion, the Court explained the new limitations on the peremptory challenge in terms of the defendant's right to the non-discriminatory selection of the jurors who will decide his or her fate.²⁵⁰ The Court quoted *Strauder v. West Virginia*²⁵¹ to support its proposition that "[t]he 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"²⁵² and reiterated that the central purpose of the jury is to guard against the arbitrary exercise of governmental power.²⁵³ Accordingly, the Court held that limitations on race-based peremptory challenges are necessary "to secure the defendant's right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.'"²⁵⁴

In another part of its opinion, however, the Court said that the purpose of the right is to protect the excluded juror: "Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial."²⁵⁵ Denying a person the opportunity to participate on a jury because of race "unconstitutionally discriminate[s] against the excluded juror."²⁵⁶ Finally, the Court also stated that the harm from discriminatory selection "touch[es] the entire community" because "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."²⁵⁷

The initial ambiguity over the purpose and ownership of the *Batson* right has given way to a constricting certainty. Subsequent applications of the rule clearly indicate that it is now intended for the protection of the excluded juror.²⁵⁸ The Court first signaled the secondary importance of jury functioning

249. *Batson*, 476 U.S. at 97.

250. *Id.* at 85-86.

251. 100 U.S. 303, 308 (1880).

252. *Batson*, 476 U.S. at 86.

253. *Id.* (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

254. *Id.* at 87 (quoting *Strauder*, 100 U.S. at 309).

255. *Id.* (citing *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 223-24 (1946)).

256. *Id.*

257. *Id.* (citing *Ballard v. United States*, 329 U.S. 187, 195 (1946)).

258. See Underwood, *supra* note 246, at 742-50 (advocating this interpretation of the rule). A number of commentators have criticized the Court's shift in emphasis away from the litigant in favor of the juror and the engraving of the color-blind principle onto the *Batson* rule. See Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511; Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807 (1993); Johnson, *supra* note 169; Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63 (1993). Needless to say, I agree with this view.

to the *Batson* rule in *Allen v. Hardy*,²⁵⁹ which held that *Batson* does not have retroactive effect. En route to that result, the Court stated that “[b]y serving a criminal defendant’s interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial,” but that its “impact on the integrity of factfinding” is not sufficient to compel retroactive application of the rule.²⁶⁰ A more decisive statement regarding the ownership of the rule came in *Powers v. Ohio*,²⁶¹ in which a white defendant invoked *Batson* to challenge the State’s peremptory exclusion of blacks from his trial jury. In extending the *Batson* rule, the Court unambiguously identified the right as belonging to the juror and, upon determining that criminal defendants have standing to assert the constitutional rights of jurors who hear their cases, held that the *Batson* rule applies regardless of the race of the defendant.

Commentators have suggested several reasons for the Court’s decision to emphasize the rights of the excluded juror.²⁶² In my view, the decision to rest the result in *Powers* on a violation of the juror’s equal protection rights stems at least in part from an inability or unwillingness to articulate how the composition of the jury affects the jury decision-making process.²⁶³ In the course of finding a sufficient connection between the defendant and the challenged juror to sustain third-party standing, the Court affirmed that discriminatory peremptory challenges cause “a cognizable injury” to the defendant.²⁶⁴ In explaining this harm, however, the Court refused to relate its nondiscrimination rule to jury performance. Indeed, the Court expressly rejected the notion that the injury to the defendant resulted because the wrongfully excluded juror “may have been predisposed to favor the defendant.”²⁶⁵ Any juror who harbors such a predisposition, the Court reasoned,

259. 478 U.S. 255, 259 (1986) (per curiam).

260. *Id.* One commentator has interpreted the holdings in *Allen* and *Teague v. Lane*, 489 U.S. 288 (1989) (holding that any possible Sixth Amendment limitation on peremptory challenges is prospective only) as a clear rejection of “the theory that race-based jury selection denies equal protection to black defendants by producing biased juries and unreliable verdicts.” Underwood, *supra* note 246, at 731.

261. 499 U.S. 400 (1991).

262. Barbara Underwood argues that interpreting the *Batson* doctrine as extending rights to jurors is the best interpretation of equal protection doctrine because defendants have no significant equal protection interest in nondiscriminatory jury selection. Underwood, *supra* note 246, at 726-36. Professor Underwood’s argument, which proved self-fulfilling when the Court cited her article in *McCullum v. Georgia*, 112 S. Ct. 2348, 2354 (1993), is persuasive from the perspective of legal analysis. But her argument fails to defend this development of constitutional doctrine in terms of social or political theory. One possible explanation for the turn the doctrine took in *Powers* is that the Court was simply anticipating and deciding a question that it believed would inevitably present itself as soon as the Court was faced with the issue of the applicability of the rule to defense peremptories: whether to prefer the rights of jurors or defendants. Professor Susan Herman has suggested that the Court has embraced *Batson* and emphasized non-discrimination in jury selection as a palliative for its unwillingness to address seriously racism in the criminal justice system. Herman, *supra* note 258.

263. The Court’s difficulty in perceiving that significant interests of the defendant were implicated when the defendant and the excluded jurors were not of the same race may be based on a simplistic understanding of the relation of race to jury performance, according to which the only relevance of race is that racial groups tend to hang together.

264. *Powers*, 499 U.S. at 411.

265. *Id.* It was, of course, precisely because the defendant believed that the jurors he challenged were more likely to favor the prosecution than other jurors available on the venire that the defendant struck them. I believe that the Court would produce more sensible jury selection rules if it took seriously the participants’ understanding of the process.

would be biased and subject to challenge for cause.²⁶⁶ Instead of resting its finding of harm on the effect of exclusion on jury factfinding, the Court located the harm of discrimination in its effect on "the integrity of the judicial process."²⁶⁷ The logic of the Court's exclusive reliance on process values in finding harm to the defendant suggests that any juror qualities that would influence performance are likewise a proper basis for exclusion, and makes sense only in the context of a theory of juror decision-making according to which juror identity should be irrelevant.²⁶⁸

Once the Court decided in *Powers* that the juror's rights were a sufficient basis for extending the rule, the applicability of *Batson* to civil cases, addressed in *Edmonson v. Leesville Concrete Co.*,²⁶⁹ depended primarily on the existence vel non of state action.²⁷⁰ Upon finding state action, the Court held that a civil litigant's peremptory exclusion of African-American venire members from the jury pool violated the equal protection rights of the excluded jurors. Likewise, in *McCullum v. Georgia*,²⁷¹ when the Court

266. *Id.*

267. *Id.* (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

268. Professor Burt Neuborne analyzes *Powers* and *Edmonson* from the same perspective and reaches a different conclusion. Neuborne, *supra* note 241, at 443-48. He concludes that the reason the Court stretched the third-party standing rules to permit criminal defendants to assert the constitutional rights of jurors is a "recognition of the contingent and subjective quality of much of what passes for judicial fact-finding and the correlative degree of creativity such a vision bestows on jurors." *Id.* at 444. While that is a reasonable conclusion to be drawn from the Court's holding prohibiting race-based peremptories despite an absence of racial identity between the defendant and the juror, it is not consistent with either the Court's stated reasons for the result or the mechanisms the Court created for enforcing the rule. As Professor Neuborne points out, the only language in the *Powers* opinion that supports his interpretation is the Court's recital that discriminatory jury selection impugns the integrity of the judicial process. *Id.* at 445. He argues that "the only reason the community would lose faith in a system that excluded jurors of one race from the trial of defendants of another is that such behavior fatally taints the reliability of the verdicts," because the community is aware that "exclusion inevitably distorts the contingent reality [the jury] is supposed to construct." *Id.* Plainly, if the Court was in fact saying something about the contingent nature of social reality, it chose a very awkward way of expressing itself. It seems more likely that the Court was in fact vindicating process values, as it said. This interpretation is not only more faithful to the language of the opinion, but also comports with the primary reliance our law places on procedural regularity as the test for the validity of the outcome. See *Herrera v. Collins*, 113 S. Ct. 853 (1993) (holding that actual innocence is not a basis for invalidating a death sentence if the defendant has received a "fair trial"); *DAMASKA*, *supra* note 133 (arguing that an orientation toward dispute resolution and an emphasis on procedure characterizes common law as compared to civil law criminal procedure); Mark Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Legal Decision Making*, 64 U. COLO. L. REV. 57 (1993) (explaining the rule against use of juror testimony to impeach jury verdicts as the manifestation of a procedural test of the validity of the verdict). More importantly, perhaps, if the Court in *Powers* was in fact motivated by a conviction that a jury verdict from which racial minorities had been excluded was "a morally and descriptively unacceptable mirror/construct of democratic reality," Neuborne, *supra* note 241, at 445, it would have found a constitutional violation upon a finding of actual exclusion, rather than limiting the scope of the rule to only those situations where the exclusion is based on an invidious intent. See *infra* notes 285-90 and accompanying text.

269. 500 U.S. 614 (1991).

270. In addition, the extension of *Batson* to civil cases also required a finding that the civil litigant had standing to assert the rights of the excluded jurors. Given its conclusion in *Powers* that a private party to a criminal action had standing, 499 U.S. at 410-16, the Court had little difficulty finding that the civil litigant had standing as well. *Edmonson*, 500 U.S. at 628-30.

271. 112 S. Ct. 2348 (1992). Whether the *Batson* rule should be extended to criminal defendants depends in part on whether trial by jury generally and the peremptory challenge in particular is regarded

considered whether a defendant's race-based peremptories are unconstitutional, there was no real question about the existence of the harm, since the purpose of the rule was to prevent indignity to the juror arising from being judged according to a racial stereotype.²⁷² The Court addressed the relation between defense peremptories and the qualifications or performance of the jury in responding to the defendants' claims that the rights of the excluded jurors were outweighed by the rights of the defendants—specifically their right to an impartial jury. In rejecting the claim that proscribing race-based peremptory challenges is incompatible with the ideal of an impartial jury, the Court chose not to defend the rule as one which promotes impartiality by enriching the diversity of the panel. Rather, the Court said that prohibiting race-based exclusions does not abridge the defendant's right to an impartial jury because "assumptions of partiality based on race" are not valid.²⁷³ By negative implication, if a juror's racial identity *were* relevant to her performance, then race would be an acceptable basis for challenge in order, presumably, to assemble a jury in which the racial identity of the decision-maker plays no role in the result.²⁷⁴

The Court's view that, as a matter of constitutional doctrine, juror identity is not relevant to juror performance became clearer when the Court addressed the applicability of the *Batson* rule to gender-based challenges in *J.E.B. v. Alabama ex rel. T.B.*²⁷⁵ Acting on behalf of the mother of a minor child, the

as a right for the protection of the criminal defendant. *See id.* at 2357-59. For contrasting views on the wisdom of extending the *Batson* rule to defendants, compare Friedman, *supra* note 240, *Leading Cases, supra* note 234, and Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989) (all opposing extension) with Joel H. Swift, *Defendants, Racism and the Peremptory Challenge: A Reply to Professor Goldwasser*, 22 COLUM. HUM. RTS. L. REV. 177 (1991) and J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges*, 63 S. CAL. L. REV. 1015 (1990) (both favoring extension).

272. The Court observed that "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination." *McCullum*, 112 S. Ct. at 2353. The Court also reiterated its argument from *Powers* that "[o]ne of the goals of our jury system is 'to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.'" *Id.* (quoting *Powers*, 499 U.S. at 413). The Court also determined that a defense attorney in a criminal case qualifies as a state actor, *id.* at 2354-55, and that the state had standing to assert the constitutional rights of excluded jurors. *Id.* at 2357.

273. *Id.* at 2359.

274. This view was not shared by all members of the Court. Justice Thomas, who concurred in the judgment, acknowledged that the racial composition of the jury may affect the result. *Id.* at 2360 (Thomas, J., concurring). He expressed his objection to placing any constitutional limitations on the exercise of peremptory challenges, and intimated that the Court's ruling would eventually lead to preventing black defendants from peremptorily removing white jurors and, perversely, reduce minority representation on juries. *Id.* at 2360-61. Likewise, Justice O'Connor predicated her dissent in part on the recognition that "conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." *Id.* at 2364 (O'Connor, J., dissenting) (citations omitted). For Justice O'Connor, the majority opinion raised the fear that the *Batson* rule would be extended to cover peremptory challenges to white jurors. *Id.*

275. 114 S. Ct. 1419 (1994). The question of the applicability of the *Batson* doctrine to gender-based challenges was widely debated before the decision in *J.E.B.* For a bibliography of articles on the issue, see Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1160 n.77 (1993).

State of Alabama sued the putative father for child support. During jury selection, the State used nine of its ten peremptory challenges to remove male jurors, resulting in a jury made up entirely of women.²⁷⁶ The defendant preserved his claim that the State's gender-based strikes violated the Equal Protection Clause and appealed on that ground after the jury found him to be the biological father.

In the first case to address the applicability of the Equal Protection Clause to the peremptory exclusion of groups not protected by the most rigorous "strict scrutiny," the Court in *J.E.B.*, for the first time in the *Batson* line of decisions, actually applied standard equal protection analysis. The Court asked whether "discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial."²⁷⁷ Consistent with its tendency to equate any influence that the juror's social identity may have on the performance of her role with disqualifying "bias," the Court held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."²⁷⁸ Because assumptions based on gender are presumptively false, the Court found that eliminating jurors based on such assumptions does not further the goal of seating jurors who are impartial.²⁷⁹ Of course, by the Court's own logic, the wholesale exclusion of either men or women from jury service would likewise not impair jury impartiality, although there is a blatant inconsistency between that view and the principle underlying the fair cross-section cases.²⁸⁰ The Court held that gender-based peremptories are unconstitutional because "[s]triking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by law, an assertion of their

276. *J.E.B.*, 114 S. Ct. at 1422. The defendant had used all but one of his peremptory strikes to remove women. *Id.*

277. *Id.* at 1425.

278. *Id.* at 1421. The Court cited two secondary sources on the use of gender as a predictor of juror performance: HASTIE ET AL., *supra*, note 199, at 140 (stating that while social science research has not found a correlation between juror sex and performance in all types of cases, female jurors are more conviction-prone in rape cases), and HANS & VIDMAR, *supra* note 169, at 76 (concluding that investigation of the conviction-proneness of women had reached contradictory conclusions). *J.E.B.*, 114 S. Ct. at 1426 n.9. For a discussion of social science research on juror identity and juror performance, see *infra* part III.C.

279. *J.E.B.*, 114 S. Ct. at 1426-27.

280. *See id.* at 1436 (Scalia, J., dissenting) (noting the contradiction between the Court's holding and the fair cross-section jurisprudence). Indeed, the majority expressly stated that "strikes based on characteristics that are disproportionately associated with one gender [such as military service or nurses] could be appropriate, absent a showing of pretext." *J.E.B.*, 114 S. Ct. at 1429.

The Court also rejected as a basis for distinguishing the problem of gender-based peremptories from race-based peremptories: the comparative unlikelihood that gender-based strikes might be used to eliminate all persons of one gender from the jury. *Id.* at 1428 n.13. The opinion in *Batson* made it clear that part of the rationale for the decision was putting an end to the practice of keeping African-Americans off juries through peremptory challenges. Given the fact that men and women are equally represented in society, and ideally in the jury venire, it would not be possible in most cases to obtain a jury made up entirely of either men or women. The Court labeled this argument for exempting gender-based peremptories from scrutiny "beside the point" because "the right to non-discriminatory jury selection belongs to the potential jurors, as well as the litigants." *Id.* at 1428 n.13.

inferiority,²⁸¹ and because state enforcement of discriminatory behavior by attorneys clouds the legitimacy of the process.

The dissenters emphatically rejected the majority's conclusion that gender-based peremptories violate the Equal Protection Clause. But on the issue of the relation between group identity and juror impartiality, the dissenters and the majority were in fundamental agreement. Concurring on the aims of jury selection, the dissent took issue only with the majority's conclusion that assumptions based on gender are invalid. Crediting the "perceptions of experienced litigators who have had money on the line"²⁸² that men and women do perform differently as jurors, Justice Scalia lamented the majority's crippling of the only workable mechanism for eliminating the "biases that go along with group characteristics"²⁸³—the truly peremptory challenge. Thus, the rule first announced in *Batson* which prohibits group-based peremptory challenges, though initially intimating a movement toward a model of diffused impartiality, has come to be understood in terms that are consistent with the negative conception of impartiality as a group purged of biased extremes.²⁸⁴

The Court's turn in these decisions toward a focus on the rights of the excluded jurors is not without practical significance. The mechanisms the Court has established for enforcement of the *Batson* rule are consistent with an understanding of the Court's purpose of protecting the excluded jurors, but are deficient as a vehicle for promoting diversity on the jury.²⁸⁵ Since the purpose of the rule is to send a clear message that the State does not countenance racial discrimination, what is offensive is the racially motivated challenge,²⁸⁶ not the wholesale exclusion of racial groups. As the *Batson*

281. *J.E.B.*, 114 S. Ct. at 1428 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). As Justice Scalia emphasized in his dissent, this statement borders on the ludicrous given that the factual posture of the case involved a challenge to the peremptory exclusion of *men*. *Id.* at 1436 (Scalia, J., dissenting). While the Court is certainly correct that it is offensive to be assimilated into a stereotype, the Court's statement is hyperbole. Certainly, the attorneys who challenge women or men do not do so because they believe them to be unqualified to serve as jurors. Rather, the thinking behind such strikes is that the juror is too well qualified for the opponent.

282. *Id.* at 1436 (Scalia, J., dissenting).

283. *Id.* at 1438.

284. A number of state courts that have imposed comparable limitations on the exercise of race-based peremptory challenges have grounded their rules in the jury trial right and have explicitly articulated a vision of jury qualification based on a diverse array of perspectives. In *Commonwealth v. Soares*, black defendants accused of murdering a white college student argued that the prosecutor deprived them of their right to an impartial jury by peremptorily challenging black jurors solely on account of race. 387 N.E.2d 499 (Mass. 1979). The court held that the prosecutor's actious denied the defendants of a jury that was a representative cross-section of the community. The court emphasized the need for diversity on the petit jury (although firmly rejecting any type of quota system) and the perceived fairness or acceptance of the trial by the community. *Id.* at 510-16. In *People v. Wheeler*, two black defendants accused of murdering a white grocery store owner claimed that the prosecutor's use of peremptory challenges to exclude black jurors denied them a trial by their peers. 583 P.2d 748 (Cal. 1978). The court found that the prosecutor's use of peremptory challenges to strike all blacks from the jury violated the defendants' rights under the California Constitution to a jury composed of a representative cross-section of the community. *Id.* at 895-907.

285. See Brand, *supra* note 258, at 584 (concluding, based on an exhaustive review of federal cases, that the *Batson* rule has failed to eliminate the discriminatory use of peremptory challenges).

286. The Court's premise that an attorney's use of a peremptory challenge to exclude a black juror amounts to a statement that the attorney does not regard blacks as qualified for jury service, *Batson*, 476

Court said, the “‘invidious quality’ of governmental action claimed to be racially discriminatory ‘must ultimately be traced to a racially discriminatory purpose.’”²⁸⁷ And, as the Court noted in a different opinion, “[d]iscriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”²⁸⁸ This conception of the harm invites acceptance of any reason for striking a juror that is not explicitly racial as a “racially neutral” reason. As Justice Marshall in his *Batson* concurrence and others have subsequently argued, this exclusive focus on the motivation for the challenge opens the door to acceptance of reasons that are either pretextual or simply a proxy for race.²⁸⁹ On the narrow view of the rule taken by the Court, what is offensive is the exercise of peremptory challenges on the basis of race. Thus, so long as the publicly stated reason for challenging the juror is something other than race, the juror’s exclusion will not have caused any harm to the excluded juror—the harm with which the rule is primarily concerned.²⁹⁰

U.S. at 87, is dubious. Professor Alschuler’s assessment of a prosecutor’s likely reasons for striking a black juror is probably more accurate. He says:

A prosecutor ordinarily might explain his or her use of race as a predictor by saying: I do not doubt that black jurors can fairly try a case against a black defendant. My goal, however, is to secure a jury that will prove as receptive to the state’s case as possible. I must exercise my peremptory challenges on the basis of limited information; and my experience has been that, although both blacks and whites are generally fair-minded and conscientious, whites tend to be more favorable to the state’s position in this sort of case than blacks.

Albert W. Alschuler, *The Supreme Court & the Jury: Voir Dire Preemptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 168 (1989).

287. *Batson*, 476 U.S. at 93 (quoting *Washington v. Davis*, 426 U.S. 229, 240 (1976)); see also Herman, *supra* note 258, at 1830 (commenting that “[a] defendant may not challenge a prosecutor’s practices simply on the ground that those practices will result in an all-white jury or, apparently, on the basis that the prosecutor is attempting to disadvantage the defendant by selecting jurors with racist attitudes.”); Steven A. Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1416-20 (1987) (observing that the *Batson* rule makes the prosecutor’s motive dispositive of the defendant’s constitutional claim and that wholesale exclusion of members of the defendant’s race is not in itself prohibited by the rule).

288. *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).

289. *Batson*, 476 U.S. at 106 (Marshall, J., concurring); Alschuler, *supra* note 286, at 173-76; Brand, *supra* note 258, at 584-96, 599-603; Herman, *supra* note 258, at 1829-31; Nunn, *supra* note 258, at 90-91; Reiss, *supra* note 287, at 1416-20; cf. Pizzi, *supra* note 244, at 134-38 (arguing that *Batson* created an “enforcement nightmare” in attempting both to permit the peremptory challenge which is by its nature not susceptible to explanation and to require an explanation for challenges that fall within the ambit of the rule).

Moreover, courts face substantial difficulties in discerning the “true” motives behind an attorney’s challenge, especially since attorneys, like other members of our society, are not necessarily aware of how race influences their perceptions or of their reasons for wanting to exclude a juror. See *Batson*, 476 U.S. at 106-07 (Marshall, J., concurring).

The requirement that the moving party make out a prima facie case of discrimination presents an additional obstacle to enforcement of the prohibition against discriminatory peremptory challenges. See Alschuler, *supra* note 286, at 170-73. Professor Brand’s survey of federal cases applying the *Batson* rule found that courts have tended to bypass the question of whether a prima facie showing has been made, moving directly to the issue of whether the challenge was based on race. Brand, *supra* note 258, at 583 n.380.

290. The Court’s only pronouncement on what counts as a racially neutral reason to rebut a presumption of discriminatory purpose confirms the anemic character of the *Batson* rule as a vehicle

The *Batson* rule is a decidedly soft blow against the practice of peremptory exclusion of non-median views,²⁹¹ and there is no reliable evidence that the *Batson* limitations on the peremptory challenge have reduced or eliminated the underrepresentation of minority groups on juries. A recent survey of federal cases applying the *Batson* rule concluded that the great majority of benign explanations proffered by attorneys are accepted by the courts as genuine.²⁹² Nevertheless, the rule has likely had a positive impact in improving jury diversity. Most attorneys probably take the prohibition against race- or gender-based peremptories seriously,²⁹³ and, even though it is fairly easy to

for achieving greater diversity. In *Hernandez v. New York*, the trial prosecutor defended his decision to strike two Hispanic jurors on the ground that, because they spoke Spanish, he doubted their ability to follow the trial judge's instruction to rely entirely on the English translation of Spanish language testimony. 500 U.S. 352 (1991). A divided Supreme Court sustained the trial court's acceptance of this explanation as racially neutral. Both Justice Kennedy's opinion for a four-Justice plurality and Justice O'Connor's concurring opinion stressed the prosecutor's subjective intent to discriminate because of race as the *sine qua non* of an equal protection violation. And, because there is no violation absent such an intent, the effect of the prosecutor's actions on the makeup of the jury is irrelevant except insofar as it circumstantially bears on intent. As Justice Kennedy noted, "While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor's actions into a *per se* violation of the Equal Protection Clause." *Id.* at 361 (italics in original). For two highly critical discussions of *Hernandez*, see Brand, *supra* note 258, at 600-05, and Johnson, *supra* note 169, at 52-59.

291. A number of critics of the *Batson* decision have suggested alternative doctrinal foundations for taming the peremptory challenge and/or proposed different solutions which are not dependent on a showing of discriminatory intent. Professor Douglas Colbert, for example, has offered the novel proposal that the proper constitutional provision for addressing race and juries is the Thirteenth Amendment prohibition against involuntary servitude. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990). Wendy Trugman argues that the Sixth Amendment is a better basis for achieving more representative juries and proposes that a constitutional violation should be recognized if (1) a distinctive group (2) is not fairly and reasonably represented on the jury in comparison to its representation on the venire and (3) the group's underrepresentation is due to the use of peremptory challenges. Trugman, *supra* note 248, at 414-17; see also Babcock, *supra* note 275, at 175-80 (proposing a reduction in the number of challenges and an expansion of *voir dire*); Johnson, *supra* note 169, at 90-92 (advocating emphasis on discriminatory impact over discriminatory motivation for challenges and suggesting a bright-line rule against any combination of challenges that increase the likelihood that racial bias will influence the outcome); Nunn, *supra* note 258, at 113-17 (advocating the prohibition of peremptory strikes against black jurors whenever there is a significant likelihood that racial issues might affect the trial). Professor Herman argues that "process-based" strategies are inadequate to address the problem of racism in the criminal justice system and calls for review of jury verdicts to determine if they are infected with racism and for education of jurors on the effects of racism. Herman, *supra* note 258, at 1846-52.

292. Brand, *supra* note 258, at 584-96. Professor Brand reviewed all federal district and circuit court cases available in the Westlaw database through May of 1993. *Id.* at 584. He found discrimination in at most seven percent of all cases. *Id.* at 588. Moreover, he found that discrimination was found even less often in more recent cases. The reason for this result, Brand asserts, is that "[h]ighly subjective, vague, and unsubstantiated prosecutorial claims are routinely accepted." *Id.* at 592.

Though not specifically addressing the question of the effect of a ban on race-based peremptory challenges, another study produced results suggesting that the California equivalent of the *Batson* rule may have a more positive effect on jury diversity. The researchers compared the racial composition of juries to the panels from which they were drawn in four Los Angeles County courts. While individual juries did not necessarily mirror the venire, the overall racial makeup of all the juries did not differ significantly from the venire from which they were drawn. MUNSTERMAN & MUNSTERMAN, *supra* note 194, at 41-46. The researchers also found that racial minorities were no more likely to be peremptorily challenged than other prospective jurors. *Id.* at 53-55.

293. Herman, *supra* note 258, at 1834.

concoct pretextual race- or gender-neutral reasons, not all attempts by attorneys to justify their challenges are accepted.²⁹⁴

Even if the *Batson* rule has had the (unintended) effect of increasing the diversity of juries, the process of selection through elimination reinforces a view of juror qualification that delegitimizes the role of perspective in the decision-making process. The peremptory challenge system, even with the *Batson* modifications, is based upon a concept of juror qualification according to which fitness is defined in terms of what jurors lack.²⁹⁵ Jurors are qualified if they are impartial, unbiased, and without preconceptions or prejudices. Accordingly, a qualified jury is constructed by eliminating from the panel those who lack these qualities. The whole structure is premised on and reinforces an epistemology that disparages "perspective" as "bias" and thereby recreates the myth of transcendent neutrality.²⁹⁶ Indeed, the expositors of the *Batson* rule now explicitly deny the relevance of personal identity to legal decision-making.²⁹⁷ This belief in the existence of a wholly neutral perspective inevitably results in the privileging of some partial point of view as objective and thereby delegitimizes the claims of those asserting that their voices are missing from the judicial process.²⁹⁸

294. See, e.g., Newton, *supra* note 26, at A1 (reporting the court's rejection of the defense's reason for striking an African-American juror in the federal trial of the police officers accused of violating Rodney King's civil rights).

295. There is, moreover, an affinity between this negative selection mechanism and a theory of belief formation in which the evidence is thought to induce beliefs directly. A focus on the evidentiary stimulus as the exclusive cause of conviction naturally encourages a discounting of any positive attributes of the ideally qualified decision-maker. What is sought in a juror is someone upon whom the evidence can work. Against this background it makes sense to think of juror qualification as an absence of positive impediments. Similarly, the negative definition of juror qualification suggests that jurors who pass the test can be regarded as entirely fungible. For if evidence causes beliefs directly, it will have an identical effect on anyone not possessed of positive disabilities.

296. Cf. Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (discussing the tendency to treat unstated points of comparison as neutral).

297. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1421 (1994).

298. The case of *Blank v. Sullivan & Cromwell* dramatically illustrates how the ideology of neutrality renders invisible the perspective of some groups but not others. 418 F. Supp. 1 (S.D.N.Y. 1975). One of the parties in this employment discrimination case sought to disqualify Judge Constance Baker Motley from hearing the case because, as a black woman, she would identify with those who had suffered race or sex discrimination. *Id.* at 4. In refusing to disqualify herself, Judge Motley said:

[I]f background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.

Id. Similarly, Judge Leon Higgenbotham rejected a motion to disqualify him from a race discrimination case based on his status as an African-American. *Commonwealth v. Local Union 542, Int'l Union of Operating Eng'rs*, 388 F. Supp. 155 (E.D. Pa. 1974). It would hardly have occurred to the parties making these recusal motions to seek disqualification of a male judge from a sex discrimination case or a white judge from a race discrimination case. The point demonstrated by these cases is that, despite the common assumption that only women have a gender and only minorities have a race, everyone's perspective is shaped by his or her experiences. This general theme is developed in Minow, *supra* note 296, at 13 n.15, where the cases discussed above are cited. See also Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 971 (1993) (observing that "[o]nce an individual is identified as white, his distinctively racial characteristics need no longer be conceptualized in racial terms").

5. The Exception That Proves the Rule: Death-Qualified Juries

Another line of cases that has attempted to plumb the meaning of jury impartiality are that group of cases dealing with dismissal of prospective jurors in capital cases based on the jurors' confessed opposition to the death penalty. The practice of "death-qualifying" juries by permitting exclusion for cause of any juror who states an unwillingness to impose the death penalty was originally a by-product of a mandatory sentencing scheme in which the death penalty was an inevitable consequence of conviction for a capital crime.²⁹⁹ It was believed that, if permitted to serve, such jurors would refuse to convict even though they were convinced of the defendant's guilt in order to avoid the imposition of a death sentence. As mandatory death penalty rules were replaced by discretionary sentencing systems in the twentieth century, the rationale for death-qualification became less compelling, since a death sentence no longer invariably followed a finding of guilt. Nonetheless, the advent of discretionary capital punishment did not eliminate death-qualification, and most courts continued to permit prosecutors to challenge jurors who were opposed to the death penalty in capital cases.³⁰⁰

In *Witherspoon v. Illinois*,³⁰¹ the Supreme Court addressed the constitutionality of an Illinois statute which permitted a challenge for cause in a capital trial of any prospective juror who had "conscientious scruples against" or was "opposed to" capital punishment.³⁰² The Court held that allowing exclusion of prospective jurors "who stated in advance of trial that they would not even consider returning a verdict of death" could plausibly be defended as producing a jury that "was simply 'neutral' with respect to penalty."³⁰³ But excluding "all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle . . . crossed the line of neutrality"³⁰⁴ and, according to the Court, therefore violated the defendant's constitutional right under the Sixth and Fourteenth Amendments to be sentenced by an impartial jury.

The conception of impartiality that underlies the outcome in *Witherspoon* is very different from that which was the basis for the pretrial publicity cases. Neither the jurors who were excluded nor those actually seated under the Illinois statute were unqualified in the sense of being unable or unwilling to decide according to the facts and the judge's instructions on the law. As the *Witherspoon* Court stated, "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment [regarding the appropriate sentence] entrusted to him by the State and can thus obey the oath

299. Welsh S. White, *Death-Qualified Juries: The "Prosecution-Proneness" Argument Reexamined*, 41 U. PITT. L. REV. 353, 354 (1980).

300. *Id.* at 355-56.

301. 391 U.S. 510 (1968).

302. *Id.* at 512 (citation omitted).

303. *Id.* at 520.

304. *Id.*

he takes as a juror."³⁰⁵ But a jury composed of admittedly impartial jurors, all of whom favor the death penalty, is *not* impartial because it represents a skewed sample of community views regarding the death penalty,³⁰⁶ and therefore cannot perform its central function of "express[ing] the conscience of the community on the ultimate question of life or death."³⁰⁷

In subsequent cases applying the *Witherspoon* standard, the Court has attempted to reformulate the rule in terms which are consistent with the more traditional definition of impartiality. In *Wainwright v. Witt*,³⁰⁸ then-Justice Rehnquist explained the *Witherspoon* formulation of the death-qualification rule in light of the capital sentencing scheme in effect in Illinois at the time *Witherspoon* was decided. Under Illinois law in 1968, jurors were afforded complete discretion over whether to sentence the defendant to death.³⁰⁹ Following *Furman v. Georgia*,³¹⁰ in which the Court held that such unguided discretion violated the Eighth Amendment guarantee against cruel and unusual punishment, states rewrote their death penalty statutes to require specific findings by the jury before a sentence of death could be imposed.³¹¹ Justice Rehnquist asserted that, under Illinois' reformulated death penalty law in which the jury's discretion is not unbounded, the *Witherspoon* rule which allowed the state to exclude only those jurors who "made [it] unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment"³¹² no longer "ma[d]e sense."³¹³ Accordingly, the Court reiterated the definition of a constitutionally impartial juror as one "who will conscientiously apply the law and find the facts."³¹⁴ The Court also reformulated the *Witherspoon* standard for when a juror may be excluded based on the juror's views about capital punishment as "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"³¹⁵

305. *Id.* at 519.

306. *Id.* at 519-20 ("[I]n a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community.").

307. *Id.* at 519.

308. 469 U.S. 412 (1985).

309. *Id.* at 421.

310. 408 U.S. 238 (1972).

311. *See* *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia's law).

312. *Witherspoon*, 391 U.S. at 522 n.21 (emphasis in original).

313. *Witt*, 469 U.S. at 422. In an earlier case, *Adams v. Texas*, Justice Rehnquist argued in dissent that the changed role of the jury in death penalty sentencing following *Furman* required a reexamination of the doctrinal underpinnings of the *Witherspoon* rule since there was no longer any "plausible distinction between the role of the jury in the guilt/innocence phase of the trial and its role . . . in the sentencing phase." 448 U.S. 38, 54 (1980) (Rehnquist, J., dissenting). In its most recent pronouncement on the subject, a majority of the Court, sans Rehnquist, reaffirmed that the *Witherspoon* principle survived the abolition of wholly discretionary death penalty laws. *Morgan v. Illinois*, 112 S. Ct. 2222, 2231 n.6 (1992).

314. *Witt*, 469 U.S. at 423.

315. *Id.* at 424 (quoting *Adams*, 448 U.S. at 45). The majority in *Witt* criticized the dissent's description of *Witherspoon* as "a latter-day version of a 'fair cross-section' theme" that was largely missing from the actual case. *Id.* at 424 n.5. Most recently in *Morgan v. Illinois*, the Court held that the defendant in a capital trial has a constitutional right to ask jurors if they would automatically impose the death penalty on a guilty defendant. 112 S. Ct. 2222. The entire Court took the view that this case

Even in its watered down version, and despite the Court's protests to the contrary, there is still a fundamental difference between the *Witherspoon* line of cases and the cases that define when a juror is constitutionally unqualified because of the juror's exposure to pretrial publicity. The *Witherspoon* rule does not define juror qualification negatively by identifying disqualifying characteristics. As the Court has repeatedly emphasized, the *Witherspoon* case is not a ground for challenging any prospective juror, but a limitation on the state's power to exclude.³¹⁶ As such, the *Witherspoon* rule recognizes, at least in the context of capital sentencing, constitutionally cognizable differences among jurors, all of whom are able and willing to decide the case based on the law and the facts.

The Court has sought to deny the suggestion that its reformulated death-qualification rules are in any way different from traditional constitutional impartiality standards. The *Witt* Court said that "*Witherspoon* simply held that the State's power to exclude did not extend beyond its interest in removing [jurors who had general objections to the death penalty]."³¹⁷ But the Court in *Witherspoon* did more than that—it said that a jury from which those jurors had been excluded is not impartial.

At about the same time the Court was trying to harmonize the *Witherspoon* rule with the traditional definition of juror impartiality in cases challenging the constitutionality of the defendant's sentencing jury, it was eagerly distinguishing the special conception of impartiality underlying that rule in cases dealing with challenges to the guilt-determining jury. In *Witherspoon*, the Court rejected the defendant's claim that the selection procedure which eliminated prospective jurors opposed to capital punishment resulted in a jury that was partial because it was unusually disposed to convict.³¹⁸ The Court, however, did not preclude such a challenge in principle; it merely held that the data adduced by the defendant in support of the argument were too tentative and fragmentary to establish his claim.³¹⁹

Eighteen years later in *Lockhart v. McCree*,³²⁰ the Court considered the same issue but had at its disposal additional empirical evidence that death-qualified juries were more inclined to convict than juries that included both opponents and proponents of the death penalty. Though the Court expressed

was resolvable under the traditional individualistic conception of impartiality as a willingness to decide based on the law and the evidence. The majority concluded that the so-called "reverse *Witherspoon*" inquiry was constitutionally required because a juror who would automatically vote for death regardless of mitigating evidence is not impartial. *Id.* at 2232 n.8, 2234-35. Justice Scalia argued in dissent that the questions should not be required because the decision whether any given evidence or any evidence at all should mitigate the defendant's sentence is entirely within the juror's discretion. *Id.* at 2237-39 (Scalia, J., dissenting). It cannot be said, therefore, that a juror who does not regard any evidence as mitigating is constitutionally unqualified. *Id.* at 2235-36.

316. *Witt*, 469 U.S. at 423; *Adams*, 448 U.S. at 47-48.

317. *Witt*, 469 U.S. at 423.

318. *Witherspoon*, 391 U.S. at 516-18.

319. *Id.* at 517.

320. 476 U.S. 162 (1986).

concern with the methodological validity of the studies,³²¹ it assumed for purposes of its decision that death-qualified juries are somewhat more prone to convict than juries that are not death-qualified.³²² It nonetheless held that a jury so selected violated neither the requirement that the jury be drawn from a fair cross-section of the community nor the requirement that the jury be impartial.³²³

With regard to the defendant's Sixth Amendment impartial jury claim, the Court said that its cases had consistently rejected a view of impartiality predicated on a balancing of predisposition of various individual jurors. Quoting *Witt*, the *McCree* Court said that "an impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts.'"³²⁴ But having thus adduced *Witt* in support of this traditional view of impartiality, the Court went on to distinguish the *Witherspoon* line of cases on the ground that they "dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the possible effects of an 'imbalanced' jury."³²⁵ Because of the discretionary nature of the jury's task in making sentencing decisions, "'a juror's general views about capital punishment play an inevitable role'"³²⁶ in that context. But, the Court continued, in the performance of its more traditional role of finding facts and determining guilt or innocence, the jury's discretion is more limited, and the considerations that underlie the sentencing cases are not applicable.³²⁷ In this arena the jurors' attitudes are not relevant. According to the Court:

[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can

321. The Court articulated various criticisms of the studies relied on in the defendant's challenge. The Court noted that of the 15 studies cited by the defendant, only six attempted to measure the central issue in *McCree*'s case—the effect of the removal of *Witherspoon* excludables on guilt determination. *Id.* at 169. Three of those six studies were before the Court when the same challenge was made in *Witherspoon*. Since they were found inadequate to establish that death qualification biased the jury in favor of conviction, they were clearly not adequate 18 years later. *Id.* at 170-71. The Court dismissed the three post-*Witherspoon* studies because the participants in the studies were not actual jurors; because the studies were not "able to predict to what extent, if any, the presence of one or more *Witherspoon*-excludables on a guilt-phase jury would have altered the outcome of the guilt determination"; and because only one of the three studies attempted to account for jurors who, because of their opposition to the death penalty, would be unable to decide impartially a capital defendant's guilt or innocence. *Id.* at 171-72. The Court concluded that "[s]urely a 'per se constitutional rule' as far reaching as the one *McCree* proposes should not be based on the results of [a single] study." *Id.* at 172-73 (italics in original). Thus, the Court seemed to take the view that a legal rule predicated on a confessed ignorance about the effect of death-qualifying juries stands on firmer ground than a rule based on evidence that was less than 100% certain.

322. *Id.* at 173.

323. *Id.* at 177, 183-84.

324. *Id.* at 178 (emphasis in original) (quoting *Witt*, 469 U.S. at 423).

325. *Id.* at 182.

326. *Id.* (quoting *Witherspoon*, 391 U.S. at 519).

327. *Id.* at 183.

conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.³²⁸

The premise of the Court's decision, that juror attitudes and beliefs are less relevant to determining guilt than to fixing punishment, is not as certain as the majority's conclusory assertions suggest.³²⁹ Empirical investigations of the effect that death-qualifying juries has on conviction proneness show more than a correlation between death penalty attitudes and disposition to convict; they suggest explanations for the correlation which highlight the salience of juror beliefs to the factfinding task.

A juror's attitudes toward the death penalty are not translated into verdict preferences directly. Rather, the juror's views on the death penalty are typically associated with a constellation of meaningfully related beliefs and attitudes which affect the way he or she interprets the evidence.³³⁰ According to one commentary on the issue, "Attitudes toward the death penalty are thus a clue to the perspective a juror has on the criminal justice system, and that perspective, rather than the death penalty attitudes themselves, colors jurors' interpretation of evidence and influences their threshold of conviction."³³¹ Among the beliefs and attitudes that correlate with views on the death penalty are opinions on the relative credibility of different types of witnesses, level of trust in prosecutors or defense attorneys, and prior theories about police, crime, and criminals.³³² These beliefs shape the juror's interpretation of the evidence by defining what is important, filling in gaps, and suggesting inferences from facts.³³³ Because of their differing

328. *Id.* at 184. The supposed qualitative difference between the jury's task in evaluating guilt and fixing punishment has been used to justify special rules in other contexts. *See, e.g.,* *Turner v. Murray*, 476 U.S. 28, 35 (1986) (explaining the capital defendant's greater need to probe possible prejudice during voir dire on the ground that "the range of discretion entrusted to a jury in capital sentencing hearing [offers] a unique opportunity for racial prejudice to operate but remain undetected"). The Court rejected the dissent's argument that "the opportunity for racial bias to taint the jury process is . . . equally a factor at the guilt phase of a bifurcated capital trial," *id.* at 41 (Brennan, J., dissenting), by stating that "the decisions that sentencing jurors must make involve far more subjective judgments than when they are deciding guilt or innocence." *Turner*, 476 U.S. at 38 n.12.

329. Justice Marshall's dissent was predicated in part on a rejection of the Court's distinction between the role of the jury at the guilt phase and in determining the sentence:

At the penalty stage of his trial, Adams' jury may have been called upon to do something more than ascertain the existence *vel non* of specific historical facts. Yet the role assigned a jury at a trial's culpability phase is little different, for there the critical task of the jury will frequently be to determine not whether defendant actually inflicted the fatal wound, but rather whether his level of culpability at the time of the murder makes conviction on capital murder charges, as opposed to a lesser count, more appropriate. Representing the conscience of the community, the jurors at both stages "unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths."

McCree, 476 U.S. at 197 (Marshall, J., dissenting) (italics in original) (quoting *Adams v. Texas*, 448 U.S. 38, 46 (1980)). In fact, the jury's task is more thoroughly normative than Marshall's illustrations indicate.

330. William C. Thompson et al., *Death Penalty Attitudes & Conviction Proneness*, 8 LAW & HUM. BEHAV. 95, 110 (1984).

331. *Id.*

332. *Id.*

333. *Id.* at 110-11.

perspectives, "two well-intentioned jurors' reconstruction of the facts and implications of those facts may be surprisingly dissimilar."³³⁴

The ramifications of these conclusions reach beyond their significance for the practice of death-qualifying juries in capital trials. The important general implication of the research in this area is that the mental baggage jurors bring with them to their task influences their factfinding role in much the same way it is believed to affect their decisions on questions of sentencing.

III. JUROR DECISION-MAKING

I have argued that the rules governing judicial factfinding, including our conception of juror qualification and rules governing jury selection, are predicated on assumptions about the nature of reality and truth that developed during the Enlightenment. The definition of juror impartiality as detached objectivity has its source in the Enlightenment beliefs in the fundamental separability of the external realm of fact and the internal realm of ideas and in the possibility of immediate apprehension of the external world by the internal mind. Because the realms of objective fact and subjective mind are postulated to be wholly discrete but mutually accessible, an external, objective point of view is regarded as both possible and desirable.

Recent theorizing on human cognition, however, contradicts the assumptions that underlie the legal system's definition of the ideal juror. This research asserts that direct access to the external world is not possible and that all of our contact with reality is mediated by the assumptions and expectations we have about it. These assumptions or knowledge structures are used to filter, order, and interpret the world that presents itself to our senses. As a result, we are constantly constructing reality as we apprehend it. Because the only world we know is in part a product of our prior expectations about it, one cannot say that mind and matter are discontinuous in the way realist philosophy assumes.

Using the assumptions of cognitive theory, researchers investigating the process by which jurors store and organize information have raised doubts about whether the legal system's modeling of the decision-making task corresponds with the way in which jurors actually go about deciding cases. Contrary to the legal system's assumption that the process of belief formation is essentially passive, this research concludes, consistent with current cognitive theory, that decision-makers actively construct representations of the trial evidence based on their prior expectations about what constitutes an adequate explanation of the litigated event. Furthermore, these representations, rather than the original "raw" evidence, form the basis of the jurors' final decision. Thus, the jurors' prior assumptions about the nature of the social world are an important ingredient of the jury's verdict. Because jurors' beliefs about the world inescapably influence the way they perform their function,

334. *Id.* at 111.

those beliefs cannot be ignored in the process of formulating rules for jury selection.

A. *The Role of Knowledge Structures in Cognition*

Recent theories of human cognition developed by linguists, phenomenological sociologists, and cognitive psychologists have come to regard information acquisition and processing as an inherently constructive process.³³⁵ According to this view, the qualities of objects in the world never simply imprint their image on a receptive mind. Rather, cognition is a process of filtering, categorizing, organizing, and interpreting information according to previously held mental models or knowledge structures. According to Nisbett and Ross, “[O]bjects and events in the phenomenal world are almost never approached as if they were *sui generis* configurations but rather assimilated into preexisting structures in the mind of the perceiver.”³³⁶

On the most general level, knowledge structures are simply beliefs or expectations about the world. The most immediate and easily recognized type of knowledge structure are the categories of language.³³⁷ Through the classificatory scheme embodied in words, we are able to distinguish objects and events in the world. Indeed, it is only on the basis of such distinctions that those objects or events come into being.³³⁸ That is, we recognize a dog by distinguishing it from a bird, a rabbit, a cat, and a rat.³³⁹ In the absence of linguistic differentiation, there is no distinction in perception or experience.

335. Among those often mentioned in connection with this view are JEROME S. BRUNER, *BEYOND THE INFORMATION GIVEN: STUDIES IN THE PSYCHOLOGY OF KNOWING* (Jeremy M. Anglin ed., 1973) (psychology); ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974) (sociology); and ALFRED SCHUTZ, *ON PHENOMENOLOGY AND SOCIAL RELATIONS* (1970) (sociology).

336. RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 36 (James J. Jenkins et al. eds., 1980) (*italics in original*); see also JEROME S. BRUNER, *Going Beyond the Information Given*, in *BEYOND THE INFORMATION GIVEN: STUDIES IN THE PSYCHOLOGY OF KNOWING*, *supra* note 335, at 219.

337. NISBETT & ROSS, *supra* note 336, at 32-33.

338. See Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1160-65 (1985) (explaining that signification is not the result of a positive connection between the conceptual referent and the thing to which one refers, but is the product of a negative differentiation from other concepts).

339. The contingent nature of any linguistic classificatory scheme is amusingly illustrated in the preface to Michel Foucault's book, *The Order of Things*:

This book first arose out of a passage in Borges, out of the laughter that shattered, as I read the passage, all the familiar landmarks of my thought—*our* thought, the thought that bears the stamp of our age and our geography—breaking up all the ordered surfaces and all the planes with which we are accustomed to tame the wild profusion of existing things, and continuing long afterwards to disturb and threaten with collapse our age-old distinction between the Same and Other. This passage quotes a “certain Chinese encyclopaedia” in which it is written that ‘animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sireus, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies.’ In the wonderment of this taxonomy, the thing that we apprehend in one great leap, the thing that, by means of the fable, is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking *that*.

FOUCAULT, *supra* note 64, at xv (*italics in original*).

For instance, the quality of being "gruel" ("i.e., examined before a given date and green, or not so examined and blue"³⁴⁰) is no less real than green or blue, but when was the last time you saw it?³⁴¹

For purposes of this Article, more important than the function of language in sorting reality is the role it plays in filling in the details of reality.³⁴² The categories of language provide a stock of information about the phenomena it labels. Any linguistic classification of an object or event simultaneously provides a basis for inference about the attributes of the thing classified. The capacity to draw inferences results from the fact that a linguistic label identifies a category. In applying that label to a particular instance, we "go beyond the information given" by clothing the instance with the attributes of the category.³⁴³ Thus, for example, when we decide based on appearance that an animal is a "dog," we round out what it is we are seeing with a whole set of expectations that derive not from this particular animal but from our beliefs about what dogs as a category are like. Because of the stock of information contained in the concept "dog," we are able to infer on the basis of what seems like a simple act of identification (that is, putting the correct label on what it is we see) a range of unseen expectations, "that it is trainable, capable of loyalty, able to bark, and likely to chase cats but is unlikely to climb trees, purr, or wash its coat."³⁴⁴

Concepts such as "dog" exemplify the simplest sort of knowledge structures which highlight a fairly limited set of characteristics. Cognitive psychologists have extended and refined the concept to include more complex structures and to distinguish among types of knowledge structures. Though there is no single agreed upon terminology or classification,³⁴⁵ one commonly used term for a set of beliefs more elaborate than the linguistic concept of "dog" is the "schema."³⁴⁶

A schema is a cognitive structure that represents some stimulus domain.³⁴⁷ Schemata are distinguished from the simplest concepts in that they are mental

340. GOODMAN, *supra* note 70, at 10.

341. To take another a well-worn example, Eskimos distinguish more than a dozen kinds of snow, but have no word for government. J.C. Smith, *The Unique Nature of the Concepts of Western Law*, 46 CAN. B. REV. 191, 196 (1968), reprinted in *COMPARATIVE LEGAL CULTURES* 8 (Casaba Varga ed., 1992).

342. BRUNER, *supra* note 336, at 219, 219-20; NISBETT & ROSS, *supra* note 336, at 17.

343. BRUNER, *supra* note 336, at 219, 219-20.

344. NISBETT & ROSS, *supra* note 336, at 33.

345. Nisbett and Ross observe that there is "a growing list of terms, including 'frames,' 'scripts,' 'nuclear scenes,' and 'prototypes.'" *Id.* at 28 (citations omitted). George Lakoff, a cognitive linguist, has added "idealized cognitive models" to the list. LAKOFF, *supra* note 63, at 68.

346. See generally NISBETT & ROSS, *supra* note 336, at 33; William F. Brewer & Glenn V. Nakamura, *The Nature and Functions of Schemas*, in 1 *HANDBOOK OF SOCIAL COGNITION* 119 (Robert S. Wyer, Jr. & Thomas Srull eds., 1984); Reid Hastie, *Schematic Principles in Human Memory*, in 1 *SOCIAL COGNITION: THE ONTARIO SYMPOSIUM* 39 (E. Tory Higgins et al. eds., 1981); Shelly E. Taylor & Jennifer Crocker, *Schematic Bases of Social Information Processing*, in 1 *SOCIAL COGNITION: THE ONTARIO SYMPOSIUM*, *supra*, at 89; Aaron Ben-Zeev, *The Schema Paradigm in Perception*, 9 *J. MIND & BEHAV.* 487 (1988); Moore, *Trial by Schema*, *supra* note 116, at 279.

347. Taylor & Crocker, *supra* note 346, at 91.

structures that have a dynamic or relational aspect.³⁴⁸ The schema consists of beliefs about the stimulus domain, including specification of relations among its attributes and concrete examples of the domain.³⁴⁹ Like simple concepts, schemata are used to "chunk" the social world into meaningful units.³⁵⁰ As Taylor and Crocker note, "When a stimulus configuration is encountered in the environment, it is matched against a schema, and the ordering and relations among the elements of the schema are imposed on the elements of the stimulus configuration."³⁵¹

Schemata also enable us to fill in missing details by directing a search for data or supplying "default options" when information called for by the schema is missing.³⁵² If told: "John sat down in a restaurant. He ordered roast beef for dinner," we know on the basis of our restaurant schema that he also consulted a menu and gave his order to a waiter or waitress.³⁵³ Because schemata enable us to "read between the lines" in this way, "our understanding of any social situation is considerably richer than would be given by any mere transcript of the proceedings."³⁵⁴

Two commonly recognized types of schemata are event-schemata (or "scripts") and person-schemata (or "personae").³⁵⁵ Scripts are social occurrences that extend over time in which the related elements are social objects or events that involve the individual as actor or observer.³⁵⁶ They

348. NISBETT & ROSS, *supra* note 336, at 33.

349. Taylor & Crocker, *supra* note 346, at 91.

350. *Id.* at 93.

351. *Id.* at 94. For instance, our "office party schema" enables us to comprehend a scene in which a group of men and women are standing in a room talking and drinking and includes the identification of the older man in the corner, talking at length to a group of deferential listeners, as the boss. *Id.*

352. *Id.* at 103-04; cf. Ben-Zeev, *supra* note 346, at 487-88 (contrasting the naïve common sense view that "[t]he act of perceiving does not change the properties of the perceptual environment, but merely reveals them as they exist independently outside the perceiver" with the view that perception is "constructive (or nonpure) [because] it contains information and features absent from the given physical stimulus").

353. John B. Black et al., *Comprehending Stories and Social Situations*, in 3 HANDBOOK OF SOCIAL COGNITION, *supra* note 346, at 45, 50.

354. *Id.* at 47. Researchers studying cognition and decision-making have also investigated the mechanisms by which people make use of schemata to arrive at judgments about real world events. They have concluded that people use schemata to interpret information in much the same way that a scientist uses a theory or hypothesis to understand scientific data. That is, people understand the relationship between schemata and events as one of probability in the same way that a scientist understands the relation between data and a hypothesis as presenting a continuum according to the degree of congruence or quality of fit. Hastie, *supra* note 346, at 43. In studying the process by which these probability assessments are reached, investigators have concluded that decision-makers employ a number of simplifying strategies or heuristics that prevent them from considering all available information in an evenhanded manner. For example, the "representativeness" heuristic involves the use of resemblance to solve problems of categorization. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 4 (Daniel Kahneman et al. eds., 1982). Salient features of the object are compared to presumed characteristics of the category to decide whether the object is an instance of the category. NISBETT & ROSS, *supra* note 336, at 24.

355. NISBETT & ROSS, *supra* note 336, at 34-35. Alternative categorizations make additional distinctions among schemata. For instance, Taylor and Crocker distinguish three types of schemata: person-schemata, role-schemata, and event-schemata. Taylor & Crocker, *supra* note 346, at 91.

356. NISBETT & ROSS, *supra* note 336, at 34.

are distinguished from other types of schemata in that the sequence of events is understood to be causally related. Nisbett and Ross explain that "[e]arly events in the sequence produce or at least 'enable' the occurrence of later events."³⁵⁷ Scripts range from the abstract and culturally ubiquitous, such as the set of norms and expectations that guide behavior in ordering food at a restaurant,³⁵⁸ to the concrete and idiosyncratic, such as the scripted household routines of people who have lived together for a long period of time.³⁵⁹ Scripts also differ in the extent to which they have their source in direct personal experience or are learned vicariously from the larger culture.³⁶⁰

Personae are "cognitive structures representing the personal characteristics and typical behavior of particular 'stock characters.'"³⁶¹ Like scripts, personae vary with respect to generality, pervasiveness, and source. Some personae are relatively simple and well-defined. Occupational personae—doctor, firefighter, and secretary—fit in this category. Others are more elaborate and suggestive, like the Don Quixote image. Even the simplest personae, though, often evince a broader spectrum of expectations than one consciously realizes.³⁶²

B. Research on Juror Decision-Making

The assumption of cognitive theorists that the use of subjective knowledge structures is necessary for all perception and cognition³⁶³ has obvious

357. *Id.*

358. ROGER C. SCHANK & ROBERT P. ABELSON, SCRIPTS, PLANS, GOALS, AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES 42 (1977).

359. NISBETT & ROSS, *supra* note 336, at 34.

360. For a useful illustration of how schemata enable cognition by helping people give meaning to the present, remember the past, and anticipate the future, see Moore, *Trial by Schema*, *supra* note 116, at 279-81. Professor Moore poses the situation of a person in a convenience store when a man with a stocking cap over his head rushes through the door, points a gun at the clerk, and runs out with the contents of the till. The observer's preexisting mental construct of a robbery allows her to match the features of the script with her observations to organize the series of events into a meaningful whole. More importantly, it guides the focus of the observer's attention and provides a basis for inferring other events and circumstances not observed. For instance, the observer might deduce that a getaway car was parked outside or afterward describe the clerk as nervous during the robbery even though the observer had her eyes on the gun throughout the incident. Finally, the observer's robbery schema serves as a mnemonic for recollection. As unorganized stimuli from the environment, the events constituting the robbery might be difficult to recall. The script that brings them all together and specifies the causal connections that relate them to each other helps in the process of reconstructing those details. *Id.*

361. NISBETT & ROSS, *supra* note 336, at 34.

362. This point is illustrated by the confusion with which many people respond to the following story: A young man was rushed to the hospital after an automobile accident in which his father was killed. When the man was taken into the operating room, the surgeon, upon seeing the patient, declared, "I can't operate on this man, he is my son." The frequency with which this riddle stumps its listeners demonstrates that our store of expectations about the attributes of surgeons includes, in addition to function and dress, gender.

363. See Ben-Zeev, *supra* note 346, at 491 (noting that "a priori forms [that] constitute the conceptual framework [are] necessary for empirical knowledge"). Ben-Zeev contrasts the operation of inferential processes with the working of a perceptual schema. Unlike "the inferential paradigm [wherein] reasoning processes precede and produce a finished perceptual product separate from the processes themselves[,] . . . [a perceptual] schema is constantly participating in the ongoing state of perceiving because it is the way the perceptual system is 'tuned.'" *Id.*

implications for the decision-making tasks of jurors, and sharply conflicts with the model of jury decision-making implicit in the rules of evidence and the specifications of juror qualification. In contrast to the traditional conception of the legal decision-maker as a comparatively passive receptor, "[t]he central characterization of the performing organism in the cognitive view is as an active, goal-seeking, purposive creature."³⁶⁴ Whereas the legal model regards the relation between the evidence and the proof categories as relatively direct, the cognitive model presupposes that all knowledge is mediated through the subjective mental structures of the individual. In contrast with the legal system's "copy" theory, which regards mental representations as literal reflections of the properties of the thing represented,³⁶⁵ schema theories assume large differences between the structure and content of a stimulus and its mental representation.³⁶⁶ In contrast with the legal system's assumption of the fungible character of legal decision-makers, "[a] key ingredient in every current cognitive theory is a mental model of the current 'subjective world' of the information processor and a set of *goals* and associated *plans* that are executed to act on the current environment to change this environment toward a more highly valued state."³⁶⁷

Researchers applying the assumptions that underlie current approaches to cognition have developed models of jury decision-making that sharply diverge from the model implicit in legal rules. Political scientists Lance Bennett and Martha Feldman were drawn to the question of juror decision-making processes through their efforts to identify the links between the formal criminal justice process and commonly held understandings of social judgment.³⁶⁸ They began with the observation that the witnesses, spectators, jurors, attorneys, and judges who participate in the justice system have vastly different relationships to the law and possess widely divergent understandings of formal justice processes.³⁶⁹ For these individuals to be able to communicate with each other, there must exist some common denominator by which the process could be rendered accessible to all, a device for translating the language of formal dispute resolution into everyday understandings.³⁷⁰ After conducting a year long ethnographic study of criminal trials in King County, Washington, Bennett and Feldman concluded that the link which connects popular understandings of the terms for social judgment with the formal

364. Hastie, *supra* note 346, at 44 (citations omitted).

365. *Id.* at 42.

366. *Id.*

367. *Id.* at 44 (emphasis in original) (citations omitted). For a discussion of the relation between the cognitive assumptions of British empiricism and schema theory, see Brewer & Nakamura, *supra* note 346, at 126-36.

368. W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981).

369. *Id.* at 11.

370. *Id.* at 3-4.

processes of the criminal justice system is their common understanding and use of stories.³⁷¹

A story, as Bennett and Feldman use the term, is a symbolic model of social action defined in terms of a limited number of elements and kinds of structural relations among those elements. They use Kenneth Burke's five social action elements—scene, act, agent, agency, and purpose—to define the components of a story.³⁷² Every story will include a central action,³⁷³ which is the element with the most connections to other elements and which answers the question of what the story is about.³⁷⁴ The story elements are linked through direct observational or "empirical" connections;³⁷⁵ through the stock of information that makes up the categories of language or "language category" connections;³⁷⁶ through "logical" connections, meaning invariant relations between types of phenomena or events;³⁷⁷ through "normative" views about proper behavior in particular circumstances;³⁷⁸ and through "aesthetic" connections based on a sense that some types of symbolic relationships seem more "acceptable, familiar, pleasing, or satisfying than others."³⁷⁹ The structural model of a story provides a "frame" for systematizing and simplifying social action that is both polysomic and far too complex for exhaustive description.³⁸⁰ By specifying "the types of symbols that can be assigned together, the connections that can be drawn between various symbols, and the features of a situation that have to be symbolized to produce a complete and interpretable account,"³⁸¹ the story form enables

371. *Id.* at 3, 11. The story form, according to Bennett and Feldman, is an ideal mechanism for linking the criminal justice system and common sense understandings of the world because it is a universally shared interpretive context by which social life is organized and communicated. "In everyday social situations people use stories as a means of conveying selective interpretations of social behavior to others." *Id.* at 7-8. Recognizing the way stories are used to translate social judgments into legal outcomes permits a wholesale reconceptualization of the justice process. Rather than regarding the process as one in which a socially exogenous and essentially alien interpretive standard—"the law"—is the central dynamic, the formal justice process can be seen as the "means of mobilizing dominant models of social reality as standards for judging behavior." *Id.* at 162.

372. *Id.* at 62.

373. *Id.* at 47.

374. *Id.* at 79.

375. *Id.* at 50. The authors provide an eyewitness' account of the defendant husband adding rat poison to a hot drink he later gave to his wife as an example of an empirical connection. The witness' observation links the husband's motive and opportunity to kill his wife with her death. *Id.*

376. *Id.* at 52. For example, in a passage that reads, "The baby cried; mommy picked it up," it is commonly understood that "mommy" is the mother of the baby. *Id.*

377. *Id.* at 56. As the term is used here, "logic" allows one to conclude from the statement, "We were waiting for our contact to deliver the drugs when a car drove up," that the engine of the car was running, because "driving" presumes a variety of constituent conditions including a running engine. *Id.*

378. *Id.* at 57. For instance, Patty Hearst "should" have tried to escape on one of several occasions when she was left unguarded if she was, as she claimed, being held against her will. Since she did not, there was no link to support a connection to her alleged status as a kidnap victim, and the story relying on that link was therefore deficient. *Id.* at 57-58.

379. *Id.* at 59. Jurors may, for example, accept a link between working as a prostitute and committing a robbery on aesthetic grounds even though empirical or categorical grounds for such a connection are weak. *Id.* at 61.

380. *Id.* at 66-67.

381. *Id.* at 67.

decision-makers to present social action in an unambiguous form making that presentation susceptible to judgment for its completeness and consistency.³⁸²

The significant implication of Bennett and Feldman's theory is that the credibility of a story depends on its structural adequacy rather than its evidentiary validation. The authors tested that hypothesis with an experiment designed to identify the criteria by which people judge the truth of stories. They employed forty-nine graduate students and instructed each student to tell the other forty-eight a story about "things that people do" or "things that can happen to people."³⁸³ A randomly selected and disguised portion of the group recounted false stories to the audience, while the remainder of the group told stories that were true.³⁸⁴ The members of the audience rated the truth of the story based solely on the storyteller's account.³⁸⁵ Bennett and Feldman defined and operationalized a test for structural coherence in terms of the number of ambiguities³⁸⁶ in the story weighted according to the complexity of the story, the number of structural connections, and the proximity of the ambiguities to the story's central action.³⁸⁷ The researchers then measured both the correlation between the actual truth of the story and the audience guesses and the correlation between the audience's assessment of the truth of a story and its structural adequacy.

The results showed a lack of correlation between audience guesses about the truth or falsity of a story and its actual status,³⁸⁸ but a strong correlation between structural coherence and story credibility.³⁸⁹ The researchers also measured the correlation between credibility and various other features of the story—length, number of actions, number of pauses by the storyteller, and duration of pauses—and found none of the other correlations to be statistically significant.³⁹⁰ Moreover, the correlation between structural ambiguity and credibility was just as strong when each of the other story variables was controlled.³⁹¹

The results of the study support the authors' central claim—that the credibility of a story depends largely on its structural plausibility. The inherent implausibility of one of Bennett and Feldman's illustrations provides additional intuitive support for this point. The defendant was seen entering a house from which the occupants had just driven away. The police arrived and found the family silver assembled on the dining room table. After searching the house, the police captured the defendant as he stepped out onto the roof

382. *Id.* at 66-67.

383. *Id.* at 73.

384. *Id.* at 70.

385. *Id.*

386. *Id.* at 71. The researchers defined ambiguity in three ways: as an absence of an interpretive rule connecting two story elements; many possible connections but no basis for selecting among them; and connections among some elements that were inconsistent with the connections among others. *Id.*

387. *Id.* at 84.

388. *Id.* ("[T]here is no intrinsic quality in true or false stories that telegraphs accurate impressions to interpreters.")

389. *Id.* at 85 ("As structural ambiguities in stories increase, credibility decreases, and vice versa.")

390. *Id.* at 86-88.

391. *Id.*

from a second floor window. The defendant admitted that he had entered the house, collected the silver, and was leaving through the window, but he denied having committed a burglary. He claimed that he entered the house to find someplace to sleep, took the silver and stacked it on the table to admire it, went upstairs in search of a bed, and stepped out onto the roof because the room was stuffy.³⁹² Though one can imagine circumstances in which such a story would be credited, most people would conclude that it is probably false without any extrinsic clues regarding the defendant's credibility. The story, using Bennett and Feldman's terms, is structurally deficient in that the connections between the events are not plausible according to accepted rules of interpretation.³⁹³

Bennett and Feldman's conclusions are at odds with the assumptions that underlie the legal system's modeling of the factfinding process. The proof rules treat a fact as proven when it is shown *by the evidence* to be probably true. Underlying these rules is the realist assumption that truth consists in a correspondence relation between ideas and the external world. To be proven at trial, a proposition of fact must be connected to the real world by evidence.

The implication of Bennett and Feldman's theory is that the test for the truth or adequacy of a story does not consist exclusively of its connection with an external referent but depends in large part on its internal coherence. Jurors will accept a party's presentation at trial if it passes the test of structural sufficiency according to a priori standards of what constitutes an adequate account of the litigated event.

Another pair of researchers, Nancy Pennington and Reid Hastie, has reached similar conclusions using more rigorous empirical methods.³⁹⁴ According to their "explanation-based" model of evidence evaluation, decision-makers begin by constructing a "causal explanation" of the evidence³⁹⁵ made up of three components: the evidence, "related world knowledge," and "expectations

392. *Id.* at 103-04.

393. *Id.* at 104.

394. The results of Pennington and Hastie's empirical studies are reported in Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. OF PERSONALITY & SOC. PSYCHOL. 242 (1986) [hereinafter Pennington & Hastie, *Evidence Evaluation*]; Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. OF PERSONALITY & SOC. PSYCHOL. 189 (1992); and Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgement*, 14 J. OF EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 521 (1988) [hereinafter Pennington & Hastie, *Effects of Memory Structure*]. The results of their empirical studies are summarized in Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) [hereinafter Pennington & Hastie, *Cognitive Theory*]. Nancy Pennington & Reid Hastie, *Juror Decision-Making Models: The Generalization Gap*, 89 PSYCHOL. BULL. 246 (1981) summarizes prior research on juror decision-making, and Nancy Pennington & Reid Hastie, *A Theory of Explanation-Based Decision Making, in DECISION MAKING IN ACTION: MODELS AND METHODS* 188 (Gary A. Klein et al. eds., 1993) [hereinafter Pennington & Hastie, *Decision Making*] contains a general description of the theory of explanation-based decision-making. Nancy Pennington & Reid Hastie, *Practical Implications of Psychological Research on Juror and Jury Decision Making*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 90 (1990) [hereinafter Pennington & Hastie, *Practical Implications*] outlines some of the implications of the authors' conclusions for jury trial practice.

395. Pennington & Hastie, *Decision Making*, *supra* note 394, at 188; Pennington & Hastie, *Effects of Memory Structure*, *supra* note 394, at 521.

about what constitutes an adequate explanation in the decision domain."³⁹⁶ From these three components the decision-maker constructs "a mental representation of the evidence that constitutes an interpretation of what the evidence is about, incorporating inferred events and causal connections between events in addition to relevant evidentiary events."³⁹⁷

What distinguishes Pennington and Hastie's explanation-based approach from traditional decision-making models is "the hypothesis that decision makers construct an intermediate summary representation of the evidence, and that this representation, rather than the original 'raw' evidence, is the basis of the final decision."³⁹⁸ Whereas earlier algebraic models emphasized the computation of evidence,³⁹⁹ the explanation-based approach regards "*reasoning about the evidence* to be a central process in decision making."⁴⁰⁰

Like Bennett and Feldman, Pennington and Hastie propose that jurors use stories as their model.⁴⁰¹ According to Pennington and Hastie, a story is a general knowledge structure in which a sequence of events is represented as connected by relationships of physical and intentional causality.⁴⁰² The types of relationships that connect story elements include "initiation" of psychological states or goals by prior physical states or other story episodes. Psychological states and goals provide the "reasons" for the actor's actions, which in turn "result" in certain outcomes or consequences.⁴⁰³

396. Pennington & Hastie, *Effects of Memory Structure*, *supra* note 394, at 521; *see also* Pennington & Hastie, *Decision Making*, *supra* note 394, at 192 (arguing that in addition to the evidence presented at trial, jurors apply two different kinds of knowledge: expectations about what makes a story complete and knowledge about events similar in content to those that are the topic of dispute).

397. Pennington & Hastie, *Effects of Memory Structure*, *supra* note 394, at 521.

398. Pennington & Hastie, *Decision Making*, *supra* note 394, at 188; *see also* Pennington & Hastie, *Effects of Memory Structure*, *supra* note 394, at 523 (comparing other models of juror decision-making and distinguishing the researchers' own approach).

399. *See, e.g.*, Hastie, *supra* note 124, at 84; Kaplan, *supra* note 124, at 198.

400. Pennington & Hastie, *Decision Making*, *supra* note 394, at 189 (emphasis in original).

401. Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 525-26; Pennington & Hastie, *Evidence Evaluation*, *supra* note 394, at 243. According to the authors' more general theory, the structure of the causal model the decision-maker uses will depend on the decision domain. Pennington & Hastie, *Decision Making*, *supra* note 394, at 190; Pennington & Hastie, *Effects of Memory Structure*, *supra* note 394, at 521. For instance, a medical internist employs a "'model of the patient'." Pennington & Hastie, *Decision Making*, *supra* note 394, at 197 (quoting William J. Clancey, *Acquiring, Representing, and Evaluating a Competence Model of Diagnostic Strategy*, in *THE NATURE OF EXPERTISE* 343 (Micheline T.H. Chi et al. eds., 1988)). The knowledge structures of an economic forecaster "are modeled as a graph of directed signed connections between economic quantities." Pennington & Hastie, *Decision Making*, *supra* note 394, at 198 (citations omitted).

402. Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 525; Pennington & Hastie, *Evidence Evaluation*, *supra* note 394, at 243.

403. Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 525; Pennington & Hastie, *Evidence Evaluation*, *supra* note 394, at 243. For a slightly different version, see Tom Trabasso & Paul van den Broek, *Causal Thinking and the Representation of Narrative Events*, 24 *J. OF MEMORY & LANGUAGE* 612, 625-26 (1985). Stories typically do not consist of a single human action sequence but instead include a number of hierarchically embedded "episodes," each of which has the basic story structure. The highest level episode characterizes the most important features of "what happened." The component parts of this episode may themselves be story episodes. For instance, a lower level episode may constitute the initiating event for a higher level episode. Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 526-27; Pennington & Hastie, *Evidence Evaluation*, *supra* note 394, at 244.

A juror's general knowledge about the structure of stories serves several important functions. First, expectations about what constitutes a story help the juror organize information by defining what kinds of information are necessary and by defining the types of connections between events. Second, the hierarchical character of the model guides a juror's assessment of the relative importance of various pieces of evidence. The highest level episode represents the most important sequence. Finally, the model provides a basis for making judgments about the completeness of the evidence. A story is complete when all necessary parts are present.⁴⁰⁴

A sequence from Pennington and Hastie's experimental stimulus illustrates how this abstract model maps onto an actual human action sequence.⁴⁰⁵ Two men, Caldwell and Johnson, are in a bar. Caldwell's girlfriend, Sandra Lee, approaches Johnson and asks for a ride to the race track the next day. This initiates a psychological state in Caldwell, who then becomes angry. Caldwell's anger provides the reason for his action of brandishing a razor and threatening Johnson. This action results in Johnson backing off, a consequence. The entire episode is an initiating event for one version of a subsequent homicide: Caldwell's threat causes Johnson to be angry, causes him to want revenge against Caldwell, and causes him to stab and kill Caldwell.

In the second stage of the jurors' decision-making process, jurors learn of the decision alternatives from the judge's instructions on the law.⁴⁰⁶ This information takes the form of a category label—for example, murder, manslaughter, self defense—with a list of features that are required for that category. The types of features specified in the category include identity, actions, the mental state accompanying those actions, and circumstances present when the actions are taken.⁴⁰⁷ The juror's actual decision results

404. Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 527; Pennington & Hastie, *Effects of Memory Structure*, *supra* note 394, at 522. Pennington and Hastie identify two "certainty principles" that govern the acceptance and level of confidence in a story. A story's "coverage" of the evidence refers to the extent to which the story accounts for all the evidence. Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 527-28. The greater the coverage, the higher the level of acceptability of the story as the correct explanation. *Id.* at 528. The second certainty principle, "coherence," has three components. *Id.* A story is "consistent" to the extent that it is free of internal contradictions, contradictions in the credible evidence, or contradictions in parts of the explanation. A story is "plausible" to the extent that it is consistent with the decision-maker's beliefs about what typically happens in the world. And a story is "complete" to the extent that all structural elements are present. The combined value of the story's consistency, plausibility, and completeness yields its overall coherence and affects the degree of acceptance of and confidence in the story. If only one story is coherent, this unique account will be accepted as the explanation for the evidence. If there is more than one coherent explanation, "belief in any one of them over the others will be lessened." *Id.*

405. This sequence appears in Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 526.

406. Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 529; Pennington & Hastie, *Effects of Memory Structure*, *supra* note 394, at 522; Pennington & Hastie, *Evidence Evaluation*, *supra* note 394, at 244. Not surprisingly, juror beliefs about the law are not derived exclusively from the judge's instructions, but are also influenced by jurors' exposure to extra-judicial sources of information in the larger culture. Vicki L. Smith, *When Prior Knowledge and the Law Collide: Helping Jurors Use the Law*, 17 LAW & HUM. BEHAV. 507 (1993).

407. Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 529; Pennington & Hastie, *Effects of Memory Structure*, *supra* note 394, at 522; Pennington & Hastie, *Evidence Evaluation*, *supra* note 394, at 244. Not mentioned by the authors is the "result" required by the definition of some crimes, such as homicide.

from matching the accepted story with a verdict category.⁴⁰⁸ The relatively close correlation between the features of the verdict category and the elements of a story facilitate this matching.⁴⁰⁹

What is significant about the claims of Bennett and Feldman as well as those of Pennington and Hastie is that they both suggest that “the structure of a story,” how well it conforms to an a priori model, “can be just as important as its documentation” in assessing its truth.⁴¹⁰ This claim presents a direct challenge to the legal system’s modeling of the decision-making task, which places exclusive emphasis on evaluation of the probative strength of the proof. Acceptance of the centrality of stories in the evaluation of evidence does not mean that validation of individual items of evidence is of no consequence, nor that judgments of fact are based purely on their structural properties.⁴¹¹ Most obviously, a story will be deemed structurally incomplete if a necessary element is lacking because it has not been proven to exist. The centrality of stories in evaluating evidence does mean, though, that normative expectations about how the world works play a central role in determinations of what is true. Although our factfinding procedures are supposedly designed to establish connections between legal facts and real world events, “symbolic representations on which verdicts are based may have little to do with what ‘really’ happened.”⁴¹² As Bennett and Feldman conclude,

[T]he stories that trial participants construct represent capsule versions of reality. In the process of taking incidents from one social context and placing them in another, the actor selects data, specifies the historical frame, redefines situational factors, and suggests missing observations. In short, he or she can re-present an episode in a version that conforms with his or her perspective both during and after the incident. This does not mean that the storytellers have complete freedom to create reality. It simply reflects the importance of the choice of symbols and the structure of relations among them in a story format.⁴¹³

C. Juror Difference and Juror Performance

The story model contradicts the legal system’s modeling of the proof process according to which proof consists of the validation of propositions by connecting them to “real world” events. The significant implication of the

408. Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 530-31; Pennington & Hastie, *Evidence Evaluation*, *supra* note 394, at 244-45.

409. Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 530-31; Pennington & Hastie, *Evidence Evaluation*, *supra* note 394, at 245. Pennington and Hastie tested their theory with a number of empirical investigations based on high fidelity simulations. The results supported the conclusions that (1) the mental representations of evidence constructed by jurors conform to story structure, and (2) that juror verdict preferences are associated with distinct story structures. *Id.* at 245-53.

410. BENNETT & FELDMAN, *supra* note 368, at 67.

411. *Id.*

412. *Id.* at 65.

413. *Id.* (footnote omitted); *see also* Scheppele, *Just the Facts, Ma'am*, *supra* note 111 (illustrating through analysis of sexual assault and harassment cases that the truth of stories is determined by evaluating how the story is constructed).

story model is that the coherence of a story—the relation of the elements to each other rather than to an external referent—is a principal criterion for acceptance of the truth of the story.

The main focus of the research discussed above is on the way in which jurors evaluate evidence, rather than on the roots of juror disagreement. Indeed, one of the central findings of this research is that in one respect all jurors respond to the evidence in the same way. At least for criminal trials, the story form is universal; all jurors fit the evidence into the basic story format of purposive action sequences.

Although not explicitly concerned with the relation between jurors and their verdicts, one important subsidiary conclusion from the research is that different jurors construct different stories. This finding is consistent with the findings of other research that jurors disagree on the first ballot in about two-thirds of all cases,⁴¹⁴ and with the collective judgment of generations of trial lawyers that jury composition matters.⁴¹⁵ In explaining that different jurors construct different stories, Pennington and Hastie observe that the factors that will have the most influence on which story the jurors construct “have to do with assumptions they make about the way the social world ‘works.’”⁴¹⁶ This background knowledge about the world is the third ingredient, along with case-specific information presented during the trial and generic expectations about the structure of stories, that jurors use in constructing stories.⁴¹⁷ This background knowledge includes such “common sense” notions as: “A person who is big and known to be a troublemaker causes people to be afraid”,⁴¹⁸ “[s]ometimes when people drink they get nasty”,⁴¹⁹ and “[n]ormally a person wouldn’t carry a big knife in their . . . front pocket.”⁴²⁰ Jurors use such assumptions, along with the information introduced into evidence and analogies to similar experiences and imagined events, to arrive at the intermediate conclusions that make up the events of their stories.⁴²¹

To illustrate how jurors reason from world knowledge and the evidence presented at trial to construct story elements, Pennington and Hastie present the following example:

414. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 487-88 (1966).

415. One study that attempted to systematically investigate whether attorney efforts to seat favorable jurors influence outcomes—by reconstructing the jury as it would have existed without peremptory challenges—concluded that while the exercise of peremptory challenges does not necessarily influence the outcome in every case, cases in which peremptory challenges do have an impact occur with some frequency. Zeisel & Diamond, *supra* note 134, at 518-19. For an intriguing examination of how jury selection affected the result in one particular high-profile case, see Hans Zeisel & Shari Siedman Diamond, *The Jury Selection in the Mitchell-Stans Conspiracy Trial*, 1 AM. B. FOUND. RES. J. 151 (1976).

416. Pennington & Hastie, *Practical Implications*, *supra* note 394, at 97; see also HASTIE ET AL., *supra* note 199, at 130.

417. Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 521-22; Pennington & Hastie, *Effects of Memory Structure*, *supra* note 394, at 522.

418. Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 524.

419. Pennington & Hastie, *Evidence Evaluation*, *supra* note 394, at 247.

420. *Id.*

421. See Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 524.

A typical deduction from world knowledge consists of the following premise (P1-P3) and conclusion (C) structure: P1 = A person who is big and known to be a troublemaker causes people to be afraid. P2 = Caldwell was big. P3 = Caldwell was known to be a troublemaker. C = Johnson was afraid. . . . [Thus], the juror matches features of Caldwell from evidence (P2) and from a previous inferential conclusion (P3) to world knowledge about the consequences of being confronted with such [a] person (P1) to infer that Johnson was afraid (C).⁴²²

As the authors point out, this reasoning process involves a representativeness judgment in which the features of the concrete facts about Caldwell are matched to a prototypic situation—a personae schema. The certainty of the juror's conclusion is a function of the quality of the match.⁴²³ The conclusion that Johnson, the homicide defendant, was afraid of Caldwell, the victim, is thus dependent on a nonevidentiary assumption about the effect large-sized troublemakers have on other people; this conclusion also forms a crucial component of the story in which Johnson acted in self-defense. Different jurors possessed of different beliefs about the social world arrive at different conclusions. For example, another subject in the experiment decided that Johnson was embarrassed by Caldwell's threats and concluded on that basis that Johnson went to the bar intending to kill Caldwell.⁴²⁴

Though never explicitly developed, this description suggests that knowledge structures operate at two levels of abstraction in the interpretation of evidence in criminal trials. At the highest level, the basic story structure provides the map for organizing comprehension of all human action sequences. All jurors in criminal trials fit the evidence into the basic story form. Schemata, less abstract knowledge structures that represent some defined area of social life, operate at a lower level. They are employed in constructing the "local" linkages which establish the intentional and causal connections that make up the story.⁴²⁵ The diversity and richness of these domain-specific schemata produce "great flexibility in the inferences we can make, and thus in the range of possible ways in which we comprehend social behavior."⁴²⁶

422. Pennington & Hastie, *Evidence Evaluation*, *supra* note 394, at 524; *see also* Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 254 (discussing the Johnson hypothetical).

423. Pennington & Hastie, *Evidence Evaluation*, *supra* note 394, at 254. The authors conclude that judgment heuristics actually comprise only a subset of the conditions that affect certainty of judgment, and refer to a broader range of "certainty conditions" including "(a) *typicality* of the instances of their categories . . . ; (b) *base rates* of the properties under consideration . . . ; (c) *variability* in the knowledge from which the general premise arises . . . ; (d) *dissimilarity* between the instance and the most similar group that behaves in a discrepant manner." *Id.* (italics in original). Full consideration of the complexity of this process is beyond the scope of this Article.

424. *Id.*; *see also* Pennington & Hastie, *Cognitive Theory*, *supra* note 394, at 524-25.

425. *Cf.* Black et al., *supra* note 353, at 48-52 (discussing "causal inferences" and "goal-related inferences" in story construction). The authors distinguish between "coherence inferences [which] provide 'local' linkages between pairs of statements in a story or actions in some social situation" and "memory-unit inferences [which] are 'global' linkages that tie together packages of story statements into memory units at a higher level." *Id.* at 48. Causal and goal-related inferences provide examples of coherence inferences.

426. *Id.* at 46; *see also* Moore, *Trial by Schema*, *supra* note 116, at 273-81. In an extended discussion of a thoroughly unexceptional hypothetical criminal trial, Professor Moore shows how schemata and the representativeness heuristic crucially influence jurors' attention to and interpretation of the evidence. For instance, in one of Professor Moore's minor examples, a juror's evaluation of a tort plaintiff's claim that she was especially careful in approaching the intersection where the auto accident

Other researchers who have directly addressed the process by which differences among jurors are translated into different verdicts have reached complementary conclusions. This research has shown that the traditional assumption of a category of "evidence" standing in opposition to subjective juror attitudes is untenable, and that what the evidence is in any given case will be a function of the beliefs and attitudes of the decision-makers.⁴²⁷ Research on the relation between death penalty attitudes and juror performance shows that such attitudes are not narrow beliefs directly influencing correspondingly narrow aspects of the juror's performance. Rather, as discussed above,⁴²⁸ attitudes toward the death penalty are associated with a whole constellation of beliefs and attitudes that comprise a locally coherent ideology about the criminal justice system. That ideology, moreover, indirectly shapes the evidence in the case through the juror's perceptions of the plausibility of prosecution and defense witnesses and the availability of different scripts or stories for understanding the crime.⁴²⁹ As a result, two conscientious jurors exposed to the same evidence may develop reconstructions of the facts and implications of those facts that are "surprisingly dissimilar."⁴³⁰

The experimental stimulus used in one of the death penalty studies illustrates how jurors' prior beliefs about the nature of the social world influence their interpretation of trial evidence.⁴³¹ The stimulus was a videotaped simulation of the testimony of a white police officer and a black defendant regarding an incident that led to the arrest of the defendant for assault. The officer testified that he was on crowd-control duty at a large auditorium when the defendant tried to break through a line of police. The defendant became belligerent, then struck the officer on the chin when the officer tried to take him aside to explain the need for dispersing the crowd. The defendant, on the other hand, testified that he was moving against the flow of pedestrians to reach friends from whom he had become separated. When he tried to explain this to the officer, the officer pulled him aside, verbally abused him with racial slurs, and then beat him without provocation.⁴³²

occurred because she had seen an accident at that very location one week earlier might be influenced by the juror's having had the same experience of exercising care when approaching the scene of an earlier accident. *Id.* at 276-77.

427. See John R. Hepburn, *The Objective Reality of Evidence and the Utility of Systematic Jury Selection*, 4 LAW & HUM. BEHAV. 89, 98 (1980) ("The data suggest that the strength of the evidence is relative, influenced by case-relevant juror attitudes. Attitudes toward those issues which constitute the basis for the case and toward those social groups which testify during the trial influence one's perception of the evidence presented by prosecution and defense.").

428. See *supra* part II.B.5.

429. Thompson et al., *supra* note 330, at 110; see also Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING, *supra* note 124, at 61.

430. Thompson et al., *supra* note 330, at 110-11.

431. *Id.* at 101-02.

432. *Id.*

The researchers found that death-qualified and excludable jurors reached significantly different conclusions on a variety of evidentiary issues presented by the testimony. The death-qualified and excludable jurors differed on their assessment of the credibility of the officer and the defendant; the plausibility of various factual claims (e.g., whether the defendant struck the officer and whether the officer used racial slurs); inferences from the facts (such as who initiated the struggle and whether the officer was too rough); and attributes of the witnesses (whether the officer had racial bias or the defendant was unduly hostile to police).⁴³³ In explaining these differences, the researchers concluded that the jurors used prior beliefs about the typical behavior of police officers and young blacks to construe ambiguities and fill in missing details in the evidence. The researchers observed that

[t]he death-qualified subjects may have been more likely than the excludables to believe the defendant threatened . . . and struck the officer . . . because these actions are consistent with their beliefs about how young blacks are likely to behave when restrained by a police officer, while excludables are more likely to expect brutality by the officer.⁴³⁴

D. "Perceptual Fault Lines"

In assessing the implications of these findings for the debate over jury reform, it might be deemed necessary to resolve the question of whether the nonevidentiary assumptions that shape constructions of social reality are distributed randomly in the population or break along racial, ethnic, gender, or class lines. Although the case for a more aggressive commitment to inclusive jury selection techniques does not stand or fall on whether jury composition affects jury performance,⁴³⁵ demonstrating that the group identity of jurors is associated with particular evidence constructions and verdict choices would seem to make the argument for reform compelling. Certainly, if juror decision-making is systematically related to race, gender,

433. *Id.* at 103.

434. *Id.* at 105. Another group of researchers has attempted to address directly the interactive influence of juror characteristics and the trial evidence in producing the verdict. Jonathan D. Casper & Kennette M. Benedict, *The Influence of Outcome Information and Attitudes on Juror Decision Making in Search and Seizure Cases*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING*, *supra* note 124, at 65; Jonathan D. Casper et al., *Juror Decision Making, Attitudes, and the Hindsight Bias*, 13 *LAW & HUM. BEHAV.* 291 (1989). Using a statistical technique called "path analysis," which is designed to measure the mutual influence among members of a set of causally related variables, the researchers investigated the effects of several different juror beliefs and attitudes on the size of juror damage awards in civil actions for illegal police searches. This methodology enabled them to test whether the individual differences among jurors influenced the verdict directly when juror recall and interpretation of the evidence was controlled, or whether the juror variables influenced the size of the award indirectly through their influence on the jurors' interpretation of the evidence. Based upon two mock juror studies, the researchers concluded that the jurors' recall and interpretation of the evidence was the strongest determinant of juror decisions, but that attitudinal variables and knowledge about the outcome of the search strongly influenced the reconstructions of the evidence. Casper & Benedict, *supra*, at 77, 81.

435. For instance, public confidence in the jury's decision will depend in part on the composition of the jury, irrespective of the decision.

income, or other identifiable juror attributes, to tolerate the exclusion of groups possessing beliefs and attitudes which are relevant to the jury's task would be inexcusable.

Just how far juror performance correlates with juror group identity is very difficult to determine. It is probably true that most of the nonevidentiary assumptions that influence jury verdicts are either altogether haphazard or understandable in retrospect, but difficult or impossible to predict in advance.⁴³⁶ On the other hand, it seems highly likely that, at least in some types of cases, the group identity of jurors does influence juror performance.

Some indication of the extent to which beliefs relevant to juror performance are associated with group identity can be gleaned from systematic empirical investigations of the relation between juror identity and verdict preferences. This research, which has been thoroughly reviewed elsewhere,⁴³⁷ has produced somewhat inconsistent results and does not support the broad conclusion that juror attributes can be used to predict performance across all categories of cases.⁴³⁸ This failure of social science to identify strong predictors of juror decisions in stable juror attributes may in part be the result of the predominant research strategy of seeking to identify people who would be either conviction- or acquittal-prone regardless of the kind of case.⁴³⁹ Those characteristics may not necessarily translate into predictable decision

436. See Ellsworth, *supra* note 429, at 42 ("The process by which a juror comes to a decision about the right verdict may resemble Brownian motion more than it does the Galilean laws of cause and effect."). While a skillful and well-prepared attorney might sometimes be able to identify jurors with relevant experiences through probing voir dire, (see, e.g., the mock voir dire reported in Spence, *supra* note 121, at 51, in which the attorney more or less stumbles on the fact that one of the potential jurors developed a physical deformity as a result of a childhood disease, an experience which the attorney believes might influence the juror's acceptance of the defense claim that the defendant developed schizophrenia as a result of childhood abuse), there must be many occasions in which the pretrial identification of jurors with beliefs or experiences that will prove relevant to the case is impossible.

437. For comprehensive reviews of the social science literature on the relation between race and jury verdicts, see Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1625-43 (1985), and King, *supra* note 111, at 82-99.

438. See RITA J. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 445-46 (1980) (finding "only slight and not consistent differences in the verdicts of jurors with different class, ethnic, and sexual characteristics"); Ellsworth, *supra* note 429, at 45-46 (asserting that the only juror characteristics that have been reliably shown to correlate with juror verdicts are gender in rape cases and juror attitudes toward the death penalty); Norbert Kerr, *Stochastic Models of Juror Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING*, *supra* note 124, at 116, 121-33 (summarizing and analyzing research); Hepburn, *supra* note 427, at 90 ("Although the relationship between demographic factors and jurors' verdicts has been substantiated, it is evident that there is no uniform set of predictor variables that can be applied universally.").

One recent article found a clear correlation between juror ethnicity and jury decisions with Caucasian and Hispanic jurors. Dolores A. Perez et al., *Ethnicity of Defendants and Jurors on Jury Decisions*, 23 J. APPLIED SOC. PSYCHOL. 1249 (1993). The article reported on a mock juror study involving 480 subjects who saw videotaped trials of Caucasian or Hispanic defendants and deliberated in six-member juries. The results were analyzed for the effect of the ethnicity of the jurors and the defendant on the decision. The authors found that the ethnicity of the defendant had no effect on the conviction rate: Hispanic defendants were convicted 62% of the time and Caucasians were convicted 59% of the time. *Id.* at 1256. They also found, however, that Caucasian-majority juries were significantly more likely to convict (79%) than Hispanic-majority juries (52%). *Id.* Consistent with the argument advanced here, the authors explain their results in terms of juror use of stereotypes in the attribution of personal responsibility. *Id.* at 1258-59.

439. See Ellsworth, *supra* note 429, at 45 (criticizing this approach).

preferences because juror characteristics influence performance mediately by shaping the intermediate interpretation of the evidence, rather than by shaping the decision directly.⁴⁴⁰ Thus, it is possible that group-specific assumptions frequently influence jury decision-making but that in many cases their effect is nondirectional. That is, diversifying the jury's standards for describing the social world may enrich the factfinding process generally without systematically orienting it toward conviction or acquittal. In any case, while research into the relation between jurors and their verdicts does not establish a correlation between juror attributes and decisions in all cases, there is a demonstrated correlation between race and decision in at least some cases.⁴⁴¹

One category of decisions that would seem to call for frequent invocation of assumptions that are likely to correspond with cultural communities are decisions about the interior mental states and proclivities of other persons—parties, witnesses, and lawyers. Jurors in all kinds of trials, but especially in criminal cases, are constantly called upon to make judgments about the intention or motivation of the actors and to draw conclusions about the likelihood of some action that either never materialized or was not witnessed. Apart from the obvious case of deciding the *mens rea* of the accused, jurors must also attribute motives to others based on external cues when evaluating

440. Hepburn, *supra* note 427, at 98 (“[I]t is apparent that . . . attitudes contribute to the juror’s verdict only indirectly. The direct causal effects of case-relevant attitudes do not account for a significant amount of the explained variation in verdict. Verdict is directly affected by the perceived strength of evidence, . . . yet the perceived strength of evidence is related to juror’s case-relevant attitudes.”); see also Ellsworth, *supra* note 429, at 61 (observing that accumulated slight differences among jurors are sometimes (though not always) “sufficient to move a juror across the line from one verdict to another”).

441. See Johnson, *supra* note 437, at 1625-43 (concluding that jurors tend to convict other-race defendants under circumstances in which they would acquit same-race defendants); King, *supra* note 111, at 80-91 (concluding from a survey of social science literature that black and white juries assess guilt differently when the defendant or victim is black, when the evidence is close, and when the case involves racially charged issues). But see Jeffrey E. Pfeifer, Comment, *Reviewing the Empirical Evidence on Jury Racism: Findings of Discrimination or Discriminatory Findings?*, 69 NEB. L. REV. 230, 241-50 (1990) (disputing the conclusions of research which shows the impact of race in mock jury studies).

Anecdotal evidence further supports the view that frameworks of interpretation that correspond to cultural communities are mechanisms by which differences among jurors are translated into different decisions. For instance, Valerie P. Hans and Neil Vidmar quote the following account of a black juror who served in Los Angeles to demonstrate how “race-dependent context and knowledge may sometimes be crucial”:

“It seemed like the only reason that they arrested the [black] defendant [who was charged with auto theft] was that someone in the gas station across the street looking out into the light in the dark could identify the run-of-the-mill black man from 90 to 100 feet away. They arrested him in the area of York Boulevard [a white neighborhood near Occidental College and Pasadena]. Well, we all know what being black is on York Boulevard. I was raised and born in Los Angeles so it is nothing new to me. If you are black and you’re on York Boulevard at four o’clock in the morning, they are going to pick you up. They will pick me up on York Boulevard walking at four o’clock in the morning. This was the only thing that they seemed to have against the man, so we acquitted him.”

HANS & VIDMAR, *supra* note 169, at 50 (quoting Ralph Davis, *Black Jurors*, 30 GUILD PRAC. 112-13 (1973)) (citations omitted).

circumstantial evidence⁴⁴² or when assessing the credibility of witnesses.⁴⁴³ In many cases, jurors are required to decide what some actor *would* have done had an event unfolded in some other way than it actually did. For instance, in deciding whether Bernhard Goetz acted in self-defense when he shot four young African-American men on a New York subway,⁴⁴⁴ cultural beliefs about the violent propensities of young black men inevitably played a role.⁴⁴⁵

In attributing mental states or predicting unfulfilled possibilities, jurors are largely articulating their view of the way the world works, rather than simply implementing the construction of reality proscribed by the legal system.⁴⁴⁶ Many of the decisions jurors make are based on standards of describing the world that are either prescribed by the legal system or are so universally shared that it is fair to say the only judgment to be made is whether the fact is or is not true. For example, in a homicide case the law prescribes that the victim must be dead, and, for the most part, consensus over when someone is dead leaves little room for the imposition of the juror's own construction of the situation. But the decision whether a trial witness who testifies that the victim is dead is telling the truth, or is careful, perceptive, or insightful, is manifestly guided by the juror's framework for understanding others. Normative expectations about what type of people are truthful, careful, perceptive, or insightful, or how such a person behaves, are used to single out from the total environment certain features of the witness' biography or past or present behavior that our culture associates with truthfulness or accuracy.

We do not know, nor could we ever determine, how far or how frequently the beliefs used in making such judgments correspond to certain ethnic, racial, or gender communities. To be sure, the area of agreement over cultural standards for describing reality is vastly more extensive than the area of disagreement.⁴⁴⁷ On the other hand, it cannot be denied that race, gender, and

442. For instance, does evidence that the victim broke off a romantic relationship with the accused support a conclusion that the defendant had the motive to kill the victim?

443. Cf. Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157 (1994) (arguing that judgments of credibility from common cultural cues are of little value in assessing actual truth of witness testimony).

444. *New York v. Goetz*, 497 N.E.2d 41 (1986).

445. See Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (discussing the moral and legal implications of considering the race of the victim in self-defense claims). As Professor Armour observes, "Virtually every person in our society, especially if white, consciously or unconsciously compiles a mental library of black stereotypes over the course of her life. The belief that blacks are prone to commit violent assaults is among the most powerful and frightening myths in this library." *Id.* at 813.

446. Cf. Lawrence Rosen, *Intentionality and the Concept of the Person*, in CRIMINAL JUSTICE: NOMOS XXVII 52, 68 (1985) (J. Roland Pennock & John W. Chapman eds., 1985) ("[M]otives and intentions are neither wholly private nor independently causal: they are culturally characteristic ascriptions by means of which the situations in which people find themselves and the kinds of people they encounter are made more or less comprehensible.").

447. For instance, no adult in our society would answer the question "How was your day?" with a description of having passed three red cars in a row in the office parking lot. Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1107 (1987). Universal assumptions about what features of the environment are relevant rule out that response as inappropriate. Likewise, in Nelson Goodman's famous example, there is universal agreement that a guard who, upon being told to shoot any prisoner who moved, immediately shot them all because they were moving rapidly around the sun, missed the point. GOODMAN, *supra* note 70, at 121.

ethnicity are highly salient categories of social understanding in our society and have been for a very long time.⁴⁴⁸ Moreover, given the longstanding social separation between the two gender communities, and the geographic and social separation between racial communities,⁴⁴⁹ it is not plausible that this differential treatment has not resulted in members of these groups holding different assumptions and having different experiences.⁴⁵⁰

To take one common, simple, and extremely important example, whites and nonwhites have very different experiences with police.⁴⁵¹ Among other differences, it is not the experience of most whites that police often lie or conceal their true intentions. For many nonwhites, however, police deception is accepted as a part of their social reality.⁴⁵² As a result of the different attributes included in white and nonwhite schemata for police officers, the two races are likely to approach police testimony very differently.⁴⁵³ Whether or not the witness is telling the truth, white jurors may find it hard to believe that police officers would intentionally lie, while black jurors are likely to approach the testimony skeptically.⁴⁵⁴

448. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE (1982) (describing different styles of moral reasoning for girls and boys); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987) (arguing that racism in America "arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities"); Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 584-94 (1977) (observing that race and sex in our society are much more than superficial physiological characteristics, affecting both the way the individual looks at the world and the way the world looks at the individual).

449. See JAMES A. KUSHNER, *APARTHEID IN AMERICA: AN HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL RESIDENTIAL SEGREGATION IN THE UNITED STATES* (1980) (describing the persistence of racial segregation); T. Alexander Aleinikoff, *The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 336-38 (1992) (containing a similar discussion of racial segregation). Though the sexes are not geographically separated like the races, they are often socially and culturally segregated.

450. See sources cited *supra* note 438. Notably, even some defenders of the current jury selection procedures have recognized that groups which tend to be excluded might contribute useful insights to the factfinding process, but these defenders minimize those contributions or suggest unrealistic solutions. See, e.g., Saltzburg & Powers, *supra* note 248, at 369-70 (acknowledging that minority jurors might be helpful in interpreting the significance of evidence that a young black defendant fled from police but proposing that the same information could be presented through expert testimony). Just one of several problems with this approach is the difficulty of anticipating what type of information would be helpful, especially given that attorneys on whom that responsibility devolves are themselves a comparatively homogeneous group.

451. See King, *supra* note 111, at 88 and sources cited therein; Tracy Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 250-62 (1991).

452. Wasserstrom, *supra* note 448, at 598.

453. See *id.*; Jeff Rosen, *Jurymandering: A Case Against Peremptory Challenges*, NEW REPUBLIC, Nov. 30, 1992, at 15-16 (citing the high acquittal rate among predominantly minority Washington, D.C. juries as evidence that minority jurors are suspicious of police); Jerome H. Skolnick, *The Jury Was Never Meant To Be Rational*, L.A. TIMES, May 1, 1992, at B7 (attributing the outcome in the King beating case to the fact that the suburban, prosperous, and unicultural jurors who acquitted the officers did not perceive police brutality in the beatings and noting that urban multicultural jurors tend not to believe police officers).

454. The much-publicized trials of the four Los Angeles police officers accused of using excessive force in arresting Rodney King involves a more complicated set of racially-based assumptions. Though the beating that was the subject of the charges was recorded on videotape by an onlooker, what happened on March 3, 1991, was, it appears, anything but clear. And what one saw was deeply

Finally, the thesis that the fundamental assumptions which shape our constructions of reality are not randomly distributed in the population but follow ethnic, gender, racial, and class lines is supported by a large body of literature, much of it written by women and racial and ethnic minorities whose main message is that the standard account of life in the United States does not comport with how they experience it.⁴⁵⁵ Though not about legal factfinding per se, this literature teaches that there are "perceptual fault lines" in our society and that these fault lines "occur at the boundaries between social groups, between whites and people of color, between the privileged and the poor, between men and women."⁴⁵⁶ Despite the fact that in some sense we all inhabit the same culture,⁴⁵⁷ there are some areas of disagreement

influenced by one's beliefs about the typical or expected behavior of police officers and young black males. Jurors whose actual or vicarious experience with police officers includes arbitrary harassment and even violence would invariably interpret the images on the tape through the belief that police officers frequently mistreat arrestees (or black or minority arrestees) and therefore would see a gratuitous beating. On the other hand, if the images on the tape are viewed through the lens of a belief that young underclass black males are violent, the officers' argument that they were simply protecting themselves seems more plausible. Mark Cammack, *Multicultural Justice: Diversity of Jurors Gives New Meaning to Fair Trial*, L.A. DAILY J., Mar. 15, 1993, at A6; see also Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571 (1993) (explaining the verdict as the result of the jurors use of the stereotype of the Big Black Man preying on whites); Anna Quindlen, *Across the Divide*, N.Y. TIMES, May 3, 1992, § 4, at 17 (noting that the white jurors in the state prosecution of the officers accused of assaulting Rodney King "walked into that [jury] room with the baggage most of us carry, the baggage of stereotypes and ignorance and pure estrangement from African-Americans"); cf. Brian Stonehill, *Facts, Lies and Videotape*, L.A. TIMES, Oct. 20, 1993, at B7 (arguing that filmmakers invariably interpret the reality they present).

One much-discussed recent example of divergent interpretations of the same event that have their source in gender as well as race grew out of the hearings held on the nomination of Supreme Court Justice Clarence Thomas. Many observers attributed the all-male Senate Judiciary Committee's seeming inability to comprehend Professor Anita Hill's allegations that Thomas sexually harassed her to the Senators' lack of any conceptual framework for understanding her claims. Kim A. Taylor, *Invisible Woman: Reflections on the Clarence Thomas Confirmation Hearing*, 45 STAN. L. REV. 443, 450 (1993); see generally Symposium, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1279 (1992) (criticizing the male-dominated Senate Judiciary Committee's inability to comprehend Anita Hill's allegations of sexual harassment). Routine prosecutions for acquaintance rape provide a more pedestrian example of the principle that culturally dependent standards for describing reality can produce divergent accounts of the same event. Thus, a woman might discern compulsion in a variety of subtle forms of intimidation and a latent potential for injury based on her smaller size and beliefs about the frequency of male violence toward women. These perceptions, however, would be wholly invisible to a man whose concept of force is more closely tied to actual or threatened physical violence. See SUSAN ESTRICH, *REAL RAPE* 60-68 (1987); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 183 (1989).

455. The literature sounding this theme is far too extensive to cite. However, for a useful treatment of this issue, see Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). For a comprehensive bibliography of one branch of this literature, see Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

456. Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2083 (1989).

457. As cultural anthropologists have pointed out, "members of a single society, though sharing in a broad set of cultural assumptions, may nevertheless possess diverse interpretations of reality." Lawrence Rosen, *The Negotiation of Reality: Male-Female Relations in Sefrou, Morocco*, in *WOMEN IN THE MUSLIM WORLD* 561 (Lois Beck & Nikki Keddie eds., 1978).

A widely used illustration of how members of the same society can hold different assumptions that yield varying interpretations of reality is Susan Glaspell's short story, *A Jury of Her Peers*. SUSAN GLASPELL, *A JURY OF HER PEERS* (1927). The story describes the visit of three men and two women to a remote farmhouse in a turn-of-the-century farm community to investigate a homicide. The victim was strangled to death with a rope while in bed. His wife was in the bed with him when he died, but she claimed that her husband was killed by an intruder and that she did not awaken. The story, told

sufficient to produce "multiple 'true' descriptions [of the same reality] that are not identical with or translatable into each other."⁴⁵⁸

Constitutional rhetoric has long recognized the central place of jury service in full participation in public life. As the Supreme Court has pointed out, jury service is second only to voting in the implementation of a participatory government.⁴⁵⁹ But our bloodless understanding of what jury service entails has produced correspondingly anemic mechanisms for its protection. The conviction that "[a] person's race simply 'is unrelated to his fitness as a juror'"⁴⁶⁰ enjoins a salutary prohibition against disqualification on racial grounds. But cultural patterns that frequently correlate with race *are* relevant to jury service, since those cultural factors are an important ingredient of what

through one of the women, demonstrates how during the visit the men and women focus on different features of the environment, and how their different observations lead them to different constructions of what happened. The women's attention is drawn to household details that figure in their own experience. They notice a half-filled measure of sugar, clumsy stitches in an otherwise finely sewn quilt patch, a broken latch on a door to a bird cage, and, finally, a dead canary concealed in a sewing basket. By fitting these observations into their general beliefs about a farm wife's daily routine and their more specific beliefs about the character of the homicide victim and his wife, they construct a story of what happened and why. They conclude that the wife strangled her husband because he broke the neck of her pet canary. Moreover, they imagine that it was the wife's intense loneliness, on an isolated farm with an emotional miser for a husband, that led her to acquire the canary in the first place, and that her sense of helplessness to improve her life led her to strangle her husband after he killed her bird. The men notice none of the details observed by the women and eventually drop the investigation against the wife for lack of proof of any motive for the killing. *Id.* at 38.

Glaspell's story illustrates several points about the role of beliefs in the generation of knowledge. It shows how beliefs guide our selection of what features of the environment to attend to and also give meaning to those features that we do notice. It was the women's prior knowledge about baking that caused them both to notice the partially-filled container of sugar and to infer that the occupant of the house was interrupted while she was cooking.

The story also shows how one's mental apparatus imposes limits on what it is we are able to perceive. The men, who had gone to the farmhouse with the express purpose of finding evidence establishing the wife's motive for killing her husband, were unable to discern the motive discovered by the women. The story suggests that even if the men had been apprised of the facts known to the women, they would not have been able to draw the same conclusion, because nothing in their experience enabled them to recognize the wife's condition.

Finally, the story shows how interpretive frameworks can correspond to cultural communities. The different perspectives of the men and the women in the story are traceable to their differing experiences, actual and vicarious, which in turn result from their inhabiting sharply divided male and female worlds in a rural farming economy. The author shows how the observations and interpretations of the characters are shaped by their own experiences. For instance, the woman narrator discerns from the half-filled sugar container in the suspect's kitchen that the wife had been interrupted by the occurrence of something out of the ordinary because the narrator herself had left her flour half-sifted when she was suddenly called away to accompany the men on their visit to the scene of the crime. *Id.* at 19.

458. Scheppele, *supra* note 447, at 1104. The belief that members of minority groups can contribute otherwise unrepresented perspectives and experiences has been the basis for other programs to enhance diversity. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (upholding an affirmative action program to increase the number of minority-owned radio and television stations); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1979) (approving the principle of increasing classroom diversity). Acknowledging the salience of group identity does not, however, entail a racial or gender essentialism. As Justice Brennan stated in *Metro Broadcasting*, it does not require a belief "that members of a particular minority group share some cohesive, collective viewpoint" to conclude "that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented." *Metro Broadcasting*, 497 U.S. at 582.

459. *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

460. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

the jury does. In addition, the guarantee against nondiscrimination in selection is not enough to implement the right to jury participation if participation means a voice for one's perspective.⁴⁶¹ Once it is recognized that exclusion, *even benign exclusion*, has real effects, actual representation is the only way that the promise of full participation can be realized.

CONCLUSION

This Article has argued that our ideas about the proper qualifications for jurors and the procedures for selecting them are traceable to and implement Enlightenment beliefs about the possibility of objective knowledge grounded in the world as it really is. The philosophical underpinnings of those beliefs, however, are now widely discredited. Furthermore, the assumption that there exists a universal perspective from which the true nature of reality can be discerned, which is the starting point for current definitions of jury qualification and the guiding principle of our jury selection rules, no longer comports with our understanding of how jurors actually make decisions. It now seems more plausible that all knowledge is shaped by the interpretive perspective of the observer.

Unfortunately, interpretivism does not resolve the question of the proper qualifications of decision-makers as readily as realism does, and I will not attempt to trace its implications here beyond some very general comments. At the outset, recognition that everyone has a point of view does not require that every point of view be recognized as equally valuable.⁴⁶² There is widespread consensus in our society that some kinds of connections to the parties or the issues are clearly and indisputably disqualifying. No one involved in the debate over jury selection is urging that jurors who have a financial or personal involvement in the outcome, or who have acquired firsthand information about case-specific aspects of the controversy, should be permitted to serve. These types of bias are presently recognized in rules regarding challenges for cause,⁴⁶³ and these rules should be retained.

But rejection of the belief in a single universal perspective does mean that having a perspective on the issues is not ipso facto disqualifying. To the contrary, the presence of multiple perspectives enriches the inquiry and offers the best hope of attaining a de-centered objectivity. Recognition that claims to objectivity "bear the imprint of those making the claims"⁴⁶⁴ and that "although we can alter the theory we use to frame our perceptions of the

461. See Note, *The Case for Black Juries*, 79 YALE L.J. 531, 531 (1970) ("Jury service should not . . . be viewed as mere catharsis for the masses; lay participation is a creative process by which community standards are injected into the legal system to guard against possible harshness, arbitrariness, or inaccuracy in the administration of justice.").

462. See, e.g., Joan C. Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WIS. L. REV. 131 (arguing that "perspectivalism" or nonfoundationalism does not entail the loss of moral certainties).

463. See, e.g., STANDARDS FOR CRIMINAL JUSTICE Standard 15-2.5 commentary at 58-59 (Am. Bar Ass'n 1986).

464. Minow, *supra* note 296, at 14.

world, we cannot see the world unclouded by preconceptions"⁴⁶⁵ requires that a qualified jury must include a broad array of experiences and perspectives.

In addition to seeking a wide array of attitudes and beliefs, we should also strive to empanel jurors who are willing to suspend judgment, to attempt to see things from another perspective, and to learn.⁴⁶⁶ For while reliance on perspective is unavoidable, no perspective need be inescapable. A juror's experience may lead her to see events in a particular way. But a willingness to try to see them from another perspective may put those same events in a completely different light.

Precisely how a vision of "diffused impartiality" could be operationalized in reformed procedures for selecting jurors is, again, a complex question that will not be elaborated upon here. Any fundamental alteration of jury selection procedures would almost certainly run up against deep-seated cultural values and administrative costs. It is not true, however, that implementing a view of impartiality based on a commitment to inclusion is impossible.

There are a variety of means either proposed or in use to remedy the problem of underinclusion of traditionally excluded groups during the early stages of jury selection. Some of these techniques are thoroughly noncontroversial, such as expanding the source list from which the venire is chosen to include, in addition to voter registration lists, driver's license lists, tax rolls, welfare rolls, and other sources.⁴⁶⁷ The only explanation for the failure to take such simple steps is an insufficient commitment to achieving more diverse panels. Other techniques involve conscious efforts to ensure minority representation in the master lists. Georgia law, for example, takes advantage of the fact that Georgia voter registration lists identify the race of all registered voters and requires that local jury commissioners use that information to create lists that mirror the demographic makeup of the district as closely as possible.⁴⁶⁸ These techniques acknowledge the salience of group identity to the jury decision-making task, and are accordingly scorned by those committed to the ideal of blank neutrality.⁴⁶⁹

465. *Id.* at 46; cf. Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990) (exploring the meanings of context in legal judgment); Catharine P. Wells, *Improving One's Situation: Some Pragmatic Reflections on the Art of Judging*, 49 WASH. & LEE L. REV. 323 (1992) (arguing that "every legal judgment is made from a particular perspective. . . . [And] if judging is a situated activity, then judges should attend to their situation").

466. See Minow, *supra* note 296, at 76 ("The solution is not to adopt and cling to some new standpoint, but instead to strive to become and remain open to perspectives and claims that challenge our own.").

467. See Kairys et al., *supra* note 169; Munsternan & Munsterman, *supra* note 169.

468. See GA. CODE ANN. § 15-12-40(a)(1) (1994) (Michie); see also Nancy J. King, *Racial Jurymaning: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 719-29 (1993) (containing a comprehensive review of this and other race-conscious selection methods).

469. See, e.g., Andrew Kull, *Racial Justice: Trial by Cross-Section*, NEW REPUBLIC, Nov. 30, 1992, at 17, 18 (criticizing the Georgia scheme). For an analysis concluding that race-conscious jury selection methods would pass constitutional strict scrutiny under some circumstances, see King, *supra* note 468, at 729-74.

The simplest way to eliminate discrimination at the challenge stage is to eliminate the peremptory challenge and seat the first twelve jurors who survive the parties' exercise of their challenges for cause. The late Justice Thurgood Marshall advocated such a change in his *Batson v. Kentucky* concurrence.⁴⁷⁰ While random selection of twelve jurors from a representative venire would not ensure a completely representative jury, it would achieve more diversity than do the current procedures. In addition, random selection has the advantage of administrative simplicity⁴⁷¹ and avoids the dilemma of exacerbating negative meanings of race or gender identities through the use of remedies that consciously rely on them.

While a system of random selection has strong appeal,⁴⁷² the benefits of the peremptory challenge cannot be ignored.⁴⁷³ The most persuasive arguments in favor of peremptory challenges include the inadvisability of entrusting the selection of jurors entirely to the judge, and preserving a role for the litigants in the process of jury selection so as to have "a good opinion of the jury, the want of which might totally disconcert [them]."⁴⁷⁴ The view of the jury as a group of "arbiters"⁴⁷⁵ whose decision is accepted because the parties have agreed to be bound by it may go back to the time when trial by jury was regarded as an innovation and therefore could not be forced upon an unwilling litigant.⁴⁷⁶ Whether or not the origins of the tradition of party

470. 476 U.S. 79, 107-08 (1986) (Marshall, J., concurring). Various commentators have likewise advocated the abolition of the peremptory challenge. See Alschuler, *supra* note 286, at 199-211; Akhil R. Amar, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1287-89 (1984); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L.Q. 369 (1992); Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227 (1986); see also VAN DYKE, *supra* note 139, at 168-69 (discussing various attempts to abolish peremptory challenges).

471. See Alschuler, *supra* note 286, at 229-33.

472. Both challenges for cause and peremptory challenges are apparently now rare in England. HANS & VIDMAR, *supra* note 169, at 48-49. But the benefit of disuse of challenges in admitting greater diversity of viewpoint into the deliberation may be lost by the fact that English criminal juries can convict on a 10-2 vote. *Id.* at 172.

473. See, e.g., *Batson*, 476 U.S. at 120-21 (Burger, C.J., dissenting); *Swain v. Alabama*, 380 U.S. 202, 218-21 (1965); *Babcock*, *supra* note 275, at 1175-76; *Babcock*, *supra* note 134, at 552-55; *Saltzburg & Powers*, *supra* note 248, at 355-57; *Underwood*, *supra* note 246, at 768-73.

474. *Babcock*, *supra* note 275, at 1176 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 1714 (3d ed. 1894)); see also *Underwood*, *supra* note 246, at 771-72. I am less impressed with the other general category of defenses of the peremptory challenge, all of which are related to its asserted role in "the elimination of bias." *Id.* at 771. It is said that permitting attorneys to challenge jurors without articulating a reason prevents the public articulation of the "core of truth" in stereotypes, facilitates the elimination of jurors who will not admit or are unaware of their biases, and provides a shield for the exercise of the challenge for cause by giving an attorney the means for striking a juror whom the attorney has alienated by trying to explore possible bias on voir dire. *Babcock*, *supra* note 134, at 553-55. These arguments are obviously predicated on a view of the nature and function of bias that this Article rejects.

475. 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 623 (2d ed. reissued 1968).

476. See PLUCKNETT, *supra* note 30, at 125-26. This doctrine led to the gruesome practice of compelling submission of the cause to jury under "peine et dure" through piling rocks on the unwilling litigant until he either agreed to jury trial or expired. *Id.*

choice in the composition of the jury are as old as the jury itself,⁴⁷⁷ it still has strong appeal, and to some degree is an obstacle to elimination of the peremptory challenge.⁴⁷⁸

A system of affirmative selection represents a bolder approach which acknowledges both the salience of perspective and the commitment to party choice. Tracey Altman's student note includes one proposed version of such an approach.⁴⁷⁹ Altman proposes a procedure in which twenty-four venire members are chosen randomly from the jury pool and examined by the attorneys during voir dire. After both sides have exercised their challenges for cause, each would list, in order of preference, twelve jurors. The judge would first select any juror whose name appeared on both lists, regardless of how the juror was ranked. Then, alternating between the lists, the judge would take the highest rated juror from each until a complete panel had been assembled.⁴⁸⁰ So long as the parties' interests are in conflict and those interests inform their choices, the jury would contain a broader array of perspectives than that which results from the use of either peremptory exclusion or random selection.⁴⁸¹

A number of commentators have gone further, calling for adoption of mechanisms to ensure minority participation on juries.⁴⁸² For example, Professor Sheri Johnson, using social science research on attribution of guilt in cross-racial decision-making, proposes that a criminal defendant be given the right to a minimum of three "racially similar jurors" on the panel that tries the case.⁴⁸³

While these proposals for affirmative selection strike many as radical innovations, they are neither historically unprecedented nor without contemporary parallel. The use of specially qualified juries of various types has a long

477. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991) (observing that "the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and its verdicts.").

478. Others suggest that we could enhance the representativeness of the jury and give at least token recognition to the tradition of party control by drastically reducing the number of peremptory challenges currently allowed to between one and three. See Pizzi, *supra* note 244, at 147-49 (discussing the advantages of reducing the number of peremptories for both prosecution and defense to two or three); Saltzburg & Powers, *supra* note 248, at 376-78 (defending peremptory challenges as necessary to obtain an impartial jury but approving of a reduction in the number of challenges). Though less than ideal, these proposals are a considerable improvement over current procedures, which accord parties many more peremptory challenges, see VAN DYKE, *supra* note 139, at 282-84, and accordingly diminish the representative character of the jury.

479. Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781, 806-11 (1986); see also Babcock, *supra* note 275, at 1179-80 (labeling Altman's proposal "attractive"); Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1062-64 (1991) (endorsing a variation on affirmative selection).

480. Altman, *supra* note 479, at 806.

481. *Id.* at 807.

482. Colbert, *supra* note 291, at 124-25; Johnson, *supra* note 437, at 1695-1700; Diane Potash, *Mandatory Inclusion of Racial Minorities on Jury Panels*, 3 BLACK L.J. 80 (1973); Note, *supra* note 461.

483. Johnson, *supra* note 437, at 1695-1700.

lineage in Anglo-American law.⁴⁸⁴ To take one isolated example, Oregon law in the 1920's required that in all cases involving minors, either as defendants or complaining witnesses, at least half of the jury had to be female.⁴⁸⁵ Current unapologetic calls for the use of handpicked juries in complex civil cases⁴⁸⁶ have not been received with horror, even though they are based on the same principle underlying proposals for affirmative selection in criminal cases—that potential jurors are differentially qualified to assess the factual issues of the case depending on their experiences. Much of the appeal of arbitration as an alternative to litigation lies in the fact that disputants have the power to select as a decision-maker someone who will be able to understand and sympathetically evaluate their claims.⁴⁸⁷

There are, to be sure, significant practical and theoretical problems with any system of affirmative selection. Virtually any system of affirmative selection would entail greater administrative inconvenience and expense. Additionally, affirmative selection would almost certainly result in more hung juries,⁴⁸⁸ and might also reduce the number of guilty pleas, since defendants might rate their chances of success at trial more favorably if they had more control over the composition of the jury or a better assurance of peer participation on the jury. The inertia of long-standing jury selection procedures weighs against any significant reform. Finally, belief in the possibility of a transcendent neutrality is still strong. This is reflected in, among other things, the opinion of many that recognizing cultural differences to solve social divisions is wrongheaded, and that the way to overcome the differences that divide us is to eliminate race, ethnicity, and gender as categories of distinction.⁴⁸⁹

484. See Richard C. Baker, *In Defense of the "Blue Ribbon" Jury*, 35 IOWA L. REV. 409 (1950); Lewis H. LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841 (1976); William V. Luneburg & 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, 901-09 (1981); R. Justin Miller, *The Woman Juror*, 2 OR. L. REV. 30 (1922); James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 144-50 (1983); Jeanette E. Thatcher, *Why Not Use the Special Jury?*, 31 MINN. L. REV. 232 (1947).

485. Miller, *supra* note 484, at 39.

486. See Dan Drazen, *The Case for Special Juries in Toxic Tort Litigation*, 72 JUDICATURE 292 (1989); Luneburg & Nordenberg, *supra* note 484, at 942-50; Rita Sutton, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. CHI. LEGAL F. 575; Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155 (1980).

487. See JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 63, 65 (Inst. for Civil Justice R-3071-ICJ 1983); DEBORAH R. HENSLE, COURT-ANNEXED ARBITRATION IN THE STATE TRIAL COURT SYSTEM 11 (Inst. for Civil Justice P-6963-ICJ 1984); Richard L. Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 310 (Richard L. Abel ed., 1982); David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 409-10 (1990); Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 421, 426 (1982). *But see* Albert W. Alschuler, *Mediation with a Mudder: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986) (arguing that arbitration is not the answer).

488. *But see* Hans Zeisel, Comment, *Affirmative Peremptory Juror Selection*, 39 STAN. L. REV. 1165, 1165-69 (1987) (demonstrating that intuitive assessments of the increase in hung juries from Ms. Altman's proposal are probably exaggerated, since attorney selection is inevitably exercised on less than perfect knowledge of jurors' probable behavior).

489. For a powerful defense of race-conscious remedies, see T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991). For a summary of the arguments against race-consciousness, see *id.* at 1075-78.

No one, including myself, believes that fundamental change in the qualifications or selection of jurors is imminent.⁴⁹⁰ But the assumptions on which the current system operates are increasingly being questioned. Given the symbolic and practical importance of juries in our political and civic life, we should begin to consider how our changing views should affect our practice.

490. See Richard Pliskin, *Jury-Selection Reform: Some Modest Proposals*, N.J. L.J., Dec. 13, 1993, at 1, 31 (reporting that aggressive jury selection reform proposals, including abolition of peremptories and supplementation of source lists with public assistance rolls, had been dropped by the state legislative committee in favor of more modest measures of adding state income tax and homestead rebate applicants to source lists and educating judges on voir dire).