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ARTICLES

PRESERVING A COMMUNITY VOICE: THE CASE FOR HALF-AND-HALF JURIES IN RACIALLY-CHARGED CRIMINAL CASES

DANIEL W. VAN NESS*

INTRODUCTION

What is the role of the jury in a criminal trial? Does it protect the individual defendant from arbitrary action by the sovereign?¹ Does it add lay experience and insight to a formalistic and technical legal process?² Or does it assert and protect the interests of the general community in a legal dispute in which the official parties are the government and the defendant?³

The Supreme Court has offered a textured response to this question, frustrating those who seek simple answers. While the

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1. See *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.

Id. (White, J.).

2. See *United States v. Dougherty*, 473 F.2d 1113, 1141-42 (D.C. Cir. 1972). [N]ullification can and should serve an important function in the criminal process. . . . The doctrine permits the jury to bring to bear on the criminal process a sense of fairness and particularized justice. The drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is 'unlawful' but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence. It is the jury—as spokesman for the community's sense of values—that must explore that subtle and elusive boundary.

Id. (Bazelon, C.J., dissenting from a holding that defendants are not entitled to a jury instruction informing it of its power to “nullify” the law).

3. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

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 [the] jury trial.

Id. (White, J.).

Court has frequently held that the function of the jury is to protect the defendant from oppressive governmental authority, the Court has also recognized the other roles as necessary, appropriate, and compatible with protecting the defendant's rights. For example, the Court upheld jury sentencing as a means of maintaining the "link between contemporary community values and the penal system" in one case,⁴ and as a way to inject the "compassion, fairness, and understanding" of a community into the formal legal system in another.⁵

Constitutional doctrine on the role of the criminal jury,⁶ then, appears to be one of those areas in which "liberalism and communitarianism coexist peacefully in the pages of the *United States Reports*."⁷ But peaceful coexistence does not provide easy answers for judges confronting cases in which community passions against a defendant are aroused. Racially-charged cases, in particular, can pose unique challenges to trial court judges: a threat of overt violence often simmers in the community while court proceedings are underway.

4. *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968).

5. *Chaffin v. Stynchcombe*, 412 U.S. 17, 22 (1973).

6. Constitutional provisions concerning jury trials in criminal cases are found in Article III as well as the Sixth and Fourteenth Amendments. Article III, Section 2, Clause 3 provides in pertinent part: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed. . . ." The relevant provision of the Sixth Amendment requires a criminal defendant's trial to be "by an impartial jury of the State and district wherein the crime shall have been committed." The Supreme Court has ruled that the Fourteenth Amendment's Equal Protection Clause prevents racial discrimination in selection of the petit jury. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

7. Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1, 3 (1991).

Liberalism and communitarianism currently coexist peacefully in the pages of the *United States Reports*. Yet many contemporary theorists assume that only one school can be correct: the positive case for each theory is built on the negative case against the other. A better view might be that both are right but that neither captures the whole truth.

Id. Professor Brilmayer describes liberalism and communitarianism as follows: To a communitarian, the key value is community membership. The community is both the chief source of political norms and an important source of personal identity. . . . Communitarians tend to emphasize the importance of community traditions in the establishment of political principles. They reject the possibility of universalist reasoning that would ground principles valid for all times and places. . . . Liberals focus on a different key characteristic—personal autonomy. This emphasis is sometimes explained in terms of equality, for liberalism rests (some say) on principles of equal concern and respect. The community is not supposed to favor one moral position over another, for instance by attempting to inculcate its citizens with some particular moral point of view.

Id. at 9-10.

The need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes.⁸

Those community passions may threaten the defendant's right to a fair trial. In fact, the more "heated and volatile" emotions become, the more likely it is that a change of venue will be requested to protect the defendant's Sixth Amendment right to an impartial jury.⁹ Ironically, then, at the very point where it is most essential to preserve public confidence, the community is denied the opportunity to participate in the trial. When the new venue is a community with a substantially different racial composition from the community in which the crime took place, the same alienation and mistrust of the judicial system emerges that the Court has attempted to minimize in its rulings on the discriminatory use of peremptory challenges.¹⁰ The criminal trial of the white police officers accused of beating Rodney King is a recent and notorious example. In order to provide the defendants with an impartial jury, the court moved the trial to Simi Valley; the result was an all-white jury.¹¹ The public outrage and riots which followed the verdict demonstrated an alienation from the justice system felt by

8. *Georgia v. McCollum*, 112 S. Ct. 2348, 2354 (1992) (Blackmun, J.) (citing Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 195-96 (1989) ("describing two trials in Miami, Fla., in which all African-American jurors were peremptorily struck by white defendants accused of racial beating, and the public outrage and riots that followed the defendants' acquittal").

9. There is a difference between *venue* and *vicinage*; the former refers to the location in which the trial will take place, and the latter to the area from which the jury may be drawn. While the two concepts are similar and are often discussed as though they were identical, they are in fact distinct. Therefore, the vicinage requirement could be met, after a change of venue is ordered, by selecting half the jurors from the district in which the crime has taken place and transporting them to the site of the trial.

10. In *Batson*, 476 U.S. 79, and *Powers v. Ohio*, 111 S. Ct. 1364 (1991), prosecutors were prohibited from using peremptory challenges in a racially discriminatory way. *McCollum* extended this prohibition to the defendant. 112 S. Ct. at 2353. In *McCollum*, the Court emphasized that *Batson* served not only to protect the constitutional rights of defendants and excluded jurors under the Fourteenth Amendment Equal Protection Clause, but also the right of the affected community to have confidence that the court system administers justice fairly and impartially. *Id.*

It does not appear that the community's harm rises to a constitutional violation. While the Court identified multiple ends in prohibiting the racial use of peremptory challenges (protecting the defendant, preventing discrimination against excluded jurors, and preserving community confidence in the courts as fair and lawful), it granted the State and defendant standing to challenge such use by the other only on behalf of the excluded jurors and not the community. *Id.* at 2357.

11. Larry Rohter, *Miami Police Officer Is Acquitted in Racially Charged Case*, N.Y. TIMES, May 29, 1993, at 1, 5.

members of that community that could not be resolved by limiting the discriminatory use of peremptory challenges.¹²

Another example is the recent case in Florida where a Hispanic police officer, William Lozano, was accused of manslaughter in the deaths of two African-American men.¹³ This case was moved five times in an attempt to constitutionally balance the interests of the defendant, the victim, and the community in which the alleged crime took place.¹⁴

What approaches are available to trial judges presiding over racially-charged cases when they determine that a change of venue is required? One method would be to pay little attention to the concerns of the community and focus only on securing the defendant a fair trial. Under this approach, the community's concerns are viewed as posing an obstacle to justice, and its potential negative influence on the verdict as something that must be substantially restrained. Removing the trial to a location outside the community is an excellent way of curbing that pernicious effect. This approach reflects the liberal emphasis on the rights of the individual, and it calls to mind one powerful image of justice as a dispassionate, blind goddess deciding cases only on their merits under the law, unmoved by the emotions and prejudices of the community.

A more communitarian strategy is to modify voir dire procedures to achieve not only an impartial jury, but a representational one as well. Some commentators have suggested that the solution lies not in limiting *exclusions* from the jury, but in insisting on certain *inclusions* by implementing procedures which guarantee racially-mixed juries¹⁵ or by establishing racial quotas for juries hearing cases involving racial minorities.¹⁶ The Supreme Court has expressed little interest in extending constitutional mandates beyond limiting racial and gender exclusions, noting that while

12. *Id.*

13. *Lozano v. State*, 584 So. 2d 19 (Fla. Dist. Ct. App. 1991).

14. Rohter, *supra* note 11, at 5.

15. See, e.g., Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images and Procedures*, 64 N.C. L. REV. 501 (1986) (proposing an abolition of peremptory challenges for the prosecution to prevent the state from excluding minorities); Lewis H. LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841 (1976) (proposing that jurors be selected based on occupational diversity).

16. See, e.g., Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment As a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 124 (1990) (arguing that "a race neutral verdict is achieved when at least three black jurors are selected to judge a criminal or civil case that involves the rights of a black person"); S. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1698-99 (1985) (arguing that "a reasonable compromise between expediency and effectiveness is to assure the defendant three racially similar jurors").

the Sixth Amendment requires that the venire represent a cross section of the community, “[i]t would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society.”¹⁷ Furthermore, proportional representation raises critical questions after a change of venue is granted: Which community should the jury reflect? Is it possible for one community’s proxies to represent the concerns of a very different community?

This Article will present a third alternative for trial courts facing these practical challenges: the *half-and-half jury*. The half-and-half jury is a pragmatic response, founded on the principal that a jury functions not only to protect the defendant from the state, but also to represent the community’s interests and values. It resembles an ancient form of special jury, the jury *de medietate linguae*,¹⁸ that arose in Twelfth Century England. The statute authorizing the jury *de medietate linguae* provided that an alien who was party to a legal proceeding could request that the case be heard by a jury half of which was composed of British citizens and half of which was composed of aliens.¹⁹ This statute, however, contained a fundamental flaw: it failed to specify that the aliens on the jury be of the same nationality as the alien party. Since courts found it more convenient to draw jurors from all aliens in the vicinity, the mechanism had little benefit to alien litigants and was rarely used after that the Twelfth Century (although there are accounts of its use in England and the United States into the early parts of the Nineteenth Century).²⁰ That flaw could be remedied, permitting the half-and-half jury to be used today in racially-charged trials.

This Article proposes using the half-and-half jury in racially-charged criminal cases when a change of venue must be ordered. Part I reviews the William Lozano case, and the very real dilemmas and ironies that faced the trial judge, defense attorney, and prosecutor. Part II argues that a significant role of the jury from its inception has been to represent the interests and values of the community. Part III examines the jury *de medietate linguae* and suggests a variation that could constitutionally balance the defendant’s and the community’s interests when a change of venue is

17. *Batson v. Kentucky*, 476 U.S. 79, 86 n.6 (1986).

18. A literal translation of *de medietate linguae* is “jury of the half-tongue.” The phrase “half-and-half jury” was coined by Jeremy Bentham, who preferred that name because it was more readily understood. See *infra* note 205 and accompanying text. I use it for the same reason, although I propose a jury substantially different from Bentham’s.

19. See *infra* notes 198-260 and accompanying text for a discussion of the development of the jury *de medietate linguae*.

20. See *infra* notes 261-75 and accompanying text for a discussion of the use of the half-and-half jury in the American colonies.

ordered. Finally, Part IV proposes how the half-and-half jury might have been used in the William Lozano case.²¹

I. THE LOZANO CASE

On January 16, 1989, Hispanic police officer William Lozano shot and killed Clement Lloyd, an African-American man who was fleeing other Miami police officers on his motorcycle.²² Allan Blanchard, a passenger on the motorcycle and also, an African-American, was killed in the accident that resulted when Lloyd was shot.²³ Riots erupted at the scene of the shooting and in other parts of Dade County.²⁴ These riots continued for three nights, leaving one man dead, seven others shot, and buildings burned and looted.²⁵ Due to the fact that these shootings occurred on Martin Luther King's Birthday and during Super Bowl Week in Miami, national and international media attention was intensified.²⁶ As the Court of Appeals put it, "[t]he Miami riots became world news."²⁷

A. *Dade County to Orange County*

Lozano was charged with two counts of manslaughter and moved for a change of venue from Dade County on the grounds that there was widespread concern that there would be new riots if he were acquitted, and that this concern would necessarily prejudice the jurors.²⁸ The trial court not only denied the motion,

21. This Article addresses the narrow issue of whether there are historical grounds that would justify assembling a jury which includes representatives of the community in which the crime took place as well as representatives of another community to which the trial has been moved as the result of a change of venue motion. There are a number of other related issues which have been discussed at length in the literature, issues which this paper will *not* address: the use of peremptory challenges to remove all members of a race (Massaro, *supra* note 15); whether the array and voir dire must produce a jury which reflects the racial make-up of the community (LaRue, *supra* note 15); the meaning of impartiality in a society permeated by the media (Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror In an Age of Mass Media?*, 40 AM. U. L. REV. 632 (1991)); and the extent to which jurors do and may rely on juror knowledge (Edward J. Finley II, *Ignorance as Bliss? The Historical Development of an American Rule On Juror Knowledge*, 1990 U. CHI. LEGAL F. 457 (1990)).

22. *Lozano v. State*, 584 So. 2d 19, 20-21 (Fla. Dist. Ct. App. 1991).

23. *Id.* at 21.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Lozano*, 584 So. 2d at 21.

28. This fear was treated as well-founded in subsequent opinions, and was borne out by the jurors themselves:

The record shows that five of the six actual jurors were directly affected by the pretrial publicity and fears of violence. Juror Gonzalez stated that she had heard from her friends that there was going to be a riot if Lozano were

but refused to even conduct a hearing on the motion at which Lozano might have offered evidence to support his assertion.²⁹ Following his Dade County trial, Lozano was found guilty on both counts.³⁰ There were no riots.

The appellate court reversed the conviction on the ground that Lozano was denied a fair and impartial trial.³¹ The court held that the trial should be moved when a community is “infected by knowledge of the incident and accompanying prejudice, bias and preconceived opinions” because the jurors have likely been affected.³² On remand, the case was assigned to Circuit Judge W. Thomas Spencer, who ordered that the case be removed to Orlando.³³

B. Orange County to Leon County

A week later, four police officers were acquitted in Simi Valley of charges that they had used excessive force in arresting Rodney King, despite the well-publicized videotaping of their conduct in arresting him.³⁴ Riots broke out in Los Angeles, resulting in 53 deaths and an estimated \$500 million in property loss and damages.³⁵ Although neither Lozano nor the State requested another change of venue from Orlando, on May 6, 1992, Judge Spencer issued a “Supplemental Order on Venue” on his own motion and without a hearing, stating that the case would be

found not guilty and stated that she could not “honestly say” she could put this aside. Juror Quigly stated that her daughter worked within one block of where the riots had occurred and was worried and nervous about her daughter being affected by the riot. Juror Grumbach stated that he would feel “some pressure” sitting on the case, that it would be uncomfortable, and that there might be a disturbance if Lozano were found not guilty. Juror Johnson stated that there might be a riot as a result of the verdict and she would become concerned if a riot affected her or her family. Juror Simmons stated that he would be concerned about the reaction to the verdict in the case, and that he lived in a neighborhood that was directly affected by the past riots.

Id. at 22 n.5.

29. *Id.* at 21.

30. *Id.*

31. *Id.* at 22.

32. *Lozano*, 584 So. 2d at 22.

We simply cannot approve the result of a trial conducted, as was this one, in an atmosphere in which the entire community—including the jury—was so obviously, and it must be said, so justifiably concerned with the dangers which would follow an acquittal, but which would be and were obviated if, as actually occurred, the defendant was convicted. Surely, the fear that one’s own county would respond to a not guilty verdict by erupting into violence is as highly “impermissible [a] factor” as can be contemplated.

Id. at 22-23.

33. *State v. Lozano*, 616 So. 2d 73, 74 (Fla. Dist. Ct. App. 1993).

34. Rohter, *supra* note 11, at 5.

35. *Id.*

transferred to Tallahassee.³⁶ The Supplemental Order reflected the judge's concern that the disturbances in Los Angeles might be repeated in Miami were the case tried in Orlando.³⁷ Later in his order, Judge Spencer identified "two other issues which America should hear" arising out of the testimony he had heard during the Miami hearings concerning the change of venue to Orlando.³⁸ The first was the acute alienation from the legal system felt by the African-American community.³⁹ The second was the community perception that shootings of African-American citizens by non-African-American policemen were treated less seriously by the court system than were other shootings.⁴⁰ Concluding that "[j]ustice is an elusive quality demanding constant pursuit," and noting that while the victims as well as 19.8% of Dade County's voters were African-American only 10.1% of Orlando's voters were African-American, Judge Spencer ordered that the trial be transferred to Tallahassee (located in a county in which 20.6% of the voters are African-American).⁴¹

C. Leon County to Orange County (Two Times)

After the case was transferred to Tallahassee, Chief Judge William Gary ordered the case returned to Orlando.⁴² Judge Gary held that Judge Spencer's *sua sponte* order, made without a motion from either party or the consent of the defendant, was null and void and therefore incapable of conferring jurisdiction on his court.⁴³ The State appealed Judge Gary's ruling to the Florida supreme court.⁴⁴ The supreme court held that the receiving judge on a change of venue may not review the sending judge's order.⁴⁵ The appropriate recourse for such an order would be an appeal by one of the parties.⁴⁶ However, two justices concurred specially in

36. *Lozano*, 616 So. 2d at 74, 76-78.

37. *Id.* at 77.

[T]his court is convinced that, rightly or wrongly, Orlando is now perceived as not providing the necessary framework for an impartial trial. Such a perception of justice is as important as its reality. The judicial system is the branch of government that must be the most sensitive to its image of impartiality.

Id.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Lozano*, 616 So. 2d at 77-78.

42. *Id.* at 74.

43. *Id.*

44. *Id.*

45. *State v. Gary*, 609 So. 2d 1291, 1294 (Fla. 1992).

46. *Id.* (holding that "the interests of justice require a rule designed to inhibit trial courts from engaging in a 'ping-pong game' by transferring a case back and forth, thereby jeopardizing the rights of the parties and undermining public confi-

order to make the following observation:

Judge Spencer transferred venue from Dade County upon the finding that a jury would, correctly or incorrectly, convict the defendant out of fear that an acquittal might result in riots. From my perception of the race relations that exist in Leon County, it is likely the same finding could be made here. At the very least a hearing on this factor should be conducted before an irrevocable trial site is determined.⁴⁷

After the case moved again to Tallahassee, Lozano moved to return the trial to Miami.⁴⁸ Lozano argued that his rights to a fair trial and Equal Protection would be denied if the case remained in Tallahassee.⁴⁹ Although Hispanics made up nearly half the population of Dade County, they comprised less than 3% of the population in Tallahassee.⁵⁰ Although initially opposed to the motion, the State joined the defendant in the motion on the day before trial; the State's reasons were that Tallahassee had a small number of Hispanics and had been chosen solely on the basis of race.⁵¹

Judge Spencer denied the motion for change of venue, and both Lozano and the State appealed.⁵² The appellate court returned the case to Orlando, holding that Judge Spencer erred in denying the motion for a change of venue and that the May 6th Supplementary Order was void.⁵³ The prospect of requiring the parties to proceed with a second trial in Tallahassee, when both expected that a third trial would be ordered if Lozano were convicted, simply invited public disrespect of the justice system.⁵⁴ Furthermore, the appellate court rejected the rationale for Judge Spencer's original order transferring the case to Tallahassee:

The May, 1992, order of transfer from Orlando to Tallahassee is clear in grounding the ruling on the basis of race, particularly the race of the victims. No consideration was given to the race of the defendant. We agree, as the parties here assert, that the trial court deliberately acted so as to increase the number of Black jurors. In doing this, the trial court virtually guaranteed the absence of Hispanic jurors.⁵⁵

dence in the judicial function").

47. *Id.* at 1295.

48. *State v. Lozano*, 616 So. 2d 73, 74 (Fla. Dist. Ct. App. 1993).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Lozano*, 616 So. 2d at 76.

54. *Id.* at 75-76 (holding that "public confidence in our criminal justice system cannot be maintained under such circumstances, and . . . either a conviction or an acquittal resulting from such a trial would be inherently suspect").

55. *Id.* at 76.

On March 10, 1993, the case returned to Orlando.⁵⁶ On May 10, a jury was sworn consisting of three whites, two Hispanics and one African-American.⁵⁷ At the conclusion of the prosecution's case, the defense offered no witnesses.⁵⁸ Following less than seven hours of deliberation, Mr. Lozano was acquitted on May 28.⁵⁹ There were only minor disturbances.⁶⁰

D. The Search for a Fair Site

Criminal trials touch many parties. Some, like the prosecution and defense, play leading roles. Others, like the victim and community, play subordinate roles. This is a consequence of the Anglo-American justice system's definition of crime (as a breach of the king's peace,⁶¹ an offense against the government). However, the victim and community have interests in seeing that justice is done as well. Increasingly, victims are securing the right to pursue that interest in criminal proceedings.⁶²

The community, through its representatives, also participates in the pursuit of justice. It elects a prosecutor, a sheriff, and a

56. Rohter, *supra* note 11, at 5.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1.

61. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I.* 67-68 n.1 (1923).

In later times [the King's Peace] became a synonym for public order maintained by the King's general authority; nowadays we do not easily conceive how the peace which lawful men ought to keep can be any other than the Queen's or the commonwealth's. But the King's justice, as we have seen, was at first not ordinary but exceptional, and his power was called to aid only when other means had failed. To be in the King's Peace was to have a special protection, a local or personal privilege. Every free man was entitled to peace in his own house, the sanctity of the homestead being one of the most ancient and general principles of Teutonic law. The worth set on a . . . king's peace was higher than any other man's. Fighting in the King's house was a capital offence from an early time. Gradually the privileges of the King's house were extended to the precincts of his court, to the army, to the regular meetings of the shire and hundred, and to the great roads. Also the King might grant special personal protection to his officers and followers; and these two kinds of privilege spread until they coalesced and covered the whole ground.

Id. (quoting Frederick Pollock, *English Law Before the Norman Conquest*, 14 *LAW Q. REV.* 301).

62. See, e.g., FLA. CONST. art. I, § 16(b):

Victims of crime or their lawful representatives . . . are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

number of judges. Its legislators enact criminal laws and procedures. It funds the institutions of justice through taxes and construction bonds. Finally, members of the community participate in the disposition of cases through the institution of the jury.

All parties but the community retain their roles in the event a trial is moved from the district of the crime, in order to secure a fair trial for the defendant. The community alone is excluded; in fact, the trial is moved because it is believed that the community will prevent a fair trial. As the *Lozano* case illustrates, this can lead to unfortunate results. First, community alienation from the criminal justice system becomes even more acute when the community is not allowed to participate in the judicial process. Second, jurists like Judge Spencer face an apparently unresolvable dilemma when they rule on motions for a change of venue. Few states have cities which are demographically and culturally identical. Consequently, a change of venue means the trial will be heard by jurors who do not share the values and interests of the original community. This only increases the sense of estrangement from the judicial system. Since the legal system's authority rests in large part on its credibility in the community, that estrangement undermines the rule of law. So, Judge Spencer and other judges similarly situated search for ways to uphold the constitutional rights of the defendant without further alienating the community.

The *Lozano* case illustrates how difficult it can be to balance the interests of the defendant, the victim, and the community. Miami was an unacceptable site because the jurors feared violence if there were a conviction. Orlando, in Judge Spencer's opinion, was unacceptable because of the likelihood that an all-white jury would hear the case. Tallahassee was unacceptable to the defense, the prosecution, and to the appellate court because it was likely there would be no Hispanics on the jury.

We are left with multiple ironies. A defendant who originally won a reversal because the first trial was held in Miami ended up asking that the second trial be held there. A judge who was once convinced that a trial in Orlando would be perceived as unfair ended up presiding over the trial in that city. And when the trial was finally conducted, it was once again in a climate significantly affected by national attention focused this time on the Los Angeles retrial of the "Rodney King" police officers in California.

Such quandaries are an inevitable result of attempting to do justice in a complex and diverse society. One way of resolving the problem is to simply ignore the community's concerns, and address only the rights and interests of the defendant and state. But choosing to do so would mark a significant departure from a role that the jury has had from its very inception. A review of the English origins of the jury trial demonstrates that among its key

purposes was to be "the voice of the countryside,"⁶³ the expression of the values and insights of the community.

II. THE VOICE OF THE COUNTRYSIDE

Seeking historical answers to what constitutes proper jury selection procedures is a confounding process. The recorded history of the jury is ambiguous, sometimes incomplete, and often conflicting. The role and form of the jury have changed significantly over time. Thus, a modern writer seeking to support a particular view of the role of the jury or jury procedure usually can find some history to support that view, although other history would contradict it.⁶⁴

Mindful of this observation to be cautious in our use of history, it is appropriate nonetheless to consider the formation of the jury in England. For while this institution evolved over time and was adopted as a mode of proof only when other more established proofs became unavailable, it was carefully crafted from the very outset to be a source of community knowledge and opinions. Although the knowledge requirement disappeared over time, the expectation that jurors bring a community perspective did not. It was this vicinage requirement that was eventually incorporated in the Sixth Amendment.

A. *The Roots of the Jury*

The roots of the English jury go back to the Continent.⁶⁵ Roman emperors and governors summoned key individuals in a community and required them to report local facts of financial interest to the government, such as the value or ownership of a piece of land.⁶⁶ This royal power, called the inquest, passed from

63. 1 POLLOCK & MAITLAND, *supra* note 61, at 624.

64. Massaro, *supra* note 15, at 504.

65. Arguably the first use of a jury can be found earlier, in Greek mythology and Aeschylus' trilogy of plays *Oresteia*. The plot involves an ongoing and bloody feud within the House of Atreus. Agamemnon had sacrificed his daughter Iphigenia as he left to fight in the Trojan War. On his return, he and his mistress Cassandra were killed by his wife Clytemnestra because of both her lingering bitterness over Iphigenia's death and her adulterous affair with Aegisthus. Orestes, the son of Clytemnestra and Agamemnon, then exacts revenge by killing his mother and Aegisthus. For this matricide, he is tormented by the Furies. Apollo interrupts this cycle of vengeance and violence by sending Orestes to Athena who convenes a lay jury and tries Orestes. When the jury deadlocks, she casts the deciding vote and Orestes is acquitted.

Paul Gewirtz, in his essay *Aeschylus' Law* notes four elements of this embryonic legal system which were distinct from the bloodfeuds it replaced: it was public and political, it established an orderly and controlled process, it required reasoned discussion from abstract principles of justice, and it sought to achieve a wise resolution. Paul Gewirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043, 1045-46 (1988).

66. EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW FROM THE EARLIEST TIMES TO THE END OF THE YEAR 1938, at 47 (1938).

the Romans to Charles the Great and his descendants.⁶⁷ The Carolingian Kings used the inquest as a convenient means to gather local information concerning lands and criminal conduct.⁶⁸ The Normans borrowed the inquest from the Carolingian Kings they conquered and brought the idea to England.⁶⁹

In 1070, William the Conqueror used the inquest to learn about the existing laws of England because he intended to rule according to English law.⁷⁰ From 1083 to 1086, he convened inquests in every English county to determine the ownership and value of all real property and published the results in the famous Domesday Books.⁷¹

"It is here," Maitland and Montague observe, "that we see the germ of the jury."⁷² This view is true if we use the term in its most inclusive sense: "a body of neighbours . . . summoned by some public officer to give upon oath a true answer to some question."⁷³ However, it is important to remember that for 100 years the inquest was used primarily for administrative, not judicial, functions.⁷⁴ Eventually, its potential application to judicial pro-

67. FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, *A SKETCH OF ENGLISH LEGAL HISTORY* 51 (James F. Colby ed., 1915).

68. *Id.*

69. 1 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 312 (1922).

70. LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* 33 (1988).

71. *Id.*

72. Maitland and Montague remark on the irony that the jury was imported from Europe:

For a long time past Englishmen have been proud of their trial by jury, proud to see the nations of Europe imitating as best they might this "palladium of English liberties," this "bulwark of the British Constitution." Their pride, if in other respects it be reasonable, need not be diminished by any modern discoveries of ancient facts, even though they may have to learn that in its origin trial by jury was rather French than English, rather royal than popular, rather the livery of conquest than a badge of freedom. They have made it what it is; and what it is very different from what it was. The story is a long and curious one.

MAITLAND & MONTAGUE, *supra* note 67, at 45-46.

73. 1 POLLOCK & MAITLAND, *supra* note 61, at 138.

74. Taswell-Langmead notes:

It was only gradually, however, that the advantages of the principle of recognition by jury in its application to judicial procedure became impressed upon the minds of both rulers and ruled. At first the sworn inquest seems to have been chiefly applied to matters not judicial, such as the domesday survey, the assessment of feudal taxation under William Rufus and Henry I., and the customs of the church of York, which the latter monarch, in 1106, directed five commissioners to verify by the oath of twelve of the citizens. . . . Henry II. applied recognition by jury to every description of business, fiscal and legal, and henceforth down to the reign of Edward I. it was, in particular, the most usual machinery employed for the assessment of taxation.

THOMAS PITT TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY FROM THE*

ceedings was recognized, and in an attempt to entice litigants to his courts Henry II enacted the "assizes,"⁷⁵ a series of laws which made the inquest available to his subjects in a variety of cases. The key example is the Grand Assize, a statute which provided that in litigation over ownership of land, the defendant could avoid battle by putting the dispute before a king's inquest.⁷⁶ Thus, the use of the jury as a means of proof was established.⁷⁷

B. *The Jury Replaces the Other Forms of Proof*

The Grand Assize and Fourth Lateran Council helped bring about the demise of the oath,⁷⁸ the ordeal,⁷⁹ and battle⁸⁰ as

TEUTONIC CONQUEST TO THE PRESENT TIME 131-32 (6th ed., Rothman 1992)(1646).

75. This word is also spelled "assise." Beames, in his notes to his translation of Glanville, provides these definitions of the term:

The term has a variety of significations. We shall briefly mention some of the chief—1. It signifieth a Writ, thus assisa of nevel disseisin of *Juris Utrum*, &c. 2. It signified a Jury. 3. It meant a statute or law, thus *assisa panis et cervisie—assisa de Clarendon*, &c. 4. It is used for the court, place, or time, where writs of assise were taken. 5. It meant a certain number. 6. It imported a tax, or tribute. 7. It was used for a fine.

JOHN BEAMES, A TRANSLATION OF GLANVILLE 43 n.1 (Fred B. Rothman 1980)(1812).

76. MAITLAND & MONTAGUE, *supra* note 67, at 53.

77. It is ironic that as the inquest took on a new role in England it disappeared from Normandy.

In 1205 Phillip Augustus, King of France, invaded Normandy and, finding little resistance, conquered the province. The result was that the jury died in Normandy while continuing in England. From this point forward it is correct to speak of the English jury as opposed to the Anglo-Norman jury.

MOORE, *supra* note 70, at 42.

78. The oath required the party to bring compurgators to court to swear to the truth of his position. Originally, this meant that the compurgators swore the same oath taken by the principal. 1 HOLDSWORTH, *supra* note 69, at 305. Over time, however, the compurgators were only required to swear to their belief that the principal was telling the truth: "By God that oath is clean and true." MAITLAND & MONTAGUE, *supra* note 67, at 47. Holdsworth suggested that Pope Innocent III sanctioned this latter approach as a means of reducing the likelihood of perjury, but notes that the new method made it very difficult to penalize a compurgator who lied. He believed that this is part of why compurgation began to be disfavored. 1 HOLDSWORTH, *supra* note 69, at 305-06. There were complicated and arcane rules concerning the kind and number of compurgators, and any failure to strictly comply with those rules meant defeat for the party or worse. MAITLAND & MONTAGUE, *supra* note 67, at 48.

The oath began to fall into disfavor in the royal courts during the twelfth century, although it continued to be used in manorial, borough and ecclesiastical courts. 1 HOLDSWORTH, *supra* note 69, at 306. Its use in any court was abolished by statute in 1833. *Id.* at 308. However, since it was never permitted as a form of proof when the king was a party, it had never been used in criminal prosecutions or in the Court of Exchequer. *Id.* at 307.

79. There was a compelling logic to the ordeal at a time when people believed that God (or gods) would intervene directly to exonerate the innocent. *Id.* at 310. A person suspected by the decision-makers of having committed a crime was given a task which was impossible to accomplish without divine intervention, such as car-

methods of proof. But the disfavor into which those proofs fell does not fully explain why the jury took their place. After all, Western Europe adopted the inquisition and confession, instead of the jury.⁸¹

The roots of the Continental approach lay with the Church. In decretals issued in 1199 and 1206, Pope Innocent III created a procedure known as the inquisition, in which a judge accumulated testimony against an individual suspected of heresy.⁸² This could be done on the judge's motion or at the prompting of another.⁸³ Although testimony was obtained secretly, the evidence offered by others was not sufficiently conclusive to assure the ecclesiastical court that it was eliminating heresy: witnesses' testimony might be inaccurate, the product of deception, or simply inconclusive.⁸⁴ It was much better to secure confessions from the accused, and judges resorted to torture when necessary to obtain them.⁸⁵ This dissatisfaction with the testimony of witnesses led France to adopt

rying red hot iron, immersing his hand in boiling water, or sinking when thrown into the water. *Id.*

Unfortunately, the ordeal was vulnerable to corruption, and consequently did not produce many convictions. Maitland, in his report of pleas before the king, noted that he had found only one case in which the ordeal did not result in an acquittal. 1 SELECT PLEAS OF THE CROWN (A.D. 1200-1225) 75 (London, F. W. Maitland, ed., 1888). The Church, recognizing not only the ineffectiveness of the form of proof, but that clergy were colluding in the fraudulent proofs, decreed in the Fourth Lateran Council of 1215 that clergy were no longer to participate in ordeals. 1 HOLDSWORTH, *supra* note 69, at 311. In 1219, Henry III instructed his judges to cease using this proof. *Id.*

80. Trial by battle was imported to England by the Normans; in fact, Holdsworth says that the Anglo-Saxons appear to have been the only nation in the world who did *not* use trial by battle prior to 1066. 1 HOLDSWORTH, *supra* note 69, at 308. However, once there it was used for a broad range of disputes, from criminal prosecutions to private disputes to international conflicts. *Id.* at 308. Parties were permitted to produce champions to do battle on their behalf, and soon churches, landowners and communities placed champions on retainer. *Id.* at 309.

The penalties for losing the battle were high. The combatants were to fight until one of them died or surrendered, or until the sun went down, in which case the party required to present proof was deemed to have lost. In criminal cases the loser was then hanged or disfigured. In all cases the losers were required to pay a fine, and were declared from that time on to be infamous, having been convicted of perjury. MAITLAND & MONTAGUE, *supra* note 67, at 50.

Formal opposition to the battle arose at the same time as opposition to the ordeal. Innocent III denounced its use at the Fourth Lateran Council. 1 HOLDSWORTH, *supra* note 69, at 309 n.11. Henry I prohibited it in controversies involving property of little value. BEAMES, *supra* note 75, at 40-41. It fell largely into disuse in the twelfth century, although it was not outlawed until 1819. MAITLAND & MONTAGUE, *supra* note 67, at 62-63.

81. 1 POLLOCK & MAITLAND, *supra* note 61, at 657.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

a similar solution.⁸⁶

Why, then, did England choose the *inquest* instead of the *inquisition*? Part of the answer, according to Professor Groot, is that, even before 1215, the jury had begun to assume adjudicative and not simply investigatory responsibilities.⁸⁷ Its verdict, although medial, was in fact the result of an evaluation of facts and claims of parties.⁸⁸

Pollock and Maitland similarly conclude:

[A]n appeal generally came before justices in eyre who were presiding over an assembly in which every hundred of the county was represented by a jury which had come there to answer inquiries. Indeed the justices as a general rule first heard of the appeal because it was "presented" to them by a jury.⁸⁹

In addition, the King had an interest in suppressing violent crime,⁹⁰ and he was unwilling to rely on the appellee's ability to defeat the appellant in battle to achieve this.⁹¹ Consequently, he began insisting on proof by verdict.⁹²

King Henry II was pivotal to the creation of the jury.⁹³ Henry II issued the Assize of Clarendon in 1166, which contained instructions to his travelling justices, instructions designed in part to thwart powerful individuals from avoiding prosecution through intimidation.

86. JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* 47-53 (Garland 1979).

87. Roger D. Groot, *The Jury of Presentment Before 1215*, 26 AM. J. LEGAL HIST. 1, 24 (1982).

88. After reviewing the records of a number of pre-1215 cases, Groot concludes: This verdict differs from the later verdict of guilty or not guilty principally because it was medial rather than final, and yet it had substantial aspects of finality. If the jurors and vills decided favorably to the accused, he was virtually certain to avoid the making of further proof by ordeal. If the medial decision was unfavorable, the accused made proof by ordeal, but if he cleared himself the verdict was sufficient for him still to be treated as guilty.

Against this background of jury adjudication and substantial credence being accorded jury verdicts, the ordeal was abolished in 1215. It was then an easy matter to coalesce the pre-proof verdict with its post-proof finality and emerge with something very like the verdict of a modern petit jury. Because the English had this ready, developed substitute for the ordeal, they were spared the search for an alternative. One alternative thus avoided was confession, even if produced by torture. To the extent the continental, inquisitorial systems can be traced to a past reliance on confessions and torture, the development of the pre-1215 jury provided the root mechanism for the Anglo-American accusatorial system.

Id.

89. 1 POLLOCK & MAITLAND, *supra* note 61, at 619.

90. *Id.* at 618-19.

91. *Id.*

92. *Id.*

93. MOORE, *supra* note 70, at 34 (stating that "[i]f a single person could be thought of as creating the jury, [Henry II] would be that person").

[T]he first clause, practically the preamble . . . provides that twelve men of each hundred and four of each vill shall swear that they will answer truly whether any man is reputed to have been guilty of murder, robbery or suchlike heinous offence. Ten years later the Assize of Northampton [1176] extended the subjects about which inquiry should be made, and directed that such inquiry should be carried out both by the judges and by the sheriffs, that is, in the judicial eyes or circuits and in the local court which came to be called the Sheriff's Tourn.⁹⁴

This Grand Assize was therefore a royal creation. Its key innovation was the presenting jury, roughly analogous to the modern Grand Jury. The twelve presenters were required to report anyone they suspected of having committed a felony, and those persons were held for trial.⁹⁵ While this was a new form of accusation, the method of proof (by that time principally the ordeal) remained the same.⁹⁶ According to Glanville (whose treatise was written only 15 years after the Assize of Clarendon), this permitted a defendant to defend against an allegation by the victim either through battle or through the Grand Assize,⁹⁷ effectively ending the use of battle in those cases, since it "never shall be waged in a case where the Assize cannot be resorted to."⁹⁸ Glanville concluded:

So effectually does this proceeding preserve the lives and civil condition of Men, that every one may now possess his right in safety, at the same time that he avoids the doubtful event of the Duel. Nor is this all: the severe punishment of an unexpected and premature Death is evaded, or, at least the opprobrium of a lasting infamy, of that dreadful and ignominious word [*cravent*, or "crying coward"] that so disgracefully resounds from the mouth of the conquered Champion.⁹⁹

Therefore, when Pope Innocent III ended clergy participation in ordeals in 1215, the presenting jury was sufficiently enough established to provide an alternative for the judicial system.¹⁰⁰ Initially the trial jury included some of the members of the presenting

94. DUDLEY JULIUS MEDLEY, *A STUDENT'S MANUAL OF ENGLISH CONSTITUTIONAL HISTORY*, FOURTH EDITION 365 (4th ed., 1907).

95. THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800*, at 7 (1985).

96. *Id.*

97. BEAMES, *supra* note 75, at 41-42.

98. *Id.* at 56.

99. *Id.* at 45.

100. As Professor Toni Massaro concludes from this:

Nothing in this early history, however, suggests that the jury method of proof was selected because it was seen as a "palladium of liberty" or as the grand bulwark of every Englishman's liberties. Trial by jury was mothered not by notions of liberty but by practical necessity.

Massaro, *supra* note 15, at 506.

jury, but over time the two juries became distinct.¹⁰¹

However, trial by jury was not always an attractive alternative for the defendant. The defendant would be invited to "put himself on the country," meaning to accept the verdict of his neighbors, but if he declined there was little the justices could do.¹⁰² It was not until the Statute of Westminster I in 1275 that such persons could be imprisoned for failure to submit to an inquest.¹⁰³ If they persisted in their refusal, they were placed in the worst part of the local prison, fed bread and water on alternate days, and forced to lie down with progressively heavier iron piled on them until they agreed to a jury trial or died.¹⁰⁴ In 1772, Parliament made refusal to respond to a felony charge in court the equivalent of a conviction.¹⁰⁵ Fifty-five years later this was amended to provide that a refusal to plead would be entered as a not guilty plea so that a trial could proceed.¹⁰⁶

But long before that time, in fact by the end of the reign of Henry III, jury verdicts were overwhelmingly more numerous than other proofs. Pollock and Maitland surveyed civil cases at Newcastle in 1256, 1269 and 1279, and found that out of 83 cases, 81 were resolved by jury verdicts, one through a wager of law, and one through a trial *per parentes*.¹⁰⁷

C. The Form and Composition of Early Juries

The local knowledge which jurors brought to their duties was initially the principal contribution they made to the royal justice system. Consequently, as the institutions of justice became more developed, this role remained a key factor. In *De Laudibus Legum*

101. GREEN, *supra* note 95, at 15.

102. FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 7 (1951).

103. Chapter 12 included this provision: "notorious felons who are openly of evil fame and who refuse to put themselves upon inquests of felony at the suit of the king before his justices, shall be remanded to a hard and strong prison. . . ." *Id.*

104. This was the notorious *peine forte et dure*. Maitland and Montague suggest why some defendants preferred to die in this way than undergo trial by jury.

Even in the seventeenth century there were men who would endure the agony of being pressed to death rather than utter the few words which would have subjected them to a trial by jury. They had a reason for their fortitude. Had they been hanged as felons their property would have been confiscated, their children would have been penniless; while, as it was, they left the world obstinate indeed, but unconvicted.

MAITLAND & MONTAGUE, *supra* note 67, at 60-61.

105. 1 HOLDSWORTH, *supra* note 69, at 327.

106. *Id.* The statutes referred to are 12 George III. c. 20 and 7, 8 George IV. c. 28, respectively.

107. 1 POLLOCK & MAITLAND, *supra* note 61, at 641. They explain the last as a trial that took place in the county court. The 81 jury verdicts were issued by four kinds of juries: grand assizes (1 verdict), petty assizes (57 verdicts), the *iuratae*, a common law jury (22 verdicts) and attaint juries (1 verdict).

Angliae,¹⁰⁸ Sir John Fortescue¹⁰⁹ detailed the structure of the fifteenth century jury system.¹¹⁰ England was divided into counties, the counties into hundreds, and the hundreds into vills.¹¹¹ All parts of England lay within some county and hundred, and virtually all lay within a vill, although there were certain places given the privilege of being outside a vill.¹¹² Each county had an appointed official, known as the king's sheriff, who was responsible for executing the king's commands within the county.¹¹³ Whenever parties in litigation joined on an issue of fact, the justices would send a writ to the sheriff ordering him to produce "twelve good and lawful men of the neighbourhood where the fact is alleged, who stand in no relation to either of the parties at issue, to declare upon their oaths whether the fact be such as one of those parties says, or not, as the other party avers."¹¹⁴

The requirement that the jurors come from the neighborhood of the fact in dispute was critically important. In fact, Fortescue emphasized that there were two fundamental requirements of jury members: first, that they have "sufficient possessions over and above moveables with which to maintain their status"; and, second, that they be "neither suspected by nor hostile to either party, but neighbors to them."¹¹⁵ While "neighbor" was never specifically defined (aside from requiring that jurors be from the county of the dispute),¹¹⁶ practice and subsequent statutes mandated that a certain number of jurors come from the hundred in which the controversy arose.¹¹⁷ Coke wrote that the early common law requirement was that at least four of the jurors must be from the hundred "for their better notice of the cause."¹¹⁸ This number was increased to "six, or at least five," in a court decision in

108. Written between 1468-1471, *De Laudibus Legum Angliae* was Sir John Fortescue's tribute to the superiority of English law over that of civilian countries. FORTESCUE, *supra* note 86, at ix, xii.

109. Sir John Fortescue was Chief Justice of the King's Bench during the 15th century.

110. FORTESCUE, *supra* note 86, at 52-59.

111. *Id.* at 53-55.

112. *Id.* at 55.

113. *Id.*

114. *Id.* at 57.

115. FORTESCUE, *supra* note 86, at 60-61. Such proximity was required in the early statutes as well, such as *Articuli super Cartas* (Articles upon the Charters), 28 Edw., ch. 9 (1300) and Statute of 42 Edw. 3, ch. 11 (1368). James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 164 n.140-41 (1983) [hereinafter Oldham, *Origins*].

116. In a 1374 case, Chief Justice Belknap held that "those of one county cannot try a thing which is in another county." JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 91 (1898).

117. *Id.*

118. 1 EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR A COMMENTARY UPON LITTLETON* 157a (1853).

1374.¹¹⁹ In 1543, the number was statutorily set at six,¹²⁰ but in 1585, it was reduced to two.¹²¹ Frustration over the delays occasioned by the practical difficulties of securing even this number led Parliament in 1705 to abolish the hundred locale requirement altogether, as long as the jurors came from the county in question.¹²² Thayer reports that a parallel change took place in the practice of criminal cases.¹²³

While proximity may have increased the likelihood that jurors would bring with them the requisite local knowledge needed to resolve the dispute, it also increased the possibility of bias. Consequently, elaborate rules for challenging both the array and individual jurors were established. Glanville reported that during jury selection, the four knights who selected the jurors¹²⁴ would usually select more than twelve¹²⁵ if one of the parties was ab-

119. THAYER, *supra* note 116, at 91.

120. *Id.* (citing St. 35 Hen. VIII., c. 6, sec. 3).

121. *Id.* (citing St. 27 Eliz., ch. 6, sec. 5).

122. *Id.* (citing St. 4 Ann., ch. 16, sec 6).

123. *Id.*

124. In an early procedure designed to reduce the influence of the sheriff over the composition of the jury, the sheriff would select four knights who in turn would select the array.

125. For centuries there was substantial uncertainty about how many jurors were required, and whether the verdict must be unanimous. THAYER, *supra* note 116, at 85-90. However, practice eventually settled both on a jury made up of twelve men, and the unanimous verdict. *Id.* at 85-86.

As to the number, Coke observed that *twelve* seemed to hold a special place in the common law:

And it seemeth to me, that the law in this case delighteth herself in the number of 12; for there must not onely be 12 *jurors* for the tryall of matters of fact, but 12 judges of ancient time for tryall of matters of law in the *Exchequer Chamber*. Also for matters of state there were in ancient time twelve *Counsellors of State*. He that wageth his law must have *eleven others with him*, which thinke he says true. And that *number of twelve* is much respected in *holy writ*, as 12 *apostles*, 12 *stones*, 12 *tribes*, &c.

1 COKE, *supra* note 118, at 155a (emphasis in original).

On the question of unanimity, there was substantially less agreement for some time. In a time in which individuality was not particularly valued, however, the courts would go to exceptional lengths to encourage unanimity even from the outset. Thayer reports:

In another assize before the same justices [Ingelby and Cavendish] at Northampton, the assize was sworn. They were all agreed, except one, who would not agree with the eleven. They were remanded and stayed there all that day and the next, without drink or food. Then the judges asked him [the one who stood out] if he would agree with his associates, and he said never, — he would die in prison first. Whereupon they took the verdict of the eleven, and ordered him to prison, and thereupon a day was given upon this verdict in the Common Bench. . . . And afterwards by assent of all the justices it was declared that this was no verdict. It was therefore awarded that this panel be quashed and annulled, and that he who was in prison be enlarged, and that the plaintiff sue a new *venire facias*. . . . Note, that the justices say they ought to have taken the assize with them in a wagon until

sent during the selection, in the hope that after that party had completed its challenge there would still be sufficient jurors left to try the case.¹²⁶ The purpose of the challenges was to eliminate those jurors who were partial to one of the parties.¹²⁷ A challenge could be raised in connection with the entire array as well as against particular jurors once the array had been accepted.¹²⁸ But juror knowledge was clearly not a basis for removal. In fact, as we will see in the next section, the *lack* of local knowledge was grounds for striking a potential juror.

The need to select jurors from the neighborhood of the dispute could create strange complications. In one fourteenth century case, the issue was whether a release by the plaintiff had been executed while he was a minor.¹²⁹ The plaintiff alleged that he was born in Fleet Street and requested a jury from that neighborhood.¹³⁰ The defendant replied that the plaintiff was of legal age when he executed the release in Tamestreet and demanded a jury from that location.¹³¹ The court summoned a jury from both locales.¹³²

D. From Source of Evidence to Weigher of Evidence

The inquest was the King's way of gaining information necessary to his rule. Consequently, he was interested in assembling jurors who had sufficient knowledge to provide that information. This was why the jurors were selected from the neighborhood of the dispute; those nearby were more likely to bring the requisite knowledge to the inquest.

Since the jury grew out of the inquest, it is not surprising that early jurors were expected to be a source of information in settling disputes. The road from the ancient expectation of juror knowledge to the modern expectation of juror ignorance was a gradual one, and the journey along that road was sporadic. Nevertheless, we can discern three stages in the process which, although they overlap, outline a progression of practice that led to

they were agreed.

THAYER, *supra* note 116, at 89 n.4.

126. BEAMES, *supra* note 75, at 60.

127. And later, by statute (25 Edw. III, st. V, c. 3), to remove jurors from the petty assize who had served on the grand assize which had indicted the defendant. JENKS, *supra* note 66, at 52.

128. FORTESCUE, *supra* note 86, at 57. Coke devotes a lengthy section to the range of challenges that could be made at common law. Challenges to the array had to be for cause, although peremptory challenges to individual jurors were permitted after the array was approved. 1 COKE, *supra* note 118, at § 234.

129. THAYER, *supra* note 116, at 92-93 (discussing Y.B. 22 Edw. III. 1, 2).

130. *Id.*

131. *Id.*

132. *Id.*

the modern jury. Throughout this time of change the requirement that jurors come from the area of the dispute remained, evidence that juror knowledge was not the sole reason for the requirement.

In the first stage of the process, jurors were expected to be familiar with the matter at issue and to have sufficient knowledge to resolve it among themselves.¹³³ Consequently, lack of knowledge was grounds for dismissal of an array or of individual jurors.¹³⁴ Jurors were expected to acquaint themselves with the facts before coming to the hearing if they did not have first-hand knowledge.¹³⁵ In fact, at one point, the parties were given the right to meet with jurors after impanelling but before the trial in order to "inform" them of the facts.¹³⁶

133. In fact, the result of their deliberation was called a *recognition*, not a discovery. See BEAMES, *supra* note 75, at 64. Glanville's description of the selection process reveals just how critical juror knowledge was:

When the Assise proceeds to make the Recognition, the right will be well known either to all the Jurors, or some may know it, and some not, or all may be alike ignorant concerning it. If none of them are acquainted with the truth of the matter, and this be testified upon their oaths in Court, recourse must be had to others, until such can be found who do know the truth of it. Should it, however, happen that some of them know the truth of the matter, and some not, the latter are to be rejected, and others summoned to Court, until twelve, at least, can be found who are unanimous. . . . With respect to the knowledge requisite on the part of those sworn, they should be acquainted with the merits of the cause, either from what they have personally seen and heard, or from the declarations of their Fathers, and from other sources equally entitled to credit, as if falling within their own immediate knowledge.

Id. at 64-65.

134. *Id.*

135. Of course, the "knowledge" so acquired by the jurors was sometimes suspect. Mitnick suggests that this may have reflected the origins of the jury: it was designed to protect the King's interests while appearing to be procedurally fair. John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 204 (1988).

Thayer excerpts a work of fiction, *THE MERCHANT AND THE FRIAR*, written in 1837 about life in the thirteenth century, and which reflects Mitnick's skepticism. The scene is Guildhall in 1303, and a defendant is about to be tried for robbing the king's treasury.

"Sheriff, is your inquest in court?" said the mayor. "Yes, my Lord," replied the sheriff; "and I am happy to say it will be an excellent jury for the crown. I myself have picked and chosen every man on the panel. . . . There is not a man whom I have not examined carefully. . . . All the jurors are acquainted with [the prisoner]. . . . I should ill have discharged my duty if I had allowed my bailiff to summon the jury at haphazard. . . . The least informed of them have taken great pains to go up and down in every hale and corner of Westminster, — they and their wives, — and to learn all they could hear concerning his past and present life and conversation. Never had any culprit a better chance of having a fair trial. . . ."

THAYER, *supra* note 116, at 91-92 n.7.

136. Thayer notes:

In 1427, we read in the St. 6 H.VI. c.2, that in certain cases the sheriffs

By the fifteenth century, courts had begun to distinguish between jurors and witnesses. We can think of this as the second stage. Fortescue, in describing trial procedure in the fifteenth century, indicated that after the parties had narrowed the issues through oral argument, they could offer any witnesses they wished to testify under oath.¹³⁷ He even noted provisions for excusing the witnesses during testimony so that "the evidence of one of them shall not instruct or induce another to testify in the same manner."¹³⁸ The jurors' knowledge would be used to evaluate the testimony of those witnesses.¹³⁹

Holdsworth indicates that although the use of witnesses can be traced to as early as the fourteenth century, it was not until the sixteenth century that their use became typical.¹⁴⁰ However, the use of juror knowledge did not die out quickly. Chief Justice Vaughan, in his famous decision in *Bushell's Case*¹⁴¹ affirming the independence of the jury, relied in part on the old doctrine that jurors were not bound by the evidence offered at trial.¹⁴²

must furnish the parties with the jury's names six days before the session, if they ask for it, since (it is recited as a grievance) defendants heretofore could not know who the jury were, "so as to inform them of their right and title before the day of the session."

Id. at 92.

137. FORTESCUE, *supra* note 86, at 61.

138. *Id.*

139. *Id.* at 53.

140. 1 HOLDSWORTH, *supra* note 69, at 334.

141. 124 Eng. Rep. 1006 (C.P. 1670).

142. *Id.* at 1012.

It is true, if the jury were to have no other evidence for the fact, but what is depos'd in Court, the Judge might know their evidence, and the fact from it, equally as they, and so direct what the law were in the case, though even then the Judge and jury might honestly differ in the result from the evidence, as well as two Judges may, which often happens.

But the evidence which the jury have of the fact is much other than that; for,

1. Being return'd of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in Court, but to this evidence the Judge is a stranger.

2. They may have evidence from their own personal knowledge, by which they may be assur'd and sometimes are, that what is depos'd in court, is absolutely false; but to this the Judge is a stranger, and he knows no more of the fact than he hath learn'd in Court, and perhaps by false depositions, and consequently knows nothing.

3. The jury may know the witnesses to be stigmatiz'd and infamous, which may be unknown to the parties, and consequently to the Court.

4. In many cases the jury are to have view necessarily, in many, by consent, for their better information; to this evidence likewise the Judge is a stranger.

5. If they do follow his direction, they may be attainted, and the judgement revers'd for doing that, which if they had not done, they should have

Green has shown, however, both that Chief Justice Vaughn's opinion was more nuanced than a blanket endorsement of jury knowledge,¹⁴³ and that use of juror knowledge was in fact increasingly condemned until it died out entirely in the eighteenth century.¹⁴⁴

By the eighteenth century, the final stage in which the modern view of witnesses and jurors emerged. As early as 1650, in *Bennet v. The Hundred of Hartford*,¹⁴⁵ "it was said by the Court, that if either of the parties to a tryall desire that a juror may give evidence of something of his own knowledge, to the rest of the jurors, that the Court will examine him openly in court upon his oath, and he ought not to be examined in private by his companions."¹⁴⁶ This was essentially the rule followed in a 1726 civil case,¹⁴⁷ and subsequently laid down by Blackstone in his *Commentaries on the Laws of England*.¹⁴⁸ In this, as in much else, Blackstone was followed by virtually every legal text and case thereafter.¹⁴⁹

E. The Voice Of the Countryside

From its inception, the jury had a symbolic—almost mystical—power to the English people. As Green has written:

[T]he jury's power reflected deep-seated assumptions about justice, assumptions which—as may increasingly have become the case—authorities shared with those they ruled. The verdict was a verdict "of the country," made by persons on oath before God to tell the truth according to their consciences. It was an inscrutable verdict, though it is by no means clear to us why that was so. We may try to understand the various aspects of the inscrutability of verdicts: they were, it was thought, divinely inspired; if the defendant so chose, the matter of life and death was for his countrymen to determine. Nevertheless, the trial jury's power also reflected incapacities of central government that could not be confronted openly and that may have induced authorities to conceive of jury verdicts

been fined and imprisoned by the Judge, which is unreasonable. . . .

Id.

143. GREEN, *supra* note 95, at 236-49.

144. *Id.* at 287.

145. 82 Eng. Rep. 671 (K.B. 1650).

146. *Id.* at 671-72. See also Mitnick, *supra* note 135, at 220.

147. Oldham, *The Jury: Perspectives on Thomas Andrew Green's VERDICT ACCORDING TO CONSCIENCE*, CRIMINAL JUSTICE HISTORY 163, 169 (citing the manuscript report of *Constable v. Nichols*).

148. "[T]he practice . . . now universally obtains . . . that if a juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court." Mitnick, *supra* note 135, at 207 (citing 3 W. BLACKSTONE at 374-75).

149. *Id.*

as presumptively legitimate.¹⁵⁰

Pollock and Maitland, in considering why it was that juries became judges of fact and not witnesses, suggested that three functional elements existed in the ancient juries which directed that development. They called these the arbitral, the quasi-judicial, and the communal elements.¹⁵¹

First, while jurors were not formal arbitrators, they had authority only because the parties voluntarily submitted their dispute to them.¹⁵² Having done so, the parties were bound by the jury's decision, and judges refused to force the jury to explain the rationale behind the decision.¹⁵³ After all, the parties had agreed to the process, had helped select the members of the jury, and had presented evidence and arguments; thus, they were bound by the decision.¹⁵⁴

Second, in making that decision, the jury often had to sift through sometimes conflicting, sometimes incomplete, evidence in order to reach a verdict.¹⁵⁵ They were clearly not expected to be eyewitnesses to the disputed matter.¹⁵⁶ This reality required development of a judicial procedure which distinguished the role of witnesses, sources of evidence, from that of the jury, weighers of evidence.¹⁵⁷ This is what Pollack and Maitland meant by the quasi-judicial role of juries.

Third, the jury was treated not as twelve individuals, but as a single entity in its own right.¹⁵⁸ It was an entity which represented not the individuals who composed it, but the community from which they came.¹⁵⁹ This "voice of the countryside" was to

150. GREEN, *supra* note 95, at 27.

151. 1 POLLOCK & MAITLAND, *supra* note 61, at 616-32.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. 1 POLLACK & MAITLAND, *supra* note 61, at 616-32.

157. *Id.*

158. Holdsworth suggests that this is why the jurors were not permitted to separate until they had reached a verdict: "the quasi-corporate character of this band of judges must be maintained till they had discharged their duty. . . ." 1 HOLDSWORTH, *supra* note 69, at 318.

159. 1 POLLOCK & MAITLAND, *supra* note 61, at 624.

The verdict of the jurors is not just the verdict of twelve men; it is the verdict of a *pays*, a "country," a neighbourhood, a community. There is here a volatile element which we can not easily precipitate, for the thoughts of this age about the nature of communities are vague thoughts, and we can not say that "the country" is definitely *persona ficta*. Still we may perceive what we can not handle, and, especially in criminal procedure, the voice of the twelve men is deemed to be the voice of the country-side, often the voice of some hundred or other district which is more than a district, which is a community. The judges seem to feel that if they analyzed the verdict they would miss the very thing for which they are looking, the opinion of the

be heard, Fortescue wrote, because the community had a very real interest in seeing that justice was done.¹⁶⁰ Green argues convincingly that in performing this function the jury acted to ameliorate increasingly severe laws which attempted to assert royal jurisdiction over what had traditionally been private, emendable actions.¹⁶¹ For example, between the twelfth and fourteenth centuries, the community (through the jury) used acquittals and verdicts of self-defense to force the courts to recognize a distinction between murder (done by stealth) and simple homicide (what would later be called homicide).¹⁶² This was a distinction which had existed since Anglo-Saxon times, but which the Kings had attempted to dissolve.¹⁶³

In the area of criminal law, the Crown was dependent upon the cooperation of society at large, and continued to be so, though in ever lessening degrees, until modern times. About the best officialdom could hope for was to convert its pervasive weakness into a moderate strength by associating itself with the popular impulses that the jury represented.¹⁶⁴

Arnold has come to a similar conclusion on the development of law in trespass cases.¹⁶⁵ Here, as well, the jury was expected to apply its lay judgment to a set of facts and arrive at a verdict.¹⁶⁶ This reflected neither lawlessness on the part of the jury nor failure of the justice system:

[F]or results tailored to individual facts by honest and conscientious laymen need not be described as illegal. We are used to thinking of law as a sovereign product, as something imposed wholesale from

country.

Id.

160. FORTESCUE, *supra* note 86, at 65.

Who, then, in England can die unjustly for a crime, when he can have so many aids in favour of his life, and none save his neighbours, good and faithful men, against whom he has no manner of exception, can condemn him? I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly. Nevertheless, it cannot be supposed that a suspect accused in this form can escape punishment, when his life and habits would thereafter be a terror to them who acquitted him of his crime.

Id.

161. GREEN, *supra* note 95, at 29-32. Green argues that jury nullification meant not only that the jury played a role in the development of substantive criminal law (as noted in the text), but that it also retarded that development, since the courts were not confronted with deciding and announcing how the law should be applied to particular or unique fact patterns. *Id.* at 98-99.

162. *Id.*

163. *Id.*

164. *Id.* at 69.

165. 1 MORRIS S. ARNOLD, 1 SELECT CASES OF TRESPASS FROM THE KING'S COURTS, 1307-1399, at xxx (Selden Society 1985).

166. *Id.*

the outside; and so to us control of the jury is necessary for achieving fair results. But if law is something internal, something capable of discovery simply by applying a moral and intelligent mind to facts, there is less reason to be suspicious of the competence of laymen.¹⁶⁷

F. *The Jury in America*

As the American colonies began to assert their independence, the Continental Congress proclaimed that the colonies were entitled "more especially to the great and inestimable privilege of being tried by their peers of the vicinage. . . ."¹⁶⁸ The Declaration of Independence complained that colonists were deprived, "in many cases, of the benefits of Trial by Jury," and were transported "beyond Seas to be tried for pretended offences."¹⁶⁹ Some of the new states included the vicinage requirement in their constitutions,¹⁷⁰ and this requirement became one of the three hotly-contested issues between the first House and Senate as they worked on a Bill of Rights.

Professor Kershen, in his seminal work on vicinage,¹⁷¹ has demonstrated that while much of the debate concerning what became the Sixth Amendment seemed to blend venue and vicinage, those who argued most forcefully (and successfully) for inclusion of a vicinage requirement were clear on the distinction.¹⁷² The debate focused on three key functions of the jury: 1) fact-finding, 2) applying the law to those facts, and 3) acting as

167. *Id.* He continues:

Lest we be too critical of the apparent inability of the medieval trial system to produce law, it is well to be cautious about the capacity of our own legal system for doing so. Present-day American legal practice, for instance, with all its carefully-crafted jury instructions, its voluminous opinions, and its sophisticated finding aids, has seemingly produced one of the most developed legal systems the world has ever seen. Yet for all this it is possible to argue that juries can have large impacts on results. Even the elaborate jury instructions and the *verbatim* transcripts of all that happens at trial do not completely contain jurors; for they still have much power to do as they please. . . . The jury being free to ignore the judge's instructions and admonitions, if the judge conducts an error-free trial little can be done about a result produced by a jury which is contrary to law.

Id. at xxx-xxxi.

168. HELLER, *supra* note 102, at 21 (citing the Declaration of Rights of the Continental Congress (1774)).

169. Drew L. Kershen, *Vicinage* (pts. 1 & 2), 29 OKLA. L. REV. 801, 828 (1976) [hereinafter Kershen, *Parts I & II*].

170. HELLER, *supra* note 102, at 23 (giving examples of states that included vicinage in their constitutions, including South Carolina, Georgia, New York, Virginia, Massachusetts, and New Hampshire).

171. Kershen, *Parts I & II*, *supra* note 169; Drew L. Kershen, *Vicinage* (pts. 3 & 4), 30 OKLA. L. REV. 1 (1977) [hereinafter Kershen, *Parts III & IV*].

172. Kershen, *Parts I & II*, *supra* note 169, at 828-33.

the conscience of the community.¹⁷³

As to the first function, fact-finding, the principal issue was whether juror knowledge would increase or decrease the likelihood of a just decision. Some argued that a jury from the vicinage would be better able to determine the truth since they would know the character of the accused, the victim and the witnesses; they would have personal knowledge of the incident; and they would be familiar with the geographic and cultural setting in which the crime took place.¹⁷⁴ Their opponents were concerned that such juror knowledge increased the possibility of bias and hence of an unjust verdict.¹⁷⁵ Since questions of fact were to be resolved only on the basis of evidence presented at trial, a jury of strangers would be more impartial than a jury of the vicinage.¹⁷⁶ This issue was resolved by including in the Sixth Amendment the right to jurors of the vicinage, to an impartial jury, and to confront witnesses.

A second function of the jury is to apply the law to the facts. It was understood that juries would be instructed in the law by the judge, but it was also understood that in order to apply the law to the facts a jury would be required to interpret the law.¹⁷⁷ Proponents of the jury trial cited Blackstone's reasoning that if the administration of justice were delegated to the professional judiciary alone, their decisions, "in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity."¹⁷⁸ The jury was an expression of democracy, of the sovereignty of the people.¹⁷⁹

One use of the jury's *power* to interpret the law is to ignore it—to refuse to convict those who are clearly guilty on the ground that the law itself is unjust. This is an extreme example of what Kershen refers to as the third function of the jury—to speak for the conscience of the community.¹⁸⁰ This power, as we have seen, was recognized in the common law of England and the Colonies at the time of the Revolution,¹⁸¹ and was celebrated by "rebels" on

173. *Id.* at 833.

174. *Id.* at 834.

175. *Id.* at 834-35.

176. *Id.*

177. See *supra* notes 133-67 and accompanying text for a discussion of medieval juries as triers of fact.

178. Kershen, *Parts I & II, supra* note 169, at 837.

179. Thomas Jefferson wrote of this in a letter to L'Abbe Arnond:

Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making them.

Id. (quoting an excerpt from Jefferson's letter).

180. *Id.* at 833.

181. What is not recognized today is the *right* of the jury to disregard the law.

both sides of the Atlantic as a buffer against government oppression. It is what Pollack and Maitland referred to as the "voice of the countryside."¹⁸² As Patrick Henry argued in criticizing the Federal Constitution for failing to include a vicinage requirement:

Because it prevents the hand of oppression from cutting you off. They may call anything rebellion, and deprive you of a fair trial by an impartial jury of your neighbors. Has not you mother country magnanimously preserved this noble privilege upwards of a thousand years? . . . And shall Americans give up that which nothing could induce the English people to relinquish? The idea is abhorrent to my mind. There was a time we should have spurned at it. This gives me comfort—that, as long as I have existence, my neighbors will protect me. Old as I am, it is probable I may yet have the appellation of *rebel*.¹⁸³

In other words, failing to include a vicinage requirement would permit government to "jury-shop" in other districts for a sympathetic jury. Adding the vicinage requirement would ensure that the community could protect any of its members it felt were being persecuted by the government.¹⁸⁴

However, if the voice of the countryside—the expression of community values and conscience—were important only because of the protection it provides to a defendant, the Sixth Amendment would have provided for a jury drawn from the community of the defendant. Instead, it provides that the jury be summoned from the community in which the crime occurred. It is possible, of course, that the framers assumed that there was no difference between the two—that in a time of limited mobility criminals would always commit crimes in their own communities, an assumption which was reflected in the common law at the time.¹⁸⁵ But as Kershen suggests, it is more likely that this marked a recognition that since a jury helps "make" the criminal law, the jury should be drawn from the community in which the crime took place so that the community's values, norms and customs (and not those of the defendant's community) would be reflected.¹⁸⁶ This provision reflected the political philosophy that decentralized government protected the sovereignty of the people more effectively than centralized government.¹⁸⁷ Differences between commu-

See infra notes 188-90 and accompanying text.

182. *See supra* note 150-67 and accompanying text for a discussion of juries as the "voice of the countryside."

183. Kershen, *Parts I & II, supra* note 169, at 840-41.

184. This argument cuts both ways, of course. It also means that a corrupt community could protect its own from prosecutions which reasonable people would agree are just and appropriate.

185. Kershen, *Parts I & II, supra* note 169, at 839.

186. *Id.* at 839-40.

187. *Id.*

nities concerning what conduct would be subject to criminal sanctions should therefore be celebrated and protected.¹⁸⁸ This suggests that for many of the framers of the Bill of Rights (certainly for those who succeeded in including the vicinage requirement), the community had an interest in ensuring that its values, norms, and customs were reflected as the jury considered how to apply the law to the facts concerning a particular crime that had taken place in the community. This interest was separate from the stake the defendant had in gaining community protection from prosecutorial abuse.

During the next 100 years, legal academics and judges began to alter their views of both the law and the fact-finding process, and consequently of the roles of judge and jury.¹⁸⁹ The increasing complexity of the law, together with a growing emphasis on applying it in a certain and uniform fashion, spurred sharper distinctions between questions of law and questions of fact and led to a more mechanical understanding of how the jury was to apply law to facts. Rather than expecting juries to interpret laws in light of local standards and then apply that understanding of the law to particular facts, courts began insisting that juries simply accept the law as articulated by the judge.¹⁹⁰ The application of law to facts, then, was viewed more as a mechanical process than a creative one.

Accompanying this shift was a parallel change in the understanding of how facts are discovered at trial. As the idea that law was a science began to gain currency in legal circles, the model of the jurors' role shifted to that of objective parties conducting observation during the course of the trial in order to identify the facts.¹⁹¹ Since facts are facts regardless of who observes them, and since different people with similar observational skills will

188. Kershen notes:

If a crime is committed in Charlottesville, jurors from Charlottesville, who will apply the law to the facts, are likely to interpret the law in accordance with the customs, habits and values of the Charlottesville area. Despite the fact that the interpretation of one Charlottesville jury is not binding upon another Charlottesville jury, it is quite likely that a relatively consistent application of the law to the facts will develop in light of the shared customs, habits and values of the Charlottesville area. It may further develop that the pattern of consistency for Charlottesville juries is different from the pattern of consistency for Eastern Shore juries. Hence, precisely as a result of the popular participation on juries by citizens, joined with the power to apply the law, a jury of the vicinage of the crime will be different from a jury from anywhere else.

Id. at 840.

189. Kershen, *Parts III & IV, supra* note 171, at 79-85 (describing changes in views of legal academics and judges on the roles of judge and jury).

190. *Id.* at 80.

191. *Id.* at 81.

recognize the same facts, it was no longer important (or even helpful) to empanel jurors who were aware of any aspect of the crime, so long as the lawyers brought all relevant evidence into court.¹⁹²

In its 1895 decision in *Sparf & Hansen v. United States*,¹⁹³ the Supreme Court held that federal juries did not have the power to determine the law of a case, simply the facts.¹⁹⁴ The Court discussed the roles of judge and jury in criminal trials:

[I]t is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions.¹⁹⁵

The jury was to be the conscience of the community, not in determining the law (or even in applying it), but in *deciding the facts*.¹⁹⁶

G. Conclusion

A distinctive characteristic of the jury from its inception—and one that persisted even as its purposes changed over the centuries—was that it provided a unique voice in the judicial process. It provided something that was lacking; initially this was local knowledge, but later it was local values and opinions. Those values and opinions were often contrary to the King's, and for that reason, the jury came to be called the "palladium of liberty," the buffer between the individual and governmental oppression. That the King first created the jury to gain information about his

192. *Id.*

193. 156 U.S. 51 (1895). *Sparf* involved a homicide, and counsel for one of the defendants had requested an instruction for attempted murder even though there was no evidence to support such a finding. *Id.* at 59-60. The judge instead instructed that the evidence would not permit any verdict other than guilty or not guilty of murder. *Id.* at 63. In affirming the lower court, the Supreme Court rejected the defendants' argument that this infringed on the functions of the jury and consequently deprived them of their constitutional rights to trial by jury. *Id.* at 102-03.

194. *Id.*

195. *Id.* (emphasis added).

196. While the jury did not have the *right* to nullify or disregard the law given by the judge, it nonetheless had the *power* to do so since judges lack the authority to set aside verdicts of acquittal in criminal cases. *Id.* at 105.

citizens and to expand the sway of his royal courts is one of the interesting ironies in English legal history.¹⁹⁷ By the time the American colonies achieved their independence, the jury was regarded in England and in America not only as a restraint against governmental tyranny, but as the "voice of the countryside"—the expression of the values, norms, and customs of local communities. While this function of the jury fell into disfavor with judges and law professors in the late nineteenth century, what changed was the extent to which the jury was viewed as having the *right* to nullify what it considered unjust laws. Its *power* to do so has remained untouched, as has its power and right to interpret the law within the parameters given it by the judge in light of the values, norms, and customs of the community.

This brings us back to the problem of racially-charged trials. The community that suspects that one or more of its members have been subjected to racial violence has an interest, deeply felt, in participating in the disposition of the case. If the sympathy and passions of the community are sufficiently aroused, it may be more interested in revenge than justice. In those situations, the trial judge must conclude that a fair trial is impossible in that community and move the proceedings to another location. This silences the "voice of the community," unless there is an alternative which permits the proxy involvement of the affected community yet protects defendants against the passions of that community when those passions threaten their rights.

Such an alternative exists in a modified version of the jury *de medietate linguae*, the half-and-half jury. It is time to examine that ancient form of special jury in more detail.

III. THE HALF-AND-HALF JURY

In 1821, Jeremy Bentham levelled an attack on the use of special juries in his book *The Elements of the Art of Packing, as Applied to Special Juries*.¹⁹⁸ Special juries originated as an alter-

197. See GREEN, *supra* note 95, at 4.

Because that evolution [of criminal justice administration] involved the steady increase of royal control over the criminal process, it might seem paradoxical that this almost final stage placed the defendant in the hands of the local community. But . . . this was a natural development, one that at once expanded and defined the limits of royal power.

Id.

198. JEREMY BENTHAM, *THE ELEMENTS OF THE ART OF PACKING, AS APPLIED TO SPECIAL JURIES, PARTICULARLY IN CASES OF LIBEL LAW* (Garland Publishing 1978)(1821). While the book was published in 1821, it was actually written in 1808, but was withheld for fear of prosecution. James C. Oldham, *Special Juries in England: Nineteenth Century Usage and Reform*, 8 J. LEGAL HIST. 148, 154 n.36 (1987) [hereinafter Oldham, *Special Juries*].

native to the conventional *common* jury.¹⁹⁹ Since common juries were viewed by judges and parties as inadequate for complex or sensitive cases, the common and statutory law provided for the *special* jury, variously described as a “higher class” jury, an expert jury, or a struck jury.²⁰⁰

During the late eighteenth century, the special jury was used extensively by Lord Mansfield to shape commercial law and by other judges to defend the interests of merchants.²⁰¹ But the special jury was used in criminal cases as well. In fact, the ability of the sheriff or judge to manipulate the selection process so as to assure a jury favorable to the crown became a major object of criticism, particularly in libel cases.²⁰² Jeremy Bentham was one of those critics.

Bentham charged that judges were maneuvering selection of special jury arrays so as to produce juries that would rule predictably. “Elaborately supported by a few facts and plentiful argument,”²⁰³ he called for full-scale reform of the entire jury-selection process.²⁰⁴ One intriguing proposal, argued for at some length, was for the creation of *half-and-half* juries²⁰⁵ to replace special juries. Rather than being composed entirely of gentlemen, these new juries would be made up of six gentlemen and six yeomen.²⁰⁶ Bentham’s argument began with the assumption (on which the idea of special juries were founded) that class and experience produce differences in individuals’ outlook and perspective, and therefore lead to differences in how those individuals would

199. Oldham, *Origins*, *supra* note 115, at 137.

200. *Id.* at 139.

201. Oldham, *Special Juries*, *supra* note 198, at 148-50.

202. *Id.* at 153.

203. *Id.* at 154.

204. BENTHAM, *supra* note 198, at 220.

205. *Id.* at 222-26. Bentham’s choice of the rather humble term *half-and-half* jury was deliberate:

De medietate status is the learned denomination, but for my part I prefer this English one: and this although it be, or rather because it is, so vulgar an one. In every part of the field of law, the interest and thence necessarily the endeavour of all lawyers, has been to render the rule of action not only as *uncognoscible* but as *unintelligible* as possible. Of every friend to mankind the endeavour, it scarce need be said, will be the reverse. As to the science of jurisprudence, and the art of legislation, for teaching and learning these accomplishments the aid of this foreign and extinct language may here and there perhaps be necessary; and necessity, so far as it exists *may*, but nothing short of necessity ever can, justify any such use of it.

Id. at 221.

206. Bentham used these terms to distinguish the persons who sat on common and special juries at the time he was writing. Those who typically formed a common jury he called yeomen; those who typically formed a special jury he called gentlemen. *Id.* at 220. His reform proposals extended beyond the special jury; he suggested that one or two gentlemen be included in all common juries. *Id.*

resolve specific disputes.²⁰⁷ He argued, for example, that the presence of gentlemen would bring intellectual strengths to the half-and-half jury²⁰⁸ and that the presence of yeomen would bring moral aptitude by ameliorating class and rank biases.²⁰⁹ These biases were a particular concern, Bentham reasoned, because they were so difficult for the legal system to control.²¹⁰ Legislators can proscribe the external influences which may pervert justice (for example, bribes), but statutes cannot expunge partiality.²¹¹ Bentham's proposal for a half-and-half jury, then, was an attempt to mitigate against the effects of this partiality by acknowledging it and compensating for it.²¹² His crowning argument was that such a jury already existed in English law, and that it existed for purposes identical to those for which he argued.²¹³ The jury *de medietate linguae* was created centuries earlier to protect foreign merchants from the biases against them.²¹⁴ Bentham's description, perhaps intended more as propaganda than history, made certain claims about the roots, purpose and use of the jury *de medietate linguae*. He implied that its roots were ancient, that both altruistic and pragmatic motives led to its creation, and that it was both available and effective. The first two claims are true

207. *Id.* at 222-25.

208. *Id.* at 225.

On *your* side is the superiority of intellectual force in all its shapes:—*knowledge, address, habit of taking the lead.* On *your* side is the whole force of that *influence* which exerts itself on the *understanding.* On *your* side is every element of what is called *respectability: education, opulence, power, rank, connection.*

Id.

209. BENTHAM, *supra* note 198, at 222.

210. *Id.*

211. "The tempter dwells *within*: within the very bosom of this occasional Judge: and, being there, in vain would legislators dislodge him, he bids defiance to their utmost efforts." *Id.*

212. *Id.* at 223.

Suppose, as between a Gentleman and a Yeoman, a cause so circumstanced as to awake, in the bosoms of these different parts of the population of the jury-box—to awaken, and to excite, to a degree of excitation fatal to justice, the passions and partialities congenial to their respective stations. In this case, let [meaning, if] there be *seven gentlemen to five yeomen*, the gentleman carries it. But, suppose *six and six*, as under the proposed constitution will constantly be the case, in this case partiality may reign without opposition in eleven bosoms, so as one of the twelve, even though it be but one, be the seat of cool and impartial justice, he who has *right* on his side, be he gentleman or yeoman, gains the cause.

Id.

213. *Id.* at 223-24.

214. "[T]hat no less politic than generous arrangement, contrived by the genius of some now forgotten statesman, for the protection of *foreigners* against those adverse interests and antipathies, which are so unhappily apt to have place in the bosoms of *natives.*" BENTHAM, *supra* note 198, at 223-24.

enough, but the last is less certain. Each claim will be explored in more detail before considering the possible contemporary application of the half-and-half jury to racially charged cases.

A. *Development of the Jury De Medietate Linguae*

Most authorities trace the emergence of the jury *de medietate linguae* to the reign of King John,²¹⁵ in a charter granted to Jews which provided that if they were sued by Christians the trial was to be by the Jews' peers.²¹⁶ When the Exchequer of the Jews was established as a separate court within the Exchequer, there was an explicit grant of a trial *de medietate linguae* if requested.²¹⁷ This was not an act of benevolence by King John.

By their inability to take an oath of fealty, [Jews] forfeited the position of freemen, and, thus excluded from the body politic, they remained subject to all the disabilities of aliens without the claims to consideration which other aliens derived from international comity and membership in the Catholic Church. They escaped villeinage, it is true, but they became a sort of social estrays, the devoted spoil of whoever might have the will and the power—and where the power was, the will was not likely to be wanting—to appropriate them.²¹⁸

In England, Jews and all their effects were decreed to be the King's property, which meant among other things that anything owed to a Jew was in fact due the King.²¹⁹ This was significant, since they served key financial roles in society, not being bound by

215. However, there is evidence that something like the jury *de medietate linguae* was available in Anglo-Saxon times. For example, Ethelred the Unready (who ruled from 978-1016) decreed that disputes between an Englishman and a Welshman should be resolved by English and Welsh judges. (The statute reads "*duodeni legales hoines, quorum lex Walli et lex Angli erunt, Anglis et Wallis jus dicunte.*" 3 CHRISTIAN'S BLACKSTONE 360 (Professional Books Ltd. 1982) (1809). At the time, the Welsh were considered aliens to the crown. FERDINANDO PULTON, *DE PACE REGIS ET REGNI* 202 (London, 1609). See also THAYER, *supra* note 116, at 94 n.4.

216. LaRue, *supra* note 15, at 849.

217. J.M. RIGG, *SELECT PLEAS, STARRS, AND OTHER RECORDS, A.D. 1220-1284*, at xxiii (Selden Society 1902). In *Appendix V: Articles Touching the Jewry*, the earlier rule was modified to resolve stalemates that had apparently developed:

Also, whereas in inquests made or to be made by Christians and Jews of pleas and complaints brought touching debt and trespass laid in the Jewry, the custom has hitherto been to admit as jurors as well Christians and Jews and in equal numbers, who are hardly able to agree, whereby justice is often delayed and damage thence results to the parties; it is provided, that when there is such discord arisen between Christians and Jews placed on the inquest, the matter be tried and adjudged by several lawful Christians of known credit, and also, if need be, by several Jews, according to the discretion and direction of the Justices. And let it rest on the verdict of several or the more part of them.

Id. at lv, lxi.

218. *Id.* at x.

219. *Id.*

the Church's prohibition of usury.²²⁰ Consequently, the King promoted his own interests when he granted the right to a jury *de medietate linguae* in 1201;²²¹ not only did he need them to offer their services in the communities, but in any lawsuit involving commercial finance half the jury was made up of people he "owned." Nevertheless, the right was available to Jews in both civil and criminal matters.²²²

This right was extended to foreign merchants by Edward I. Under the *Carta Mercatoria* (1303), in any case except capital offenses, a foreign merchant residing in England was entitled to have six foreigners on the jury in any case in which he was involved.²²³ This charter was reaffirmed in a 1353 statute,²²⁴ and one year later the right was extended to include cases in which the King was a party.²²⁵ This right appears to have been avail-

220. *Id.* at xi-xii.

221. *Id.*

The privileges which they enjoyed were derived from a Charter granted by Henry I to a particular magnate, his family and dependents, that was confirmed to his posterity by Henry II and Richard I. The Charter was probably from the first construed with considerable latitude, for it was not to the interest of the Crown to limit its scope, and it was expressly extended to the entire community by John (10 April 1201).

Id.

222. For example, Rigg reports the following 1278 case:

Hak of Canterbury and Abraham of Dorking, charged with the death of Matthew of Ockham, slain in St. Laurence Lane in the Jewry, as appears among the Memoranda of this Term, put themselves upon the country, that they are not guilty of the said death; whereof the inquest came by Henry Rous, Alexander Taylor, Andrew Goldsmith, and other Christians, and by Solomon Bunting, Elias of Cornhill, and other Jews, who say upon their oath, that the said Hak and Abraham are not guilty of the death of the said Matthew. Asked, whether they knew who was or were guilty of the said death, they say, that they know not, by reason that the said Matthew was going by night alone along St. Laurence Lane, in the middle of the road, when certain malefactors sprang upon and wounded him; and though he lived for three weeks after, and was often asked by his friends and neighbours, who they were that thus sprang upon him, he confessed, that he knew nought thereof. Therefore it is adjudged, that the said Hak and Abraham are quit of the charge of the said death.

RIGG, *supra* note 217, at 105-06.

223. See POLLOCK & MAITLAND, *supra* note 61, at 624. See also MOORE, *supra* note 70, at 58 (discussing the development of policies on juries under Edward I).

224. Oldham, *Origins*, *supra* note 115, at 168 n.161 (citing 27 Edw. 3, Stat.2, ch. 8 (1353)).

225. 28 Edw. 3, ch. 13 (1354) provided:

And that in all Manner of Inquests and Proofs which be to be taken or made amongst Aliens and Denizens, be they Merchants or other, as well as before the Mayor of the Staple as before other Justices or Ministers, although the King be Party, the one half of the Inquest of Proof shall be Denizens, and the other half of Aliens, if so many Aliens . . . be in the Town or Place where such Inquest of Proof is to be taken, that be not Parties, nor with the Parties in Contracts, Pleas, or other Quarrels, whereof such Inquests or Proofs

able to others as well. Professor Oldham cites cases in which burgesses, university scholars, and the Church requested juries half of whose members were made up of burgesses, matriculated laymen, and clergymen, respectively.²²⁶

Over time, however, the use of this jury declined. By the end of the eighteenth century it was a formality more than a true benefit,²²⁷ and by the middle of the nineteenth century it had all but disappeared.²²⁸ As we will see, there were several pragmatic and statutory reasons for this.

B. Rationale for the Jury De Medietate Linguae

Juror knowledge does not appear to have been the reason for the jury *de medietate linguae*.²²⁹ Instead, commentators have suggested a range of possible rationales, including fair dealing, reassurance, empathy, and impartiality.

1. Fair dealing

Thayer suggested that “fair dealing,” which he contrasted with the desire to obtain an informed jury, was a prime motivation.²³⁰ It was important to present the justice system as even-handed, and the jury *de medietate linguae* was one way to accomplish that.²³¹ In commenting on an early mercantile case, Hall wrote that “it was clearly essential (if justice was not to become a farce) that not only half the jurors, but also some at least of the auditors . . . and of the arbitrators . . . should speak the language that was before them in a written form.”²³²

ought to be taken; and if there be not so many Aliens, then shall there be put in such Inquest or Proofs as many Aliens as shall be found in the same Towns or Places which be not thereto Parties, nor with the Parties, as afore is said, and the Remnant of Denizens, which be good men, and not suspicious to the one Party nor to the other.

1 STATUTES OF THE REALM 348 (1816)

226. Oldham, *Origins*, *supra* note 115, at 169. The jury *de medietate linguae* was also apparently used in piepowder courts. *Id.* at 168.

227. *Id.* at 170.

228. MOORE, *supra* note 70, at 123.

229. THAYER, *supra* note 116, at 94 n.4. Evidence of this is demonstrated in the broad construction given by courts to the term “alien” in the 1354 statute. See *infra* notes 241-43 and accompanying text. Had juror knowledge been the rationale, the courts could not have construed “alien” to mean *any* non-native, but would have forced them to swear only the alien party’s compatriots to the jury.

230. THAYER, *supra* note 116, at 94 n.4.

231. Chitty, in his description of the jury *de medietate linguae*, attributes it to the “singular humanity of the law.” 5 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 525 (Garland 1978) (1816).

232. Oldham, *Origins*, *supra* note 115, at 169, n.172 (quoting 2 SELECT CASES CONCERNING THE LAW MERCHANT A.D. 1239-1263, at xx (H. Hall ed., 1930)).

Professor LaRue, in evaluating two alternative explanations for the original grant of the jury *de medietate linguae* to Jews, agreed with Thayer.²³³ The first explanation was that it expressed a minimum standard of procedural fairness necessary to compensate for the Jews' status as an oppressed minority.²³⁴ The second was that it was an irrelevant gesture implying fairness but meaning virtually nothing in light of the overall exploitation of Jews during that time.²³⁵ The determining factor for LaRue was that the right was eventually extended to others whose positions were not as tenuous as the Jews', and he therefore concluded that the first was the more likely explanation.²³⁶ It should be noted that there is a third, less benevolent, possible reason, and that is that since the Jews were deemed to be property of the King, he was interested in giving them procedural advantages over their legal adversaries.²³⁷

2. Reassurance

Thayer also notes that Crown policy at the time was to encourage foreign merchants and artisans to bring their trade to England.²³⁸ The right to a jury *de medietate linguae* was an inducement to persons who otherwise might have been reluctant to do business in England out of fear that jurors, a distinctive of England's legal system, would be antagonistic to foreigners.²³⁹ This argument finds support in exceptions which prevented its use by "rogues" and "vagabonds."²⁴⁰

3. Empathy

Professor Massaro has suggested that one purpose was to create a jury in which there was empathy with the alien party.²⁴¹ She distinguishes *empathy* from *sympathy*, with the former meaning "the capacity for participating in or vicariously experiencing another's feelings, volitions, or ideas. It is a form of understanding. Sympathy, in contrast, suggests an affinity or relationship with another such that the feelings, volitions, or ideas of

233. La Rue, *supra* note 15, at 850.

234. *Id.*

235. *Id.*

236. *Id.*

237. See *supra* notes 219-21 and accompanying text for a discussion of the status of Jews during the twelfth and thirteenth centuries.

238. THAYER, *supra* note 116, at 94 n.4.

239. LaRue, *supra* note 15, at 850.

240. Oldham, *Origins*, *supra* note 115, at 170. Chitty reports that the exception was repealed by 23 Geo. III. c. 51 (1783). 5 CHITTY, *supra* note 231, at 526.

241. Massaro, *supra* note 15, at 552.

another are shared or mutually experienced."²⁴² In other words, sympathy is empathy without impartiality. Sir Thomas Gascoigne, on trial for treason, requested an empathetic jury, "a jury . . . of my own country, that may be able to know something how I have lived hitherto."²⁴³ While this distinction seems plausible when applied to alien parties, it does not provide a satisfactory explanation of why the jury *de medietate linguae* was extended to burghesses, scholars, and the clergy. There, the issue would appear to be (using Massaro's definitions) sympathy, not empathy.

4. Impartiality

This purpose, related to the one before, was cited by Blackstone and by Pollock and Maitland. Here the focus of attention is not on individual jurors, but on the jury as a whole. These commentators assume that jurors come with class and racial biases, and that the solution is a kind of balancing of powers.²⁴⁴ Blackstone, in describing the jury *de medietate linguae*, wrote: "where either party is an alien born, the jury shall be one half denizen, and the other aliens (if so many be forthcoming in the place) for the more impartial trial."²⁴⁵ Pollock and Maitland explain how such a jury achieves impartiality in terms reminiscent of Bentham: "Already the idea is that a jury, taken as a whole, should be impartial, while its component parts should in some sort represent the interests of both parties."²⁴⁶ It is this explanation that is compatible with the broad construction of the 1354 statute. The intention was to obtain an impartial jury by balancing six British subjects (who were thoroughly steeped in British values and customs) with six who were not. The goal was to balance six "insiders" with six "outsiders" in selecting the panel who would determine the facts.

242. *Id.*

243. Oldham, *Origins*, *supra* note 115, at 167.

244. A contemporary expression of this, used by the Supreme Court, is the notion of *diffused impartiality*.

The Supreme Court has acknowledged the interest served by numbers, observing that participation by twelve laypeople can produce a "diffused impartiality." The need for diffused impartiality stems from the heterogeneity of society, and hence of perceptions, and from the realization that no person is really "impartial." Theoretically, a fact-finding process conducted by a number of persons is more likely to discover the "truth" than a process conducted by one person.

Massaro, *supra* note 15, at 511.

245. 3 CHRISTIAN'S BLACKSTONE, *supra* note 215, at 360.

246. 1 POLLOCK & MAITLAND, *supra* note 61, at 624.

C. Procedures and Limitations

Both the array and individual jurors could be challenged on the grounds that they failed to meet the qualifications of a jury *de medietate linguae*. When a sheriff returned twelve jurors and incorrectly described half of them as aliens, the party could object to the array (as not containing a sufficient number of aliens)²⁴⁷ or to specific jurors.²⁴⁸ Under the statute of 1354, alien jurors could not be sworn in if they had an interest in the litigation, had business or blood ties to a party, or lacked impartiality.²⁴⁹ No biased juror could serve on the jury, whether he was an alien or citizen.²⁵⁰

Generally, an alien was required to request a trial *de medietate linguae* when he pleaded.²⁵¹ For a criminal defendant, this meant there was no right to challenge a grand assize for failure to include aliens, even if they were investigating his affairs.²⁵² The first opportunity he would have to challenge the jury would be at the arraignment when he entered his plea.²⁵³ In any event, his motion for a jury *de medietate linguae* was to be entered before the jury was sworn, or he was deemed to have waived the right.²⁵⁴ A plaintiff, on the other hand, was required to move for a jury *de medietate linguae* before the venire facias was granted.²⁵⁵

247. 3 CHRISTIAN'S BLACKSTONE, *supra* note 215, at 360.

248. 5 CHITTY, *supra* note 231, at 526.

249. See PULTON, *supra* note 215, at 203.

And whereas the words of the foresaid Statute of 28. Edw. 3. bee (That are not parties, nor with the parties in contracts, pleas, or other quarrels, hereof such Inquests or proofes ought to bee taken). By these words it doth appeare, that the makers of this Statute would, that the parties should have their Challenges to the Polles in those said cases. And therefore, though they have not expelled [delineated] but certaine cases, which induce hatred, or malice, yet by the mentioning of them, it seemeth, that they intended to allow all Challenges, which doe induce favour, or otherwise.

Id.

250. There was one challenge which could be made against a citizen but not an alien, and that was that he owned no property. Since aliens were prohibited from owning real property, this would have been an impossible condition to meet, and would have rendered the jury *de medietate linguae* meaningless. Blackstone noted the problem (Book III, 361), but by the early nineteenth century, Chitty tells us it had been settled that the aliens returned for jury duty by the sheriff in response to an order for a jury *de medietate linguae* need not possess real property. 5 CHITTY, *supra* note 231, at 525.

251. PULTON, *supra* note 215, at 202.

252. *Id.*

253. *Id.* at 202-03.

254. 5 CHITTY, *supra* note 231, at 525.

255. PULTON, *supra* note 215, at 203. Chitty provided language that the alien could incorporate into his pleadings to secure such a jury:

Nevertheless, practical challenges confronted a court attempting to find six jurors from the same country as an alien party. Considering the brevity of most trials, the delay attendant to the jury *de medietate linguae* must have seemed excessive even when an ample number of the alien's compatriots were readily available. Finding appropriate jurors was even more of a problem when the alien had few countrymen residing in London. The delays and stalemates this could produce were the stated justification for the earlier *Articles Touching the Jewry* and led to an expansive construction of 28 Edw. 3, ch. 13, the 1354 statute which had extended the right to the jury *de medietate linguae* to criminal trials.²⁵⁶ That statute did not specify whether aliens on the jury were to be from the country of the alien party. Pulton, in 1602, argued that because the statute referred only generally to aliens it was not material whether they were of the same nationality as the party.²⁵⁷ Two hundred years later, Chitty observed that precedents had gone both ways, but he felt the better view was that there was no need to restrict the aliens on the jury to those from the party's native land, since the statute spoke only generally of including aliens.²⁵⁸

Selecting jurors from the party's native land was not the only limitation. Soon, a proliferation of statutes began exempting certain groups or offenses from the right to *de medietate linguae* trials. "By statute, trial *de medietate* was unavailable to 'Egyptians,' that is, to rogues and vagabonds commonly known as gypsies. Likewise, this privilege was unavailable in treason trials, in actions or suits concerning statutes regulating imports and exports, and in inquests to assess damages by a writ of inquiry upon a default judgment taken against an alien."²⁵⁹

These limitations are credited with having led to the demise of the jury *de medietate linguae*.²⁶⁰ They also suggest that Ben-

And thereupon the said F. says, that he is an alien, and was born in D., in parts of Germany under the allegiance of the emperor of Germany; and he prays the writ of our lord the king to cause to come here twelve, &c., whereof one half to be of natives, the other of aliens, to wit, born in D., in parts of Germany under the allegiance of the emperor of Germany, to try the issue of the said plea, according to the form of the statute in such case made and provided, and it is granted to him, &c. Therefore, according to the form of the statute aforesaid, it is commanded to the sheriff that he cause to come here, &c. twelve, &c., whereof one half to be natives, and the other half aliens, &c. as above, by whom, &c. And because neither, &c. to recognize, &c. because as well, &c.

5 CHITTY, *supra* note 231, at 306.

256. RIGG, *supra* note 217.

257. PULTON, *supra* note 215, at 202.

258. 5 CHITTY, *supra* note 231, at 526.

259. Oldham, *Origins*, *supra* note 115, at 170. (citations omitted).

260. *Id.*

tham was referring more to the concept than the practice when he used such glowing terms in the early nineteenth century to describe the benefits it conferred on alien parties. However, by the nineteenth century, the jury *de medietate linguae* had all but disappeared.

D. The Jury De Medietate Linguae in the Colonies

Altruism was not the motivation for creating the jury *de medietate linguae*. Economic considerations played a major role in both the initial grant to the Jews and in the subsequent extension to foreign merchants. The jury *de medietate linguae* induced Jews and foreign merchants for them to do business in England and reassured them that England would be fair in administering justice. So, it is intriguing that the jury *de medietate linguae* was brought to the American colonies.

In the colonial system the policy was certainly inverted. Foreign merchants were prohibited from trading with us, and artists were certainly not encouraged, for it was the policy of the mother country to supply the colonists with manufactures of her own production, and to keep the colonists engaged in the cultivation of the earth, to grow the raw materials for the manufacturers of the mother country.²⁶¹

There is ample evidence to show that the jury *de medietate linguae* was used in the United States before and after Independence. Evidence suggests that it may have been granted rather routinely, when requested, prior to the Revolution.²⁶² After the Revolution, however, the cases turned on how judges ruled on two legal issues. The first issue was whether there was a statute providing for a jury *de medietate linguae* (in some cases there were),²⁶³ in which case the statute controlled. In the absence of a

261. *State v. Antonio*, 11 N.C. (4 Hawks) 200, 206-07 (1825) (Henderson, J., concurring).

262. There are no *reported* cases prior to the Revolution. However, there are two reasons for concluding that the jury *de medietate linguae* was used. First, there are references in post-Revolution cases to practice before independence. *See, e.g.*, *Pennsylvania v. Mesca*, 1 U.S. (1 Dall.) 73, 73-74 (1783); Second, post-Revolution cases refer to statutes which provided for that jury; *Antonio*, 11 N.C. (4 Hawks) at 204. *See, e.g.*, *Commonwealth v. Wendling*, 182 F. 140 (W.D. Ky. 1910) (centering around whether Kentucky's statute providing for the jury *de medietate linguae* conflicted irreconcilably with another statute requiring that all jurors be citizens); *United States v. McMahon*, 26 F. Cas. 1131 (C.C.D.C. 1835) (No. 15,699) (referring to a Maryland statute in support of its decision to deny a jury); *Brown v. Commonwealth*, 9 Va. (11 Leigh) 711 (1841); *Richards v. Commonwealth*, 9 Va. (11 Leigh) 690 (1841) (both referring to a Virginia statute giving discretion to the trial judge to grant such a motion); *Mesca*, 1 U.S. (1 Dall.) 73 (referring to an 1834 statute abolishing the jury *de medietate linguae*).

263. *See supra* note 262 for a discussion of cases which mention statutes granting a right to a jury *de medietate linguae*.

statute, however, the decision turned on the second issue: whether the jurisdiction considered the jury *de medietate linguae* to be part of the common law of England, which was applicable to the colonies, or whether the jury *de medietate linguae* only applied locally to England. Judges resolved this issue in one of three ways. Some judges held that the statute was not a part of the common law because its rationale applied only to England and not to her colonies.²⁶⁴ Others argued that the law did not apply because aliens were treated differently in America than in England; hence, they did not need the additional protection required there.²⁶⁵ Although St. George Tucker had no commentary to add to Blackstone's provision on the jury *de medietate linguae*, his note on the rights of aliens in America and England makes the same basic argument.²⁶⁶ Finally, others decided the issue on the

264. See, e.g., *Antonio*, 11 N.C. (4 Hawks) at 206-07.

265. See, e.g., *Mesca*, 1 U.S. (1 Dall.) 73; *Antonio*, 11 N.C. (4 Hawks) 200 (Henderson, J., concurring); *Richards*, 9 Va. (11 Leigh) at 694-95. In *Richards*, the court stated:

In England, the jealousy of the common law denied to aliens the privileges of citizenship. To compensate the alien for the disabilities under which he laboured, a jury to try his causes, composed of equal numbers of aliens and citizens, was allowed to him. And, practically, there was no great inconvenience in doing so, compared with the benefit to be derived from attracting to the country the skill and capital of foreign artisans and merchants, then rendered necessary by the infant state of the trade and manufactures of the country. Besides, the aliens, in that country, spoke a different language, and were collected together at the various marts of trade, and could easily be distinguished from the citizens. It is not so, and never was so, in this country. The moment an alien sets his foot upon our shores, he acquires rights unknown to the laws of England. All aliens may, in a few years become citizens; they are scattered through the country, instead of being confined, as originally they were in England, to certain places; three-fourths of them speak the language of the country, and are in some degree familiar with its laws; and from the recent settlement of the country by immigrants from abroad, and the continual influx of foreign immigration, there can exist no such prejudice against them as gave rise to the statute of 28 Ed. 3.

Richards, 9 Va. (11 Leigh) at 694-95.

266. See I(2) TUCKER'S BLACKSTONE app. at 98-100 (1803) (*Of the Rights of Aliens in the United States*).

Let us now compare the situation and rights of aliens in England with those in America. An alien in England remained the subject of that king or government under which he was born; . . . he could not be made a denizen, but by the *special favour* of the crown; nor be naturalized, but by the *like favour* of the supreme legislature, (whose power extends even to an alteration of the constitution itself.) Both these acquisitions must be obtained as a matter of the highest grace and favour, and not of *right*. . . .

An alien in America, antecedent to the revolution, was entitled to *all* the rights and privileges of an alien in England, and *many more*; . . . he became a denizen, as of right, *instantly*; he became naturalized upon payment of the legal fees for his letters of naturalization, and taking the usual oaths.

By the adoption of the constitution of the United States, the rights of aliens to become citizens was by no means intended to be taken away. . . .

basis of precedent—pre-Revolutionary use (or lack thereof) by colonial courts of the jury *de medietate linguae*.²⁶⁷

Whichever way they approached the issue, however, fewer judges granted a jury *de medietate linguae* as the nineteenth century progressed. In fact, it is interesting to note that in the years since Jeremy Bentham's enthusiastic embrace of the jury *de medietate linguae* in 1821,²⁶⁸ there have been only twelve instances²⁶⁹ in which the jury has been discussed in American case law, and it was upheld in only four of those (the last of which was in 1841).²⁷⁰ In 1936, Chief Justice Hughes included this dicta in *United States v. Wood*:²⁷¹ "Although aliens are within the protection of the Sixth Amendment, the ancient rule under which an alien might have a trial by jury *de medietate linguae* . . . no longer obtains."²⁷²

As in the United States, the jury *de medietate linguae* disappeared in England as well.²⁷³ It failed because it became burdensome to fill racial quotas and to find aliens within the county who were fellow citizens of the alien party.²⁷⁴ It was easier to construe the statute broadly and simply accumulate six non-Englishmen; the predictably absurd results made it unattractive to defen-

Every alien coming into the United States, in time of peace, therefore acquired an *inchoate right*, under the constitution, to become a citizen; and when he has, in compliance with the laws, made the requisite declarations of his intention to become a citizen, and to renounce for ever all allegiance and fidelity to any foreign prince, or state, and particularly that prince or state whereof he was last a citizen or subject, he seems to have acquired a *right*, of which no *subsequent* event can divest him, without violating the principles of political justice, as well as of moral obligation.

Id.

267. See, e.g., *Pennsylvania v. Mesca*, 1 U.S. (1 Dall.) 73 (1783); *United States v. Carnot*, 25 F. Cas. 297 (C.C.D.C. 1824) (No. 14,726); *Richards v. Commonwealth*, 9 Va. (11 Leigh) 690 (Va. 1841).

268. See *supra* notes 198-214 and accompanying text for a discussion of Jeremy Bentham.

269. See *Commonwealth v. La Vinz*, MS (1822), a Pennsylvania case noted at the conclusion of *Mesca*, 1 U.S. (1 Dall.) 73. See also *United States v. Wood*, 299 U.S. 123, 145 (1936); *Commonwealth v. Wendling*, 182 F. 140 (W.D. Ky. 1910); *United States v. McMahan*, 26 F. Cas. 1131 (C.C.D.C. 1835) (No. 15,699); *Carnot*, 25 F. Cas. at 297; *United States v. Cartacho*, 25 F. Cas. 312 (C.C.D.Va. 1823) (No. 14,738); *People v. Vesely*, 587 P.2d 802 (Colo. Ct. App. 1978); *Commonwealth v. Acen*, 487 N.E.2d 189 (Mass. 1986); *Antonio*, 11 N.C. (4 Hawks) 200; *Commonwealth v. DeMora* (1824), a Pennsylvania case noted at the conclusion of *Mesca*, 1 U.S. (1 Dall.) 73; *Brown v. Commonwealth*, 9 Va. (11 Leigh) 711 (1841); *Richards*, 9 Va. (11 Leigh) 690 (1841).

270. See *La Vinz*, *supra* note 269; *Carnot*, 25 F. Cas. 297; *Cartacho*, 25 F. Cas. 312; *Richards*, 9 Va. (11 Leigh) 690.

271. 299 U.S. 123 (1936).

272. *Id.* at 145.

273. Oldham, *Origins*, *supra* note 115, at 170.

274. *Id.*

dants who might otherwise have claimed its benefits.²⁷⁵

E. Conclusion

Bentham was right that the jury *de medietate linguae* had enjoyed a long history, and that it was motivated by the need to attract foreign merchants and artisans to do business in England. A review of the reported cases in the United States suggests, however, that it was not used to a significant degree after the mid-nineteenth century. The explanation given for this was that "things had changed."²⁷⁶ Aliens no longer suffered the disabilities they had experienced in England since they could easily become citizens. Furthermore, the jury *de medietate linguae* was not needed to attract merchants to the United States. Of course, Bentham was not suggesting that the half-and-half jury be used to protect aliens. He had identified an entirely different problem, and proposed modifying the jury *de medietate linguae* to overcome class biases that he felt were perverting justice.

The problem that discouraged the courts from using the jury *de medietate linguae* (the difficulty of locating compatriots of the alien party to serve on the jury) would not have defeated Jeremy Bentham's proposal for juries made up of half gentlemen and half yeomen, since both were in abundant supply. What was unacceptable about his proposal were the assumptions he made about class biases and limitations, assumptions the law would not judicially acknowledge. The law must, of course, acknowledge the existence of *community* biases when courts rule on motions for a change of venue. Consequently, the conceptual barriers to Bentham's proposals for the half-and-half jury would not appear to pose a problem for trial judges who chose to use the model in racially charged trials requiring a change of venue.

What is proposed here is not to resurrect the jury *de medietate linguae*, but to adapt the model of the jury represented there to address a new and pressing problem. Such an adaptation has been done before. Early Virginia colonists were required by statute to conduct capital trials in Jamestown.²⁷⁷ Because the colony was large, it was often impossible to obtain a jury from the neighborhood of the crime; hence, for a time, the jury was drawn from spectators at the court in violation of the vicinage requirement.²⁷⁸ In 1662, a new statute provided an alternative designed to increase fairness and maintain court efficiency.²⁷⁹ Under its provisions, the sheriff of the neighborhood where the crime was

275. *Id.*

276. LaRue, *supra* note 15, at 862.

277. HELLER, *supra* note 102, at 19-20.

278. *Id.*

279. *Id.*

committed was ordered to summon six jurors, while the other six were selected from bystanders at the court in Jamestown.²⁸⁰

A similar remedy should be made available to judges presiding over racially charged criminal cases. While such a remedy is probably not constitutionally required, it would provide a vehicle by which judges could more easily comply with the two provisions of the Sixth Amendment in those situations where a change of venue becomes necessary. The Sixth Amendment provides that a defendant has the right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed." When pre-trial publicity or pre-existing hostility toward the defendant²⁸¹ threatens the defendant's right to an impartial jury, courts have pursued three basic remedies: first, conduct extensive voir dire; second, delay the trial to permit passions to die down; and third, change the venue.²⁸² A change of venue, however, means that the jury will fail to meet the vicinage requirement. Defendants and judges, then, are forced to choose between two provisions of the Sixth Amendment.²⁸³ The model of the half-and-half jury avoids the need for such a choice.

IV. PRESERVING A COMMUNITY VOICE

Pollack and Maitland called the jury "the voice of the countryside," a voice which reflects community norms, values and culture as it applies law to particular facts. If this is so, it is a voice with a remarkably limited vocabulary; juries, after all, are required to reduce all controversies and deliberations into one of two verdicts: guilty or not guilty. It is this binary choice which makes its verdicts inscrutable, and which masks the extent to which those verdicts may indeed be an expression of the community voice. The dominant concerns of judges and legal scholars have been how to select a jury that will be impartial as to the defendant and at the same time willing to uphold the law. Since both of these concerns arise out of the recognition that juries of the vicinage will express community sentiment, it would be easy

280. *Id.*

281. See *Groppi v. Wisconsin*, 400 U.S. 505, 509-10 (1971).

282. Scott Kafker, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. CHI. L. REV. 729, 732 (1985).

283. Kafker notes one case in which the court became convinced that pre-trial publicity made it impossible to find an impartial jury in the district of the crime, but when the defendants refused to request a change of venue, the court decided its only remedy was to dismiss the charges. A more typical response, he reports, is for the courts to presume that the district can provide an impartial jury unless the defendant moves for a change of venue. He proposes yet a third alternative: "in cases in which the defendant cannot be tried by an impartial jury of the district yet refuses to move for a change of venue, the court should order a change of venue" anyway. *Id.* at 731.

to conclude that such an expression is an evil to be avoided. Therefore, before considering ways in which a half-and-half jury might be used in racially-charged cases, it would be useful to review the arguments concerning the desirability of having the jury express a community voice, provided that the defendant is at the same time assured of an impartial verdict.

A. *The Case for Recognizing a Community Voice*

To be accepted, any system of adjudicating disputes must be seen by the parties as credible and just on a consistent basis. While credibility of the system is clearly connected to the perceived justice of its verdicts, the two qualities are not the same. A verdict perceived as just may emanate from a judicial system which has no credibility. On the other hand, an institution which produces an unjust verdict will not be repudiated if the mistaken verdict is seen as an exception to a series of essentially correct verdicts. What distinguishes the two qualities is that credibility addresses matters of composition and procedure, while the justice of verdicts emphasizes the outcome of the process. Including a community voice enhances the likelihood that the community will perceive the judicial system as credible and just.

1. *Credibility*

A source of verdicts must, over the long run, be credible to the defendant, the government, the victim, and the community. If it is not seen as credible by the defendant and government, those parties will seek alternative ways of adjudicating their dispute. If it is not seen as credible by the victim and community, the strength of the justice system itself is subverted.

The precursors to the jury—the oath, ordeal, and battle—failed this requirement of credibility. The oath required a party to produce twelve compurgators to swear in court to the truth of his position or at least to their belief that the party was telling the truth.²⁸⁴ The ordeal was predicated on the belief that God intervened in human affairs to bring justice, in particular, to exonerate the innocent. Suspects were therefore given tasks which would be impossible without divine intervention, such as carrying red hot iron, immersing their hands in boiling water, or sinking when thrown into the water, in order to give God an opportunity to vindicate them.²⁸⁵ The battle required combatants to fight until death or surrender. In criminal cases, the loser was then hanged or disfigured. In all cases, the losers were required to pay a fine, and were declared from that time on to be “infamous,”

284. See *supra* note 78 and accompanying text for a discussion of the oath.

285. See *supra* note 79 and accompanying text for a discussion of the ordeal.

having been "convicted" of perjury.²⁸⁶

Each of these forms of proof was initially assumed to be authoritative. If twelve men swore before God that the party was telling the truth, or if God intervened directly to exonerate the accused party, or if the party was willing to fight to death to defend his honor, then the result had great weight in the community. Over time, however, dissatisfaction with each of these arose because they had been compromised sufficiently that they no longer were credible: compurgators lied, ordeals were rigged, and battles were fought by paid champions.²⁸⁷

The continental solution to this problem was the confession. A conviction based on an admission of the defendant was credible, since an innocent person was highly unlikely to assume the liabilities of guilt. This led, as we have seen, to the use of torture, which the British realized made confession an unreliable form of proof.²⁸⁸

England, on the other hand, chose the *inquest* instead of the *inquisition*, the jury instead of confession. In part, this was because the jury had already begun to assume adjudicative responsibilities, and it had done so in a credible way.²⁸⁹ The jury's verdict also had the king's confidence (in contrast to the battle), and this was important as the king began assuming a greater role in suppressing breaches of the king's peace.²⁹⁰

But the jury was also credible to the community; in fact, it took on near-mystical qualities over the centuries. It was the "voice of the countryside," the collective judgment of the people.²⁹¹ This transcendental quality was enhanced by the inscrutability of the guilty/not guilty verdict. This inscrutability grew out of "deep-seated assumptions about justice, assumptions which . . . authorities shared with those they ruled."²⁹² It was enhanced by the knowledge that the parties had voluntarily submitted their dispute to the jury, were able to select jurors on the basis of their impartiality (not knowledge of the specific events), and received a single verdict from the twelve jurors.²⁹³ A single,

286. See *supra* note 80 and accompanying text for a discussion of trial by battle.

287. See *supra* notes 78-80 and accompanying text for a discussion of the problems with the oath, ordeal, and battle.

288. See *supra* notes 81-83 and accompanying text for a discussion of the inquisition.

289. See *supra* note 68-77 and accompanying text for a discussion of the inquest.

290. See *supra* notes 90-92 and accompanying text for a discussion of the King's peace.

291. See *supra* note 159 and accompanying text for a discussion of the "voice of the countryside."

292. See *supra* note 150 and accompanying text for a discussion of the importance of the jury in English law.

293. See *supra* notes 151-59 and accompanying text for a discussion of the role of

inscrutable verdict from twelve unbiased people of the countryside had great credibility to the community.

Would such a verdict from twelve jurors who knew nothing about the parties *or* about the community in which the crime took place have had similar credibility? The answer is undoubtedly that it would not, for the same reasons that motivated the jury *de medietate linguae*: fairness was more likely if the jurors understood the customs of the communities of the parties.²⁹⁴ In part this was because the jury of the vicinage protected local defendants against abuse of central government's authority, and in that sense, was the "palladium of liberty."²⁹⁵ But the verdict had to be credible to the community as well, and fairness to it was also more likely when some, at least, of the jurors understood its customs and in that sense represented its interests.

Today it is unlikely that anyone would attribute mystical qualities to a jury's verdict, and its credibility has been weakened by judicial decisions which equate impartiality with ignorance. The ideal juror, therefore, must be completely uninformed about the parties, community sentiment, and the subject matter of the dispute.

2. Justice

Connected to, yet distinct from, the perception of credibility, is the issue of justice. A source of verdicts must be seen as producing consistently just verdicts. Just verdicts exhibit at least two values: first, that the truth about what happened must be ascertained, and second, that the law be applied to the facts in a way which is congruent with the customs, norms and values of the community.

First, the jury must make factual findings in such a way that the community can be assured that the truth about what happened has been discovered. Fact-finding is certainly the oldest function of the jury, which originated as a means of drawing local knowledge into the administration of large empires.²⁹⁶ William the Conqueror used juries as fact-finders as he began to rule England.²⁹⁷ When the jury's responsibilities shifted from administrative to judicial, local knowledge continued to be prized. Early

the jury.

294. See *supra* notes 230-37 and accompanying text for a discussion of fairness and the jury *de medietate linguae*.

295. See *supra* note 197 and accompanying text for a discussion of the jury as protector of the community's voice.

296. See *supra* notes 65-69 and accompanying text for a discussion of the historical role of the jury as fact-finder.

297. See *supra* notes 69-71 and accompanying text for a discussion of the Normans' use of the inquest.

juries were expected to be completely familiar with the facts of the dispute and with the characters of the parties and witnesses. Recognition that such familiarity could produce a jury which was partial to one party or the other led to the practice of excluding jurors challenged by either party.²⁹⁸ The ideal jury was "neither suspected by nor hostile to either party, but neighbors to them."²⁹⁹ The framers of the American constitution recognized the role of the jury as a source of local knowledge and the possibility that knowledgeable jurors might be biased. This resulted in the Sixth Amendment's provisions for an impartial jury of the vicinage.³⁰⁰

Of course, reliability of fact-finding does not depend on the jurors themselves possessing knowledge of the facts. In fact, as the roles of jurors and witnesses were distinguished in the fourteenth through sixteenth centuries,³⁰¹ and the fact-finding model of jury decision-making shifted in the nineteenth century from one of community consensus to scientific discovery,³⁰² local knowledge ceased to be seen as an asset. Instead, the potential for partiality led courts and commentators to adopt the position that ideal jurors should be completely ignorant of the facts and parties to a dispute.³⁰³

But this shift should not obscure the obvious: a verdict that ignores facts the community knows to be true is less likely to be viewed as just than one that acknowledges those facts.³⁰⁴ This

298. See *supra* notes 108-28 and accompanying text for a discussion of the medieval procedures used to exclude jurors for cause.

299. FORTESCUE, *supra* note 86, at 60-61.

300. See *supra* notes 168-88 and accompanying text for a discussion of the jury in colonial America.

301. See *supra* notes 137-44 and accompanying text for a discussion of juries in the fourteenth through sixteenth centuries.

302. See *supra* notes 189-92 and accompanying text for a discussion of juries in the nineteenth century.

303. This generalization must be qualified in three ways. First, there is evidence that juries continue to rely on local knowledge in coming to decisions, although it is not clear to what extent this occurs. See, e.g., Dale W. Broeder, *The Impact of the Vicinage Requirement: An Empirical Look*, 45 NEB. L. REV. 99 (1966). Second, American courts have distinguished between *direct* knowledge (having witnessed or experienced a particular fact) which is not permitted and *vicarious* knowledge (possessing indirect and fragmentary information about matters that are not directly at issue), which has been accepted particularly as jurors judge the credibility of witnesses. Finley, *supra* note 21. Third, advocates of the use of special juries in complex cases predicate their arguments on the assumption that jurors possess differing experiences, knowledge, and skills, and that some degree of those may be needed in weighing the evidence in those cases. See e.g., Rita Sutton, Comment, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. CHI. LEGAL F. 575 (1990).

304. An exception, of course, is when facts are ignored in order to nullify an unjust law, yielding a just result. See *supra* notes 161-65 and accompanying text.

has been noted in debate over evidentiary rules,³⁰⁵ but applies to jury verdicts as well. Reflecting on the Simi Valley verdicts in which police officers were acquitted of beating Rodney King, columnist Donna Britt wrote:

For most of us, there was horror in watching King's abuse; for others, vindication. Black folks who for years have been inexplicably cursed, shaken, whipped and worse by men and women paid to protect them felt that here, at last, was unassailable proof that these things happen. That now, they must be believed.

I'd heard rumblings that the King case could end in acquittal—and dismissed them as preposterous. Then it happened, and I lost it.

For the first time in my life, I wished for a riot. I craved some fiery vent for my outrage that the country I've kept believing in—even after one of its police forces took my own brother's life; even after I've seen black lives cheapened and dismissed on TV, in film, on the street and in newspapers I've written for—could do this. That it could see Rodney King beaten, and say "not guilty" about the men who wielded the sticks.³⁰⁶

The Simi Valley verdicts were not accepted in part because they were unbelievable in light of the facts as understood by the community.

Second, a just verdict requires that the law be applied to the facts in a way which is congruent with the customs, norms and values of the community. As a democratic institution the jury permits and requires lay people to determine how the law of the land applies to particular fact situations. While a judge instructs the jury concerning the law, it is the jury which interprets the law in order to arrive at the verdict.

Professor Levinson has shown that criminal juries must incorporate community standards in construing legal concepts such as reckless,³⁰⁷ reasonable person,³⁰⁸ ordinary person,³⁰⁹ mater-

305. See, e.g., Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061 (1992) (discussing the exclusionary rule); Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1987).

306. Donna Britt, *When Crazy Happens, Hope Isn't Easy*, WASH. POST, May 1, 1992, at D1.

307. Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1553 (1993).

While the specific definition of recklessness may differ by jurisdiction, the basic concept calls upon the jury to decide whether the defendant's conduct evidenced a gross deviation from the standard of conduct of a law-abiding person in that situation. Thus, jurors are asked to draw upon their common experiences in the community to determine whether the defendant's conduct was grossly reckless.

Id.

308. *Id.*

A juror's determination as to how a reasonable person would have acted

ial,³¹⁰ and excessive force.³¹¹ While the court will instruct in general terms, it is the jury which must interpret what those terms mean in light of their experience and that of the people they know.

Further, a jury may "interpret" the law by ignoring it and acquitting a defendant even when the facts and law seem to compel conviction. This power has been recognized and celebrated on both sides of the Atlantic for centuries.³¹² Why would we celebrate a lawless verdict? The answer can only be that an overriding sense of community justice has prevailed. Requiring juries of the vicinage, then, was a way to prevent the government from obtaining convictions by trying defendants in districts which were antagonistic.³¹³

However, as noted earlier, the Sixth Amendment does not require a jury to be drawn from the community of the defendant, which is what we might expect if protection of the accused were the only objective. Since it calls for a jury from the community in which the crime occurred, the framers must have also intended that the values, norms and customs of that community be reflected in the interpretation of the law. Differences between communities are to be honored, not repressed.³¹⁴ One way of honoring the

when provoked in the manner the defendant was provoked will naturally be based upon the individuals with whom that juror has had contact — the reasonable people of the juror's community.

Id.

309. *Id.*

Bank robbery requires that the defendant use the type of force or intimidation that would make an "ordinary person" fear bodily harm. Who is the ordinary person? In the juror's mind this person is not a mythical figure. The ordinary person is an amalgam of individuals with whom the jurors have come into contact during their lives in the community.

Id.

310. *Id.* at 1554.

For many different types of false statement and fraud crimes, the defendant must make a "material" misrepresentation. The jury determines whether a statement is material by asking whether a member of the community affected by that statement would be misled by its contents.

Id.

311. *Id.*

In determining whether the force applied was excessive, the jury had to consider not only what the officers believed, but also whether the community would view the force employed as unreasonable under the circumstances. Thus, . . . the key issue in the Powell case required the jury to apply community standards in determining the defendants' culpability.

Id. at 1555.

312. See *supra* note 197 and accompanying text for a discussion of the jury as the voice of the community's values.

313. See *supra* notes 183-84 and accompanying text for a discussion of vicinage as a means of protecting the individual from government "jury-shopping."

314. See *supra* notes 185-86 and accompanying text for a discussion of the Sixth

differences is to require that the jury be drawn from the community in which the crime occurred.

B. Preserving a Community Voice through the Half-and-Half Jury

As illustrated by the William Lozano case, judges attempting to protect the defendant's right to an impartial jury must struggle with the implications this protection will have on the community's perception of the integrity of the justice system itself. Removing the trial from the community of the crime effectively eliminates that community's voice in the judicial process. This means that a resulting verdict runs the risk of being perceived as less credible and unjust, a perception which undermines the authority of the formal legal system.

If the choice in a given situation actually reduces to community alienation, on one hand, and a fair trial for the defendant on the other, the court must choose the latter. However, the decision to change the venue of a trial need not eliminate the community's participation on the jury if the judge impanels a half-and-half jury which satisfies the constitutional requirement of impartiality toward the defendant. This is because the goal of *voir dire* is to empanel an impartial *jury* which is necessarily composed of individual jurors each bringing unique experiences, values and an awareness of community norms to the deliberation.

The sixth amendment guarantees a defendant's right to trial by impartial jury, not impartial jurors. Protecting this right does not depend on finding jurors with no opinions or prejudices, but rather on the rough and tumble interaction of twelve members of the community, and the experiences and knowledge they bring into the jury box. Their verdict is not merely the sum of twelve independent votes; it is the product of deliberation, of the interaction between the twelve sets of experiences and knowledge, and thus a reflection of the community.³¹⁵

This being true, the judicial system could satisfy the vicinage requirement and assure the defendant of an impartial jury if the court can find individuals who, when removed to another location for the trial and joined with an equal number of other individuals who have not been touched by the potentially biasing influence, would constitute an impartial jury.

It might be helpful to illustrate how this could have been done in the Lozano case. To do that, it is necessary to briefly outline Florida's procedures in criminal jury trials. The state Consti-

Amendment's requirement that jurors come from the district where the crime occurred.

315. Minow & Cate, *supra* note 21, at 659-60.

tution includes a jury provision comparable to the Federal Constitution's: "In all criminal prosecutions the accused . . . shall have the right to . . . a speedy and public trial by an impartial jury in the county where the crime was committed."³¹⁶ It further provides that the right to the jury trial shall be available to all, that there shall not be fewer than six persons on the jury, and that the qualifications and numbers of the jurors are to be fixed by law.³¹⁷ The legislature has provided that in criminal cases the jury shall consist of six persons except for capital cases where twelve jurors are required.³¹⁸ Jurors must be at least 18 years old, citizens of Florida, and registered electors in the county in which the trial is to be held.³¹⁹ They are selected during a voir dire in which the judge, the state and the defendant may examine the prospective jurors orally.³²⁰ After the jury is selected and sworn, it may be sequestered at the discretion of the judge.³²¹

The provisions for change of venue are contained in Rule 3.240 of the Rules of Criminal Procedure promulgated by the Supreme Court. The ground for the motion is that "a fair and impartial trial cannot be had in the county where the case is pending for any reason other than the interest and prejudice of the trial judge."³²² Either the defendant or the state is permitted to move for a change of venue.³²³ If the motion is granted, the Rule provides for transferring the defendant (if in custody)³²⁴ and the court documents³²⁵ to the receiving court. Witnesses are obligated to attend the proceedings in the new court,³²⁶ and the prosecutor is permitted to amend the complaint as needed³²⁷ to harmonize it with the order of removal. The trial then proceeds to judgment before the receiving court.³²⁸

Selection of half-and-half juries could be provided for by promulgation of a revised Supreme Court Rule 3.240 with a new Section (k):

(k) Half-and-Half Jury. The state or the defendant may move the receiving court for selection of a half and half jury, or the court may

316. FLA. CONST. art. 1, § 16(a).

317. FLA. CONST. art. 1, § 22.

318. FLA. STAT. ANN. § 913.10 (West 1993).

319. FLA. STAT. ANN. § 40.01 (West 1993).

320. FLA. R. CRIM. P. 3.300(b).

321. FLA. R. CRIM. P. 3.370.

322. FLA. R. CRIM. P. 3.240(a). A separate rule contains procedures for removal of the judge.

323. FLA. R. CRIM. P. 3.240(a).

324. FLA. R. CRIM. P. 3.240(e).

325. FLA. R. CRIM. P. 3.240(f).

326. FLA. R. CRIM. P. 3.240(g).

327. FLA. R. CRIM. P. 3.240(j).

328. FLA. R. CRIM. P. 3.240(i).

act on its own motion. The court shall receive evidence (including the affidavits and the transcripts of any testimony offered in the hearing concerning the change of venue) on whether a fair and impartial trial could be had in the receiving county with a jury half of whose members are from the sending county and half from the receiving county. If the receiving court grants the motion,

(1) the clerk shall transmit to the sending court a certified copy of the order for a half-and-half jury; the sending court shall conduct a voir dire examination as provided by these rules and select and swear six jurors in all capital cases and three jurors in all other criminal cases; the half jury shall be transported by the Sheriff to the receiving court;

(2) the receiving court shall conduct a voir dire examination as provided by these rules and select and swear six jurors in all capital cases, and three jurors in all other criminal cases; and

(3) the receiving court shall order the entire jury sequestered.

Under such a Rule, Judge Spencer could have, on his own motion, conducted a hearing to determine whether an impartial jury could be selected using persons from both Dade and Orange Counties. Had he so concluded (and this seems likely since the defendant had requested that the trial return to Miami), he could have ordered creation of a half and half jury. Since he was both the sending and receiving judge in the original venue change from Dade to Orange County, it would have been relatively simple for him to conduct the voir dire examinations in both locations. Sequestration of the entire jury during the course of the trial would have ensured not only that all jurors were treated equally, but that they were insulated from the effects of publicity during the trial.

The additional practical and logistical problems that this procedure might create would be relatively minor given the complexities of transferring the entire case to a new county. Furthermore, this process is similar to a procedure used in some states, known as the "imported jury," in which the change of venue motion results, in effect, in a change of vicinage. An impartial jury is achieved by convening a jury from a new county and sequestering them in the county in which the crime occurred and where the trial takes place. These gained notoriety during the trial in 1980 of John Wayne Gacy, who was accused of murdering 33 boys in suburban Chicago. The jury was selected in Rockford, Illinois, and then brought to Cook County for the trial. This was done to save the State the expense of transporting over 100 witnesses to Rockford.³²⁹

329. Vicki Quade, *Use of Imported Juries Gains in Popularity*, 68 A.B.A. J. 668, 668 (1982).

CONCLUSION

It would be simplistic to suggest that the use of a half-and-half jury in the Simi Valley trial of police officers accused of beating Rodney King would have prevented the riots that followed their acquittal. Those who riot after such verdicts are motivated by impulses ranging from outrage to greed. However, as the United States Supreme Court has recently affirmed, a goal of the jury system is to preserve public confidence in the integrity of the courts, "to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the laws by persons who are fair."³³⁰ Achieving this goal requires that the jury be *perceived* as fair, a perception that is more likely when the jury comes from the community. "Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."³³¹

The King of England believed that he could attract foreign merchants by offering them the right to a half-and-half jury. In so doing, he created a perception of judicial fairness which induced those merchants to do business in England. It seems reasonable that use of the half-and-half jury in racially-charged cases could similarly contribute to increased public confidence in the court system today.

330. *Powers v. Ohio*, 499 U.S. 400, 412 (1991).

331. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).