IN THE UNITED STATES TODAY, it is common to describe the ideal jury as a “body truly representative of the community.” To practice this ideal, all jurisdictions rely on a computerized version of the oldest and most direct of democratic selection methods: the random drawing of names by lot. The basic principle behind the lottery is that the pool of persons from which actual juries are drawn must approximate a fair, representative cross section of the local population. Because of the luck of the draw, as well as uneven patterns of excuses and challenges, the particular jury a person gets may not itself form a cross section of the community. But so long as jurors are summoned randomly from an initially representative list, the democratic nature of jury membership is said to be preserved.

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

In 1968, with the Jury Selection and Service Act, Congress abandoned this system for federal courts, declaring it henceforth to be “the policy of the United States that all litigants in Federal courts entitled to trial by
jury shall have the right to grand and petit juries selected at random from a fair cross section of the community." In 1975, the Supreme Court extended the ideal of the cross-sectional jury to state courts as well, ruling that the very meaning of the constitutional guarantee of trial by an impartial jury required that the jury pool be a mirror image or microcosm of the eligible community population.

Both Congress and the Court justified the new theory as a remedy for the discrimination practiced under the guise of searching for elite jurors. The slippery and subjective standards for jury eligibility under the elite model provided convenient cover for systematic exclusion of certain people, African-Americans in particular; they also allowed for the perpetuation of the all-white jury in the South nearly a century after the Supreme Court outlawed, in theory, such juries. The immediate task of the cross-sectional reform was to strip away such discrimination, making all persons equally eligible for jury duty who met minimum and objective standards of citizenship, age, residency, and literacy.

But the ideal of the cross-sectional jury speaks to more than the abolition of intentional discrimination in jury selection. To say, as the Supreme Court did in its landmark 1975 decision, that only "representative" juries are "impartial" juries is to suggest a new way of thinking about how to make jurors capable of impartial justice—a way that stands the classical view of impartiality on its head.

As discussed in chapter 1, common law defined an impartial juror as genuinely capable of bracketing his own interests and preconceptions and of deciding the case solely upon evidence presented in open court. In the words of the great common-law jurist Lord Coke, "He that is of a jury, must be liber homo, that is, not only a freeman and not bond, but also one that hath such freedome of mind as he stands indifferent as he stands unsworne." This is a demanding notion of impartiality, requiring jurors to be independent not only from the dictates of others but also from their own opinions and biases. It requires jurors to achieve "a mental attitude of appropriate indifference." The noble purpose of such a jury was also to silence expressions of group prejudice and to ratchet up the deliberations to a higher level of generality. Jurors wishing to be persuasive would now have to abandon arguments that depended on the particular prejudices or perspectives of their own kind. Their arguments would have to resonate across group lines.

In 1990, Han Tak Lee, a Korean-born defendant, was found guilty of murdering his daughter by arson. No Asian-Americans served on the jury and several jurors indicated that they felt Asian-American defendants were being judged by group prejudice and to ratchet up the deliberations to a higher level of generality. Jurors wishing to be persuasive would now have to abandon arguments that depended on the particular prejudices or perspectives of their own kind. Their arguments would have to resonate across group lines. In 1990, Han Tak Lee, a Korean-born defendant, was found guilty of murdering his daughter by arson. No Asian-Americans served on the jury and several jurors indicated that they felt Asian-American defendants were being judged by group prejudice and to ratchet up the deliberations to a higher level of generality. Jurors wishing to be persuasive would now have to abandon arguments that depended on the particular prejudices or perspectives of their own kind. Their arguments would have to resonate across group lines.

"I say "his own" advisedly here because the common law's disqualification of women as jurors was almost total. The issue of gender discrimination in jury selection will be taken up later in this chapter.
More recently, courts have begun to sever the connection between the deliberative and representative features of the jury to justify the cross-sectional jury in terms borrowed from the world of interest group politics. Cases and law reviews are full of language about the mythical nature of impartial deliberation as the common law conceived it and about the ubiquitous presence of subtle bias embedded in group identity in America. The new purpose of the cross section becomes to give voice or representation to competing group loyalties, almost as if a juror had been sent by constituents to vote their preferred verdict. Such a description of the representation we expect from jurors might explain why we call the jury a democratic institution. But it is a vision of democracy so tied to different groups voting their different interests that it cannot inspire confidence in the jury as an institution of justice. This is the predicament we find ourselves in today.

The debate over forging representative juries is important in its own regard. But it also joins the broader debates about the meaning of justice in a multiethnic society. On one side of this debate stand those who hold fast to the ideal of a color-blind Constitution and a world in which race, sex, and national origin are irrelevant to legal rights and responsibilities. On the other side are those who argue that justice requires more than prohibiting discrimination, that it requires affirmative results. Those on the latter side stress that democracy does not reach its ideals if blind procedures leave significant groups underrepresented in our schools, police forces, and elected and appointed offices. Beyond ending discrimination, they impose upon government and government-assisted programs an obligation to achieve representation for minority and other groups in proportion to their numbers in the population.

These arguments over group-blind versus group-conscious assignments spill over into the world of the jury. The leading question is whether we have democratized jury selection by accomplishing the so-called negative goal of not discriminating. Or does the principle of the cross-sectional jury go beyond traditional color-blind norms, to impose on jury commissioners the affirmative duty to achieve demographic balance on the jury rolls? The difference between these two approaches is crucial. In the first, it does not matter, for example, what race jurors are; justice is satisfied so long as selection procedures make all persons equally eligible for jury duty. In the second, “proportional representation” view, an all-white jury cannot possibly do justice to a black defendant, black victim, or black civil litigant (or vice versa) no matter how color-blind the procedures are for selecting the jury.

In 1992 two trials, a continent apart, did much to spawn cynicism about the capacity of jurors to deliberate across racial lines. First, in the Crown Heights section of Brooklyn, violence erupted between African-Americans and Jews in 1991 after a car escorting a Hasidic rabbi struck and killed a four-year-old black child. The violence left Yankel Rosenbaum, a visiting Hasidic student, dead. Lemrick Nelson, Jr., a black teenager, was arrested for the murder, on the strength of the dying Rosenbaum’s identification of his assailant and the fact that the murder weapon, a knife, was found in Nelson’s possession. Nonetheless, in what many regarded as a verdict of racial loyalty, a jury of six African-Americans, four Hispanics, and two whites acquitted Nelson of all charges.

Meanwhile, in Los Angeles, many drew the same despairing conclusion about juries and racial justice from the notorious failure of a state jury, which included no African-Americans, to convict four Los Angeles police officers of beating Rodney King. The “universal assumption was that ten whites, one Asian, and one Hispanic could not fairly decide a case in which white police officers were accused of beating a black man, or at least that a verdict of acquittal rendered by such a jury could never be accepted as fair.”

What the King and Crown Heights cases did to spark cynicism about race-conscious juries the 1994 Menendez verdicts did for gender-conscious juries. Erik and Lyle Menendez were jointly tried for the murder of their parents before separate juries hearing evidence admissible only against each brother. Their defense was sexual abuse by their father. Both juries deadlocked, but the jury for Erik Menendez apparently split along sexual lines, with six women holding out for voluntary manslaughter and five of the six men voting first-degree murder (the sixth came in for second-degree murder). Media accounts stressed that the split “was not a.

coincidence” but was typical of the difference between “victim-sensitive women” sympathetic to sexual abuse charges and “cold-blooded men” more impressed by the brothers’ money motives to murder. Moreover, the six women on Erik Menendez’s jury portrayed the men as “sexist,” “homophobic,” and incapable of entering into arguments with women. The message was clear—on real juries, men and women filter the evidence through different preconceptions, even different prejudices.

The cynicism prompted by the Crown Heights, King, and Menendez trials was unfortunate. I acknowledge the many empirical studies showing that race especially, but other demographic factors as well, influence jurors. But just because jurors start from different places does not mean that they are doomed to deadlock; in fact, only about one in twenty juries fails to reach a unanimous verdict. Nor do the empirical studies show that jurors are so captivated by narrow group loyalties that they typically vote in blocs, with conversation powerless to change views and deliberation a meaningless sideshow. Indeed, research indicates that “when jurors of different ethnic groups deliberate together, they are better able to overcome their individual biases.”

From personal experience as an assistant district attorney, I can add my own testimony that jurors cross demographic boundaries to reach unanimous verdicts in cases every day. The crossing is far from perfect, and in some areas—notably, death penalty cases—a breakdown in color-blind justice continues to haunt the system.

But it would be wrong to ignore the considerable progress American juries have made from the openly bigoted deliberations reported for all-white juries of the 1950s to sour on continued efforts to devise a jury system that defines our common values, not just our different interests. The aspiration for jury behavior may outstrip the reality, but it is still an aspiration within our reach.

The story of how American society has struggled, failed, forgotten, and struggled again to create representative juries is a long one, and I turn to it now. My purpose is to defend the rise of the cross-sectional ideal insofar as it speaks to enriched deliberation across group lines and to criticize it insofar as it recommends mere proportional representation for group differences.

*Chapter 6 will take up the difficulties of juries deliberating on death.

JURY SELECTION AND THE CROSS-SECTIONAL IDEAL

JURY SELECTION PRIOR TO THE CROSS-SECTIONAL IDEAL: THE CASE OF THE ALL-WHITE JURY

In 1880 two cases came before the Supreme Court involving black men convicted of murder by all-white juries. In the case of Strauder v. West Virginia, exclusion of blacks from the jury was mandated by a state law restricting jury service to “white males.” In the case of Virginia v. Rives, Virginia law itself did not discriminate against blacks as jurors, but the actual pool of persons from which the jury for Burton and Lee Reynolds was drawn included no blacks. And it also appeared that no blacks had ever served on a jury in that county “in any case . . . in which their race had been in any way interested.” In deciding the Strauder and Rives cases, the Supreme Court distinguished between them in ways that still influence the course of jury selection.

On one level, the Court distinguished the cases in terms of the familiar contrast between de jure and de facto discrimination. The defendant Strauder proved that the absence of blacks from his jury was attributable to the deliberate design of the state and not to chance. For the majority of the Court, such legal discrimination was incompatible with the Fourteenth Amendment’s guarantee of equal protection of the laws to black citizens. By contrast, the Reynolds defendants in Virginia failed to convince the Court that the absence of blacks from their jury was due to a deliberate intent on the part of the state to exclude blacks. On its face, Virginia law made citizens between the ages of twenty-one and sixty eligible for jury duty, without regard to race. The only evidence cited to prove that state officials administered the law in a discriminatory fashion was the fact that no black persons were available to be selected as jurors in the Reynolds case or in any case in which their race was an interested party. But the 1880 Court was not yet prepared to treat such results as conclusive proof of an intent to exclude blacks.

This was no doubt a stingy evidentiary decision by the Court that immediately defanged Strauder’s otherwise biting condemnation of de jure exclusion of blacks from juries. Still, even if one granted the possibility that the all-white jury in Virginia was the result of nondiscriminatory selection procedures, this would not have decided the Rives case. For the defendants’ complaint was that they suffered prejudice from having to defend themselves before an all-white jury, no matter whether the whiteness of the jury came about through chance or design. They alleged “that
a strong prejudice existed in the community of the county against them, independent of the merits of the case, and based solely upon the fact that they are negroes, and that the man they were accused of having murdered was a white man.” On account of this prejudice, “they could not obtain an impartial trial before a jury exclusively composed of the white race.”27

As a remedy, the defendants moved prior to their trial to have the panel of available jurors modified so that it would be one-third black. Such a motion, the Supreme Court rightly noted, went beyond a Strauder-like claim for neutral procedures in selecting jurors. The motion for a jury that was one-third black was premised on the existence of an affirmative right to have blacks actually included on the jury (that is, to have blacks represented in rough proportion to their population in the county). In other words, the focus of the defendants’ motion was on whom the jurors were, not on how they came to be there.

The Virginia defendants were asking for a variant of the common-law mixed jury—a jury composed half and half of peers of both parties to a case. The mixed jury had enjoyed a long and ancient history, dating back at least to thirteenth-century England and still alive in the United States at the time of the Rives case.*

Typically, the right to a mixed jury was extended to marginal groups that lacked full legal equality in a society and who therefore could not easily be swept into a homogenized concept of trial by one’s peers. One of the oldest examples of the mixed jury was the English Crown’s requirement that Jews be present on the jury deciding lawsuits brought by a Christian against a Jew. More generally, the Crown sought to attract alien merchants to the realm by guaranteeing them trial by a jury of six aliens and six citizens.28

Understood against this background, the Virginia defendants’ motion for a jury that was one-third black was a claim that society was so cleaved along racial lines that the jury had to be also. But the Supreme Court emphatically rejected the implied analogy between the legal status of blacks and aliens. Aliens might need the device of a mixed jury because they themselves were not citizens legally entitled to be jurors. But the whole point of the Civil War amendments, according to the Court, was to abolish those forms of discrimination that made blacks legal aliens in their own state. Blacks were now eligible to be on the jury, and Virginia had recognized that eligibility. Because this was so, a “mixed jury [was] not essential to the equal protection of the laws.”29

But why was the Court so opposed to any concept of proportional representation for the races on the jury? After all, if one started with Strauder’s refreshing acknowledgment of the depth of racial division in 1880, it would seem to follow that there was no such thing as an impartial all-white jury, no matter how fairly the particular whites were chosen. But this was exactly the skeptical conclusion, implicit in the idea of a mixed jury, that the Court staved off in Rives. In Strauder, the Court saw itself serving the traditional ideal of impartial justice across racial lines, by insisting that the state no longer deliberately pack the jury with members of only one race. West Virginia was not content to be neutral as to the race of jurors. It openly made white skin a qualification, thereby signaling to jurors that the state expected them to judge black defendants as their inferiors. By ending such racially discriminatory selection procedures, the Court was doing no more than forcing the state to practice the theory that justice is color-blind.

But if the Court were to order the remedy of a jury that was one-third black, it would be implicitly abandoning the ideal of color-blind justice. It would be acknowledging that racial prejudice was so deep that the only solution was to represent it—to include blacks on the jury so they would counterbalance the prejudices of whites. The significance of Virginia v. Rives was the Court’s adamant refusal to admit that racial justice required such a racially conscious jury.*

*In a companion case to Rives, Supreme Court Justice Stephen Field expressed that refusal as follows: “The position that in cases where the rights of colored persons are concerned, justice will not be done to them unless they have a mixed jury, is founded upon the notion that in such cases white persons will not be fair and honest jurors. If this position be correct, there ought not to be any white persons on the jury where the interests of colored persons only are involved. The jury would not be an honest or fair one, of which any of its members should be governed in his judgment by other considerations than the law and the evidence, and that decision would hardly be considered just, which should be reached by a sort of compromise, in which the prejudices of one race were set off against the prejudices of the other.” Ex Parte Virginia, 100 U.S. 339, 369 (1880) (Field, J., dissenting).
RACIAL DISCRIMINATION AFTER
STRAUDER: THE ELITE JURY

Strauder's promise to end racial discrimination in jury selection proved stillborn. From 1880 to 1909, cases steadily came before the Supreme Court in which black defendants throughout the South drew the Court's attention to the fact that the Southern jury remained de facto all white. But, with alarming regularity, the Court invoked the authority of Virginia v. Rives to hold that the mere absence of blacks from a jury did not establish an intent to discriminate on the basis of race. Some typical cases include the following:

- In 1896, a black man indicted by an all-white grand jury in Washington County, Mississippi, for the murder of a white man complained that though there were “7000 colored citizens competent for jury service in the county . . . and 1500 whites qualified to serve as jurors . . . there had not been for a number of years any colored man ever summoned on the grand jury of said county court.” The Supreme Court's response to this was only to say that “these facts, even if they had been proved and accepted, do not show that the rights of the accused were denied by the Constitution and laws of the state.”

- In 1903, a South Carolina black man appealed his murder conviction on the grounds that the grand jury indicting him was all white, even though blacks accounted for four-fifths of the population and of the registered voters in the county. The Supreme Court's decision fit the pattern: the mere disparity between the racial composition of the county and the racial makeup of the jury was not evidence that the state was purposely excluding blacks from the jury.

- The story continued in Texas in 1906: although the county was one-fourth black, the Supreme Court found no evidence of a purpose to discriminate just because the grand jury indicting a black defendant was all white.

By 1909, the Court's record of rebuffing equal protection challenges to jury selection methods was so unbroken that cases simply stopped coming to the Court's way on the subject. For an entire generation, the Court remained silent on jury selection. Then, in 1935, the Court reentered the fray in a more enlightened posture. In that year, for the first time, the Court looked beyond the face of the law and ruled that defendants could make out a prima facie case of discrimination through evidence of “long-continued, unvarying, and wholesale exclusion” of members of their race. In the particularly odious case before it, the Court set aside a black teenager's conviction of rape by an all-white jury, relying on testimony from some of the county's elderly lifelong residents that no one could remember a black ever serving as a grand or trial juror in either the county where the defendant was indicted or the county where he was eventually tried. County officials' mere recitals that they did not consider race in selecting jurors were not sufficient to overcome the presumption that only discrimination could account for the absence of blacks, especially because the evidence in one county further showed that the abbreviation “col.” appeared next to the names of all black males on the jury list.

This new “systematic exclusion” theory marked progress in putting teeth back into Strauder, but it came nowhere close to ending the era of lily-white juries in the South. Jury scholar Jon Van Dyke estimates that, from 1935 to 1975, the Supreme Court decided on average one case per term regarding discriminatory jury selection, usually ruling in favor of the challenge. But the steady stream of cases requiring reversal indicated that, at ground level, the discrimination continued. A large part of the problem was that jury commissioners were under no affirmative obligation to make jury lists representative of the population, and so many kept on with attempts to fob off as coincidental the racial disparities in their jury lists. The best the courts could do, under the systematic exclusion theory, was to review cases on a one-on-one basis, to see whether the underrepresentation was of such a magnitude as to suggest intentional discrimination.

But it took egregious patterns of fact to satisfy the systematic exclusion standard of proof. In 1938, the Court found discrimination when no blacks had been summoned for grand or petit jury service in one Kentucky county from 1906 to 1938, even though eight thousand of the county's population of forty-eight thousand were black. In 1939, the Court found blacks were systematically excluded from jury service in a Louisiana parish (county) for twenty years running. In 1947, the Court reversed a Lauderdale County, Mississippi, death penalty conviction of a black man sentenced to death by an all-white jury; out of an adult black population of 12,511 in the county, only roughly 25 blacks met the jury requirement of being a qualified elector, and no black had served on a county jury in the previous thirty years. In 1953, the Court found that
Fulton County, Georgia, commissioners drew names of jurors out of a box, but only after printing names of prospective white jurors on white tickets and names of prospective black jurors on yellow tickets.42

One common defense offered by jury commissioners when they were questioned as to why blacks were underrepresented on their jury lists was that it was a legitimate side effect of recruiting blue-ribbon juries.43 Consider this 1959 episode from the federal district court in Georgia. In that year, federal jury commissioners added 559 new names to the court's pool of qualified jurors. Only 4 of the newly approved jurors were black, leaving the total percentage of blacks on the jury list at 5.9 percent in a district where 34.5 percent of the population was black. When asked to account for such a dramatic underrepresentation of blacks in the jury pool, one jury commissioner pled ignorance: the problem was that neither he nor any of the "key men" in the community with whom he consulted happened to know many qualified blacks personally.44

There was a second, more sinister reason why the blue-ribbon ideal so readily permitted the state to discriminate against blacks. The same jury commissioner who pled ignorance also testified that,

unfortunate as it may be, I think the Negro community . . . does not qualify on the very grounds that we set up, of intelligence, integrity and ability to serve on those grounds alone. . . . I think anybody who reads the papers and knows about the educational levels of our State would have to admit, reluctantly if he wants, that there is no question but that there . . . aren't numerically as many of them that are qualified in terms of the same educational standards.45

It should come as no surprise that juries selected through prejudice deliberated with prejudice. In the 1950s, the University of Chicago undertook a massive empirical study of the American jury. In regard to black defendants, the study suggested two conclusions about jury verdicts. First, all-white juries had trouble taking seriously violence within the black community, especially within the black family. They treated black defendants in such cases as parents treat children, dismissing their crimes as "what one expects from a Negro."46 Second, all-white juries reacted with severity to black defendants charged with violence against whites, convicting them in disproportionate numbers.47

In his classic study of American racism, the Swedish sociologist Gunnar Myrdal singled out the all-white jury for giving racial prejudice its safest harbor in the South. The jury system, Myrdal noted, was a form of "extreme democracy" that worked tolerably for cases involving only members of the majority group, which "controls the court. . . . [But it] causes . . . the gravest peril of injustice in all cases where the rights of persons belonging to a disfranchised group are involved." Myrdal found that grand juries refused to indict "when the offender is a white man and the victim a Negro." It is notorious," he added, "that practically never have white lynching mobs been brought to court in the South, even when the killers are known to all in the community and are mentioned by name in the local press." By contrast, "when the offender is a Negro, indictment is easily obtained and no such difficulty at the start will meet the prosecution of the case."48

Two of the most infamous cases of all times bear out Myrdal's portrait of the all-white jury's extreme version of democracy. On March 25, 1931, two groups of young drifters, one white and one black, were riding a freight train across northern Alabama. A fight broke out, ending with all but one of the whites thrown off the train. By the time the train pulled into the depot at Paint Rock, a sheriff and posse were waiting. The posse rounded up nine black youths from the forty-two car train, and also came across two young white women, wearing men's caps and overalls. When one woman said she had been raped by the blacks, the nine blacks were whisked off to Scottsboro, indicted within a week and brought to trial for their lives before two weeks had passed. Eight of the nine "Scottsboro Boys" were found guilty and sentenced to death by all-white juries in four separate trials lasting less than a day each (a mistrial was declared for the ninth defendant, a thirteen-year-old, when several jurors held out for the death penalty even though the prosecutor sought only life imprisonment). Although the Scottsboro Boys were indigent and illiterate, the trial judge made no serious attempt to appoint counsel for them, first appointing all members of the local bar to assist them and then placing the defense in the hands of a lawyer from Chattanooga, Tennessee, who had met the defendants only minutes before the first trial began. It took the intervention of the United States Supreme Court to stay the Scottsboro executions and grant new trials with adequate representation. Subsequently, one of the two women admitted to lying about being raped.49

The Emmett Till case is perhaps the single worst instance of the all-white jury's quickness to acquit whites charged with crimes against blacks. Fourteen-year-old Till was shot through the head and dumped in the Tallahatchie River with a fan tied to his neck, by two men who
thought Till had talked freshly to the wife of one of the men. At trial, Moses Wright identified the two defendants as the men who came to Wright's house and kidnapped Till the night of the murder. But it took the all-white jury only one hour and seven minutes to acquit the defendants. Said one juror, "If we hadn't stopped to drink pop, it wouldn't have taken that long."50

SEX DISCRIMINATION IN JURY SELECTION
The history of discrimination against women in the selection of juries runs deep into the common law. Sir William Blackstone thought it obvious that women were disqualified from jury service proprio defectum sexus ("on account of the defect of sex").51 But the common law did impanel a "jury of matrons" when a possible pregnancy affected an inheritance claim or the scheduling of a prisoner's execution. Loath to hang a pregnant woman, authorities turned to all-female panels to certify that the pregnancy was real rather than feigned.52

Early colonial records from Virginia make clear that a jury of matrons was known in the New World. In 1633, Margaret Hatch was "sentenced to be hanged; pleads pregnancy; and jury of Matrons find 'her not pregnant.'" In 1679, in Accomack County, an infant "bastard child" was found dead as a result of circumstances indicating foul play. The coroner's inquest jury was composed entirely of women, who watched for any telltale changes in the corpse's appearance when each of three suspects touched it.53

Into the eighteenth century, witchcraft proceedings also occasioned another exceptional circumstance where all-female juries or committees were charged "to inspect and search [the defendant's] body whether any suspicious signs or marks did appear that were not common or that were preternatural."54

Outside of such special issues calling for so-called women's wisdom, or a woman's perspective, females remained disqualified from jury service in the colonies and then the United States until late in the nineteenth century. The suffrage movement included jury eligibility among the rights of political participation it sought for women.55 The movement's first, momentary success occurred in 1870 when the Wyoming Territory granted women the right to vote and hold office; a few local trial courts thereafter permitted women to serve on juries because, theoretically, voter eligibility and jury eligibility went together.56

The very first jury to include men and women appears to have served in Laramie City, Wyoming, in March 1870.56 In their history of the suffrage struggle, Elizabeth Cady Stanton, Susan Anthony, and Matilda Joslyn Gage reported that newspapers from New Orleans to Philadelphia criticized the Wyoming example as defying the "laws of delicacy," and threatening "all distinctions of sex . . . with swift obliteration."57 A rhyme captured the counterreaction: "Baby, baby, don't get in a fury; Your mamma's gone to sit on the jury."58 Women were needed at home, women were too delicate for the vulgar world of trial testimony, women were too emotional to abide by the disciplines of evidence: all these rationales stood behind the barrier against women on juries.59 By September 1871, women disappeared from Wyoming juries.60

In 1898, Utah became the first state to break the sex barrier and authorize women to serve on juries. Washington followed in 1911, Kansas in 1912, Nevada in 1914, California in 1917, and Michigan in 1918.61 The ratification of the Nineteenth Amendment in 1920 spurred additional states to qualify women for jury service, but it was not until the 1940s that a majority of the states made women eligible as jurors.62

But making women legally eligible for jury duty was not the same as treating them equally. As late as 1975, several states continued to run a two-track system of jury selection. Men were drafted but women had to volunteer.63 The different recruitment procedures for the sexes was justified in terms of women's "special responsibility" for the family.64 As recently as 1961, Supreme Court cases approved of such self-exemption programs for women, even if they resulted in virtually all-male jury lists.65 Not until 1975 did the Constitution begin to definitively require that the jury pool represent women as equally as men.66

As with exclusion of black jurors, the absence of women on the jury marred the impartiality of deliberations, especially in cases involving rape and domestic violence. The University of Chicago Jury Project found that the 1950s, when rape cases were decided by predominantly male juries, was an era of leniency toward rape defendants. In trials of aggravated rape, involving violence extrinsic to the act of rape itself, juries
were willing to convict. But in cases of so-called simple rape, jurors agreed on the “contributory fault” of the victim or her “assumption of risk” and acquitted defendants of rape charges in thirty-seven of forty-two cases studied (although in nine of these cases the jury did convict of a lesser charge). In explaining why juries acquitted when they would have found the defendant guilty of rape, presiding judges sounded similar themes. One speculated that the jury “probably figured the girl asked for what she got,” after being raped following a beer-drinking party; another judge thought the jury unwilling to find rape “where [a] woman involved went to public dance and was picked up by defendant.”

There were also telltale signs of sex-biased deliberations in regard to women as defendants. In 1957 Gwendolyn Hoyt bludgeoned her husband to death with a baseball bat, following a failed attempt to save their marriage. Florida law at the time still exempted women from jury duty unless they volunteered. The result was that women constituted only 0.1 percent of the jury list, even though they accounted for 52 percent of the county’s population and 40 percent of registered voters. Predictably, Hoyt’s jury included no women, and she was convicted of second-degree murder.

In her appeal to the Supreme Court, Hoyt argued that “the nature of the crime of which she was convicted peculiarly demanded the inclusion of persons of her own sex on the jury.” This was so because her defense at trial was temporary insanity brought on during a fight with her husband over his infidelity and his rejection of her efforts at reconciliation. Women jurors, Hoyt argued, would have been more understanding or compassionate than men in pondering her insanity defense.

The Supreme Court dismissed Hoyt’s complaint as “misconceiv[ing] the scope of the right to an impartially selected jury.” The right did not include “a jury tailored to the circumstances of the particular case, whether relating to the sex or other condition of the defendant, or to the nature of the charges to be tried.” The Court went on to affirm the right of Florida to grant exemptions to women on account of their special responsibilities at home, even if this left defendants like Hoyt with all-male juries. Before the Supreme Court would overrule Hoyt and end open discrimination against women in jury selection, the ideal of the cross-sectional jury would have to be promoted.

### The Rise of the Cross-Sectional Ideal

In the 1940 case *Smith v. Texas*, the Supreme Court for the first time referred to the need to make the jury a “body truly representative of the community.” Such a phrase suggested a reform of jury selection procedures going beyond a simple ban on racial discrimination. It suggested what *Virginia v. Rives* had rejected—inclusion of blacks on juries in proportion to their numbers in the eligible adult population. And it suggested that this right of representation extended not just to the races but to all groups in the community.

But the looming battles over exactly what it meant to revamp the jury into a representative body had not yet come into focus. The concern of the *Smith* court was still with racial discrimination of a familiar, if abysmal, sort. On its facts, the *Smith* case once more presented the Court with clear evidence that “chance and accident alone could hardly have brought about the listing for grand jury service of [only five] negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service.” It was only in this context that Justice Hugo Black, writing for the Court, could say almost in passing that it was “part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.”

So long as what was meant by a “representative” jury was a jury selected without discrimination, the emerging ideal could coexist with the traditional practice of using supposedly elite juries. For instance, in 1942 a committee of federal judges issued a report on the federal jury system, detailing instances of discrimination and calling on courts to impanel more racially representative juries. But the same report explicitly endorsed the key man system, noting that “nothing in the concept [of representative juries] opposes the tradition of federal courts that jurors should be men of recognized intelligence and probity.”

However, these early attempts to stave off the tension between elite jurors and representative jurors proved short-lived. Soon debate spilled over from the legal periodicals to the popular journals concerning what kind of juror was wanted. To federal judge Jerome Frank, the choice was
obvious: we could have a democratic jury or we could have a knowledgeable jury but we could not have both. Frank therefore urged reforms that would make the jury less representative of the community. Taking up his cry, a whole school of elitist critics of the concept of a representative jury arose during the 1940s and 1950s, urging that jurors be carefully screened by being subjected to newly available psychological tests for intelligence and lack of prejudice.

In the midst of this debate, the Supreme Court hesitated about how far to push the mass democratic implications of the representative ideal. For instance, in 1946 and 1947 two cases came before the Court raising the issue of whether a jury pool had to fairly represent the laboring population. In the case involving a federal jury, the Court invoked its inherent supervisory power over the federal courts to prohibit one court's practice of deliberately excluding all persons known to work for a daily wage from the jury list, on the assumption that jury service would be a financial hardship for them. No matter how well intentioned the exclusion, the Court feared that such an open departure from the cross-sectional ideal “would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status.” It would “breath life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged.” Moreover, the Court was emphatic that “jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid $3 a day may be as fully competent as one who is paid $30 a week or $300 a month.”

But when it came to reviewing the lack of representation of laborers on a state jury the following year, the Court refused to apply the representative ideal. At issue was the long-standing practice in New York of impaneling so-called special juries in cases of unusual intricacy, importance, or publicity. Special jurors were chosen after personal interviews that were alleged by defendants to imbalance the jury against fair representation of manual laborers. In the particular case before it, the Court refused to find that such underrepresentation had been proven. But even if it had been proven, the Court emphasized that the Constitution did not prohibit New York from preferring elite over representative jurors:

All were subjected to the same tests of intelligence, citizenship and understanding of English. The state's right to apply these tests is not open to doubt even though they disqualify, especially in the conditions that prevail in New York, a disproportionate number of manual workers. A fair application of literacy, intelligence and other tests would hardly act with proportional equality on all levels of life.

Matters stood in this mixed position until the civil rights movement of the 1960s caught up with the jury. As we saw earlier, Congress formalized the cross-sectional requirement for federal juries in the Jury Selection and Service Act of 1968. Abolishing the elite jury and the key man selection system, the law mandated random selection procedures, beginning with the use of names from voter registration lists or lists of actual voters. These lists could be supplemented with other sources whenever their exclusive use failed to serve the overall policy of achieving proportionate representation on the jury rolls for all “distinct,” or “cognizable,” groups in the community.

Under the new law, a jury plan did not meet the test for cross-sectional equality merely because it was nondiscriminatory. The law's novelty was that government now bore the additional, affirmative obligation to include members of cognizable groups, in proportion to their percentage of the voting population or population registered to vote. Federal jury selectors were to start with the voter registration list or actual voter list for their judicial district and then pick an “interval number” (arrived at by calculating what percentage of voters on the source list would be needed for jury duty over a given period of time). Next, they were to choose names from the assigned intervals and place them on the master jury wheel for the jurisdiction. Questionnaires were then to be mailed to a random sample of people whose names were on the master wheel, to determine whether these persons were qualified for jury service.

At this stage of selection, the new congressional law removed all discretionary authority from the jury commissioners. All persons returning the qualification form were deemed qualified unless it appeared from the form or other competent evidence that the person was (1) not a U.S. citizen eighteen years of age who has resided in the judicial district for at

A cognizable group is any “recognizable, distinct class, singled out for different treatment under the laws, as written or applied.” Castanada v. Partida, 430 U.S. 482, 494 (1977). Courts have found cognizable groups to include those based on race, sex, national origin, religion, and economic status. Cf. United States v. Sanchez-Lopez, 879 F. 3d 541 (9th Cir. 1989) (Hispanics); United States v. Black Bear, 878 F. 2d 213 (8th Cir. 1985) (Native Americans). The young have not been found to be a cognizable group for jury selection purposes. Barber v. Ponte, 772 F. 2d 962, vacated, 772 F. 2d 996, 1000 (1st Cir. 1985), overruling United States v. Buxera, 420 F. 2d 564 (1st Cir. 1970).