ARTICLE

EMPTY VOTES IN JURY DELIBERATIONS

Kim Taylor-Thompson

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INTRODUCTION

For much of the past quarter-century, courts and legal scholars have devised various strategies to combat the exclusion of people of color and women from juries. Animating this effort has been the belief that to deny access to jury service based on an individual’s heritage or gender offends core democratic principles. The Supreme Court has outlawed the wholesale exclusion of members of protected groups1 and has similarly disapproved procedural devices that function as barriers to full participation of members of these groups.2 For the most part, courts and litigants have tried to follow these rules. Yet the complexion and composition of juries have barely changed.3 Juries remain overwhelmingly white and male.4

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1 See, e.g., Taylor v. Louisiana, 419 U.S. 527, 537 (1975) (prohibiting the exclusion of female jurors); Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (prohibiting the exclusion of African American jurors).

2 See, e.g., J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 135 (1994) (holding that peremptory challenges exercised against women require “heightened scrutiny”); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding that the Equal Protection Clause “prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges”); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (ruling that “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant”).

3 See, e.g., RANDALL KENNEDY, RACE, CRIME AND THE LAW 232 (1997) (observing “a substantial ‘underrepresentation’ of blacks” on juries); Hiroshi Fukurai & Edgar W. Butler, Sources of Racial Disenfranchisement in the Jury and Jury Selection System, 13 NAT’L BLACK L.J. 238, 264 (1994) (noting that people of color and the poorly educated are underrepresented on juries in Orange County, California); Nancy J. King, Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection, 68 N.Y.U. L. REV. 707, 712 (1993) (“Jury selection policies that have survived constitutional challenge continue to produce juries and jury pools with percentages of African Americans and other racial and ethnic minorities that are smaller than the percentages of these groups in the adult population of the jury district.”).

4 See, e.g., NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES (Elissa Krauss & Beth Bonora eds., 1999) (“American jury systems tend to overrepresent white, middle-aged, suburban, middle-class people and underrepresent other groups.”); Cynthia A. Williams,
Scholars have clashed over the causes of this lack of diversity. Some blame race- and gender-based peremptory strikes exercised during voir dire. Many of these scholars applaud the Supreme Court's requirements of closer scrutiny of peremptory challenges excluding people of color and women. Others dispute the efficacy of prohibiting such strikes, observing that courts routinely accept lawyers' pretextual reasons for removing members of commonly targeted groups. Monitoring challenges, these scholars insist, would serve only to obscure — rather than to eliminate — the practice of striking jurors based on race or gender. Still, despite its full-throated quality, the debate remains centered within the bounds of the same basic picture.

But the picture is incomplete. Peremptory challenges may not be the only cause for concern. Another phenomenon within the jury box threatens quietly — but effectively — to deprive individuals with diverse views who actually serve on juries from exercising any real voting power. This phenomenon is the emerging acceptance of nonunanimous verdicts in criminal cases, in which ten or sometimes nine of twelve jurors are permitted to issue the verdict. The picture becomes all the more complex because, on the surface, majority rule voting seems innocuous enough. Advocates of nonunanimous voting almost reflexively equate majority rule with democracy. But for all its appearance of fairness, nonunanimous voting in this setting tends to inhibit inclusion. Jury research conducted in the past two decades reveals that eliminating the obligation to secure each person's agreement on the verdict can result in truncating or even eliminating jury delib-

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See, e.g., Hiroshi Fukurai, Edgar W. Butler & Richard Krooth, Race and the Jury: Racial Disenfranchisement and the Search for Justice 70-71 (1993) (noting that prosecutors are more likely than are defense lawyers to exercise peremptory challenges against people of color).


7 See, e.g., Jeffrey S. Brand, The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters, 1994 Wis. L. Rev. 511, 527-30; Sheri Lynn Johnson, The Language and Culture (Not To Say Race) of Peremptory Challenges, 35 WM. & MARY L. Rev. 21, 29-59 (1993) (discussing Batson and its progeny and concluding that the Court tolerates discriminatory strikes so long as lawyers avoid denoting their challenges as race-based).

8 See Johnson, supra note 7, at 29-59.

erations. By discouraging meaningful examination of opposing viewpoints, majority rule decisionmaking impovershes deliberations.

But an even more basic and fractious consequence looms. Nonunanimous decisionmaking in criminal trials could jeopardize the limited victories that historically excluded groups have won in cases challenging barriers to jury service. If — as is often true — the views of jurors of color and female jurors diverge from the mainstream, nonunanimous decisionmaking rules can operate to eliminate the voice of difference on the jury. Given that people of color tend to form the numerical minority on juries, the majority could ignore minority views by simply outvoting dissenters. Equally troubling is the fact that studies examining the participation rates of women in a group setting, coupled with jury research on the impact of nonunanimous voting, suggest that a majority of jurors could reach a verdict without ever hearing from women on the jury. Thus, despite the simplistic appeal of making the jury system more “democratic,” nonunanimity threatens to eliminate the voices of those who have only recently secured the right to participate in the democratic process.

What one thinks of such jury dynamics may depend on one’s degree of faith in the ultimate fairness of supermajorities. An examination of psychological and social science research suggests that personal background and experience define and in very real ways limit individual perception. An individual’s experiences influence her capacity to interpret and evaluate facts and then to make judgments about justice. More particularly, race and gender inform the processes by which individuals make decisions, especially about social justice. Until now the requirement to reach complete consensus has at least provided an impetus to stretch beyond group experiences and loyalties. But the race and gender unconsciousness inherent in majority rule would permit a jury to return a verdict without ever acknowledging or confronting gaps in its interpretation of evidence.

The United States Supreme Court played a role in creating this dilemma. Over two decades ago, the Court issued a pair of decisions holding that the Constitution does not mandate jury-verdict unanimity
in state criminal trials. The Court's review of the constitutionality of majority rule showed little appreciation of a possible relationship between this practice and the Court's long history of battling exclusions of groups from the jury process. The Court perceived no dissonance between nonunanimous decisionmaking and the democratic aspirations it had consistently embraced. Interestingly, the Court's reasoning lacked the practical grounding that one might expect of such pivotal rulings. Based largely on intuition, both the majority and dissenting opinions made sweeping conclusions about jury decisionmaking. All of the Justices agreed on the importance of the deliberative process, but they disagreed on the likely impact of an alteration in the voting rule, and particularly the extent to which a minority of jurors can still influence the ultimate decision. Against that backdrop, the Court granted states the opportunity to experiment with majority rule.

Thus far, few states have accepted the Court's invitation. Recently, however, the movement toward nonunanimous voting in criminal cases threatens to gain political momentum and scholarly support. This drive for nonunanimous verdicts is occurring even though unanimity has long inspired confidence in the American system of justice. Critics of the jury system capitalize on moments of public out-

13 See Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). Five years earlier, in 1967, Great Britain abolished the unanimity requirement in favor of majority rule, as a result of evidence that in some trials of "professional criminals," some jurors had been bribed or intimidated into voting for acquittals. Prior to this development, there was little study of the impact of majority rule. See Valerie P. Hans & Neil Vidmar, Judging the Jury 172 (1986).

14 See infra Section I.A.

15 See generally Apodaca, 406 U.S. 404; Johnson, 406 U.S. 356. The Court's unanimity decisions followed soon after its decision regarding jury size. In 1970, the Court in Williams v. Florida, 399 U.S. 78 (1970), had permitted states to experiment with reducing the number of jurors from twelve to six. See id. at 103. The Court ruled with little consideration of the impact this reduction would have on the voice of difference on the jury. See infra Part III. In Ballew v. Georgia, 435 U.S. 223 (1978), however, the Court limited the states' ability to reduce the size of juries by declaring unconstitutional a five-person jury in a criminal trial. See id. at 245.

16 In addition to Louisiana and Oregon, whose statutes the Supreme Court has upheld, only three other states at the time of writing permit nonunanimous verdicts. See Idaho Const. art. I, § 7 (permitting five sixths of the jury to render a verdict in a misdemeanor trial); Okla. Const. art. II, § 19 (allowing three fourths of the jury to render a verdict in misdemeanor trials authorizing fewer than six months' imprisonment); Tex. Const. art. V, § 13 (authorizing nine of twelve jurors to render a verdict in trials of criminal cases below the grade of felony in the District Courts).


18 See Amar, supra note 9, at 1189 (recommending nonunanimous voting as an important jury reform); Jere W. Morehead, A "Modest" Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts, 46 U. Kan. L. Rev. 933 (1998); Schwartz & Schwartz, supra note 9, at 325.

19 See, e.g., Abramson, supra note 9, at 182–85.
rage following high-profile criminal cases such as People v. Simpson\textsuperscript{20} to urge radical correction of the current system.\textsuperscript{21} Reflexive responses to what many perceive to be "wrong" outcomes in such cases are to vilify unanimity and to romanticize majority rule voting in jury decisions. California\textsuperscript{22} and Colorado,\textsuperscript{23} for example, have introduced bills in the state legislatures that would eliminate the unanimity requirement in criminal cases. Although to date these proposals have failed to garner sufficient legislative support, legislators will likely reintroduce similar measures. In a criminal justice system susceptible to slogan-driven, crisis-inspired reform, majority rule could easily become standard practice.

But reform that may produce the twin consequences of excluding people of color and women from meaningful participation in jury deliberations warrants critical examination. This article explores the unappreciated costs of such exclusions with particular emphasis on the disinterested quality of the jury's deliberative and factfinding process. Part I begins with a discussion of the Supreme Court's withdrawal of constitutional protection from the unanimity standard in state criminal trials. It then reviews subsequent jury research that calls into question the Court's assumption that adoption of nonunanimous decisionmaking would have little, if any, impact on the deliberative ideal. Part II examines the ways in which majority rule reinforces patterns of racial and gender subordination in the jury process. This Part also considers the specific harms that will likely occur if majority rule operates to bar

\textsuperscript{21} Although the Simpson jury ultimately reached a unanimous decision, critics of the verdict seized on the elimination of the unanimity standard as a vehicle for reform of the jury system. See, e.g., Fred Goldman Campaigns to Reform Judicial System, L.A. TIMES, Nov. 17, 1995, at B4 (discussing the campaign of the father of one victim in the O.J. Simpson murder case to adopt majority rule as more conducive to a just system); Jan Crawford Greenburg & Ginger Orr, Simpson Trial Yields a Verdict Against the System, NEWS TRIB. (Tacoma, Wash.), Oct. 8, 1995, at F1, available in 1995 WL 537634 ("State legislators in California have responded to the [Simpson] trial by introducing legislation to change the jury system . . . . One proposal would eliminate the requirement . . . . that juries be unanimous in their decisions."); see also Andrew Blum, A Hostile Environment for Unanimous Juries, NAT'L L.J., Sept. 11, 1995, at A1.
\textsuperscript{22} Assembly Constitutional Amendment 18 provided that "in a criminal action in which either a felony or a misdemeanor is charged, five-sixths of the jury may render a verdict; but if the death penalty is sought, only an [sic] unanimous jury may render the verdict." A.C.A. 18, 1995-1996 Reg. Sess. (Cal. 1995) (failed in committee), available at <http://www.leginfo.ca.gov/pub/95-96/bill/asm_ab_0001-0050/aca_18_bill_950223_introduced.pdf>. Senate Constitutional Amendment 24 would have amended the California Constitution to "allow eleven-twelfths of the jury to render a verdict in a criminal action except in an action where the defendant may be sentenced to the death penalty or life without parole." S.C.A. 24, 1995-1996 Reg. Sess. (Cal. 1995) (failed in committee), available at <http://www.leginfo.ca.gov/pub/95-96/bill/sb_0001-0050/sca_24_bill_950504_introduced.pdf>.
\textsuperscript{23} See, e.g., Larry S. Pozner, Decay of Liberty and Justice for All, ROCKY MTN. NEWS (Denv.), Apr. 29, 1996, at 29A, available in 1996 WL 7569489 (arguing against a proposal to change Colorado's unanimous verdict system to one of majority rule).
effective participation by people of color and women. Part III addresses the constitutional and policy implications of majority rule. Given the body of empirical data on the effects of jury composition, the Court may need to take a new, hard look at its earlier approval of majority rule. Policymakers who may be tempted to consider alterations in the decisionmaking scheme will certainly need to confront the wide-ranging consequences of such systemic change.

I. THE NATURE OF MAJORITY RULE

A. The Supreme Court's Sanctioning of Majority Rule

Until 1972 the United States Supreme Court canonized the virtues of jury unanimity in an almost unbroken line of decisions.24 Although the Constitution does not explicitly mandate unanimous verdicts, the Court consistently construed the Sixth Amendment jury trial guarantee to encompass the jury system as the Framers had known it at common law — including the requirement of unanimity.25 As early as 1897, the Court insisted that it was beyond question that a jury in a criminal case must return a unanimous verdict.26

But in 1972 the Supreme Court reconsidered its position. In Apodaca v. Oregon,27 the Court considered a Sixth Amendment challenge to a provision of the Oregon Constitution that authorized conviction by a nonunanimous jury.28 The petitioners in Apodaca were three criminal defendants who had been convicted of felonies in separate

24 See Andres v. United States, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required when the Sixth and Seventh Amendments apply . . ."); Patton v. United States, 281 U.S. 276, 288 (1930) (indicating that a right to a jury trial should be understood to require a unanimous verdict of twelve jurors, as at common law); Maxwell v. Dow, 176 U.S. 581, 586 (1900) ("[A]s the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury trial is held . . ."); Thompson v. Utah, 170 U.S. 343, 351 (1898) (indicating that because the defendant committed his crime while Utah was still a federal territory, he had the "constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons").

25 See Andres, 333 U.S. at 748.

26 See Thompson, 170 U.S. at 347, 353.


28 Article I, section 11 of the Oregon Constitution provides as follows:
In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; . . . provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of first degree murder, which shall be found only by a unanimous verdict, and not otherwise . . . .

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cases joined on certiorari review. They asserted that their convictions based on nonunanimous jury verdicts violated their Sixth Amendment right to trial by jury and their due process right to a jury panel that reflected a cross-section of the community.\textsuperscript{29} The Court nonetheless upheld the constitutionality of nonunanimity.\textsuperscript{30}

In response to the petitioners' Sixth Amendment claim, the Court explored the historical origins of the unanimity requirement and recognized that unanimity had become an accepted feature of the common-law jury by the eighteenth century. The Court concluded, however, that the Due Process Clause of the Fourteenth Amendment did not incorporate against the states the Sixth Amendment requirement of unanimity. The Court reviewed the history of the Sixth Amendment, noting that early draft versions had included a unanimity requirement or language defining a jury to possess "the accustomed requisites."\textsuperscript{31} But the version that Congress ultimately submitted to the states provided only for a guaranteed jury trial, without reference to unanimity. The Court maintained that Congress's deletion of any reference to unanimity in its drafting "was intended to have some substantive effect."\textsuperscript{32} Still, the Court observed that its inability "to divine 'the intent of the Framers' when they eliminated references to the 'accustomed requisites' requires that in determining what is meant by a jury we must turn to other than purely historical considerations."\textsuperscript{33}

The Court then addressed the jury's function in contemporary society, observing that the jury's role is to insert "between the accused and his accuser the commonsense judgment of a group of laymen."\textsuperscript{34} However, it suggested further that "[a] requirement of unanimity . . . does not materially contribute to the exercise of this commonsense judgment."\textsuperscript{35} The Court went on to note that it perceived no constitutional difference between juries required to act unanimously and those permitted to return nonunanimous verdicts.\textsuperscript{36}

Petitioners' due process argument in \textit{Apodaca} also failed. Petitioners linked the unanimity requirement to systemic concerns about the participation of minorities within the community, arguing that unanimity is a necessary precondition for the Due Process Clause's fair cross-section requirement. But the Court found two flaws in this argument. Precedent exposed the first. According to the Court, the peti-

\textsuperscript{29} See \textit{Apodaca}, 406 U.S. at 406.
\textsuperscript{30} See \textit{id.} at 412.
\textsuperscript{31} \textit{Id.} at 409.
\textsuperscript{32} \textit{Id.} at 410.
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.} (quoting Williams v. Florida, 399 U.S. 78, 100 (1970)) (internal quotation marks omitted).
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} See \textit{id.} at 411.
tioners' position "assum[ed] that every distinct voice in the community has the right to be represented on every jury and a right to prevent conviction of a defendant in any case."37 Although the Court acknowledged a prior decision holding that the Constitution forbids the "systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels,"38 it noted further that none of its decisions authorized an individual defendant, for example, to challenge the composition of a jury because it failed to include any members of her race.

The second flaw in petitioners' argument related to another "assumption" that the Court refused to accept — this time without reference to case law: "that minority groups, even when they are represented on a jury, will not adequately represent the viewpoint of those groups simply because they may be outvoted in the final result."39 The Court cited no precedent or jury research to reach this conclusion. It simply rejected the petitioners' assumption in favor of its own. The Court presumed that because members of the minority "will be present during all deliberations, . . . their views will be heard."40 Thus, in one line, the Court made an interesting leap: it equated presence with influence. Arguing as follows, the Court ultimately rejected the petitioners' due process claim:

We cannot assume that the majority of the jury will refuse to weigh the evidence and reach a decision upon rational grounds, just as it must now do in order to obtain unanimous verdicts, or that a majority will deprive a man of his liberty on the basis of prejudice when a minority is presenting a reasonable argument in favor of acquittal.41

In a companion case, Johnson v. Louisiana,42 the Court dispensed with two additional constitutional objections to nonunanimity. A jury had convicted Johnson of robbery under a Louisiana law that authorized punishment at hard labor upon a vote for conviction by nine of twelve jurors.43 Johnson challenged the Louisiana statute on two grounds. First, he asserted that a nonunanimous verdict failed to satisfy the reasonable doubt standard required by the Due Process Clause. Second, Johnson raised an equal protection challenge arguing that Louisiana's graduated voting scheme for juries in different types of criminal cases disadvantaged defendants contesting charges belonging to his class of felony.

37 Id. at 413.
38 Id.
39 Id.
40 Id.
41 Id.
43 See id. at 358.
In support of his due process claim, Johnson asserted that, to give substance to the standard of proof in a criminal case, courts should read the Due Process Clause to require a unanimous jury verdict. Because three jurors had voted for acquittal, he argued, his conviction failed to satisfy the standard of proof beyond a reasonable doubt. The Court rejected this claim, stating that in "criminal cases due process of law is not denied by a state law... which dispenses with the necessity of a jury of twelve, or unanimity in the verdict." Specifically, the Court explained that "the mere fact that three jurors voted to acquit does not in itself demonstrate that, had the nine jurors of the majority attended further to reason and the evidence, all or one of them would have developed a reasonable doubt about guilt." Relying on intuition rather than empirical evidence, the majority dismissed Johnson's assertions — and the dissenters' fears — that jurors in the minority would be ignored. It chose instead to trust that jurors in the majority would only override the minority after they had considered and rejected the minority's views. Still, the Court did concede that the state's proof would have appeared "more certain if it had convinced all twelve jurors instead of only nine." Nonetheless, it concluded that the verdict as rendered did not deprive Johnson of due process of law.

The Court found Johnson's equal protection argument similarly unpersuasive. Johnson argued that the Equal Protection Clause prohibits Louisiana's voting scheme, which required a nonunanimous vote from a five-person jury to convict a defendant of less serious felonies, a majority of nine of twelve jurors to convict of more serious felonies, and a unanimous vote from a twelve-member jury for capital crimes. The Court acknowledged that Louisiana had decided to "facilitate, expedite, and reduce expense in the administration of criminal justice" by instituting a graduated scale for obtaining convictions depending on the gravity of the offense. Yet the Court deferred to the Louisiana legislature's judgment and found "nothing unconstitutional or invidiously discriminatory... in a State's insisting that its burden of proof be carried with more jurors where more serious crimes or more severe punishments are at issue."

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44 Id. at 359 (quoting Jordan v. Massachusetts, 225 U.S. 167, 176 (1912)) (internal quotation marks omitted).
45 Id. at 361.
46 See id.
47 See id.
48 Id. at 362.
49 See id. at 363.
50 See id. at 364.
51 Id. (quoting State v. Lewis, 56 So. 893, 894 (La. 1911)) (internal quotation marks omitted).
52 Id.
The dissenters in both Johnson and Apodaca proceeded from starkly different premises. They urged that unanimity serves to assure the reliability of the verdict and to safeguard against biased decisionmaking. In his dissenting opinion in Johnson, Justice Stewart argued that only a unanimity requirement can adequately guard against the “potential bigotry” of individuals who, swayed by personal or societal passions or prejudices, may “acquit when evidence of guilt is clear” or convict on inadequate evidence. He linked the rule of unanimity to the Court’s decisions requiring the impartial selection of jurors. Unanimity and impartial selection, he argued, “complement each other in ensuring the fair performance of the vital functions of a criminal court jury.”

Justice Stewart cautioned that citizens would call into question the legitimacy of a system in which a defendant “who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines.”

In a separate dissent in Johnson, Justice Douglas argued vehemently that the elimination of the verdict unanimity requirement strips the jury minority of its power to persuade the majority to acquit or to exercise caution by convicting the defendant of a lesser included offense. He questioned the reliability of a verdict issued from a deliberative process cut short due to the jury’s consolidation of the necessary majority vote. In Justice Douglas’s view, unanimity operates as a check against hasty factfinding. He further concluded that majority rule would permit the prosecution to enjoy a substantially higher conviction rate than it deserved. Although Justice Douglas did not rely on much empirical data, he did refer to studies conducted by noted jury specialists Harry Kalven and Hans Zeisel. As Justice Douglas observed, these studies showed that a unanimous verdict rule enables a numerical minority to override the will of the majority in one out of ten cases. He cautioned that majority rule would forfeit this opportunity to overturn the judgment of the majority. Justice Brennan’s dissent expressed similar concerns. He insisted that verdict unanimity operated to ensure substantial participation by all groups in the

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53 See id. at 388 (Douglas, J., dissenting).
54 See id. at 398 (Stewart, J., dissenting).
55 Id.
56 Id.
57 Id.
58 See id. at 388 (Douglas, J., dissenting).
59 See id. at 389.
60 See id. at 388.
61 See id. at 389 & n.4 (citing HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 490 (1966)).
62 See id.
63 See id. at 395 (Brennan, J., dissenting). Justice Marshall joined in the dissent.
criminal justice system.64 Acknowledging the value of a diversity of perspectives, Justice Brennan argued that majority rule could marginalize minority viewpoints.65

B. Social Science Research Examining the Effects of Majority Rule

In the wake of the Supreme Court's decisions in Johnson and Apodaca, researchers began to experiment with nonunanimous decision rules. They constructed jury studies to test the assumptions of both the majority and dissenting opinions. Although jury research should perhaps be viewed with some caution,66 its findings provide necessary insight into the operation of such rules.67 Indeed, the evidence that jury researchers have amassed directly contravenes the majority opinions' contentions that these decision rules have no effect on the reliability of jury decisions.68 A shift to majority rule appears to alter both the quality of the deliberative process and the accuracy of the jury's judgment. In the end, the data indicates that unanimity assures viewpoint diversity better than majority rule.69

The heart of the problem is that nonunanimous decisionmaking constricts the flow of information. Researchers have discovered that once a vote indicates that the required majority has formed, deliberations halt in a matter of minutes.70 Jury research reveals how rarely juries deliberating under majority rule attain full consensus.71 In more

64 See id. at 396.
65 See id. (noting that under a majority rule regime "consideration of minority views may become nothing more than a matter of majority grace"). Justice Stewart also acknowledged the value of diversity. He remarked that, under the Court's decision, "nine jurors can simply ignore the views of their fellow panel members of a different race or class." Id. at 397 (Stewart, J., dissenting).
67 Although mock-jury research may have its limitations, examining genuine jury behavior is notoriously difficult given the legal system's efforts to protect jury secrecy. Many jurisdictions prohibit lawyers from communicating with jurors even after they have issued a verdict. Many states ban any observation, recording, or filming of actual jury deliberations. Therefore, although mock-jury studies may invite criticism, it is difficult to imagine alternative, more accurate methodologies by which to assess jury dynamics.
68 See, e.g., John Guinther, The Jury in America 81 (1988) (finding that jurors operating under nonunanimous voting schemes correct each other's errors of fact less frequently than do jurors required to reach unanimity).
69 See id.
70 See, e.g., Hastie, Penrod & Pennington, supra note 10, at 30.
71 See Nemeth, supra note 10, at 51. In the experiments conducted by Nemeth, mock jurors issued their pre-deliberative opinions of a criminal case and then split into two types of juries—four-to-two favoring guilt and four-to-two favoring innocence. Researchers instructed half of the juries that they could return only a unanimous verdict, while the other half could return a verdict
than seventy percent of the cases in which a majority develops, the jury does not bother reaching consensus. This behavior reduces the amount of information considered by jurors. In contrast, at least one study of groups operating under unanimity schemes found that several significant procedural events occurred after the group had reached a majority position. Twenty-seven percent of the requests for additional instructions from the judge, twenty-five percent of the oral corrections of errors made during discussion, and thirty-four percent of the discussions of the standard of proof beyond a reasonable doubt occurred in efforts to reach unanimity after a majority view had surfaced.\footnote{See Hastie, Penrod & Pennington, supra note 10, at 96.}

Not surprisingly, jurors operating under majority rule express less confidence in the justness of their decisions.\footnote{See Nemeth, supra note 10, at 53.} Jurors’ lack of assurance is warranted. Jury research indicates that shorter deliberation leads to less accurate judgments. At first blush, to question the accuracy of the jury’s decision in a criminal trial may seem odd. The justice system tends not to expect the jury to discern the objective “truth” about the events at issue.\footnote{But see George Fisher, The Jury’s Rise as Lie Detector, 107 Yale L.J. 575 (1997) (discussing the historical role of juries and the emergence of the modern expectation that they discern which witnesses are telling the truth).} Instead the jury must deliver its evaluation of whether the government has met its burden of proof. Still, empirical research alerts us to the fact that majority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable.

In one study individuals called for jury duty were given the opportunity to volunteer to serve on a mock jury.\footnote{See Hastie, Penrod & Pennington, supra note 10, at 45–58.} Researchers conducted a mock voir dire, showed participants a film re-enactment of a murder trial, and then divided jurors into groups governed by either unanimity or majority rule. Legal experts evaluating the murder case considered first-degree murder an untenable verdict given the evidence. According to pre-deliberation questionnaires, many individual jurors initially preferred the higher charge. Following deliberations, however, not one unanimous jury returned a first-degree murder verdict — the arguably “incorrect” choice. By contrast, twelve percent of the majority-rule juries reached this result.\footnote{See id. at 60.}

Majority rule also reduces the likelihood that jurors will hear, respect, or vigorously challenge each other’s views. In mock-jury studies examining the impact of both unanimous and majority decision rules,
researchers have established that, in approximately ten percent of the cases in which juries must deliberate until they reach unanimity, the initial majority will change its vote. When the decision rule mandates the agreement of all jurors, the minority can transform the majority’s evaluation of the event. In those instances, had majority rule governed the decisionmaking process, the jury may well have returned an arguably erroneous verdict.

Verdict closure operates as a powerful incentive for juries governed by nonunanimous voting schemes. A jury system that steers jurors toward an outcome that is at once predictable and consistent with public expectations has obvious value. But this all-consuming urge also has real costs. In studies closely examining the deliberative process, researchers have discovered two distinct and conflicting styles of jury decisionmaking: “verdict-driven” and “evidence-driven.” Juries locked in verdict-driven mode spend less time deliberating and expend more effort trying to build verdict coalitions. They consider the perspectives of fellow jurors only to the extent that these views help to form or to prevent a majority voting block from forming. Jurors in the numerical minority typically exert little if any influence on the decisions of the majority. Researchers have found that majority-rule juries tend to exhibit these traits. The evidence-driven style of deliberation, by contrast, tends to occur in juries operating under a unanimity standard. In these deliberations jurors engage in intensive examination of the evidence and often have spirited debates characterized by complex disagreements. The mandate to reach complete consensus encourages the participation of jurors in the numerical minority. By focusing so intensely on returning a verdict, a majority decision rule seems to allow a jury majority to marginalize the perspectives of the minority. Obviously, attempts to understand a perspective that differs from one’s own can prove difficult. Yet the unanimous decision rule effectively encourages this effort. For all their differences, jurors must try to achieve consensus through conversation and persuasion, not simply by outvoting or subduing dissenting viewpoints. Majority rule, by contrast, eliminates the imperative to engage in substantive discussions with the minority. Instead of encouraging jurors to exercise care in the collective effort to acquit or convict the right person of the right crime, majority rule invites them to elect the easier course: they need only deliberate long enough to produce the necessary majority. In short, ju-

77 See Kalven and Zeisel, supra note 61, at 490.
79 Hastie, Penrod, and Pennington discovered that “larger factions in majority rule juries adopt a more forceful, bullying, persuasive style because their members realize that it is not necessary to respond to all opposition arguments when their goal is to achieve a faction size of only eight or ten members.” Id. at 112.
rors can acquit or convict without once considering conflicting perspectives on the meaning or strength of the evidence.

These findings should not be surprising. Because the jury’s work largely depends on subjective interpretations of evidence, a variety of perspectives will enrich jury discussions. It is true that many facts will be readily apparent to all jurors. For example, in a homicide case, jurors may easily accept medical evidence establishing that the victim sustained a fatal injury on the day in question. But significant questions of guilt or innocence and the degrees of responsibility for conduct often hinge on a juror’s personal interpretation of behavior — which other jurors may or may not share.80 When deciding whether the government has established the requisite mental state for the offense, for instance, the juror often must infer the actor’s state of mind from conduct open to numerous interpretations. The juror must also determine whether the actor’s conduct is culpable or can instead be justified or excused. And in all cases the juror must determine whether the witnesses are sufficiently credible. Like other members of society, jurors approach these responsibilities with the imperfect yet well-worn assumptions and expectations that guide their everyday evaluations of events.81 They often have a wide range of views regarding whose word merits trust82 or distrust.83

So open discussion is critical. An individual juror’s experience can affect her perception of and reaction to the evidence.84 As knowledge and expertise may be distributed unequally within any given jury, interaction among jurors will expand the range of issues to be discussed and broaden the scope of information shared by the group. Of course,

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80 See, e.g., Kim Lane Scheppele, Foreword: Telling Stories, 87 Mich. L. Rev. 2073, 2081 (1989) ("The experience of justice is intimately connected with one’s perceptions of ‘fact,’ just as it is connected with one’s beliefs and values.").

81 See Robert Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 4 (1983) ("We inhabit a nomos — a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.").

82 For example, many standard jury instructions recognize that a police officer’s official status may incline jurors to credit her testimony. To counteract this tendency to trust the testimony to the point of refraining from subjecting it to scrutiny, many standard instructions inform jurors that they must treat the testimony of police officers as they would the testimony of any other witness. See, e.g., Young Lawyers Section of the Bar Ass’n of D.C., Criminal Jury Instructions, No. 2.25, at 64 (3d ed. 1978) [hereinafter D.C. Criminal Jury Instructions] ("A police officer’s testimony should be considered by you just as any other evidence in the case and in evaluating his credibility you should use the same guidelines which you apply to the testimony of any witness. In no event should you give either greater or lesser credence to the testimony of any witness merely because he is a police officer.").

83 See Mark Cammack, In Search of the Post-Positivist Jury, 70 Ind. L.J. 405, 480 (1995) (arguing that "jurers are largely articulating their view of the way the world works, rather than simply implementing the construction of reality proscribed by the legal system").

84 See Scheppele, supra note 80, at 2083 (discussing “perceptual fault lines . . . between whites and people of color, between the privileged and the poor, between men and women”).
this information will not necessarily be purely factual. Rather, open communication may introduce strongly held beliefs and prejudices into the discussion. But the existence of competing beliefs and prejudices in jury deliberations may help to reduce their significance. In the end, a deliberative process that emphasizes and maximizes consultation among individual jurors with diverse backgrounds broadens the overall perspective of the jury.

Still, suppose that majority rule affects all jurors equally. Perhaps its adoption will not present a significant legal problem. States may simply weigh the equities and conclude that, on balance, majority rule offers sufficient guarantees of fairness to warrant its adoption. But if the operation of the rule should result in a diminished participation of specific groups, then the use of nonunanimous decisionmaking in criminal trials will raise significant constitutional and policy questions. The next section explores the likely negative consequences of majority rule’s operation to bar the participation of people of color and women.

II. THE RACIAL AND GENDER EFFECTS OF MAJORITY RULE

A. The Effects of Majority Rule on Participation by People of Color

Close examination of criminal trial juries reveals a disturbing phenomenon. Few people of color actually serve on juries. This reduced presence is apparent even in the venire from which attorneys and courts will ultimately select their petit juries. Except in a few jurisdictions that have acted consciously to correct this problem, the number of people of color in the venire is disproportionately lower

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85 See Dean C. Barnlund, A Comparative Study of Individual, Majority, and Group Judgment, 58 J. ABNORMAL & SOC. PSYCHOL. 55, 58–59 (1959) (noting that a more objective view of a problem emerges from competition among the private prejudices of group members).
87 A variety of socioeconomic barriers contributes to racially disproportionate representation on juries. For example, the use of registered voter rolls as source lists tends to produce lower numbers of people of color in the venire, given lower voter registration rates among minority populations. Similarly, high residential mobility reduces the likelihood that some people of color will receive jury summonses. Finally, individuals who have only recently entered the labor market or have less stable workplaces are likely to be excused for reasons of economic hardship. See FUKURAL, BUTLER & KROOTH, supra note 5, at 18–22.
than one might expect on the basis of population figures. When they do appear in the jury pool, jurors of color are often targets of both strikes for cause and peremptory challenges by litigants who perceive that these jurors will be less receptive to their arguments. To the extent that people of color actually serve on juries, they tend to make up the numerical racial minority. If, as research indicates, majority rule delivers the message that the jury need not take advantage of its heterogeneity, deriving information and judging facts from a wide range of social experiences, majority rule may also lead to the emergence of a largely homogeneous group outnumbering and outvoting the minority.

But is this necessarily wrong as a normative matter? Indeed, one could conceivably embrace homogeneity as an important goal. To the extent that homogeneity reduces conflict and moves the group toward even limited consensus, it need not be rejected as inherently undesirable. However, if this harmonious and empowered subsection of the jury no longer reflects the actual diversity of the community for which it purports to speak, homogeneity assumes a different character. It then prompts questions about the representative quality of the jury's decisions and the legitimacy of its conclusions. Thus, when the jury further silences distinct racial groups, it may no longer be able to honor what is arguably its charge: to bring the considered judgment of the community to bear on significant questions of justice.

Perhaps the appeal of majority rule is its familiarity. In a political context the vote of a majority serves as a sufficiently reliable gauge of the community's judgment. Citizens have come to expect and to accept as a necessary cost of political participation some subordination of

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89 See Kairys, Kadane & Lehoczky, supra note 86, at 803–04 (estimating a disparity between the percentage of people of color in the community and the percentage in jury pools of between 18% and 44%); Cynthia A. Williams, Note, Jury Source Representativeness and the Use of Voter Registration Lists, 65 N.Y.U. L. REV. 590, 615 (1990) (showing a 14% rate of underrepresentation of African Americans on voting lists and a 53% underrepresentation rate for Latinos).

90 See A.B.A. STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND TRIAL BY JURY 15-2.5 (1996) (explaining that a juror may be excused for cause if she "is unable or unwilling to hear the case at issue fairly or impartially").

91 See Charles J. Ogletree, Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges, 31 AM. CRIM. L. REV. 1099, 1100 (1994) ("The discriminatory use of peremptory challenges has become common and flagrant. The statistical evidence that does exist shows that peremptory challenges have been used disproportionately against blacks.").

92 See, e.g., Barbara Allen Babcock, A Place in the Palladium: Women's Rights and Jury Service, 61 U. CIN. L. REV. 1139, 1148–49 (1993) (arguing that a nonunanimous voting rule deters participation by people of color on juries such that "[a] litigant could effectively have her all-white verdict without an all-white jury").

93 See, e.g., Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power — to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biassed response of a judge.").
individual perspectives to the will of the group. But what the public tolerates in a political system will not necessarily be as palatable in a legal context — particularly when our most fundamental interests are at stake. Invoking the state's coercive power to deprive an individual of her liberty or life should require a high threshold of certainty in decisionmaking. Given the finality of the jury's decision, a juror who disagrees with the outcome of a particular case cannot revisit the decision at a later time to change the result, as may a voter in a political election. Rather, a juror's vote in a case represents her sole opportunity to exercise her will and to influence the judgment. The high stakes warrant more than a mere majority vote.

On a more instrumental level, an unrepresentative jury's verdict may invite sharp criticism from underrepresented groups in the community. Such criticism is by now familiar. When verdicts issue from all-white juries or other juries that do not represent the racial or ethnic diversity of the affected community, critics often openly excoriate the criminal justice system. Such critiques reflect deeper truths about the nature of jury decisionmaking and community acceptance of the decrees of homogeneous groups. Jurors' tasks involve little that is mechanical or computer-like. The essential function of the jury — fact-finding — is neither neutral nor objective.94 We expect jurors to exercise evaluative judgment as they engage in their deliberations. When jurors analyze competing accounts of an event, they operate on a variety of levels. Indeed, jurors' views of justice influence almost every aspect of competing analyses of events, from their cognitive assessments of what occurred to their applications of law to facts. A large body of social science research demonstrates that jurors' assumptions and beliefs about the world inevitably frame95 their judgments and perceptions of evidence.96 Jurors necessarily rely on context and individual interpretation as they sift through often disjointed and complex presentations of evidence to find facts and to make decisions.

Using her own experience as both a guide97 and a source of analogy,98 the individual juror constructs stories in an effort to interpret evidence and to explain events in a trial. To the extent that a particu-
lar narrative correlates with other jurors’ experiences, it acquires persuasive power.\textsuperscript{99} Because our system of justice charges the jury with evaluating the conduct of the accused, the jury can benefit from the observations and comments of individuals who share at least one socializing characteristic or who may have had some common experiences with the accused. These jurors can offer narratives to guide the jury’s understanding — or perhaps rejection — of the accused’s interpretation of events.\textsuperscript{100} Given the correlation between experience and race, the reduced presence and influence of people of color may have significant consequences in any individual case.

The point is generalizable to the criminal justice system as a whole. The Supreme Court has endorsed the elimination of barriers to full participation of all groups in the justice system. The rationale that appears to undergird the Court’s position is that the exclusion of individuals based on their race or ethnicity offends basic American principles of fairness.\textsuperscript{101} Increasing access to participation not only leads to a greater diversity of viewpoints, but it also may encourage a robust exchange of ideas. In order to achieve these ends, however, jurors of color need to brandish voting power sufficient to combat the numerical imbalance already in place. The mere presence in the jury room of a few people of color will not guarantee the access that the Court has endorsed.

1. The History of Race and the Jury. — The significance of the battle over the presence of people of color on juries should not be underestimated. Throughout most of this country’s history, courts excluded people of color from jury service.\textsuperscript{102} Before the Civil War,

\textsuperscript{99} See Jerome S. Bruner, actual minds, possible worlds 11, 88 (1986) (suggesting that narrative is the lens through which we understand daily human experience); see also Cover, supra note 81, at 10 (proposing that common “scripts” assist perceivers to place information in context and thereby to understand it).

\textsuperscript{100} See, e.g., Ronald J. Allen, Unexplored Aspects of the Theory of the Right to Trial by Jury, 66 Wash. U. L.Q. 33, 37 (1988) (arguing that “jurors’ experiences and perspectives are crucial variables in determining the effect of the words that a witness speaks at trial”).

\textsuperscript{101} See Smith v. Texas, 311 U.S. 128, 130 (1940) (“For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.”).

\textsuperscript{102} See Abramson, supra note 9, at 108–09. One historical exception to the wholesale exclusion of jurors of color is the colonial courts’ use of mixed juries. See Deborah A. Ramirez, A Brief Historical Overview of the Use of the Mixed Jury, 31 Am. Crim. L. Rev. 1213 (1994). Colonists at Plymouth, Massachusetts used mixed juries — consisting of half Native Americans and half settlers — as early as 1674. See id. at 1320. Pennsylvania, New York, Virginia, South Carolina, and Kentucky also recognized mixed juries between the late seventeenth century and 1911. See id. The concept of the mixed jury appears to have originated in England in the twelfth century, when the law began to permit foreign litigants to try their cases before juries consisting of an equal split between natives and foreigners, to safeguard against juror prejudice. The first such minority group consisted of Jews, whom the English saw as aliens in race and culture. When
Massachusetts was the only state that allowed African American men to serve as jurors. After the Civil War, African Americans began to spread across the country, becoming an integral part of the American social fabric and work force. This demographic shift, coupled with post-Civil War political debates over the status of African Americans, forced Congress to question whether it was appropriate to exclude citizens of color from jury service. In 1875 Congress responded: it prohibited jurisdictions from excluding qualified citizens of color from serving on juries.

Five years later, the Supreme Court followed Congress's lead. It conceded in Strauder v. West Virginia that race matters in an individual's ability to receive justice. At issue was a West Virginia statute disqualifying African Americans from jury service. In concluding that the law deprived African American defendants of equal protection of the law, the Court stated:

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 . . . 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.

Both Congress and the Court therefore acknowledged — if implicitly — that the perspectives brought by people of color constitute an essential ingredient of justice when a person of color seeks the protection of the jury.

Predictably, the Southern states saw the issue differently and stubbornly resisted African American jury participation. At the end of the nineteenth century, systematic exclusion of African Americans was still commonplace, particularly in the South. Indeed, through the first half of the twentieth century, state courts used systems such as coloring of tickets placed in the jury selection box in order to separate white jurors from jurors of color. Other states tolerated cronyism by

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104 See id. at 885.
106 100 U.S. 303 (1880).
107 See id. at 304-05.
108 Id. at 308. To combat such racial prejudice, the Supreme Court held that a statute could not bar African Americans from jury service. See id. at 310.
109 See Alschuler & Deiss, supra note 103, at 894-95.
110 In Georgia, for example, jury commissioners would print the names of white and black jurors on white and yellow tickets, respectively. The commissioners would draw some number of
allowing white jury commissioners to select grand jurors from among their friends.\textsuperscript{111} The Supreme Court finally declared such practices unconstitutional in the middle of this century.\textsuperscript{112}

Even today, except in a few jurisdictions,\textsuperscript{113} people of color are not well-represented on juries. Although states can no longer legally bar them from the venire, the presence of people of color on juries is far from guaranteed. Historically trial lawyers have used peremptory strikes to target people of color, resulting in limited participation at the institutional level.\textsuperscript{114} When the Supreme Court proscribed this practice in the landmark case of \textit{Batson v. Kentucky},\textsuperscript{115} the Court seemed headed toward adopting the position that racial minorities are entitled to meaningful participation in the criminal justice system. Acknowledging that racial differences can affect the quality of justice rendered, the Court noted and condemned the government’s pattern of singling out and striking jurors of the same race as the accused.\textsuperscript{116} The Court recognized that the purposeful exclusion of jurors who share the accused’s race rendered the process unfair.\textsuperscript{117}

The Court has since chipped away at much of \textit{Batson}’s teeth. In \textit{Hernandez v. New York},\textsuperscript{118} the Court considered the validity of the justifications the prosecutors had offered (and the trial judge had accepted) for striking jurors of color.\textsuperscript{119} The government argued that although the case involved a Latino defendant, the prosecutor’s decision to strike all Spanish-speaking jurors was sufficiently race-neutral to avoid violating \textit{Batson}.\textsuperscript{120} The defense countered that the reasons advanced were pretextual.\textsuperscript{121} But rather than take this opportunity to require the government to justify the strikes on grounds unrelated to the juror’s ethnic or racial identity, the Court winked. Upholding the government’s practices, the Court suggested that a prosecutor may strike jurors of color and survive a \textit{Batson} challenge so long as she

\textsuperscript{111} See Alschuler & Deiss, supra note 103, at 895.
\textsuperscript{113} From 1981 to 1991, I worked in the Public Defender Service for the District of Columbia. A trial lawyer during much of that period, I tried misdemeanors and felonies before juries in which a majority of jurors were people of color.
\textsuperscript{115} 475 U.S. 79 (1986).
\textsuperscript{116} See id. at 99.
\textsuperscript{117} See id.
\textsuperscript{119} See id. at 355.
\textsuperscript{120} See id. at 356–57.
\textsuperscript{121} See id. at 357.
does not expressly acknowledge that the selection was race-based.\textsuperscript{122} Given the difficulty of controlling the extent to which race ineluctably influences all of our judgments, the Court has in effect relieved lower courts of this task. Nonetheless, precisely because the Court has adopted devices that tolerate some exclusion of people of color, the requirement of jury unanimity is all the more important.

\textit{2. Tyranny of the Majority}. — Individuals in a numerical minority may lack the ability to disaggregate a biased majority or to check its power. In electoral politics majority rule presupposes that voters can remove majorities from power by forming different minority voting groups. Critics of majority rule have argued that this theoretical construct breaks down in practice when the interests of racial minorities come into play.\textsuperscript{123} Coalition-building among racial minorities to cement a majority voting bloc rarely occurs, leading some scholars to assert that the concept of majority rule in electoral politics inadequately protects minority interests.\textsuperscript{124} The same holds true for juries. Given the skewed demographics of jury service, as well as the discriminatory operation of peremptory challenges, the complexion of the majority will remain a constant. Consequently, jurors of color will rarely find themselves in the “winning” coalition.\textsuperscript{125} This presents obvious problems. With the overrepresentation of young men of color in the criminal justice system,\textsuperscript{126} majority rule increases the frequency with which all-white groups decide the fate of a person of color.

This phenomenon occurs because, in practice, majority rule militates against reaching complete consensus among jurors.\textsuperscript{127} A simple cost-benefit analysis offers at least a partial explanation. To construct a coalition larger than the decision rule requires will involve unneces-

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\textsuperscript{122} See id. at 362. See generally Johnson, supra note 7 (disagreeing with Hernandez but arguing that the decision was directly traceable to questions that Batson left open); Miguel A. Méndez, Hernandez: The Wrong Message at the Wrong Time, 4 STAN. L. \\& POL’LY REV. 193 (1992–1993) (discussing Hernandez and several sets of implications).

\textsuperscript{123} See generally LANI GUINIER, THE TYRANNY OF THE MAJORITY (1994) (discussing the practical impact of majority rule on minority interests).

\textsuperscript{124} See, e.g., id. at 4–5.

\textsuperscript{125} People of color tend to be underrepresented on juries. Because jurors of color have a “high probability of expressing dissenting opinions,” to relax the unanimity rule will likely marginalize their views. FUKURAI, BUTLER \\& KROOTH, supra note 5, at 28–29.

\textsuperscript{126} See MARC MAUER \\& TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1995) (finding that one in three African American men between the ages of 20 and 29 is under criminal justice supervision, as compared to one in 15 white men of that age and still lower rates among women).

\textsuperscript{127} In hearings before the California Assembly Judiciary Committee on ACA 18, see supra note 22, on May 15, 1996, Jack Morris, Esq., Chair of the Oregon Association of Criminal Defense Lawyers, testified that, in his experience as a criminal defense lawyer, juries in Oregon rarely returned unanimous verdicts. See also HASTIE, PENROD \\& PENNINGTON, supra note 10, at 163 (noting that majority rule juries typically end their deliberations not when they achieve unanimity but when they attain the requisite quorum).
sary investment in discussion and bargaining. More significantly, reaching for agreement beyond the rule’s voting requirement exposes the majority to the risk of compromise entailed in the accommodation of divergent views. Thus, once the necessary number of jurors finds common ground, members of this majority have an interest in ignoring divergent views that may otherwise split the majority. In short, achieving the necessary majority often involves less effort than does reaching a unanimous decision.

And with similar ease, the numerical — and often racial — majority on the jury can then impose its view on the numerical minority. The minority remains powerless to derail the majority’s decision. Remarkably, proponents of majority rule contend that unanimity, and not majority rule, raises concern about the likelihood of a group exercising a veto power over the views that prevail on the jury. These arguments presuppose that numerical minorities will act irrationally or purposefully ignore credible evidence to block a conviction and to cause a mistrial. Thus, some commentators claim that the unanimity standard allows a minority of jurors to hold the jury system hostage and to engage in a form of tyrannical rule. Even assuming, however, that a juror may on occasion intentionally cause a mistrial, a unanimity standard cannot reasonably be characterized as minority rule. Although the minority can block a majority decision by refusing to alter its votes, which may in turn provoke a mistrial, it cannot impose a verdict. This is often a decisive blow to the prosecution, but a mistrial is not an acquittal. When a mistrial occurs the government may indeed choose to dismiss the case. But the accused can — and often will — face retrial before another jury. Thus, the minority has not truly “ruled.” The same, however, cannot be said of nonunanimous voting. Majority rule can subdue the minority.

The potential suppression of the views of racial minorities on the jury seems an excessive cost of a shift to nonunanimous voting. Perhaps more than anywhere else in the legal system, race plays a significant role in the administration of criminal justice. Obviously, in criminal cases that involve cross-racial eyewitness identifications or in

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128 See JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 211 (1962) (“Given the behavioral assumptions of our models, individuals will tend to make collective decisions by organizing themselves in the smallest coalitions defined as effective by the decisionmaking rules . . . .”).

129 See, e.g., Amar, supra note 9, at 1190; Glasser, supra note 9, at 675.

130 See Jeremy Osher, Comment, Jury Unanimity in California: Should It Stay or Should It Go?, 29 LOY. L.A. L. REV. 1319, 1346 (1996) (quoting a district attorney’s contention that if one were to “[p]ut any 12 Californians in a room[,] you’ll have [at least] one flake”).

131 See id.

132 For a discussion of the evidence that people have difficulty identifying faces of those of different races, see ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 136–42 (1979), and Sheri
hate crimes motivated by racial animus, race assumes a central position in the courtroom. But even outside such cases, race is present as a determinative factor whenever a person of color faces trial on a criminal charge.\textsuperscript{133} Race affects not only the decisions to arrest and to indict a person,\textsuperscript{134} but also the perceptions of players within the criminal justice system.\textsuperscript{135}

Statistics indicate a one-in-three likelihood that the defendant in a criminal case in the United States will be an African American man and a one-in-twelve chance that the defendant will be Latino.\textsuperscript{136} Statistics show further that the defendant will not likely face a jury composed principally of people who resemble him.\textsuperscript{137} With these odds, the accused often cannot afford to strike any person of color who is on the panel. Although the juror of color will not necessarily sympathize with or support the accused, her presence offers the accused the best possible chance that someone in the jury room will understand the accused's world and world views. Because of the pervasiveness of racism, jurors of color, regardless of their socioeconomic position, are likely to have experienced some form of racial subordination that may provide them with a broader conceptual framework for the ensuing discussion in the deliberation room.\textsuperscript{138}

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\textsuperscript{133} The O.J. Simpson case has come to epitomize both the explicit and the subtle use of race in a criminal prosecution. Remarkably, the media concentrated on the defense case to raise questions about when it is and is not appropriate to "play the race card." But what the media and commentators missed was that at the moment that Simpson, an African American man, stood accused of killing a white woman, race came into play. This alleged act raised the spectre of history, when many African American men risked a lynching merely for looking at white women the wrong way. In addition, neither the media nor the commentators broached the issue of race at the preliminary hearing stage of the case, when the Simpson case most resembled a typical criminal case in which every player in the courtroom was white and the only person of color was the accused.

\textsuperscript{134} See, e.g., MAUER & HULING, supra note 126, at 1 (noting that the rate of arrests of African Americans for drug offenses is disproportionate to the rate of African American drug users); Christopher H. Schmitt, Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price, SAN JOSE MERCURY NEWS, Dec. 8, 1991, at 1A (reporting on a ten-year study in California showing that whites are more successful than nonwhites at getting charges dropped or reduced to lesser offenses).

\textsuperscript{135} See, e.g., Donald C. Nugent, Judicial Bias, 43 CLEV. ST. L. REV. 1, 5 (1994) (arguing that judges may "fail to take into account the unavoidable influences we all experience as human beings and disregard the limits of human nature and the difficulty of bringing to the conscious level subjective motivations, beliefs and predilections").

\textsuperscript{136} See MAUER & HULING, supra note 126, at 3.

\textsuperscript{137} See generally FUKURAI, BUTLER & KROOTH, supra note 5.

\textsuperscript{138} See, e.g., Angela J. Davis, Race, Cops, and Traffic Stops, 51 U. MIAMI L. REV. 425, 431–32 (1997) (citing empirical and anecdotal evidence that race is frequently the defining factor in pretextual traffic stops); David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 560–73 (1997) (demonstrating police use of traffic violations as a pretext to stop African American and Latino
So jurors of color must have the power to voice and to vote their views, especially because the jury room may be the only setting in which jurors confront such questions. Judges tend to be reluctant to air issues of race and often resist lawyers' efforts to bring racial dynamics into the open. But racial heritage in this country often exposes individuals to varying experiences that may have relevance to the determination of what constitutes justice in a given trial.

3. Recognizing Race in the Courtroom. — What happens at the margins of society often assumes center stage in a criminal trial. The key participants in the trial — the accused and the victim — often come from economically or racially subordinated communities. Jurors typically represent higher financial brackets and dominant racial groups. To return a verdict, participants in the trial must be able to bridge societal and cultural gaps. Obviously, the defense lawyer and prosecutor must try to use narratives that have sufficient universal appeal to convey the concepts at issue in trial. But the deliberative process invites juries to negotiate and renegotiate the interpretation of acts, making the presence of jurors of color all the more important.

In the jury room, the juror of color can help to translate experiences for jurors who may otherwise miss the cultural meanings of acts and words. In the event that a lawyer fails to explain conduct sufficiently, the juror of color can serve as a jury-room interpreter by introducing concepts to the discussion or offering explanations that simply may not occur to her white counterparts due to different societal experiences. The role of interpreter is not new to people of color in a mixed racial setting. The ability to bridge cultural gaps becomes critical in any effort to explain reactions or experiences that may be unfamiliar to — or at least less common for — members of dominant

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139 See, e.g., United States v. Telfaire, 469 F.2d 552, 559 (D.C. Cir. 1972) (Bazelon, C.J., concurring) (arguing that, when confronted with cross-racial identifications, courts have “developed a reluctance — almost a taboo — to even admit the existence of the problem, let alone provide the jury with the information necessary to evaluate its impact”). See generally Jody Armour, Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit, 83 CAL. L. REV. 733 (1995) (describing the reluctance of courts to allow lawyers to refer overtly to racial issues).

140 See FUKURAI, BUTLER & KROOTH, supra note 5, at 18.

groups by virtue of their position in society. Particularly, when a trial involves issues of race or a person of color’s reactions are at issue in a trial, a juror of color’s perceptions may be critical to a determination of truth.

Understandably, jurors of color may balk at the suggestion that they should assume the role of “voice of the race” in the jury room. People of color often find such roles thrust upon them and may simply tire of the responsibility. In a different world, jurors of color would not need to shoulder a greater burden than their white counterparts. But given that race plays such a pivotal role in American society in general — and in the criminal justice system in particular — jurors of color may feel compelled to participate on behalf of their racial groups. Still, people of color are certainly not homogeneous in outlook, politics or experience. Some who aspire to assimilate into the dominant group may choose to distance themselves from negative stereotypes associating people of color with crime by judging defendants of color more harshly or by dismissing any explanations for their behavior. Yet, there remain those jurors of color who will by virtue of their experiences add to the discussions a cultural and racial context that would not necessarily emerge if they did not participate and vote as jurors.

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142 See, e.g., Peter Arenella, Simms Memorial Lecture Series Explaining the Unexplainable: Analyzing the Simpson Verdict, 26 N.M. L. REV. 349, 356 (1996) (reporting that black jurors in the O.J. Simpson murder trial evaluated officer credibility based on experience and disbelieved officer’s denial of use of racial epithet even before his lie was exposed).

143 A good friend who is Chicana once remarked that, when she graduated from college with a B.A., she should have been awarded an additional degree in education, because she had spent her undergraduate years trying to teach her white classmates and teachers about issues of race.

144 Cf. Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 YALE L.J. 677, 679 (1995) (urging black jurors to recognize a moral obligation to nullify verdicts in nonviolent drug cases, given that a disproportionate number of young men of color have come under the supervision of the criminal justice system for such offenses).

145 See Castaneda v. Partida, 430 U.S. 482, 503 (1977) (Marshall, J., concurring) ("[M]embers of minority groups frequently respond to discrimination and prejudice by attempting to dissociate themselves from the group, even to the point of adopting the majority’s negative attitudes towards the minority."); Randall Kennedy, My Race Problem — And Ours, ATLANTIC MONTHLY, May 1, 1997, at 55 (shunning notions of racial pride and racial kinship). But see DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 245 n.9, 249 (2d ed. 1980) (arguing that although Justice Marshall’s suggestion in Castaneda was still valid, his sources were outdated).

146 See, e.g., Barbara Allen Babcock, Voir Dire: Preserving "Its Wonderful Power", 27 STAN. L. REV. 545, 553 (1975) (observing that in the 1969 criminal trial of twenty-one Black Panthers, the defendants challenged as many black jurors as did the prosecution, because “black males as a class can be biased against young alienated blacks who have not tried to join the middle class.")

The presence of people of color on a jury may also influence a lawyer’s choice of argument. Efforts to objectify the accused through the use of animal imagery,\textsuperscript{148} for example, or through appeals to racial fears\textsuperscript{149} may lack force if jurors who share the accused’s racial heritage have the power to reject such appeals with their verdict.\textsuperscript{150} Such arguments would be counterproductive if even a few people of color served on the panel, provided the decision rule required complete consensus. But with a majority-rule system in place, such appeals to racial intolerance can succeed. A trial lawyer may choose tactically to align the jury majority against both the accused and the minority of jurors who resemble him if she thinks it can advance her case.\textsuperscript{151}

4. The Influence of Race on Jury Deliberations. — The courtroom is only one setting in which jurors of color play a key role. Inside the deliberation room, they also can serve as racial barometers of sorts. The jury’s task of evaluating the evidence presented in the courtroom invites discussion of — and comparison to — social situations beyond the events of the trial. The deliberations may delve directly into racial matters, or race may be an unspoken issue that influences the discussion.

Not only can jurors of color perform a decoding or balancing function, but they can also help to identify when race is “in play.”\textsuperscript{152} Through conversations along these lines, they may help to broaden the jury’s focus. Use of a process described as “going meta”\textsuperscript{153} enables members of subordinated groups to step back occasionally from active participation in an event and to take note of its interactive components.

\textsuperscript{148} For example, in the trial of Bernhard Goetz, defense lawyers referred to the four African American victims as “vultures,” “predators,” and “savages.” See GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 206 (1988).

\textsuperscript{149} See, e.g., Carter v. Rafferty, 621 F. Supp. 533, 540–43 (D.N.J. 1985) (overturning a murder conviction, in part, because the prosecution made the unsubstantiated argument to the jury that an African American defendant murdered total strangers because they were white), aff’d, 826 F.2d 1299 (3d Cir. 1987); Elizabeth L. Earle, Note, Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism, 92 COLUM. L. REV. 1212, 1212 (1992) (recounting the argument in a death-penalty case in which a prosecutor asked an all-white jury whether it could “imagine the fear that [the victim] went through . . . [when] out with three blacks”).

\textsuperscript{150} Some may argue that defense lawyers representing an accused who is a person of color could make racial appeals to the jurors of color to cause a hung jury, but statistics reveal that hung juries are relatively rare. See infra p. 1317.

\textsuperscript{151} See, e.g., Eva S. Nilsen, The Criminal Defense Lawyer’s Reliance on Bias and Prejudice, 8 GEO. J. LEGAL ETHICS 1, 1–2 (1994) (noting that criminal defense lawyers frequently employ strategies for tactical advantage that they find morally repugnant, because such strategies perpetuate racial, gender, or ethnic stereotypes). For a discussion of racial alignments in the context of lynching trials, see Anthony V. Alfieri, Lynching Ethics: Toward a Theory of Racialized Defenses, 95 MICH. L. REV. 1053, 1077–81 (1997).


\textsuperscript{153} Id. at 1636.
— for example, they observe the impact of their race or gender upon
the dynamics of a conversation in which they participate. Although
commentators have sometimes emphasized the pathological potential
of this process,\textsuperscript{154} I use it here in its more positive sense.\textsuperscript{155} Assumption
of the role of "participant-observer"\textsuperscript{156} enables jurors of color to
engage in substantive dialogue with their fellow jurors and simultane-
ously to evaluate and acknowledge the impact of race upon the dy-
namics of the discussion. Going meta may permit the juror of color to
observe the degree to which race affects and infects the jury deliber-
ation process, and then to re-engage and contribute insights. Without
such intervention, the jury may not acknowledge — or even notice —
the effect of race on their discussions.

Of course, encouraging discussions of race may prompt jurors to
express race-based opinions. As jurors table their interpretations of
evidence or their views of guilt or innocence, racist remarks may filter
into the conversation. Despite the suggestion, or perhaps hope, that
racism has somehow descended underground, researchers find that in-
dividuals in this society continue to convey racist views openly.\textsuperscript{157}
These views now emerge not only from those once labeled "extremist,"
but from mainstream voices as well.\textsuperscript{158} Thus, inside the jury room,
where issues of life, liberty, and security from crime hang prominently
in the balance, deliberations are likely not immune to such discussions.
Rather, jurors of color must be prepared to respond to and rebut such
attitudes when expressed.

But will they be expressed? One of the principal corollaries to the
argument that racism assumes less overt forms is that individuals who
hold such views will avoid mentioning them in the presence of people
of color. Although some empirical evidence supports this expectation
of self-censoring,\textsuperscript{159} researchers find that negative stereotypes of African
Americans, in particular, continue to prevail.\textsuperscript{160} The lack of last-

\textsuperscript{154} Because going meta can "interfere with the ability of the stigmatized to act in the world," this process may have pathological potential. \textit{Id.} at 1637.

\textsuperscript{155} See id. at 1937. Professor Davis notes that going meta has creative potential, particularly in the context of legal criticism.

\textsuperscript{156} See id.


\textsuperscript{158} Consider, for example, Jesse Helms's 1990 Senate re-election campaign against Harvey Gantt, an African American. Helms used a racially divisive television commercial showing the hands of a white man crumbling a rejection letter while a voice announced, "You were the best qualified, but they had to give it to a minority because of a racial quota." \textit{See In South, It's a Divisive Race to the Finish, CHI. TRIB., Nov. 5, 1990, at 4, available in 1990 WL 2881084.}

\textsuperscript{159} See Sniderman \& Piazza, supra note 157, at 39 ("Whites express more favorable attitudes toward blacks when they are speaking to a black interviewer, more negative attitudes when they are speaking to a white interviewer.").

\textsuperscript{160} See id. at 37-56 (describing surveys finding that whites tended to agree that blacks on welfare can get a job, need to try harder, have chips on their shoulders, and are aggressive or violent).
ing, if any, negative social or political consequences for such views or beliefs has helped to encourage racist expression. At the same time, rewards for having the “courage of conviction” about such issues may motivate still others to reveal their racist views. Of course, when an individual acknowledges her biases, the listener can better respond to the speaker’s otherwise hidden assumptions.

In short, race consciousness may prod factfinders to confront their biases. Each of us occupies a space on a continuum ranging from low to high prejudice. One whose personal beliefs about a particular group track stereotypes about that group would qualify as “high-prejudiced.” At the other end of the spectrum, one who tends to reject automatic stereotypical responses to particular groups would fall within the “low-prejudiced” category. According to research in this area, the low-prejudiced person must be conscious of the stereotype as stereotype in order to avoid unconscious reliance on it. Because “nonprejudiced responses take time, attention, and effort,” open discussion of race and potentially prejudiced reactions may discourage an individual from resorting to stereotypes in understanding and evaluating behavior.

In a provocative examination of the impact of race on jurors’ reasonableness determinations in the self-defense context, Professor Cynthia Kwei Yung Lee has proposed that judges give a jury instruction that openly addresses the influence of racial stereotypes. She advises that the jury instruction explain that stereotypes often generate assumptions about the parties and witnesses. The instruction should then recommend that if any juror suspects that stereotypes have colored her evaluation of the case, she should engage in a process of “race-switching” in which she imagines the same events but transposes the race of one or both of the parties. Such an instruction

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161 See, e.g., Kavin Merida, 3 Consonants and a Disavowal: The More You Ask Trent Lott About His Ties to the White-Supremacist CCC, the Less He Has to Say, WASH. POST, Mar. 29, 1999, at C1 (describing the Senate Majority Leader’s refusal to condemn white supremacist group).

162 See Armour, supra note 139, at 757 (citing social cognition research indicating that “for a person . . . to avoid stereotype-congruent responses to blacks (i.e., to avoid falling into bad habit), she must intentionally inhibit the automatically activated stereotype and activate her . . . personal belief structure”).


164 See id. at 16.

165 Id. at 5, 16; see also Armour, supra note 139, at 757 (discussing the tendency of low-prejudiced people to act on stereotypes unless they consciously “monitor and inhibit” the activation of such stereotypes).


167 See id.

168 See id.
could empower a juror to encourage other jurors to use this process if she suspects the influence of race.\textsuperscript{169}

But lawyers rarely request such instructions, and judges rarely give them. A court in its discretion would likely choose not to issue this instruction even if a party proposed it. Thus, the deliberative process should encourage jurors who suspect that stereotypic assumptions are driving the discussion to suggest that they and their counterparts examine the degree to which race has affected their evaluations. Obviously, any juror sensitive to issues of race could raise these questions. Still, the person who raises the issue is most likely someone who has directly experienced differential treatment based on race, and given this country’s history, someone with that experience is probably a person of color.

Of course, candid discussions of race will not necessarily occur. Inside and outside of the courtroom there may still be considerable reluctance to confront this difficult issue. Jurors of color, who likely have been victims of racial subordination, may better recognize instances of race influencing other jurors’ decisions. The challenge, then, is to empower the more sensitive juror to bring the issue into open discussion.

People of color can often detect various manifestations of the covert, or aversive, racist.\textsuperscript{170} They have often experienced the subtle condescension or the efforts to maintain distance from certain “types” of people. Particularly, in a setting that encourages sharing of reactions — as a unanimity system does — the juror of color is more likely to identify and to assail openly such behavior, which might otherwise remain hidden. Obviously, any reaction has the potential to polarize the group. But in a setting that requires consensus, open discussion can provoke examination of the influence of racial views on jurors’ interpretations of activities that arise in the course of a trial. A rule that instead permits the jury to render a decision short of consensus may legitimize the polarization that could occur.

5. Empirical Evidence of the Impact of Jury Ethnicity. — As far as race is concerned, unanimity matters to the extent that differences will emerge along group lines. To what extent should we anticipate such a pattern? Social cognition theory may offer some insights. It suggests that all human beings design strategies to simplify the com-

\textsuperscript{169} An article in the ALASKA JOURNAL OF COMMERCE reported that James McComas, a defense lawyer in Alaska, had convinced a trial judge to issue instructions on race-switching in a case involving an African American teenager charged with assaulting a white classmate with a hammer; the article further described the instruction as “unprecedented.” See Ingrid Martin, Hard Work, Passion Propel Top Litigators, ALASKA J. COM., Dec. 1, 1997, at 1, available in 1997 WL 15283934.

\textsuperscript{170} See Peggy C. Davis, Law as Microaggression, 98 YALE L. J. 1559, 1569–71 (1989) (describing the ways in which jurors of color recognize and respond to microaggression).
plexities of the world.\textsuperscript{171} We tend to divide the world into social and personal categories that enable us to make sense of our experiences and to determine appropriate responses to incoming information.\textsuperscript{172} The categories into which we separate information include an individual’s social group (race, gender, sexual orientation), social role, and behavioral traits. Therefore, when we evaluate an individual, we tend to classify her in a familiar category on the basis of particular attributes. We then apply our knowledge about that category to guide our subsequent evaluations and predictions of that individual’s behavior.\textsuperscript{173} Studies have found that these categories are so ingrained that our memories tend to build around them.\textsuperscript{174}

One particular form of category that organizes our expectations about others is stereotype. One commentator has described stereotypes as well-learned sets of associations among groups that entrench themselves before individuals develop the cognitive skills to assess the reliability of the associations.\textsuperscript{175} These stereotypes are often so deep-rooted that they generate automatic responses.\textsuperscript{176} Although scholars often conflate prejudice with stereotype, social cognition research suggests that the concepts are distinct. Prejudice has been defined as the endorsement of the content of a negative cultural stereotype.\textsuperscript{177} An individual holding a negative stereotype in her memory is not necessarily high-prejudiced; she may deliberately reject the assumptions embodied in the stereotype. High-prejudiced individuals, by contrast, actually accept the content of a negative cultural stereotype and act in accordance with it.

Once a stereotype triggers, individuals pay greater attention to information that corroborates the stereotype and tend to forget or miss information that contradicts stereotypic expectations.\textsuperscript{178} Individuals recall more details about an “in-group” member — someone who shares socially defining characteristics with them — than about an

\textsuperscript{171} See generally JEROME S. BRUNER, JACQUELINE J. GOODNOW & GEORGE A. AUSTIN, A STUDY OF THINKING (1956).

\textsuperscript{172} See id.

\textsuperscript{173} See id. at 12–13.


\textsuperscript{175} See Devine, supra note 163, at 6.

\textsuperscript{176} See Lee, supra note 166, at 398.


\textsuperscript{178} See Dale T. Miller & William Turnbull, Expectancies and Interpersonal Processes, 37 ANN. REV. PSYCHOL. 233, 247 (1986) (arguing that activation of stereotypic concepts leads to “encoding bias” that precipitates selective attention toward stereotypic-consistent information and “attributions bias” that causes individuals to discount or reinterpret information inconsistent with the stereotype).
"out-group" member. Research shows that memory about the activities of a member of an out-group tends to support stereotypic biases. Remarkably, these stereotypic biases may occur automatically even in individuals who do not endorse racist beliefs. This research suggests that jurors belonging to the stereotyped group will recall information differently. They will bring to the deliberations different sets of stereotypes for processing the events of the trial. If the jurors from the stereotyped group possess the same power that their juror colleagues have to insist on addressing issues, the jury system can combat the power of stereotyping.

In a pair of studies conducted in 1987 and 1988, social psychologist Galen V. Bodenhausen examined the effect of stereotypes on judgment. The earlier study, which Bodenhausen conducted with Meryl Lichtenstein, inquired as to whether stereotypes would exert greater influence in more complex decision tasks than in simple ones. Bodenhausen and Lichtenstein presented subjects with the facts of a criminal case, sorted the subjects into select groups, then provided some of the groups with a name identifying the defendant as Latino. Subjects were divided into groups whose goal was to determine either the defendant’s guilt or his general aggressiveness. The researchers hypothesized — and empirically proved — that judging guilt would be more complex than judging aggressiveness, because it would require greater cognitive resources and effort. Bodenhausen and Lichtenstein’s research revealed that, in determining the defendant’s guilt or in sentencing him, subjects who had learned the accused’s ethnicity were more likely to find him guilty than were subjects who had not; in fact, subjects who knew the defendant’s ethnicity recommended on average a sentence twice as long as those who were ethnicity-blind.

Building on this study, Bodenhausen conducted tests in 1988 in which he manipulated the time at which mock jurors learned the ac-

180 See Fiske & Taylor, supra note 174, at 127.
183 See id at 878. The judgment of guilt involved consideration of a variety of factors, such as the opportunity to commit the crime, motive, and raised defenses. Interpreting an individual’s behavior in terms of a single trait — aggressiveness — was found to be much simpler and more straightforward.
184 See id.
cused's ethnicity. He posited that if stereotypes were influencing results, he should find more negative reactions when jurors learned the accused's ethnic identity before hearing the evidence. His results supported this hypothesis. When information activating the stereotype presented itself prior to the introduction of evidence, individuals' recall of evidence was selective and supported their stereotypical views. Interestingly, Bodenhausen also found that, regardless of when mock jurors learned the accused's ethnicity, they considered him more culpable when researchers identified him as Latino than when researchers omitted references to his ethnic identity.\textsuperscript{185}

Later studies have expanded on Bodenhausen's findings by examining whether jury ethnicity influences the perceptions of the accused's honesty and guilt. In 1993 Dolores A. Perez conducted a jury simulation focusing on both the ethnicity of a criminal defendant and that of the jurors.\textsuperscript{186} The researcher showed subjects a videotape of a simulated robbery trial and asked students serving as mock jurors first to return a unanimous verdict on guilt or innocence and second, to recommend a sentence if they convicted the accused. Researchers also attempted to track juror attitudes toward the defendant against several factors, including the defendant's similarity to the juror and the juror's views on the defendant's trustworthiness.

Perez found that jury ethnicity influenced perceptions of the defendant's honesty and guilt.\textsuperscript{187} Although the defendant did not testify and subjects only saw and heard him entering a plea of not guilty,\textsuperscript{188} majority-white juries were less likely to consider him honest when he was Latino.\textsuperscript{189} They also convicted the Latino defendant more frequently than majority-white juries convicted a white defendant,\textsuperscript{190} and they were more likely to recommend maximum sentences for the Latino man.\textsuperscript{191} These results support the theory that individuals are biased against out-groups and more favorably predisposed toward members of their in-group.\textsuperscript{192}

Although most empirical scholarship has focused on the impact on the accused of the jury's ethnicity, one series of studies examined whether a victim of color could expect varying treatment depending on the racial makeup of the jury. Gary D. LaFree conducted post-trial

\textsuperscript{185} See Bodenhausen, supra note 181, at 731.

\textsuperscript{186} See Dolores A. Perez, Harmon M. Hosch, Bruce Ponder & Gloria Chanez Trejo, Ethnicity of Defendants and Jurors as Influences on Jury Decisions, 23 J. APPLIED SOC. PSYCHOL. 1249 (1993).

\textsuperscript{187} See id. at 1258.

\textsuperscript{188} See id. at 1255.

\textsuperscript{189} See id. at 1257.

\textsuperscript{190} See id. at 1256, 1259.

\textsuperscript{191} See id. at 1256.

\textsuperscript{192} See id. at 1259.
interviews with 360 actual jurors in Indianapolis rape trials.\textsuperscript{193} He found that jurors tended to be middle-class whites who harbored stereotypes about African American women. In a case involving the rape of a young African American girl, one juror argued for acquittal on the grounds that a girl her age from "that kind of neighborhood probably wasn’t a virgin anyway."\textsuperscript{194} The mostly white jury viewed African American rape complainants to be more likely to have consented to sex or more sexually experienced and therefore less likely to have suffered harm by the assault. Other jurors were simply less willing to believe the testimony of African American complainants. One white juror told researchers: "Negroes have a way of not telling the truth. They’ve a knack for coloring the story. So you know you can’t believe everything they say."\textsuperscript{195}

There are, of course, scholars who have questioned the extent to which race adversely affects defendants of color in criminal trials.\textsuperscript{196} They raise questions about the propriety of generalizing from mock-jury studies. Although the mock-jury studies aim to evaluate the impact of race on jury decisionmaking, some studies of this sort lack similarity to real-life situations in which jurors render a verdict. For example, some mock-jury studies included written descriptions of the accused instead of permitting the jury actually to see the accused as they would in a trial. Many studies used transcripts of trials rather than re-enactments. Still others failed to give jury instructions that might have discouraged the inappropriate use of race in making a determination of guilt or innocence.\textsuperscript{197} Commentators also criticize several of these studies for using students as jurors instead of individuals who accurately reflect the composition of most jury pools.\textsuperscript{198} Finally, concerns exist that the results of any such studies merely survey dated or geographically-bound information about racial bias.\textsuperscript{199} Because

\textsuperscript{194} Id. at 220.
\textsuperscript{195} Id.
\textsuperscript{196} See, e.g., RANDALL KENNEDY, RACE, CRIME, AND THE LAW 242–43 (1997); Pfeifer, supra note 66, at 249–50.
\textsuperscript{197} See Jeffrey E. Pfeifer & James R.P. Ogloff, Ambiguity and Guilt Determinations: A Modern Racism Perspective, 21 J. APPLIED SOC. PSYCHOL. 1713, 1720–23 (1991); Pfeifer, supra note 66, at 244.
\textsuperscript{198} See Pfeifer, supra note 66, at 243; see also Pfeifer & Ogloff, supra note 197, at 1714, 1722 (criticizing the study design of mock-jury experiments). Professor Sheri Lynn Johnson made note of this concern but responded that the use of college students actually underestimated the degree to which race may influence judgments because students tend to be more lenient and more enlightened with regard to racial stereotyping than much of the jury pool. See Sheri Lynn Johnson, Black Innocence and the White Jury, 83 MICH. L. REV. 1611, 1637 [hereinafter Johnson, Black Innocence].
many of these studies took place in the 1970s and 1980s, critics raise
the possibility that any bias that may have existed at the time has
since dissipated.

One recent study attempts to address these criticisms and to assess
the validity of the earlier findings that race influences jurors’ judg-
ments. Researchers conducted a systematic review of mock-jury stud-
ies and found that “anti-Black bias exerted [a] . . . significant effect on
the sentencing decisions of mock jurors.”200 The authors analyzed the
extent to which sentencing bias against African American defendants
may be more pronounced in older as opposed to more recent studies.201
They also evaluated the hypothesis that sentencing bias against black
defendants is greater in samples from the southern United States than
in those from other parts of the country.202 Finally, they addressed
questions of methodology, particularly issues of verisimilitude of set-
ting and choice of mock jurors.203 The researchers found no support
for the propositions that discrimination in sentencing has lessened over
time or that geographical divisions account for differences among ju-
ries.204 They established that the central factor in determining a de-
fendant’s guilt or innocence was race. Jurors who could see rather
than merely read about the race of the accused were particularly likely
to succumb to the influence of race in their assessments of the defen-
dant’s guilt.205

All of these studies demonstrate that stereotypic biases affect deci-
sionmaking and memory. The presence of jurors whose racial back-
grounds differ from the accused’s makes it more likely that conscious
and unconscious bias will influence the determination of guilt. To the
extent that people of color serve on a jury, they may need the power to
bring attention to the evidence that they alone have recalled and to
push their fellow jurors to consider information that challenges their
stereotypic assumptions. Under majority rule, however, that power is
eliminated. And without full participation by jurors of color, the
criminal justice system structurally reinforces and perpetuates the ra-
cial dominance of white decisionmakers.

200 Id. at 190.
201 See id. at 186.
202 See id.
203 See id. at 186–88.
204 See id. at 190–91.
205 See id. at 191.
B. The Effects of Majority Rule on Participation of Women on Juries  

Similar concerns arise when one considers the impact of majority rule upon the participation of women on juries. Although it may be difficult to measure the extent of the rule’s silencing impact on women, the effect remains real and troubling. Nonunanimous voting locks jurors into a dynamic that undervalues individual contribution and participation, except to the extent necessary to form a majority. If, as research suggests, women participate at lower rates than men in mixed gender settings, they the jury could reach a majority consensus without the benefit of insights from its female members.

1. History of Gender and Jury Service. — A mere twenty-five years ago, courts generally restricted jury service to men. English law deemed women unqualified to serve on juries because of a “defect of sex.” In 1880 the United States Supreme Court ruled that the Fourteenth Amendment did not prohibit states from using jury criteria based on gender. The certainty that men had the capacity to generalize from their experiences to account for any missing perspectives provided an easy rationale for barring other groups from service. Gender could not have any significant impact on judgment or interpretation, according to this argument. The same factors — individual personality, background, and economic status, but not sex — presumably influenced both men and women.

Ultimately, the Supreme Court revisited this view. In Ballard v. United States, the Court invoked its supervisory powers over the federal courts to dismiss an indictment because of the purposeful and categorical exclusion of women from grand and petit juries. Writing for the majority, Justice Douglas emphasized the diversity of opinion the inclusion of females could offer:

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206 See infra Section II.B.2.
207 Women occasionally served as jurors of sorts in witch trials in the seventeenth and eighteenth centuries. As members of investigative committees, these women would examine the accused for physical indications that she was a witch. See Paul Boyer & Stephen Nissenbaum, Salem Possessed: The Social Origins of Witchcraft 13 (1974); Carol Weisbrod, Images of the Woman Juror, 9 Harv. Women’s L.J. 59, 60 n.3 (1986).
209 In 1870 Parliament enacted a statute in line with this common-law doctrine, see 33 & 34 Vict., ch. 77 (1870), but ultimately rejected the doctrine in 1919, see 9 & 10 Geo. 5, ch. 71 (1919).
210 See Strader v. West Virginia, 100 U.S. 303, 310 (1880).
211 See Ballard v. United States, 329 U.S. 187, 193 (1946); see also Carol Gilligan, In A Different Voice: Psychological Theory And Women’s Development 173 (1982) (“The failure to see the different reality of women’s lives and to hear the differences in their voices stems in part from the assumption that there is a single mode of social experience and interpretation.”).
212 See id. at 195–96.
[If the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. 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.213

Following Ballard, studies of the performance of women as jurors demonstrated that women do indeed introduce different perspectives and values to the deliberation process.214 But exclusionary practices were deeply entrenched. Two years after Ballard, fifteen states still barred women from jury service.215 Congress then intervened on a national level with the Civil Rights Act of 1957216 and declared women eligible to serve on federal juries even in states that barred them from serving on state juries. Yet states continued to use various means to exclude women from jury duty. For example, the state of Florida did not explicitly prohibit women from serving; it merely granted women an automatic exemption from jury duty with no equivalent exemption available to men.217 In upholding this practice, the Court proclaimed in Hoyt v. Florida.218

Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.219

The Supreme Court did not put a stop to such practices until 1975. The Court eventually held that the Constitution prohibits the systematic and purposeful exclusion of women from juries. In Taylor v. Louisiana,220 the Court held that the elimination of women from jury ve-

213 Id. at 193–94 (footnotes omitted).
214 See Bruce C. Hoiberg & Lloyd K. Stires, The Effect of Several Types of Pretrial Publicity on the Guilt Attributions of Simulated Jurors, 3 J. APPLIED SOC. PSYCHOL. 267 (1973). The debate over a woman’s right to serve on a jury was just one component of the larger discussion over a woman’s role in society and politics. See generally Weisbord, supra note 207, at 68–77 (noting that proponents of women’s participation generally often argued that women would bring a distinct perspective by virtue of their different experiences).
215 See Weisbord, supra note 207, at 61 n.6.
219 Id. at 61–62.
nires deprives an accused of the Sixth Amendment right to trial by an impartial jury drawn from a fair cross-section of the community.\textsuperscript{221} The Court suggested further that exclusion of women dilutes "the quality of community judgment represented by the jury in criminal trials."\textsuperscript{222}

Given the Court's decision in \textit{Taylor}, one may be tempted to conclude we have safely locked away issues of exclusion in our past; however, quite the opposite is true. The number of women who actually serve on juries is often lower than their percentage in the population.\textsuperscript{223} Men are more likely to be called for jury duty, and courts are more likely to excuse women from service.\textsuperscript{224} Once selected, women are frequently subject to peremptory strikes by the lawyers on the case.\textsuperscript{225} In an effort to deter this practice, the Supreme Court has urged courts to scrutinize peremptory challenges to ensure that strikes are not gender-based.\textsuperscript{226} Despite this monitoring, however, the number of women actually seated as jurors can be disproportionately low.\textsuperscript{227} When jury selection begins with few women in the venire, the actual jury will almost inevitably reflect that underrepresentation.

2. \textbf{The Difference Dynamic in the Jury Room.} — The jury's responsibility to render a fair verdict necessarily means that each juror should have some influence over the decision, and not merely that each juror should have the ability to cast an "empty vote ... after the real decisions are made."\textsuperscript{228} Majority rule, however, generally operates as a structural impediment to the participation of women and can create an environment that squelches their contributions.

Behavior in the deliberation room tends to reflect the power relations and imbalances that occur elsewhere in society.\textsuperscript{229} Jurors consciously rely on their experiences to help them judge events and evidence. Still, on a less conscious level, acceptance of standard forms of

\textsuperscript{221} \textit{See id. at 531--33.}

\textsuperscript{222} \textit{Id. at 535.}

\textsuperscript{223} \textit{See, e.g., Fukurai, Butler & Krooth, supra note 5, at 18--19 (citing studies showing underrepresentation of women on juries).}


\textsuperscript{225} \textit{See, e.g., Linda K. Kerber, No Constitutional Right to Be Ladies 214--15 (1998); David Everett Marko, The Case Against Gender-Based Peremptory Challenges, 4 Hastings Women's L.J. 109, 109, 130 (1995).}

\textsuperscript{226} \textit{See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 137, 135--42 (1994).}

\textsuperscript{227} \textit{See, e.g., Duren v. Missouri, 439 U.S. 357, 360 (1979) (noting underrepresentation of women in the jury pool).}

\textsuperscript{228} \textit{Terry v. Adams, 345 U.S. 461, 484 (1953); cf. Lani Guinier, The Representation of Minority Interests: The Question of Single-Member Districts, 14 Cardozo L. Rev. 1135, 1146 (1993) (noting that black voters should have a voice that serves them effectively in the political process).}

\textsuperscript{229} \textit{See Nancy S. Marder, Gender Dynamics and Jury Deliberations, 96 Yale L.J. 593, 598 (1987).}
behavior in relation to other jurors also informs conduct during deliberations. Researchers have discovered that the behavior of male jurors tends to differ from that of female jurors in ways that mirror traditional societal roles. Critical manifestations of this phenomenon include the frequency of participation and the degree to which one listens to other viewpoints.

In mock-jury studies, researchers have observed that women generally speak less frequently than men in the deliberation process. When women offer comments in the course of mock deliberations, men often interrupt them or ignore their statements. This process of dismissing women's contributions frequently results in a progressive diminution of remarks from women as time passes. Women also tend to take longer than men to enter a discussion and to voice their views. In a decision scheme that demands full jury consensus, jurors may at least recognize the need to draw out the views of those who do not contribute as readily or as frequently. But under majority

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230 See Rosabeth Moss Kanter, Women and the Structure of Organizations: Explorations in Theory and Behavior, in ANOTHER VOICE 34, 56 (Marsha Millman & Rosabeth Moss Kanter eds., 1975); Marder, supra note 229, at 597.

231 See, e.g., HASTIE, PENROD & PENNINGTON, supra note 10, at 141–42 (observing that male jurors offered 40% more comments than did female mock jurors); Rita M. James, Status and Competence of Jurors, 64 AM. J. SOC. 563, 566 (1959) (finding a 7% average rate of participation for women as opposed to a 9% rate for men); Fred L. Strodtbeck, Rita M. James & Charles Hawkins, Social Status in Jury Deliberations, 22 AM. SOC. REV. 713, 715 (1957) (finding a 5.6% participation rate among female jurors and 9.6% rate for male jurors).

232 See John E. Baird, Sex Differences in Group Communication: A Review of Relevant Research, 62 Q.J. SPEECH 179, 181 (1976) ("Males used more words, talked more often, and, in mixed groups, interrupted females more frequently than females interrupted them."); Davis, supra note 152, at 1651–67; Candace West & Don H. Zimmerman, Small Insults: A Study of Interruptions in Cross-Sex Conversations Between Unacquainted Persons, in LANGUAGE, GENDER AND SOCIETY 107 (Barrie Thorne, Chers Kramarae & Nancy Henley eds., 1985) (finding that in cross-gender dialogue men are three times more likely than women to interrupt another speaker); see also DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND 77 (1990) (arguing that men use conversation as a means of maintaining status in a "hierarchical social order," whereas women see conversation as a way of establishing rapport); cf. Lani Guinier, Michelle Fine & Jane Balin with Ann Bartow & Deborah Lee Stachel, Becoming Gentlemen: Women's Experiences at One Ivy League Law School, 143 U. PA. L. REV. 1, 3–4 (1994) (observing that in law school classrooms, women participate at much lower rates than men).

233 See Don H. Zimmerman & Candace West, Sex Roles, Interruptions and Silences in Conversation, in LANGUAGE AND SEX: DIFFERENCE AND DOMINANCE 105, 118 (1975) (finding, in one study, that 62% of women's aggregate silence occurred after the interruptions or delayed or dismissive responses of men).

234 See JESSIE BERNARD, THE SEX GAME 146 (1968) ("Perhaps because their voices are less powerful, women have a harder time getting the attention of [a mixed-gender group]; and they are more likely to lose it by successful interruption from men. Unless someone in the group makes a special effort to give time to the women, they may sit for long periods contributing nothing."); Fred L. Strodtbeck & Richard D. Mann, Sex Role Differentiation in Jury Deliberations, 19 SOCIOLOGY 3, 9 (1956) (noting that men tend to initiate long streams of comments while women tend to react to those contributions).
rule, decisions tend to be reached faster, leaving jurors without an incentive to encourage full participation in the deliberations. Once jurors arrive at the number necessary to return a verdict, they tend to end discussion. This abbreviated process leaves less opportunity for women to venture into the fray. Indeed, majority rule may make it less likely that women’s voices will ever be heard.

This would be of little practical consequence if women’s perspectives were not unique. Both feminist theory and jury research suggest that gender matters in moral decisionmaking. Difference theory in particular has located the points at which women and men diverge in their knowledge, behavior, and judgments. In her seminal work, psychologist Carol Gilligan observed that differences in social status and power that shape the experiences and judgments of women and men translate into a notable divergence in the way the genders approach moral problems. For women, the moral imperative is “an injunction to care,” characterized by an obligation to identify and to alleviate problems, rather than the application of rules without focusing on context. This ethic of care generally gives women a greater sensitivity than men to relationships when resolving dilemmas. Moreover, Gilligan found that, before reaching a decision, women are more likely to attend to voices other than their own and to embrace collaborative methods of dilemma resolution.

But is behavior so different in men? According to Gilligan’s research, it is. Gilligan found that men tend to concentrate less on reciprocity and care, and more on abstract rights and rules. Men tend

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235 See HASTIE, PENROD & PENNINGTON, supra note 10, at 173.
236 See MICHAEL J. SAKS & REID HASTIE, SOCIAL PSYCHOLOGY IN COURT 84–86 (1978) (asserting that satisfaction of a quorum is psychologically binding, such that some jurors, upon achieving the necessary majority, asked “why time was being spent debating with the minority jurors when their votes were superfluous”).
237 Of course feminist theory is not monolithic. Whereas liberal feminist theory suggests that men and women are essentially alike and therefore deserve equal treatment, difference or relational theory emerged to critique that view. Difference feminists argue for both the existence of gender differences and the need to embrace and value those differences. Although dominance theorists recognize that women’s accomplishments and traits should be valued, they suggest that many of those differences result from the power imbalance between men and women, and that women’s different identities are social constructs born of subordination. For a general summary, see Anne C. Dalley, Feminism’s Return to Liberalism, 102 YALE L.J. 1165, 1165 (1993).
238 See supra pp. 1297, 1298–99.
239 See GILLIGAN, supra note 210, at 64–105.
240 Id. at 100.
241 See id. at 30 (describing a woman’s world as one of “relationships and psychological truths where an awareness of the connection between people gives rise to a recognition of responsibility for one another”); see also Marder, supra note 229, at 503.
243 See GILLIGAN, supra note 210, at 100.
to emphasize the value of independence and separation.\textsuperscript{244} The experiences on which men usually rely direct them toward finding a solution that weighs individual rights against competing principles, which generally results in a focus on an abstract rule.\textsuperscript{245} The moral imperative for men tends to involve respect for the rights of others and protection of those rights from interference.

The differences observed by Gilligan between decisionmaking approaches of men and women stem not from biology, but from what can be described as a “gendered social structure.”\textsuperscript{246} Gilligan noted that because men’s social orientation is “positional,” while women’s orientation is “personal,” men and women tend to perceive social reality differently.\textsuperscript{247} Women are more prone than men to judge events based on the potential impact of an action or decision on the specific interpersonal relationships involved.

Some feminists have attacked Gilligan’s care theory. They criticize Gilligan’s relational feminism for drawing too heavily on traditional maternal images and thereby inhibiting women’s efforts to receive equal treatment.\textsuperscript{248} But Gilligan’s findings have prompted others to recognize the value of the different voice that women may bring to events — of whatever kind it may be.\textsuperscript{249} Gilligan herself cautioned that she did not observe the ethic of care in all women. Only slightly more than half of the women in her study focused on issues of care rather than justice; however, Gilligan did find that the “care focus . . . was almost exclusively a female phenomenon . . . . If girls and women

\textsuperscript{244} See Nancy Levit, Feminism for Men, Legal Ideology and the Construction of Maleness, 43 UCLA L. REV. 1037, 1045 (1996) (noting that men reason toward an ethics of rights, while women value relations and an ethic of care).

\textsuperscript{245} Gilligan did not find that men always reached the decision to apply the law as written, but rather at times they chose to violate the rule of law because they considered it wrong under the circumstances. See GILLIGAN, supra note 210, at 26.

\textsuperscript{246} Susan Moller Okin, Thinking Like a Woman, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 145, 154 (Deborah L. Rhode ed., 1990).

\textsuperscript{247} GILLIGAN, supra note 210, at 16; see also Michelle Zimbalist Rosaldo, The Use and Abuse of Anthropology: Reflections on Feminism and Cross-Cultural Understanding, 5 SIGNS 389, 413–14 (1980) (discussing the ubiquity of and exploring reasons for sexual asymmetry in relationships between women and men).


\textsuperscript{249} See, e.g., Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543 (1986); Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1, 3 (1988).
were eliminated from the study, care focus in moral reasoning would disappear.\textsuperscript{250}

When we apply these findings to jury deliberations, the absence of women raises obvious concerns. A completely male jury is likely to neglect any discussion of conduct and events in the context of relationships. Moreover, because Gilligan’s studies reveal that men tend to discuss moral issues in rights-oriented terms, a jury composed exclusively of men is particularly likely to engage in a more abstract analysis of the issues raised at trial. Gilligan’s empirical work suggests that male and female jurors who experience the same events at trial will likely evaluate them from very different perspectives, and, if they do not interact, they may reach quite distinct conclusions.

3. \textit{Difference and Deliberation}. — The quality of a jury’s deliberations and the accuracy of its factfinding depend, in part, on the jurors’ individual and collective memories. Typically courts do not permit jurors to take notes during testimony.\textsuperscript{251} Instead, they require jurors to recall without assistance the substance of the testimony, the witnesses’ demeanor, and any demonstrative evidence used to explain the witnesses’ testimony.\textsuperscript{252} Studies reveal that women and men generally recall more accurately information that relates to their respective gender.\textsuperscript{253} For example, when researchers ask women questions related to a woman’s conduct in a given situation, women tend to respond with greater accuracy than men in their descriptions. Similarly, men are more likely to give accurate descriptions of the conduct and characteristics of male subjects.\textsuperscript{254}

Researchers do not attribute these findings to inherent biological differences, but rather to the differences between men and women in social position and experience. Psychologists long ago discovered that cultural context affects memory and understanding:

\textsuperscript{250} Carol Gilligan, \textit{Prologue: Adolescent Development Reconsidered}, in \textit{Mapping the Moral Domain: A Contribution of Women’s Thinking to Psychological Theory and Education} xviii–xix (Carol Gilligan, Janie Victoria Ward & Jill McLean Taylor with Betty Bardige eds., 1988). Gilligan notes that boys often exhibit this care focus in early childhood, but that the trait usually diminishes in their early development. See id.


\textsuperscript{252} See, e.g., \textit{D.C. Criminal Jury Instructions}, supra note 82, No. 2.03, at 38 (“If any reference by the court or by counsel to matters of evidence does not coincide with your own recollection of the evidence, it is your recollection which should control during your deliberations.”).

\textsuperscript{253} For a fictional treatment of this phenomenon, see SUSAN GLASPELL, \textit{A Jury of Her Peers}, reprinted in \textit{The Best Short Stories of 1917}, at 255 (E.J. O’Brien ed., 1918), which tells how female observers at a crime scene registered crucial clues regarding a woman’s motive to kill her husband that male observers missed.

\textsuperscript{254} See Peter A. Powers, Joyce L. Andrik & Elizabeth F. Loftus, \textit{Eyewitness Accounts of Females and Males}, 64 APPLIED PSYCHOL. 339, 344 (1979) (finding statistically significant differences in accuracy between men and women depending on the type of information a question sought: both women and men tended to pay more attention to details that were gender-specific).
Every social group is organized and held together by some specific psychological tendency or group of tendencies, which give the group a bias in its dealings with external circumstances. The bias constructs the special persistent features of group culture . . . . This immediately settle[s] what the individual will observe in his environment, and what he will connect from his past life with this direct response.  

Whatever the cause, the finding that memories diverge along gender lines indicates that the absence or silence of one gender can produce troubling consequences for jury decisionmaking.

Studies also indicate that a juror’s confidence in witness recollections tends to differ between genders as well. Each gender demonstrates less susceptibility to inaccurate suggestions about gender-specific details.  

Researchers have detected another gender dichotomy that should raise still greater concern. Studies examining jurors’ evaluations of eyewitness testimony — which show that both women and men overestimate the ability of witnesses to make an accurate identification — suggest that men tend to give greater weight to this type of testimony than do women.  

Without cross-gender discussion, an eyewitness’s testimony can escape more critical evaluation.

Of course, the jury’s role consists of far more than the recollection and reconstruction of facts. Jurors also must evaluate the credibility of witnesses in order to decide which testimony to credit or reject. To place the witness’s testimony in context, jurors may require some understanding of that witness’s experiences and perspectives.  

Jurors make judgments informed both by what they know about the world and by the assumptions that flow from that knowledge.  

If jurors lack sufficient familiarity with the life experiences or perspectives of a  

255 Francis C. Bartlett, Remembering: A Study in Experimental and Social Psychology 255 (1954 prtg.); see also Bruner, supra note 95, at 59 (finding that experience of and memory about the social world are steeped in cultural conceptions of one’s own world).  

256 See Powers, Andriks & Loftus, supra note 254, at 344.  


258 See Martha Minow, Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors, 33 WM. & MARY L. REV. 1201, 1205 (1992) (noting that “[s]ome commonality is necessary to know enough to judge”); Burt Neuborne, Of Sausage Factories and Sylogism Machines: Formalism, Realism and Exclusionary Selection Techniques, 67 N.Y.U. L. REV. 419, 431 (1992) (“Who a juror is and what she has experienced almost certainly influences what she accepts as plausible ‘fact.’”).  

259 Justice O’Connor has endorsed this view, noting that “[j]urors are not expected to come into the jury box, and leave behind all that their human experience has taught them.” J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 149 (1994) (O’Connor, J., concurring) (quoting Beck v. Alabama, 447 U.S. 625, 642 (1980)) (internal quotation marks omitted); see also Minow, supra note 258, at 1203 (“[W]e want jurors . . . to have, and to remember, experiences that enable their empathy and evaluative judgments.”).
witness, they may be unable to discern the witness’s motivations or to judge accurately whether the testimony makes sense.260

The "perceptual fault lines"261 between women and men deepen when jurors must assess the reasonableness of an accused’s behavior. If an accused raises a justification, such as self-defense, to explain her conduct, jurors must place themselves in the position of the accused to render an appropriate judgment of her actions.262 Was the accused afraid? If so, was her fear reasonable under the circumstances as they appeared to her at the time of the incident? The juror will often rely on her own background, prior experiences, and unique observations to interpret the accused’s responses to an event. Reasonableness will often depend on the extent to which the juror can find a similar situation in her own experience.263

This is not to suggest that only a woman can understand another woman’s perspective. Indeed, women may judge other women more harshly.264 But without resorting to essentialism, it is reasonable to suggest that our experiences tend not only to correlate with gender, but also to affect our reaction to an event.265 Therefore, the deliberation

260 See Minow, supra note 258, at 1205.
261 Schepppele, supra note 80, at 2083 (using this term to describe gaps in perception between groups); see also Kim Lane Schepppele, The Re-Vision of Rape Law, 54 U. CHI. L. REV. 1095, 1104-13 (1987) (providing examples of perceptual distinctions between men and women).
262 See, e.g., D.C. CRIMINAL JURY INSTRUCTIONS, supra note 82, No. 5.13, at 354 ("Every person has the right to use a reasonable amount of force in self-defense if (1) he actually believes he is in imminent danger of bodily harm and if (2) he has reasonable grounds for that belief. The question is not whether you believe, in retrospect, that the use of force was necessary. The question is whether the defendant, under the circumstances as they appeared to him at the time of the incident, actually believed he was in imminent danger of bodily harm, and could reasonably hold that belief."); see also Martha Minow, Not Only For Myself: Identity, Politics, and Law, 75 OR. L. REV. 647, 691 (1996) (discussing the value of the "reasonable person standard" but affirming the need to link it to circumstances, including the "meanings of group identity in a given community during the specific time period").
263 See Minow, supra note 258, at 1205 (noting that even before women were permitted to perform jury service, allowed for the use of midwife jurys when “knowledge of pregnancy or childbirth would be critical to a reliable judgement”); see also Weisbrod, supra note 207, at 67 (relaying a late nineteenth-century judge’s view that men represent “worlds of work and battlefield,” whereas women are “peculiarly alert to vices that assail the home”) (internal quotation marks omitted).
264 See, e.g., Mark Curriden, The Death of the Peremptory Challenge, 80 A.B.A. J. 62, 64 (1994) (discussing a jury consultant’s findings that “[w]omen who sit on juries seem to be very harsh on women who are victims”).
265 See, e.g., Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 1183, 1203 (1989) (arguing that men often regard sexual harassment as a harmful form of amusement); Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 YALE L.J. 1177, 1207 (1990) (stating that men react to some forms of sexual harassment as “harmless social interactions to which only overly-sensitive women would object”); see also Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (noting that although there may be a broad range of viewpoints among women as a group, many
process needs to enable those jurors who may have had similar experiences to voice their individual views and thereby to inform the judgment of the group. Clearly, if experience enhances the jury’s evaluation of evidence, then a diversity of viewpoints is invaluable.

Although a female juror’s perspective may differ from her male counterpart’s, her view does not consistently tend toward sympathy for the accused or blame for the victim. Particularly in cases involving a charge of rape, researchers have found women to be less likely than men to sympathize with or credit the accused. Studies have also concluded that women are more likely to convict and tend to impose harsher sentences. Thus, one should not view the inclusion of women to ensure a particular viewpoint or outcome. The ultimate interest served here is the achievement of a principal objective of the jury system: to produce outcomes that flow from informed judgments.

4. Is There a Difference When Race and Gender Intersect? — Although some researchers and theorists suggest that women have a different voice, it may be more accurate to say that women speak with several voices. Women of color often maintain perspectives quite distinct from both white women and men of color, due to both the par-

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266 Recognizing that women may perceive events differently, some courts have adopted a standard of evidence evaluation that acknowledges that difference. For example, in Ellison, the Ninth Circuit indicated that the trier of fact should apply a “reasonable woman” standard in sexual harassment cases when assessing whether a workplace had become a hostile environment. 924 F.2d at 879. The court stated that “[m]en, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.” Id. See generally Robert S. Adler & Ellen R. Peirce, The Legal, Ethical and Social Implications of the “Reasonable Woman” Standard in Sexual Harassment Cases, 61 FORDHAM L. REV. 773 (1992) (examining the development of the reasonable woman standard in sexual harassment cases); Roberta K. Flowers, Does It Cost Too Much? A “Difference” Look at J.E.B. v. Alabama, 64 FORDHAM L. REV. 491, 527 (1995) (discussing Ellison).

267 See, e.g., Marina Angel, Criminal Law and Women: Giving the Abused Woman Who Kills A Jury of Her Peers Who Appreciate Trifles, 33 AM. CRIM. L. REV. 229, 266 (1995) (“If diversity does not exist in the jury room, not all stories will be told and heard.”).

268 See Marsha B. Jacobson, Effects of Victim’s and Defendant’s Attractiveness on Subjects’ Judgement in a Rape Case, 7 SEX ROLES 247, 252–54 (1981); Michael G. Rumsey & Judith M. Rumsey, A Case of Rape: Sentencing Judgments of Males and Females, 41 PSYCHOL. REP. 459, 464 (1977) (finding that ambiguity in rape evidence leads men more often than women to blame the alleged victim).

ticular economic circumstances faced by women of color and their daily encounters with the dual stigmatizing factors of their gender and race. These unique circumstances often provide women of color with an insight into motivations and conduct that others may miss. Consequently, their viewpoints can broaden the jury’s context for analyzing evidence and rendering judgment.

Some commentators reject the view that women of color have a unique vantage point. Such skeptics maintain that even if white men may not fully understand the views of women of color, white women surely do. But this assertion warrants close inspection. In the early years of the feminist movement in this country, feminist activists shared similar assumptions. They advanced positions on behalf of all women without regard for racial and cultural differences. Responding to portrayals of women as a monolithic group, many women of color

270 See U.S. DEP’T OF LABOR, TIMES OF CHANGE: 1983 HANDBOOK ON WOMEN WORKERS 105 (relating that the incidence of poverty among African American women is generally two to four times higher than the rates for white women).

271 See, e.g., Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 HARV. L. REV. 817, 819 (1991) (describing the findings of an empirical study showing first that the final offer mark-ups for new and used automobiles were three times as high as those for white males and, second, that the discrimination against black women was greater than the combined discrimination against both white women and black men); see also SANDRA BAXTER & MARJORIE LANSING, WOMEN AND POLITICS: THE VISIBLE MAJORITY 94–96 (2d ed. 1983) (noting that, compared to white women and white and African American men, African American women have the lowest levels of trust in the political process and the lowest feelings of political power).

272 See GLORIA ANZALDÚA, BORDERLANDS: LA FRONTERA: THE NEW MESTIZA 21 (1987) (suggesting that Chicanas’ position at the crossroads between cultures may enable them to provide new understandings of each culture: “[t]he new mestiza [woman of mixed ancestry] copes by developing a tolerance for contradictions, a tolerance for ambiguity. She learns to be an Indian in Mexican culture, to be Mexican from an Anglo point of view. She learns to juggle cultures.”); bell hooks, FEMINIST THEORY FROM MARGIN TO CENTER 15 (1984) (contending that black women have a "special vantage point" on questions of racism and sexism because they experience both); Harris, supra note 269, at 601 (“Black women are not white women with color.”) (internal quotation marks omitted); Kim A. Taylor, Invisible Woman: Reflections on the Clarence Thomas Confirmation Hearing, 45 STAN. L. REV. 443, 448–52 (1993) (suggesting that white men on the Senate Judiciary Committee, as well as white feminists and traditional African American groups, lacked the perceptual framework required to recognize and to understand the sexual harassment claim brought by Professor Anita Hill).

273 But see Harris, supra note 269, at 585 (critiquing the writings of feminist legal theorists Catherine MacKinnon and Robin West for suggesting the existence of a “unitary” women’s experience isolated from race).

274 See Judy Scales-Trent, Black Women and the Constitution: Finding Our Place, Asserting Our Rights, 24 HARV. C.R.-C.L. L. REV. 9, 12, 23–35 (1989) (arguing that black women merit recognition as a discrete group for constitutional purposes, because of the long-standing and unique nature of harm inflicted on them due to the “dual stigma of being black and female”).

275 See Crenshaw, Demarginalizing, supra note 269, at 139 (contending that “single-axis” analyses distort the “multidimensionality of Black women’s experiences”).
broke ranks with white feminists and publicly aired historical and contemporary political differences and priorities. The debate continues today. But the unmistakable message is that regardless of good intentions, white women cannot simply generalize from their experiences to understand those of women of color.

Once again, this does not suggest that all women of color interpret their experiences in the same way. Nor would the inclusion of their votes and views necessarily orient the jury toward a specific judgment or verdict. Still, the experience of subjection to overlapping bias and oppression often enables women of color to recognize and appreciate experiences that might elude their fellow jurors. Because the jury must deliver the judgment of the community, the jury should include the perspectives of all members of the community who emerge from the voir dire process. Of course, some might argue that this notion of “the community” is utopian and that it is questionable whether a jury can ever deliver the community’s judgment. But the jury process is at least partly aspirational. A unanimity rule moves us closer to that ideal, because it forces members of society to engage in dialogue that may not otherwise occur. Without a rule requiring

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276 See Patricia A. Cain, Feminist Jurisprudence: Grounding the Theories, 4 BERKELEY WOMEN’S L.J. 191, 213 (1989-1990) (criticizing feminism for restricting its focus to limited subgroups of women, such as white heterosexuals). See generally supra note 272.

277 See, e.g., Harris, supra note 269, at 599-600 (criticizing white feminists for failing to understand white women’s role in the lynching of African American men following rape accusations).

278 See AUDRE LORDE, SISTER OUTSIDER 66-71 (1984) (criticizing feminist Mary Daly for her suggestion that all women suffer the same oppression simply by virtue of their gender); see generally Doris Davenport, The Pathology of Racism: A Conversation with Third World Witimin, in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 85, 85 (Gloria Anzaldúa & Cherríe Moraga eds., 1983) (criticizing the exclusion of black women’s experiences from the feminist movement).

279 Of course, even if we accept that the perspective of a woman of color may be unique, one will not necessarily be on the jury. Recognizing this, some scholars have proposed mechanisms for using voir dire and peremptory challenges in a manner that would guarantee more equal racial and gender distributions on juries. See Alschuler, supra note 88, at 710-11 (suggesting that when a person of color faces indictment, he is entitled to have on the grand jury at least two persons of color who so identify themselves); see also Johnson, Black Innocence, supra note 198, at 1695-1700 (arguing that persons of color should be allotted at least three “racially similar” members of the jury). Radical measures such as these may indeed be valuable tools for increasing the diversity of a given petit jury, but their implementation is unlikely. To the extent that women — and particularly women of color — survive the voir dire process, the decision rule governing deliberations should operate in a manner that encourages the inclusion of these frequently absent voices.

280 See SAKS & HASTIE, supra note 236.

281 See Phoebe A. Haddon, Rethinking the Jury, 3 WM. & MARY BILL OF RTS. J. 29, 77 (1994) (“Those who have not experienced oppression have difficulty recognizing it.”).

282 See, e.g., Richard St. John, Note, License to Nulify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking, 106 YALE L.J. 2563, 2578 (1997) (arguing that because “juries fail to reflect an adequate demographic sample of the community,” they can “neither represent nor embody the community or its will”).

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members of the jury to seek out each other’s views to build consensus, we can expect the experience outside of the jury room to recur within it: the views of women of color will be ignored or discounted.

Still, regardless of one’s definition of community, empirical research on discriminatory effects calls into question the constitutionality of majority rule in jury decisionmaking. If the imposition of majority rule could eviscerate constitutional gains that have followed from the prohibition of discriminatory exclusions of protected groups, the Court may recognize the need to revisit its earlier rulings. Or, if the Court chooses to adhere to its rulings in Apodaca and Johnson, other policymakers may decide to address the political implications of adopting majority-rule initiatives in light of the findings of jury research.

III. CONSTITUTIONAL AND POLICY IMPLICATIONS OF THE GENDER AND RACIAL EFFECTS OF MAJORITY RULE

A. Shifts in the Shared Understanding of the Jury

The Court’s earliest observations about the essential features of jury decisionmaking powerfully signaled a commitment to democratic aspirations. With its acknowledgment of the importance of representativeness in the composition of the jury, the Court demonstrated its appreciation for the critical links between a diversity of perspectives and more democratic deliberations.283 Along the way, however, the Court’s analysis has taken a different direction.284 The Court has focused less on diversity and more on the interests of prospective jurors in nondiscriminatory access to jury service as a basis for monitoring the operations of juries. Nevertheless, even with this new orientation, the Court’s examination of mechanisms that affect the functioning of juries continues to pursue the objective of eliminating barriers to democratic participation by historically protected groups.

Consistent with these aspirations, the Court has rejected gender- or race-based attempts to exclude jurors.285 At the same time, the Court has denounced efforts to mandate the inclusion of people of color and women on petit juries as mechanisms hostile to democratic aspira-

283 The Court observed 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; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.” Strader v. West Virginia, 100 U.S. 303, 308 (1880) (emphasis added).

284 See, e.g., Cammack, supra note 83, at 435–56 (expounding upon the Court’s unintelligible approach to diversity).

tions.286 Neither the accused nor the state has a right to place representatives of certain groups on the petit jury. What remains is a conception of the jury as an embodiment of democratic principles that prohibit the systematic exclusion of citizens based on race, gender or ethnicity. To secure this vision, the Court expects the criminal justice system to adhere to formal neutrality with respect to race and gender.

Instrumentally, this may make sense. To devise strategies to determine when consideration of race or gender may be appropriate could prove complicated at best. So the Court has chosen instead to require racial and gender neutrality in jury selection. But this framework has prompted considerable debate. Much of the argument has centered around the extent to which race and gender matter in moral decisionmaking and the degree to which courts should acknowledge the influence of these factors. Some scholars urge the Court to take affirmative steps to guarantee the inclusion of jurors from diverse backgrounds.287 Others reject express consideration of race and gender because they worry that such consciousness carries an implicit endorsement of discrimination.288 Yet for all the variety of these positions, there seems to be little disagreement among scholars — or within the public at large289 — that race and gender have some bearing on an individual’s judgment concerning questions of social justice. Regardless of one’s ultimate view of the appropriate legal response to the impact of race and gender, few individuals would assert that all-white juries or all-male juries are functionally the same as mixed juries.

Thus, this subtle commonality may signal the beginning of a loose consensus about juries. If we can acknowledge that race and gender may play some role in the outcome of jury trials, it seems all the more important that judicial and legislative decisions about whether to abandon the unanimous decisionmaking rule take into account the results of relevant empirical jury research. Whether proposals to amend the decision rule appear as constitutional questions for courts to decide or as initiatives for legislatures to adopt, decisionmakers should ex-

287 See supra note 279.
289 See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 167 tbl.1.18 (Kathleen Maguire & Ann L. Pastore eds., 1994) (indicating that 74% of blacks believe that police protection in black neighborhoods is worse than it is in white neighborhoods); see also Ruth Marcus, Racial Bias Widely Seen in Criminal Justice System, Research Often Supports Black Perceptions, WASH. POST, May 12, 1992, at A4 (reporting that 89% of blacks and 43% of whites think that blacks do not receive equal treatment in the criminal justice system).
amine the extent to which majority rule impairs the jury’s opportunity to benefit from dialogue among jurors of diverse groups. Equally important, decisionmakers should consider the costs to the perceived legitimacy of the system, as well as the reliability of the result, if they implement a system that removes incentives for jurors to reach across cultural, racial, and gender boundaries.

1. Is There Room to Revisit the Constitutionality of Nonunanimous Jury Decisionmaking? — In 1972, when the Supreme Court considered the issue of jury unanimity in Johnson v. Louisiana\(^{290}\) and Apodaca v. Oregon,\(^{291}\) the Court asked precisely the right questions: would a change in the decisionmaking rule diminish the reliability of the jury’s verdict? Would adoption of nonunanimous decisionmaking affect the nature and quality of the jury’s deliberations? The litigants presented the Court with the existing empirical data. Unfortunately, that data was limited and did not offer the Court much direction. The empirical findings did provide the Court with important general information about the impact of nonunanimous voting upon the power of a numerical minority to influence the outcome of a case. Briefs filed by the petitioners relied in part on studies conducted by Harry Kalven and Hans Zeisel that demonstrated a reduction in the numerical minority’s power to shift the majority’s view in a nonunanimous voting scheme.\(^{292}\) The petitioners also relied on empirical findings to caution the Court that adoption of majority rule would decrease the number of hung juries and increase the likelihood of convictions.\(^{293}\)

At the same time, no empirical evidence addressed the effects that majority rule might have on people of color and women. The petitioners in Apodaca did allude to the impact that a shift to majority rule may have upon racial and ethnic minorities.\(^{294}\) The petitioners urged that a jury should reflect a fair cross-section of the community and warned that nonunanimous decisionmaking would make it less likely that the jury’s ultimate decision would reflect the considered judgment of the entire community. Echoing those concerns, the dissenting justices expressed concern that a change in the rule may prevent minority groups from affecting the outcome of the trial.\(^{295}\) Hard data did not support these concerns, however. So the Court in 1972 could reasonably have concluded — based on its best guess — that a change in the

\(^{290}\) For a discussion of Johnson, see pp. 1269–72.

\(^{291}\) For a discussion of Apodaca, see pp. 1367–69.


\(^{293}\) See id. at 15.

\(^{294}\) See id. at 18.

\(^{295}\) See Johnson v. Louisiana, 406 U.S. 356, 397 (1972) (Stewart, J., dissenting); id. at 402 (Marshall, J., dissenting).
decisionmaking rule would not offend the well-recognized values of access and participation. 296

Current jury research contradicts that intuition. The Court now has access to new "legislative facts"97 that go beyond the assumptions that supported its earlier analysis. Importantly, these facts indicate that nonunanimous voting schemes are likely to chill participation by the precise groups whose exclusion the Court has proscribed in other contexts. Majority rule's disproportionate impact on participation impairs the deliberative ideal: deliberations will be less robust if individuals are systematically denied meaningful participation based on their group status.

Of course, one can imagine a variety of responses from the Court. It may choose to ignore the empirical evidence and to adhere to its prior decisions. Simply by relying on the principle of stare decisis, for example, the Court may avoid reconsideration of Apodaca and Johnson. Important policy considerations of stability and coherence arguably favor such deference to precedent. Yet given that this new empirical data directly contradicts what the Court had presumed to be true, a stubborn adherence to precedent would be a perverse dynamic. More importantly, the Court may conclude that the fundamental values at stake compel reconsideration, even at the cost of fidelity to precedent.

The Court may instead defer to federalism principles. It can simply allow states to continue to devise their own procedural rules and to reject unanimous decisionmaking if they so choose, but it is certainly within the power of the Court to impose constitutional rules of criminal procedure that state governments would not impose upon themselves.298 Consequently, the Court could adopt the policy that nonunanimous decisionmaking is a procedural frontier that states may not cross. Of course, courts should exercise judicial lawmaking with caution.299 The Court should not lightly encroach upon the power of state legislatures to formulate rules that govern the criminal trials of their citizens. Given the constitutional consequences of inaction, however, the Court may need to take a new, hard look at the adoption of

296 Indeed, the Apodaca majority made clear its assumption that the unanimity requirement did not "materially contribute" to the exercise of the jury's common-sense judgment. Apodaca, 406 U.S. at 410.
297 For discussion of the concept of "legislative fact" and the role it may play in constitutional adjudication, see Kenneth Culp Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 402 (1942); and Peggy C. Davis, "There Is a Book Out...": An Analysis of Judicial Absorption of Legislative Facts, 100 Harv. L. Rev. 1539 (1987).
299 See, e.g., Peggy C. Davis, supra note 297, at 1600.
majority rule. Assuming that the Court's democratic aspirations are genuine, a re-examination of these earlier decisions in order to assess the new legislative facts seems particularly compelling.

Then, too, suppose that the Court's expressions of democratic ideals are disingenuous. The Court's decisions to outlaw exclusion from jury service could have meant to provide only nominal assurance of representation, rather than an actual commitment to more robust participation. If the Court has retreated from the deliberative ideal it previously embraced, then it may ignore the new empirical data.\textsuperscript{300} But if we take the Court at its word — that it adheres to the principle that the deliberative process intends to encourage jurors to hear and consider competing perceptions of events rather than to focus solely on gathering a sufficient number of votes — then the appropriate course of action seems clear. The Court must determine whether it can simultaneously honor that deliberative ideal and still continue to tolerate majority rule. Because the empirical evidence shows that these two concepts cannot peaceably coexist, the Court should prohibit nonunanimous decisionmaking.

2. Moving Beyond Assumption in Drawing Constitutional Lines. — Is there any basis for cautious optimism that the Court may prove amenable to treating new jury research as sufficient reason to reconsider its view regarding nonunanimous decisionmaking by juries? In other contexts the Court has expressed reservations about the probative weight of social science data.\textsuperscript{301} Furthermore, the Court continues to adhere to principles of federalism in allowing states to experiment with novel approaches in the criminal justice system. Nonetheless, there is reason to believe that the Court may be willing to confront the new evidence squarely. In recent years the Court has demonstrated a willingness to resist states' efforts to make fundamental changes in the jury's component parts. This has occurred in cases where parties have presented empirical evidence that such alterations could undermine the goal of eliminating barriers to full participation.

The Court's jurisprudence on the appropriate minimum size of the jury most clearly reveals the influence of social science data on its thinking. The Court's initial analysis of this issue appeared in Williams v. Florida,\textsuperscript{302} in which the majority concluded that to reduce the traditional twelve-person jury to six would not violate the Sixth Amendment, because the reduction would not affect the quality of de-

\textsuperscript{300} See, e.g., Abramson, supra note 9, at 115–39; Cammack, supra note 83.

\textsuperscript{301} See, e.g., McCleskey v. Kemp, 481 U.S. 279, 291–92, 313 (1987) (holding that a statistical study showing racial disparities in the application of the death penalty did not render the defendant's death sentence unconstitutional).

\textsuperscript{302} 399 U.S. 78 (1970).
liberations.\textsuperscript{303} Also, despite its emphasis on the need to obtain a representative cross-section of the community so as to ensure the jury's independence, the Court concluded that a 50\% reduction in the size of the petit venire would not undermine this ideal.\textsuperscript{304} At the time, the Court had only limited data from which to assess the impact of such a change.\textsuperscript{305} A wealth of scholarly criticism and a flurry of jury studies followed the Williams decision, raising questions about the Court's analysis.\textsuperscript{306}

So the Court responded. Eight years after Williams it re-examined in Ballew v. Georgia\textsuperscript{307} the impact of reduced jury size upon the quality of deliberation. In that case the Court relied on empirical studies in declaring a five-person jury unconstitutional in a criminal trial.\textsuperscript{308} The Court candidly acknowledged that the jury studies upon which it then relied provided the only basis "besides judicial hunch" to determine whether continuing to decrease the size of the jury would affect the jury's ability to fulfill its Sixth Amendment mandate.\textsuperscript{309} It observed that a reduction in size below six jurors seriously impairs the purpose and operation of the jury in a criminal trial. The Court stated that smaller juries are less likely to engage in effective group deliberation or to produce accurate results.\textsuperscript{310} More importantly, the Court used this decision as an opportunity to reiterate its own normative agenda: to promote the representation of divergent community views and the mitigation of juror bias.\textsuperscript{311}

The Court's receptiveness to jury studies in Ballew is encouraging. Indeed, nonunanimous decision rules may be prime candidates for reconsideration, particularly as the Court in 1979 indicated a willingness to take a closer look at majority rule. In Burch v. Louisiana,\textsuperscript{312} the Court considered whether Louisiana could employ nonunanimous decisionmaking in six-member juries and concluded that the rule in that context violated the Sixth Amendment.\textsuperscript{313} Recognizing that majority

\textsuperscript{303} See id. at 100.
\textsuperscript{304} See id. at 100-03.
\textsuperscript{305} Scholars have suggested that the Court misinterpreted the data that did exist. See, e.g., Hans Zeisel, \ldots And Then There Were None: The Diminution of the Federal Jury, 38 U. CHI. L. REV. 710 (1971).
\textsuperscript{307} 435 U.S. 223 (1978).
\textsuperscript{308} See id. at 235-39.
\textsuperscript{309} Id. at 232 n.10.
\textsuperscript{310} See id. at 232-34.
\textsuperscript{311} See id. at 236-37.
\textsuperscript{312} 441 U.S. 130 (1979).
\textsuperscript{313} See id. at 134.
rule may endanger vigorous deliberation, the Court struck down its use in trials before six-member juries.\textsuperscript{314} Although the Court did not take this opportunity to apply the same analysis to twelve-member juries or to overrule \textit{Apodaca} or \textit{Johnson}, it did recognize the central principle that robust debate among jurors gives substance to the right to a jury trial.\textsuperscript{315}

Majority rule would foreclose such robust discussion. The absence of perspectives of people of color and women could skew the jury’s deliberations and subsequent verdict. The winnowed-down majority would be less likely to represent the community from which the jury was drawn. The practical effect of adopting nonunanimous voting is to undermine fundamental practices and principles the Court has endeavored to protect. By allocating disproportionate decisionmaking authority to unrepresentative segments of the population, nonunanimous voting could deny the right of all citizens to share in the administration of justice. It can also prevent the jury from serving in its prophylactic roles as a shield against bias and as a check on prosecutorial power.\textsuperscript{316}

These effects are not limited to individual criminal trials. The jury could suffer as an institution from the adoption of this decision rule. If nonunanimous decisionmaking gives insular majorities the power to decide cases without considering the diversity of community views, then this rule could undermine public confidence in the fairness of verdicts. Furthermore, if — as empirical evidence suggests — the rule leads jurors to engage in purely verdict-driven deliberations, the likelihood of a hasty and ill-considered decision increases. As majority jurors silence or ignore dissenting perspectives, evidence may not receive the rigorous scrutiny our system of justice expects and demands. Given the Court’s lack of tolerance for jury mechanisms that thwart the value of access, the Court may be receptive to revisiting and perhaps overruling its earlier decisions granting states permission to experiment with nonunanimous decisionmaking.

\textbf{B. Acknowledging Empirical Data in Deciding Whether to Adopt Legislation Permitting Nonunanimous Decisionmaking}

Although courts are, of course, the arena for adjudication of the constitutional dimensions of majority rule in jury decisionmaking, the central forum for discussion of this practice in recent years has been the state legislature. Given that the Supreme Court has sanctioned

\textsuperscript{314} See \textit{id.} at 138 (basing its conclusion on "much the same reasons" as in \textit{Ballew}).

\textsuperscript{315} See \textit{id.} at 133–37 (citing Williams \textit{v. Florida}, 399 U.S. 78, 86 (1970); \textit{Apodaca} \textit{v. Oregon}, 406 U.S. 404, 410, 412 (1972); and \textit{Ballew} \textit{v. Georgia}, 435 U.S. 223, 239 (1978)).

\textsuperscript{316} See \textit{Taylor} \textit{v. Louisiana}, 419 U.S. 522, 530 (1975).
state experimentation with majority rule governing twelve-person juries, states have correctly concluded that they can implement such proposals free of constitutional problem. In light of the empirical evidence, however, such statutes may be at odds with the principles upon which our system of government rests. If the legislature genuinely embraces democratic principles, then data showing that majority rule excludes individuals from participation should, at least, give rise to legislative concern.

Legislators should take care to consider the institutional impact of adopting a decision rule that so patently privileges mainstream sentiments. In the last decade, the nation has witnessed the social and political upheaval triggered by verdicts of unrepresentative juries. In such cases, part of the public scorns the jury’s voice as false. Especially when a case implicates race, gender or both, the absence of a diversity of perspectives fosters a public perception of unfairness and diminishes the likelihood of public acceptance of the verdict. If we expect the criminal jury system to legitimize the government’s imposition of punishment, then legislators should avoid devices that threaten to undermine the public’s confidence in both the jury’s judgment and the legitimacy of the system as a whole.

High-profile cases provide the clearest examples. As the public analyzes such trials, it attempts to discern a broader message about the evidence, the verdict, and the justice system. To the extent that the public perceives a gap between its evaluation of the events and the jury’s conclusions, it will reject a verdict as unacceptable even though a majority of jurors favors it. Particularly in hotly-contested cases, some segment of the population will inevitably disagree with the outcome. But if the decisionmakers reflect a fair cross-section of the community, a larger segment of society will likely support their judgment. By assuring a dissatisfied public that the verdict has the assent

317 The riots that followed the 1991 acquittal of the Los Angeles police officers involved in the beating of Rodney King are one such example. See M. Shanara Gilbert, An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases, 67 TUL. L. REV. 1855, 1858 (1993) (noting that the exoneration of officers by a jury with no African American representation subverted faith in the potential for fairness in the criminal justice system); Benjamin L. Hooks, NAACP National Office Speaks out on Rodney King Verdict Crisis, Apr.–May 1992, at 2 (“We are convinced that the change of venue that produced an all-white jury, and Mr. King’s race were major factors in the acquittal.”).

318 In Georgia v. McCollum, 505 U.S. 43 (1992), the Court held that the use of peremptory challenges to exclude African Americans violated the Fourteenth Amendment. See id. at 59. In so doing, the Court recognized that in trials in which race is a factor, “emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in [such cases].” Id. at 49.

319 The public may likewise reject unanimous verdicts of unrepresentative juries. However, a nonunanimous verdict issued along racial lines is particularly corrosive because it highlights — and perhaps exacerbates — racial divides on issues of justice.

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of a representative sample of the population, controversial decisions may become more palatable. Indeed, the public may then limit its disapproval to complaints about the wisdom of individual jurors rather than the wisdom of a jury system. As criminal cases continue to track and unearth the depth of this country's racial and gender divides, maintaining procedures that emphasize inclusion seems politically advisable.

Under a majority-rule regime, jury decisions become more susceptible to attack. The individual most obviously at risk under majority rule is the accused: if the majority votes to convict, then the verdict could result in the accused's loss of liberty, with attendant costs to society. But the public loses as well when the majority votes to acquit in a case in which a unanimity scheme would have yielded more extended discussion and ultimately a conviction. Equally troubling is the possibility that majority rule may relieve individual jurors of the burden of independent thought. Rather than push themselves to debate and discuss all of the relevant issues raised in a given case, jurors may assume more passive roles under a majority rule. In the safety of a group, individual jurors may feel decreased responsibility for the justice of the case outcome. Unless jurors must consult with one another to gain consensus, they may find it easier to convict an accused whose perspective and circumstances they have failed to understand. Particularly in a criminal case, in which a defendant may forfeit her liberty or life, fairness mandates that jurors have the structural power to exercise individual judgment.\^320

1. Shifting the Focus from Outcome to Deliberation. — The distinctive and defining feature of the American jury is its deliberative character. By virtue of their focus on the small percentage of cases in which juries are unable to reach a unanimous verdict, advocates of majority rule have elevated outcome over process. But this emphasis on speed does not necessarily make the jury system more just. To the extent that the process is more representative and enhances genuine deliberation, decisions — or failures to reach decision — are good approximations of substantive justice.

Implementation of decision rules that encourage divided verdicts can do little to improve the jury system's image. Because the criminal justice system may generally be reluctant to adopt procedures that formally mandate an increase in the representation of people of color and women on juries,\^321 maintaining a decision rule that offers diverse

\^320 See Robert M. Cover, Violence and the Word, 95 YALE L.J. 1601, 1615 (1986) ("Persons who act within social organizations that exercise authority act violently without experiencing the normal inhibitions or the normal degree of inhibition which regulates the behavior of those who act autonomously.").

representatives on the jury an opportunity to vote their views and to affect the outcome seems the best hope for maintaining the jury system's legitimacy in the eyes of the public. To the extent that the jury functions as a "school for civic duty" in which jurors learn about the responsibilities of citizenship, unanimity is better positioned to convey the message that the jury system demands thoughtful participation of every citizen.

Still, the quest for an interactive, wholly integrated jury may be quixotic. It is nonetheless a worthwhile pursuit. The trial—particularly in criminal cases—tends to be a drama that the public often attends and from which it forms judgments about our justice system. While majority rule may indeed reflect what we commonly encounter in a political context, its potential silencing of the voice of difference in a legal context ultimately sets the wrong example and sells justice short.

Of course, even a unanimous voting scheme does not ensure meaningful juror interaction. The deliberative ideal may remain aspirational. In a jury system requiring consensus, one or more individuals' refusal to engage in the necessary deliberative exchange can disrupt the process. Similarly, a single juror with an idiosyncratic view of the evidence can provoke a mistrial. But such occurrences may be less frequent than is imagined. Early research by Kalven and Zeisel demonstrates that juries rarely deadlock because of one or two intractable jurors. More recent research confirms their findings, showing that deadlocks caused by one or two holdouts usually involve juries that had a much larger number of dissenters at the outset of deliberations. As these researchers have discovered, jury division in cases of this sort often reflects genuine disagreement over the weight of the evidence.

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324 See KALVEN & ZEISEL, supra note 61, at 462–63.
325 See HASTIE, PENNOD & PENNINGTON, supra note 10, at 166–67.
326 See id.; Michael J. Saks, What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?, 6 S. CAL. INTERDISCIPLINARY L.J. 1, 41 (1997). This conclusion finds support even in the initial trial of the Menendez brothers, which drew heavy criticism from opponents of the unanimity rule. The jury divided widely on the appropriate verdict. For example, on the charge that Lyle Menendez had killed his mother, three jurors wanted first-degree murder convictions, three supported second-degree murder, and the remaining six jurors favored convictions of manslaughter. See Alan Abrahamson, Lyle Menendez Case Ends in a Mistrial; D.A. to Retry Brothers, L.A. TIMES, Jan. 29, 1994, at A1. One cannot possibly attribute this breakdown to the eccentricities of the individual jurors. Rather, it appears to reflect a deep disagreement
Similarly, jurors may engage in block voting. Even though judges instruct jurors to exercise individual judgment, there may be occasions when extralegal factors influence jurors' decisions. Representation voting seems at odds with the ideal of robust deliberation to reach a just result. But again, this problem may not occur as frequently as some claim or fear. Still, there may be some inaccuracy — descriptive and normative — to the suggestion that jurors never act in a representative capacity. To some degree, what contributes to the unique value of having people of color and women on a jury is that they do bring a certain representational capacity. Often — although not always or exclusively — people of color and women will be the jurors who object to the foreclosure of perceptions or issues relating to gender or race. This practice of taking a stand in favor of a point of view or raising issues that others might have missed manifests an element of representativeness. Such a representative role may occasion some dysfunction, of which block voting is an example. But these costs seem less troubling when compared to the costs of omitting these perspectives entirely.

2. Redefining the Language of Legitimacy. — Proponents of majority rule tend to cast the general public as losers under the unanimity regime. Advancing rhetoric that equates majority opinion with justice, proponents argue that a hung jury denies the public the justice to which it is entitled. But the raw numbers suggest that the problem may be overstated. In the last decade in Los Angeles Superior Court, where the O.J. Simpson case was tried, there have been unanimous verdicts in 87% of the cases that proceeded to trial. During that same period, the frequency of hung juries has declined. In the early 1980s, 15.5% of cases tried ended in hung juries. Even with the decrease in guilty pleas and increase in trials since the enactment of "Three Strikes and You're Out" legislation in Los Angeles, the number of hung juries dropped to 13%. Given that only 5% of the felonies charged in Los Angeles actually proceed to trial, hung juries do not occur in over 99.35% of the felony cases. As 99.5% of misde-
meanor cases settle without trial, hung juries constitute an infinitesimal percentage of such cases.\textsuperscript{332}

Proponents of majority rule herald it as a more efficient method for achieving justice in criminal trials. But, as empirical evidence confirms, speed of judgment does not necessarily correlate with justice. Indeed, despite claims that majority rule offers a more efficient method of managing justice, that efficiency will necessarily be measured only in aggregate rather than in the individual case.\textsuperscript{333} The ostensible paragon of efficiency actually will produce inefficient outcomes in some instances. Particularly because the impetus for the rule seems to be the amelioration of perceived inefficiencies that occur in less than 15\% of cases that proceed to trial, to undertake a change in the decision rule affecting all cases seems a disproportionate remedy. And because the primary goal of the jury system is the generation of just verdicts rather than statistically probable results,\textsuperscript{334} majority rule appears to achieve marginal efficiency benefits in the face of substantial social costs.

In the end, the fear of hung juries seems exaggerated. Proponents of majority rule regard hung juries as avoidable miscarriages of justice. An alternative view is that the occurrence of hung juries serves to prevent such injustices. By voicing genuine dissatisfaction with the evidence, jurors can signal to prosecutors that additional evidence is necessary to secure a conviction. Hung juries often simply reveal divided community sentiment, a natural and inevitable by-product of a system that asks jurors to deliver the judgment of the community.\textsuperscript{335} Perhaps the move toward majority rule actually indicates a fear of such societal divisions.\textsuperscript{336}

\textsuperscript{332} The number decreases still further when one considers that many hung juries involve relatively even splits among jurors, a result which would produce hung juries even under the typical majority rule proposal (which permits a 10-2 or 9-3 majority to issue a verdict).


\textsuperscript{334} See Nesson, \textit{supra} note 323, at 1363–68 (arguing that the goal of verdicts is not to reach a decision based on the laws of probability, but to issue a statement about the event that the public can accept).

\textsuperscript{335} See Tracey L. Altman, \textit{Note, Affirmative Selection: A New Response to Peremptory Challenge Abuse}, 38 STAN. L. REV. 781, 810 (1986) (arguing that "hung juries may more accurately reflect the divided community sentiment").

CONCLUSION

As the population undergoes dramatic demographic changes, we can expect a proliferation of "cultural" defenses that may push the jury system beyond its own frame of reference in order to grapple with difference. To the extent that we silence members of the jury who may otherwise offer insight into other cultures, we discourage communal connections and cross-cultural understanding. In addition to its practical role as factfinder, the jury serves an important symbolic function: it adds legitimacy to the justice system by providing citizens with the "security... that they, as jurors, actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse." Particularly in criminal cases where loss of liberty or even life is at stake, the jury system should employ procedures that ensure that jurors cast meaningful votes. The public expects its juries to render fair judgments that will ultimately speak on its behalf.

Whether it is the Supreme Court or a legislative body that ultimately confronts the shortcomings of the majority rule approach to jury decisionmaking, lawmakers should somehow acknowledge the fundamental flaws in reasoning that produced Johnson's and Apodaca's sanction of nonunanimous jury verdicts. The operation of majority rule does interfere with the participation of people of color and women. Its adoption should trigger the same concerns that prompted the Court to outlaw the wholesale exclusion of jurors who happen to be members of these groups. The jury system must find ways to build consensus and to encourage expression of and debate about divergent views. Deliberation and group agreement help to ferret out extreme views and to ensure that all jurors are engaged. By contrast, the growing disenchantment with the justice system will only become more pronounced if it adopts a decisionmaking rule that in essence excludes segments of the jury and, by extension, segments of the community.

338 See, e.g., James J. Singh, Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law, 108 YALE L.J. 1845 (1999) (arguing that the exclusion of cultural evidence from the doctrine of provocation will lead to violations of the antidiscrimination principle).