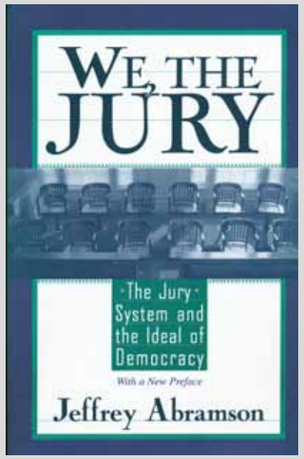

WE, THE JURY

Jeffrey Abramson

We the Jury may be read as as an essay in political philosophy as well as a tract on an old institution that has survived the out of control complexity of today's legal system. It is an hymn to democracy in all its forms – and Jeffrey Abramson is definitely more in love with the democratic reality of the Western democracies than I am! He loyally stands up in defence of an ideal that has eluded society from time immemorial, although the principle of trial by jury pushes the weaknesses of democracy even further by affecting in an extremely direct and immediate way the destiny of citizens. Those that are the target of prosecutors as much as the victims that rely on the judicial to obtain justice. Unfortunately, the problems of the democratic process are only amplified in the context of a trial. The average citizen, be it a voter or a jury member, is rarely a rational and informed person. It is sad to say, but the people – Abramson and the Founding Fathers will excuse me – are an attractive political and philosophical idealization that, translated into practice, takes the shape of a gullible community, perfect prey for consummate coaxers, instilled prejudice, enthralling beliefs and media hype. Which, in the end, is probably the reason why the smarter people have come to accept, at least formally, the democratic system. But, if nobody would trust his own life to the collective wisdom of the people for anything vital, like a medical decision or an airplane check before a flight, why society has resorted to a jury to sentence on the fate of its members? It is worthless to search for an answer in Abramson's elaborate defence or in some sort of Rawls' argument that "most reasonable principles of justice are those everyone would accept and agree to from a fair position". Such a choice cannot be argued rationally. Democracy and Jury Trial belong to the same class of imperfect social arrangements whose foundation is reactive. That is to say, not equitable and "scientific" solutions to the quest for social order, but institutional devices born as a reaction to an order imposed with spiteful arrogance by a few, in defence of undeserved privileges. And if these societal expedients have not changed much the substance – the democratic order is still in the (invisible) hands of a few – their form is more agreeable and offers the crowds the illusion of freedom and power. We the Jury is not reviewed here to discuss democratic principles, however. Jeffrey Abramson is commendable because he has done an excellent job in dissecting the judgment process into its many aspects and biases, while his analysis goes far beyond his intended subject as both judges and juries are often victims of the same failings. But the most interesting idea that surfaces throughout the book is that there is a value in ignoring the coherence of a formal system of laws. Abramson goes as far as defending jury nullification, that is the power to ignore the law, on the ground that in concrete cases it is necessary to reconcile law and justice. The potential abuse of this power is obvious, but the underlying idea of the primacy of substance over form – I would say of concrete common sense over abstract coherence – deserves to be pondered with great attention. The book discusses many practical cases that have captured the headlines over the past years and I don't necessarily share all his conclusions. But it is refreshing to read an academic treatise that discusses the very concrete subject of justice in practical terms rather than delving into theoretical lucubrations disconnected from social reality. This has an explanation: Jeffrey Abramson is Professor of Politics and not a lawyer!

Paperback: 350 pages
Publisher: Harvard University Press, 2000
Language: English
ISBN-10: 0674004302

TWILL #15 - WWW.TWILL.INFO

INTRODUCTION

Trial by jury is about the best of democracy and about the worst of democracy. Jurors in Athens sentenced Socrates to death for religious crimes against the state, but in England jurors went to prison themselves rather than convict the Quaker William Penn. Juries convicted women as witches in Salem, but they resisted witch hunts for communists in Washington. Juries in the American South freed vigilantes who lynched African-Americans, but in the North they sheltered fugitive slaves and the abolitionists who helped them escape. One jury finds the Broadway musical Hair to be obscene, another finds Robert Mapplethorpe's photographs to be art. The names of the Scottsboro Boys and of Emmett Till, Viola Liuzzo, Lemuel Penn, and Medgar Evers mark the miscarriages of justice perpetrated by an all-white jury system that was democratic in name only. The names of John Peter Zenger, John Hancock, Angela Davis, Father Philip Berrigan, and the Oakland Seven mark the courage of jurors willing to protect dissenters from the orthodoxies of the day. In short, the drama of trial by jury casts ordinary citizens as villains one day, heroes the next, as they struggle to deal justly with the liberties and properties – sometimes even the lives – of their fellow men and women.

Today, the jury continues both to attract and to repel us precisely because it exposes the full range of democratic vices and virtues. No other institution of government rivals the jury in placing power so directly in the hands of citizens. Hence, no other institution risks as much on democracy or wagers more on the truth of democracy's core claim that the people make their own best governors. The jury's democratic gamble is striking in comparison with the hedged bet that most of our institutions of representative democracy make on the people. Elections for president, governor, senator, or other office give power of a sort to the people by making those who are elected accountable to their constituents through the ballot box. But this is a far cry from empowering the people themselves with the daily responsibility for governing. Voting and elections, even at their best, activate popular sovereignty only periodically and for passing moments. However loudly we speak during an election, the activity of governance is still ceded to the few.

> **"Today, the jury continues both to attract and to repel us precisely because it exposes the full range of democratic vices and virtues."**

By contrast, the jury version of democracy stands almost alone today in entrusting the people at large with the power of government (the only other example that comes to mind is the town meeting, but this hardly rivals the jury on a daily or national basis). I do not mean to suggest for a moment that jury selection in actual cases always lives up to the ideal of recruiting members from all walks of life; in practice, excuses, challenges, and changes of venue often skew the representative nature of juries. Still, for most of us the jury remains our only realistic opportunity to participate in governing ourselves. We hold no elections for jury service but instead draft people by essentially drawing lots. Although technological advancement has made the lottery system computerized today, the noble principle remains that every citizen is equally competent to do justice. So long as selected persons meet minimal qualifications of age, citizenship, literacy, and residency, they take turns as jurors, randomly rotating on and off the jury wheel.

The contemporary democratization of jury service stands in marked contrast to the discriminatory practices that dominated centuries of jury history. In England, it wasn't until 1972 that the property qualification for jurors was abolished. Women were ineligible for jury service in every state until 1898, when Utah allowed them to be jurors. Up until 1968, federal jury selection in the United States openly worked to limit jury service to supposedly elite individuals recommended by community leaders. That year, Congress officially abandoned the "blue-ribbon" jury in favor of the "cross section of the population" jury for the federal system. The Supreme Court extended the cross-sectional requirement to state juries, as a matter of constitutional law, only in 1975. Thus, we are the first generation in U.S. history that can regard jury verdicts as a fair test of democracy's faith in the collective wisdom of all the people. Ironically, this very democratization of jury selection has provoked a crisis of confidence in the quality and accuracy of jury verdicts. Few in the United States advocate abolishing the jury system, but many favor following England in restricting the kind of cases civil juries may resolve. On the criminal side, the violence that left thirty dead in the wake of the first jury trial for the white policemen accused of beating black motorist Rodney King in 1991 tells a story in itself about collapsed faith in the jury.

All in all, the grounds for skepticism about jury justice are familiar and, at first blush, telling:

- **Justice requires distance** and insulation from the pressure to do whatever is popular. That, after all, is why we appoint, not elect, federal judges and grant them life tenure. The jury vision of democracy insists to a fault that what we want is popular Justice, the "conscience of the community." But justice is not always popular, and the conscience of the community is not always pure. Today's juries therefore substitute the rule of people for the rule of law.
- **The gap between the complexity of modern litigation** and the qualifications of jurors has widened to frightening proportions. The average jury rarely understands the expert testimony in an antitrust suit, a medical malpractice case, or an insanity defense. Trial by jury has thus become trial by ignorance.
- **The search for representative juries** bogs down jury selection over issues of demographic balance, creating the impression that justice precariously depends on the race, gender, religion, or even national origin of jurors. The message of the cross-sectional ideal is that different groups have different perspectives on justice. This teaches us that cases are won or lost not on the basis of evidence but on the basis of who the jurors are.
- **Justice requires living under settled laws** that treat like cases alike. But jury verdicts are notoriously unpredictable, ad hoc, arbitrary, idiosyncratic, whimsical. Like cases are not treated alike..
- **Juries decide cases according to emotion**, prejudice, and sympathy more than according to law and evidence. They turn trials into circuses where the verdict is determined by defendants' way of dressing or by their race or ethnicity.
- **Jury democracy is really pseudodemocracy** because it invites, or at least permits, an anonymous group of unelected people to spurn laws passed by a democratically elected legislature. Whenever this occurs, the jury becomes a lawless institution, rendering decisions for which the jurors will never be held accountable.

In this book, I examine the pros and cons of the jury's great experiment with democratic justice. Both the civil jury and the criminal jury are part of that experiment, but I will concentrate on the criminal jury as the premier body translating democratic ideals into everyday practice. My concern in part is a lawyer's concern for how juries actually decide cases. Like any zealous lawyer, I am eager to know whatever tricks of the trade might help my client's fate before a jury. I want to know how much stock juries put in eyewitness identifications, why they rarely buy an insanity defense, and whether recently they have become more willing to excuse violent acts committed by victims of sexual abuse. My own experience – as a law clerk on a state supreme court reviewing jury verdicts, as an associate in a corporate law firm, as an assistant district attorney, and as a teacher of law and political theory – has convinced me that jurors are smarter than assumed by lawyers working from manuals. We have all witnessed a jury surprise the prognosticators by accepting the insanity defense of

a defendant as unpopular as John Hinckley charged with attempting to assassinate a president as popular as Ronald Reagan. I do not argue that juries always get their verdicts right. Who ever promised that there would be no risks to democracy? But to get at the good, we must risk the bad. To get the jury that resists the tyranny of the state, we must risk our freedom on the jury that practices its own petty tyranny. My ultimate concern, therefore, is what the jury teaches us about ourselves and our capacity for self-governance. What can we learn about winning democracy, not just about winning cases, from studying the jury?

Let me begin by telling a story told to me by a Philadelphia lawyer when I first started practicing law. Early in his own career, this lawyer was defending a large corporation being sued by a smaller company on charges of civil fraud. It was a classic David-versus-Goliath lawsuit. The lawyer researched the case for months and had no doubt that the facts and the law were on his client's side. Shortly before the case was due for trial, the judge called the parties in for a pretrial conference to explore grounds for settlement. The lawyer stressed the strength of his legal position and his confidence in going forward to trial. The judge patiently listened to this recital, nodding his apparent agreement with the force of the points. But when the lawyer finished, the judge focused a knowing glance on him and said simply, "But you know if this case ever goes to a jury, you'll lose." A short time later, the client agreed to settle the case for a large cash amount.

"And the jury today remains our best tool for ensuring that the law is being applied in a way that wins the people's consent."

I tell this story to illustrate two points. First, the influence of the jury on the conduct of litigation in the United States goes far beyond the jury trials that actually take place. For the case I am describing, merely the threat of a jury trial controlled the outcome. So it is across the board. In the civil area, jury trials take place in fewer than 1% of cases disposed of in state courts and in only 2% of cases terminated in federal courts. In criminal litigation, two-thirds of all cases are disposed of in state courts through guilty pleas. But it is the background existence of the right to a jury trial, and predictions about how juries would decide cases were they to get them, that drive parties to settle or plea bargain in the first place. Those who argue that the jury is unimportant because jury trials are infrequent thus mistake the tip of the iceberg for the whole.
I learned a second lesson from my lawyer friend's experience in the judge's chambers that day. Evidently, the law was one thing and jury justice was another; I remember being outraged by the difference. In my law school, there were no courses on jury forecasting. In fact, there were no courses on the jury at all. If juries introduced a disturbance into the legal system such that verdicts were not predictable from the law, then that disturbance was a proper study for psychology but not for law school courses.

To me, as a young lawyer, the jury signified the rule of emotion over reason, prejudice over principle, whim over written law. With the passage of years, however, I have come to take a more positive position. After all, there would be little point to a jury system if we expected jurors always to decide cases exactly as judges would decide them. The whole point is to subject law to a democratic interpretation, to achieve a justice that resonates with the values and common sense of the people in whose name the law was written. In my lawyer friend's story, the judge was asking him to consider what the people, through the jury, would eventually say about justice in his case, how the equities would seem from the commonsense point of view. And the judge's experience with prior trials put him in a position to say that the commonsense view of justice favored the plaintiff in the matter. To resent the intrusion of such popular conceptions of justice into the judicial process now strikes me as a resentment against democracy. In a democracy, the legitimacy of the law depends on acceptance by the people. And the jury today remains our best tool for ensuring that the law is being applied in a way that wins the people's consent.

I could go on telling war stories, but my purpose here is to move beyond anecdote to sustained study of the changing democratic ideals and values embedded in our jury practices. The first envisions the jury as essentially a representative body, where jurors act as spokespersons for competing group interests. Such a view comfortably fits the jury to prevailing models of interest group behavior; it assumes that jurors inevitably favor their own kind and vote according to narrow group loyalties. Like other representative institutions, therefore, the democratic jury is said to give fair and balanced representation to the competing perspectives of community groups. The description comes close to implying that jurors have constituents to represent, that their mission is to hold fast to their group's perspectives, even as other juror-representatives remain allegiant to their group's preconceptions. This view of the jury is much in vogue today, but it is a description that ultimately undermines any defense of the jury as an institution of justice. Surely the jury has not survived all these centuries only to teach us that democracy is about brokering justice among irreconcilably antagonistic groups.

I will argue for an alternative view of the jury, a vision that defends the jury as a deliberative rather than a representative body. Deliberation is a lost virtue in modern democracies; only the jury still regularly calls upon ordinary citizens to engage each other in a face-to-face process of debate. No group can win that debate simply by outvoting others; under the traditional requirement of unanimity, power flows to arguments that persuade across group lines and speak to a justice common to persons drawn from different walks of life. By history and design, the jury is centrally about getting persons to bracket or transcend starting loyalties. This is why, ideally, voting is a secondary activity for jurors, deferred until persons can express a view of the evidence that is educated by how the evidence appears to others. Although the deliberative model of democracy survives in the jury, even there it is in serious decline. Every chapter of this book will tell part of the story of the eclipse of the deliberative ideal and the reduction of the jury into a mere mechanical fact-finder warned to leave deliberations about law and justice to the judge.

"No group can win that debate simply by outvoting others; under the traditional requirement of unanimity, power flows to arguments that persuade "

In the first part of the book I focus on the question of democratic knowledge – what ordinary citizens are presumed to know to be capable of rendering accurate verdicts. The lead story, told in chapter 1, is of a sea change from the jury as an intimate institution of small-town justice, where members were expected to bring their own local knowledge of the facts to bear on their deliberations, to the jury as a distant institution of impartial justice, where jurors are expected to know as little as possible about the matters and persons on trial. But what should we make of an ideal of impartial justice that prefers ignorance to knowledge in jurors? Modern law unnecessarily undermines the fullness of jury deliberation, even about the facts of the case, by posing a false opposition between well-informed jurors and fair-minded jurors. The spectacle of jury selections that eliminate vast numbers of would-be jurors solely because they follow the news about important events in their communities can only undermine public confidence in the accuracy of jury verdicts.

Jury trials today often provoke cynicism about the ability of ordinary citizens to understand the law. Law is massive and mysterious, inaccessible to the uninitiated; it takes professional study, not just natural reason, to understand its intricacies and details. Hence there must be a basic division of labor between jury and judge (juries decide questions of fact, judges answer questions of law). Such a mechanical description of the jury's task raises two central questions. First, do real jurors actually follow the judge's instructions or even comprehend them in the way the division of labor theory requires? Second, what happens to the jury's historic right to follow conscience rather than law? If juries must accept and abide by the judge's instructions, is there room any longer for juries to function as the conscience of the community? I argue for reviving the jury's authority to nullify unjust laws or unjust applications of law, even while acknowledging the racism and other forms of prejudice that have tainted the history of jury nullification. In part II, I focus on what the jury teaches us about the nature of democratic representation. In particular, I concentrate on the surprisingly recent shift, starting in 1968, from selecting elite, or blue-ribbon, juries to drawing jurors from a representative cross section of the community. This shift requires us to review the long and sordid history of discriminatory jury selection practices in the United States. It also raises, in the context of the jury, all the familiar questions about color-blind justice, racial quotas, and racial balance that Americans struggle with elsewhere.

" I argue for reviving the jury's authority to nullify unjust laws or unjust applications of law"

But what are we saying about jury justice when we insist on making juries fairly representative of the races, as well as of the sexes, ethnic groups, and other cognizable groups in our heterogeneous society? How do we reconcile the ideal that justice is blind to a defendant's demographic features with realities of prejudice that make it obvious that the demographic composition of the jury matters? I offer a defense of the cross-sectional ideal, but only by insisting on some crucial clarifications. Jurors are not disembodied angels; each hears the evidence from perspectives rooted in personal experience as well as in the experiences of others in the jury. This is why democratic deliberation requires that jurors be recruited from a cross section of the community. Whenever any group is intentionally excluded from the jury, the fullness and richness of jury debates are compromised. Lost is the distinctive knowledge and perspective that persons from the excluded group may have contributed to the collective effort. Let loose into the deliberations are the prejudices that people more freely express about a group in its absence. For these reasons, the practice of drawing jurors from a cross section of the community is absolutely vital to enforcing the rational, knowledgeable, and deliberative behavior we seek to inspire in jurors. We do not want to encourage jurors to see themselves as irreconcilably divided by race, selected only to fill a particular racial or gender slot on the jury. Long ago, Aristotle suggested that democracy's chief virtue was the way it permitted ordinary persons drawn from different walks of life to achieve a "collective wisdom" that none could achieve alone. At its best, the jury is the last, best refuge of this connection among democracy, deliberation, and the achievement of wisdom by ordinary persons. Beginning in 1986, the Supreme Court rewrote the rules to prohibit prosecutors (and now defense lawyers) from using peremptories to eliminate would-be jurors solely because of their race. In 1994 the Court went one step further and announced a similar prohibition on using a person's sex as the sole reason for striking him or her from the jury.

Still to be resolved by the Supreme Court is whether to impose a ban on peremptory challenges based on religion, national origin, or even age. Indeed, sooner or later, the Court will have to confront the tension between the very existence of peremptory challenges and the ideal of the cross-sectional jury. Lawyers often use their peremptory challenges on the basis of some suspicion that young or old, rich or poor, white-collar or blue-collar, Italian or Irish, Protestant or Jewish jurors will be favorable to the other side. The effect of such peremptory challenges may be to lessen the representative nature of the jury actually seated. Why should lawyers be able to undermine the cross-sectional nature of the jury at all? Such a question forces us to explore, at a more philosophical level, what theory of representation we are trying to practice when we reform juries to be cross sections of the community.

I focus first on perhaps the most peculiar aspect of jury democracy – the traditional requirement that Juries in criminal cases reach unanimous agreement. After all, most democratic institutions make do with majority rule; why did the jury historically take such a different route? And why, since 1972, has the Supreme Court permitted states to abandon the unanimous verdict requirement? Exploring the future of unanimous verdicts will require us to look at the kind of society that could expect jurors to deliberate and reach a shared view on justice. Today, when we reform jury selection to represent the diversity of social groups, there can be no surprise that the aspiration for unanimity seems out of place. Here, too, changes in long-standing jury practices reflect the changing understandings of democracy in an increasingly heterogeneous society. I argue, however, that the loss of unanimous verdicts would be a serious blow to the survival of the criminal jury as a deliberative body. It would signal its conversion into a body that functions by registering and tallying up group differences.

I turn finally from theory to practice and consider the outcome of jury deliberations in death penalty cases. When juries deliberate a death sentence, all the imperfections of the conscience of the community are under a magnifying glass. Death penalty cases are not typical, but they require us to attend to the limits of what we can sensibly ask jurors to deliberate about. In 1972, the Supreme Court declared a moratorium on the death penalty in the United States, finding that existing laws gave jurors no standards for deliberating about death sentences. In 1976, the Court permitted states to reinstitute the death penalty, so long as they specified what jurors were supposed to deliberate about when recommending execution versus life imprisonment. But substantial questions remain today about whether preoccupations with race are a determining factor in how jurors deliberate about the death sentence. Evidence that the death penalty falls disproportionately on defendants who murder whites rather than nonwhites is today the most serious indictment of the jury system.

THE CASE OF JOHN DELOREAN

Belief in the almighty power of jury selection took yet another quantum leap forward in 1984 when a federal Jury of six men and six women stunned prosecutors by acquitting automaker John DeLorean of cocaine trafficking charges.
Undercover federal agents had videotaped DeLorean in the apparent act of conspiring with government informants (Posing as crooked bankers and drug dealers) to sell cocaine as a quick way to raise money for his failing new automobile venture. One tape, shown prior to trial on the national CBS program "60 Minutes," showed DeLorean in a hotel room sitting in front of an open suitcase filled with fifty-five pounds of cocaine, saying, "It's as good as gold." How could a jury find DeLorean not guilty after viewing such an incriminating videotape? Press accounts once again favored defense advantages gained during jury selection as the likely explanation. In particular, the advice of jury consultant Cathy Bennett emerged as the defense's supposed secret weapon.

Overall, the twelve jurors seated were politically moderate or conservative; they had voted 10 to 2 for Ronald Reagan in the previous presidential election. Three came from law enforcement backgrounds, one retired army colonel. Two were insurance adjusters. In post trial interviews given after the verdict, nine of eleven jurors admitted to going into the trial assuming that DeLorean was guilty. Thus, the defense did not win the case through some immediately apparent scientific edge gained during jury selection.

"How could a jury find DeLorean not guilty after viewing such an incriminating videotape?"

Media accounts reported the verdicts as if they flew in the face of DeLorean's obvious guilt – all recorded on videotape. But, according to post trial interviews, the jurors did not find the evidence as strong as the media reported. Seven jurors concluded that there was insufficient evidence that DeLorean had ever entered into a conspiracy to deal drugs. DeLorean, in the videotapes, was certainly eager to engage in some scheme for laundering this money through investment in his failing company. But apparently the jury found the tapes far from clear as to whether DeLorean went further and conspired to buy and resell drugs himself for profit. According to the final tape, where DeLorean is filmed with a real drug smuggler and an open suitcase of cocaine, there were never any arrangements made by the two for what drugs DeLorean would buy, how much he would pay, or how profits would be split. Seven jurors found that such evidence left them


sunny
Detroit Free Press
friday
metro final
Jury Finds De Lorean Not Guilty
Tapes were dramatic, but didn't sway jurors
news analysis

with reasonable doubts about whether DeLorean was actually intending to do a drug deal-as opposed to laundering a drug smuggler's profits (a crime with which he was not charged).

Five other jurors thought that DeLorean might have conspired to sell drugs but that the government had entrapped him. In sum, the defense had a stronger case than media accounts ever acknowledged. From post trial interviews, a consistent picture emerged of a jury basing its decision on the evidence, or lack of it. As one juror put it, "You start with the presumption of innocence and it was never proven to my satisfaction that he'd committed those acts." But remarks such as these were not taken at face value in the considerable speculation following trial about what went wrong for the government. With images of the "60 Minutes" tape still fresh in people's minds, the work of jury consultant Bennett became the lead story of the trial.

CONCLUSION

As the twentieth century draws to a close, jury trials in the United States bring to the fore one question above all others: in a multiethnic society, is there one justice for jurors to render, or are there different justices for different groups? In regard to race, the Rodney King trials put this question before the nation, but so too did a startling series of cases of interracial violence in recent years: the Bernhard Goetz trial, the Howard Beach and Bensonhurst attacks in Queens and Brooklyn, the trials of white police officers for slaying blacks in Detroit and Miami, the Crown Heights affair, and the Reginald Denny trial in Los Angeles. In all these cases, jury trials have been a window into our democratic soul. The jury system allows us to take a hard look at the conscience of the community and our inner doubts about the attainability of impartial justice.

The question of one justice versus many justices is sharpest when trials involve racial divisions, but the issue has life elsewhere. Consider four cases mentioned in this book. In 1994, the much publicized gender gap on Erik Menendez's jury (six men finding him guilty of murdering his parents, six women believing he was sexually abused and therefore guilty only of manslaughter) raised the issue of whether men and women respond in fundamentally different ways to cases involving allegations of sexual abuse. In the trial of Lorena Bobbitt, on charges of maliciously wounding her husband by severing his penis, the jury of seven women and five mien agreed unanimously that she was not guilty by reason of temporary insanity brought on by a history of abuse and rape.

One case in particular captured the fragile reputation of jury justice in a society where the consuming issue is the racial or ethnic balance of power on the jury. In Miami, on Martin Luther King Day in 1989, William Lozano, a Hispanic police officer, shot and killed a black motorcyclist during a chase through the mostly black section of Overton; a passenger on the motorcycle died the next day of wounds suffered in the crash. Lozano claimed that he fired in self-defense at a speeding motorcycle heading in his direction, but the facts were unclear and the incident unleashed festering tensions between the African-American and Hispanic populations and led to three nights of rioting. Lozano was indicted for the slaying, and in December 1989, a Dade County jury of three whites, two blacks, and one Hispanic convicted him on two counts of manslaughter. But, in a decision emblematic of declining faith in the local geography of justice for which the jury has historically stood, a state appeals court reversed Lozano's conviction in 1991, finding error in the trial judge's refusal to move the trial from Miami and Dade County, where fears of further rioting may have unduly influenced jurors to convict.

As Florida authorities searched for neutral turf for Lozano's retrial, there ensued a bizarre odyssey that acted out every issue about local justice, impartial justice, cross-sectional juries, and representative juries that this book has addressed. Black civic leaders balked at not permitting Miami citizens to judge the behavior of their own police, arguing that familiarity

TWILL #15 - WWW.TWILL.INFO

BOOK TRAILER

with police behavior in Miami was an indispensable element in any jury's ability to understand the case in context. But, if the trial had to be moved, they argued for a venue where the jury pool would include about as many African-Americans as would a jury pool in Dade County (the county pool is approximately 50 percent Hispanic, 30 percent white, and 20 percent African-American). Equally concerned about demographics, Lozano's lawyers stressed that he, too, as an immigrant from Colombia, was a member of an identifiable ethnic group and that his right to be tried by a cross-sectional jury meant that the venue for retrial should mirror the percentage of the Dade County population that was Hispanic. Over the next few months, a demoralizing spectacle took place as various judges took turns ordering the trial back to Orlando, then back to Tallahassee, then finally back to Orlando again. In all, the proposed location for the trial shifted five times. Trial finally commenced in Orlando in May 1993 – a jury of three whites, two Hispanics, and one African-American acquitted Lozano of all charges on May 28. The Lozano case highlights the unresolved dispute

"The older ideal made deliberation, not representation, the key behavior we expected of jurors."

in the United States about the demographics of justice and the way to make juries representative of the community. The eventual choice of Orlando rested more on compromise than on any discernible principle. And Miami authorities let out an audible sigh of relief when the peace held, despite Lozano's acquittal. Behind the logistics of where to locate the Lozano trial lay broader issues about the democratic credentials of the jury.
Throughout this book I have distinguished between two different ideals for jury democracy. The older ideal made deliberation, not representation, the key behavior we expected of jurors. The deliberative ideal was a demanding one, seeking to inspire jurors to put aside narrow group allegiances in favor of spying common ground. It was a model of democracy that believes that face-to-face meetings matter, that voting is secondary to debate and discussion, that power should ultimately go to the persuasive, that collective wisdom results from gathering people in conversation from different walks of life, that unanimity is practicable and desirable, and that there is a justice shared across the demographic divides of race, religion, gender, and national origin. The new and competing ideal for the jury is a group-representation model, one that seeks to redesign the jury so that it basically fits the pluralist paradigm of democracy and interest group politics. This model is openly skeptical about whether deliberation inside the jury room matters; it insists, in the name of realism, that there is no one justice to share, that juries are not above the political fray but are a microcosm of the biases and prejudices, the bartering and brokering among group interests that dominate democratic deal making in general. According to this point of view, the key to jury verdicts becomes whom the jurors are, not what the evidence shows. Because jurors are seen as voting their demographics just as citizens do in elections, the crucial moment of trial is said to come during selection, and the highest aspiration we can have for jury democracy is to represent the perspectives of groups in some fair way, to balance the biases of jurors and therefore achieve an overall impartial jury.

A contemporary defense of the deliberative ideal for the jury must acknowledge, as our predecessors did not, that the search for common justice starts with the different experiences attached to identity in America. We have learned the hard way that no ideal of deliberation fit for a multiethnic society can be naive about the conscience of "the" community and ignore the different sub-communities in which we live and that have obvious influence on the ways we perceive justice and injustice. But our differences need not be an obstacle to deliberation and rational persuasion; they can enrich conversation out of a commitment to the basic democratic norm that ordinary persons joined together can achieve the most complete assessment of events on trial-complete both in the sense of rendering the most accurate account of what happened and in the sense of judging its significance before the law. The key point here is that we should seek to inspire jurors not to represent their own kind but to use their different starting perspectives to educate one another, to defeat prejudiced arguments, and to elevate deliberations to a level where power goes to the most persuasive. Jurors in real cases may seldom practice this deliberative ideal perfectly. I have argued in favor of preserving the unanimous verdict as a way of empowering arguments that resonate across group lines.

For the same reason, I have argued for abolishing the peremptory challenge, which is so frequently wielded by lawyers to deprive a person from a place on the jury simply because of the person's religion, national origin, age, or occupation. The time has come to fully practice what we preach and to prohibit discriminatory, exclusionary practices from occurring under cover of the peremptory challenge. Too frequently, persons struck by peremptory challenge are left wondering why they were suspected of bias and whether the suspicion accused them of some level of inherent racism or prejudice. Some of the reforms I have argued for in this book, in the name of enriching jury deliberation, are broader in scope and harder to achieve than those just mentioned. While acknowledging the dangers of jury nullification, I believe it necessary to instruct jurors that, as the conscience of the community, they may set aside the law to acquit a defendant. I say this because history indicates that we cannot eliminate jury nullification – we can only drive it underground. My preference is for a jury that does things aboveboard and is fully apprised of its choices.

"Unfortunately, the numbers indicate that escaping jury service remains a favorite pastime of citizens."

Of all the reforms suggested in this book, the most difficult to achieve will be a reversal of jury selection trends that disqualify persons for overexposure to pretrial publicity. In practice, jury selection needs to regain a sense of balance and to cease making the rabidly antidemocratic assumption that whole segments of the community are routinely unable to be fair-minded jurors. Judges must do their part, by guarding against patterns of excuses and challenges that keep so many willing persons from serving. Unfortunately, the numbers indicate that escaping jury service remains a favorite pastime of citizens.
A 1988 Massachusetts report showed that 31 percent of jurors summoned for state jury duty in Massachusetts in 1988 were either disqualified or excused. Twenty-five percent of qualified jurors found some way to cancel or postpone their jury duty; another 6 percent were simply absent. Among those who do appear and are sent into a courtroom for voir dire, the art of getting excused is highly developed. Individuals accuse themselves of prejudice, students say they cannot afford to miss classes, and self-employed persons state they cannot afford to miss work.

The ebb and flow of the jury's reputation is an old story, one that will continue so long as the jury remains the embodiment of non-elite, participatory ideals of democracy. The direct and raw character of jury democracy makes it our most honest mirror, reflecting both the good and the bad that ordinary people are capable of when called upon to do justice. The reflection sometimes attracts us, and it sometimes repels us. But we are the jury, and the image we see is our own.