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Article

***429** AND SO SAY SOME OF US . . .WHAT TO DO WHEN JURORS DISAGREE

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I. INTRODUCTION

This is the fourth article we have written analyzing decisionmaking by juries in criminal cases. The first of these articles seeks to determine the differences between the verdicts which would be rendered by juries governed by the currently dominant rule in the United States, requiring unanimity either for acquittal or conviction, as compared to the verdicts which would be rendered by juries governed by the supermajority rule which is employed in Oregon, Louisiana, Great Britain, and other jurisdictions. [FN1] In that article, we also explore the conditions under which a defendant is better off having the jury instructed on lesser included offenses. [FN2] The second article analyzes the various rules in the American states governing juries that are determining whether to impose capital punishment. [FN3] This article identifies the important relationship between jury selection rules and jury voting rules. [FN4] Building on this analysis, the third article considers how the right to exercise peremptory challenges [FN5] conferred on counsel for the prosecution and the defense impacts decisionmaking by juries. [FN6]

***430** In the present Article, we extend this prior work to address what we now believe to be the fundamental question that must be resolved in order to devise appropriate rules governing decisionmaking by juries: What is the best way to generate an authoritative outcome when the members of the jury disagree as to what that outcome should be? When we expect jury decisionmaking to be very straightforward and uncontroversial, the rules employed make very little difference. If we expect all people to reach the same conclusions from the evidence presented, the composition of the jury is irrelevant, as is the number of votes needed for a conviction or acquittal. Things only get interesting when we expect potential jurors to disagree.

The process now dominant in the United States has two prominent features: it requires the jury to be unanimous for either conviction or acquittal in order to render a verdict, and it empowers opposing counsel to exclude from the jury the persons most likely to dissent and make it impossible for the jury to achieve such unanimity. The unanimity requirement encourages jurors to vote insincerely for the sake of achieving the appearance of unanimity. When this occurs, an illusion of consensus among jurors is created even though they may actually be quite divided. The peremptory challenge system, by removing likely dissenters, produces an illusion of societal consensus when it does not really exist. We suggest here that this system should be replaced by one in which a simple majority is empowered to render a verdict, the power of opposing counsel to challenge prospective jurors is severely curtailed, and jurors vote sincerely to convict or acquit.

There is, of course, good reason to expect that in a significant number of instances there will be disagreement among the members of the jury as to whether the defendant should be convicted or acquitted. Moreover, if the charged offense is one which permits the jury to convict the defendant of either that offense, or one or more "lesser included" offenses, there is often disagreement among jurors as to which offense(s) the defendant should be convicted of committing (even if the members of

the jury all believe that the defendant should be convicted of at least one of these offenses). After all, under the current, but still very new, conception of appropriate jury composition, its members should represent "a fair cross section" of the population. [FN7] Thus, at the very heart of our view about what a jury should be ***431** lies the recognition that we are a diverse population, and that it is important that this diversity be replicated, to the extent practicable, in the juries which decide criminal cases. To embrace this conception of the representative jury is to strongly imply that a juror's place in our society, her deep convictions, and her experience will often be influential in determining whether she votes to convict or acquit a particular person charged with committing a particular crime. The fair-cross-section requirement can only be interpreted as resting on the belief that differences among people in these essential respects should somehow be taken into account in the process through which guilt or innocence is determined. But, such inclusivity does not come without a price. It seems reasonable to conclude that a group of people chosen to be representative of the diversity which exists in our society will in a significant number of cases disagree as to which verdict is most appropriate.

A cursory analysis of the functions that must be performed by the criminal jury makes it clear that the diversity which characterizes the membership of the jury will often manifest itself in disagreement as to what outcome is the correct one. Most obviously, jurors will bring different knowledge and experience to bear in drawing inferences from the evidence presented. Moreover, the crucial "beyond a reasonable doubt" standard allows each individual juror substantial freedom in deciding what degree of certainty she will require in order to convict. An identical resolution of this issue by a diverse group of people is unlikely. In "close" cases, the differences in the certainty required by each individual juror may easily lead the jurors to disagree as to the correct outcome. [FN8]

There are many other important instances in which each juror has substantial freedom to choose the standard that will govern her decision. Many legal rules do not pose only "neutral" issues for juries to resolve. Instead, many rules are framed to raise what are commonly referred to as "mixed" questions of law and fact. This occurs when, as is often the case, ***432** the precise weight to be given to the various relevant factors in deciding particular cases cannot be specified in advance. When this is so, the essential function of giving weight to the various factors is assigned to the jury. The many rules employing terms such as "reasonable" or "necessary" are the most obvious examples of this phenomenon. [FN9] However, other, more subtle, instances occur throughout the criminal law. Consider, for example, the terms "premeditated," with "malice," and "reckless" disregard, which are used to distinguish various homicide offenses. [FN10] It seems reasonable to ***433** expect that a diverse group of people, each with substantial freedom to give precise content to rules of this kind, will often disagree as to what verdict should be reached.

The final source of jury disagreement arises from its unlimited power to acquit for any reason it chooses. Putting aside until later in this Article the hard question of what exactly jury "nullification" means and what its legitimate role should be, [FN11] it is clear that a member of the jury has the power, if she wishes to exercise it, to vote to acquit for any reason she believes to be sufficient. It seems virtually tautological to say that a diverse group of people will often, consciously or unconsciously, exercise this power in different ways.

There is an inescapable tension between the expectation of frequent disagreement among members of the jury and the rules currently governing decisionmaking by juries. The dominant decision rule governing jury verdicts in the United States is framed so that any disagreement among the members of the jury that persists throughout deliberations precludes the jury from reaching a verdict. Absent such unanimity, the defendant is neither convicted nor acquitted. (The jury "hangs.") The defendant may, but need not, be tried again.

If the rule governing jury composition is combined with the rule governing jury decisionmaking, the conception of the appropriate process for resolving criminal cases would appear to be that a defendant should not be convicted or acquitted

unless the members of a jury, representing a fair cross section of the population, unanimously believe that either conviction or acquittal is the correct outcome. If such a fairly representative jury unanimously agrees on a verdict, then we can be confident that they have reached the "right" verdict. Remarkably enough, we are unaware of any principled view that has ever been offered as to what the right outcome is if unanimity for either conviction or acquittal is not present. The purpose of this paper is to provide a means for answering this question. Our answer, perhaps initially surprising, is that guilt or innocence should be determined by majority vote. In brief, our argument is as follows.

First, there is a real problem to be addressed. In a significant number of (often important and controversial) cases, the goal of having a unanimous ***434** verdict rendered by a jury representing a fair cross section of the population is unattainable.

Second, various means are now employed to achieve authoritative outcomes in the absence of unanimity, while still formally retaining the requirement-- insincere voting by members of the jury (in the form of compromise or some jurors just "giving up"), dismissal or retrial after a jury hangs, and manipulation of the jury composition to eliminate potential members who are likely to prevent the jury from being unanimous. Employing these means is inferior to addressing the problem directly by abandoning the unanimity requirement.

Third, as a normative matter, unanimity should not be the only basis for a jury to render an authoritative determination.

Finally, and most controversially, a simple majority of jurors [FN12] should be empowered to convict or acquit the defendant.

What we have to say has both a positive and a normative component. The positive component, which has largely been demonstrated in our previous work, [FN13] is relatively straightforward. It consists essentially of capturing the consequences resulting from the current rules governing jury composition and decisionmaking. An appreciation of these consequences provides both a good reason for asking whether it is not possible to devise a better set of rules, and a framework for posing the normative issues identified as central by the positive analysis.

The present paper goes beyond our prior work by taking these normative issues head on. These issues turn out to implicate fundamental questions about what a criminal justice system should be. We proceed not in the spirit of authoritatively resolving these difficult and troubling questions, but rather in inviting serious consideration of what we believe to be very important, but largely neglected, issues.

***435** We begin by considering the various means through which the present rules governing jury composition and jury decisionmaking generate outcomes despite the tension between the reality of likely disagreement among jurors and the requirement of unanimity. Interestingly, while these means are well understood, we are unaware of any principled defense of any of them.

II. CURRENT MEANS OF CIRCUMVENTING THE UNANIMITY REQUIREMENT

A. Hung Juries

Sometimes the conflict between the unanimity requirement and the reality of jury disagreement is manifested directly and unmistakably. This occurs when the members of the jury are unwilling to vote unanimously for conviction or acquittal and no verdict can be rendered. So far as we are aware, no one has offered a principled defense of the means that are employed to resolve the situation when the jury is divided and cannot, under current rules, render a verdict.

It is nevertheless worthwhile to reemphasize all of the reasons why the hung jury is an undesirable result. The jury can, of

course, hang no matter how the members of the jury divide on the guilt or innocence of the defendant. Even a single juror can prevent all of the other jurors from convicting or acquitting the defendant. There is thus the fundamental issue, which we address at length below, [FN14] of a minority, sometimes consisting of only one person, preventing a majority from determining the outcome of the case.

The objections to the unanimity requirement in circumstances in which a jury hangs, however, go well beyond the basic issue of empowering the minority to block the majority. Most fundamentally, if the first jury hangs, this provides strong evidence that a body representing a fair cross section of the population is not unanimous as to whether the defendant should be convicted or acquitted. All of the means which are employed to resolve the case after a jury hangs constitute unacknowledged abandonments of the unanimity principle. Moreover, all of the substitutes for a unanimous jury determination are seriously flawed.

One common means of resolving a case after a jury hangs is for the prosecutor to decline to try the defendant a second time. The conclusion by the prosecutor that the defendant should not be tried again surely cannot be taken as resting on the judgment that the jury in the second case, or, indeed, ***436** any jury representing a fair cross section of the population, would unanimously favor acquittal. Anticipation that a second jury would also hang is sufficient to justify a decision not to try the defendant again. Indeed, what the prosecutor must decide is whether the chances of a second jury voting unanimously to convict are high enough to justify the costs of a retrial to the state and to the defendant. Thus, the decision of a prosecutor to dismiss the case rather than retry the defendant can hardly be viewed as a vindication of the unanimity principle as embodied in the current governing rules.

In order to defend the process of dismissal after a jury hangs as a means of achieving an authoritative outcome, it would be necessary to posit a unanimity requirement far stronger and less ambiguous than the one embodied in current practice. It would have to be claimed that unless the jury unanimously favors conviction, the defendant should be acquitted. But if this is the principle that is to be vindicated, why not do so directly and unambiguously by requiring a unanimous vote for conviction with acquittal resulting from any other vote by the jury?

A second possibility for resolving a case after a jury hangs is a unanimous verdict for conviction or acquittal at a subsequent trial. But the fact that a second jury is unanimous does not necessarily mean that a jury representing a fair cross section of the population unanimously favors conviction or acquittal. To reach this conclusion, one must first explain the failure of the first jury to render a unanimous verdict. Two explanations are possible. One is simply that the composition of the two juries was different with the members of the second jury being less heterogeneous in their predisposition to favor conviction or acquittal. If, however, this is the explanation, how can we exclude the possibility that the first jury did represent a fair cross section of the population and that the second jury was able to reach a unanimous verdict only because it did not?

The second explanation for the inconsistent results reached by the two juries does provide some, but in our view inadequate, justification for the unanimity requirement. The evidence presented at the second trial may more strongly support guilt or innocence than that at the first trial. And, to be fair, counsel do try to determine the reasons why a jury hung and to strengthen their second presentations to respond to the doubts expressed by the jurors. However, to adhere to the unanimity principle, it would be necessary to claim that in every instance the first jury would have been unanimous if presented with the evidence available to the second.

There is, of course, no way to determine how many instances, in which unanimous verdicts are rendered in subsequent trials, are explained by differences in the composition of the jury and how many by differences in the evidence presented. We believe, however, that the explanation resting ***437** on differences in jury composition is the correct one in a significant

number of instances. As a result, allowing conviction by a second jury after the first jury hangs constitutes a substantial departure from the unanimity principle.

It is, of course, also clear that the possibility of a better evidentiary record at subsequent trials does not necessarily justify the current two-way unanimity requirement. In a variety of circumstances, the law must deal with a litigant's claim that she did not prevail because she did not present as strong a case as she could have; therefore, she should be given a second chance to make a stronger presentation. Such claims are granted in only very limited circumstances. The reason, of course, is that we want cases to be presented as strongly as possible the first time to avoid the delay and costs associated with a second trial. In the criminal setting, these considerations are particularly compelling. The budgetary constraints under which prosecutors operate and the terrible cost of litigation for criminal defendants both support a policy of trying to limit the costs of the criminal justice system. If there are circumstances in which the inadequacy of the evidentiary presentation at a criminal trial justifies disregarding the outcome reached at that trial and having a second trial, that possibility should be explicitly addressed. The fact that the jury hangs hardly provides a reliable proxy for concluding that allowing a second trial is the correct result.

As far as we are aware, no defense of the two-way unanimity requirement on the theory of assuring an adequate evidentiary record has been offered by anyone else. Indeed, the hung jury outcome has never been defended on any reasoned basis. What is claimed, however, is that hung juries, while perhaps theoretically troubling, do not represent a serious practical problem.

The available evidence with respect to hung juries is, unfortunately, far less extensive and textured than would be necessary to draw a firm conclusion as to how serious the problem really is. Information regarding hung juries is not systematically recorded or tabulated. No study of the nationwide incidence of hung juries has been undertaken since the fair-cross-section conception of jury composition has become the dominant one. [FN15] However, individual state studies have been conducted. A three-year ***438** survey of nine California counties shows that in these counties, where the unanimity requirement controls, the average rate of hung juries is about 13%; in some of these counties for some offenses, it is as high as 30%. [FN16] In Oregon, one of the states employing a supermajority voting rule, the average rate of hung juries for eight selected counties is significantly lower, averaging 0.4%. [FN17]

We have no doubt that understanding the hung jury phenomenon would be greatly enhanced if we had better evidence as to what actually occurs. Moreover, the basic tension between the unanimity requirement and the fair-cross-section principle suggests a number of interesting hypotheses concerning the causes and consequences of hung juries that have never been systematically tested.

Despite the paucity of evidence, we have no difficulty in concluding that the hung jury phenomenon represents a significant problem. Dismissal after a jury hangs yields an outcome very close to an acquittal supported by only a (possibly very small) minority favoring acquittal and the prosecutor believing that the chances of a unanimous verdict at a second trial are too small to justify the costs. A conviction or acquittal reached by a unanimous jury at a second trial entails the additional cost of the second trial and the substantial risk that the second jury is unanimous only because it does not represent a fair cross section of the population. Such evidence as there is indicates that hung juries occur in a significant number of instances. Moreover, there is good reason to believe that more theoretically sophisticated empirical work will establish that the problem is substantially more important than would be indicated by the overall rate. For instance, we would like to know how many "unanimous" verdicts were rendered in ***439** spite of disagreement among members of the jury. This brings us to our second method of circumventing the unanimity rule, insincere voting.

B. Insincere Voting

The possibility of the jury hanging does not only lead to a departure from the unanimity principle in those cases in which the jury actually hangs. Even though the members of the jury vote unanimously to convict or acquit, it is clear in many circumstances that if they were to cast their votes on the basis of their sincere beliefs, they would be in disagreement so that the unanimity requirement could not be satisfied.

This is so in part because members of the jury often regard the hung jury outcome as an undesirable one, a view which is reinforced by the judge's stern instructions about the importance of returning a unanimous verdict. This importance is stressed in the form of a "dynamite charge" when the jury is in danger of hanging. [FN18] This leads to insincere voting of ***440** two kinds. First, sometimes a minority, certain that it cannot persuade all members of the majority to adopt its position, simply accepts the majority position so that a verdict can be rendered. In effect, the unanimity requirement is abandoned in favor of some species of majority rule. There are, of course, a number of reasons why a minority might adopt such a course.

Consider the admittedly extreme case in which a small minority sincerely favors conviction, yet accedes to the majority favoring acquittal. The minority may do this simply because it regards it as wrong to block the majority. There are, however, other reasons why the minority may accede to the majority. The minority may believe that if the jury hangs, it is unlikely that the defendant will be tried again, and even more unlikely that, upon retrial (unless a very different jury decides the case), the defendant will be convicted. Although the minority's response is understandable, this ad hoc method of abandoning the unanimity requirement is inferior to enacting a rule expressly authorizing a majority to render a verdict. When the minority accedes to the majority position, the burden of deciding how great a majority should be empowered to render a verdict is placed on the minority coalition in the particular case. The members of the minority, without guidance, and in contradiction to the instruction that they must vote sincerely, are obliged to decide whether to hang the jury or accede to the majority.

Even more troubling is the very real possibility that the minority will acquiesce due to the bullying and badgering of a majority coalition who view the minority members as simply obstructionists. There is evidence that after initial votes are taken, jurors in the minority coalition are often the objects of hostility and impatience. [FN19] Faced with the prospect of hours of defending herself against the onslaught of jurors who believe her to be wrong, the temptation for a juror to switch her vote rather than continue the unpleasantness is certainly understandable.

The possibility of the jury hanging leads to a second form of insincere voting. When the jury is instructed on lesser included offenses, such as ***441** when the defendant is charged with first degree murder, and second degree murder and manslaughter are lesser included offenses, the jury may convict of the offense charged or any of the lesser included offenses. The members of the jury may disagree as to which of these offenses, if any, the defendant should be convicted of committing. The jury is charged that unless it is unanimous either for conviction on one of these offenses or for acquittal on all of them, it cannot render a verdict. [FN20]

In these circumstances, however, the members of the jury have strong incentives to disregard these instructions and, in effect, abandon the unanimity principle. The crucial element that creates these incentives is that the members of the jury may unanimously prefer conviction of one of the three possible offenses to a hung jury. They can, as a result, all be made better off by compromising and voting unanimously to convict the defendant of one of the offenses. This outcome, of course, requires some members of the jury to vote insincerely.

Moreover, in many circumstances, such a compromise outcome may be inferior to authorizing a majority verdict. Consider the case where seven jurors favor conviction for manslaughter, one favors conviction for second degree murder, and four favor conviction for first degree murder. Under the current unanimity rule, the result would be a hung jury. If, however, the seven jurors favoring the manslaughter conviction prefer a conviction for second degree murder to a hung jury, and the four

jurors favoring a first degree conviction also prefer a second degree conviction to a hung jury, the likely result is a unanimous vote to convict for second degree murder--the outcome preferred by only one juror. If, instead, the majority favoring conviction for manslaughter were authorized to render a verdict, the result would be one that enjoys much greater support. Furthermore, the defendant would be convicted of a less serious offense.

For our purposes, the basic conclusions to be drawn from considering the possibility of insincere voting are clear. Often, unanimity is achieved only because some jurors feel compelled to vote insincerely. As well, in many circumstances, the result produced by insincere voting is inferior to the one that would be reached if a majority were expressly authorized to render a verdict.

***442** In addition, as we discuss at length below, [FN21] the possibility of reaching a compromise outcome through insincere voting has a deleterious effect on the deliberations of the jury. Instead of attempting to persuade each other as to which outcome is the correct one, the members of the jury are induced to engage in a process of threats and counter threats to hang the jury in an effort to achieve an outcome which is as close as possible to the one each prefers.

C. Gerrymandering to Achieve Unanimity

So far we have considered the consequences of imposing a unanimity requirement on a group which is likely to be divided as to which outcome is the correct one. The more heterogeneous the group, the more serious these problems will be.

Although they are not acknowledged to be designed to perform this function, challenges for cause and, most importantly, peremptory challenges serve to alleviate this tension by substantially reducing the heterogeneity of the members of the jury. [FN22] Challenges for cause permit each side to remove persons from the jury who, for specified reasons, are thought likely to be strongly disposed to favor the other side. Peremptory challenges permit each side, without assigning any reason for doing so, to exclude large numbers of prospective jurors believed to be strongly disposed to favor the other side.

The net result of granting to the parties this extensive power to determine the composition of the jury is to produce a jury much more homogeneous in its predisposition to convict than one which truly represented a fair cross section of the population. In brief, when each party eliminates those jurors most predisposed to favor their opposition, the result is a centrist jury purged of people strongly disposed to either side. Such a jury is, of course, much more likely to agree on what outcome should be reached than one which includes the more extreme views eliminated by the exercise of challenges. In slightly different terms, the two groups of people most likely to prevent the jury from reaching either a unanimous verdict of guilty or a unanimous verdict of not guilty are excluded from membership in the jury.

As we discuss in a prior article, [FN23] the possibility of a minority of jurors, either strongly disposed to conviction or to acquittal, blocking action by the ***443** centrist majority could also be eliminated by adopting a majority voting rule so that the concurrence of the minority is not required for the jury to reach a verdict. The difference, however, is that if the majority is empowered to reach an outcome by excluding from the jury those people most likely to dissent, the minority is deprived not only of its right to block the majority, but also of its right to persuade the members of the majority that the initial minority position is the correct one. The central reason for the fair-cross-section requirement is the importance of having the full range of views within the society expressed and taken into account in the deliberations of the jury. The system of challenges is essentially inconsistent with this objective since it denies both those people most predisposed to acquit and those most predisposed to convict, any opportunity to persuade the other members of the jury that they are right.

A decision rule empowering a majority of the jury to render a verdict similarly makes it impossible for a minority favoring either conviction or acquittal to prevent the majority from reaching a verdict. The crucial difference, however, is that the

persons strongly predisposed to conviction or acquittal are permitted to serve and try to persuade the other members of the jury that their position is the correct one. In our view, for this reason, permitting a majority of a truly representative jury to render an authoritative verdict is plainly more consistent with the underlying objective of the fair-cross-section requirement than the use of challenges to exclude from jury service persons likely to prevent the jury from reaching a unanimous verdict.

The use of a majority decision rule rather than the use of challenges to reach an authoritative result also has great practical advantages. The process of jury selection, well understood to be a key determinant of the jury's outcome, is a very costly and time-consuming process. [FN24] If, instead, peremptory challenges were eliminated and challenges for cause severely restricted, this aspect of the criminal trial would be much less important and less costly.

III. REASONS FOR NEVERTHELESS RETAINING THE TWO-WAY UNANIMITY RULE

Persons supporting the retention of the current two-way unanimity rule have not argued, as we believe they must, that its advantages outweigh the disadvantages discussed previously. [FN25] Our position depends, of course, both ***444** on what we believe to be the importance of these disadvantages and our assessment of the reasons supporting retention of the rule. Four sets of reasons for retention of the two-way unanimity rule have been advanced: (1) the long use of the rule (it was first adopted in the fourteenth century) demonstrates the wisdom of retaining it; (2) unanimity is required for jury verdicts to be regarded as legitimate; (3) the rule is required for appropriate implementation of the beyond a reasonable doubt standard; and (4) the unanimity requirement induces the members of the jury to be receptive to and assign appropriate weight to the views of other jurors with whom they initially disagree. We consider these reasons in turn.

A. The Historic Use of the Unanimity Rule

The unanimity requirement in the United States was adopted from the British system where it was employed beginning in the fourteenth century. [FN26] It is understandable that there is a strong presumption in favor of maintaining a practice that has been used for so long a time. We believe, however, that a close look at the history of the use of the unanimity rule suggests little reason to retain the rule at the present time.

Inquiries into what might be called the "theory" of the jury which underlies the original adoption of the unanimity requirement have yielded no results. The consensus among historians is that the choice of a unanimity rule was a "historical accident." [FN27] Medieval practice was to assemble the witnesses to an alleged crime together with persons familiar with the parties to the case. Twelve persons from this group were called to testify. If they all agreed about the guilt of the defendant, a verdict was handed down. If any disagreement was present, additional witnesses were called until any twelve of them agreed. Initially, those in dissent could be found in contempt. [FN28] For reasons that remain obscure, the practice evolved ***445** into one in which the failure of the twelve to agree precluded the defendant from being convicted. Thus, the unanimity requirement was born.

It is instructive to examine the recent history of unanimity in jurisdictions that originally inherited the British system. England itself has changed its practice from unanimity to requiring only ten of twelve jurors to agree to a verdict. [FN29] The states of Australia have chosen to adopt requirements of anything from nine to twelve jurors necessary to render a verdict. [FN30] Both Ireland and Northern Ireland require either ten of eleven or ten of twelve, depending upon the size of the jury. [FN31] Before juries were abolished in South Africa, verdicts were rendered by any seven jurors on a nine person jury. [FN32]

If one looks beyond the countries that inherited the British tradition, unanimity is virtually unknown. For centuries, Scotland has employed a jury of fifteen that decides by simple majority rule. [FN33] In continental Europe, both lay juries and mixed

panels of judges and lay persons decide criminal cases under a variety of rules ranging from simple majority to two-thirds supermajority. [FN34] In addition, on the European continent, all jurisdictions use ***447** one-way rules; therefore, hung juries are not a possibility. In those jurisdictions employing simple majority rule and an even number of "jurors," it is universally stipulated that a tie vote is resolved in favor of the defendant. The pervasiveness of simple majority rule is even more pronounced in Latin America where all countries employing juries, except Nicaragua, use simple majority rule. [FN35] In Russia, when the criminal jury was recently introduced as one of many democratic reforms, simple majority rule was adopted. [FN36]

In the United States, the two-way unanimity rule has been the dominant one. However, it should be noted that the Supreme Court has sustained the constitutionality of the relaxation of the unanimity rule by Oregon and Louisiana, in favor of a supermajority rule. [FN37] There was, moreover, a ***448** recently pending amendment to the California Constitution which would replace the unanimity requirement with a rule requiring only ten votes for conviction or acquittal in all but capital cases. [FN38] Thus, although the American experience shows widespread acceptance of the unanimity requirement, there is some dissent, and the movement for change in California may indicate growing dissatisfaction with the practice. In addition, it must be emphasized that a true unanimity rule, under which the defendant is acquitted unless the jury is unanimously in favor of conviction, has never been adopted anywhere. History, then, offers only the hung jury as a solution to the problem of disagreement among jurors.

Recent fundamental changes in other aspects of the criminal jury system also materially weaken the argument that the unanimity requirement has passed the test of history. Its wide acceptance occurred when the jury was a very different institution than it is today. As a result, the verdict of history on the wisdom of retaining the unanimity requirement under the current circumstances has not yet been rendered. This is the question we address. There are two related changes which may recommend abandonment of the unanimity rule: first, the adoption of the principle that the jury should represent a fair cross section of the general population; and second, the increased importance of the political function of the jury in producing authoritative outcomes for a population deeply divided on fundamental social issues. We now consider the effects of these related changes on the conception of the role of the criminal jury in a democratic society.

Until fairly recently, most jurisdictions in the United States employed what is known as the "key man" system for selecting jurors. As noted by Jeffrey Abramson:

The cross-sectional jury is so familiar to us today that we forget how modern is its triumph. As recently as 1960, federal courts still impaneled blue-ribbon juries. The theory was that justice required above average levels of intelligence, morality, and integrity. In place of random selection, therefore, jury commissioners typically solicited the names of "men of recognized intelligence and probity" from notables or "key men" of the community. A 1967 survey of federal courts showed that 60 percent still ***449** relied primarily on this so-called key man system for the names of jurors. [FN39]

This practice was not abandoned in federal courts until Congress passed the Jury Selection and Service Act of 1968. [FN40] In Taylor v. Louisiana, [FN41] the Supreme Court held that the fair-cross-section requirement was binding on the states. The Court stated:

We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting

jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. [FN42]

We must ask what conception of the jury underlies the change from a jury of "men of recognized intelligence and probity" to one which represents a "fair cross section of the population." More pointedly, for our purposes, we must ask whether a unanimity requirement will, as a positive matter, have different consequences when a jury consists of "men of recognized intelligence and probity" than when it represents a "fair cross section of the population." Secondly, we must question whether, as a normative matter, unanimity, assuming that it was justifiable when the elitist jury conception controlled, remains so when operating under the democratic conception. We believe that unanimity had different consequences when the elitist conception controlled, and that whatever normative justification there may have been for the unanimity requirement has been weakened dramatically by the democratization of the jury.

The answer to the positive query has two parts. The first point, simply, is that the extreme consensus required for a jury to reach a unanimous verdict will more likely be present when the jury is chosen from a homogeneous elite population than when the jury is representative of the ***450** entire population. Perhaps it is more accurate to say that the increase is not one of heterogeneity, but rather of the influence of previously excluded groups. Second, as race, gender, and economic disparity have increasingly become factors shaping attitudes towards what constitutes justice, the legal system has been pressed to reshape doctrine appropriately to take these factors into account. Underlying the democratization of the jury must be the conviction that a jury exercising discretion in a particular case is an important mechanism for taking proper account of the views and interests of our diverse population. If this were not so, why should the jury represent a fair cross section of the population? Only if the views of different groups vary systematically, and these variations manifest themselves when people serve as jurors, is there any point in democratizing the jury.

Not only is it less likely that a jury will be able to deliberate to a unanimous consensus when its members are drawn from a more heterogeneous population, but the nature of those deliberations is likely to change as well. This is true in large part because a fair cross section of the population includes in the process disadvantaged groups that may view themselves as having been substantially excluded from the legislative process which enacted the laws juries enforce. In addition, members of these groups may feel that they are discriminated against when prosecutors exercise discretion in deciding who will be charged with violating the law. [FN43]

One way to conceptualize this difference is to point out that the relationship between jurors on the one hand, and legislators and officers of the court on the other, involves agency in two directions. It is true, as has often been emphasized (and is explicitly included in jury instructions), that jurors are agents of the state generally, and of the legislators who pass the laws. That is, the jury has been delegated responsibility by the legislature to implement the law. What has not been sufficiently emphasized, however, is that the legislators and prosecutors are also agents of the jurors, in that jurors are members of the public. This public has delegated to the legislature and the court the responsibility for formulating the laws, and to the prosecutors the responsibility for determining who will be prosecuted for violating them.

When juries formerly consisted of members of society's elite, these jurors could perform their duty as agents of the state with some confidence that the legislators and prosecutors had acted as their faithful agents in framing and enforcing the laws that they, the jurors, were now being asked ***451** to apply. On the other hand, the democratically chosen jury includes individuals who are much less confident that the legislators and officers of the court have been their faithful agents. As such, juries operating under the current system are more likely to include individuals who believe it necessary to revisit fundamental issues of justice in order to determine what is the appropriate resolution of the particular case at hand. As a result, the cross-sectional ideal introduces into jury deliberations new issues about the resolutions of which a jury is likely to be divided.

Therefore, unanimous consensus is more difficult to attain.

The move away from the elitist conception to the fair-cross-section ideal thus poses great difficulty for the two-way unanimity rule. While it is possible that the unanimity requirement posed a relatively minor obstacle to the functioning of homogeneous juries of local elites, it is certain to hinder the ability of juries to render verdicts when the jury is composed of people from all walks of life, debating very fundamental issues of justice and fairness. Consequently in any particular case, there is an inescapable tension between the desire to have all of the diverse views regarding what justice requires influencing the outcome, and the competing desire to have a jury render a verdict only when all members agree as to what the outcome should be. The current two-way unanimity rule offers no method to alleviate this tension. Our modest conclusion, then, is that to view the current two-way unanimity rule as having passed the test of time, such that it should be retained, is to ignore the current realities that cast so much doubt upon its present viability.

B. The Unanimity Rule and the Legitimacy of Jury Verdicts

It is very difficult to know exactly what is meant by the claim that the two-way unanimity rule is essential for public acceptance of the legitimacy of jury verdicts. The governing rules themselves seem to imply that legitimacy depends on the unanimity of jurors representing a fair cross section of the population, voting on the basis of their sincere views as to which outcome is the right one. If this is, indeed, the basis for the public acceptance of trial by jury, then it is difficult to avoid the conclusion that the factual predicate of public confidence is simply false. As we demonstrate above: (1) many cases are disposed of by dismissal after a jury hangs; (2) if the first jury hangs, there is no assurance that a second jury, unanimously favoring conviction or acquittal, represents a fair cross section of the population; (3) a verdict reached by a second jury, after the first jury hangs, necessarily runs contrary to the vote of at least one juror who has sat in judgment on the case (so, the verdict is not really unanimous); (4) many purportedly unanimous verdicts are reached only because some jurors do ***452** not vote sincerely; and (5) the composition of the jury is gerrymandered to make unanimity among those who do serve as jurors more likely.

In any event, no matter how realistic the basis of public opinion is, it seems doubtful that the public, for whatever reason, strongly supports retention of the two-way unanimity rule. A group of district attorneys in California, seeking an amendment to the state constitution to change the jury decision rule in criminal cases from unanimity to ten of twelve votes, conducted a poll of 800 randomly selected Californians which demonstrated that "a large majority of Californians favor changing [the] law to a majority jury system which will allow 10/2 verdicts." [FN44] Other polls confirm this conclusion. [FN45]

There also appears to be little objection to the practice of non-unanimous decision rules in any of the jurisdictions that employ them. This includes Scotland, where simply majority rule has been used for centuries. [FN46] It is instructive to note that all movement has been in the direction of abandoning unanimity in favor of a less demanding rule. No jurisdiction of which we are aware has ever changed its laws to require more consensus by juries to render verdicts.

C. Unanimity and the Beyond a Reasonable Doubt Standard

The relationship between the beyond a reasonable doubt standard and the unanimity rule is a complex one which, so far as we are aware, has never been systematically analyzed before. It is clear that both are responses to the reality that there is always some uncertainty as to whether the defendant should be convicted or acquitted.

The beyond a reasonable doubt standard responds to this uncertainty by positing a rule to govern the decision of the individual juror. The unanimity rule responds by requiring complete consensus among jurors, thus empowering a single juror to block all the other members of a jury from rendering a verdict.

In our view, retention of the beyond a reasonable doubt standard and a majority decision rule constitutes a much better response to the uncertainty that characterizes decisionmaking by juries. The beyond a reasonable doubt rule instructs a juror, who in all probability needs no instruction, that if she errs in voting to convict, it is worse (in some meaningful, but unspecified, ***453** sense) than if she errs in voting to acquit. The instruction also reinforces her awareness of the intuitively obvious truth that the more certainty she requires in order to vote to convict, the smaller the likelihood that she will err in voting to convict, but the greater the likelihood that she may err in voting to acquit.

Such an instruction, however, leaves the individual juror considerable freedom to trade off the risk of erroneous conviction with the risk of erroneous acquittal and to decide how certain she must be in order to vote to convict the defendant. Making the requisite trade-off and choosing an appropriate degree of certainty is, moreover, a complex undertaking. We do not suggest that each juror explicitly engages in this process. However, we do believe that these relevant considerations, whether made consciously or unconsciously, are important in determining the level of certainty the juror chooses to require.

Each level of certainty has associated with it some likelihood of erroneously voting to convict and some likelihood of erroneously voting to acquit. In order to choose her preferred level of certainty, a juror must trade off these two undesired outcomes and choose the level of uncertainty that minimizes the total harm resulting from both types of errors. To do this, the harm resulting from an erroneous vote to convict and the harm resulting from an erroneous vote to acquit must be put on a common scale so that they can be weighed in order to choose a rule which will yield the lowest possible total harm.

The process of placing value on erroneous votes to convict and erroneous votes to acquit implicates fundamental questions about the nature and purposes of the criminal law, the good and bad consequences of criminal punishment, and the blameworthiness of various criminal acts. These are questions about which society is greatly and, in many instances, bitterly divided. Consequently, it is to be expected that the members of a jury representing a fair cross section of the population will often disagree as to how much certainty they will require in order to vote to convict. This will often lead to disagreement within a jury as to whether a defendant should be convicted or acquitted.

Once again, what must be done is to devise a means to achieve an outcome in the face of disagreement among members of the jury. The two-way unanimity requirement in this respect, as in the other situations we consider, offers no principled solution. It does, however, empower the juror requiring the greatest certainty in order to convict to prevent all other members of the jury favoring conviction from rendering a guilty verdict. Moreover, it empowers the juror requiring the least certainty in order to convict to prevent all other members of the jury favoring acquittal from rendering a verdict of not guilty.

***454** The question of how much certainty to require in order to convict a defendant, then, is like all of the other sources of jury disagreement. Individual jurors have substantial freedom in choosing the standard that will govern their decision to vote to convict or acquit. For understandable reasons, they will often differ in how they choose to exercise this freedom. This will make them more or less predisposed to convict. If the case is to be disposed of by the decision of a jury, some segment of jury opinion must be made decisive. The unanimity rule empowers the extreme segments of opinion predisposed to either acquittal or conviction. In its present two-way form it does not, however, empower the extreme segments of opinion to render a verdict, but only to prevent the jury from rendering one.

By contrast, a majority rule empowers the centrist segment of jury sentiment to render a verdict. As we discuss at length in the final section of this Article, [FN47] this is the best that can be done in a democratic state whose citizens disagree about many important matters.

D. The Unanimity Requirement and the Responsiveness of Jurors to the Views of Other Jurors

In his recent book, Jeffrey Abramson makes the best argument, of which we are aware, for retention of the unanimity requirement. He says:

Replacing unanimous verdicts with majority verdicts would not obliterate deliberation altogether . . . . But it would alter the basic institutional design of our jury and the behavior promoted by that design. If they are instructed to return a unanimous verdict, jurors know their task is not to vote. For all their differences, they must approach justice through conversation and the art of persuading or being persuaded in turn. Majority verdicts signal an entirely different type of behavior, where jurors ultimately remain free to assert their different interests and opinions against one another. The distinctive genius of the jury system has been to emphasize deliberation more than voting and representation. Abolishing the unanimous verdict would weaken the conversations through which laypersons educate one another about their common sense of justice. [FN48]

The argument gains much of its force because Abramson does not blink at the tension between the unanimity requirement and the likely heterogeneity of opinion as to what outcome should be reached among jurors truly representing a fair cross section of the population.

However, we do not agree with Abramson's view as to how this basic tension should be resolved. He accepts that a juror's prior experience and values do significantly affect her behavior. He concludes, consequently, that all segments of opinion in society at large should be represented in the jury. ***455** His understandable concern is that if jurors view themselves as representatives, they will act so as to serve the objectives of the groups they represent rather than to arrive at the correct result. His solution to this problem is that jurors, while they undoubtedly reflect and embrace the views of the groups of which they are members (and must be included in juries precisely because they do so), should, starting from their differing points of view, deliberate with the sole objective of arriving at a correct result, whether or not it is the result that best serves the interests of their respective groups. He states, "[m]y purpose is to defend the rise of the cross-sectional ideal insofar as it speaks to enriched deliberation across group lines and to criticize it insofar as it recommends mere proportional representation for group differences." [FN49] Abramson thus urges that we retain the unanimity rule because the need to achieve complete agreement will provide motivation for each juror to be attentive to the views of each other juror.

Abramson's conception of how jurors should behave has much appeal. The notion of tolerance of and receptivity to the views of others is, indeed, a central tenet of democratic theory. The idea that a result should be favored not because it serves narrow group interest but because it is desirable for the entire society is, of course, a compelling one.

However, we do not accept Abramson's defense of the unanimity requirement for two reasons. First, as a positive matter, we believe that in a significant number of instances, despite the most open-minded and socially responsible deliberative process by a jury, disagreement will persist. We, as a society, cannot avoid deciding the fate of the defendant when this occurs; Abramson does not address this question.

Our second reason for rejecting Abramson's view is that we believe he misconceives the relationship between the decision rule and the nature of jury deliberations. The focus of his attention is on what may be characterized as the demand side of the process. The concern is that a faction of jurors will, if they have enough votes to render a verdict, choose not to seek out alternative interpretations of the facts and the law among their fellow jurors. He does not, however, consider the incentives of jurors to supply these alternative interpretations. Because the unanimity rule is a two-way rule, a change to majority rule provides members of a minority coalition a much better chance of actually prevailing (rather than hanging the jury) through the deliberative process.

The relaxation of the unanimity requirement can thus increase the persuasive influence of minority sentiment because the minority must persuade only some of the jurors in the initial majority in order to prevail. ***456** In the case of unanimity, the

minority must persuade all members of the majority, including those most strongly committed to the majority position. If a simple majority rule is in place, a minority will be converted to a majority by the switch of a few votes, sometimes as few as one vote. In this setting, the outcome is more likely to be determined by rational persuasion than by a strategic threat to hang the jury that plays such an important role when unanimity is required. Therefore, the members of the minority coalition will choose to exert more effort to convince members of the initial majority to switch their votes.

The increased efforts at persuasion by the minority will have a secondary effect. As the minority coalition members argue more vigorously for their position, proponents of the majority position, mindful of the fact that their majority could easily become a minority, will be forced to refine and strengthen their arguments in response. Consequently, the overall quality of debate will be enhanced because, in an important sense, the verdict is always in doubt.

To illustrate our position with respect to the relationship of the controlling decision rule and the nature of jury deliberations, we offer the example of the deliberative process in the famous O.J. Simpson case. It is reported that the initial jury vote was two for conviction and ten for acquittal. [FN50] In a very short time, the jury returned a unanimous vote of acquittal. It is, of course, possible that in this short time the majority persuaded the minority to adopt its position. We believe, however, that another explanation may account for the behavior of the jury. The two initial dissenters must have realized that it was virtually hopeless to convince all of the ten members of the majority to join them in voting for conviction. The only other realistic option for the minority of two was to hang the jury. (Since conviction of a lesser included offense was not a possibility, the strategy of threatening to hang the jury in order to obtain a unanimous vote of conviction for a lesser included offense was not available.)

Having sat through the months of jury selection and the trial itself, all of the jurors were, of course, well informed about how costly retrial would be. In addition, the two jurors favoring conviction probably realized that a conviction by unanimous vote on retrial was unlikely. They may well have preferred casting an insincere vote for acquittal as opposed to hanging the jury by voting in accordance with their belief that the defendant was guilty. While we may never know what motivated the various jurors, this explanation is not implausible.

***457** The moral of this tale is, however, for present purposes, a different one. If the decision rule had been simple majority, or supermajority, the task of the minority in trying to secure a verdict of conviction would have been a much less hopeless one. If the decision rule were simple majority, the minority would have only had to convince half of the jurors favoring acquittal to vote for conviction. It is thus possible that the deliberative process might have been more extended and covered more issues had a simple majority rule been in place.

In addition, a simple majority rule facilitates the type of deliberations that we, like Abramson, prefer. He would like views to prevail that transcend narrow group interests and take into account consequences to the entire society. Under a unanimity rule, such views can prevail only if all members of the jury embrace them. Under a simple majority rule, they can prevail if they are embraced by a centrist segment of opinion. As a result, if a unanimity rule controls, it may be thought pointless to advance such views if their adoption can be blocked by extremists of any persuasion motivated by perceived group loyalties which make them inattentive to the consequences of their actions to non-members of their group. By contrast, if a simple majority rule controls, what may be called other-regarding views have a much better chance of prevailing. As a consequence, they will be more forcefully advanced in jury deliberations.

IV. REPLACING THE TWO-WAY UNANIMITY RULE WITH A RULE OF SIMPLE MAJORITY

We conclude that in a significant number of instances, there is simply no way to avoid directly addressing the fact that jurors may, for understandable, legitimate, and reasonable reasons, disagree as to what verdict should be rendered. There are many

things wrong with the present system that purports to require unanimity yet employs undesirable means to produce an authoritative outcome when unanimity is not really present. What must be done is to accept the reality of disagreement and decide what degree of consensus should be required for the jury to reach a verdict.

We believe that one aspect of this question is easy. There is little point in having a decision rule that allows the possibility of a hung jury. If, for example, nine votes were required either for conviction or acquittal, the chances of a jury hanging would be reduced but not eliminated. A minority of four could block a majority of eight from either convicting or acquitting but would lack the power to render a jury verdict consistent with minority sentiment. In cases where division of this kind was present, all of the difficulties we have identified as characterizing the present system would remain. What needs to be done is to have a rule providing that a specified ***458** majority is required for conviction and that, absent such a majority, the defendant will be acquitted.

We are now at the end of the long road leading to the crucial question of what that majority should be. To answer this troubling question, we must first identify the family of rules from which we must choose. This family consists of all rules that will result in conviction or acquittal after one trial.

We find it illuminating to begin by considering one such rule suggested by the current two-way unanimity rule: the defendant will be acquitted unless the members of the jury unanimously favor conviction. We conjecture that, if proposed by popular referendum, such a rule would be rejected almost unanimously. Moreover, identifying the reasons why such a rule would be rejected by so large a margin is a good way to begin to decide what rule should be employed.

A unanimity requirement is the most extreme form of minority rule. We must emphasize that if unanimous consensus is actually present, it does not matter what the decision rule is. If all of the members agree on what result should be reached, it will be reached no matter what decision rule is in place. It is, consequently, only when unanimous consensus is lacking that a unanimity requirement matters. What a unanimity rule does when disagreement is present is to empower a minority as small as one to prevail over the large majority preferring the opposite outcome.

Our widely shared views of what constitutes fair process in a democracy lead us, with little conscious thought, to reject such an extreme form of minority rule. Moreover, the reasons underlying so strong and immediate a rejection of rule by unanimity, in our view, provide strong support for the adoption of a rule of simple majority.

We reject rule by unanimity, and other rules empowering small minorities to prevail over large majorities, for essentially two reasons. First, minority rule violates one of the fundamental tenets of democratic theory. Respect for all members of the population requires that everyone have an equal influence on the outcome. A jury representing a fair cross section of the population constitutes a means of replicating the result that would be reached if the case were submitted for decision by popular referendum to the entire population. A rule of simple majority means that no member of the population is given greater power to determine the outcome than any other member of the population.

The second basic reason for rejecting a rule of unanimity, or other rule empowering a small minority to prevail, is that a view held only by one, or a small minority of a decisionmaking body, is likely in some meaningful sense to be an "extreme" one. By contrast, a position enjoying majority ***459** support is likely to represent a centrist one within the range of views held by members of the society. [FN51]

For a variety of reasons discussed earlier in this Article [FN52] and in our previous work, [FN53] the members of the jury may be usefully thought of before the trial begins as being arrayed from the juror most predisposed to convict to the juror least predisposed to convict. All other jurors are somewhere between these extremes. A decision rule constitutes the means of

deciding which juror in this array will be empowered to cast the deciding vote. A rule requiring unanimity for conviction empowers the juror least predisposed to convict. It is virtually tautological to characterize a view held by only one of twelve jurors as an extreme one.

A rule of simple majority, by contrast, empowers the median voter, located quite literally at the center of the distribution. [FN54] It must, of course, be recognized that a majority decision rule is only critical when the jury is closely divided. If there is a large majority favoring conviction or acquittal, it will obviously prevail under a simple majority rule as it would under a supermajority rule. Put another way, when true consensus exists among the jurors, the decision rule does not make much difference. The question then is what to do when the jury is closely divided. In this (likely rare) circumstance, a majority decision rule empowers the median voter, who determines the outcome by voting either with the group of jurors favoring conviction or the group favoring acquittal. The median voter then is the one least disposed to strongly favor either conviction or acquittal. Democratic theory teaches that in a heterogeneous society there is no better way to give effect to the consensus that holds the society together in the face of widespread disagreement than to employ processes which permit the centrist position to prevail. [FN55]

***460** There may, however, be an understandable concern that if a rule of simple majority were adopted, a majority segment of the population, most saliently those who are white, will be able to oppress a minority segment, those who are black or members of other minority groups. We believe, however, that this concern does not provide an adequate basis for preferring a rule requiring a supermajority for conviction to a rule of simple majority.

To illustrate our point, we start with what may be described as the worst case scenario as to the reality of racial prejudice. Suppose people who were white systematically had a strong tendency to convict when the defendant was black and the victim white. Suppose further that in such cases, black jurors had a strong tendency to acquit. The understandable fear is that the white majority will outvote the black minority and the defendant will be convicted.

Even if the world is as ugly as our worst case scenario assumes it to be, a supermajority requirement for conviction is a poor way to protect the minority. This is so because if you make it hard to convict a member of the minority, by requiring a large majority to support a conviction, you also render it virtually impossible for the minority to obtain the protection of the law when the alleged perpetrator is a member of the majority and the victim a member of the minority.

Consider, for example, instances of alleged police brutality against members of minority groups. For the defendant officer to be convicted when the officer is a member of the white majority, and if the jury indeed represents a fair cross section of the population, some members of the white majority jury must vote to convict. The larger the supermajority required for conviction, the smaller the number of white jurors who have the power to prevent conviction of a white person alleged to have committed an offense against a black victim.

***461** Our second defense of a rule of simple majority in a world where racial prejudice is a reality takes us into much deeper waters from which we nevertheless emerge convinced that a rule of simple majority should be employed. We begin by dropping our worst case scenario and imagine a more complicated world, which can never be fully understood.

Imagine now that both the white majority and black minority population do not, as assumed above, consist of homogenous groups strongly influenced by the race of the defendant and the victim. Instead each group consists of people ranging from those strongly influenced by such factors to those for whom they have no importance.

The question of how to deal with this reality implicates what has been the most difficult issue in our work on decisionmaking by jurors. The fair-cross-section requirement implies that there will be systematic differences in the behavior of jurors

depending on their race, gender, wealth, religious beliefs, and other factors. The unanswered question, however, is whether jurors, to any degree, should regard themselves as representatives of the groups of which they are members or should instead strive for an "impartiality" which transcends all group affiliation.

While we share Abramson's view that there is much appeal in the conception of impartiality, [FN56] we are less certain that there is no justification at all for a juror to some extent acting as a representative of the group of which she is a member. Jurors have great freedom in deciding whether to vote to convict or acquit. The question of whether a black juror, in a case of alleged police brutality against a member of her race, or a female juror, in a case in which a long-abused wife assaults or kills her habitually violent husband, should not, to some degree at least, view themselves as representatives of the groups to which they belong is one that we have simply been unable to answer with confidence.

We do believe that it may be helpful to distinguish two aspects of the question. First, with respect to issues such as giving precise content to the beyond a reasonable doubt standard, the system of criminal justice is constructed so that normative issues required to devise the standard which will be applied in the particular case are left to the individual juror. The question then is not whether the juror should depart from a command issued by the legislature or judge, but rather how she should exercise the discretion that has been conferred upon her. Second, the juror may decide that it is appropriate to disregard an unambiguous legislative or judicial directive. This is, of course, the much discussed problem of nullification. We have little more than a hunch that the question of the desirability of a ***462** juror viewing herself as representative of her group is different in these two contexts.

One difference is clear. A juror cannot avoid exercising the discretion that is conferred upon her. Consciously or unconsciously, to some degree at least, how she exercises this discretion will depend on the preconceptions she brings to the task. By contrast, disregarding an unambiguous legislative directive in order to serve the interests of the group of which she is a member is something that can be avoided if a juror chooses to do so. The question of whether a juror should ever disregard the plainly expressed intent of the legislature is a very large question to which we can offer no confident answer. We cannot exclude the possibility that nullification, conscientiously practiced in cases in which it is thought to be very unjust to convict the defendant, in balance, makes the system of criminal justice a better one. [FN57] We thus take an agnostic position on the troubling question of the extent to which jurors should act in a representative capacity. We simply assume that such behavior by jurors does occur and that, perhaps, some undetermined amount of it should occur.

On these assumptions, a rule of simple majority is the best we can do to take appropriate account of the views of individual jurors. If we once again think of jurors as arrayed from the person most predisposed to convict to the person least predisposed to convict, it seems plausible to assume that the people at both extremes are those most influenced by group affinity. This is so because each juror must balance her desire to serve her group with her desire to serve society as a whole. Giving greater weight to the desire to serve her group is likely to make her strongly disposed to either conviction or acquittal. By contrast, the jurors giving greater weight to what they view as the welfare of the entire society are less likely to be strongly disposed to either conviction or acquittal. They are, if you will, more "neutral" toward the defendant. A simple majority voting rule empowers this centrist position to prevail, informed, of course, by the deliberative arguments of both types of "extremists" as well as other "centrists."

It is admittedly true that the median voter who is empowered to cast the decisive vote is more likely to be a "moderate" member of the majority segment of the population than a "moderate" member of the minority segment of the population. If this is viewed as an important problem, it can only be addressed by some system of quotas giving minority groups disproportionate representation on juries. Such a solution raises all the issues about how to define groups and assign places to them that are well understood to render quotas a problematic means of offering protection to ***463** minority groups. For our

purposes, it is sufficient to acknowledge that all the consequences that result from the fact that there are majority and minority groups in the society cannot be eliminated by a decision rule. We do believe, however, that a rule of simple majority is the best choice for responding to this problem and the many others we have discussed.

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[FN1]. See Edward P. Schwartz & Warren F. Schwartz, Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules, 80 Geo. L.J. 775 (1992).

[FN2]. See id. at 788-801.

[FN3]. See Edward P. Schwartz & Warren F. Schwartz, Deciding Who Decides Who Dies: Capital Punishment as a Social Choice Problem, 1 Legal Theory 113 (1995) [hereinafter Schwartz & Schwartz, Capital Punishment].

[FN4]. See id.

[FN5]. "Peremptory challenge. A request from a party that a judge not allow a certain prospective juror to be a member of the jury. No reason or 'cause' need be stated for this type of challenge." Black's Law Dictionary 230 (6th ed. 1990) (defining this term within the definition of "Challenge").

[FN6]. See Edward P. Schwartz & Warren F. Schwartz, The Challenge of Peremptory Challenges, 12 J.L. Econ. & Org. 325 (1996) [hereinafter Schwartz & Schwartz, Peremptory Challenges].

[FN7]. See Jeffrey Abramson, We, the Jury 99-141 (1994) (describing the evolution of the present representative conception of appropriate jury composition). Abramson describes the present situation as follows:
In the United States today, it is common to describe the ideal jury as a "body truly representative of the community." To practice this ideal, all jurisdictions rely on a computerized version of the oldest and most direct of democratic selection methods: the random drawing of names by lot. The basic principle behind the lottery is that the pool of persons from which actual juries are drawn must approximate a fair, representative cross section of the local population.
Id. at 99 (footnote omitted).

[FN8]. For an experimental investigation into how different legally permissible characterizations of the "beyond a reasonable doubt" standard translate into different juror certainty thresholds for voting guilt, see Irwin A. Horowitz & Laird C. Kirkpatrick, A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts, 20 Law & Hum. Behav. 655, 655-70 (1996).
For an experimental investigation into the distribution of both juror and judge certainty thresholds, see Rita James Simon & Linda Mahan, Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom, 5 Law & Soc'y Rev. 319-30 (1971). For jurors, the lowest quartile reported certainty thresholds at or below 60%, while for judges, the same cutoff was at somewhere between 75% and 80%. See id. at 324 tbl.4. The mean for jurors was 79% while for judges it was 89%. See id. Most important for our analysis is that there was a large spread among jurors. So, a randomly selected twelve person

jury is almost certain to have on it at least one juror whose threshold for reasonable doubt is below 60% and at least one juror whose threshold is at 100%. For any degree of certainty about the guilt of the defendant between these values, even if shared by all jurors, there will be disagreement about the appropriate verdict.

[FN9]. See, e.g., Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 454- 63 (1986) (discussing self-defense); id. at 405-20 (discussing mistake of fact); id. at 463-65 (discussing defense of another person); id. at 470- 77 (discussing use of force by a police officer in making an arrest); id. at 668-75 (discussing involuntary manslaughter).

[FN10]. In the first Menendez trials in 1994 which resulted in a hung jury for each of the two defendants, one jury was instructed as follows:
All murder which is perpetrated by any kind of willfull, [sic] deliberate and premeditated killing with express malice aforethought is murder of the first degree.
The word "willful," as used in this instruction, means intentional.
The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.
If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.
The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
...
The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree.
To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, [he] decides to and does kill.
...
Murder of the second degree is the unlawful killing of a human being with malice aforethought when there is manifested an intention unlawfully to kill a human being but the evidence is insufficient to establish deliberation and premeditation.
Every person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of voluntary manslaughter ....
There is no malice aforethought if the killing occurred [upon a sudden quarrel or heat of passion] [or] [in the honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury].
...
To reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of such character and degree as naturally would excite and arouse such passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.
The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his] own standard of conduct and to justify or excuse [himself] because [his] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation....
The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed

by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.
Jury Instructions on file with authors.

[FN11]. See infra note 57 and accompanying text.

[FN12]. At the outset, one source of confusion should be eliminated. Under current American practice, there are an even number of jurors, most commonly twelve, making it slightly more complicated to define majority rule. There is no particular reason why the jury should have an even number of jurors.
Sampling error, that is, the possibility that a jury randomly chosen from a cross-sectional pool will not itself represent a fair cross section of the population, can be reduced by increasing the size of the jury. See Schwartz & Schwartz, Peremptory Challenges, supra note 6, at 357. Combining these two concerns, fifteen, the number used in Scotland, which does employ a simple majority decision rule, would seem to be a good candidate for the appropriate size of a jury. If the jury has an odd number of members, then a majority voting rule does not favor either conviction or acquittal. Theoretical analyses of voting rules generally assume a decisionmaking body with an odd number of members. The institutional solution we advocate would include a jury with an odd number of members. However, it will sometimes be necessary at later points in this Article to consider possible changes in the voting rule on the assumption that a jury with an even number of members is retained. On this assumption, when we use the term "majority voting rule," we mean a majority is required for conviction--so that the defendant will be acquitted if the jury is evenly divided.

[FN13]. See Schwartz & Schwartz, supra note 1; Schwartz & Schwartz, Capital Punishment, supra note 3; Schwartz & Schwartz, Peremptory Challenges, supra note 6.

[FN14]. See infra Part III.D.

[FN15]. See Harry Kalven, Jr. & Hans Zeisel, The American Jury 453 (Univ. of Chicago Press 1971) (1966) (estimating that 5% of all juries hang). The authors also conclude that the incidence of hung juries is higher in cases they characterize as close and difficult. Id. at 457. See also Leo J. Flynn, Does Justice Fail when the Jury Is Deadlocked, 61 Judicature 129, 130 (1977) (concluding that 12.2% of all felony jury trials in California in 1971, 1972, and 1975 ended in hung juries).
The instances of hung juries in controversial cases, often involving prominent defendants, also suggest that the problem is an important one. Some examples include the following: (1) Marion Barry, the Mayor of Washington, D.C., was charged with drug possession and perjury. The jury hung on twelve counts of the indictment. See Steve Twomey & DeNeen L. Brown, Barry Guilty on 1 Count, Cleared on 1; Mistrial Declared on 12 Other Charges, Wash. Post, Aug. 11, 1990, at A1. (2) Reverend Wayne T. Harris, a prominent activist in Indianapolis, was charged with arson. The jury hung at each of two trials and charges were dropped. See Arson Charge Dropped Against Indiana Pastor, Chi. Trib., Nov. 2, 1988, at 3. (3) Kimberly McCoy, a former teacher, was charged with child sexual abuse. The jury hung in each of two trials. See Liz Ruskin, Hung Jury Declared in Sex Case: 2nd Trial of Teacher Ends, Anchorage Daily News, Oct. 10, 1997, at 1B. (4) In the case of a woman claiming that the man she shot was threatening to harm her daughter, the jury hung (eight favoring acquittal and four favoring conviction) with respect to a charge of involuntary manslaughter. See Minerva Canto, Trujillo Trial Ends with a Hung Jury, Albuquerque J., Aug. 31, 1996, at 1. (5) In the first trial of the Menendez brothers, charged with killing their mother and father, the jury hung. See Seth Mydans, The Other Menendez Trial, Too, Ends with the Jury Deadlock, N.Y. Times, Jan. 29, 1994, § 1, at 1. All of the jurors believed that both brothers were guilty of a crime in causing the death of their parents. See id. The hung jury resulted from disagreement as to which offense each of the defendants should be convicted of committing. See id

[FN16]. California District Attorneys Association, Non-Unanimous Jury Verdicts: A Necessary Criminal Justice Reform app. C (May 8, 1995) (unpublished position paper; on file with the authors) (reporting hung jury survey statistics as compiled by the California District Attorneys Association for 1992-94 in nine selected California counties).

[FN17]. Id. at app. E (reporting hung jury statistics as compiled by The Honorable Fred Avera, Polk County District Attorney, for 1993-1995 felonies in eight selected Oregon counties, representing approximately 85% of the population in Oregon).

[FN18]. In Lowenfield v. Phelps, 484 U.S. 231 (1988), the Supreme Court sustained a jury verdict imposing the death penalty despite the fact that the presiding judge went to great lengths to influence the jury to achieve unanimity so that a verdict could be reached. See id. at 234-37. The opinion of the Court described the judge's actions as follows:
The jury was allowed to retire late in the evening, and reconvene the next day. During the afternoon of that day a note came from the foreman of the jury stating that the jury was unable to reach a decision at that time, and requesting that the court again advise the jury as to its responsibilities.
The jury was called back. The court provided a piece of paper to each juror and asked each to write on the paper his or her name and the answer to the question whether "further deliberations would be helpful in obtaining a verdict." The jurors complied, and were asked to retire to the jury room. The papers revealed eight answers in the affirmative--that more deliberation would be helpful--and four in the negative. Defense counsel renewed a previously made motion for a mistrial, arguing that the jury was obviously hung. The trial court denied the motion, noting that this was the first sign that the jury was having trouble reaching a verdict in the penalty phase. The court directed that as previously agreed upon the jury would return to the courtroom and be instructed again as to its obligations in reaching a verdict.
When the jurors returned to the courtroom a new note from them was given to the judge. This note stated that some of the jurors had misunderstood the question previously asked. The judge polled the jury again using the same method but changing the question slightly; the judge asked, "Do you feel that any further deliberations will enable you to arrive at a verdict?" This time 11 jurors answered in the affirmative and 1 in the negative. The court then reinstructed the jury:
Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment without benefit of Probation, Parole, or Suspension of Sentence.
[sic] When you enter the jury room it is you duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment.
[sic] Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
Id. at 234-35 (citations omitted).

[FN19]. See Charles Nemeth, Interaction Between Jurors of Majority vs. Unanimity Decision Rules, 7 J. Applied Soc. Psychol. 38, 38-56 (1977). Jurors, in three mock jury experiments, deliberated under either a unanimity or two-thirds majority voting rule, as members of six person juries. See id. at 43. The deliberations were coded for the nature of verbal exchange, along several dimensions. See id. at 45-46. Verdicts were recorded, and jurors were surveyed after the fact. See id. at 43-44. Under unanimity rule, jurors disagreed more and showed more unfriendliness towards each other during deliberations. Id. at 46. In addition, jurors deliberating under unanimity were statistically more likely to report that they felt "uncomfortable during deliberations." Id. at 47, 48 & tbl.4.

[FN20]. For example, one jury from the first Menendez trials was instructed as follows:
Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or

not guilty, but also, if you should find [him] guilty of an unlawful killing, you must agree unanimously as to whether [he] is guilty of [murder of the first degree] [or] [murder of the second degree] [or] [[voluntary] [or] [involuntary] manslaughter].
Jury Instructions on file with authors.

[FN21]. See infra Part III.D.

[FN22]. See Schwartz & Schwartz, Peremptory Challenges, supra note 6, at 346-60 (analyzing the effects of peremptory challenges on jury composition). See also Schwartz & Schwartz, Capital Punishment, supra note 3, at 124-26 (analyzing the effects of excluding persons opposed to the death penalty from juries deciding whether to impose capital punishment).

[FN23]. See Schwartz & Schwartz, Peremptory Challenges, supra note 6, at 339-48.

[FN24]. See Abramson, supra note 7, at 143-76, for a description of the current process of jury selection in the United States. The author describes the extraordinarily costly process of trying to select a jury as predisposed as possible to conviction or acquittal. See id. at 149. Indeed, a significant cottage industry of experts in this field has flourished.

[FN25]. See supra Part II.

[FN26]. See Abramson, supra note 7, at 179.

[FN27]. See Sir P. Devlin, Trial by Jury 48 (1988).
The answer is that no one ever planned that it should be that way; the rule is simply an "antique" . In Cheatie v. the Queen, 177 C.L.P. 541, 550 (1993) (Austl.) the Court said: "The origin of that requirement of unanimity would seem to lie not in any reasoned development of principle but in a requirement of the concurrence of twelve jurors in the verdict in the early days when jurors performed the function of local witnesses in trial by compurgation."
Id. See also Abramson, supra note 7, at 182 ("History provides no clear answer as to why the ideal of unanimity found such a permanent home in the jury.").

[FN28]. See William Forsyth, History of Trial by Jury 202 (1875).
[I]f seven men swore positively that they had seen and known of the possession of land to be in a particular person, or his ancestors, the presumption was very strong that five other neighbors who professed to be cognizant of the matter must have known the same fact, and therefore, in refusing to concur in the verdict of the majority, they were deemed to be guilty of contumacy, if not willful perjury.
Id.

[FN29]. See Criminal Justice Act, 1967, ch. 80, § 13(1) (Eng.).

[FN30]. See Criminal Code Act, § 368 (N. Terr. Austl.) (requiring ten of eleven or twelve jurors, or nine of ten jurors to agree if after six hours of deliberation); Jury Act, 1899, § 48 (Tas. Acts) (requiring ten of twelve jurors to agree if after the "necessary period" of deliberation); Juries Act, 1957, §§ 18, 41 (W. Austl. Acts) (requiring ten of twelve jurors to agree if after three hours of deliberation); Juries Act, 1927 § 57 (S. Austl. Acts) (requiring ten of eleven or twelve jurors, or nine of ten jurors to agree if after four hours of deliberation).

[FN31]. See Criminal Justice Act, No. 22, § 29 (1984) (Ir.); Criminal Procedure Majority Verdicts Act, ch. 37 (1971) (N. Ir.).

[FN32]. See Abolition of Juries Act, No. 34 (1969) (S. Afr.) (repealed in 1982).

[FN33]. See Affleck v. H.M. Advocate, 1987 J.C. 150 (holding that no verdict of guilty can be returned unless eight members of the fifteen member jury agree); Criminal Procedure in Scotland, Second Report, Cmnd. 6218, 194-208 (1975).

[FN34]. Listed below are the voting requirements for Classic Jury Courts and Mixed Courts in a number of European countries. The list is divided into those countries that use a Classic Jury Court (jury deliberates separately from professional judge(s)) and those that use a Mixed Court (jury or lay assessors (Schöffen) deliberate with professional judge(s)). Note that Austria, Denmark, Germany, and Norway employ both Classic Jury Courts and Mixed Courts.
The following synopsis of rules was graciously supplied by Stephen Thaman. See Letter from Stephen Thaman, Associate Professor, Saint Louis University School of Law (Sept. 5, 1996) (on file with authors). Special thanks to Lucas Messenger, Edgardo Reis, Cynthia Sandoval, and Mitra Yadegar for their help with the translation of a portion of these foreign materials.
I. Classic Jury Courts (where the jury deliberates separately from professional judge(s)).
Austria. A jury decides most serious crimes. See § 14 Strafprozessordnung [[Criminal Procedure Statute] [StPO]. The jury is composed of eight. (The bench consists of three professional judges.) See § 300(2) StPO. The jury decides guilt by a majority vote: five-three is sufficient for a guilty verdict, four-four rules in favor of the defendant. See § 331 StPO.
Belgium. A jury trial occurs for all felonies. See Code d'instruction criminelle [Criminal Instruction Code] [CIC] § 364. A jury of 12, see Code Judiciare [Judicial Code] [CJ] §§ 123, 124, sits with a court of three professional judges, see CJ § 119. A majority verdict of seven-five is required for guilt; a six-six decision is favorable to the defendant. See CIC § 347. A jury deliberates with professional judges on punishment. See CIC § 364.
Denmark. Jury trial for crimes in high courts is punishable by four years or more. See Law on Judicial Procedure [LJP] § 687.21. A jury of 12 decides guilt by a majority of eight for decisions against the defendant. See LJP § 897.2. A panel of three judges must also find the defendant guilty by a majority vote. See LJP § 906(a). Jurors participate with three professional judges at the sentence. See id. Judges and jurors deliberate and vote together. See id.
Norway. Courts of appeal are composed of ten jurors, subject to certain restrictions. See Straffeprosessloven [Criminal Procedure Act] [Str] May 1981, act of 22, no. 25, § 355, translated in Criminal Procedure Act 1981 (unpublished manuscript, on file with authors). Verdicts are rendered by seven of ten jurors. See Str § 372.
Spain. For crimes against life, crimes against public officials, and other specified crimes, a jury trial consists of one professional judge and nine jurors. See Boletín Oficial del Estado [Official Gazette] (B.O.E., 1995, 122(1)(2)). A decision of guilt and questions unfavorable to a defendant must be agreed upon by seven of the nine jurors. See B.O.E. 122(60). Five jurors must agree for a not guilty verdict to be rendered. See id. Five votes are also needed for a recommendation of lenience. See id.II. Mixed Courts: (where the jury or lay assessors (Schöffen) deliberate with professional judge(s)).
Austria. A mixed court decides lesser crimes. See § 10 Strafprozessordnung [[Criminal Procedure Statute] [StPO]. A mixed court consists of two judges and two lay assessors. See § 13(1) StPO. A majority vote controls (for example, three-one necessary for conviction, two-two in favor of defendant). See § 20 StPO.
Denmark. A mixed court decides lesser crimes; two lay assessors sit with one professional judge in municipal courts. See Law on Judicial Procedure [LJP] § 18.2.3. Lay assessors sit with three professional judges on appeals of these cases in the High Court. See LJP § 6.2 (majority decisions control).
France. A mixed assizes court composed of at least two professional judges hears serious crimes. See Code de procedure penale [C. pr. pen.] arts. 244, 248, 249. A jury has nine jurors. See C. pr. pen. art. 296. The judges and jurors deliberate together with respect to all guilt and punishment questions. See. C. pr. pen. arts. 355-57. Answers to questions unfavorable to the accused must be by a majority of eight-four, at a minimum. See C. pr. pen. art. 359.
Germany. In lesser crimes, a mixed court is composed of one professional judge and two lay assessors. See § 29 Gerichtsverfassungsgesetz [Judicial Code] [GVG]. For more serious crimes, a mixed court in Landgericht (penal chamber, or jury court) consists of three professional judges and two lay assessors. See § 76 GVG. Guilt and punishment must be by two-thirds majority. See § 63 Nr. 1 Strafprozeßordnung [Criminal Procedure Statute] [StPO].

Greece. Minor crimes are tried by a mixed court of two professional judges and four lay assessors. See art. 8 § 1 Kaodikos Poinikes Dikonomias [Code of Criminal Procedure] [KPD].
Norway. Lesser criminal cases are heard by a mixed court of one professional judge and two lay assessors. See Straffeprosessloven [Criminal Procedure Act] May 1981, act of 22, no. 25, § 276, translated in Criminal Procedure Act 1981 (unpublished manuscript, on file with authors).
Italy. Mixed assizes court hears murder and other crimes punishable by life imprisonment. See art. 5 Codice di procedura penale [C.p.p.]. The court is composed of two professional judges and six "popular judges" (giudice populare) in the first instance, see art. 3 Reordinamento dei giudizi di Assise [Statute on the Assizes Court] [RGA], C.p.p., and the same for appeals, see art. 4 RGA. Judges and lay judges decide all questions together. See art. 5 RGA. A majority vote controls and an equal vote means decisions are favorable for the defendant. See art. 527 C.p.p.
Portugal. A mixed jury court is composed of three professional judges and four jurors. See Da Constituicao Do Tribunal [CDT], Código de Processo Penal [[C.P.P.] art. 1. For more serious crimes, punishable by eight years, see CDT art. 2. Judges and jurors deliberate together. See Autorizazacao Legislativa Em Materia De Processo Penal [ALM], C.P.P. art. 365(2). Decisions are by a simple majority. See ALM art. 365(5).
Sweden. In cases punishable by less than two years, a mixed court of one professional judge and three lay assessors sits; if a charge is punishable by more than two years, one judge and five lay assessors sit. See Code of Judicial Procedure [CJP] ch. 1, § 3(2). In typical appeals cases, three professional judges sit with two lay assessors. See CJP ch. 2 § 2.

[FN35]. Listed below are the voting requirements for Jury Courts and Mixed Courts in a number of Latin American countries. The following synopsis of rules was graciously supplied by Stephen Thaman, see Letter from Stephen Thaman, supra note 34. Special thanks to Edgardo Reis and Cynthia Sandoval for their help with the translation of a portion of these foreign materials.
Brazil. In a jury trial for all homicide cases, a simple majority of seven jurors rules. See Código do Processo Penal [C.P.P.] § 457.
Mexico. Jury trials take place only in political or press cases. See Código de Procedimientos Penales para el Distrito Federal [C.P.P.D.F.] § 457. A jury of seven sitting with one professional judge must render a majority verdict. See C.P.P.D.F. §§ 333, 342, 364.
Nicaragua. A court is composed of one judge and four jurors. A unanimous verdict is required. See Código de Instrucción Criminal de la República de Nicaragua [Code of Criminal Instruction for the Republic of Nicaragua] [CICN] §§ 275, 307.
Panama. A jury is used mainly for homicides. See Codigo Judicial [CJ] art. 2320. Seven jurors decide, see CJ art. 2332, by a majority vote, see CJ arts. 2387, 2388. Court decides sentence. See CJ art. 2389.
El Salvador. For cases punishable by eight or more years in prison, an absolute majority is required from a jury of five sitting with one judge to render a verdict. See Codigo Procesal Penal [CPP] arts. 315, 316, 367, 370.

[FN36]. The following was graciously supplied by Stephen Thaman, see Letter from Stephen Thaman, supra note 34. A mixed court of one professional judge and two people's assessors is required for all but the most serious felonies in People's Courts. See Ugolovno-Protsessual 'nyi Kodeks RF [Code of Criminal Procedure] [UPK RF] § 15 (Russ.). Decisions are taken by a simple majority. See UPK RF § 306. A jury of twelve, see UPK RF § 440, sitting with one judge hears serious felonies in regional/territorial courts. See UPK RF §§ 36, 421. Majority verdicts are decisive (seven-five) with six-six for the benefit of the defendant. See UPK RF § 454.

[FN37]. See Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). No American state has employed a rule of simple majority and, consequently, there is no precedent as to whether a simple majority voting rule would be permissible under state constitutions or the United States Constitution. Moreover, the Court was divided 5-4 in Apodaca and Johnson, sustaining supermajority rules against a challenge under the federal constitution. It is, consequently,

unclear as to whether a simple majority rule would be permissible under the United States Constitution. We do believe, however, that if the Court focuses on the essential fairness of the rule as it did in Apodaca and Johnson, our analysis provides a sound basis for sustaining the constitutionality of a simple majority voting rule. In any event, as noted above, our objective is to stimulate a careful re-examination of the two-way unanimity rule. We are not so naive as to believe that this Article will lead to prompt, widespread adoption of the simple majority rule we advocate.

[FN38]. See Cathleen Decker, The Times Poll: Voters Growing Angry, Cynical About Legislature, L.A. Times, Sept. 13, 1995, at H1.

[FN39]. Abramson, supra note 7, at 99 (footnotes omitted).

[FN40]. 28 U.S.C. §§ 1861, 1862-1869, 1871 (1968).

[FN41]. 419 U.S. 522, 530 (1975). The cross-sectional ideal had received earlier judicial support (short of acceptance as doctrine). For example, see Justice Black's opinion in Smith v. Texas, 311 U.S. 128, 132 (1940).

[FN42]. Id. (citation omitted).

[FN43]. Paul Butler, in his recent article on race-based jury nullification, explicitly urges African Americans to use the jury system to nullify drug charges (and certain other offenses) against African American defendants. See Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677, 698 (1995). It appears that such rationale does motivate the votes of jurors in some urban jurisdictions. Id. at 678- 79.

[FN44]. California District Attorneys Association, supra note 16, at 12.

[FN45]. See Decker, supra note 38 (stating that fifty-eight percent of respondents who expressed an opinion backed a proposed state constitutional amendment to allow non-unanimous verdicts in criminal trials); Unanimous Jury Rule Is Unpopular: Strong Majority in State Favors 10-to-2 Verdicts, S.F. Chron., Sept. 12, 1995, at A13 (stating that seventy-one percent of respondents who expressed an opinion favor allowing verdicts of at least ten to two in criminal cases not involving the death penalty).

[FN46]. See generally Forsyth, supra note 28, at 282-88.

[FN47]. See infra Part IV.

[FN48]. Abramson, supra note 7, at 205 (footnote omitted).

[FN49]. Id. at 104.

[FN50]. See Simpson Jurors Say Evidence Fell Short, Raleigh News & Observer, Oct. 5, 1995, at 1A.

[FN51]. There is another reason to have a simple majority voting rule. We have emphasized the function of the jury in exercising its considerable discretion to convict or acquit. The jury, of course, must also decide purely factual issues which all members of the jury believe to be relevant. The members of the jury vary in the information they possess which is useful in drawing appropriate inferences from the evidence presented. Indeed, one of the purposes of the fair-cross-section requirement is to have juries composed of people with as wide a range of knowledge and experience as possible. The famous "Condorcet Jury Theorem" posits that in circumstances where all of the members of a decisionmaking body are imperfectly

informed, so that each of them if deciding alone would sometimes reach the incorrect conclusion, the likelihood that the decisionmaking body will reach the correct outcome is maximized by a simple majority voting rule. See generally Bernard Grofman, Judgmental Competence of Individuals and Groups in a Dichotomous Choice Situation: Is a Majority of Heads Better than One?, 6 J. Mathematical Soc. 47 (1978).

[FN52]. See supra Part II.C.

[FN53]. See Schwartz & Schwartz, Peremptory Challenges, supra note 6, at 339-48.

[FN54]. As discussed in note 12, supra, this is strictly true only if there are an odd number of voters. If the twelve-person jury were retained, the crucial voter would be the seventh least predisposed to convict. While not precisely at the center of the distribution, this voter does represent a centrist position in the range of jury sentiment.

[FN55]. The fact that simple majority rule is the only voting scheme to produce authoritative outcomes and weigh all votes equally is formalized in May's Theorem. See generally Kenneth O. May, A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision, 20 Econometrica 680 (1952).
Formally, simple majority rule is the only vote aggregation mechanism that satisfies the three criteria--monotonicity, undifferentiatedness, and neutrality--identified by Kenneth J. Arrow as desirable. See id. at 680- 81 (mentioning these three criteria). Monotonicity requires that as additional people prefer one alternative to another, the social choice does not flip to favor the alternative losing support. This condition is also sometimes referred to as positive responsiveness. If this condition were not satisfied, the social choice could not really be considered the will of the people because decisions could sometimes move contrary to their desires. Undifferentiatedness (or anonymity, as it is often called) simply requires that a vote should be not counted differently if it is cast by different people. This form of fairness implies that attaching new names to the voters should not change the outcome. Finally, neutrality requires that no alternative be given artificial advantage in any vote. So, it should be possible to change the names on the alternatives and produce the same result. One-way unanimity (or a one-way supermajority rule) is not neutral because acquittal is given an artificial advantage. This is considered "unfair" because it weighs the votes of some people more heavily than those of others simply because of the alternative they prefer. May's Theorem proves that simple majority rule is the only method of counting votes that is always positively responsive to the desires of the group members and never counts one person's vote more heavily that anyone else's vote.

[FN56]. See generally Abramson, supra note 7, at 99-141.

[FN57]. See Abramson, supra note 7, at 58-95 (containing an excellent account of the history of jury nullification and the related question of whether the jury should be empowered to determine the law as well as the facts).

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