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New York University School of Law

September 25th, from 4-7 pm
Lester Pollock Room, FH, 9th Floor

Colloquium in Legal, Political, and Social Philosophy

Conducted by

Liam Murphy and Samuel Scheffler

Speaker: Melissa Schwartzberg, NYU
Paper: The Impartial Jury and Democracy

Colloquium Website: http://www.law.nyu.edu/node/22315

The impartial jury and democracy

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I want to peer into the relationship between democracy and impartiality, specifically to ask what we mean when we ask democratic institutions to judge impartially. Surely there are many institutions expected to decide impartially, such as social welfare agencies tasked with determining eligibility for benefits, though the jury is the most obvious among them. So, if we can first ascertain what it might mean for a jury to be impartial, then perhaps we can get some traction on what it would mean for other democratic actors and institutions to decide impartially.

But here we have a puzzle. If we ask "what is an impartial jury?", one plausible response is that individual jurors must be free from bias, understood as willing to decide the case strictly on the basis of the evidence presented; a showing of bias on the part of a prospective juror would typically authorize a challenge for cause. We will refer to this form of impartiality, freedom from bias or "neutrality," as *disinterest*. However, although disinterest on the part of individual jurors is a necessary condition for an impartial jury, in the United States it is not a sufficient one. A second component of the impartiality guarantee, at least since *Taylor v. Louisiana* [419 U.S 522 (1975)], is the jury's *representativeness*. The relevant section of the Sixth Amendment (the jurisprudential focus of this paper) reads as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed…" For a petit jury to satisfy the condition of impartiality, either at the federal or state level, it must be drawn from a pool that reflects a "fair cross-section" (FCS) of the community, and it must be insulated from significant distortions to

the cross-section that might be generated through peremptory challenges (rejections without a required reason). To pass constitutional muster under the Sixth Amendment and Fourteenth Amendment, the jury pool must reflect the wider community from which the petit jury will be selected. The cross-sectional requirement applies to the pool, or venire, from which civil juries and grand juries are selected as well, not merely the criminal jury; all must resemble in significant respects the wider community from which they are drawn.

From a conceptual vantage point, though, the relationship between the two conditions of impartiality poses a puzzle. After all, if individual jurors satisfied the condition of *disinterest*, whether they satisfied the second condition – whether they are *representative* – would seem to be largely moot. The former condition suggests that the sole relevant consideration would be whether the agents were capable of judging strictly according to the evidence presented. The impartiality of a judge in a bench trial generally does not hinge upon that judge's having been selected from a pool representing a fair cross-section, nor do we usually think that does representativeness in a descriptive sense ought to condition the selection of a panel of judges.[1] So

[1] See Minow (1992), though, who raises questions about the ideal of a judge as "stripped down like a runner" (in the evocative words of Clarence Thomas during his confirmation hearings) or as "enriched by experience." Minow cites Fuller, who cautioned against the partiality associated with an arbiter with a narrow range of life experience; he argued that a sailor accused of threatening someone with bodily harm before three-judge panel in Germany was disadvantaged by the fact that two of these judges had "spent their lives in genteel surroundings far from the waterfront." (Fuller 1978, 391) Justice Sonia Sotomayor argued in the context of her famous statement that "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that light," that … "The aspiration to impartiality is just that – it's an aspiration because it denies the fact that we are by our experiences making different choices than others. Not all women or people of color, in all or some circumstances or indeed in any particular case of circumstance but enough people of color in enough cases, will make a difference in the process of judging." I take Sotomayor's argument to be not that representativeness on the part of the judiciary is instrumental to impartiality, which is a questionable ideal, but to some broader conception of justice rooted in wisdom.

how might we explain the role – if any – that representativeness plays, or should play, in the impartiality of the jury? And, at a more general level, how might we think about similar conditions for democratic institutions that aspire to impartiality, whether in the form of administrative commissions or citizens' assemblies?

It might seem that the answer to this question is an easy one, at least within the jury. A plausible explanation of the fair cross-section guarantee would invoke the shameful history in the United States of racial exclusions from jury service, including through the use of peremptory challenges. Jury selection has always been a tempting domain of control over criminal justice by prosecutors and other state actors who might be motivated by racial animus. As such, constitutional jurisprudence has disabled certain strategies of discrimination in jury selection by ensuring that the pool has not been constructed through deliberate exclusions, and that the selection of a petit jury from that pool has not been shaped through the racialized use of peremptory challenges. All defendants deserve to have trials conducted before juries free from such taint, and all adult citizens should be eligible to serve on juries. But it is especially worrying when the defendants themselves are members of racial minorities, who might reasonably believe that they are unlikely to receive a fair hearing, regardless of individual jurors' avowals that they can judge impartially. One might further argue that public confidence in verdicts would be enhanced through demographic diversity: the specter of an all-white jury convicting a Black defendant would seem at odds with the publicity requirement, that justice must be seen to be done.

There surely is much validity to these explanations, despite the fact that the landmark cases through which the FCS guarantee emerged originally focused on gender-based, rather than race-

based, exclusions.[2] Note, however, that they do not seem to speak to the value of impartiality, at least not as understood as disinterest. Rather, the reason for ensuring a representative jury would seem to be at least partially on the grounds of the benefits of social proximity, something more closely akin to the concept of a jury of one's peers. This does not invoke freedom from bias, but rather the benefits of understanding, or even sympathy, borne from shared status or experience. As we will discuss, if necessarily briefly, this is a notion tightly linked to the "vicinage" requirement, that the jurors should be drawn from the "state and district wherein the crime shall have been committed." Put provocatively, the common-law jury was designed for *partiality* in fact-finding, rather than impartiality.

As we will see, the value of an impartial jury was first invoked in response to concern about jury-packing on the part of Crown actors, and arose for similar reasons under the Sixth Amendment. "Impartiality" served a remedial function against state partiality, and against concerns about certain forms of partiality associated with community-based judgment. But by bringing the socially proximate into the activity of fact-finding, the jury itself operated to *balance* partiality; it was an institution that developed in such a way that it was designed to be sympathetic to defendants, both civil and criminal. The genealogy of the jury helps to explain why balanced partiality, rather than impartiality, better characterizes the institutional function and operation of the jury – even if we continue to believe individual jurors can, and should, be disinterested. Sixth Amendment jurisprudence continues to reflect this genealogy. But if even jury impartiality is better characterized as balanced partiality, it gives us reason to reconsider the conceptual and normative value of impartiality in characterizing other democratic institutions.

[2] Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri 439 U.S. 357 (1979)

As I am relying primarily on Sixth Amendment doctrine, the "impartial jury" – i.e., the jury as an institution - will be my primary focus, but throughout, I try to distinguish among the levels at which the argument intends to operate: the individual level ("juror"), the institutional level ("jury"), or the systemic level ("the criminal justice system"). Although I argue that balanced partiality, rather than impartiality, appropriately characterizes the design of the jury and at least some other democratic institutions, I do not insist here that impartiality as disinterest is unachievable or necessarily undesirable at the *individual* level, whether on the part of a juror or an administrator. There are good reasons to doubt that a juror who knew one of the parties well could render a disinterested judgment. Even if she were to swear that she could judge without drawing on her past experience with that party, there would be good reason for the opposing party, and the public as a whole, to be skeptical of this claim.[3] That said, there are also reasons to be worried about excessive, and potentially strategic, scrutiny of juror disinterest, particularly insofar as the institution is structured so as to remedy the effects of such partiality. It is also possible that impartiality may also be attractive at a *systemic* level, perhaps especially insofar as we conceptualize impartiality as a type of system-wide guarantees of equal protection under the law. But balanced partiality is, in general, a better way to characterize the jury, and plausibly other democratic institutions that rely on representativeness as a means of achieving impartiality.

A few additional caveats. First, this paper has little to say about impartiality as a moral matter. For instance, it does not speak to questions about whether partiality is morally permissible or required in certain contexts, or how an impartial moral agent ought to be

[3] Note, however, that the Supreme Court denied certiorari to a case in which a juror attended church with the mother of the decedent in a homicide trial (Justice Marshall and Brennan dissented), Porter v. Illinois 479 U.S. 898 (1986).

characterized.[4] It is true that in describing jurors in the genealogical section, and in objecting to certain forms of scrutiny and challenge in the concluding section, the paper does evince some skepticism as to the model of an "ideal impartial observer" and sympathy for some feminist critiques of impartiality in adjudication (e.g., Minow 1987; Resnik 1987). However, I largely bracket these questions, and for the bulk of the paper will assume that freedom from bias at the individual level is both achievable and that there are good reasons for insisting upon it, because I mostly want to focus on the puzzle of representation given disinterested jurors. There is also, of course, a robust literature in political philosophy on conceptions of justice as impartiality (notably, Barry 1995) and Rawls' use of the veil of ignorance in the original position as a device to enable second-order impartiality over the selection of the principles of justice (Rawls 1971). There is also a literature on justice as a remedial virtue, drawing on Hume via Sandel (Sandel 1982). Certain readers may also seek to draw parallels to Arendt's account of the impartial judgment of spectators, and of political judgment as representative thinking (Arendt 2006). Although it is possible that the arguments in this paper may eventually bear on those wider questions, my aim here is much narrower, analyzing the link between representativeness and impartiality within democratic institutions.

The paper proceeds as follows. Again, the first part is genealogical, designed to dispel the common view that the jury has always been tasked with rendering judgments impartially, and to bolster the claim that balanced partiality provides a superior explanation for the "impartial jury" clause. (Impatient readers who are willing to accept on faith that the early English jury was self-informing, and remained an institution designed to provide local knowledge, can skip this

[4] Although this is true, attendees of this colloquium will also immediately recognize this as a blatant attempt to avoid engaging Tom Nagel and Sam Scheffler on topics for which they are justly famous and I am basically incompetent; please take pity.

section.) The brief discussion of the framing of the Sixth Amendment then suggests that the language of an "impartial jury" was a late and strategic addition designed to combat concerns about the vicinage requirement. I then turn to the modern jurisprudence of the Sixth Amendment to address the key conceptual puzzle motivating this paper, the relationship between representativeness and impartiality. I focus on the case of *Holland v. Illinois* [493 U.S. 474 (1990)], which holds that the fair cross-section requirement is instrumentally valuable to impartiality, but characterizes impartiality in a way that is better described as balanced partiality. Drawing on *Holland*, I argue that the FCS requirement seeks to remedy three different problems associated with partiality (*sheriff*; *asymmetry*; and *confidence*); understood this way, how to explain the requirement that an impartial jury must be representative becomes significantly clearer.

Drawing on this analysis, the final sections of the paper look at other democratic institutions – notably, the Federal Election Commission and proposed citizens' assemblies – that rely on representativeness as an ostensible means to impartiality. I suggest that both may be better characterized as balancing partiality, though in different ways. I further argue that characterizing representativeness as a means to impartiality is typically unhelpful, insofar as it may keep us from distinguishing between forms of partiality that might threaten the functioning of the institution from those that might benefit it. The concluding section identifies a set of institutional reforms, to the jury and beyond, designed to help us draw such distinctions.

From the self-informing jury to the problem of partiality

Although today jurors' prior exposure to information about a crime or a lawsuit is often a bar to service, ostensibly on prejudicial grounds, medieval and early modern English jurors were self-informing, meaning that they were largely responsible for finding out the facts of the case on their own outside of court. This was a main reason why they were chosen from the surrounding area or "vicinage": put succinctly, the jury was chosen because of their relevant knowledge. This may seem surprising, particularly if one is familiar with Sir Edward Coke's famous claim in *Commentary Upon Littleton* that the juror ought to be "indifferent as he stands unsworn," often cited as a defense of juror impartiality (155b). But even Coke modified this claim in his later invocation of the vicinage requirement, "within which the matter of fact issuable is alleged, which is most certain and nearest thereto, the Inhabitants whereof may have the better and more certain knowledge of the fact" (193). Prior knowledge of the facts was no barrier to disinterest, even for Coke, writing in the early seventeenth century.

From the *Articuli super Cartas* (1300), jurors should be "next neighbors, most sufficient and least suspicious" (Bellamy 1998). Presentment jurors, the predecessor to the grand jury, could gather information from the surrounding area, but there is ample evidence that the jurors themselves could be victims of supposed crimes and their close relatives. (Musson 1997) Although trial juries did sometimes hear witnesses, jurors typically came to court with information about the case and the litigants. As the legal historian John Langbein has argued, "the medieval jury came to court not to listen but to speak." (Langbein 2003, 1170) Trial accounts from the thirteenth century provide ample details of juror testimony. A treatise from Bracton in the late 1220s or early 1230s indicates that although there were always concerns that

jurors might be motivated by animus, prior knowledge itself was not grounds for exclusion. Only in the most egregious cases of conflict would a juror be removed for cause; Bracton wrote that a justice can inform the indicted person that "if he suspects any of the twelve jurors he may remove them for just cause, and let the same be said of the [jurors of] the vills, as where there are deadly enmities between some of them and the indicted man, or there is a greedy desire to get land." (Bracton 403-06, cited in Klerman 2003, 133)

By the mid-fourteenth century, a defendant had the right to challenge the assignment of "presenting jurors," who had indicted him, to the trial jury. (Klerman 2003, 147; 25 Edw. 3, stat. 5, c.3). Though this constituted some check on bias, it also meant the twelve most knowledgeable members of the community would have been excluded, and it seems that the challenges were not consistently honored. By the mid-fifteenth century, the trial jury relied more on witness testimony than on the jurors themselves, in part because the expanded geographic range from which the jurors were drawn made them less likely to possess such knowledge. Yet the chief justice and constitutional theorist Sir John Fortescue, in defending the common-law jury of the time, argued that the civil law's system reliance on witnesses in fact made them susceptible to unchecked "depravity and wickedness" (Fortescue 2012, 30), relative to sworn jurors, and so the transition from jurors' own knowledge to the testimony of witnesses was not obviously considered an improvement in terms of impartiality.

Yet the agents associated with partiality identified throughout the medieval and early modern period were state actors, notably the despised sheriffs. Concerns about biased judgment rested less with the jurors themselves than with those who chose them, i.e., the sheriffs and justices of the peace. Sheriffs were susceptible to "laboring" on the part of litigants, efforts to install on the jury close relations of one of the parties. There were at least seven statutes enacted

between Edward III and Elizabeth I to control sheriffs' misdeeds. (Bellamy 1998) Even in an idealized description of juror selection, Fortescue highlighted the ways in which the sheriff's motivations were typically suspect. It was the responsibility of the sheriff to summon "twelve good men and lawful men of the neighborhood where the fact is alleged, who stand in no relation to either of the parties at issue." However, when the sheriff appeared before the justices and the parties with the names of those on the panel, "either party can challenge these … by saying that the sheriff made the panel favorable to the other party, that is, of persons not altogether impartial. If this exception is found true by the oath of two of the men selected," the justices could order a new panel from the county coroners. It is worth emphasizing that Fortescue characterized jurors as honorable, and as willing to disclose their connections to the parties. On his account, the problem lay instead with sheriffs, and with their corrupt selection processes.

Complaints about sheriffs and "jury packing" proved enduring. Throughout the seventeenth century, Parliament sought to enact laws to curb the tendencies of sheriffs towards partiality in the creation of panels, and to engage in other offenses to justices, such as accepting bribes from the wealthy to avoid service. Even after the Glorious Revolution, in 1696, an "Act for the Ease of Jurors and better Regulating of Juries" sought to address objections with respect to onerous demands for service and excessive delays. Here the blame was placed squarely on "the partiality and favor of sheriffs, the corruption of officers and many other evil practices."[5] In 1725, a widely circulated pamphlet proposed a revision of the freeholder books (with an increase in the property

[5] 'William III, 1695-6: An Act for the Ease of Jurors and better regulating of Juries. [Chapter XXXII. Rot. Parl. 7 & 8 Gul. III. p. 9. n. 1.]', in Statutes of the Realm: Volume 7, 1695-1701, ed. John Raithby(s.l, 1820), British History Online https://www.british-history.ac.uk/statutes-realm/vol7/pp148-151 [accessed 29 December 2024]. See also (Minow and Langevoort 1987)

qualification for service), and that the under-sheriff should write each freeholder's name on a scroll:

> which being put into a box, the judges to draw out, by lot, 48 freeholders, or more or less, according to the bigness of each county, under a severe penalty, and the whole number of them to be returned as the jury, in every cause, and their name to be again wrote on scrolls, and put into a box; and when the cause is called in court, then the associate in open court to draw out, by lot, to the number of twelve, and they to try the cause.

The author of this pamphlet said this would solve two problems of corruption, as it would "totally exclude" the under-sheriffs and prevent others from having an opportunity to bribe the jurors.[6] In 1730, Parliament adopted this proposal for selection by lot in "An Act for the Better Regulation of Juries" (sometimes known as "An Act Against Jury Packing"). Blackstone, a key source for the framers of the U.S. Constitution, took impartiality to be an affirmative benefit of selection by lot, as a means of countering "all partiality and bias, by quashing the whole panel and array, if the officer is suspected to be other than indifferent; and repelling particular jurors, if probable cause be shewn of malice or favour to either party."[7]

Given the contemporary salience of sortition as an impartial mechanism (e.g. Abizadeh 2021; Landemore 2020), as will be discussed shortly, it is important to emphasize the problem that the lot was introduced to solve. The lot removed the power of selection from the *sheriffs*, who were themselves primarily to blame for partiality in adjudication: they themselves

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[6] Eminent lawyer, and Attorney. Proposals humbly offered to the Parliament of Great-Britain and Ireland. For remedying the great charge and delay of suits at law and in equity. The seventh edition, with additions. By an eminent lawyer. Printed and sold by George Faulkner, in Pembroke-Court, Castle-Street, 1726. Eighteenth Century Collections Online, link.gale.com/apps/doc/CW0123826965/ECCO?u=new64731&sid=bookmark-ECCO&xid=ff8c1372&pg=36. Accessed 30 Dec. 2024. Hay (2014, at p. 317, f. 49) notes that the first two publications in 1707 did not include the lot proposals; six subsequent publications in the 1720s included them, as well as two in 1730.

[7] https://avalon.law.yale.edu/18th_century/blackstone_bk3ch23.asp

constructed the panel, the main source of corruption.[8] The jurors themselves might be susceptible to bribery, were their identity known in advance, but the desire to ensure their disinterestedness as such was not the primary reason for the introduction of lot. Nor was the aim to exclude forms of local knowledge; this was essential for fact-finding. Rather, the implication was that the burdens of participation had been inequitably distributed by corrupt sheriffs, who sought themselves to extract bribes from prospective jurors for evading service, or who often sought to construe the panel in a way that would be favorable to a particular party. Challenges to individual jurors could remove those who were too closely associated with the case. But the Parliamentary acts suggested that the main problem did not lie in the partiality of jurors as such, but the corrupt means of their selection. Crucially, this means that lottery - the signal institution tasked with producing impartial jurors - was introduced as a procedural check on deliberate and corrupt action by Crown actors: it was a remedial institution.

Recall that the aim of this historical excursus is begin to examine how representativeness could contribute to jury impartiality. As we will discuss, sortition *can* yield descriptive representation by producing a microcosm of a population; such representativeness itself is taken to be a means to impartiality. Yet this was not part of the original justification for its use on the jury, because the lot was introduced in tandem with revisions to restrict eligibility for service. To the extent that randomization was considered an improvement in terms of impartiality, it was because, by removing deliberate action from agents, it was able to "sanitize" the process from the bad – i.e., biased or partial – reasons that had previously governed juror selection (Stone 2011). Put differently, the lottery was not justified affirmatively, either in terms of its ability to

[8] A further problem was that the pool generated by the sheriff was so clearly inadequate that the jurors themselves were replaced by talesman.

promote disinterest or representativeness on the part of jurors themselves, but negatively, as a means of blocking certain strategies of partiality.

The US Constitution and the impartial jury

During the framing of the United States Constitution, debates over the inclusion of a right to a jury trial continued to rely on a conception of the jury that emphasized the value of social and geographic proximity as a means of protection for criminal defendants and for debtors against elite creditors. Article III, Section 2, Clause 3, provides a right to a jury trial in criminal trials; it does not invoke impartiality, but rather a form of a guarantee of vicinage: "such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed." It is well-known that the Constitution did not originally protect a right to a trial by jury in civil cases, one cause of opposition to ratification, leading to the Seventh Amendment (which I cannot discuss here). Less often noticed is that the *locus* of trials, both criminal and civil, was also central to the conflict between Federalists and Anti-Federalists, driving in no small part the adoption of the Bill of Rights. It is in this context that the language of an impartial jury emerged.

Here I can only be synoptic. Briefly, Federalists and Anti-Federalists shared a conception of the jury inasmuch as they generally agreed that it relied on community knowledge, and, broadly that such knowledge was itself no barrier to fair judgments. As James Wilson observed in the Pennsylvania ratifying convention, "Where jurors can be acquainted with the characters of the parties and the witnesses,-- where the whole cause can be brought within their knowledge and

their view,--I know no mode of investigation equal to that by a jury."[9] The main worry on the part of many anti-Federalists, like Patrick Henry, was that the Article III framing was too broad: that criminal trials could be drawn from the "State where the said crimes shall have been committed," meant that a jury could be "collected 500 miles from where the party resides … no neighbours who are acquainted with their characters, their good or bad conduct in life, to judge of the unfortunate man who may thus be exposed to the rigour of that Government."[10]

Some, like Henry, argued that such knowledge actually contributed to the condition of disinterest: "Persons accused may be carried from one extremity of the State to another, and be tried not by an impartial jury of the vicinage, acquainted with his character, and the circumstances of the fact; but by a jury unacquainted with both, and who may be biassed against him."[11] A delegate to the South Carolina Convention, Federalist Judge Robert Barnwell, complained that problems both associated with unfamiliarity and partiality would surely arise if a case were a South Carolina citizen creditor to try to recover against a Georgia citizen debtor before a Georgia jury: "Why, the citizen must rest his cause upon the jury of the opponent's vicinage, where, unknown and unrelated, he stands a very poor chance for justice against one whose neighbors, whose friends and relations, compose the greater part of his judges. … [J]udging from myself, it is in this instance *only* that every man would wish to resign it, not to a jury with whom he is unacquainted, but to an impartial and responsible individual." (Elliot IV, 295, emphasis mine) Similarly, in the Massachusetts Ratifying Convention, Abraham Holmes

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[9] 11 December, 1787, Elliot 2:515-519. https://press-pubs.uchicago.edu/founders/documents/amendVIIs9.html

[10] 23 June 1788, Documentary History X, 1465-66 (cited in Rakove 1996, 320)." Hon. Richard Henry Lee, a Virginia delegate, 16 Oct. 1787, similarly invoked Blackstone with respect to vicinage, both in criminal and civil cases. (5.6.3, p. 114)

[11] II J. Elliott, The Debates over the Several State Conventions on the Adoption of the Federal Convention 112-113

worried that by failing to provide for a vicinage requirement, the Constitution did not in fact secure the right to an impartial trial; distance might empower those who "*may be* interested in his conviction."[12] (italics in original)

Others, primarily anti-Federalists, took the jury's partiality to be an attractive check on what otherwise would have been the partiality of elite judges. An anti-Federalist letter of Centinel (Samuel Bryan) invoked Blackstone on this point (2.7.44)[13]:

> "if the power of judging were entirely trusted with the magistrates, or any select body of men, named by the executive authority, their decisions, in spite of their own natural integrity, would have a bias towards those of their own rank and dignity: for it is not be expected, that the few should be attentive to the rights of the many. This therefore preserves in the hands of the people, the share which they ought to have in the administration of justice, and prevents the encroachments of the more powerful and wealthy citizens."

See, likewise, the Federal Farmer, who argued that the "common people" needed to have influence in both the legislative and judicial departments, because the "few, the well born … in judicial decisions as well as in legislation, are generally disposed, and very naturally too, to favour those of their description."[14]

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[12] Not everyone agreed that proximity supported disinterest; there were a few dissenters. For instance, responding to Holmes, Christopher Gore responded that vicinage itself could contribute to biased judgment on the part of jurors, who might rely on "personal considerations" external to the facts of the case:

> "the idea that the jury coming from the neighborhood, and knowing the character and circumstances of the party in trial, is promotive of justice, on reflection will appear not founded in truth. If the jury judge from any other circumstances but what are part of the cause in question, they are not impartial. The great object is to determine on the real merits of the cause, uninfluenced by any personal considerations; if, therefore, the jury could be perfectly ignorant of the person in trial, a just decision would be more probable."

[13] The Complete Anti-Federalist, edited by Herbert J. Storing, University of Chicago Press, 1998. ProQuest Ebook Central, https://ebookcentral.proquest.com/lib/nyulibrary-ebooks/detail.action?docID=584947.

[14] 12 October, 1787, Letter from the Federal Farmer (Storing 2.8.54, 249)

To secure ratification, the Sixth Amendment needed to address both those who feared losing the benefits of community knowledge, as well as those who worried that tying it too tightly to specific localities, particularly where the case crossed regions, would yield partiality. It thus specified that the trial should be "by an impartial jury of the state and district wherein the crime shall have been committed." Further, the Sixth Amendment invoked the ability "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor" as a further checks on partiality that might be introduced by shifts in venue. A main worry was that those who might be tried where they were unknown would need to challenge ill-founded aspersions on their character and be able to present those who could attest to their merits, but this language also reassured those who doubted that those familiar with the parties would be likely to mete out justice.

Tracking language likely drawn from the constitution of Virginia,[15] the language of the "impartial jury" entered the Sixth Amendment for strategic reasons, i.e., to counter objections that (given the outsized importance of jury trials in the period) threatened to derail ratification. But it also served remedial purposes, to counter the imbalance of local information relied upon by neighbors when the litigants were from different communities, and to affirm the value of the jury more generally as a check on the partiality of judges. The jurisprudence of the Sixth Amendment has had to try to reconcile these two distinct features - impartiality and social proximity – ever since, generating the puzzle that motivated this inquiry.

[15] The Virginia Declaration of Rights Section 8, included in its 1776 Constitution, secures a "speedy trial by an impartial jury of twelve men of his vicinage"; it is mirrored by language in the Delaware and Pennsylvania Constitutions.

The Sixth Amendment guarantee

The constitutional jurisprudence of the Sixth Amendment is both extensive and complex, including with respect to the narrow question of the role of a representative cross-section in securing impartiality. There are various jurisprudential routes to the guarantee of an impartial jury. As the introduction suggested, one could surely begin with Reconstruction-era cases considering the exclusion of Black jurors, such as *Bush v. Kentucky* [107 U.S. 110 (1883)], *Neal v. Delaware* [103 U.S. 370 (1881)], *Ex Parte Virginia* [100 U.S. 339 (1879)], *Virginia v. Rives* [100 U.S. 313 (1880)], and *Strauder v. West Virginia* [100 U.S. 303 (1880)]. If one looked to *Ex Parte Virginia*, for instance, one would see that it is via the Fourteenth Amendment – the denial of equal protection – that the issue emerges; a Black defendant is denied equal protection if the State discriminates against jurors because of the color of their skin. Yet *Ex Parte Virginia* is a case in which a county judge was indicted and held in custody for excluding Black jurors, consistent with the view that real problem of partiality lies with state actors given the power of selection, and that the remedy lies in eliminating discrimination on their part. (In a moment, we will term this the *problem of the sheriff*.) *Batson v. Kentucky* [476 U.S. 79 (1986)], which prohibited peremptory challenges by prosecutors based on race, also emphasizes the role of the state in exclusion, holding that the Equal Protection Clause guarantees the (Black) defendant that the State will not exclude members of his race from the jury venire on racial grounds.[16]

[16] As will be discussed further in Holland, the petit jury itself need not be "representative" either under the Sixth or the Fourteenth Amendment, but members of cognizable groups may not be deliberately excluded by the state (beginning with Strauder 100 U.S. 305, which held that a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race,' but that a defendant does have a right to a jury selected according to nondiscriminatory criteria). In Peters v. Kiff [407 U.S. 493 (1972)], the Supreme Court found that a non-Black petitioner

But to focus on the Sixth Amendment guarantee of an impartial jury, and how it relates to the condition of representativeness, the better strategy runs through *Taylor v. Louisiana* [419 U.S. 522 (1975)]. In *Taylor*, a male defendant indicted on kidnapping charges sought to challenge a petit jury on the grounds that women had been systematically excluded from the venire; the Louisiana Constitution and the Code of Criminal Procedure excluded women from jury service unless a woman had previously filed a written declaration of her desire to serve. The defendant was ultimately convicted. These provisions were deemed unconstitutional under the Sixth and Fourteenth Amendments, and the conviction was reversed. Under the Federal Jury Selection and Service Act of 1968, litigants in Federal jury trials "shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes." The majority opinion in *Taylor* held that this fair cross-section was "fundamental to the jury trial" under the Sixth Amendment. Writing for the majority, Justice Byron White wrote:

> "the purpose of the jury is to guard against the exercise of arbitrary power – to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional, or perhaps overconditioned or biased response of the judge. … This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."

In adopting the language of the "hedge" and the "prophylactic" character of the jury, Justice White affirmed the aim of checking partiality on the part of the state, which, he suggests, depends upon representativeness. Indeed, the opinion in *Taylor* held that the "constitutional concept of the jury" depends upon representativeness, and, further, that such representativeness

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would have standing on due process grounds to challenge a jury drawn from a venire in which Blacks had been excluded.

was a means to impartiality. Citing Justice Frankfurter's dissent in *Thiel v. Southern Pacific Co.* [328 U.S. 217, 227 (1946)], the opinion read: "'Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case….[T]he broad representative character should be maintained, *partly as assurance* of a diffused impartiality…." (italics my own) In sum, the exclusion of women from venires deprives the defendant of his "Sixth Amendment right to trial by an impartial jury drawn from a fair cross-section of the community."

From *Taylor* and *Thiel*, it might seem that the Sixth Amendment would mandate a broadly representative petit jury, not merely a representative cross-section, as instrumental to impartiality. It was this point that *Holland v. Illinois* [493 U.S. 474 (1990)] sought to address. *Holland* is worth examining in detail because it provides a comprehensive set of responses to the central puzzle animating this paper.[17] The question in *Holland* was whether a prosecutor's use of peremptory challenges to exclude Black prospective jurors from a white defendant's jury violated the Sixth Amendment. Writing for the majority, Justice Scalia argued that there was no Sixth Amendment prohibition on the exclusion of cognizable groups through peremptory challenges; the fair cross-section requirement for the venire "constitutes a means of ensuring not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)." Briefly, the majority opinion held that the peremptory challenge supported impartiality by allowing the defendant and the State to eliminate "extremes of partiality on both sides … thereby 'assuring the selection of a qualified *and unbiased* jury,'" citing *Batson*. (475) The court

[17] Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist; Justice White; Justice O'Connor, and Justice Kennedy. Justice Kennedy wrote a concurring opinion. Justice Marshall dissented, joined by Justices Brennan and Blackmun; Justice Stevens wrote a separate dissent.

held that a petit jury fair cross-section requirement would "cripple" peremptory challenges, thereby obstructing the "constitutional goal of an 'impartial jury.'" (475)

On first reading, the holding would seem straightforwardly to suggest that if representativeness and impartiality are in conflict, the former must give way to the latter; the peremptory challenge is an essential means to securing the Sixth Amendment right to an impartial jury, and so it must be protected at the expense of representativeness (so long as it there is no violation of equal protection). Notice, however, how the opinion characterizes the support peremptory challenge offers to impartiality. Specifically, peremptory challenge operated "by allowing the accused and the State to eliminate persons thought to be inclined against their interests"; citing *Swain v. Alabama* [380 U.S. 202 (1965)], the peremptory challenge specifically permits "cognizable" groups to be excluded: "For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be." Without a representative venire, "the State would have, in effect, unlimited peremptory challenges to compose the pool in its favor." But having satisfied the FCS requirement, each state may then "use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side." The Court cited Blackstone to show that it was already at that time "venerable."

Crucially, the court in *Holland* characterizes impartiality in a way that underscored its function as a check on partiality, not as disinterest. The problems of partiality, according the majority opinion, were (1) the State's inclination to stack the deck in its own favor, and, (2), the desire of both the defendant and the State to challenge "extremes of partiality." The claim was *not* that the jury selection process aimed to empanel jurors who would be "indifferent" or "neutral"; rather, the aim was to allow reciprocal checks, and to ensure that the pool was not

stacked by the State for its own purposes. (I will term the concern that the jury would be disproportionately inclined towards one side - or to extremes of either - the *asymmetry problem*; recall that the problem of state actors is the *sheriff problem*.)

By contrast, Justice Marshall's dissent held that the representation condition and the disinterest condition were distinct under the Sixth Amendment. Representativeness defined the *jury*, but not its impartiality. "Contrary to the majority's implication, the fair-cross-section requirement is not based on the constitutional demand for impartiality; it is founded on the notion that what is denominated a 'jury' is not a 'jury' in the eyes of the Constitution unless it is drawn from a fair-cross-section of the community," he wrote. Further, Marshall suggested that *Duren v. Missouri* [439 U.S. 357 (1979)] also distinguished between disinterest and representation, supporting both, because "Duren did not contend that any juror was biased against him. Rather, he claimed that his right to a jury trial was violated by the *de facto* exclusion of women from his venire." Marshall's dissent, then, interpreted impartiality to mean *only* disinterest, but insisted that the Sixth Amendment also protects representativeness on the petit jury through the FCS requirement.[18]

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[18] In Duren v. Missouri (1979), the Court held that to establish that there is a prima facie violation of the FCS requirement, a defendant must show: "1) that the group alleged to be excluded is a 'distinctive' group in the community; 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of search persons in the community; and 3) that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process." [439 U.S. 357, 364 (1979)] Justice Marshall also cited Lockhart v. McCree [476 U.S. 162 (1986)] in support of this view. In Lockhart, which considers whether removing "Witherspoon-excludables" (jurors who would not under any circumstances vote to impose the death penalty) violates the FCS guarantee, the Court rejected a view of jury impartiality that the "when the State 'tips the scales' by excluding prospective jurors with a particular viewpoint, an impermissibly partial jury results," and that instead, an "impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts" [as in Wainwright v. Witt, 469 U.S. 412, 423 (1985)].

In a separate dissent, Justice Stevens held that the Sixth Amendment "guarantees the accused 'an impartial jury,' not just an impartial jury venire or jury pool," and so the State may not remove jurors arbitrarily and on a discriminatory basis. Via the FCS guarantee, the Sixth Amendment thereby ensures a "jury that will best reflect the views of the community – one that is not arbitrarily skewed for or against any particular group or characteristic." That is, it must satisfy the condition of representativeness. Stevens sought to rebut the contention that the exercise of peremptory challenges always serves the State's "legitimate interest in obtaining an impartial jury. That contention rests on the assumption that a black juror may be presumed to be partial simply because he is black - an assumption that is impermissible since *Batson*." Justice Stevens read the concept of impartiality to extend beyond mere disinterest on the part of jurors to include a wider category of procedural safeguards, such as size and majority requirements, as well as representativeness (fn. 3).

Holland raises several important questions about the role of the peremptory challenge more generally, and the extent to which its use may undermine not merely representativeness but disinterest; we shall return to these concerns in the conclusion. But the main issue at stake here is how the various opinions in *Holland* characterize the role of representativeness as a means to "impartiality." They identify three main concerns about partiality:

1) *The sheriff problem*: A non-FCS venire gives us reason to suspect that the deck has been stacked by a state actor from the start.
2) *The asymmetry problem*: A non-FCS venire gives us reason to worry that the petit jury would be asymmetric in its viewpoints.
3) *The confidence problem*: A non-FCS venire would give the general public reason to suspect that the verdict was not fair.

The holding in *Holland* insists that the FCS requirement targets only *sheriff* and *asymmetry*. Its argument is that the FCS requirement disables the state from producing a pool of defendants supportive of its own aims (*sheriff*), and that as peremptory challenges enable "each side to exclude those jurors it believes will be most partial toward the other side," they are "'a means of "eliminat[ing] extremes of partiality on both sides'" (*asymmetry*). Recall that both the majority opinion and Marshall's dissent argue that representativeness is not a condition of impartiality as such. That is, Marshall accepts representativeness as a defining attribute of the jury, but regards it as a distinctive demand from impartiality, which he understands primarily as aiming to check the problems of *sheriff* and *asymmetry*. However, Marshall does also suggest that *confidence* poses a challenge to impartiality, arguing that exclusions in the venire and peremptory challenges are "destructive of the public's perception that our system of criminal justice is fair." (497) Justice Stevens accepts all three targets, but strongly implies that, from *Strauder* and *Ex Parte Virginia*, an "impartial jury" *just is* a representative one: "A jury that is the product of such a racially discriminatory selection process cannot possibly be an 'impartial jury' within the meaning of the Sixth Amendment." (509) Finally, it is important to emphasize that none of these opinions argue that representativeness is instrumentally valuable to *disinterest*.

We return to the puzzle. How does the value of impartiality relate to representativeness, in the form of the fair cross-section guarantee? The genealogical account provides some support for Justice Stevens's implication that a jury must be representative to be impartial. But that is not because representativeness is itself a *form* of impartiality, but because – per the majority opinion – an FCS was required to remedy the misdeeds of State actors (*sheriff*), and the broader interests of the parties in deck-stacking (*asymmetry*). Synthesizing the genealogy and *Holland*, the aim of the jury, and the justification for the FCS requirement, always was *balanced partiality*: the jury

would judge on the basis of robust local knowledge, generated outside of the sheriff's control, and, as a result, criminal defendants (and debtors) in particular, could have reason to believe they might receive a sympathetic hearing against powerful elites.

Read this way, the puzzle is solved: representativeness is instrumentally valuable to the impartial jury only if we redescribe impartiality in terms of "balanced partiality," thereby distinguishing it from *disinterest*. It is worth emphasizing that the challenges remedied by a representative jury - of prosecutorial control, of social or informational imbalances, and of the social costs of what might seem to be publicly unequal treatment - are different from the problem of biased jurors, nor are they reducible to that problem. Disinterestedness on the part of jurors is necessary but insufficient for an "impartial jury," because, at the level of the jury, "impartial" means that it was formed by mechanisms designed to *balance* partiality.

Although declining in *Holland* to incorporate *Batson* into the Sixth Amendment, the majority opinion acknowledged the possibility of a Fourteenth Amendment equal protection claim in support of the representative composition of the petit jury. Kennedy's concurrence emphasized the value of "equal participation in civic life," and the right to "be tried by a jury whose members are selected by nondiscriminatory criteria and on the need to preserve public confidence in the jury system." One way of characterizing the problem of *confidence* is thus worry about the *systemic* implications of unchecked partiality from the standpoint of publicity. That is, the problem of confidence is not only, or even necessarily, linked to the perceived fairness of a particular trial or verdict, but of the criminal justice system more generally. Judges, as finders of law, plausibly help to secure a form of impartiality as disinterest at the systemic level, in the

sense of treating like cases alike.[19] Yet assigning the finding of facts to juries was designed in part to promote sympathetic hearings against the risk of elite-driven partiality on the part of judges, so it is also possible to explain the complementary roles of judge and jury within the legal system as a whole in terms of balanced partiality. If so, this might also mean that the representativeness of juries is indeed instrumentally valuable to the disinterested enforcement of the law at the *systemic* level, even if representativeness is not instrumental to disinterestedness at the level of either the juror or the jury.

Let me summarize the argument so far. Drawing on the history of the jury and Sixth Amendment doctrine, I hope to have shown that the representativeness condition of the "impartial jury" responds to three worries about partiality: 1) that a jury pool might have been distorted by the state for its own purposes (*sheriff*); 2) that a jury pool might include a disproportionate number of members who might have reasons to prefer or oppose one party (*asymmetry*); 3) that for any reason (including but not restricted to sheriff and asymmetry), the pool might seem to give the general public good reason to suspect that it could not generate a fair verdict (*confidence*). Yet these problems of partiality are not restricted to the jury, and the characterization of representation as in some way instrumental to impartiality also transcends that specific democratic domain.

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[19] See Hart (1958): "If we attach to the legal system the minimum meaning that it must consist of general rules – general both in the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals – this meaning connotes the principle of treating like cases alike, though the criteria of when cases are alike will be, so far, only the general elements specified in the rules. It is, however, true that one essential element of the concept of justice is the principle of treating like cases alike. This is justice in the administration of law, not justice of the law. … Natural procedural justice consists therefore of those principles of objectivity and impartiality in the administration of the law which implement just this aspect of law and which are designed to ensure that rules are applied only to what are genuinely cases of the rule or at least to minimize the risks of inequalities in this sense."

Balanced partiality beyond the jury

One might object that this migration of arguments drawn from the history of the jury into other political domains generates a category error. The jury is supposed to render judgments; don't other political bodies, particularly legislatures, merely channel preferences? One might argue that the problems of partiality can't really obtain when these institutions are just intended to satisfy competing interests. Madison, at least, disagreed; recall the *Federalist* 10 argument that, like judges, legislators run the risk of judging in their own interest, and the remedy lies in enabling factions to check each other: i.e., enabling the legislature as an institution to balance the partiality both of its members as individuals and as classes (debtors or creditors) or parties.[20] Although Madison primarily worried about partiality taking the institutional form of unchecked majority factions, today concerns about "capture" are far-reaching, both in terms of the effect on the wider institutional framework of democracy, and within legislatures more specifically.[21] The

[20] "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice." (italics added)

[21] See, most recently, Bagg (2024).

response to these worries today often take the form of representative institutions characterized as promoting impartiality.

Two examples of such institutions illuminate the strategy I have in mind. The first, the Federal Election Commission (FEC), is an example of a bipartisan commission tasked with the impartial enforcement of law against the threat of partisan encroachment into elections. The second is a proposed lottery-based alternative to the Canadian Senate, justified as a means of supporting an impartial legislative process against party dominance. We will examine each briefly in turn.

Federal Election Commission

Consider, for instance, the design of the Federal Election Commission, established by Congress in 1974, to enforce campaign finance laws after Watergate. Specifically, in the language of former FEC chair John Warren McGarry, "Clearly, a major concern leading to the creation of the FEC was the need to ensure independent, *impartial* enforcement of the laws relating to campaign finance activity and public disclosure." (italics added).[22] Its six commissioners serve staggered terms, but no more than three can be affiliated with the same political party. (Since the creation of the FEC, all but one commissioner has been aligned with one of the two major parties; Stephen T. Walther, who served from 2006 to 2022, is a registered independent.) Four affirmative votes are required for most business, as an additional institutional check on the risk of party control.[23] Members are to be appointed by the President and confirmed

[22] Application and Administration of the Federal Election Campaign Act of 1971, as Amended: Hearings Before the Committee on Rules and Administration, United States Senate, Ninety-seventh Congress, First Session, on S. 1550 ... S. 1766 ... S. 1851 ... November 20 and 24, 1981. United States: U.S. Government Printing Office, 1982. Cited in 606 F. Supp. 541(1985)

by the Senate on the basis of their "experience, integrity, *impartiality*, and good judgment." (italics added) Not only are they prohibited from serving in the executive, legislative, or judicial branch of the Federal Government, they may not engage in any other business or employment, lest these roles seem to introduce partial interests that might interfere, or seem to interfere, with their public service. The design of the FEC seeks to equalize the distribution of seats across parties, and the majority threshold (four of six votes), requires at least one member of a competing party to agree to proposed decisions, aiming to prevent outcomes that are dictated by one party alone.

Like jurors, if FEC commissioners individually are disinterested - understood as willing to interpret and enforce election law on the basis of evidence presented to them and freed from other professional responsibilities that might present conflicts of interest - then it would seem that their party identification should be irrelevant. If, on the other hand, their partisanship is indeed relevant because they might be expected to be motivated to secure their party's interests against encroachment or impediment by opposing partisans, this would seem to undermine the argument that they are disinterested, either *qua* individuals or at the level of the commission. How might we explain this?

It is possible that commissioners themselves could successfully commit to disinterested decisions; their legal enforcement role makes them more analogous to judges than to jurors, selected not for their lay status, but their integrity and competence. Nonetheless, public confidence in the FEC, and potentially in the fairness of the electoral system more generally, may require a demonstration that the institution is not subject to partisan capture. Representativeness across the aisle may serve primarily as a means of signaling publicly that the agency does not act in the service of one party rather than another. Put differently, in the case of

the FEC, representativeness may not *in fact* be instrumental to disinterest, but it may be instrumental to the public perception that it is, i.e., to *confidence*. The commission too would be vulnerable to public concerns about *asymmetry* were members themselves disproportionately, even if unintentionally, drawn from one party (perhaps one with fewer members with significant business interests to sacrifice for public service).

However, the FEC's post-Watergate genesis itself suggests the *sheriff* is likely to be the most significant source of partiality. At both the individual and institutional level, the president *qua* sheriff may be tempted to complain that the members of the opposing party are biased against him personally or against his party. He may characterize those members as mere partisan hacks, while insisting that his own party's commissioners are disinterested, motivated strictly by considerations of fairness in enforcement of the law. Most troublingly, he may deliberately seek to sow problems of confidence as a means of undermining constraints on his electoral activities. The FEC is sharply limited, post-*Citizens United*, in the extent to which it is able to enforce sources of imbalance in the form of unequal campaign spending, but it does have in its remit the enforcement of some rules conducive to electoral competition. Indeed, the reason why the FEC lacks a quorum, as of this writing, is because the current president removed the commission chair and has declined to replace other commissioners.

The problem of the sheriff, recall, is about the role an interested party may play in convening, and thereby controlling, an institution tasked with rendering judgments. It may be that this problem is effectively insoluble, for instance, if all potential conveners are partisans, and if the shape of the institution will affect parties' electoral prospects. There is clearly a point at which a democratic institution is incapable of remedying the problems of the sheriff and of asymmetry, and so the resulting loss of confidence is appropriate: one small source of solace is that in this

context, there typically are clear institutional markers of failures. Attractively, it should be noted, it is easier to identify these types of failures than to challenge individual members on the grounds of bias, particularly when *all* members are partisan and so have their own plausible sources of interest. That is, such challenges may themselves be motivated by partisan interest, making it preferable to focus objections to observable problems associated with selection and composition. Even if the individual commissioners all believe themselves to be capable of enforcing the law in a disinterested fashion, there are good reasons to think of the commission as a whole, its composition and its function, as shaped by strategies of balancing partiality.

Canadian Senate

Scholars today defend randomly-selected citizens' assemblies for a variety of reasons, but salient among them is their purported impartiality. Such impartiality is sometimes characterized as a benefit of the selection mechanism – i.e., that sortition is attractively impartial insofar as it is insensitive to distinctions among citizens (Landemore 2020, 90) – but it is today often described in terms of the resulting pool's ostensibly greater resistance to capture. For Arash Abizadeh, sortition is a "mechanism for promoting the responsiveness of political institutions to shared and conflicting interests and viewpoints in an impartial fashion (by protecting against capture by powerful partial interests and promoting a descriptively representative assembly)." (Abizadeh 2021, 792) He characterizes impartiality in the following way: "to say that conflicts are treated *impartially* is to say that conflicting interests and views receive equal consideration in collective decision-making irrespective of whose they are, i.e., collective decision-making processes are not captured." (Abizadeh 2021, 795, italics in the original)

Abizadeh joins many others in proposing to replace one house of a bicameral legislature with one selected by sortition.[24] Specifically, he proposes replacing the appointed Canadian Senate with a lottery-based assembly relying on stratified sampling at the level of federations. This selection by region is justified by the "balancing function," designed to represent the federations' distinctive interests, and, Abizadeh maintains, its "claim to impartiality [is] thanks to being more or less descriptively representative of the federation." From the large pool of those initially selected by lot, members will then indicate their willingness to serve; members should then be chosen via stratified sampling in proportion to socially salient features such as "gender, age, visible-minority and First Nations status, primary tongue, and class." Note that Abizadeh does not argue that the individual members of a sortition-based assembly would be impartial in the sense of *disinterest*, that their decision-making will be driven strictly by the evidence before them, or even that these members themselves will bracket their own considerations of interest or partisanship. Rather, he emphasizes that sortition will yield descriptive representation, which is itself "an instrumental means to secure impartiality" insofar as the chamber "is presumptively responsive to people's interests in an informed, impartial fashion."

Recall the argument that representation was instrumentally valuable to impartiality was central to the holding in *Holland*, so let us see if the same logic holds. In *Holland*, the opinion did not argue that descriptive representation (via the FCS) enhanced impartiality, understood as disinterest; rather, it served to check the asymmetry and sheriff problem, ensuring that the members were unlikely to be clustered in their viewpoints or "extreme," and that the state could not stack the deck. Abizadeh's claim, similarly, is not that descriptive representation would

[24] These include Callenbach and Phillips (1985); Sutherland (2008); Zakaras (2010); Barnett and Carty (2008); Pourtois (2016); Vandamme and Verret-Hamelin (2017); and Gastil and Wright (2018).

promote disinterest. Instead, sortition would enable *responsiveness* to a wider range of interests – and, specifically, would enable the "balance" of competing viewpoints.

Abizadeh endorses Jane Mansbridge's conception of gyroscopic representatives (Mansbridge 2003), who act on the basis of their membership in groups, deliberating as their co-members would, and advancing their interests. But responsiveness to interests is awkwardly characterized as a form of impartiality; rather, it asks members to be robustly attentive to what might be more plausibly characterized as partial concerns, concerns that are tied closely to the needs of specific constituencies. It would seem that the true aim of such a body would be to treat interests more *equitably* than do electoral institutions, in the sense that randomly selected representatives might advance the interests of groups that have historically been neglected or subordinated (Schwartzberg and Knight 2024). Treating such interests equitably (as opposed both to impartially and equally) might involve assigning greater weight to previously neglected interests, or perhaps protecting certain discrete interests on the grounds that they are fundamental to marginalized groups.

As in *Holland*, representation is indeed instrumental to balanced partiality. Random selection avowedly aims at the problem of *asymmetry*, in the form of checking "powerful partial interests." Abizadeh is also attentive to the problem of the *sheriff* insofar as he flags that the mechanisms of stratified sampling he has in mind may enable leaders to manipulate the pool; he suggests that allowing the incumbent chamber to decide the features for the next lottery may mitigate these worries, and that independence from party resources and partisan control more generally would make it less susceptible to manipulation than the existing Senate. Finally, he argues that descriptive representation, and immunity from "partial, elite interests," would grant the sortition

chamber "the legitimacy and *confidence*" (italics added) to veto legislation to a greater extent than the current Senate.

Even if one is sympathetic both to Abizadeh's proposal and to his critique of existing institutions, the composition and functioning of this assembly is better characterized as balanced partiality – balanced both within the sortition-selected body, and across the bicameral Parliament – rather than impartiality. In principle, individual participants may well orient themselves in a disinterested fashion towards to identifying the objectively correct answer to policy questions, irrespective of their own preferences or private interests. The argument here, again, is not that individual agents are *incapable* of judging on a disinterested basis, nor even that it would necessarily be undesirable to have them try to do so. But on Abizadeh's own account, the ostensible reason to replace the Canadian Senators with randomly selected citizens is not to promote disinterested judgment – which in principle the former could render equally well – but to benefit from the latter's greater insight into the situated knowledge or lived experiences of all members in a community.

Finally, one might respond that even if a sortition-based chamber itself secures (at best) balanced partiality rather than impartiality, it might be possible that the introduction of such a body does promote impartiality at the systemic level. Here too there are reasons for skepticism. Some of these reasons are pragmatic; as Dimitri Landa and Ryan Pevnick have argued, it is plausible that randomly selected members will be ripe for targeting by special interest groups or susceptible to bureaucratic capture (Landa and Pevnick 2021; 2025). The background conditions that contribute to problems of capture or inequality of political influence are likely to continue to obtain; merely changing the mode of selection of one house is unlikely to remedy, and may exacerbate, problems of partiality.

But there are also reasons to wonder if impartiality, understood as freedom from bias, is even a value we ought to seek at the level of a democratic system, or whether we should eschew this language entirely at the systemic level, perhaps in favor of responsiveness to interests. As we have seen, even the institution of the jury operates to bring lay knowledge into democratic judgment, and to provide a counterbalance to elites; although beyond the scope of this paper, this is part of how jury nullification is often justified. Similarly, it is conceivable that indeed sortition-based institutions may enable the emergence of new, potentially countervailing interests, even if at least some of these assemblies so far have been deployed by the sheriff for his own purposes.[25] If I am right, and descriptive representativeness in a range of institutions is better justified as an instrument to counterbalance both deliberate and latent sources of domination, it is plausible that the wider aim of democratic systems should be to expand the scope of interests that may receive a hearing. But this would be for reasons of equity, not so as to realize impartiality.

[25] See, for instance, the French President Emmanuel Macron's response to The Yellow Vest protests in 2018. The protests originally emerged in response to announcement of a green tax on fuel; residents of rural areas initially demanded a repeal of the green tax, but the scope of their demands quickly expanded. The civil unrest became a crisis for the French government, particularly for Macron himself, who had long been criticized as an elite, out-of-touch technocrat. In response to the protests – his approval rating falling and an election looming – Macron called for the Great Debate, a two-month set of meetings designed to address the topics of energy transition, taxation and public spending, democracy and citizenship, and the state and public services. In addition to town hall meetings and the creation of complaint books, the Great Debate featured a series of twenty-one randomly selected citizen assemblies. Of course, the role of Macron in this project would immediately seem to suggest the problem of the sheriff: indeed, residents of the banlieues declined to participate en masse on the grounds that they believed it was a charade orchestrated by him (Miscoiu and Gherghina 2021).

Conclusion

In this paper, I have taken a puzzle that arises in Sixth Amendment jurisprudence – how a form of descriptive representation may promote impartiality – and sought to explain and resolve it through both genealogy and conceptual analysis. Historically, the jury's reliance on local knowledge for fact-finding was its defining attribute, but this made it susceptible to manipulation both on the part of state actors, and an object of concern when cases crossed community lines. The Sixth Amendment language of the "impartial jury" arose in part to try to respond to some of these difficulties. Yet the problems of dominance and distortion that may arise in creating a pool of jurors from a given community transcend narrow concerns about biased jurors. This has meant that, per *Holland*, representativeness is characterized as a mere means to impartiality, when it is better described as a check on a set of distinctive problems of partiality.

Although the point of this paper is not to advocate for jury reform, the balanced partiality approach does have certain implications for the jury system in the United States that are worth flagging. First, because of the ostensible significance of impartiality and the permissibility of peremptory challenges, courts in the United States tend to be excessively preoccupied with ferreting out potential bias on the part of prospective jurors. The claim of the majority in *Holland* as to the venerable and ineliminable character of procedures designed to check partiality is dubious; the United Kingdom does not rely on *voir dire* to determine whether jurors may harbor bias, nor does it permit peremptory challenge. For instance, if revealing prior contact with the criminal justice system – even if only on the part of a family members – provides grounds for juror removal, it is reasonable to suspect that the system will lose members from communities more likely to have such contact, perhaps merely as a result of over-policing. A less-noticed

worry about felon disenfranchisement is that those with such convictions also typically lose eligibility to serve on juries, ostensibly because their experiences with the criminal justice system might lead them to harbor biases against the prosecutor. Excluding those with felony convictions may present a tradeoff between remedying asymmetry and weakening confidence, but might confer additional benefits in terms of its response to the problem of the sheriff. The claim here is not that a particular balance is always appropriate or attractive, just that impartiality at the institutional level is better characterized as the aim of striking a good one.

Further, the project of public scrutiny for personal experiences that might generate partiality has troubling implications. The recent trial of Ghislaine Maxwell, a close associate of Jeffrey Epstein's, for sex trafficking and conspiracy charges brought these types of concern to light. During jury deliberation, Juror 50 revealed that he had been the victim of sexual abuse as a child – yet on question 48 of his juror questionnaire, he had answered "no" to the question of whether he had ever been the victim of sexual harassment, sexual abuse, or sexual assault.[26] Maxwell's attorneys insisted that if he had answered "yes," he would have been excluded for cause, and sought a new trial. Judge Alison Nathan ruled instead that this challenge would not have been granted, and that the critical question pertaining to impartiality was whether a juror "has the ability to decide the case based only on the evidence presented in court, not extraneous information, and without bias," and allowed the verdict to stand.[27] Nonetheless, it is plausible that if juror 50 had revealed this sexual abuse, he would have been subject to peremptory challenge, despite his avowed ability to decide the case on the basis of evidence. This process – of asking jurors to reveal publicly the most intimate details of their lives to sift out whether their

[26] https://www.nytimes.com/2022/03/08/nyregion/ghislaine-maxwell-trial-juror.html
[27] https://www.documentcloud.org/documents/21568882-nathan-ruling/

experiences might incline them against the state or the defendant, regardless of their avowals – is not only objectionable, but ahistorical and counterproductive, on a theory of the jury that takes local knowledge seriously and seeks to balance partiality.

The upshot of this paper, though, is to argue that if even the jury as an institution is better explained in terms of securing balanced partiality, it is so much more so for other democratic institutions for which impartiality is less obviously a virtue. Again, we might take descriptive representation to be instrumental to the equitable, rather than impartial, treatment of interests. The value of descriptive representation in principle is that such representatives may have special insight into the needs of the communities from which they come, and a strong incentive to act in ways that they believe will benefit them. The trick, of course, is that other, more powerful agents will retain incentives to stack the deck and to secure their advantages. The sheriff is wily, and there are structural reasons to worry that marginalized groups may still not receive adequate representation. There are reasons to be wary, and to emphasize checks on partiality, rather than to justify democratic institutions on the fragile pretense of impartiality.

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