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THE ROLE OF RACE IN JURY IMPARTIALITY AND VENUE TRANSFERS

DARRYL K. BROWN*

I. INTRODUCTION

A. Two Cases in Point

In 1990, Washington, D.C., Mayor Marion Barry was indicted on fourteen charges of drug possession and perjury arising from a federal investigation that yielded a videotape of Barry smoking crack cocaine in Washington's Vista Hotel.1 Barry and his attorney chose not to seek a change of venue for the trial, despite overwhelming pretrial publicity about the case that included constant replays of the incriminating videotape on local television stations.2 The jury, drawn from the District and comprised mostly of African Americans,3 convicted Barry, an African American, of only one misdemeanor possession charge—not the one arising from the videotape.4 The verdict was generally viewed as a victory for the defendant.5

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1. See Michael York & Tracy Thompson, Barry Guilty on 1 Count, Cleared on 1; Mistrial Declared on 12 Other Charges: Government Faces Tough Decision Over Whether to Continue Case, WASH. POST, Aug. 11, 1990, at A1.

2. See Tracy Thompson & Jill Nelson, Tape Furor Riles Barry Prosecutors: Jury Selection Moves Slowly in Mayor's Trial, WASH. POST, June 6, 1990, at A1 (noting the effect of the publicity on potential jurors); Saundra Torry, Barry Jurors Eat, Sleep in Shadow of the Law; Marshals Monitor Panelists' Every Move, WASH. POST, July 30, 1990, at A1 (noting that the jury in the Barry trial was sequestered because of publicity).

3. See Steve Twomey & DeNeen Brown, Barry Guilty on 1 Count, Cleared on 1; Mistrial Declared on 12 Other Charges: Panel Split 6 to 6 on Vista Charges, One Juror Says, WASH. POST, Aug. 11, 1990, at A1 (noting that the majority of the jury was black); Tracy Thompson & Barton Gellman, Chosen to Sit in Judgment: 12 of 18 on Panel are Black Women, WASH. POST, June 19, 1990, at A1 (noting that of the 18 jurors and alternates in the Barry trial, 15 were women, 13 were black).

4. See Twomey & Brown, supra note 3, at A1 (noting that the jury found Barry guilty of one drug possession charge, found him not guilty of one drug possession charge, and was hung on the remaining nine drug charges and three perjury charges); see also York & Thompson, supra note 1, at A1 (noting that Barry was not convicted of the charge that was based on a videotape that showed him smoking crack cocaine).

5. See Keith Harriston, Reaction to Verdict is Another Hung Jury; Regional Response is Sharply Divided, WASH. POST, Aug. 11, 1990, at A10 (noting that "reactions [to the Barry verdict] came mostly along racial lines, with blacks generally supporting the mayor and whites disappointed by the verdict"); Jill Nelson, After the Verdict, Food for Thought, WASH.
In April 1992, four white Los Angeles police officers were tried in a California state court on several charges arising from their beating of a black motorist, Rodney King. The defendants had sought and won a venue change from Los Angeles County on the grounds that publicity, including a videotape of the beating that had been widely replayed on Los Angeles television, had prejudiced the vicinage. The jury from suburban Ventura County, which had no African-American members, acquitted the defendants of all charges but one, on which they could not reach a verdict.

These two cases raise several important issues about the nature of impartial juries and the limits of the requirement that the jury represent a fair cross section of the community and about the role of race and the venue change procedure in achieving jury impartiality. Both cases demonstrate that juries representative of their jurisdictions may nevertheless be homogeneous and unrepresentative of the broader regional or national populace; that such juries can cause public skepticism of the criminal justice system even though they meet Sixth Amendment requirements; that the community from which a jury is

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7. See id. (discussing the grant of the defendants' request for a change of venue on November 26, 1991, to Simi Valley, Ventura County, which has a black population of 1.5%).

8. See id. (noting that the jury was composed of six men and six women, none of whom were black).

9. See Lou Cannon, National Guard Called to Stem Violence After L.A. Officers' Acquittal in Beating; Justice Dept to Review Case, WASH. POST, Apr. 30, 1992, at A1 (noting that three officers were cleared of all charges, and one officer was found not guilty of all charges except one, on which the jury was hung).

10. One could add the homicide trial of Miami police officer William Lozano. In 1989, Lozano fatally shot a black motorcyclist who was fleeing police. The cyclist's passenger was killed in the resulting crash, and Lozano was convicted of two counts of manslaughter. See Tony Pugh, A Taut Tallahassee Waits as Lozano Trial Approaches, MIAMI HERALD, Mar. 1, 1993, at 1A. The convictions were overturned, however, after a Florida appeals court concluded that Lozano should have been granted a change of venue from Miami, where the incident—and riots sparked in response—garnered much pretrial publicity. Lozano v. State, 584 So. 2d 19, 20-23 (Fla. Dist. Ct. App. 1991). On remand, the trial was initially transferred to predominantly white Orlando. In the wake of the verdict in the Rodney King-beating case, the venue was again changed to Tallahassee, which has a 24% African American population, in an effort to reduce the chances of an all-white jury. See Pugh, supra, at 1A. Subsequently, the venue was changed yet again, back to Orlando, where a jury of two Hispanics, one African American, and three non-Hispanic whites acquitted Lozano. See William Booth, Law Officer is Acquitted in Florida, WASH. POST, May 29, 1992, at A1.

11. For discussions of the trial of the officers who beat Rodney King, see Cannon & Smith, supra note 6, at A29 (noting that a large majority of Americans in a Washington
drawn can substantively affect the verdict; and that defendants employ
the change of venue rules in recognition of these facts.

B. An Overview of the Constitutional Jury Requirements

Under the Sixth Amendment to the Constitution, criminal de-
fendants have the right to be tried by an impartial jury selected from a
fair cross section of the community. Defendants also have separate
rights, under Article III of the Constitution and the Sixth Amend-
ment, either to have their trial conducted in the community in which
the crime was committed or to have the trial moved to a different
venue if pretrial publicity or other factors render an impartial jury
improbable in the original venue. The intersection of these doc-
trines—further complicated by the Batson doctrine, which protects
and hinders both sides in a criminal case from the use of racially
based peremptory strikes in jury selection—raises puzzling issues

Post-ABC poll thought that the verdict in the King beating case was wrong); Lynne Duke,
Blacks and Whites Define Word 'Racism' Differently, WASH. POST, June 8, 1992, at A1 (listing
poll results which found that 25% of whites and 78% of blacks thought the verdict "shows
that blacks cannot get justice in this country"); Sue Ann Presley, Case Casts Long Shadow,
WASH. POST, May 1, 1992, at A1 (stating that the verdict "raise[s] fundamental questions
about race relations and criminal justice in this country"); DeNeen L. Brown & Pierre
Thomas, In D.C., Some Link Verdict to Racism, Police Power, WASH. POST, Apr. 30, 1992, at A25
(reporting citizen sentiments such as, "Racism is alive and thriving in this country. This [King] case symbolizes that.").

For details of the verdict in the trial of Mayor Barry, see Harriston, supra note 5, at A10
(noting that "reactions [to the verdict] came mostly along racial lines," and reporting that
one (presumably white) citizen stated that the Barry verdict "was a miscarriage of justice"
and that "[t]he jury was obviously poorly selected. They should have had a change of venue
to Dubuque, Iowa"); and quoting one (presumably black) citizen as stating, "[b]lacks at this
particular time had an opportunity to help a black man, and that's what they did....
[T]hat's justice."); Nelson, supra note 5, at C4 (reporting comments by black citizens that
generally were in favor of the Barry verdict, and discussing it in explicitly racial terms and
with reference to the treatment of blacks by the American justice system).

from a representative cross section of the community is an essential component of the
Sixth Amendment right to a jury trial."); see also 28 U.S.C. § 1861 (1988) ("All litigants in
Federal courts entitled to trial by jury shall have the right to grand and petit juries selected
at random from a fair cross section of the community in the district or division wherein the
court convenes.").

Parties in many civil proceedings, of course, have a right to a jury trial under the
Seventh Amendment. The Seventh Amendment provides in part: "In suits at common law
... the right of trial by jury shall be preserved ..." U.S. CONST. amend. VII. Much of the
analysis in this Article may apply to civil juries as well, but the Article will concentrate on
the Sixth Amendment and the criminal context.

13. See Swain v. Alabama, 380 U.S. 202 (1965) (holding that an accused has a Sixth
Amendment right to have his trial in the county where the offense was committed); Rideau v.
Louisiana, 373 U.S. 723 (1963) (holding that a defendant has a right to a change of venue
if extensive publicity prejudices the potential jury pool).

14. See infra text accompanying notes 94-111.
about the nature of the jury impartiality and collective community judgment that is guaranteed to the criminal defendant. Central to those issues is the perpetually thorny problem of the relevance of race in the criminal justice system.

The underlying presumption of the fair cross section requirement is that a defendant's fellow citizens will judge his case fairly and neutrally only when those citizens represent the entire community and not simply one segment of it. Only through an impartial jury can a defendant be assured that the case will be determined by the "commonsense judgment of the community," a jury's impartiality, however, depends upon its representativeness. That presumption, of course, rests on the idea that members of one racial (or gender) group in the community think, reason, and judge differently than members of other groups, and that the outcome of a trial could vary if it were determined by only one segment of a community—for example, only men, or only whites. Consequently, a jury should represent a balance of distinct segments of the community, including gender, race, or (though the law is less protective of this basis) socio-economic class.

Restrictions on racially motivated peremptory strikes, arising from the Equal Protection Clause rather than the Sixth Amendment, safeguard the rights of both defendants and potential jurors not to have citizens excluded from juries on the basis of race. The line of cases beginning with *Batson v. Kentucky* and restricting race-based peremptory challenges includes relatively little discussion of race as a factor in obtaining a fair cross section on the jury panel. In fact, in light of *Holland v. Illinois*, *Batson*’s contribution to maintaining a fair cross section on the petit jury is only a secondary purpose of the doctrine. Nevertheless, the *Batson-Powers-Edmonson-McCollum* line of cases

15. See infra notes 28-49 and accompanying text.
16. See *Taylor*, 419 U.S. at 530.
shows an underlying substantive preference for racially diverse juries and implicitly recognizes the effect of excluding a racial group on the jury's fact finding ability.\textsuperscript{22}

Finally, venue guarantees—and change of venue rules arising from the Due Process Clause—safeguard a fair jury for the defendant, but only in a conceptual framework that makes no reference to the concerns implicated in the fair cross section and peremptory strike doctrines. Modern change of venue doctrine disregards the composition of the communities to and from which the trial is being moved and seeks only to ensure that, regardless of the composition of that community, the jury pool is sufficiently impartial by virtue of being untainted by factors such as pretrial publicity, personal acquaintance with the defendant or victim, or racial prejudice.\textsuperscript{23} The venue provisions of Article III and the Sixth Amendment guarantee a defendant that his trial will be held in the jurisdiction that encompasses "the scene of the crime" and with a jury selected from that locale.\textsuperscript{24} Those guarantees recognize the substantive importance, and distinct character, of the judgment of particular communities. The constitutional provisions resulted from the realization that some communities will judge defendants differently than others, even if each of the communities was impartial in the Sixth Amendment sense. These venue provisions recognize the distinction between impartial judgment and the "commonsense judgment of a community."\textsuperscript{25}

The object of this Article is largely descriptive: to explore the intersecting concepts of impartiality and "commonsense judgment" in the context of the overlapping doctrines of vicinage, venue, and fair cross section. This Article will examine the implications of the acknowledged role race plays in jury impartiality and judgment, with the aim of contributing to a deeper understanding of jury impartiality than that which often is employed; it will demonstrate that the jurisprudence of jury impartiality has implicitly rejected a traditional objectivist notion of fact finding and jury judgment, and instead is understood better through an antifoundationalist approach to truth and inquiry.

\textsuperscript{22} See infra notes 28-49 and accompanying text.

\textsuperscript{23} Id.

\textsuperscript{24} "The Trial of all Crimes . . . shall be held in the State where the said crimes shall have been committed . . . ." U.S. Const. art. III, § 3; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI.

\textsuperscript{25} Taylor v. Louisiana, 419 U.S. 522, 530 (1975).
This Article also will address one prescriptive matter in the doctrine of venue change that arises from its analysis. In brief, this Article argues that Sixth Amendment jurisprudence recognizes that juries can be constitutionally impartial and still reach verdicts very different from the verdicts that juries of other compositions (i.e., representative of other communities) would likely reach. The fair cross section, peremptory strike, and jury impartiality doctrines acknowledge that demographic distinctions between venues—especially race—matter in how jurors view evidence and render a verdict.\textsuperscript{26} The substantive perspective of the jury is likely to change when a trial is moved to a venue having substantially different racial demographics. Therefore, change of venue doctrine should take into consideration the demographic composition of the original and alternative venues and should seek to find a rough match between the latter and the former.\textsuperscript{27}

Part II of this Article will examine the jurisprudence of the Sixth Amendment’s fair cross section requirement and its underlying theory of jury impartiality. Part III will analyze the \textit{Batson} doctrine’s limitations on jury selection and how the implications of that jurisprudence inform the notion of impartiality. Part IV will look at the venue and

\textsuperscript{26}See infra text accompanying notes 28-49.

\textsuperscript{27}One factor criminal actors might calculate is the likely community reaction to their crime—whether the community will have an understanding of or tolerance for their actions. Legislators make a similar calculation when they conclude that tougher criminal laws will have a deterrent effect; they assume that potential offenders assess the risk of harsher penalties in the jurisdiction and decide to commit their crimes elsewhere, or not at all. If such thoughts do occur to the criminal actor, then changing the venue of a trial to a completely different type of community for a reason beyond the defendant’s control (such as the widespread publicity his case may have received in the community) deprives him of judgment by the community on which his calculations were based and which was the actual victim of his criminal actions. Cf. \textsc{Jon M. Van Dyke}, \textit{Jury Selection Procedures: Our Uncertain Commitment to Representative Panels} 7 (1977) (“The Constitution thus firmly established an individual’s right to demand the community’s sanction—expressed in the jury’s verdict . . . .”).

However doubtful it may be that offenders make such a calculation before committing crimes, the Constitution protects that reliance in two separate provisions—Section Two of Article III and the Sixth Amendment. Many states make the same guarantee. See, \textit{e.g.}, State v. Mendoza, 258 N.W.2d 260 (Wis. 1977) (holding that only a defendant may waive the right to be tried in the venue where the crime was committed). Defendants may be particularly interested in, and may base the decision to waive venue upon, a comparison of the racial composition or other demographics of the original venue with those of the venue to which the case could be transferred. See, \textit{e.g.}, \textit{id.} at 268 (“[The] defendant . . . consciously determined that he wished to be tried by a jury in Milwaukee . . . [based on] the desire to have jurors from the same environment in which the crime took place chosen from a pool having a Mexican-American community.”).

Florida recently enacted a statute requiring that, upon a change of venue order, the trial court must give priority to the alternative county with a demographic composition closest to the original venue. \textit{See} 1993 Fla. Sess. Law Serv. ch. 99-225 (West).
vicinage guarantees of Article III and the Sixth Amendment and at how the jurisprudence of those provisions acknowledges the connection between a jury's social origin and the substance of its judgment. Part V draws on the insights of antifoundationalist theory for a description of concepts central to the jury—fact finding, interpretation, truth discovery—and focuses in particular on the salience of race in jury decisionmaking and factual interpretation generally.

II. THE FAIR CROSS SECTION REQUIREMENT AND JURY IMPARTIALITY

A. Purposes of the Fair Cross Section Requirement

The fair cross section requirement arises from the Sixth Amendment's guarantee of an impartial jury, yet it was not until the 1940s that the Supreme Court identified "the concept of the jury as a cross-section of the community." It took another two decades for a meaningful doctrine to evolve around that idea and for the Court to articulate a conception of an "impartial jury" as a body that fairly represents the community.

28. For an example of a state analog to the Sixth Amendment fair cross section clause, see Ky. Const. § 11.

29. "The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does)." Holland v. Illinois, 493 U.S. 474, 480 (1990). The Holland court also explained:

The fair cross section venire requirement is obviously not explicit in this text [of the Sixth Amendment], but is derived from the traditional understanding of how an "impartial jury" is assembled. That traditional understanding includes a representative venire, so that the jury will be, as we have said, "drawn from a fair cross section of the community."

Id. (quoting Taylor, 419 U.S. at 527 (emphasis added)).

Justice Marshall believed that the fair cross section doctrine arises not from the first word in the phrase "impartial jury," but from the second. "[T]he fair cross section requirement is not based on the constitutional demand for impartiality; it is founded on the notion that what is denominated a 'jury' is not a 'jury' in the eyes of the Constitution unless it is drawn from a fair cross section of the community." Id. at 814 (Marshall, J., dissenting).

30. Glasser v. United States, 315 U.S. 60, 86 (1942). Two years earlier, the Court stated for the first time that a jury must be "a body truly representative of the community." Smith v. Texas, 311 U.S. 128, 130 (1940); see also Toni M. Massaro, Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C. L. Rev. 501, 532-33 (1986).

31. See Akhil R. Amar, Note, Choosing Representatives by Lottery Voting, 93 Yale L.J. 1283, 1287-88 (1984) (discussing the older vision of the jury as a nonrepresentative body composed of "handpick[ed] jurors of exemplary moderation and wisdom" and contrasting it with the modern vision of a body fairly representing all segments of a community). Whether the cross section requirement serves to facilitate impartiality, or is essential for a body to be called a "jury" at all, has been a matter of debate on the Court. See Holland, 493 U.S. at 490 (Marshall, J., dissenting).

The defendant's right to a fair cross section of jurors, and the citizens' responsibility and right to participate in juries, is reiterated in federal law. See 28 U.S.C. § 1861 (1981)
The fair cross section requirement expanded the concept of jury impartiality and linked that concept to the jury's diversity and representativeness. The fair cross section doctrine presumes a jury is more likely to be impartial if it is composed of representatives of all segments and groups of the community, who together create a body capable of exercising the central ideal of the doctrine—"the commonsense judgment of the community." Bringing such judgment to bear is not possible "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.

(explaining that the Jury Selection and Service Act is based on the "policy of the United States" that an accused faces a jury from a "fair cross section of the community" and that "all citizens shall have the opportunity to be considered for service on grand and petit juries").

32. Taylor, 419 U.S. at 530. See Apodaca v. Oregon, 406 U.S. 404, 410 (1972); Williams v. Florida, 399 U.S. 78, 100 (1970); Van Dyke, supra note 27, at 9 (The "jury's legitimacy has always rested in its capacity to express fairly the community's conscience."). See generally G.K. Chesterton, Tremendous Trifles 55-59 (1930).

[T]he horrible thing about all legal officials, even the best, about all judges, magistrates, barristers . . . , is simply that they have got used to it.

. . . .

Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks [people] who know no more law than I know, but who can feel the things that I felt in the jury box . . . [W]hen it wishes anything done which is really serious, it collects twelve of the ordinary [people] standing round.

Id. at 58-59.

The other major function of the fair cross section doctrine serves the appearance of justice: the public will be more likely to retain confidence in the justice system if it sees that the system is overseen by all segments of the community. Thus, unrepresentative jury pools "create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well." Peters v. Kiff, 407 U.S. 493, 503 (1972) (Marshall, J., plurality opinion).

One should note that the fair cross section doctrine does draw its justification from the jury's primary task as that task is ordinarily described—to examine evidence, reach factual conclusions, and determine whether the defendant is guilty or not guilty. The fair cross section rule ensures that a jury can perform the larger social function of serving as a democratic check on the criminal process and its professional players. Taylor, 419 U.S. at 530.

33. Taylor, 419 U.S. at 530.

34. Peters, 407 U.S. at 503. See also Dennis v. United States, 339 U.S. 162, 183 (1950) (Frankfurter, J., dissenting) ("[O]ne cannot have confident knowledge of influences that may play and prey unconsciously upon [jurors'] judgment."); Massaro, supra note 30, at 545-46.
The Supreme Court has recognized that impartiality is not simply a matter of juror bias, narrowly defined and traditionally understood as some pretrial information about the case or acquaintance with the parties; nor is it simply a function of weeding out biased jurors (through voir dire, challenges for cause, and peremptory strikes) and keeping neutral ones. The fair cross section doctrine acknowledges that jury impartiality and judgment are products of a much more complex phenomenon than is accounted for in the ordinary concept of bias.\textsuperscript{35}

The fair cross section doctrine also reinvigorated a secondary purpose of jury impartiality. The jury not only must engage in fact finding and guilt determination,\textsuperscript{36} which itself is a complicated and subtle task,\textsuperscript{37} but also must exercise a form of community judgment that is essential to prevent government abuse of power.\textsuperscript{38} The fair cross section doctrine renewed an emphasis on the jury’s function of serving as a democratic check on the government actors who run the criminal justice system—that is, on the judges, prosecutors, and police.\textsuperscript{39} The doctrine “guard[s] against the exercise of arbitrary power” and ensure[s] that the ‘commonsense judgment of the community’

\begin{itemize}
\item \textsuperscript{35} See Massaro, supra note 30, at 545-47; see also supra notes 28-33 and accompanying text.
\item \textsuperscript{36} See Johnson v. Louisiana, 406 U.S. 356, 373 (1972) (noting that the right to “trial by jury derives from the special confidence we reposes in a ‘body of one’s peers to determine guilt or innocence as a safeguard against arbitrary law enforcement’”) (quoting Williams, 399 U.S. at 87); Massaro, supra note 30, at 510-11.
\item \textsuperscript{37} See infra notes 170-195 and accompanying text.
\item \textsuperscript{38} See Johnson, 406 U.S. at 373 (noting that the jury serves “‘as a safeguard against arbitrary law enforcement’”) (quoting Williams, 399 U.S. at 87); Williams, 399 U.S. at 100 (observing that the purpose of the jury is “to prevent oppression by the Government”).
\end{itemize}
will act as 'a hedge against the overzealous or mistaken prosecutor,'”40 and against the “‘compliant, biased, or eccentric judge.’”41 The doctrine suggests that community judgment, realized through debate among subgroups, will not share the prejudices and jaded perspectives of prosecutors or judges.42

The Supreme Court also has explained that the fair cross section requirement is important to “preserv[ing] ‘public confidence in the fairness of the criminal justice system,’ and . . . implement[ing] our belief that ‘sharing in the administration of justice is a phase of civic responsibility.’”43 Applying such a rationale signals the Court’s adoption of a revised understanding of impartiality. Formerly, to satisfy the goal of impartiality was to empanel twelve people of integrity, good character, and trusted judgment—an intentionally nonrepresentative group of a community’s best citizens.44 But both the Court and the public whose confidence it seeks to maintain gradually have reached a new understanding of impartiality that encompasses the community’s collective judgment.45 Juries composed of “leading” citizens under-represented many groups in the community and came to be recognized as holding particular, but not neutral, viewpoints.46

The fair cross section doctrine recognizes that communities comprise nonfungible subgroups, each of whose judgment is distinct and may not match the judgment of the whole.47 It rejects the idea that an unbiased individual who acts objectively and in good faith can be a neutral arbiter, fungible with any other, regardless of social origins, and instead acknowledges that individuals are distinguishable by their

41. Johnson, 406 U.S. at 373 (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).
42. See Massaro, supra note 30, at 508-10.
44. This is the premise of the “key man” system of jury selection, in which one upstanding citizen is designated to select a group of similarly qualified citizens to serve as jurors. See Castaneda v. Partida, 430 U.S. 482 (1977) (describing the Texas “key man” jury selection system).
45. Id. at 492-501 (holding that the Texas "key man" jury selection system constituted prima facie discrimination in jury selection).
46. Id.
47. See Apodaca v. Oregon, 406 U.S. 404, 413 (1972) (acknowledging that groups within a community have distinctive viewpoints that their members will represent when serving on juries: "We also cannot accept . . . that minority groups . . . will not adequately represent the viewpoint of those groups simply because they may be outvoted in the final result"); Johnson, 406 U.S. at 397 (Stewart, J., dissenting) (objecting to the fact that a nonunanimous jury verdict permits jurors to "ignore the views of fellow panel members of a different race or class").
group affiliations or social history. Twelve white men with neither connection to a case or discernable bias nevertheless are likely to reach different conclusions than twelve similarly unconnected, unbiased black women. Impartiality and community judgment, therefore, are achieved through debate among all the community's subgroups.

B. Defining the Community and the Problem of Diversity

The fair cross section doctrine emphasizes the need for diverse viewpoints on a jury and to some extent presumes a diverse community in which there are subgroups that can inform each other's perspectives and judgments. Yet the Court has never examined the definitions or boundaries of communities that are utilized by state and federal courts, even though those boundaries are a fundamental determinant of a community's diversity. Judicial districts have never had to meet any standard analogous to that which the Voting Rights Act imposes on legislative districts, although it is conceivable—if

48. Even if judges did not become "overconditioned or biased," Taylor, 419 U.S. at 530, and even if community judgment were not the normative preference, the social and group differences among individuals would justify a preference for juries over single judges.


Note, however, that if a jury were required to represent all community subgroups, and if no other criteria were available to define a "fair jury," then the cross section rule actually could harm the defendant because jurors known to be hostile to the defendant's racial group would have to be represented on the jury anyway. See id. at 547.

50. The term "community" as used in the fair cross section doctrine refers to the same population locus that the terms venue and vicinage refers to in other doctrines. While venue technically refers to the geographic area in which a trial is conducted, change of venue rules really are concerned with the population of potential jurors in a venue; that is, with the vicinage. Each of these terms is used to refer to the population base from which a jury will be selected (usually the population of a county or judicial district).

51. See supra notes 47-49 and accompanying text.

52. See Stanton D. Krauss, Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing, 64 IND. L.J. 617, 632-33 & nn. 68-71 (1989) (observing that, in obscenity cases, the Supreme Court has left open the question of whether the community that the jury represents is statewide, nationwide, coextensive with the vicinage, or defined by some other boundary); Steven I. Friedland, Race, Rap and the Community Standards Test of Obscenity: The Community of Culture, 15 NOVA L. REV. 119, 123-24 (1991).

53. It is interesting to contrast the method used in drawing judicial jurisdictional boundaries with that used to create state and federal legislative districts. Judicial boundaries are drawn without regard to the populations they define, and yet once the boundaries are set, the Constitution assumes that jury pools drawn from the districts will well represent their populations. Legislative districts, on the other hand, are drawn (and redrawn periodically) explicitly with the goal of population representation in mind, as mandated by the Constitution and the Voting Rights Act. Each voting district is designed not to be a diverse community within itself, as would be ideal with jury venues, but rather so that representatives from all the districts will combine to form a "fair cross section" in the legislature or in Congress.
burdensome—that judicial districts could be redrawn periodically to maximize demographic diversity.54

Criminal law has always been administered predominantly at the local or regional level;55 many communities defined by traditional political boundaries (usually county or city limits) lack large and identifiable subgroups of the national community,56 however, and local populations often share a comparatively limited variety of human experiences.57 Many counties, cities and federal districts are not racially diverse. Even if jury pools perfectly represent the local community, they still may be "made up of only special segments of the [larger, national] populace,"58 and as a result, "large, distinctive groups are excluded from the pool."59

Moreover, the Supreme Court has made clear that the fair cross section rule does not require representative petit juries.60 The doctrine provides only a guarantee that the procedures for creating a jury pool are designed to yield a fair cross section of the predefined local

54. It should be noted that such a project is not necessarily infeasible even if it would be somewhat burdensome. Legislative districts (and now judicial election districts as well) must be redrawn every ten years. For legislative districts, the aim usually is to give particular racial groups dominance within the appropriate districts. Conversely, the goal for the judicial districts would be to make each district more diverse. The task would be complicated by the fact that judicial districts usually maintain separate court records, and reorganizing the records with each redistricting might prove to be an administrative nightmare. But the project may not be impossible: perhaps vicinages (districts used solely for jury selection purposes) could be separated from the judicial districts designed for administrative purposes.


56. Few would demand that jury pools represent the national demographic mix, but courts sometimes have expected juries to discover and then reflect the sentiments of a national community. See Krauss, supra note 52; Multi-Venue, supra note 55.

57. At the same time, judicial districts are no more likely to encompass a diversity of culture or experience. In federal courts, the "community" usually consists of the federal judicial district or one of its divisions, and it frequently is designed with little apparent reference to demographic patterns or state political subdivisions. See 18 U.S.C. § 1863 (1988); Drew Kershen, Vicinage, 30 OKLA. L. REV. 1, 101-17 (1977) [hereinafter Kershen, Vicinage I].

58. Taylor v. Louisiana, 419 U.S. 522, 530 (1975); see also Massaro, supra note 30, at 547 (observing that a true "cross section of the 'community' could be a totally homogeneous group" known to be hostile toward a defendant's racial group).

59. Taylor, 419 U.S. at 530.

community. At two points in the process then—defining the vicinage and selecting the petit jury from a venire—the Sixth Amendment provides no protection against a nondiverse jury. Juries representative of homogeneous communities still lack certain "varieties of human experience;" when any one cognizable group is absent, "a flavor, a distinct quality is lost." Failure to provide more protection for the representativeness of petit juries further undercuts the fair cross section doctrine's ability to achieve its two main goals: permitting a diverse populace to render an impartial judgment resulting from debate among its subgroups, and maintaining public faith in the criminal justice system. The latter goal is at risk because a jury fairly representative of its vicinage nevertheless may look unrepresentative to a broader, more diverse populace. The Barry trial and the Rodney King beating trial are prime examples: both verdicts met with speculation and public criticism centering on the racial homogeneity of their juries, even though both juries fairly represented the relevant vicinage.

One explanation for the incomplete remedy that Sixth Amendment doctrine affords is that the goal of a judgment rendered by a representative group of jurors comes into tension with a separate value of the criminal law: local administration of criminal justice. The fact that criminal judgments reflect the particular perspectives of a community enables the community to tailor its criminal law (and thus, to some extent, its social life as well) in accord with local prefer-

61. See Taylor, 419 U.S. at 530; Apodaca v. Oregon, 406 U.S. 404, 413 (1972) ("All that the Constitution forbids . . . is systematic exclusion of identifiable segments of the community from jury panels."); see also Swain v. Alabama, 380 U.S. 202, 208 (1965) ("Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group.")., overruled by Batson v. Kentucky, 476 U.S. 79 (1986); Holland v. Illinois, 493 U.S. 474, 480 (1990) (holding that the petit jury must be "drawn from a fair cross section of the community.") (quoting Taylor, 419 U.S. at 527). That is why the doctrine is sometimes termed the "fair cross section venire requirement." Holland, 494 U.S. at 480; see Massaro, supra note 30, at 534.

62. See Race and the Criminal Process, supra note 17, at 1585-87.


64. Ballard v. United States, 329 U.S. 187, 194 (1946). The Court used this phrase in the context of the exclusion of women from jury pools, but has never given any indication that the same result does not follow from the exclusion of racial or ethnic groups as well. Cf. Peters, 407 U.S. at 504 (citing Ballard in a case involving exclusion of African Americans from jury pools).

65. See supra text accompanying notes 43, 49.

66. See supra note 11. The same fear of public hostility to a verdict rendered by a largely white jury prompted the move of the William Lozano trial from mostly white Orlando to the more racially mixed city of Tallahassee, Florida. See Pugh, supra note 10, at 1A.
ences. Localized decisionmaking in criminal matters serves the values of community autonomy, regional and cultural diversity, and federalism. Just as states and localities can adopt different criminal laws reflecting the consensus of their populace—defining and regulating obscenity, banning alcohol sales, or imposing the death penalty—so too juries can interpret and enforce laws (and assess the actions of their prosecutors, judges and police) according to local preferences. The benefit of local justice administration is the flip side of the value we place on diverse juries. Local preferences can be valuable precisely because they represent the views of a particular subgroup untempered by input from other perspectives.

68. See Multi-Venue, supra note 55, at 406 (quoting Maitland, The Constitutional History of England 141 (1941)).
69. See Roth v. United States, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring) (noting that in the context of obscenity, the same material may be judged differently “according to the part of the community it reached”).
70. See Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939) (holding that States have absolute power under the Twenty-First Amendment to prohibit the sale of alcohol within their boundaries).
71. See McCleskey v. Kemp, 481 U.S. 279 (1987) (concluding that the Court has established limitations on the death penalty where the community has reached a consensus that the death penalty was disproportionate in relation to certain classes of crimes).
72. That juries should be able to follow community preference was one of the explicit concerns when the Sixth Amendment jury trial and vicinage provisions were drafted. See infra text accompanying notes 156-169.
73. In the abstract, we probably worry more about the potentially unjust outcomes of local, nondiverse juries than we do about the loss of local autonomy resulting from the imposition of broader diversity in jury pools. Illustrations of the worst case scenarios include all-white juries convicting innocent black defendants, or freeing guilty white defendants, due to racial prejudice. But the use of nondiverse juries also can empower communities to administer their criminal justice system in an arguably even more direct manner. For instance, a liberal county in a state that has authorized capital punishment might produce juries that never impose the death penalty, even for crimes that would carry a death sentence elsewhere in the same state. As in Mayor Marion Barry's trial on drug charges, a local jury also can refuse to convict a defendant in order to protest tactics of the police and prosecutors—which is precisely the role of checking governmental abuse of power that juries are supposed to play.
74. As discussed below, the value our system places on community diversity and autonomy, as reflected in the recognition that juries from different communities decide cases differently, also creates a difficulty in applying change of venue doctrine. If local communities are truly distinct, then transferring a case from one venue to another necessarily changes not only the type of community that will render the verdict but also the substantive normative judgment the defendant will face. This change can have a greater effect on the outcome of the trial than the prejudice from pretrial publicity that the venue transfer seeks to remedy, as trial attorneys have always known.
C. Judgment and Varieties of Bias

The fair cross section doctrine acknowledges that jury bias can result solely from the social origin or position of its members, regardless of their good faith or lack of pretrial knowledge about the case they judge. Bias therefore can be divided into at least two types. The first, specific bias, is a reaction to the particular case at hand: perhaps a juror personally knows the defendant, the victim, or a participating attorney, or has been prejudiced by pretrial publicity. Bias from pretrial publicity has been the focus of most Supreme Court case law on impartial juries. This first form of bias is addressed by the traditional judicial mechanisms of voir dire, challenges for cause, peremptory strikes, sequestration of the jury, limitations on publicity, and change of venue; it is this conception of bias that dominates discussions concerning jury impartiality in the case law and literature.

The second type of bias can be termed general bias or—perhaps better for this discussion—interpretive bias. This form of bias arises from the composition of the jury and from the varying perspectives that jurors bring to the court even without any specific knowledge of or connection to the case. Jury interpretive bias is important because

75. This Article uses “social origin” broadly to include race and gender, because those distinctions, in the context of American cultural history (and the West’s generally), inevitably affect every person’s social life.

76. The Court seemed to make this distinction in Taylor v. Louisiana:


77. See, e.g., Patton v. Yount, 467 U.S. 1025 (1984) (finding that even a four-year time lapse between adverse publicity and respondent’s second trial resulted in an impartial jury); Dobbert v. Florida, 432 U.S. 282 (1977) (holding that although there was extensive pretrial media coverage of petitioner’s case, petitioner failed to prove it had resulted in a constitutionally unfair trial); Sheppard v. Maxwell, 384 U.S. 333 (1966) (concluding that the “massive, pervasive and prejudicial publicity” prevented petitioner from receiving a fair trial); Estes v. Texas, 381 U.S. 532 (1965) (holding that the televising of the trial was inherently prejudicial and thus a denial of due process); Rideau v. Louisiana, 373 U.S. 723 (1963) (holding that the televised interrogation and subsequent confession of the petitioner resulted in “Kangaroo court proceedings” that denied petitioner due process of law).

78. See, e.g., RITA J. SIMON, THE JURY–ITS ROLE IN AMERICAN SOCIETY 109-21 (1980) (discussing the impact of pretrial publicity on the jury); Massaro, supra note 30, at 543.

79. General or interpretive bias is used here to refer to the same thing for which Hans-Georg Gadamer employed the term “prejudice.” See infra notes 184-186 and accompanying text. Neither prejudice nor bias in this usage is employed in a negative sense; rather, they refer to a person’s inevitably partial and contextualized perspective.
the exercise of juror judgment entails interpretation and assessment of facts, evidence, witness demeanor, and even law.\textsuperscript{80} Such interpretive (and intuitive) analysis by jurors is more likely to be a product of their life experiences than of any bias arising from specific knowledge about the defendant's case.\textsuperscript{81} What is at issue in a discussion of general or interpretive bias among jurors is the differences in their intuition, common sense, and deep-seated hunches and judgments about social life—\textsuperscript{82} the type of differences in perspective that often arise from differences in race or gender. It is this form of bias, or interpretive perspective, that is the concern of the fair cross section doctrine. If the jury does not represent a fair cross section of the community, then the defendant may be judged from the perspective of only a limited segment of the community; because the experience or perspective of that group is distinctive, judging the defendant in those terms alone and without the contribution of the remainder of the community constitutes impermissible bias.\textsuperscript{83} The fair cross section requirement guards against such partiality.\textsuperscript{84}

\textsuperscript{80} See Reid Hastie et al., \textit{Inside the Jury} 22-23 (1983) (discussing the “interpretive operations” in an “ideal juror analysis” according to the “story model” of a juror’s cognitive processing, which includes “creating an interpretive context for the actions at the center of the story through inferences” and “evaluating the interpretation against social frames to determine the degree of internal consistency and descriptive accuracy”); Ronald J. Allen, \textit{Unexplored Aspects of the Theory of the Right to Trial by Jury}, 66 Wash. U. L.Q. 33, 37 (1988) (“[J]urors’ experience and perspectives are crucial variables in determining the effect of the words that a witness speaks at trial.”).

\textsuperscript{81} See, e.g., Van Dyke, supra note 27, at 18 (“[J]urors bring to the jury box prejudice and perspectives gained from their lifetimes of experience”; overall, however, a random mix of jurors “will be impartial in the sense that they will reflect the range of the community’s attitudes.”); People v. Wheeler, 583 P.2d 748, 761 (Cal. 1978) (explaining that the fair cross section doctrine serves to “achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences”).

\textsuperscript{82} For a further elaboration of this idea, see infra text accompanying notes 178-195.

\textsuperscript{83} Justice Frankfurter recognized that over-representation of particular juror perspectives would result in jury partiality and urged that the “[b]road, representative character of the jury should be maintained, partly as an assurance of diffuse impartiality . . . .” Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting) \textit{quoted in} Taylor v. Louisiana, 419 U.S. 522, 530 (1975). The idea of “diffused impartiality” acknowledges that impartiality is achieved by balancing the diverse perspectives of a variety of jurors and that such a balance requires a representative panel.

\textsuperscript{84} See Van Dyke, supra note 27, at 12 (“The justification for a jury representing a cross-section of the community is instead the realization that people do have their own perspectives—based on their different lives—and that only by balancing these perspectives can we hope to achieve impartiality. Including a fair cross section is the best way of protecting the jury’s integrity.”); \textit{id.} at 16-17 (quoting testimony of Judge Irving Kaufman, head of the committee on the operation of the justice system, at hearings regarding the Jury Service and Selection Act of 1968). Van Dyke adds:

Because all people have their prejudices, and the jury is not a scientific instrument, it cannot be guaranteed that bias will not play a part. But the best way to
Because general bias affects the intellectual basis for acts of assessment or judgment, it determines the form and effect of specific bias; conceptually, general bias precedes specific bias. More particularly, the effect that pretrial publicity has on a potential juror—whether it will incline her for or against the defendant, or have no effect—depends on the general perspective bias through which the juror filters and interprets the publicity. The case of Mayor Barry provides a perfect example of this interpretive filter. The pretrial publicity in that case included a videotape of Barry smoking crack cocaine in a hotel room, to which he was lured by a sometime girlfriend who was cooperating with federal investigators. A common effect of that videotape on white citizens of Washington, D.C., was that it led them to conclude that Barry was "caught red-handed" and was indisputably guilty. On the other hand, many black citizens saw in that same video a black public official entrapped by white agents, a man who deserved more empathy than blame. Each group developed a specific bias from its exposure to the pretrial publicity, but that specific bias varied greatly depending upon the observers’ different interpretive perspectives.

Jurors serve as the community’s representatives. There are competing conceptions of how they fulfill that function, but the interpretive bias that is the concern of the fair cross section doctrine is a central attribute of each juror. One might understand jurors to act as “free agents” following the model of capital juries, on which each member is to render judgment based upon her own conscience according to the assumption that twelve impartial and properly selected jurors collectively will represent and “express the conscience of the community.” Alternatively, one can apply the model of jurors in ob-

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85. SIMON, supra note 78, at 110-13 (discussing the effects of publicity and public opinion on jurors).
86. See Harriston, supra note 5, at A10.
87. See id.
88. The phrase, in this context, is Professor Krauss’s. See Krauss, supra note 52, at 617-18, 625-32.
89. Witherspoon v. Illinois, 391 U.S. 510, 519 (1968); Krauss, supra note 52, at 617-18, 625-32 (defining “community conscience”).
scenity cases, in which the jurors are to function as the community's "delegates." That is, rather than being free agents, jurors are the delegates of the community, and must carry out its collective judgment even if particular jurors disagree with it. In the "delegate" model, the twelve individual jurors are each bound to vote as they believe the collective community would, and the purpose of requiring a cross section of the community is to give jurors varying perspectives on how to define the collective community sentiment that each will be obligated to follow. Regardless of how the juror's task is conceived—or how the jury is instructed to perform its task—the inevitability of interpretive bias remains fundamental to an understanding of jury decisionmaking.

III. LIMITATIONS ON JURY SELECTION TACTICS

A. Race-Based Peremptory Strikes and Jury Composition

Fair cross section doctrine played no part in the series of Supreme Court decisions that ostensibly limits parties' abilities to change the racial composition of petit juries. Beginning with Batson v.

from the community's broad-based, nonlocalized perspective. Not only will other perspectives not be represented, but the subgroup on the jury will not have their views informed, and perhaps changed, by input from other subgroups' perspectives. This model thus has difficulties in light of the Sixth Amendment's relatively weak guarantee that the petit jury actually will be a cross section of the community.

90. Krauss, supra note 52, at 618, 632-42 (demonstrating the difficulty a juror may have in determining community standards or public opinion).

91. Id. at 641.

92. The supposition of a single, ascertainable "community sentiment" has always been problematic. One difficulty is what to do when there is no community standard because the community is so divided that no consensus exists. Does a view shared by 51% of the populace constitute a standard, or must the consensus be much broader? See Roderick A. Bell, Determining Community Standards, 63 A.B.A. J. 1202 (1977); J. Steven Beckett & Roderick A. Bell, Community Standards and Admitting a Public Opinion Poll into Evidence in an Obscenity Case, 84 CASE & COM. 18, 23 (Mar.-Apr. 1979). Moreover, assessments of such an abstract construct as a "community standard" are likely to vary, and interpretive biases will underlie any such judgment. For an argument that a unified, coherent community sentiment does not exist in many contemporary geographical areas and that the concept of a community defined by geography is outdated and instead should be defined by nongeographical considerations such as a shared culture, see Friedland, supra note 52, at 132-57.

93. Capital and obscenity cases represent particularly "constitutionalized" areas of criminal law; consequently, the model for jury behavior in more routine criminal cases has not been authoritatively dictated. For instance, some standard jury instructions are closer to the capital jury model, directing jurors to render a verdict in line with their own consciences or convictions after deliberating with an open mind and considering other views. See, e.g., 2 GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS 20 (1984).

Kentucky, the Court strengthened a constitutional limitation on both prosecutors and defendants (as well as civil litigants) that prohibits them from exercising their peremptory strikes during voir dire for racially discriminatory reasons. The restriction on racially motivated peremptory strikes arises from the Fourteenth Amendment's Equal Protection Clause, not from the Sixth Amendment. Nevertheless, some of the concerns articulated by the Court in Batson are essentially fair cross section concerns. The Court relied, in part, on cases decided under the Sixth Amendment and stated that permitting racially biased peremptory strikes could serve to deny the defendant "the protection that a trial by jury is intended to secure"—a panel of "'peers or equals . . . , that is, of his neighbors, fellows, [and] associates,'" who will serve as a safeguard "against the arbitrary exercise of power by prosecutor or judge." In Allen v. Hardy, the Court described Batson as establishing a new rule that "serv[es] a criminal defendant's interest in neutral jury selection procedures" and that "may have some bearing on the truthfinding function of a criminal trial." Moreover, in Powers v. Ohio, the Court concluded that defendants suffer cognizable injury from race-based peremptory strikes because such strikes "place[ ] the fairness of a criminal proceeding in

96. See McCollum, 112 S. Ct. at 2359.
97. See Edmonson, 111 S. Ct. at 2080.
98. Batson, 476 U.S. at 86, 89, 97.
99. See Holland, 493 U.S. 474 (1990) (holding that the Sixth Amendment does not govern the use of peremptory strikes).
100. See Batson, 476 U.S. at 86 & n.8 (citing Duncan v. Louisiana, 391 U.S. 145 (1968); Taylor v. Louisiana, 419 U.S. 522 (1975)).
101. Id. at 259. The Court also described Batson as "protect[ing] a defendant's interest in a neutral factfinder." Id. See generally Alfredo Garcia, The Sixth Amendment in Modern American Jurisprudence: A Critical Perspective 197 (1992) (analyzing the doctrinal development of the Sixth Amendment by concentrating on the Supreme Court's interpretation since the 1960s). Furthermore, the Allen Court noted that Batson served other functions, namely, to ensure "that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race," and to "strengthen[ ] public confidence in the administration of justice." Allen, 478 U.S. at 259.
102. Batson, 476 U.S. at 86 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880)).
103. Id. at 259.
The Batson prohibition on race-based peremptory strikes, therefore, serves not only the antidiscrimination purpose of the Equal Protection Clause, but also the Sixth Amendment goal of providing the criminal defendant with an impartial fact finder—in the form of a jury whose impartiality is safeguarded by its racial diversity.

Notwithstanding such judicial acknowledgements that a jury's composition can substantively affect its decisions, the law governing peremptory challenges, like the fair cross section doctrine, is at bottom a procedural protection rather than a substantive guarantee. That is, Batson and its progeny purport to provide protection against racial prejudice when such prejudice serves as the basis for striking jurors. But the ban on race-based peremptory challenges, like the fair cross section requirement, gives neither party a right to a particular jury composition. Neither doctrine guarantees a substantive outcome...
to the jury selection process, even though they both affirm the importance of jury diversity.

Yet because the Batson Court recognized that race is significant to the way a juror will perform—and thus is significant to jury impartiality—the Batson doctrine is problematic. The doctrine recognizes that, because race marks a distinguishable social history and position (factors that are the origin of general bias), it makes a difference in how a juror will judge a defendant, the prosecution, and the social events described by the evidence. In sum, the doctrine recognizes that race can make a difference in the jury's verdict. Given that fact, a strike based on race is not necessarily unfounded, or racist in the sense of a groundless and irrational prejudice. In fact, race marks a probable bias (or perspective) that is the premise of the fair cross section doctrine's idea of impartiality. Batson denies litigants, who can strike jurors based on any other bias, the opportunity to strike based upon a constitutionally recognized bias. On one hand, Batson denies the salience of bias on the basis of race group membership by declaring it an improper basis on which to strike a juror; on the other hand, Batson acknowledges and privileges that bias by serving to increase the odds a jury will be racially diverse, even though diversity on no other basis—save gender—is so protected.

108. The substance-process distinction, always a flimsy one if pressed too hard, gets murky here because the actions improperly affecting the process are actions based upon substantive (or political) decisions. The cases, ostensibly guaranteeing only proper jury selection procedures, do so only after making substantive value judgments. Thus, the fair cross section cases and the Batson line of cases side against the ability of parties or state actors to act on certain judgments or opinions, and in that sense the cases are substantive limits.


110. One could understand Batson to deny litigants the right to strike jurors for racist reasons (in the sense of irrational and inaccurate stereotypes), as distinguished from legitimate race-based reasons. But the prohibition must ban all race-based strikes because we cannot distinguish legitimate from illegitimate decisions. When the strike was peremptory, there was no way to know whether a party struck a black (or white) juror for some racist reason, or because the party recognized that blacks (like whites) are more likely to render a verdict disfavorable to that party given the racial dynamics of the case. Furthermore, the line between racist stereotypes and legitimate race-based decisions sometimes blurs. If, in a given case, black jurors are more likely than white jurors to render a verdict favorable to a black defendant, is it racist to strike them ("blacks cannot be fair; they favor their own kind") or empirically sound and rationally defensible ("studies show all-black juries acquit in such cases more often than all-white juries")? The strike is motivated in some sense by race, but is it motivated by racism?

111. Groups cognizable under the Sixth Amendment are broader, and more flexible over time, than the suspect classes cognizable under the Equal Protection Clause. See Laurie Magid, Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts, 24 SAN DIEGO L. REV. 1081, 1104-05 (1987).
B. Holland v. Illinois: Impartiality Versus Representativeness

The Court’s decision in *Holland v. Illinois* disrupts the unity of purpose between the fair cross section requirement and the *Batson* doctrine. In *Holland*, the Court held that the Sixth Amendment fair cross section doctrine does not prohibit a prosecutor from exercising peremptory strikes on the same racial grounds that *Batson* held were prohibited by the Equal Protection Clause. The Court emphasized again that the fair cross section requirement is limited to the composition of the venire and that it provides no guarantee as to the representativeness of the final petit jury.

*Holland* downplays any connection between a petit jury’s representativeness and its impartiality. Earlier opinions had emphasized that a key goal of the representative venire was to make a representative petit jury more likely; a diverse jury was at least an aspiration that served the overall goal of impartiality. *Holland* articulates a different vision of jury composition, one that presumes a tension between a jury that is impartial and one that is representative of the community. In the view of the *Holland* majority, due to the fair cross section requirement the venire starts out representative of the community. The parties may then diminish that representativeness by striking the jurors they determine to be most partial to the other side. That process of peremptory strikes leads, in the *Holland* Court’s view, to a

113. *See supra* notes 94-111 and accompanying text.
115. *Id*. at 482-83.
116. *Id*. at 480 (stating that the Sixth Amendment “is derived from the traditional understanding of how an ‘impartial jury’ is assembled [but] ... has never included the notion that, in the process of drawing the jury, that initial representativeness cannot be diminished”).
120. *Id*.; *see* McAtee, *supra* note 117, at 1063-64.
121. The Court reaffirmed the value of the peremptory strike system by noting that “[o]ne could plausibly argue . . . that the requirement of an ‘impartial jury’ impliedly compels peremptory challenges,” that the tradition of those challenges “was already venerable at the time of Blackstone,” and that the “constitutional phrase ‘impartial jury’ must surely take its content from this unbroken tradition” of peremptory strikes. *Holland*, 493 U.S. at 481-82.
petit jury that is even more impartial than the venire was. The Holland vision of jury impartiality implies that a petit jury may be more impartial than the venire by virtue of being less representative.

Holland implies a change in the idea of how an impartial jury is composed. Earlier decisions described an impartial jury as one containing members from several groups within the community. In this view, most jurors are not more partial, in terms of general or perspective bias, than any others (or than an ideal juror). Rather, all jurors come to the courtroom with certain perspectives and experiences that will affect their deliberation and judgment. The way to achieve impartiality on a jury, therefore, is to have a mix of these different perspectives and biases and to let them inform each other during deliberation.

In Holland, by contrast, the Court posits that some jurors in the venire are more partial or biased than others and that the jury selection process eliminates the most biased candidates so that the final petit jury comprises the most neutral jurors. In that view, there is

122. Id. at 480.
123. Justice Stevens acknowledged this position and partially agreed with it in his Holland dissent. See id. at 513 (Stevens, J., dissenting) ("A randomly selected jury will not necessarily be 'impartial' in the strict sense of that term, because the jurors bring to the jury box prejudice and perspectives gained from their lifetimes of experience.") (citing Van Dyke, supra note 27, at 18).
124. Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (concluding that a representative jury assures impartiality); see supra note 76; Taylor, 419 U.S. at 526, 530 (holding that the presence of a fair cross section of the community is essential to satisfy the Sixth Amendment’s guarantee of an impartial jury trial).
125. Certainly, there is variation among jurors in terms of their specific bias. That is, some may have been exposed to prejudicial pretrial publicity, including inadmissible evidence, and others have not; one juror may be related to the defendant while the others are not. There is much less, if any, variation in the jurors’ general bias, at least as that concept is defined herein. All jurors are members of certain groups (religious, racial, economic, gender, regional) that influence their perspectives on human events. General bias in one direction is not any more objectively incorrect than is an equally strong general bias in the opposite direction. To take one example: with respect to a defendant that is African American, black jurors will not be “biased” while whites are “unbiased.” Instead, black jurors will interpret the evidence in light of their particular experience as African Americans, while white jurors will do the same from their own perspective.
126. Consciously or not, this perspective is usually manifested as an “in-group” bias—a predisposition to view sympathetically the statements or predicaments of people who are most like members of the group. See Hastie et al., supra note 80, at 235-36 (discussing the “egocentric bias” of jurors).
128. For scholarship articulating the same argument, see Stephen A. Saltzburg & Mary Ellen Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L. Rev. 337, 342 (1982).
no need for a mix of perspectives, because all perspectives, or biases, are not equal. The goal is to remove the bad potential jurors and keep the good ones; to remove extreme or close-minded members of the venire and keep the moderate and enlightened ones. Such a view is plausible if the only bias at issue is specific bias, but the fair cross section doctrine is addressed to general bias. Although the Holland Court acknowledges the existence of general bias, that is, that a juror likely has a particular perspective or bias due to her group membership and consequent life experience, Holland affirms a prosecutor’s right, so far as the Sixth Amendment is concerned, to strike jurors on the basis of that general bias—on the basis of their membership in a racial group. The inconsistency in the Holland view is that it acknowledges general bias and affirms the prosecutor’s ability to strike jurors because of such bias, but it fails to acknowledge that the jurors remaining—now a less representative sample of the community—also have biases, and their deliberations will not be informed by the views and biases of their colleagues from other groups. The Holland paradigm might succeed if all biased jurors could be struck, so that only neutral jurors remain; but Holland itself acknowledges that no jurors are truly neutral because all are members of some group.


130. See Holland, 493 U.S. at 481 (noting that parties may “use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side”). The Court did not even pretend that parties use peremptory strikes for more ostensibly legitimate reasons than membership in a racial group—reasons such as to remove jurors who have revealed personal views or information about themselves that may indicate some bias that falls short of providing a basis for a challenge for cause.

131. Save for this internal inconsistency, the Holland majority’s opinion is largely a return to a vision of the jury that predates the fair cross section doctrine. Formerly, both state and federal courts often empaneled juries by the “key man” system, in which jury commissioners were appointed to identify appropriate citizens to serve jury duty. See Shelvin Singer & Marshall J. Hartman, Constitutional Criminal Procedure Handbook § 21.5, at 694 (1986); Castaneda v. Partida, 430 U.S. 482 (1977); see also supra notes 44-46 and accompanying text. The aim of that system was to give one person the discretion to identify for jury service those citizens of notable wisdom, moderation, and good character. The procedure, however, consistently yielded an underrepresentation of the poor, nonwhites, women, and other groups. See Van Dyke, supra note 27, at 14-15; Amar, supra note 31, at 1287. The old system therefore was consistent with the Holland vision in that citizens who make better jurors were thought to possess more of the valued characteristics than others possess, in the view that those characteristics exist independently of other biases that affect jury decisionmaking, and in the view that no other factors existing in the community, such as the perspective gained from women or racial minorities, merits representation on the jury.

Because peremptory challenges are a tool by which the parties can reduce the representativeness of the venire mandated by the Sixth Amendment, strong supporters of per-
Justice Marshall dissented in *Holland*. He argued that the fair cross section requirement is a Sixth Amendment guarantee separate and distinct from the guarantee of an impartial jury. In his view, impartiality is largely a matter of seating twelve jurors who are without specific bias. The fair cross section rule, on the other hand, is essential to providing the defendant with "the commonsense judgment of the community." It is this community judgment, Marshall argued, rather than the jurors' impartiality, that guards defendants against the overzealous prosecutor and the biased or overconditioned judge. Because his concern is to ensure selection of a jury that can render the community's judgment, Marshall correctly sees the fair cross section rule as the proper mechanism for combining all the various general biases (which result from the various group memberships of the jurors) in the community, so that each is countered and informed by the others. Allowing prosecutors to strike peremptory challenges, such as the *Holland* majority, usually put less emphasis on the importance of the representativeness of jury panels. See, e.g., Sam Ervin, *Jury Reform Needs More Thought*, 53 A.B.A. J. 132, 134 (1967) (arguing that the "cross-section of the community" standard improperly assumes that "justice is a function of 'class.'"); Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177 (1980) (suggesting that the averaging of juror viewpoints, with its impact on the verdict, is crucial to community representation). On the other hand, those who seek to maximize the chances that petit juries will represent a cross section of the community argue for the limitation or abolition of peremptory challenges. See Amar, *supra* note 31, at 1288. See also *Garcia*, *supra* note 103, at 192-96 (calling the peremptory challenge "that quintessentially undemocratic device"); *Van Dyke*, *supra* note 27, at 166-69 (proposing a compromise position restricting the number of peremptory challenges in order to preserve the demographic integrity of the jury); Albert W. Alschuler, *The Supreme Court and the Jury*, 56 U. CHI. L. REV. 153, 163-170 (1989) ("Peremptory challenges ensure the selection of jurors on the basis of insulting stereotypes without substantially advancing the goal of making juries more impartial."); Martin H. Levin, *The Jury in a Criminal Case: Obstacles to Impartiality*, 24 CRIM. L. BULL. 492, 517-19 (1988) (proposing that courts forbid peremptory challenges because attorneys do not use the challenges solely to obtain impartial juries).


133. These are jurors who are impartial with respect to the particular case. The fair cross section requirement ensures that a juror will not be struck "for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case," that is, for the reason of their general, rather than specific, bias. *Id.* at 496 (Marshall, J., dissenting) (quoting *Lockhart* v. *McCree*, 476 U.S. 162, 175 (1986)).

134. *Id.* at 495 (Marshall, J., dissenting) (quoting *Lockhart*, 476 U.S. at 174-75) (citation omitted).

135. See *id.* at 495 (Marshall, J., dissenting). To view Marshall's position through the paradigm of this Article, the impartiality requirement guards against specific bias, while the fair cross section rule guards against an unrepresentative concentration of general bias. A community's "commonsense" judgment (which it reaches through balancing its general biases) is the appropriate mechanism with which to check the general factors that run through criminal trials regardless of the defendant: the credibility of police and prosecutors, and the bias of judges.

tives of particular groups directly contravenes that goal of the Sixth Amendment because it takes certain biases out of the jury but leaves others in, skewing the jury's collective judgment.

IV. VENUE AND VICINAGE: THE SOCIAL CONTEXT OF THE JURY

A. Constitutional Guarantees of Venue and Vicinage

The Constitution provides criminal defendants with two separate guarantees that their criminal trial will be held in the jurisdiction in which the crime was committed. For federal criminal defendants, Section two of Article III provides that "the Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." Additionally, the Sixth Amendment ensures both state and federal defendants that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." Analogous state law provisions vary considerably, and only about half of the states guarantee the defendant a trial in the venue in which the crime was committed. Moreover, in limited circumstances, the Due Process Clause guarantees defendants the right to transfer the trial to another venue. Due to the incorporation of the

138. U.S. Const. amend. VI. The impartial jury trial clause of the Sixth Amendment was incorporated into the Fourteenth Amendment Due Process Clause in Duncan v. Louisiana, 391 U.S. 145 (1968). See also Irvin v. Dowd, 366 U.S. 717, 721-22 (1961) (holding that the defendant's trial was clearly unfair where jurors admitted that they thought the defendant was guilty, but stated that they could nevertheless render an impartial verdict); Groppi v. Wisconsin, 400 U.S. 505, 511 (1971) (holding that a state law prohibiting a change of venue in misdemeanor cases violative the right to a trial by an impartial jury). The vicinage portion of that clause was not at issue in Duncan or Groppi, however, and it could be argued that the vicinage provision therefore has not been incorporated against the states, even though all other portions of the Sixth Amendment have. Moreover, the wording of the vicinage clause—requiring that the jury must come from the "State or district" in which the crime was committed—renders its incorporation somewhat awkward. Obviously, states will prosecute violators of state law only within the state, so the "State" part of the "State and district" phrase is superfluous upon incorporation. Furthermore, "district" does not necessarily identify a common judicial division within a state as it does federal court districts. Although many states are divided into judicial districts, county or city boundaries are also frequent divisions for purposes of jurisdiction and judicial administration.

It is clear, however, that the incorporation of the Sixth Amendment impartial jury clause into the Fourteenth Amendment brings state change of venue laws under the purview of the United States Constitution. In particular, the Sixth Amendment forbids states to place limits on a defendant's right to demand a venue change when such is the only way to provide an impartial jury. See Irvin, 366 U.S. at 717; Groppi, 400 U.S. at 511.

139. See Andrew L. Faber, Note, Change of Venue in Criminal Cases: The Defendant's Right to Specify the County of Transfer, 26 Stan. L. Rev. 131, 149-50 nn.98-101 (1973) (summarizing the variety of venue and vicinage provisions in state constitutions and codes).
Sixth Amendment into the Fourteenth Amendment as well as due process requirements, all states have a mechanism for changing venue to protect the defendant from an unfair jury.

Technically, Article III provides the venue guarantee, meaning the location in which the trial will be held, while the Sixth Amendment contains the vicinage provision, which furnishes a right to have a jury selected from a particular community regardless of where the trial is held. As a practical matter, the distinction is of little importance because American courts rarely have attempted to draw a jury from one community and hold the trial in another. Together, the two clauses serve to assure the defendant that his trial will be conducted in, and his jury selected from, the community in which he allegedly committed the crime.

In modern case law, venue issues arise almost exclusively when defendants attempt to waive their rights to be tried in the local venue and by the local vicinage, in an effort to obtain a more impartial jury. Waiver permits transfer of the trial to another, less prejudiced venue.

140. Duncan, 391 U.S. at 145.

141. See Faber, supra note 139, at 150 (suggesting that in states that do not have constitutional venue or vicinage requirements, the same rights are statutory).

142. 2 Charles Alan Wright, Federal Practice and Procedure § 301, at 190 (2d ed. 1982) (concluding that the distinction between the Article III venue guarantee and the Sixth Amendment’s vicinage guarantee “has been of no importance”); William W. Blume, The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue, 43 Mich. L. Rev. 59, 65 (1944); United States v. Possevolis, 615 F.2d 975, 977 n.3 (3d Cir. 1980). But see Drew Kershen, Vicinage, 29 Okla. L. Rev. 801, 828-29 (1976) [hereinafter Kershen, Vicinage I] (discussing the potential importance of distinguishing between venue and vicinage); see also Kershen, Vicinage II, supra note 57, at 130-38 (explaining that the government has the option to change venue when the original locality is in rebellion, but that the defendant may require the government to bring jurors from that rebellious vicinage into the new venue).

Juries from a distant vicinage occasionally have been brought into a venue for trial. See, e.g., Peter D. O’Connell, Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice, 65 U. Detroit L. Rev. 169, 179 (1988) (discussing the Illinois trial of John Wayne Gacy). There is a strong argument that in certain circumstances federal defendants have a right to a jury from a different vicinage so that they do not have to waive their Article III venue right in order to be tried by an impartial jury. See Kershen, Vicinage II, supra note 57, at 147.


The other context in which venue issues arise in modern cases is federal statutes that create multiple venues for a single crime. E.g., United States v. Johnson, 323 U.S. 273, 275 (1944) (“[A]n illegal use of the mails or of other instruments of commerce may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district.”).
Although courts can employ a variety of tactics to alleviate some forms of prejudice (including limiting the news media in court, restricting attorney statements to the media, sequestration of witnesses and jurors, continuance until prejudice abates, and voir dire), transfer to a different venue sometimes is essential to empaneling a fair jury.

The cases in which the Supreme Court has forged its jurisprudence of venue have involved not only change of venue issues to be adjudicated under the Due Process Clause, but also have involved almost exclusively problems of pretrial publicity that also implicated due process concerns. In some circumstances, such as those at issue in Estes v. Texas and Rideau v. Louisiana, the publicity was so

144. See Fed. R. Crim. P. 20(a). There is the possibility of a conflict between the defendant's right to be tried by an impartial jury and his right to be tried within the venue in which the crime was committed. If the community is irreversibly prejudiced, but the defendant refuses to waive his venue right, then a fair trial may be impossible. One commentator has suggested resolving that problem by simply abrogating the defendant's venue right and allowing the court to force a venue change without his consent. See Scott Kafker, Comment, The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution, 52 U. Chi. L. Rev. 729, 746-50 (1985). An alternative resolution, occasionally employed, is simply to dismiss the charges against the defendant. See United States v. Cotton, No. 68-CR-115 (E.D. Wis. 1969), appeal dismissed, 397 U.S. 45 (1970). For a discussion of the Cotton case, see Kafker, supra, at 735-36. The alternative resolution employed in Cotton is supported by the argument that a community that has become so irrevocably prejudiced that it cannot render a fair trial should pay for its prejudice by watching suspects set free without trial.


146. Given the strong protection of the free press and of the public nature of trials, effective restriction of pretrial publicity sometimes is impossible. See Sheppard, 384 U.S. at 349-52. Moreover, few of the aforementioned methods will be effective if the problem is widespread acquaintance with the defendant or victim or a diffuse bias such as racial prejudice that infects a large part of the community. See United States v. Means, 409 F. Supp. 115 (D.N.D. 1976).

147. As a result, much of the scholarship on venue transfer discusses the doctrine solely in terms of prejudicial pretrial publicity. See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE § 8-3.3(c) (2d ed. 1980) ("A motion for change of venue or continuance shall be granted whenever it is determined that, because of the dissemination of potentially prejudicial material, there is a substantial likelihood that, in the absence of such relief, a fair trial cannot be had.") (emphasis added); 2 Wright, supra note 142, § 342, at 249-56 (discussing only publicity as the source of prejudice in a community); Raymond L. Spring, Change of Venue: A Need for Traditional Reemphasis, 54 JUDICATURE 15, 15-17 (June-July 1970) (noting how courts and commentators have come to think of prejudice as arising solely from pretrial publicity and arguing that courts need to recognize prejudice from other sources, such as word of mouth in small communities).


149. 373 U.S. 723 (1963).
extreme that the Court held that the circumstances had raised a presumption of prejudice and that the Due Process Clause required the use of a jury selected from a different community. 150

150. In Estes, the Court found that the "massive pretrial publicity" that gave the case "national notoriety"—including live television broadcast of a pretrial hearing—was so inherently prejudicial that it deprived the defendant of due process. Estes, 381 U.S. at 535. The Court stated:

It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. Id. at 542-43. The Estes Court noted that the presence of news reporters in the courtroom gave proceedings a "notorious character" that made a fair trial impossible. Id. at 538.

The Estes standard was based on Rideau, which was decided two years earlier. In that case, the defendant's state court trial was conducted in a county in which a film of his confession to the sheriff was repeatedly broadcast on local television before trial. The Court concluded, without requiring other evidence of actual prejudice from the defendant, that it was a denial of due process to refuse the defendant's request for a change of venue. Rideau, 373 U.S. at 726-27. The Rideau Court held that the Due Process Clause required a jury selected from a community that had not seen the film. See id. at 727.

The presumption of prejudice standard was reaffirmed in Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (concluding that the totality of the circumstances regarding pretrial publicity demonstrated a denial of due process and noting that some circumstances can be deemed inherently lacking in due process); see also Patton v. Yount, 467 U.S. 1025, 1031 (1984) ("[A]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed."). See generally O'Connell, supra note 142, at 185-92 (discussing the prevailing standards for the grant of a change of venue due to prejudicial pretrial publicity).

In less extreme situations, the Court has held that defendants must demonstrate a probability or a reasonable likelihood of prejudice. Subsequent cases have found no denial of an impartial jury despite substantial pretrial publicity when the Court has concluded either that time had dissipated any prejudice sparked by publicity or that the jurors had not been prejudiced by the publicity to which they had been exposed. E.g., Dobbert v. Florida, 432 U.S. 282, 303 (1977) (finding no constitutional violation even though the jury was picked from a community in which there was much pretrial publicity; jurors need not be totally ignorant of facts and issues involved if they can "lay aside" pre-conceived opinions: "[E]xtensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair.") (citing Murphy v. Florida, 421 U.S. 794, 798 (1975)); Patton, 467 U.S. at 1025 (holding that the defendant, whose murder conviction was overturned and who was retried in the same county four years later, was not deprived of an impartial jury when he was denied a change of venue in the second trial because public passion had died down with passage of time).

Change of venue motions are made in federal court under Federal Rule of Criminal Procedure 21, which provides for transfer to another district at the defendant's request "if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial" anywhere within the district. FED. R. CRIM. P. 21(a). The most widely articulated standard under the rule is that the defendant must demonstrate a reasonable likelihood of prejudice. See 2 WRIGHT, supra note 142, § 342, at 248 & n.7. The Supreme Court cases set the outer parameters of that standard, defining those rare situations in which prejudice must be presumed and the larger class of cases in which the defendant must demonstrate actual prejudice. See Estes, 381 U.S. at 542-43 (noting that a showing of actual prejudice is required). District courts have considerable discretion in granting venue transfers pursu-
The context of this case law creates the mistaken impression that venue protections, and change of venue doctrine, address themselves exclusively to issues of specific bias resulting either from pretrial publicity about the case or widespread community acquaintance with a key figure in the trial. In fact, both the Article III and the Sixth Amendment venue clauses (as well as many state constitution predecessors) were devised more to provide defendants with a guarantee of the social character of their juries and to prevent the government from transferring cases to venues in which the populace—irrespective of any publicity or other specific bias—would be less sympathetic to the defendant.

B. History and Purpose of the Venue and Vicinage Guarantees

Both the Article III and the Sixth Amendment clauses were intended foremost to provide procedural safeguards for defendants by removing the government’s power to select the venue for prosecution. The Article III clause, in particular, was a reaction to English attempts to transfer venue to England or to other colonies without the defendant’s consent. In the decades preceding the American Revolution, England attempted to remove (often to England) some to Rule 21 and have exercised that discretion to grant changes of venue very infrequently. See 2 Wright, supra note 142, § 342, at 248-49 & nn. 8 & 9; Faber, supra note 139, at 132-33.

151. See Van Dyke, supra note 27, at 7 (recounting how these constitutional provisions addressed the compromised legal position of colonial defendants under British rule); Kershen, Vicinage I, supra note 142, at 827 (noting that the Sixth Amendment vicinage provision was placed among other procedural rights of defendants); Garcia, supra note 103, at 183-85 (explaining that the right to a jury trial generally was an individual right of the defendant to protect against government oppression); 2 Wright, supra note 142, § 341, at 245 (discussing the defendant’s privilege to waive his venue rights under Fed. R. Crim. P. 21); Delaney v. United States, 199 F.2d 107, 116 (1st Cir. 1952) (“The right to apply for a change of venue is for the defendant’s benefit and at his option.”).

Concomitant state provisions regarding venue also protect defendants’ interests procedurally. See, e.g., State v. Mendoza, 258 N.W.2d 260, 265-66 (Wis. 1977) (upholding defendant’s objection to trial court’s sua sponte change of venue on grounds that the order violated the right to be tried in the vicinage of the crime pursuant to the Wisconsin and United States Constitutions).

152. Although the clause does not guarantee that the trial will be held in the defendant’s home community, the framers presumed it would often serve to keep the trial there. Even when the locale of the crime and the trial is different from the defendant’s home, the defendant at least retains the advantage of being able to investigate and call witnesses from that locale to defend himself. See Van Dyke, supra note 27, at 7 (noting that some opposition to the Constitution was based on fears that the Article III venue provision was too broad and thus insufficiently protected the defendant’s concurrent interest in a trial by his peers); Kershen, Vicinage I, supra note 142, at 811-12; see also Multi-Venue, supra note 55, at 410, 413; Kafker, supra note 144, at 741-46. The Supreme Court has also recognized the importance to a defendant of being tried in his home community:
criminal trials from their original colonial venues, where the populace was hostile to English governance and empathic with defendants.\(^{155}\) The Virginia House of Burgesses formally objected to the practice, demanding that "all Trials for . . . any Felony or Crime whatsoever, committed and done in this his Majesty's said Colony . . . [should] out of Right to be . . . held within the said Colony."\(^{154}\) The same grievance was listed in the Declaration of Independence, which complained of "transporting us beyond Seas to be tried for pretended Offences."\(^{155}\)

We do not wish to be understood as approving the practice of indicting citizens of distant states in the courts of this District, where an indictment will lie in the state of the domicil of such person, unless in exceptional cases, where the circumstances seem to demand that this course shall be taken. To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship, to which he ought not to be subjected if the case can be tried in a court of its own jurisdiction.

Hyde v. Shine, 199 U.S. 62, 78 (1905); see also United States v. Johnson, 323 U.S. 273, 275 (1944) (noting the history of Article III and the "needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense"). But see Johnston v. United States, 351 U.S. 215, 220-21 (1956) (noting that the "requirement of venue states the public policy that fixes the situs of the trial in the vicinage of the crime rather than the residence of the accused"); Travis v. United States, 364 U.S. 631, 634 (1961) ("The use of agencies of interstate commerce enables Congress to place venue in any district where the particular agency was used."). Thus, although trial in the defendant's home community is a preference that has been long recognized, venue law does not protect or guarantee that preference because the doctrine is solely concerned with the location of the crime. See id.

153. Parliament had enacted statutes that permitted trials for charges of treason and certain other crimes to be held in any county in the "realm" that the prosecution chose. See 35 Henry VIII, c.2 (1543) (revived by the British Parliament in 1769); 12 Geo., III, c.24 (1772); 14 Geo. III, c.39 (1774); Blume, supra note 142, at 63-64; Kershen, Vicinage I, supra note 142, at 805-12.

154. Blume, supra note 142, at 64-65. More fully, the Virginia legislature declared:

[A]ll Trials for Treason, Misprison of Treason, or for any Felony or Crime whatsoever, committed and done in this his Majesty's said Colony . . . ought of Right to be had, and . . . held within the said Colony . . . and that . . . sending such Person or Persons to Places beyond the Sea, to be tried, is highly derogatory of the Rights of British subjects . . . .

Id. at 64 (quoting from the JOURNALS OF THE HOUSE OF BURGESSSES, 1766-1769, 214 (Kennedy ed., 1906)). The body made clear its sympathy for the defendant threatened with trial away from his home and the scene of the crime:

For, how truly deplorable must be the Case of a wretched American, who . . . is dragged from his native Home, and his dearest domestick Connections, thrown into Prison . . . to exchange his Imprisonment in his own Country, for Fetters amongst Strangers?

Id. at 65. See generally Garcia, supra note 103, at 184-85 ("[R]oots of revolt against English rule may be partially traced to fierce resistance to British attempts to restrict or evade the right to a jury trial.").

155. The DECLARATION OF INDEPENDENCE, para. 21 (U.S. 1776). See also Kershen, Vicinage I, supra note 142, at 807.
The Sixth Amendment vicinage guarantee appears to have been motivated by the same concerns, but assurance of trial by a jury drawn from the community in which the crime was committed had a somewhat less consistent history, particularly in the American colonies. Some colonies made no provision for it, while others included it as a basic right. Nevertheless, in 1774 the Continental Congress included “peers from [the defendant’s] vicinage” as an essential component of the “great right . . . of trial by jury.” The first Congress’s drafting of the Sixth Amendment was marked by strong support for the vicinage provision from James Madison and the House of Representatives. After revisions deleted the word “vicinage” from Madison’s proposal, the Senate, where the provision enjoyed less support, acceded to the House’s demand for a guarantee to defendants of trial “by an impartial jury of the State and district wherein the crime shall have been committed.”

156. Venue and vicinage concepts are so closely intertwined that colonists used vicinage arguments against English attempts to change trial venues. In the vast majority of cases jurors were chosen from the community in which the trial was held, making venue and vicinage identical. See Blume, supra note 142, at 65-66 (noting that colonists insisted on rights of “vicinage” for purposes of escaping transportation overseas for trial). But see Oliver P. Chitwood, Justice in Colonial Virginia 67 (Leonard W. Levy ed., De Capo Press reprint 1971) (1905) (recounting adoption of a 1662 Virginia statute that incorporated English vicinage customs and provided that six men of a twelve man jury would be summoned from the vicinity of the crime and six selected from bystanders).

157. See Multi-Venue, supra note 55, at 409 (noting that seven of the first 15 state constitutions made some reference to venue or vicinage and that four required trial in the defendant’s vicinage).

158. Kershon, Vicinage I, supra note 142, at 814-15 (noting the diversity among colonies in the use of petit juries chosen from the vicinity of the crime).

159. Id. at 815 (quoting from the Declaration of Violation of the Rights of the Colonists by the First Continental Congress, 1774).

160. Id. (quoting from the address to the Province of Quebec from the Continental Congress, 1774).

161. Id. at 822-27.

162. U.S. CONST. amend. VI. Although the primary purpose of the venue and vicinage clauses is to protect the rights of defendants, some have posited a secondary purpose for the two clauses: to protect the right of the community in which the crime was committed to try and resolve criminal cases according to local mores and sentiments. Cf. United States v. Means, 409 F. Supp. 115, 117 (D.N.D. 1976) (acknowledging the strength of a community’s interest in having those charged with violations of its laws tried within the community); Van Dyke, supra note 27, at 10-11 (arguing that the jury’s role is not only to protect the accused but also to represent the community that has been victimized); Kershon, Vicinage I, supra note 142, at 808-10, 803-15; Multi-Venue, supra note 55, at 406 (quoting Maitland, The Constitutional History of England 141 (1941)). There is little explicit support for the idea that the community’s interests also are protected in the history of the drafting of either clauses, but the theory of juries as local bodies serving as a democratic check on overzealous prosecutors and biased judges is consistent with the recognition of those interests.
Colonial objections to transfers of venue were not based solely on the insulting implication that Americans were incapable of providing fair trials, but rather on the two-fold advantage that transfers of venue gave to the prosecution. A distant trial location took the defendant away not only from family and friends but also from witnesses and evidence available at the crime scene. Perhaps just as importantly, colonists recognized the hostility of British judges and juries. Even if British fact finders were not hostile or biased in a malicious sense—i.e., even if they acted in good faith—they were so likely to see the situation from a different perspective or set of social prejudices that Americans correctly recognized that they were at a disadvantage. Even if the British forum comported with contemporary notions of due process, Americans recognized the disadvantage created by the interpretive bias of that forum.

Thus, the venue and vicinage clauses implicitly recognize that the composition of the jury—and of the community from which the jury is drawn—is crucial to the jury's character, and therefore to the nature of its impartiality. These clauses originally protected defendants not against specific biases from sources such as pretrial publicity, but rather against being tried by a community having a different social character or historical perspective from the community in which the crime occurred. In the late eighteenth century, changing venue from Virginia to England would cause a substantial change in a jury's general bias—as substantial as the change would be today from moving a venue from Washington, D.C., to Ventura County, California, for example. Venue doctrine recognizes that, even when jurors hold no specific bias and act in good faith, the unavoidable interpretive bias arising from their social origins can make a substantive difference in the outcome of the case.

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163. A 1774 statute suggested precisely that—that in Massachusetts "an indifferent trial cannot be had." See Blume, supra note 142, at 630 (quoting 14 Geo. III, c. 39 (1774)).

164. Those advantages continue to be factors that defendants weigh in considering a change of venue, see State v. Mendoza, 258 N.W.2d 260, 268 (Wis. 1977), and that the Supreme Court recognizes as important concerns in defining a proper venue. See United States v. Johnson, 323 U.S. 273, 275 (1944).

165. See Massaro, supra note 30, at 508, 550-51 (discussing the importance of same-group membership to a jury of one's "peers").

166. In the nineteenth century, the importance of venue was demonstrated by the fact that juries in northern states rarely convicted defendants charged with aiding escaped slaves under the federal Fugitive Slave Law. See Simon, supra note 78, at 7.

167. Id. This is the bias that was recognized by the defendants in the Marion Barry and the Rodney King beating cases. See, e.g., Cannon & Smith, supra note 6, at A29 (discussing the grant of the defendants' request for a venue change to an overwhelmingly white suburban county in the King beating case); Thompson & Gellman, supra note 3, at A1 (noting the composition of the jury drawn from the District of Columbia in Barry's trial); see also
That the Constitution's venue and vicinage clauses protect against transfer to a venue with a substantively different social character than the original venue supports the idea that courts should recognize differences in the racial composition of an alternative venue. The differences between venues that defendants risk today most often arise from racial distinctions rather than nationalist ones. Venues that differ dramatically in racial demography create the possibility of prejudicial (or favorable) bias for the defendant. The framers of the Constitution recognized that communities may be biased against a defendant for unspecified, hard-to-define reasons of popular sentiment, common experience, and group identification. Ample data demonstrates that analogous factors are at work among different racial and economic groups. Yet courts have been reluctant to acknowledge what the framers assumed—that even when particular venirepersons will not admit in voir dire a bias against a defendant, differences in sentiment, experience, prejudice and perspective still can exist among communities, and thus a venue change may substantively change the nature of the jury's impartiality.

V. AN ANTIFOUNDATIONALIST DESCRIPTION OF THE JURY FUNCTION

A. The Theory of Jury Decisionmaking

The importance of jury composition depends on how we understand the jury's task. In its most concise statement, a jury's job is to determine the truth. In the legal context, ascertaining the truth traditionally occurs in two parts: historical fact discovery (whether the defendant committed the prohibited act) and assessment of moral culpability (whether the defendant acted with the requisite criminal

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Joan B. McConahay et al., The Use of Social Science in Trials with Racial Overtones: The Trial of Joan Little, 41 LAW & CONTEMP. PROBS. 205, 209-14, 226 (Winter 1977) (discussing elaborate evidence offered by murder defendant Joan Little in a successful effort to move venue from rural, conservative eastern North Carolina to Orange County, North Carolina, which has a more prosperous, educated, and diverse population).

168. See generally Sheri L. Johnson, Black Innocence and the White Jury, 83 MICH. L. REV. 1611 (1985) [hereinafter Johnson, Black Innocence] (setting forth trial data that reveals a tendency among whites to convict black defendants in instances in which white defendants would be acquitted).

169. Occasionally, courts will acknowledge the salience of race in transfers of venue, or at least its importance to public confidence in the jury's impartiality. See Pugh, supra note 10, at 1A (discussing the trial of Miami police officer William Lozano, in which courts changed venue a second time to a locale with a larger black population).

170. In the criminal context, it is more precisely to determine whether the prosecution's version of events is, beyond a reasonable doubt, the truth.
intent, making him deserving of community condemnation). On that view, the jury’s primary function is to voice the community’s assessment of the defendant’s moral culpability. Reconstructing historical fact usually is the less problematic project and is a function that can be performed just as well—perhaps better—by someone or some process other than a jury.

Yet the Sixth Amendment—including both the fair cross section rule and the venue clause—concedes the importance of jurors’ perspective and context. Such an acknowledgement requires that the idea of truth discovery be understood in a framework other than the traditional foundational, or subjectivistic, epistemology. The traditional view is marked by a faith in the possibility of finding objective truth: it assumes a perceiving subject separate from the world that she inhabits, the objects she observes, and the phenomena she experiences. Truth discovery is described as the process by which the subject strives for a clear and unbiased view of an object, which can be known in its true essence via objective reason and method. This paradigm permits a positivistic formulation of fact-finding and truth discovery; one seeks to settle disputes by discovery and reference to the external object at issue. Investigation is modeled on natural science methodology, which posits the possibility of inquiry conducted from a neutral, Archimedean vantage point.


172. Moreover, the difficulty of fact finding may be thought to be due largely to imperfect information; a jury lacks access to some uncontrollable source of information such as, for example, an audio-videotape, an unbiased eye witness to all relevant events, or some other means of confirming key facts and claims. But see Race and the Criminal Process, supra note 17, at 1559 (arguing that the “fact-finding ability” of juries also is “impaired in a way that hurts minority defendants” by the underrepresentation of minorities on juries).


174. See Scheppel, supra note 171, at 2088-94.


176. Subjectivistic epistemology is an essentially Platonic tradition in which truth is conceived as an external objective reality capable of being discovered by using accurate, neutral investigative strategies and rational analysis modeled on the paradigm of the natural sciences. The human mind can discover, understand, and describe this external reality without affecting it, and thereby possess a “mirror of nature.” Around these concepts of truth, rationalism, and objective reality developed the methodology of detached scientific
Within this tradition, the race, gender or other social history of the observer should make no difference, because truths exist separate from the truthseeker. The social origin of jurors would have no relevance to their task of fact-finding, the first half of the jury’s two-part process; the fair cross section doctrine would matter only when jurors assessed the moral culpability of a defendant according to community standards.

Therefore, the relevance of the jury’s social composition to its fact-finding duties (that is, the necessity of a fair cross section to the fact-finding task) can be explained only through an antifoundationalist epistemology. Antifoundationalists understand truth as a conclusion that cannot exist separate from the human mind.

Investigation, which sought to eliminate and contrast itself with any form of investigation or interpretation in which the observer/investigator affected the external reality or ultimate conclusion. This paradigm fit best with the natural sciences, but the social sciences and humanities—including the law and even literary criticism—took it as a model for practice. See generally Warnke, supra note 175; Richard Rorty, Philosophy and the Mirror of Nature (1979) [hereinafter Rorty, Mirror of Nature]; Joan Williams, Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells, 62 N.Y.U. L. Rev. 429 (1987).


178. More accurately, this approach is described not as epistemology, but rather as phenomenology, or phenomenological hermeneutics, because its premise entails the demise of epistemology as that term refers to a science or method of understanding human knowledge. See Warnke, supra note 175, at 34-41, 147-51 (discussing phenomenology in juxtaposition to traditional epistemology). Epistemology has been used more broadly in recent decades, however, to include phenomenological or antifoundationalist descriptions of human understanding along with foundationalist or subjectivist theories.

The label antifoundationalism is used herein rather than phenomenology because the former is more common in legal scholarship and also may connote a broader theoretical discussion. By either name, this viewpoint traces its origins most prominently to Hegel and, in this century, Heidegger, but for the purposes of this Article representative theorists and partisans include Hans-Georg Gadamer and Richard Rorty. See id. at 139-66. See generally Hans-Georg Gadamer, Truth and Method (1975); Rorty, Mirror of Nature, supra note 176; Richard Rorty, Contingency, Irony, and Solidarity (1989) [hereinafter Rorty, Contingency, Irony, and Solidarity]; Hermeneutics and Praxis (Richard Hollinger ed., 1985). Antifoundationalist critiques, particularly in recent decades, have come from a variety of disciplines including the natural sciences, see, e.g., Thomas Kuhn, The Structure of Scientific Revolutions (2d ed. 1970) (discussing how scientific revolutions alter the historical perspectives of the communities that experience them), literary and linguistic studies, see, e.g., Jacques Derrida, Of Grammatology (1976); and law, see, e.g., Roberto Unger, False Necessity (1989) (“We cannot live without a set of formative institutional arrangements and enacted deals of human association...[b]ut we can...diminish the force with which they contain and imprison us.”); Steven L. Winter, Bull Durham and the Uses of Theory, 42 Stan. L. Rev. 639 (1990) [hereinafter Winter, Uses of Theory] (arguing that developments in cognitive theory have undermined one aspect of antifoundationalist position argued by Stanley Fish).

179. Rorty, Contingency, Irony, and Solidarity, supra note 178, at 4-5, 8.
not to say that there is no external world, or reality, separate from the mind, but simply that truths are human understandings or descriptions about the world, and those understandings cannot be separated from the human-created language used to describe them or the particular historical vantage point from which they are perceived. Disputes cannot be settled by reference to facts, because we know and understand facts only from a certain point of view, or—to put it another way—we know facts only as we comprehend and describe them within a particular language, cultural tradition, and social context.\textsuperscript{180}

Antifoundationalism abandons the theoretical possibility of a detached and objective observer, positing in its place a subject that is always a part of that which it observes, whose perception is inevitably contextualized, and for whom the only knowledge available is contingent on the social history into which that person is thrown.\textsuperscript{181} As Professor Fish, a prominent partisan of the antifoundationalist position, has put it: “Anti-foundationalism teaches that questions of fact, truth, correctness, validity, and clarity can neither be posed nor answered in reference to some extracontextual, ahistorical, nonsituational reality” because such things “are intelligible and debatable only within the precincts of the contexts or situations or paradigms or communities” and are “inextricable from the social and historical circumstances in which they do their work.”\textsuperscript{182}

“Social and historical circumstances” provide the conceptual basis for responding to criticisms raised by adherents of traditional subjec-

\textsuperscript{180} See Stanley Fish, Is There a Text in This Class? 338 (1980) [hereinafter Fish, Text in This Class] (“[D]isagreements cannot be resolved by reference to the facts, because the facts emerge only in the context of some point of view.”); Scheppele, supra note 171, at 2081-82, 2085.

\textsuperscript{181} See Warnke, supra note 175, at 34-41, 168-73; Stone, supra note 175, at 10-11; see also Simon, supra note 78, at 57 (discussing research conducted by Dale Broeder for the Chicago Jury Project that confirms that “such factors play important roles in shaping a jury’s deliberations.”).

\textsuperscript{182} Stanley Fish, Antifoundationalism, Theory, Hope, and the Teaching of Composition, in Doing What Comes Naturally 342, 344-45 (1989) [hereinafter Fish, What Comes Naturally].

Fish also claims that the antifoundationalist insight and rejection of subjectivist epistemology have no consequences because “the situated subject . . . is always constrained by the local or community standards and criteria of which his judgment is an extension.” Stanley Fish, Consequences, in Fish, What Comes Naturally, supra, at 323. We cannot renounce prejudices “in favor of convictions we choose more freely” because that choice also requires finding a position transcending context, a “moment of unconstrained choice.” Id. See also Stanley Fish, Unger and Milton, in Fish, What Comes Naturally, supra, at 431-32 (“[Y]ou don’t challenge the presuppositions of some formative context merely by saying that a challenge is possible.”). For a contrasting view arguing that antifoundationalism does create the possibility of a liberating freedom from previously unrecognized constraints, see Winter, Uses of Theory, supra note 178.
tivist epistemology that antifoundationalism is relativistic. That is, although knowledge is not grounded on unfiltered observations of reality and brute data, the prejudices, language, and perspectives through which it is achieved are shared among those with a common historical experience. To a significant extent, we cannot choose our prejudices and contexts because we are always already in the midst of them. They constitute the very way we think, see, and understand. The prejudices and prejudgments that inform our conclusions are not mere whims or personal predilections. Rather, they are the shared context or history that constrain our knowledge and perception and that make agreement on most perceptions so common.

Antifoundationalism patterns investigation and truth discovery on a contemporary understanding of hermeneutics, an interpretive approach that acknowledges the observer/interpreter as a social being who reaches truth through a dialectical relationship between the interpreter and the phenomenon or text. Rather than describing


184. Gadamer developed this point by emphasizing how tradition shapes a common historical consciousness. See Richard J. Bernstein, Beyond Objectivism and Relativism 129-50 (1983) (discussing Gadamer); see also id. at 142 ("[W]e belong to a tradition before it belongs to us: tradition, through its sedimentations, has a power which is constantly determining what we are in the process of becoming. We are always already 'thrown' into a tradition."); Gadamer, supra note 178. Rorty makes the same point by emphasizing the shared contingencies of language and conscience. See Rorty, Contingency, Irony, and Solidarity, supra note 178, at 3-22. Fish has developed this topic through his thesis of "interpretive communities." See Fish, Text in This Class, supra note 180 (subtitled "The Authority of Interpretive Communities"). See also Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 Harv. C.R.-C.L. L. Rev. 401, 417 (1987) (arguing that one always interprets through an "experiential perspective").

185. The approach here is adopted largely from Gadamerian and post-Gadamerian hermeneutics, with Rorty being the most relevant post-Gadamerian. See Warnke, supra note 175, at 139-66. On Gadamerian hermeneutics, see id. at 42-106, 167-71; Bernstein, supra note 184, at 109-69. See generally Gadamer, supra note 178.

186. Hermeneutics was dramatically redefined in the twentieth century, in large part by Hans-Georg Gadamer in his seminal work Truth and Method, from its earlier formulation as a subjectivist methodology of textual exegesis. See Warnke, supra note 175, at 5-41. It is from Gadamer that this Article takes much of its understanding of hermeneutics. As Richard Bernstein explains it:

One of the most important and central claims in Hans-Georg Gadamer's philosophical hermeneutics is that all understanding involves not only interpretation, but also application. . . . [Understanding, interpretation, and application]
the discovery of an object or truth by detached subjects, hermeneutics acknowledges that the process of understanding cannot be separated from the interpreter's language, perspectives, prejudgments and historical context. Knowledge is never final or definitive, but it can be tested in a practical and effective sense against other perspectives and contexts. Hermeneutics entails a dialogic adjudication of truth-claims that gain reliability as they withstand examination from a greater variety of social-historical traditions.

On this antifoundationalist-hermeneutic view, the jury is structured optimally for its task, which is the interpretation of evidence and propositions in a dialogical adjudication of truth-claims. The jury has the benefit of several perspectives: a literal conversation among jurors and, in some sense, an interpretive dialogue between the jurors and the phenomena or texts they interpret. The deliberative process—efforts to persuade fellow jurors and to reconcile competing interpretations—is constrained by the shared assumptions of jurors.

are not three independent activities to be relegated to different subdisciplines, but rather they are internally related. They are all moments of the single process of understanding.

...Gadamer ... highlight[s] the subtle dialectical and dialogical relation that exists between the interpreter and what he seeks to interpret. We misconceive this relation if we think that we are merely subjects or spectators standing over and against what is objective and what exists an sich. We participate in the works of art, texts, and tradition that we encounter, and it is only through understanding that their meaning and truth is realized. ... But what Gadamer stresses ... is that we do not do this by forgetting or seeking to bracket our own historicity, our own forestructures, prejudgments, and prejudices.


187. WARNKE, supra note 175, at 172 ("[It is precisely in confronting other beliefs and other presuppositions that we can both see inadequacies of our own and transcend them.").

188. Id. at 168-71; John D. Caputo, The Thought of Being and the Conversation of Mankind: The Case of Heidegger and Rorty, in HERMENEUTICS AND PRAXIS, supra note 178, at 248, 251 ("Truth as it emerges ... is not the representation of reality but a holistic coherence of beliefs, settled by an on-going social debate.").

189. See Thomas C. Grey, The Constitution as Scripture, 37 STAN. L. REV. 1, 4-5 (1984) (explaining that human behavior can be viewed as a "text-analogue" and interpreted as would a written text).

190. Cf. Krauss, supra note 52, at 631-32 (noting that the addition of one death penalty opponent to a capital jury does not necessarily change a verdict from 12-0 to merely 11-1; rather, that one juror provides a perspective that may persuade others, raising the possibility that the one juror could change the vote to anywhere from 10-2 to 0-12); Massaro, supra note 30, at 511 (discussing the advantages of the jury's multiple decisionmakers over a single judge).
Even assuming proper use of voir dire, jurors are unbiased only in the limited and specific sense that they know nothing about the defendant and the other players in the trial (or at least know nothing that the judge believes will affect their judgment concerning the defendant's guilt or innocence). Each juror brings to the jury personal history, prejudices, preunderstandings, and group affiliations. The term "prejudices" here is used as Gadamer defined it—not as something that can or should be bracketed or overcome so that we may investigate neutrally, nor as something in the narrow, negative sense of prejudice as in racial bias. Prejudices are what inevitably constitute us as beings who always already exist in a particular context, without access to a transcendent Archimedean point; they are "simply the conditions whereby we experience something." A juror's ontology precedes her epistemology: her being-in-the-world, the self she has

191. See Bernstein, supra note 184, at 138; Stanley Fish, Change, in Fish, What Comes Naturally, supra note 182, at 141, 144-45. Cf. Peller, Race Consciousness, supra note 183, at 794 (describing black nationalist ideology and positing that the "base of social identity is that we are, in a sense, thrown into history, with aspects of social reality already structured to limit some possibilities, while making other ones available"); Pamela S. Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 Harv. C.R.-C.L. L. Rev. 173, 179 (1989) (noting that individuals as voters are not fungible but rather "take with them their political, racial, ethnic and socioeconomic affiliations and interests").

It is important to note that the number of perspectives or social histories present on the jury does not necessarily correlate with the number of jurors. If several jurors come from effectively identical backgrounds with little insight beyond that experience, they collectively represent a single, common perspective. On the other hand, one juror who has learned from other perspectives or experiences may effectively bring several viewpoints to the jury's project. For a discussion of this latter possibility, see Mari Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 Women's RTS. L. Rep. 7, 7-10 (1989); Williams, supra note 184, at 411.

192. See Bernstein, supra note 18184, at 127 (quoting Hans-Georg Gadamer, The Universality of the Hermeneutical Problem, in Philosophical Hermeneutics 9 (1976)):

It is not so much our judgments as it is our prejudices that constitute our being. This is a provocative formulation, for I am using it to restore to its rightful place a positive concept of prejudice that was driven out of our linguistic usage by the French and the English Enlightenment. It can be shown that the concept of prejudice did not originally have the meaning we have attached to it. Prejudices are not necessarily unjustified and erroneous, so that they inevitably distort the truth. In fact, the historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. Prejudices are biases of our openness to the world. They are simply conditions whereby we experience something—whereby what we encounter says something to us. This formulation certainly does not mean that we are enclosed within a wall of prejudices and only let through the narrow portals those things that can produce a pass saying, "Nothing new will be said here." Instead we welcome just that guest who promises something new to our curiosity.

Id.

193. Id.
become by experience and context, is prior to and constitutive of the knowledge she acquires and the judgments at which she arrives.

On this view, then, the jury's social diversity is crucial even to its task of fact determination. When a jury finds facts, the process entails subtle and often difficult tasks such as assessing witness demeanor or the probative value of character evidence, reconciling (or rejecting) competing and often fragmentary descriptions of a single event, and otherwise interpreting multiple narratives that claim to inform about a single question. As a result, finding fact is an interpretive endeavor, the outcome of which varies with the fact finder. Who finds facts is just as important to the legal outcome of the trial, therefore, as who determines moral culpability and community condemnation.

B. Race and Interpretation

Trial lawyers have long assumed that race, as an indication of group membership and social experience, affects how a juror will interpret events and whether a trial argument will seem persuasive or commonsensical. That assumption is why attorneys peremptorily strike jurors based on racial or ethnic stereotypes; it is also what prompted the Batson doctrine, and why race is one of the few distinc-

194. The hard part of the jury's task in reconstructing historical fact is resolving, on the basis of partial and often contradictory information, issues such as whether the defendant acted in self-defense or had permission to withdraw money from certain accounts, or whether the police officer is really as sure as he claims to be that the man he saw running in the dark from the crime scene was the defendant, or whether the defendant was motivated by love, money, or racial hate, or whether the defendant's alleged solicitation was a serious offer, a joke, or a misunderstood statement.

195. In one sense, this observation may seem banal; after all, few would assert that the jury's fact-finding method could be described as a variant of scientific positivism yielding an objectively verifiable conclusion. The jury's task is more analogous to analyzing a character's actions and intentions on the basis of the information in a true crime novel; that is, the task is comparable to interpreting a book or movie. But even accepting that analogy, the antifoundationalist position still meets controversy. For example, it is still a respectable held and ardently defended position among literary theorists that a novel's meaning is the author's intention and that such intention is objectively and conclusively determinable. See E.D. Hirsch, Jr., The Aims of Interpretation (1976). Juxtaposed to that viewpoint is the antifoundationalist position that the meaning of a text (whether a novel or an oral narrative given in a courtroom) is not a separate entity from the reader/interpreter; instead, that person's context and presuppositions inform his conclusions about the text's meaning. When the jury's operation is understood from this latter perspective, the question of the jury's composition takes on increased importance.

196. See Simon, supra note 78, at 41; see also Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323, 323 (1987) [hereinafter Matsuda, Looking to the Bottom] (observing that black jurors are "more likely to understand... that people in power sometimes abuse law to achieve their own ends").

tions that Sixth and Fourteenth Amendment jurisprudence recognizes as affecting a jury's impartiality.

In recent years, legal scholarship (as well as that in other disciplines) has expanded upon this insight and has explored the structure and implications of racial differences both in legal practice and scholarship. For example, Professor Crenshaw has described a "white race consciousness" that underlies doctrinal and public policy debates. She argues that, while explicit racism is no longer permissible, what passes as (and what its practitioners may honestly believe is) a neutral perspective actually is an unconscious "white norm" that "makes it difficult—at least for whites—to imagine the world differently." As one example, she argues that in discrimination actions brought by black women plaintiffs, courts have conceptualized the claims as "hybrid" or "compound" claims of race and sex discrimination. By contrast, reverse discrimination claims brought by white males have not been so described, even though plaintiffs in those cases also have alleged discrimination based on the combination of their race and gender. As another example, she points out that courts have doubted the ability of black women, but not of white women, to represent a class of female plaintiffs in gender discrimination litigation, as if white women's race makes them neutral class representatives while black women's race compromises their ability to represent women of all races.

peremptory strikes against white jurors and that the prosecutor used all 7 strikes against black jurors).


200. Id. at 196-97.

That Black women’s claims raise the question of compound discrimination while white males’ reverse discrimination claims do not suggests that the notion of "compound class" is somehow relative or contingent on some presumed norm . . . . If that norm is understood to be white male, one can understand how Black women, being "two steps removed" from being white men, are deemed to be a compound class while white men are not.

Id.

201. Id. Professor Crenshaw argues:

[In gender discrimination cases,] the absence of a racial referent [when white women seek to represent all women] does not necessarily mean that the claim being made is a more inclusive one. A white woman claiming discrimination against females may be in no better position to represent all women than a Black
Along the same lines, Professor Matsuda has argued that the experience and perspectives of people of color in America provide a "new epistemological source" for examining the structure and implications of legal doctrine.\textsuperscript{202} Her argument implies that the common experience of racial minorities in America alters their shared historical consciousness so that certain policy arguments and doctrinal options, unaccepted in mainstream debate, seem persuasive, sensible or necessary.\textsuperscript{203} Similarly, Professor Williams has posited the "experiential perspective of blacks" as the explanation for why blacks are more likely than some others to favor legal rights rhetoric as an empowering conceptual strategy.\textsuperscript{204} In support of that thesis, she has observed more generally that "it really is possible to see things—even the most concrete things—simultaneously yet differently" and that blacks' and whites' "qualitatively different experiences of rights"\textsuperscript{205} explains their divergent assumptions about when the assertion of rights is appropriate or useful.

Such scholarship\textsuperscript{206} explicates a specific and important example of the general antifoundationalist idea of interpretive bias: one always understands the world—whether doctrinal issues or everyday human actions—from some specific locus and personal history. An integral part of one's history and social position, for Americans, has always been race.\textsuperscript{207} Though this scholarship generally has not addressed itself to juries, but rather has focused on judicial analysis—legal reasoning as opposed to fact finding, logic as opposed to observation—the insight is highly applicable to the jury's project. Race is a determinative prism through which people interpret social events and understand both human behavior and the law and through which they apply

\begin{itemize}
  \item woman who claims discrimination as a Black female and wants to represent all females.
\end{itemize}

\textit{Id.}

\textsuperscript{202} Matsuda, \textit{Looking to the Bottom}, \textit{supra} note 196, at 324-25.

\textsuperscript{203} See \textit{id.} at 360.

\textsuperscript{204} Williams, \textit{supra} note 184, at 404-05.

\textsuperscript{205} \textit{Id.} at 410-12.


the latter to the former. This scholarship, and antifoundationalism generally, presupposes an historicized view of human reason and understanding. Both repudiate the idea of a universal vantage point from which all people objectively may discern and understand social life.

This position contrasts with much of the scholarship in recent decades addressing race in American law. The ideological formulation that has developed to counter the nation’s history of racism is premised on the normative assertion that race should not matter in any respect—that law and social policy should be colorblind. This argument proceeds on the basis that ideally our society will transcend race and achieve the ability to see each other and social life neutrally, untainted by any racial perspective; race will become as insignificant a physical trait as eye color. Those arguing for race consciousness generally, as well as critical race theorists such as Crenshaw, Matsuda, and Williams in particular, stand in opposition to the theory of colorblindness.

The race-consciousness position yields at least two points that are important to the discussion of juries. First, race groups, particularly African Americans, are “distinct social communit[ies]” whose shared

208. See Aleinikoff, supra note 198, at 1066-69; Williams, supra note 184, at 404 n.4; Johnson, supra note 207.

209. See Peller, Race Consciousness, supra note 183, at 794.

210. Id.


213. For discussions of this approach to race issues, see Peller, Race Consciousness, supra note 183, at 765-79 (discussing “integrationism” as the dominant understanding of race in law and social policy generally); Aleinikoff, supra note 198, at 1061-65 (discussing the theory of “colorblindness” as a “normative principle” that “runs deep” in civil rights law); Alan Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049 (1978) (discussing the failure of the “colorblind approach” in antidiscrimination law to address the underlying condition reinforcing the inequality between blacks and whites).

214. See supra notes 198-210 and accompanying text (discussing the work of scholars usually associated with critical race theory).

215. For a discussion contrasting colorblind “integrationism” with the race-conscious position, see Peller, Race Consciousness, supra note 183, at 791-811.
history has produced a race identity that marks them as members of a community "in much the same way that national self-identity operates to establish the terms of recognition and identity in 'regular' nations."\(^{216}\) Second, the distinctiveness of African Americans as a racial group increases the odds that blacks who serve on juries will bring to the juror's task an interpretation of evidence and law different from that of white jurors.\(^{217}\) The Supreme Court acknowledged as much in \textit{Peters v. Kiff},\(^ {218}\) holding that racial differences matter not only for explicitly racial issues, but also for a broad range of social facts and issues.\(^ {219}\)

To return to the examples with which we started, the trials of Mayor Barry and the officers who beat Rodney King confirm the relevance of race in jury decisionmaking. Neither of those trials were explicitly about race—the government did not accuse the defendants of race discrimination, the defendants' defenses did not require any reverse allegation, and the juries did not have to decide issues of racial intent or effect.\(^ {220}\) The juries did have to grapple with issues that all juries confront, however: which witness is telling the truth, whether the defendant acted reasonably, what evidence is credible and persuasive. The fact that the defendants in both trials were acquitted (or avoided conviction by reason of a hung jury) by juries dominated by members of their own race is not a fact that many, least of all the

\(^{216}\) Peller, \textit{Race Consciousness}, \textit{supra} note 183, at 792, 793-94.

\(^{217}\) One need not ascribe to racial identity as either monolithic or essentialist in nature to accept this proposition. \textit{See} Williams, \textit{supra} note 184, at 404 & n.4; Aleinikoff, \textit{supra} note 198, at 1094.


\(^{219}\) \textit{See id.} at 505-04 ("[W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race ... [Their] exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."). \textit{See also} Aleinikoff, \textit{supra} note 198, at 1086 (making the same point).

\(^{220}\) On the other hand, both trials were widely seen as racially charged: in Barry's case, a popular black elected official was pursued by white investigators and prosecutors under the direction of a conservative administration that was unpopular with District residents. In the Rodney King case, the videotape of white officers beating a black motorist prompted a lengthy national discussion of racially motivated police brutality. Nevertheless, many criminal cases have a comparable racial dynamic—either with a defendant and a victim of different races or with a defendant and the arresting officers of different races. Given the disproportionate number of black men charged with crimes, \textit{see} Randolph N. Stone, \textit{Crisis in the Criminal Justice System}, 8 \textit{Harv. Blackletter L.J.} 33 (1991), and the continued white dominance of law enforcement, such scenarios are neither unexpected nor uncommon. Even when such dynamics are absent, there remains the dynamic between the jurors and the defendant and witnesses: jurors are assessing a defendant or a witness either of their own race or of another race and that fact alone raises the salience of the racial dynamic at least to a minor extent.
defendants, would claim was meaningless or incidental.\textsuperscript{221} The race of the jurors in those cases made a substantive difference in the outcome of those trials.\textsuperscript{222}

VI. RECOMMENDATIONS AND CONCLUSION

A. A Proposal for Changes of Venue

The analysis of this Article raises several practical implications for legal doctrines affecting juries: that \textit{Batson} is flawed inasmuch as it fails to acknowledge how race affects jurors' judgments; that the fair cross section doctrine should more closely guard the racial diversity of petit juries and perhaps also should examine the boundaries of judicial districts; and that venue changes should take account of the racial composition of both the original and the alternative venues. On the latter point, the Rodney King beating case again is instructive: that trial's venue was transferred from multi-ethnic Los Angeles to predominantly white Ventura County. In an effort to find jurors who were less biased by pretrial publicity (a dubious effort given the national attention that the case, and the beating videotape, attracted), the jury's racial composition was drastically altered. Even if the new venue was more neutral in the narrow sense of being less affected by publicity, the venue change effected a dramatic change in the general bias resulting from the social character of the community by which the defendants would be judged. The Sixth Amendment standard of impartiality was unaffected by the venue change; the Ventura County jury was "impartial" under Sixth Amendment doctrine. But the collective prisms of racial history and social experience through which the jury assessed evidence and applied law shifted significantly with the venue transfer. Thus, if the venue change increased neutrality in one respect, it dramatically shifted perspectives in another.\textsuperscript{223}

The Sixth Amendment jurisprudence of jury impartiality, as informed by its venue clause, needs to reclaim its original recognition that transfers of venue substantively affect the standard and perspective by which defendants are judged. It would be relatively simple for

\textsuperscript{221} These racial issues certainly were not incidental to public reaction to those verdicts and thus to public confidence in the criminal justice system.

\textsuperscript{222} Empirical data supports the conclusion that race generally affects criminal trials. \textit{See} Johnson, \textit{Black Innocence}, \textit{supra} note 168, at 1619-40 (discussing research that indicates a widespread tendency among white jurors to convict black defendants in cases in which white defendants would be acquitted).

\textsuperscript{223} \textit{See} Faber, \textit{supra} note 139, at 141 (noting that a defendant "who is a member of a minority race may feel that despite considerable publicity-engendered prejudice in the urban county where the crime took place, his chances for acquittal are worse still in a distant rural county where the minority population is small").
change-of-venue doctrine to take account of the racial implications of a proposed change. \(^{224}\) Whenever the defendant seeks a venue change, the court, in selecting an alternative venue, could consider the racial demographics of alternative venues and could select one that roughly approximates the original venue. \(^{225}\) Predominantly white areas often would be relatively easy to match; for venues dominated by racial minorities, the distance to comparable locales may be greater. But the doctrine could permit the trial judge, in her discretion, to assess the balance and trade-offs between a venue with radically different racial demographics and one that is so distant as to impose logistical burdens on the conduct of the trial. A multi-factor analysis, on the model of federal *forum non conveniens* doctrine, would be appropriate: the trial court, in selecting an alternative venue, could consider (a) the amount of change in racial demographics, (b) the distance to the new venue and the inconvenience or expense that would be imposed on the parties, and (c) the likelihood that the new venue would reduce the bias that infects the original locale. \(^{226}\) Furthermore, the doctrine might allow the defendant to exercise his venue waiver after the trial judge has selected an alternative venue, thereby allowing the defendant to weigh the impartiality gains of a

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224. In the wake of the William Lozano trial, *see supra* note 10, Florida enacted a statute doing exactly this. *See* 1993 Fla. Sess. Law Serv. ch. 93-225 (West). This new approach should not open a Pandora's box of factors to consider in selecting alternative venues. Besides race and ethnicity, only gender has been granted strong constitutional recognition under the Sixth and Fourteenth Amendments. Fortunately, gender demographics are roughly the same in all venues, so that factor is of no concern. Although myriad other factors affect juror decisionmaking, including economic class, occupation, and religion, venue doctrine nevertheless could defensibly draw the line at protecting only racial or ethnic demographics. The original venue may have many farmers or factory workers while the alternative may have more white-collar professionals, but that does not mean a defendant is entitled to constitutional or statutory protection of that demographic mix. As a policy matter, opening the venue calculation to factors other than race likely would make it prohibitively complicated.

225. A Florida court did exactly this in transferring the venue of the William Lozano trial from Orlando to Tallahassee. *See supra* note 10.

In some cases, this will be easy: Barry's trial, for instance, might have been transferred to Baltimore, Maryland, a forty-minute drive north, or at least to Prince George's County, Maryland, which has a substantial African American population. The problem of federal districts that encompass large areas of a state (or perhaps even an entire state) would have to be worked out, probably by picking juries from divisions within districts, as many districts currently do. *See* 28 U.S.C. § 1863 (1988) (permitting federal judicial districts to operate separate jury selection plans "for each division or combination of divisions within a judicial district").

226. Florida's statute takes a simpler approach, mandating that the trial judge give priority to the venue with demographics that most closely match the original. *See* 1993 Fla. Sess. Law Serv. ch. 93-225 (West).
new venue against the disadvantages of defending in a distant forum.\textsuperscript{227}

Such a rule takes seriously the insights about the nature of impartiality that the fair cross section requirement's jurisprudence provides. If no jury is impartial in terms of its racial perspective—if competing perspectives are merely different, but not more or less objective—then the law needs to recognize this understanding of impartiality. Once we acknowledge that race makes a difference in jury impartiality, the only remaining standard by which to measure impartiality (in the sense of interpretive bias or racial perspective) is the demographics of the venue that the defendant initially "chose" by committing the alleged criminal acts in that venue.\textsuperscript{228}

\textbf{B. Conclusion}

The centrality of race and social history to jury impartiality points toward other projects of doctrinal revision as well. It emphasizes the

\begin{itemize}
\item \textsuperscript{227} See generally Faber, supra note 139 (arguing that defendants should be allowed to specify the venue to which their case is transferred).
\item \textsuperscript{228} This regime has the additional quality of lessening defendants' opportunities to manipulate transfer of venue in highly publicized cases. Whenever a change of venue would be granted, defendants have the choice of whether or not to request it. They will request a change if they believe the move benefits them, but in making that assessment they calculate not only the prejudice arising from pretrial publicity but also the demographics of the likely new venue. Mayor Barry chose not to change venue, despite prejudicial publicity, because he calculated (correctly) that the favorable demographics of the original venue outweighed any benefit he could gain from a transfer. The defendants in the King beating case, on the other hand, sought a transfer in hopes of being tried in a largely white, suburban venue. Adjusting venue transfer doctrine as discussed herein to take account of racial demographics will remove many of defendants' opportunities to make such calculations.
\item Reducing opportunities for changing racial demographics through venue changes may or may not be a normative improvement. In the few cases in which it applies, change of venue doctrine gives defendants a tool with which to counter the government's existing ability to manipulate venue by choosing the locale in which it has the advantage when several venues are available (as is the case under many federal criminal statutes). See United States v. Johnson, 323 U.S. 273, 278 (1944) ("While it might facilitate the Government's prosecution in a case like this to have its witnesses near the place of trial, this must be balanced against the inconvenience of transporting the Government's witnesses to trial . . . [and] the serious hardship of defending prosecutions in places remote from home . . . "); Multi-Venue, supra note 55, at 401-03 (1962) (discussing the practice of Congress to designate various federal crimes as "continuing offenses," thereby allowing for prosecution in multiple districts). The number of cases in which these two situations coincide—that is, the case is brought under a statute that has permitted the prosecution to select an inconvenient forum, but the venue is somehow prejudiced so that the defendant would be entitled to a venue change—is undoubtedly small. Moreover, the defendant could be empowered by a rule of procedure (which could apply whether or not change-of-venue doctrine is altered from its current formulation) allowing the waiver of her venue right to be conditional on transfer to an alternative district she selects.
\end{itemize}
need to reexamine the compromise that Sixth Amendment doctrine has struck regarding petit juries, forgoing a guarantee of their representativeness as a concession to administrative costs. Options exist for moving closer to a guarantee of diverse petit juries; courts and scholars need to work toward their formulation. Courts and policymakers also need to consider the feasibility of revising judicial districts in order to maximize diversity and should reexamine sources and methods for composing juror lists as well as grounds for granting hardship excuses to jurors, both of which contribute to unrepresentative juries.

Sixth Amendment jurisprudence contains the unavoidable tensions and inconsistencies of doctrines that must give content to controverted and difficult concepts such as the nature of impartiality and the salience of race. Those tensions are largely inevitable when tentative conclusions about these concepts must serve as the premises for policy and practice. Some of those tensions (identified by persuasive empirical research) are unpleasant to contemplate—such as the fact that whites are less likely to render favorable judgment upon a black defendant. Others invite changes that are infeasible to implement—such as requiring equitable representation of a community on every petit jury.

Implicit in the structure of the fair cross section doctrine, however, is a productive understanding of how racial issues should inform

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229. See Race and the Criminal Process, supra note 17, at 1585-87. One of those options might be to eliminate peremptory strikes, either for the prosecution only or for all parties. See, e.g., Massaro, supra note 30 (arguing that eliminating the state's use of peremptory challenges would better protect a defendant's Sixth Amendment right to a jury composed of at least some of his peers).

230. See Martin Howard Levin, The Jury in a Criminal Case: Obstacles to Impartiality, 24 CRIM. L. BULL. 492, 498 (1988) (stating that, for many reasons, various types of jurors are excused or avoid jury service, so that juries "frequently do[ ] not reflect the distribution of attitudes, values and biases in the general community"); Race and the Criminal Process, supra note 17, at 1561-81.

231. See Race and the Criminal Process, supra note 117, at 1560.

Although empirical evidence is fairly conclusive that all-white or predominantly white juries work to the real disadvantage of minority defendants, the discomfort some may have with this acknowledgement arises in large part because of how we have constructed the ideas of impartiality and objectivity. The antifoundationalist position provides a descriptive basis for understanding these ideas; antifoundationalism explains the unjust result in a manner less accusatory to the jurors. Because there is no comprehension of trial evidence separate from the jurors' contextual interpretation or understanding of it, and because that understanding is always filtered through the juror's cultural interpretive biases, neither blacks nor whites as a group are necessarily being racist in the sense of acting in bad faith or ignoring evidence. The empirical trend arises instead from the nondiversification of the jury panels and the juries' failure to engage in an exchange of ideas and perspectives.
the judicial understanding of impartiality. Impartiality is more than an absence of pretrial information about a case and a genuine willingness to evaluate evidence fairly. The Sixth Amendment's fair cross section and venue doctrines have each recognized that jury impartiality cannot be separated from the social history of each juror, nor from the social context into which jurors collectively are thrown. The *Batson* doctrine and Sixth Amendment jurisprudence each acknowledge that, in the United States, racial identity cannot be separated from social history, nor from the interracial narratives that dominate American criminal law. These observations do not point toward any easy or obvious reconstructive projects for the law of juries. But they merit attention, and they can productively inform future decisions on venue and jury selection and composition.