2018

The Criminal Jury, Moral Judgments, and Political Representation

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THE CRIMINAL JURY, MORAL JUDGMENTS, AND POLITICAL REPRESENTATION

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Was the sexual act consensual? Did the defendant have a reasonable belief that he was in imminent danger of death by an attacker? Did the police use excessive force? Did the defendant act in a heinous or cruel manner? Did the defendant act with depraved indifference to human life? These are some of the questions that criminal juries encounter. Determinations of such questions involve a combination of factual and moral questions, both questions about what happened and questions about the evaluative significance of what happened. This feature of the criminal jury—that the jury routinely decides normative questions—is frequently noted but is rarely examined. What does it exactly mean when we say that juries make normative determinations, and what is the nature of the inquiry that the jurors are engaging in when they consider moral questions in this particular setting? More specifically, this Article asks whether a juror, when making moral judgments, should follow his or her individual moral beliefs or identify and implement the community's perspective. Many things said about the criminal jury appear to support the view that the jurors should attempt to replicate the community's perspective. It is often said, for instance, the criminal jury serves as the community's conscience, representative, or fiduciary, and such formulations suggest an obligation on the part of the jurors to reproduce the community's perspective. This Article argues that despite the popularity of such accounts, they are either too indeterminate to imply an obligation on the part of the jurors to reproduce the community's perspective, or in conflict with the fundamental obligation of jurors to adjudicate fairly and accurately. This Article, therefore, concludes that we are better off jettisoning the talk of the criminal jury as the community's conscience, representative, or fiduciary, at least in this context, and should instead embrace the notion that jurors fulfill their roles in the criminal justice system most effectively when they

* Professor of Law, Fordham University School of Law. Thanks to Marcia Baron, Chad Flanders, Stephen Galoob, Clare Huntington, Joshua Kleinfeld, Ethan Leib, Gabe Mendlow, Malcolm Thorburn, and participants at Fordham Law School Faculty Workshop and at the Conference on Philosophical Perspectives on Criminal Procedure at Osgood Hall Law School for helpful comments. Finally, I would like to thank my hosts at the Law Department of LUISS Guido Carli in Rome, where much of the early work on the Article was done.

vote as individuals, not as representatives, by applying legal standards to particular situations and bringing a diversity of viewpoints to the task.

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These are some of the questions that criminal juries encounter. Determinations of such questions involve a combination of factual and moral questions, both questions about what happened and questions about the evaluative significance of what happened. This feature of the criminal jury—that the jury routinely decides normative questions—is frequently noted[1] but raises many questions that have largely gone unanswered. What does it exactly mean when we say that juries make normative determinations, and what is the nature of the inquiry that the jurors are engaging in when they consider moral questions in this particular setting?

To start thinking through these questions, consider the case of Owen Labrie.[2] Labrie, an eighteen-year-old male student in a high school in New Hampshire, had a sexual encounter with a fifteen-year-old female student at the same school, though many of the facts are in dispute.[3] The female student claimed that they had sex without her consent, whereas the male student said that they never had sex.[4] Setting the facts aside for now, the most serious charge Labrie faced was aggravated felonious sexual assault, which provides, in relevant part, that "[a] person is guilty of the felony of aggravated sexual assault if such person engages in sexual penetration with another person . . . when at the time of the sexual assault, the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act."[5] As to the *mens rea* requirement of the statute, the Supreme Court of New Hampshire interpreted this provision as calling for the inquiry "whether a reasonable person in the circumstances would have understood that the victim did not consent."[6]

Now imagine two jurors in the case. After hearing all the evidence, the two jurors are in agreement that the two students had sex and that the female student "indicate[d] by speech or conduct that there is not freely given consent."[7] But the jurors are in disagreement as to whether "a reasonable person in

1. Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1209 (1998) ("[T]he jury's task is . . . to make individualized moral judgments through application of indeterminate rules . . . ."); Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 102 ("[T]he jury has, and is meant to have, a significant normative role in applying—indeed, in effectively defining—broad and ambiguous legal standards that otherwise lack substantive content."); George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 39–41 (1992) (distinguishing between questions that can be answered by "direct observation" and those that can be determined "only by reflection" and "exercise of judgment" "after all the evidence is in"); John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 460 (1999) ("Indeed, the application of moral judgment appears to be an inevitable part of assessing and reconstructing facts and of interpreting and applying law—whether these tasks are performed by judge or jury.").

2. *See* Todd S. Purdum, *St. Paul's Before and After the Owen Labrie Rape Trial*, VANITY FAIR (Mar. 2016), https://www.vanityfair.com/news/2016/03/st-pauls-owen-labrie-rape-trial.

3. *Id.*

4. *Id.*

5. N.H. REV. STAT. ANN. § 632-A:2 (2015).

6. State v. Ayer, 612 A.2d 923, 926 (N.H. 1992).

7. § 632-A:2.

the circumstances would have understood that the victim did not consent."[8] The first juror thinks that it was not unreasonable to fail to perceive the lack of consent, but the second juror thinks that a reasonable person would have perceived the lack of consent. Furthermore, assume that the first juror's view that it was not unreasonable to be mistaken about the lack of the female student's consent was based on a widespread understanding of consent whereas the second juror's view that a reasonable person would have perceived the absence of consent is based on an understanding of consent that is more demanding of one's ability to perceive such an absence than the understanding held by most people in the community. Should the second juror vote according to the more common view in the community, or should he stick to his opinion that the defendant's failure to perceive the lack of consent was unreasonable?

Consider also the case of Adrian Peterson, a professional football player who was charged under Texas law with the crime of "injury to a child" for beating his four-year-old son with a tree branch.[9] "Injury to a child" in Texas is a crime that can range from negligent infliction of bodily injury to intentional infliction of serious bodily injury.[10] Texas has a separate statute that governs the parent-child relationship, and it provides that "[t]he use of force . . . against a child . . . is justified . . . if the actor is the child's parent . . . and when and to the degree the actor reasonably believes the force is necessary to discipline the child or to safeguard or promote his welfare."[11]

Again imagine two jurors in the case—or a potential child abuse case like it, involving corporal punishment of a child by his or her parent. After hearing all the evidence, the two jurors are in agreement about all the facts regarding what occurred but disagree as to whether what the parent did was justified. The first juror thinks that the parent reasonably believed that the force was necessary and the second juror thinks that such a belief would be unreasonable. Assume also that the first juror's view that the parent's belief was reasonable is based on a widespread understanding in the community regarding the proper methods of parental discipline of children and that the second juror's view that the belief was unreasonable is based on a minority perspective about appropriateness of corporal punishment. Should the second juror vote according to the majority view of the community, or should she stick to her belief that the defendant's belief was unreasonable?

This Article focuses on this issue of what question jurors are asked to answer when they are asked to make moral judgments and proceeds as follows. As a preliminary matter, we first need to address the potential objection that the fact that there are moral terms in crime definitions does not necessarily mean that moral judgments must be made in applying the law. Even if it is the case

8. *See Ayer*, 612 A.2d at 926.

9. Steve Eder & Pat Borzi, *N.F.L. Rocked Again as Adrian Peterson Faces a Child Abuse Charge*, N.Y. TIMES (Sept. 12, 2004), https://www.nytimes.com/2014/09/13/sports/football/adrian-peterson-indicted-on-child-injury-charge.html.

10. TEX. PENAL CODE ANN. § 22.04 (West 2018).

11. *Id.* § 9.61.

that crime definitions appear to have moral terms, is that not just an appearance? Is it not possible that the terms are often defined by relevant lawmakers and that there is in fact very little room for moral reasoning by jurors? Part II describes this challenge and dismisses it but acknowledges the possibility that moral questions in the context of criminal adjudication are of a special type, namely about what the relevant community thinks about the issue. Then, we are back to the original questions raised by the examples raised above, and the rest of the Article addresses these.

Parts III and IV start by considering answers that are tempting but are ultimately nonstarters. Part III considers the ubiquitous reasonable person test, which appears to call for identifying community norms instead of individual moral beliefs. Part III argues that while the reasonable person standard calls for factfinders to engage in *a* moral inquiry, it is inconclusive on the question of whether the relevant moral inquiry is, again, a special kind of moral inquiry in which a juror is to discern the community perspective.

Part IV reviews various arguments in favor of viewing the moral inquiries jurors face as inquiries about the community perspective by considering the common view that jurors serve as the "community's conscience," are "community representatives," or are "fiduciaries" of the community. Part IV argues that while these views, too, imply that the jurors are to reproduce the community's perspective on moral questions, such views are not only inconclusive on the issue but also have normatively unattractive implications about the proper role of the criminal jury.

The overall conclusion of Parts III and IV is that arguments about the nature of the reasonable person test or arguments stemming from general descriptions of the role of the criminal jury as conscience, representatives, or fiduciary do not answer the question posed about the nature of moral inquiry conducted by the criminal jury. Part V takes a different approach and gives direct arguments, based on features of criminal law and punishment and notions of democracy, culpability, and fair notice, to believe that jurors ought to replicate the community perspective.

Part VI presents the case against the view presented in Part V and argues that jurors should make moral judgments based on their individual beliefs as opposed to the beliefs held by the community by articulating the proper role of jurors in our criminal justice system. Part VI then revisits the arguments given in Part V, argues that the reasons given in Part V do not justify the view that jurors ought to replicate the community perspective, and shows the ways in which the concerns raised in Part V can be accommodated in the view that jurors ought to vote according to their individual moral beliefs.[12]

12. Before proceeding, let me address one potential objection to this project. It is fair to ask, in this age of vanishing trials, whether it makes sense to focus one's scholarly efforts on jury trials in the criminal process. *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html. This Article assumes that, given the "archetype"-like status that the right to trial by jury has in our criminal justice system as a fun-

II. JURORS AS FINDERS OF FACT: DO JURORS REALLY MAKE MORAL JUDGMENTS?

There are several types of questions that jurors are tasked with in criminal trials, such as: "What crime was committed?," "Did the defendant commit the crime?," "What did the defendant do?," and "Did the defendant's actions constitute a crime?" These questions overlap, but the reason they are phrased slightly differently is because sometimes it is clear that a crime was committed (a person was killed), and the question is whether the defendant can be linked to the crime (Was O.J. Simpson the killer?), whereas at other times there is little dispute about whether the government has identified the correct defendant and the important questions that remain are exactly what the defendant did (Did Martha Stewart tamper with potential evidence?) and whether what the defendant did constituted a crime and, if so, which crime (Did Dharun Ravi invade his roommate's privacy, and if so, was there bias intimidation?).

Deciding these cases requires reconstructing historical facts. Far more than that, however, is often involved in determining whether a person's conduct met the definition of a crime. Terms like "reckless," "without consent," "depraved," "grave," "cruel," "wanton," "heinous," "debased," "perversion," and "impair or debase the morals" are routine in criminal law. It is true that these terms would apply only if certain factual circumstances are present, which makes their applications depend heavily on findings of facts, but the terms have evaluative content. When two people disagree on whether a concept applies, the disagreement can be purely evaluative, in the sense that one's normative attitude toward the thing can indicate whether the concept in question applies to the thing.[13] For instance, two people can disagree on whether the term "reck-

damental constitutional commitment, it is important for scholars to work out the nature and scope of such commitments, even if the actual number of cases that go to trial is small. For a discussion of legal archetypes, see Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1723 (2005) (defining "archetype" as "a particular provision in a system of norms which has a significance going beyond its immediate normative content, a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law"). Moreover, even if it is the case that very few cases go to trial, how a criminal case is expected to be resolved at the end of the process can have an impact on the plea-bargaining process. Therefore, the fact that there are very few trials does not mean that trials are unimportant as a subject of study.

13. These terms resemble what Bernard Williams has called "thick concepts." BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 140–41 (1985). Williams's own examples were terms like "coward," "lie," "brutality," and "gratitude." *Id.* at 140. As Williams explains, thick concepts are "action-guiding" in the sense that they are "characteristically related to reasons for action," as "[i]f a concept of this kind applies, this often provides someone with a reason for action." *Id.* They are, however, called "thick" concepts because they are "thick" with descriptive attributes, which make the concepts "world-guided" as well as "action-guiding." *Id.* at 141. Like the moral elements at issue in this Article, when two people disagree on whether a thick moral concept applies, the disagreement can be purely evaluative. *See, e.g.*, Jonathan Dancy, *In Defense of Thick Concepts*, 20 MIDWEST STUD. PHIL. 263, 263 (1995) ("[W]ith the thick, evaluation partly determines description."); Allan Gibbard, *Thick Concepts and Warrant for Feelings*, 66 PROC. ARISTOTELIAN SOC'Y (SUPPLEMENTARY VOLUMES) 267, 275–77 (1992); T.M. Scanlon, *Thickness and Theory*, 100 J. PHIL. 275, 276 (2003) ("In order to trace the contours of the ethical concept's applicability we have to understand its evaluative point."). I am not the first to make this connection between thick concepts and certain legal concepts. *See, e.g.*, R.A. Duff, *Rule-Violations and Wrongdoing*, *in* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL

less" correctly applies to risk-taking because of their differing assessments as to whether the risk-taking was justifiable. Therefore, when applying crime definitions to particular cases, different kinds of determinations must be made about historical facts—or questions about *what happened*—and about norms—or about the *evaluative significance of what happened*. Because of this feature of the criminal jury's task, commentators have often observed that jurors "make individualized moral judgments."[14]

Just because many of these legal terms sound like moral terms, however, does not mean that deciding whether these elements are established necessarily involves moral reasoning. As Oliver Wendell Holmes warned us many years ago, the law is "full of phraseology drawn from morals," which "continually invites us to pass from one domain to another without perceiving it," but "nothing is easier . . . than to take these words in their moral sense . . . and . . . to drop into fallacy."[15] The idea here is that the law is one thing and morality quite another, and the fact that the two systems share some of the same terminology should not lead us to forget the distinction between the two and "drop into fallacy."[16]

If we take Holmes's warning as our starting point, we might consider the possibility that all of these so-called moral terms have legal meanings determined by legislation and precedents and boiled down to specific jury instructions that spell out for jurors what facts are necessary and sufficient to find that these legal elements have been established. All that the jury has to do, according to this view, is to see if the defendant's conduct has features that satisfy the legal definitions of these terms, which leaves the jury very little room to engage in moral reasoning.

Furthermore, the argument might go that, at least ever since *Sparf v. United States* was decided in 1895, it has been clear that jurors decide questions of fact and judges decide questions of law.[17] When considering the distinction between law and fact, what moral elements contained in legal definitions cover seems to be more a question of law than a question of fact. In order to respect the division of labor between judges and juries, one might argue, we should understand the jurors' task when considering moral elements to be mostly factual, not moral. And a way to confine the jurors' task to fact-finding is for those who write the law to spell out what these moral terms in legal definitions mean and have jurors focus solely on the factual question of whether the relevant standards have been met.

PART 47 (Stephen Shute & A.P. Simester eds., 2002) [hereinafter Duff, *Rule-Violations and Wrongdoing*]; David Enoch & Kevin Toh, *Legal as a Thick Concept*, *in* PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW 257 (Wil Waluchow & Stefan Sciaraffa eds., 2013); Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187, 1192 (1994).

14. *See, e.g.*, Brown, *supra* note 1, at 1209.

15. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459–60 (1897).

16. *Id.* at 460.

17. 156 U.S. 51, 106 (1895). There is historical evidence that juries had the power to decide questions of law at the time of the Founding. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY 67–88 (1994).

Moral reasoning does not go away so easily, however. It is true that moralistic-sounding terms could give rise to highly technical, precise legal definitions. But it is also often the case that vague and evaluative terms like "unjustifiable," "reasonable," "depraved," and "cruel" are not defined precisely.[18] The terms can be defined precisely or not, and they are frequently applied to individual cases by trial judges and juries without detailed guidance from appellate decisions and legislation.[19] When defendants have complained that some of these terms need further specifications for the jury, courts have often rejected these challenges on the basis that the relevant term has a common, ordinary meaning that jurors can readily understand and apply.[20]

In other words, notwithstanding Holmes's admonition about not confusing the ordinary meaning and technical meaning of terms, it appears that when such terms with common meanings are used in crime definitions, jurors are often asked to apply them using their ordinary understandings of these terms without the courts further specifying them.

Does this argument establish then that the moral terms should be taken at face value and we should conclude that jurors are engaging in something like moral reasoning or moral judgment-making when they are applying these terms? That would be too quick a conclusion because it is possible that jurors understand, even without anybody saying so explicitly, that the same words can mean different things in different contexts, just by ordinary rules of interpretation. Everybody knows that saying something is "not fair" can mean different things depending on where the term is used—from playgrounds, schools, workplaces, business transactions, to the society at large. So when judges say that these terms have common, ordinary meanings that jurors can understand and apply, we can also assume that background rules of interpretation that can give different meanings to terms in different contexts remain in play. So, under ordinary rules of interpretation, what could these moral terms mean when they appear in crime definitions?

Here is one suggestion. Perhaps every time we encounter a term like "reckless," "without consent," "depraved," "grave," and so on, in the legal con-

18. Sometimes, even technical terms that do not appear moralistic like "material" as in the crime of misrepresenting a "material fact," can contain significant evaluative components. *See* United States v. Gaudin, 515 U.S. 506, 509 (1995); Darryl K. Brown, *Judicial Instructions, Defendant Culpability, and Jury Interpretation of Law*, 21 ST. LOUIS U. PUB. L. REV. 25, 33 (2002) ("Materiality . . . reveals whether the defendant's statements were mere technical, blameless violations, or to the contrary, whether they were important enough that they indicate his larger intent and even his motive and character."); *see also* Brown, *supra* note 18 ("Willfulness . . . allows even an unreasonable belief to constitute a defense if it is honestly held by the defendant").

19. For a detailed discussion of the different ways in which courts deal with jurors' interpretive discretion, see generally Lawrence M. Solan, *Jurors as Statutory Interpreters*, 78 CHI.-KENT L. REV. 1281 (2003).

20. *See, e.g.*, State v. Chacon, 860 So. 2d 151, 153 (La. Ct. App. 2003) ("Mistreatment is equated with 'abuse' and has a commonly understood meaning."); People v. Biegajski, 332 N.W.2d 413, 418 (Mich. Ct. App. 1982) (pointing out that the word "torture" has "a common, ordinary meaning"); State v. VanVlack, 765 P.2d 349, 351 (Wash. Ct. App. 1988) ("The term 'consent' does not have a technical meaning different from the commonly understood meaning. . . . Consequently the trial court was not required to instruct the jury on the definition of consent."); *see also* State v. Blount, 770 P.2d 852, 855 (Kan. Ct. App. 1989) ("A person of common intelligence could readily understand what constitutes a lack of consent and . . . does not have to guess at the meaning of 'lack of consent' to determine whether one has acted in violation of the statute.").

text, the question is not whether these terms apply to the facts in question directly, as in "conduct *X* was reckless" and "conduct *X* was without consent." Rather, the question is whether the relevant community believes that "conduct *X* was reckless" and "conduct *X* was without consent." Ronald Allen and Michael Pardo have made precisely such a suggestion.[21] Allen and Pardo ask us to, for example, "[s]uppose that 'negligence' means the violation of community standards."[22] In that case, "what 'negligence' means is indeed a fact; it is the fact of the matter of what relevant community standards are."[23] If this is what these moral terms mean in the legal context, then it would be wrong to simply read the statute and say that the jury now has to decide whether "conduct *X* was reckless" or "conduct *X* was without consent." The question that the jury has to answer is whether "conduct *X* is considered reckless by the community" or "conduct *X* is considered to be without consent by the community." Is this a correct understanding of the juror's role? Parts III and IV consider several tempting—though ultimately inconclusive—arguments in favor of this understanding.

III. THE CASE OF THE REASONABLE PERSON

One way to get at the question of whether jurors make moral judgments or simply report where a community stands on various questions is by looking at the terms "reasonable" and "unreasonable," which frequently refer to the idea of a "reasonable person," a ubiquitous legal standard that seems to explicitly call for jurors to find out what the community believes and then apply it. Both the Labrie case and the Peterson case mentioned in Part I implicated laws making references to the "reasonable person" in the test of "whether a reasonable person in the circumstances would have understood that the victim did not consent"[24] (in the Labrie case) and the standard of "when and to the degree the [parent] reasonably believes the force is necessary to discipline the child or to safeguard or promote his welfare"[25] (in the Peterson case).

It is true that not all crime definitions with normative elements make a reference to reasonableness. Whatever conclusions are drawn in this Part, therefore, would be limited to laws that make use of the reasonable person test. At the same time, while it is beyond the scope of this Article to review all the ways in which the term "reasonable" is used in criminal law, the reasonable person is a large and complex topic, which resists truncated treatments. For these reasons, the following discussion may strike some readers as a lengthy detour. Given the prevalence of the reasonable person test and its powerful hold on the legal culture, however, we need to address the question of the reasonable person in order to deal with a large portion of jury judgments that have norma-

21. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1792 (2002).

22. *Id.* at 1790.

23. *Id.* at 1790–91.

24. State v. Ayer, 612 A.2d 923, 926 (N.H. 1992).

25. TEX. PENAL CODE ANN. § 9.61 (West 2018).

tive components. Additionally, even in crime definitions that do not make an explicit reference to the reasonable person, there may be implicit references to the reasonable person.

Here is a brief overview of uses of "reasonable."[26] First, "reasonableness" can be used to designate the proper level of concerns for others' well-being when one engages in conduct.[27] In New York, "recklessly" is defined as acting when the person is "aware of and consciously disregards a substantial and unjustifiable risk" and the risk is "of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."[28] Similarly, "criminal negligence" is defined as failing to "perceive a substantial and unjustifiable risk" where the risk is "of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."[29] Various offenses then make references to these terms, such as "reckless assault of a child" ("recklessly causes serious physical injury to the brain of a child less than five years old by shaking the child");[30] "assault in the second degree" ("recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument");[31] "assault in the first degree" ("under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person");[32] "criminally negligent homicide" ("with criminal negligence, he causes the death of another person");[33] "manslaughter in the second degree" ("recklessly causes the death of another person");[34] and "murder in the second degree" ("under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person").[35]

In New York—which, like many states, follows the Model Penal Code's culpability provisions with some modification—the formulations of "recklessly" and "negligently" refer to a "substantial and unjustified risk," where disregarding or failing to perceive that risk "constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."[36] The term "substantial" suggests that criminal law kicks in only in instances of

26. For a helpful discussion, see Benjamin C. Zipursky, *Reasonableness in and Out of Negligence Law*, 163 U. PA. L. REV. 2131 (2015); *see also* Marcia Baron, *The Standard of the Reasonable Person in Criminal Law*, *in* THE STRUCTURES OF THE CRIMINAL LAW 12 (R.A. Duff et al., eds. 2011); Peter Westen, *Two Rules of Legality in Criminal Law*, 26 L. & PHIL. 229, 255 (2007).

27. *Cf.* Zipursky, *supra* note 26, at 2160–65.

28. N.Y. PENAL LAW § 15.05 (McKinney 2018).

29. *Id.*

30. *Id.* § 120.02.

31. *Id.* § 120.05.

32. *Id.* § 120.10.

33. *Id.* § 125.10.

34. *Id.* § 125.15.

35. *Id.* § 125.25.

36. *Id.* § 15.05; *see also* MODEL PENAL CODE § 2.02 (AM. LAW INST. 1981).

risk-taking when the amount of risk exceeds a certain threshold level, whereas the term "unjustified" in this context asks whether the amount of risk taken is justified.[37] The idea of an "unjustified" risk combines moral and epistemic considerations, and it is brought out most obviously in the contrast between recklessness and negligence. "Disregarding" a risk of, say, harm to others, implies indifference or lack of due concern for the well-being of others, whereas "failure to perceive" a risk indicates an epistemic failure. Of course, one may "disregard" the risk of one's being wrong about one thing or another, which we may classify as an epistemic failure, and one's failure to perceive a risk may arise from indifference to others' well-being, which would be a moral failure.[38] The Model Penal Code finesses all of these considerations by referring to "the standard of conduct that a reasonable person would observe in the situation," thereby making "reasonable" do much of the work.[39]

Second, the term "reasonable" is sometimes used to invoke a level of soundness in judgment and is synonymous with sound, prudent, or sensible.[40] This understanding of reasonableness, at issue in the Adrian Peterson case mentioned above, is identified most easily in situations when a person is performing a task, and the nature of the job is such that it demands a series of judgments. In New York, the term "reasonable" is used to designate situations where transit conductors and physicians and nurses may use force to the extent that they "reasonably" believe it to be necessary.[41] New York has a provision to deal with corporal punishment, as it permits "[a] parent, guardian or other person entrusted with the care and supervision of a person under the age of twenty-one . . . [to] use physical force . . . upon such person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person."[42] Similar provisions on corporal punishment can be found in a number of states, including Texas as before mentioned, where Peterson's corporal punishment case was adjudicated.[43]

Third, the term "reasonable" is used as a way of indicating epistemic justifiability.[44] New York, for instance, allows infliction of physical force upon another person where "he . . . reasonably believes such to be necessary to defend himself . . . from what he . . . reasonably believes to be the use or imminent use of unlawful physical force by such other person."[45] And in California, self-defense requires an actual and reasonable belief that one's life is in danger,

37. *See* N.Y. PENAL LAW § 15.05 (McKinney 2018).

38. *See, e.g.*, R.A. DUFF, INTENTION, AGENCY, AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 163 (1990).

39. *See* MODEL PENAL CODE § 2.02 (AM. LAW INST. 1981).

40. *Reasonable*, MERRIAM-WEBSTER, https://www.merriam-webster.com/thesaurus/reasonable (last visited May 31, 2018).

41. N.Y. PENAL LAW § 35.10.

42. *Id.*

43. TEX. PENAL CODE ANN. § 9.6 (West 2018); Doriane Lambelet Coleman et al., *Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse*, 73 L. & CONTEMP. PROBS. 107, 118 (2010).

44. *Cf.* Zipursky, *supra* note 26, at 2140–41.

45. N.Y. PENAL LAW § 35.10.

where "reasonable belief" is defined in terms of "a reasonable man" having "sufficient grounds for his belief."[46] As we saw above in the Labrie case, the term "reasonableness" also makes an appearance in sex offense definition as to the defendant's state of mind with regard to the victim's consent.[47] In New York, "rape in the third degree" is defined as "engag[ing] in sexual intercourse with another person without such person's consent," where "lack of consent" is defined as a situation where "the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."[48] In Tennessee, when "sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent," a crime of rape is committed.[49] In this context, "reasonable" is a way of addressing situations of mistakes of fact, and "reasonable" is used to indicate epistemic justifiability.

Fourth, the term "reasonable" is used to designate situations in which one's loss of self-possession is excusable or partially excusable in doctrines of duress and provocation. In New York, it is an affirmative defense that a person "engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist."[50] In Georgia, voluntary manslaughter is defined as homicide "which would otherwise be murder . . . if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person."[51] In these examples, unlike mistakes of perception that are nevertheless epistemically justifiable, the term "reasonable" indicates reasonable failures of reason. What makes failures of reason due to anger or fear reasonable is that even reasonable people, when facing certain extreme situations, could lose control over their everyday faculties that otherwise enable them to live as law-abiding, responsible citizens.[52]

The usual caveats apply, of course. The four categories are neither exhaustive nor mutually exclusive.[53] There are overlaps, and instead of thinking

46. People v. Williams, 142 Cal. Rptr. 704, 709 (Cal. Ct. App. 1977); *see also* COLO. REV. STAT. ANN. § 18-1-704 (West 2018); N.J. STAT. ANN. § 2C:3-4 (West 2018); TEX. PENAL CODE ANN. § 9.22. *See generally* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 378–79 n.27 (1996).

47. *See, e.g.*, N.Y. PENAL LAW §§ 130.05, 130.25.

48. *Id.* For other states with similar provisions, see Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 FORDHAM L. REV. 263, 273–74 (2002).

49. TENN. CODE ANN. § 39-13-503 (West 2018).

50. N.Y. PENAL LAW § 40.00.

51. GA. CODE ANN. § 16-5-2 (West 2018).

52. R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 295 (2007) [hereinafter DUFF, ANSWERING FOR CRIME]. *See generally* R.A. Duff, *Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion?*, 58 INQUIRY 189 (2015).

53. For other uses of reasonableness, see Zipursky, *supra* note 26, at 2138–42.

of these as different categories, we may instead think of them as different dimensions of reasonableness where different dimensions are prominently displayed in different contexts. What the four categories have in common is that they have all been subject to the basic tension that runs through the idea of reasonableness.

This basic tension is well-known. The term "reasonable person" is sometimes understood to mean "typical person," "average person," or "ordinary person"—all phrases that suggest the method of imagining an ordinary member of the community and asking what such a person would have believed, would have perceived, would have thought, and so on, in the relevant circumstances.[54] The term "reasonable," by contrast, seems to have something to do with having reasons, being sound and sensible. The two readings are in tension because a reasonable person may find oneself surrounded and outnumbered by unreasonable people, and in such a group, an ordinary person would not be so reasonable.[55] In this respect, it is instructive to note that some states use the phrase "ordinary person," not "reasonable person," in their criminal codes.[56] Courts also sometimes use "ordinary person," though in some of those cases, the idea of "reasonableness" comes back in through terms like "prudent."[57]

Sometimes the two different meanings of "reasonableness" are described as the contrast between "descriptive" (or "positive") and "normative."[58] This framing is understandable given that identifying what an ordinary person would think about this or that sounds like a descriptive inquiry, whereas determining what is "reasonable" sounds normative. Characterizing the contrast between "ordinary" and "reasonable" as that between descriptive and normative, however, can be misleading. As the four types of situations stated above make clear, it is difficult to escape normative assessments when discussing the reasonable person. Showing proper concern for others and displaying sound judg-

54. John Gardner, *The Many Faces of the Reasonable Person*, 131 L.Q. REV. 563, 575 (2015) (describing the view where a juror is supposed to determine "not whether a certain action, belief, decision etc. was justified but whether people, or some people would in her judgment think it was justified").

55. As John Gardner puts it, "the average Joe [may not be] as reasonable as all that." *Id.* at 572.

56. *See, e.g.*, LA. STAT. ANN. § 14:31 (2018); N.M. STAT. § 30-2-3 (West 2018); N.M. UNIF. CRIM. JURY INSTR. 14-222 ("The provocation must be such as would affect the ability to reason and to cause a temporary loss of self-control in an ordinary person of average disposition."); OKLA. STAT. tit. 21, § 1040.75 (West 2006); TENN. STAT. § 39-11-302 (West 2018) ("The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint."); TEX. PENAL CODE ANN. § 6.03 (West 2018); UTAH CODE § 76-2-103 (West 2018).

57. State v. Henson, 197 P.3d 456, 463 (Kan. 2008); State v. Winfield, 5 S.W.3d 505, 513 (Mo. 1999). California's definition of negligence refers to "a prudent man" and the kind of care he "ordinarily bestows." CAL. PENAL CODE § 7 (West 2018). Texas has a separate provision for "reasonable belief," and it refers to "an ordinary and prudent man." TEX. PENAL CODE ANN. § 1.07; Williams v. State, 630 S.W.2d 640, 642 (Tex. Crim. App. 1982); *see also* Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 432–34 (1982); Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 973 n.65 (2002).

58. *See, e.g.*, Lee, *supra* note 46, at 495 ("Jurisdictions utilizing an objective or hybrid subjectivized-objective standard of reasonableness currently employ what I call a positivist model of reasonableness. By positivist, I mean that the model is descriptive rather than normative."); Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 324 (2012).

ment when engaging in certain tasks—the first and second categories above—obviously implicate normative issues. Though not as obvious and perhaps more controversial, reasonableness as to epistemic justifiability involves normative concerns, as a person's factual perceptions—such as whether a person consented to sex—can be influenced by values that one holds in myriad ways.[59] Finally, reasonableness in the context of duress or provocation also sets a standard of courage or equanimity that society expects of its citizens.[60] But does all this mean that the debate between "descriptive" and "normative" understandings of the reasonable person has a clear winner, the winner being the "normative" understanding?

The answer is no. It is true that the reasonable person standard may be normative in that it is used to set a standard of behavior, and it may even be the case that the standard is used to evaluate how well a person has normatively assessed the situation in which he has found himself. At the same time, the actual content of the reasonable person may be given by asking what an ordinary person in a given situation would do, which may be done descriptively. What we are interested in for the purposes of this Article are situations where the term "reasonable" is used as a standard to judge how a person has perceived or acted in a situation calling for a combination of factual and normative assessments. One way of going about such a judgment is by asking how an ordinary person would have perceived or acted in such a situation; another way is by asking how a reasonable person would have perceived or acted.[61]

The ordinary-reasonable controversy has been with us for quite some time, and the most frequently cited example is the case of Bernhard Goetz, who was prosecuted "for having shot and wounded four youths on a New York City subway train after one or two of the youths approached him and asked for $5."[62] Goetz testified that he "knew" from the facial expression of one of them that they wanted to "play" with him and that "he had a fear, based on prior experiences, of being 'maimed.'"[63] Goetz was white, and "the four youths" were young black men. Whether Goetz was justified in shooting at them in order to defend himself turned on the question of whether he "reasonably" believed that he was in imminent danger of being subject to deadly force by them.[64] The question of whether the "reasonableness" element requires that the jurors apply the standard of an "ordinary person" or a "reasonable person" is implicated in

59. *See, e.g.*, DUFF, ANSWERING FOR CRIME, *supra* note 52, at 292–96 (2007); Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119, 124 n.28 (2008); Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 731 (2010); Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 20 (2008); Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137, 144 (2008). *See generally* MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING (2009).

60. Duff, *Rule-Violations and Wrongdoing*, *supra* note 13, at 63.

61. Gardner, *supra* note 54, at 574 (formulating the dilemma as between "what the average Joe round these parts would believe" and "what a genuinely reasonable person would believe").

62. People v. Goetz, 68 N.Y.2d 96, 99 (N.Y. 1986).

63. *Id.* at 101.

64. *Id.* at 106.

this case—it is commonly understood—because it seems easy to reach the conclusion of "reasonableness" in this context if one pictures an "ordinary person," as one could assume that an ordinary person harbors prejudice against black men.[65] If one's starting point is that of a "reasonable person," reaching the conclusion of "reasonableness," by contrast, is not as straightforward given that it seems to require endorsing the view that racial prejudice is reasonable. In short, racial prejudice may be ordinary but not reasonable.

Legal scholars commenting on the Goetz case have generally argued in favor of the view that "the reasonable person" does not mean a typical, average, or ordinary person but means a "*reasonable* person."[66] Jody Armour has argued, for instance, "[i]f we accept that racial discrimination violates contemporary social morality, then an actor's failure to overcome his racism for the sake of another's health, safety, and personal dignity is blameworthy and thus unreasonable, independent of whether or not it is 'typical.'"[67] Cynthia Lee, similarly, has argued that "[i]nterpreting reasonableness as a function of typicality is problematic because it permits racial stereotypes to have too great an influence on juror determinations in self-defense cases."[68]

More generally speaking, outside the context of the Goetz case, Mayo Moran's book *Rethinking the Reasonable Person* argues against treating "reasonable" as "ordinary" and extensively documents the ways in which conflating the two ends up "counting widely shared mistakes as 'reasonable.'"[69] Peter Westen has also argued that "'reasonableness' is not an empirical or statistical measure of how average members of the public think, feel, or behave" but is rather "a normative measure of ways in which it is right for persons to think, feel, or behave—or, at the very least, ways in which it is *not wrong* for them to do so."[70] Marcia Baron also urges judges to "bear in mind" that "what is ordinary, or customary, or 'normal' is of limited relevance to the issue of whether a reasonable person in the defendant's circumstances might have acted as the defendant did."[71]

If these commentators are right, what would that imply about the question we have been asking? If "the reasonable person" is equivalent to "the ordinary person," then the jurors would be tasked with identifying the ordinary person and describing how he or she would think and behave. But if, as these commentators argue, "the reasonable person" is not the same as "the ordinary person," and the idea of "the reasonable person" is normative, then does that mean each

65. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 788 (1994); Garvey, *supra* note 59, at 128, n.34 (collecting social science studies documenting the ways in which people's perceptions of potential threats they face depend on racial factors).

66. Armour, *supra* note 65, at 805; *see also* Lee, *supra* note 46, at 495.

67. *See* Armour, *supra* note 66, at 788, 790; Lee, *supra* note 46, at 495.

68. Lee, *supra* note 46, at 496.

69. MAYO MORAN, RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD 14 (2003).

70. Westen, *supra* note 59, at 138.

71. Baron, *supra* note 26, at 30.

juror should ask what he or she personally thinks it would be reasonable to do in relevant circumstances?

Not necessarily. Consider, for instance, the view recently defended by Saira Mohamed that the law's choice not to equate reasonableness with ordinariness is indicative of criminal law's attempt to "set[] out *aspirational* standards."[72] Under this account, "reasonableness" designates how people *ought* to think and behave.[73] And on *that* question of what people ought to aspire to, there may be a difference between what an individual juror thinks and what the community at large thinks. What "the community" aspires to might not be equivalent to what an ordinary person aspires to because "the community" might aspire to something higher and more commendable than what the ordinary person aspires to (and vice versa). Thus, just because the normative reading of "reasonableness" is correct, this does not necessarily mean that the jurors ought to make normative judgments based on individual normative views. It may still be the case that they ought to attempt to reproduce the community's perspective on "reasonableness."

So, where do we end up? It appears that looking at the reasonable person test closely does not answer the question as to what jurors ought to be doing in dealing with moral questions. Perhaps instead of approaching the question through the debates surrounding the reasonable person test, we might look more closely at the ways in which people talk about jurors and how they fit into our judicial system.

IV. JURORS AS THE CONSCIENCE, REPRESENTATIVES, OR FIDUCIARIES OF THE COMMUNITY

A. How Jurors May Represent

It turns out that there are a number of reasons to justify the belief that the jury's job is to inquire into what the relevant community believes—criminal jurors are often described as the community's conscience, representatives or fiduciaries of the community. Below is an overview of those reasons.

1. Conscience of the Community

The jury's position in the legal system is often described as acting as "the conscience of the community" by, among others, the Supreme Court. For instance, in *Witherspoon v. Illinois*, the Court noted that "a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."[74] The Court also observed that "one of the

72. Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law*, 124 YALE L.J. 1628, 1676 (2015).

73. *Id.* at 1636.

74. 391 U.S. 510, 519 (1968).

most important functions any jury can perform in making such a selection is to maintain a link between community values and the penal system—a link without which the determination of punishment would hardly reflect the 'evolving standards of decency that mark the progress of a maturing society.'"[75] Since then, the phrase "the conscience of the community" has been used a number of times by the Court to describe the jury's task in the death penalty context,[76] and it is explicitly invoked by lawyers in jury trials as well.[77]

Numerous scholars who have written in praise of the criminal jury have also often invoked the notion of "the community." Jeffrey Abramson, for instance, states that the jury historically "was our best assurance that law and justice accurately reflected the morals, values, and common sense of the people asked to obey the law,"[78] describes "the political function" of the jury as "bringing community norms to bear on the law,"[79] and justifies "the cross-sectional composition of the jury" because it "underwrites the democratic authority of *that* jury to locate through deliberation what *that* community's local norms are in *that* case."[80] Rachel Barkow has similarly described the jury as offering a "unique perspective to the criminal justice system: the views of the community,"[81] and has argued that "[t]he jury possesses the power to elaborate the governing norms underlying criminal law from the perspective of the community and its sense of moral blameworthiness."[82] Barkow has also argued that "the Framing generation" believed that "the purpose of the jury was to inject the common-sense view of the community into a criminal proceeding."[83] These are only a few of many examples of scholars who hold similar views about the jury.[84]

75. *Id.* at 519 n.15.

76. *See, e.g.*, Jones v. United States, 527 U.S. 373, 382 (1999) ("[T]he Government has a strong interest in having the jury express the conscience of the community on the ultimate question of life or death"); Brecheen v. Oklahoma, 458 U.S. 909, 912 (1988) ("As we have previously recognized, the function of the sentencing jury is to 'express the conscience of the community on the ultimate question of life or death.'"); Lowenfield v. Phelps, 484 U.S. 231, 238 (1988) (noting the state's "strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.'").

77. *See* James Joseph Duane, *What Messages Are We Sending to Criminal Jurors When We Ask Them to "Send a Message" with Their Verdict?*, 22 AM. J. CRIM. L. 565, 576 n.29 (1995).

78. ABRAMSON, *supra* note 17, at 28; *see also* Cahill, *supra* note 1, at 103 ("The jury's normative, fault-finding function has been supported . . . on its own terms, based on the capacity of a lay jury to express community norms . . . .").

79. Jeffrey Abramson, *Second-Order Diversity Revisited*, 55 WM. & MARY L. REV. 739, 785 (2014) [hereinafter Abramson, *Second-Order*].

80. *Id.* at 783.

81. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 77 (2003).

82. *Id.* at 59; *see also* PATRICK DEVLIN, TRIAL BY JURY 160 (1956) (arguing that a trial by jury provides "insurance that the criminal law will conform to the ordinary man's idea of what is fair and just").

83. Barkow, *supra* note 81, at 58–59.

84. *See e.g.*, NEIL VIDMAR &VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 225 (2007) ("The jury channels the community's political views within the rule of law."); Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and* Nolo Contendere *Pleas*, 88 CORNELL L. REV. 1361, 1401 (2003); Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 687 (2012) ("[J]urors draw their power not from their ability to parse facts but from their ability to represent the communi-

Such invocations of the "community" suggest that the jury's function in the system is to provide the perspective of the community and that individual jurors should in turn feel obligated to discern such a perspective as they consider their cases. An implication one may draw from this picture is that jurors do not "directly" answer moral questions even when they are applying crime definitions with heavily moral components. Rather, they are to answer moral questions by turning to what the relevant community thinks about such moral issues.

2. Jurors as Representatives

Jurors are sometimes also described as "community representatives"[85] or as "standing for" or "standing in for" the relevant community.[86] As Hélène Landemore, a democratic theorist, puts it in terms that are familiar, "[r]epresentatives are supposed to take into account their constituents' interests and judgments, not act and decide entirely on their own."[87] If so, the idea of representation suggests, again, that jurors are to find out where the community overall would stand on a given moral question and vote accordingly, as opposed to making their own moral judgments.

ty and to define criminal acts in terms of the community's perception of them."); Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2426–27 (1999) (arguing that "the jury . . . serve[s] as the conscience of the community" and that "we hope that a community-based sense of right and wrong will guide juror decisionmaking in appropriate cases"); Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 364 (1999) (describing jurors as "shar[ing the] goal of determining guilt or innocence in accordance with law and the community's sense of justice"); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 997, 1007 (1999) (saying that "the jury must not only find the facts but must also make a judgment" about "standards such as 'recklessness' and 'reasonableness' that are intended to be evaluated in the context of community norms" and describing good verdicts as those that are "compatible with the community's sense of justice"); Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1551 (1993) (discussing the phrase "the conscience of the community" when describing the criminal jury); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 904 (1999) (arguing that juries "bring their sense of community norms into the process of applying the law to the facts"); Victoria Nourse, *After the Reasonable Man: Getting over the Subjectivity/Objectivity Question*, 11 NEW CRIM. L. REV. 33, 38 (2008) (referring to the jury as the "majorities' surrogate"); Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1392–97 (1994) (describing the jury's role as "the voice of the community"); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1277 (2000); Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1375–76 (1999) (reviewing KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998)) (describing that "[o]ne of the primary functions of a jury is to express the moral sentiment of the community in applying the law").

85. *See* United States v. Gilliam, 994 F.2d 97, 101 (2d Cir. 1993); Barkow, *supra* note 81, at 62; Carroll, *supra* note 84, at 673; Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 298 (2003); *see also* Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 737 (1995) ("The claim that jurors serve in a representative capacity seems in one sense uncontroversial.").

86. Abramson, *Second-Order, supra* note 79, at 771.

87. Hélène Landemore, *Democratic Reason: The Mechanisms of Collective Intelligence in Politics*, *in* COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS 251, 263 (Hélène Landemore & Jon Elster eds., 2012).

3. Jurors as Fiduciaries

In a similar vein, in a recent article, *Fiduciary Principles and the Jury*, Ethan Leib, Michael Serota, and David Ponet propose that we view jurors as fiduciaries who are obligated to advance the interests of "the people."[88] The authors go on to argue that jurors, as fiduciaries, owe a duty of loyalty to the people and that the practice of jury nullification can be explained as a device that jurors use to "channel loyalty to the public interest—by conforming to the ethical intuitions of the people" and to communicate, as "citizen representatives," "popular judgments on the existing laws."[89] Again, a likely implication of such a view is that jurors have an obligation to produce decisions that "conform[] to the ethical intuitions of the people," which supports the view that jurors do not answer moral questions but rather have an obligation to reproduce moral views held by "the community" or "the people."[90]

B. Do Jurors Represent?

So the idea of jurors as the conscience, representatives, and fiduciaries suggests an answer to the question this Article has raised. But it turns out, upon closer scrutiny, that these theories do not compel an answer one way or another on the question of whether jurors should vote according to individual moral beliefs or the community's perspective. In order to see why, we need a more detailed look at the idea of representation, which, while being only one of the three ideas mentioned above, is broad enough to encompass the idea of the criminal jury as the conscience or a fiduciary as well. And when we take such a look, we can see that the term "representation" is used in a number of different ways, as shown in Hanna Pitkin's 1967 book, which remains the starting point of any discussion regarding the nature of political representation today.[91] When we, in turn, look at different ideas of representation, we will also see that they are too limited, inapplicable, indeterminate, or problematic to offer a viable answer to the question we are interested in.

1. Representatives as Agents Who Can Bind Principals

Jurors may be considered "representatives" of the relevant community in the sense that "anyone who performs a function for [a] group" is the group's representative if his "actions may be attributed to [the group] and are binding on it."[92] But this characterization tells us only what consequences follow from acts of representing and does not tell us much about what the jurors ought to do

88. Ethan J. Leib, Michael Serota & David L. Ponet, *Fiduciary Principles and the Jury*, 55 WM. & MARY L. REV. 1109, 1115 (2014) [hereinafter Leib et al., *Fiduciary Principles*].

89. *Id.* at 1137.

90. *Id.*

91. *See generally* HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION (1967).

92. *Id.* at 41.

and how they ought to conceive of their role. It is thus too limited in scope to be helpful for our purposes.

2. Authorization by and Accountability to Constituents

Are jurors representatives in the way legislators are representatives? It does not seem that way. Jurors are not elected like legislators or otherwise authorized directly by the citizens to act on their behalf, which is one way a person represents another person.[93] Nor are they held "accountable" to those they supposedly "represent" in the sense of being "held to account" or required to "answer to" those they represent, as jurors do not face reelection or potential termination for reaching a decision their "constituents" do not like.[94] To be sure, jurors are authorized by law to serve as jurors and are accountable to the legal system, itself represented by the presiding judge, to do their job, but they are not authorized by or accountable to specific persons.

In fact, it is fair to describe the criminal jury as an entity specifically designed so that they would *not* be held accountable or answer to those they "represent," whoever they may be. Federal Rule of Evidence 606(b), for instance, prohibits jurors from "testify[ing] about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's vote; or any juror's mental processes concerning the verdict or indictment."[95] The oft-stated policy behind the rule, as articulated by the Supreme Court in *Tanner v. United States*, is to ensure that "the jury system . . . survive[s]" and to preserve "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople."[96]

The *Tanner* Court considered the need to protect the jury deliberation process to be so important that it was willing to let a jury verdict go unchallenged despite evidence that, during trial and deliberation, "four male jurors

93. *Id.* at 42–44.

94. *Id.* at 55; *see also* Mark E. Warren, *Citizen Representatives*, *in* DESIGNING DELIBERATIVE DEMOCRACY 50, 57–59 (Mark E. Warren & Hilary Pearse eds., 2008); IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 131 (2000) ("The representative is authorized to act, but his judgment is always in question. . . . The representative acts on his or her own, but in anticipation of having to give an account to those he or she represents."); Mark B. Brown, *Citizen Panels and the Concept of Representation*, 14 J. POL. PHIL. 203, 221 (2006).

95. FED. R. EVID. 606(b).

96. 483 U.S. 107, 120 (1987); *see also id.* at 137 (Marshall, J., dissenting) (citing "freedom of deliberation, finality of verdicts, and protection of jurors against harassment" as the purposes behind the rule). As the Supreme Court recently explained in *Pena-Rodriguez v. Colorado*, all American jurisdictions have some version of the same rule, though several have exceptions to it to allow testimonies about various improprieties during jury deliberation, including expressions of racial bias. 137 S. Ct. 855, 878 (2017). The Court held that:

> [W]here a juror makes a clear statement that indicates that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Id. While *Pena-Rodriguez*'s holding is important and cracks open the door to the jury room somewhat, such limited exceptions do not threaten the observation made here about the criminal jury's general lack of accountability.

shared up to three pitchers of beer" and "smoked marijuana" on a daily basis, two of them ingested "cocaine . . . on several occasions," one male juror "used cocaine during breaks," a female juror would drink "a liter of wine at lunch," and two other female jurors "regularly consumed one or two mixed drinks at lunch."[97] In addition, special verdicts are disfavored in criminal jury trials[98] and inconsistent verdicts are allowed[99]—both positions defended by the need to keep jurors in criminal trials free from outside scrutiny.[100] Therefore, when it is said that jurors "represent" the community, the relevant idea of representation is not the kind that holds jurors accountable. Specifying the idea of representation in terms of authorization or accountability accordingly does not help, as that particular specification does not fit our jury practice.

3. Descriptive Representation

Another reading of the term "representation" in the context of the jury may be that a jury is supposed to "represent" by being a microcosm or a "representative sample" of the relevant community.[101] According to Pitkin's theory of "descriptive representation," the key requirements for the jury to be a good representative are "resemblance, reflection, [and] accurate correspondence."[102] Under this view, the jury exists as a way of producing a verdict that the entire community would present if it were there to hear the case, as its function is to accurately reflect the community's perspective.

There is some support for this way of thinking about juries. For instance, *Taylor v. Louisiana*, which held that criminal juries "must be drawn from a source fairly representative of the community," seems to envision criminal juries as charged with reflecting the community's perspective.[103] An extreme version of this perspective among legal scholars can be found in an article by George Thomas and Barry Pollack in which they assume for the purposes of their analysis that "'true' guilt means nothing more, or less, than the judgment that society as a whole would reach in a given case" as they evaluate criminal juries and their decisions.[104]

As appealing as this idea of representation may be, it does not answer the question we are interested in—namely, the nature of the proper task for each juror.[105] If the purpose of the jury is to arrive at the "judgment that society as a

97. *Tanner*, 483 U.S. at 136 (Marshall, J., dissenting).

98. United States v. Spock, 416 F.2d 165, 183 (1st Cir. 1969).

99. United States v. Powell, 469 U.S. 57, 69 (1984).

100. *Id.* at 69; *Spock*, 416 F.2d at 182.

101. *Spock*, 416 F.2d at 181 n.39.

102. PITKIN, *supra* note 91, at 62.

103. 419 U.S. 522, 530, 538 (1975).

104. George C. Thomas III & Barry S. Pollack, *Rethinking Guilt, Juries, and Jeopardy*, 91 MICH. L. REV. 1, 9 (1992); *cf.* PITKIN, *supra* note 91, at 84 ("Representing may be seen as an accurate correspondence between legislature and nation . . . to ensure that the legislature does what the people themselves would have done if they acted directly.").

105. Moreover, as has been pointed out many times, as a descriptive matter, there are serious problems with the idea of the jury mirroring or resembling the community. For one thing, the *Taylor* Court left no ambi-

whole would reach in a given case," does it follow that each juror should attempt to arrive at such a judgment? Or does the system essentially depend on some hope that the jury would end up mirroring the broader society if each individual juror voted according to his or her personal judgment? This way of thinking about representation also introduces a third possibility, which is, as Pitkin puts it, that "a representative . . . must reflect his *constituents* as truly and accurately as possible,"[106] where "constituents" might mean a particular group defined in terms of, say, race, gender, or class.[107] This third possibility suggests that jurors may see themselves as having "constituents" and should represent "the black perspective," "the female perspective," "the urban poor perspective," and so on.[108] The idea of descriptive representation seems consistent with all three possibilities and is thus too indeterminate to render an answer to the question in which we are interested.

4. Jurors as Fiduciaries

Pitkin remarks that "[r]epresentation certainly is, as many writers have pointed out, a fiduciary relationship, involving trust and obligation on both sides."[109] Can the "fiduciary" notion illuminate the question on the table? As mentioned above, Leib, Serota, and Ponet have suggested as much. They have defended the view that we conceive of jurors as fiduciaries and, as noted above, have argued that the practice of jury nullification can be explained as a device that jurors use to "channel loyalty to the public interest by conforming to the

guity when it said that it "impose[s] *no* requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in population." *Taylor*, 419 U.S. at 538; *see also* Holland v. Illinois, 493 U.S. 474 (1990). As a matter of practice, as Andrew Leipold explains, "[a] jury need not present a cross-section of the citizenry; the panel does not have to reflect the community's racial, gender, economic, or ethnic make-up; and some groups are routinely excluded from service by law or by practice." Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 299 (1996); *see* Jeffrey Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861, 881 (2015) (noting that "the match between actual jury practices and the theory of descriptive representation is poor"); Daniel C. Richman, Old Chief v. United States*: Stimulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 974 (1997).

106. PITKIN, *supra* note 91, at 90.

107. *Cf. id.* Pitkin states:

> If we are discussing the duties of a representative, or distinguishing good from bad representing, the descriptive view is not totally irrelevant . . . . It is irrelevant insofar as representing involves no action at all but only characteristics; in that case representing is not something that any one man can do well or badly (though one man can be more typical than another). But if we speak of it as the activity of "representation making" . . . then a representative does seem to have a duty; he must reflect his constituents as truly and accurately as possible.

Id.

108. The theory of descriptive representation for juries is controversial partly because of this possibility. *See, e.g.*, ABRAMSON, *supra* note 17, at 140; Alschuler, *supra* note 85, at 738 (stating that "no individual juror should be expected to represent anyone other than herself"); *see also* Abramson, *Second-Order*, *supra* note 79, at 744 n.14. Kim Taylor-Thomson also acknowledges that "jurors of color may balk at the suggestion that they should assume the role of 'voice of the race' in the jury room." Taylor-Thompson, *supra* note 84, at 1286. For further discussion, see *id.* at 1287–1290, 1298–1305 (race and gender).

109. PITKIN, *supra* note 91, at 128. As Pitkin suggests, the idea of public officials as "fiduciaries" has a long history. For a quick summary of its pedigree, see Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 708–710 (2013) [hereinafter Leib et al., *Theory of Judging*].

ethical intuitions of the people,"[110] which in turn implies an obligation to reproduce moral views held by the community.

But what does the term "fiduciary" mean? One suggestion may be to think, as Pitkin describes the view at one point, that "the representative must do what his principal would do, must act as if the principal himself were acting."[111] Under this description, jurors ought to attempt to approximate what the relevant community would wish to do. But that conclusion is not required by the idea of representation, as illustrated by the traditional debate over whether a good representative does what the represented wants or does what is good for the represented.[112] Sometimes a good representative does what is in the beneficiary's interest but is not necessarily what the beneficiary would wish.

Pitkin's own solution is that we stop asking "whether the representative ought to act in his constituents' interest as he sees it or as they see it" and simply recognize that he "must act in their interest, period."[113] She later proposes a formulation that includes the thoughts that "representing . . . means acting in the interest of the represented, in a manner responsive to them" and that the representative's "action must involve discretion and judgment."[114]

What would all this mean in the jury context? Here, I focus on Leib, Serota, and Ponet's recent article on the jury as it is the most developed account of the jury and jurors as fiduciaries. Leib, Serota, and Ponet start from the observation that there are multiple possibilities when assigning the fiduciary-beneficiary designations to different actors in a jury system.[115] Each juror or each jury could be a fiduciary.[116] And possible beneficiaries, they mention, are "'the law' or the 'legal system' or 'the state'; one or the other or both of the litigants; or 'the people.'"[117] They settle on the answer that "both the individual juror and the petit jury as a whole are fiduciaries for 'the people.'"[118]

What follows from the proposition that the criminal jury is a fiduciary for the people? That formulation by itself does not tell us much about how jurors ought to approach their tasks. Of course, to the extent that the legal system is there to serve "the people," there is nothing wrong with the idea that the judiciary, by extension, exists to serve "the people" as well. In fact, every public official, including a juror, can be described as a "representative" of "the people" with various fiduciary obligations. Moreover, that state institutions and state officials exist for "the people" is not an idea unique to democracy. Consider this quote from Edmund Burke: "The king is the representative of the people;

110. Leib et al., *Fiduciary Principles*, *supra* note 88, at 1137.
111. PITKIN, *supra* note 91, at 144.
112. *See id.* at 145.
113. *Id.* at 165.
114. *Id.* at 209.
115. Leib et al., *Fiduciary Principles*, *supra* note 88, at 1130.
116. *Id.*
117. *Id.*
118. *Id.* at 1115.

so are the lords; so are the judges. They are all trustees for the people."[119] It is true that positing the people as the beneficiary does rule out certain visions of the government—say a person believes that the government exists to enrich the President and his family or benefit the wealthy few but no one else—but other than ruling out such obvious nonstarters, its implications are highly indeterminate. So, if the question we are asking is what obligations legislators, prosecutors, judges, and jurors have in a society, saying that they all "represent the people" and have various fiduciary obligations to them does not advance the inquiry sufficiently far to reach the question that we have been addressing.

That is not quite fair, though, to Leib, Serota, and Ponet, as the three authors (though sometimes just Leib and Ponet) have given the idea of being a fiduciary more content over the years. The theory they present is rich and multifaceted, so I will focus only on the aspect that seems most relevant to the topic of this Article. Consider one of the central features of the authors' fiduciary theory: deliberative engagement.[120] The authors have argued over the years that within "the core of the constellation of fiduciary duties in fiduciary political representation" lies a "dialogic imperative" that they call "deliberative engagement."[121] What does "deliberative engagement" call for? Leib, Serota, and Ponet define it as "an affirmative obligation to engage in dialogue with the public fiduciary's beneficiary."[122] One implication of this obligation is that "it is the fiduciary representative's job *to try to divine a coherent public will*,"[123] as the "duty requires an authentic effort to uncover . . . their beneficiaries' preferences."[124] Like the idea of the jury being the community's conscience, these references to the "public will" or the people's "preferences" seem to suggest a bias in favor of identifying the community's perspective on moral questions and implementing it.

However, as Leib, Serota, and Ponet acknowledge, "many well-established features of the jury system"—such as instructions not to discuss the case during trial or to do independent research—"seem in tension with the public fiduciary's duty of deliberative engagement."[125] In fact, when we look at different functions that criminal procedure rules play in the United States, especially given its history of racial subordination and violence, one of the most important functions is that they serve as a barrier that stands between mob violence and the rule of law.[126] Presumption of innocence, the proof beyond a rea-

119. PITKIN, *supra* note 91, at 129 (internal citation omitted); *id.* at 231 ("[T]he actions of a benevolent dictatorship might be directed toward the welfare of the populace, and make no concessions to anything resembling democratic participation.").

120. *See* Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. POL. PHIL. 178, 188–98 (2012) [hereinafter Leib & Ponet, *Fiduciary Representation*]; Leib et al., *Theory of Judging*, *supra* note 109, at 740–52; Leib et al., *Fiduciary Principles*, *supra* note 88, at 1140–45.

121. Leib & Ponet, *Fiduciary Representation*, *supra* note 120, at 190.

122. Leib, et al., *Fiduciary Principles*, *supra* note 88, at 1141.

123. Leib & Ponet, *Fiduciary Representation*, *supra* note 120, at 191.

124. Leib et al., *Theory of Judging*, *supra* note 109, at 741.

125. Leib et al., *Fiduciary Principles*, *supra* note 88, at 1141.

126. *See, e.g.*, Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 56 (2000).

sonable doubt requirement, the right to counsel, prohibitions on *ex post facto* laws, double jeopardy, cruel and unusual punishments, and so on serve, among other things, as safeguards to ensure that each criminal defendant is treated fairly, even if doing so can interfere with convicting the guilty and even if there may be enormous pressures from the people to convict and punish those whom the public sees, correctly or incorrectly, as wrongdoers. Given such features of criminal procedures, it seems in fact the case that jurors should *not* understand their job to "require[] an authentic effort to uncover . . . their beneficiaries' preferences."[127]

Given all this, it is understandable why Leib, Serota, and Ponet call for "a *modified* duty of deliberative engagement, calibrated according to the particularities of jury representation."[128] Furthermore, it is instructive that when Leib, Serota, and Ponet discuss jury nullification, the identity of the beneficiary is referred to neither as "the people" nor "the public" but as "the public interest," as in "[w]hen a jury's decision emanates from jurors' commitment to being loyal to *the public interest*" and "the act of jury nullification may channel loyalty to the *public interest*."[129] The difference is subtle, but the phrase "public interest" takes the focus away from "the people" or even from "the public" and places it on the question of what is good for society overall, which may call for ignoring what the people wish on a given day.

What does all this mean for the question that we are interested in, which is whether jurors ought to attempt to replicate the community's perspective? To answer, we might picture the relevant relationships as follows: The people authorize the legal system to administer law in order to serve the people; the legal system assigns roles to different parts of the system in order to serve the people; those roles, however, do not necessarily make direct references to the people because sometimes, in order to serve the people most effectively, one may have to put blinders on and ignore the people.

The upshot of all this, for our purposes, is not necessarily that jurors do not "serve the people" or "represent" the community or that they are not "community representatives." There is a sense in which they are clearly representatives of the community. Neither is the point that theories that posit jurors as fiduciaries are deficient; it is clear that such theories have resources to deal with some of the problems raised by building in various obligations the fiduciary has. For instance, just as Leib, Serota, and Ponet have said about judges, they could respond to my concerns by saying that jurors "serve the people" by "[d]ischarging [their] responsibilities fairly and impartially" and by "upholding the rule of law."[130] Rather, the point is that thinking of jurors as fiduciaries who represent "the people" does not by itself illuminate the nature of their obligations as moral judgment-makers and may, in fact, encourage a way of thinking

127. Leib et al., *Theory of Judging*, *supra* note 109, at 741.
128. Leib et al., *Fiduciary Principles*, *supra* note 88, at 1142 (emphasis added).
129. *Id.* at 1137.
130. Leib et al., *Theory of Judging*, *supra* note 109, at 722.

of jurors that is at odds with the core obligation of the criminal jury to be independent and to be first and foremost loyal to the rule of law.

V. WHY SHOULD JURORS MIRROR THE COMMUNITY PERSPECTIVE?

If the idea of the jurors as the conscience, representatives, or fiduciaries of the community does not help us answer the question about the nature of the moral inquiry jurors are engaged in for a variety of reasons canvassed above, we may be better off shifting the focus from the general *form* of the criminal jury's role to its *substance*. There may still be several independent normative reasons to think of the jurors' job as mirroring the community's perspective in the criminal law context, and here I review a few.

A. The Expressive Dimension of Punishment

The institution of punishment has a communicative, expressive dimension. When the state punishes, it condemns what the offender has done as blameworthy, and it communicates to the offender that what he has done is wrong. As Antony Duff formulates it, the criminal law "declares and defines *mala in se*, and creates *mala prohibita*, as public wrongs from which citizens should refrain," and crimes are accordingly "public wrongs" that "merit a public, communal response" in the form of "authoritative, communal condemnation of such wrongs" through conviction and punishment.[131] One who is inspired by this way of thinking about punishment[132] might reason as follows: if it is the case that our criminal justice system reflects such a system of communal responses to wrongs, and the criminal jury is a body that is charged with the responsibility of expressing such condemnation, then it appears to follow that the jurors are "representatives" who act on behalf of the community. Accordingly, the argument might go, jurors ought to attempt to determine the community's position on the moral blameworthiness of the conduct in question as the jury reaches its decisions.

B. Democracy

Victoria Nourse has argued that the "norms" applied by the criminal law "must be majoritarian" and that the jury's aim is to "reflect[] . . . majoritarian norms," and this, she has explained, means being "attentive . . . to general soci-

131. R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 61, 80 (2001) [hereinafter DUFF, PUNISHMENT]; *see also* Joel Feinberg, *The Expressive Function of Punishment*, *in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 147 (1970) (stating that "punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority or of those 'in whose name' the punishment is inflicted.").

132. I put it this way because I do not mean to attribute the view that follows to Antony Duff. The only point being made here is that one who subscribes to the notion of "communal response" in the punishment context may hold certain views as to how such a view ought to be identified and articulated, not necessarily that this is Duff's own view.

etal rules of behavior."[133] Nourse adds that "a jury that applies Stalinist norms to the defendant violates basic rules of our constitutional order."[134] The basic idea here is that in a democratic society like ours, laws are enacted through the democratic process, and, if done well, the laws should reflect the viewpoint of "the people." Given that the jurors are tasked with interpreting and enforcing criminal laws as they apply them to defendants, they should keep in mind the democratic groundings of these laws and should thus attempt to line up the laws' views with the views of the people. This, in turn, implies that when jurors enforce moral elements, they ought to attempt to find out what the people believe and apply such beliefs.

C. Notice

As the Labrie and Peterson cases mentioned above illustrate, crime definitions often rely on the notion of the "reasonable person," and as John Gardner points out, "the reasonable person" can be portrayed as the enemy of legal certainty.[135] The phrase is vague and details are left to factfinders to work out. The ideal of legality and giving citizens fair notice of what the law requires are especially important in the criminal law context, where consequences of being held liable are dramatic. To the extent that terms like "reasonableness" place a person's behavior in the grey area of criminality, there is a danger of there being insufficient notice before the law is enforced against him. Gardner says that the reasonable person test is accordingly "reined in" in various ways in order to mitigate the rule of law concerns the standard carries, and one of those ways is by appealing to the idea of an "ordinary," "typical," or "average" person.[136] Similar notice considerations suggest that jurors should apply moral terms in crime definitions in terms of prevailing norms in a community.[137]

Legal scholars generally think the response that an ordinary person is often not "reasonable" is an insufficient answer to the notice problem. If what different moral terms mean in a particular context comes across as a surprise to ordinary citizens, there can be a problem of notice. Someone like Mayo Moran might object that such a concern is misplaced given that the argument "I, an ordinary person, did not know *that* is what reasonableness demanded," would be tantamount to raising a mistake of law defense, and ignorance of the law is no excuse.[138] However, the mistake of law doctrine is no help since the most controversial mistake of law cases involve situations where the notice problem is

133. Nourse, *supra* note 84, at 48. She also emphasizes that such majoritarian norms must be "restrained," but what she means by "restrained" is that the jury must "restrain vengeance," so this qualification, while important for her argument, is not relevant to the question we are interested in here.

134. *Id.* at 37.

135. Gardner, *supra* note 54, at 564.

136. *Id.* at 576–77.

137. *Id.* at 575 (describing the view where a juror is supposed to determine "not whether a certain action, belief, decision etc. was justified but whether people, or some people would in her judgment think it was justified").

138. MORAN, *supra* note 69, at 235–37; *see also* Baron, *supra* note 26, at 30.

the most serious.[139] Invoking the mistake of law idea, thus, serves only to highlight the potential notice problems that may arise when one departs from ordinary understandings of moral terms.

D. Culpability

According to a standard account of culpability and responsibility, capacity is an important factor to consider when holding people criminally responsible. That is, if one lacks the capacity to do something, then one should not be held responsible for failure to do that thing.[140]

If it is indeed the case that the reasonable person standard is a way of implementing the principle that one should not be held criminally responsible for failing to do something he lacks the capacity for, that is a reason to set the standard of the reasonable person at a realistic level. It may all be fine and, as Saira Mohamed has argued, maybe criminal law is "an aspirational tool" that "envisions a set of behaviors that one day might become the norm."[141] But if the aspirational standard is set so high that it is unrealistic to expect ordinary citizens to live up to it, then we could end up treating individuals unfairly. The reasonable person standard should not make unreasonable demands, and one way of avoiding this is to set what the reasonable person standard requires at the level of the ordinary person. The same rationale applies to jurors when they are to give meaning to moral terms. That is, the reason to interpret legal standards by referring to how an average member of the community would understand it can be one way of ensuring fair treatment of criminal defendants by setting aspirational standards at a reasonable level.

So, there are a number of reasons to think that the jury's job when interpreting vague moral terms is to inquire into what the relevant community believes and enforce such beliefs.

VI. JURORS AND THE COMMUNITY

A. How Jurors Contribute

The question this Article has been asking is what jurors are obligated to do as they perform their duty. How should we think about such obligations? I suggest we start thinking of their obligations as *political* obligations, or obligations individuals owe to the state. Because we are talking of jurors, the type of obligations we have at issue in this scheme are "role obligations"—obligations that jurors owe *as* jurors or, more specifically, as participants in and citizen-administrators of a state institution. So, in order to understand what obligations

139. *See, e.g.*, Lambert v. California, 355 U.S. 225, 228 (1957).

140. *Cf.* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 152 (1968) [hereinafter HART, PUNISHMENT]. Whether Hart's particular understanding of responsibility is the same as the view described here is not my concern. The point merely is that the idea of one's capacity is of central importance in attributions of responsibility.

141. Mohamed, *supra* note 72, at 1676.

jurors have, we need an understanding of how the jury system contributes to the existing scheme of state institutions.

1. Jurors Are Not Like Contestants on Family Feud

We may start by making the obvious observation that when jurors are asked to decide whether a person is guilty in a criminal trial, they are asked whether the defendant committed the crime charged, and not whether the defendant committed the crime charged according to the community. That is, the question that the jury is asked is not like the question that contestants on the show *Family Feud* are asked. On *Family Feud*, the contestants are not asked what, say, the most useful kitchen appliance is but are asked to guess what the survey says the most useful kitchen appliance is. Similarly, if we are really interested in asking jurors to replicate the community's perspective on moral questions, we could simply ask that question, but that is not the question we ask. We instead ask the jurors whether a person was unreasonable, reckless, lacked consent, and so on.

2. Jurors Are Given the Task of Giving Content to Vague Terms

When jurors make moral judgments in applying crime definitions, they have some discretion because these moral terms—such as "reckless," "cruel," and "debauch a child's morals"—are indeterminate. More specifically, they are vague and contestable and carry specific connotations that need to be grasped in order to apply them correctly. To understand the jurors' role in all this, we need an understanding of why such vague terms are used in the first place.

The role of vagueness in law is a topic that has been much discussed.[142] For one thing, indeterminate terms, by avoiding committing to answers on difficult questions, help us avoid erroneous decisions. It is sometimes difficult for legislators to specify in advance how people ought to behave in given situations. They may not be able to foresee all scenarios that fall within the scope of behaviors the law seeks to regulate and could end up making mistakes if they try to formulate rules for all situations. If they attempt to foresee all factual scenarios in advance and specify what ought to happen in each instance, the law in that area may be so complex and unwieldy that it would in fact start to compromise the guidance function of the law.[143] For instance, there are many different ways for a person to cause another person to die in a reckless manner. Some situations may come up often enough—say driving while heavily intoxicated—that bright-line rules may make sense, but there are more ways in which

142. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 124–36 (2d ed. 1994) (discussing "open texture") [hereinafter HART, THE CONCEPT OF LAW]; Timothy A. O. Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD J. LEGAL STUD. 1, 6–7 (1999).

143. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 32–33 (2012) ("Vagueness . . . is often intentional, as general terms (reasonable time, best efforts, equal protection) are adopted to cover a multitude of situations that cannot practicably be spelled out in detail or even foreseen." (emphasis removed)).

people can behave recklessly and cause death than we can specify or even imagine in advance. In such cases, it may be error-inducing to attempt to improve upon the formulation that one may be convicted of manslaughter if one causes a person's death in a reckless manner.

So when does the ultimate decision get made? When, for example, questions arise as to whether a particular death occurred due to a person's recklessness, the legal system must come to a resolution. We cannot just tell people to stop behaving recklessly and hope for the best. Deaths will happen, questionable behaviors leading to the deaths will be identified, and the government has to decide whether the legally established penal consequences for people who are responsible for such deaths should apply. Therefore, even though indeterminacy may be ineliminable and even desirable, determinate resolutions must be made.[144] As Hart puts it, there sometimes exists a "need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case."[145] The key idea here is that when we have indeterminate terms in law, what is happening is delegation of the legislative authority to decision-makers in different times and places when they are in better positions to make them.[146]

So, if this is what jurors are doing—making "an informed, official choice" about whether a particular act falls into one moral category or another—then the question the jurors ought to ask is what these moral terms mean as applied to particular contexts. The delegation to the jury is to determine how the law ought to be applied, and not to determine how "the community" believes the law ought to be applied. Given that the idea here is to reach better decisions by seeing how a general idea plays out in a particular context, jurors who have access to such particular facts are better positioned to determine just that (how the general idea applies in a particular context) than to determine how the community at large would view the same question.

The debate on popular constitutionalism, which we may characterize roughly as the view that judges ought to take into account what the ordinary people understand the Constitution to mean when interpreting the Constitution,

144. HART, PUNISHMENT, *supra* note 140, at 132–33 (discussing negligence).

145. HART, THE CONCEPT OF LAW, *supra* note 142, at 130.

146. Youngjae Lee, *Reasonable Doubt and Moral Elements*, 105 J. CRIM. L. & CRIMINOLOGY 1, 27 (2015); *see* Joseph Raz, *Sorensen: Vagueness Has No Function in Law*, 7 LEGAL THEORY 417, 419 (2001). Raz states:

> Making law, we say, is and should be a collaborative enterprise. Different aspects of the law are made by different institutions at different times, involving courts, Congress, state legislatures, local authorities, administrative authorities, regulatory authorities, and more. It is important that the right bodies will contribute the right elements to the law, and that they should do so at the right time. Therefore, when wisely used, all means and devices that ration powers to make the law among public organs and that regulate the time for the use of such powers have an important function in the law. Vagueness is one source of discretion. As such it is a power-regulating device and therefore has an important function.

Id.

has some parallels here.[147] Consider this criticism of popular constitutionalism by David Pozen:

> The problem is not that laypersons are unable to develop intelligible, respectworthy preferences on questions of constitutional law . . . but rather that they are unlikely to hold such preferences on the precise sorts of questions that come before a court. State judges do not address constitutional disputes in a vacuum. They do so in the context of specific cases, laden with all manner of supplemental claims, factual particularities, procedural histories, jurisdictional complexities, and doctrinal precedents that shape and constrain the judicial task. Ordinary citizens have neither the training, nor the resources, nor the responsibility to engage constitutional disputes in the way that judges must engage them.[148]

Similarly, we might say that, even though it is the case that "the people" hold opinions on the meaning of various moral terms that jurors consider and apply, the people at large are unlikely to have positions on the "precise sorts of questions" that come before a jury. Juries address moral questions in "the context of specific cases" that are laden with "factual particularities," and the people do not engage moral questions in the way that jurors must engage them.[149] If we, despite all this, ask jurors to determine what the community might think the moral terms mean in this particular context, we would be asking them to take up guesswork about what some abstract entity that has never thought about an issue might think about it, as opposed to simply state what *they*, the jurors, think.

Therefore, asking individual jurors to discern the community perspective would be an oddly roundabout and potentially error-prone way of getting at what the community believes. If we were really interested in what the community thinks rather than the jurors themselves, then it seems that legislators are better positioned to do such a thing given that they are elected and are held accountable by the electorate. So, if jurors, when answering a moral question in order to apply a crime definition, attempt to figure out how the community would answer the question instead of simply answering the question, they would most likely be answering the wrong question.

3. Jurors Bring a Diversity of Viewpoints

Furthermore, consider what jurors as a group bring as a distinct advantage in problem solving: diversity of viewpoints. The benefits of diversity in collective decision-making have been noted by many. Aristotle observed that "the many, of whom each individual is not a good man, when they meet together may be better than the few good, if regarded not individually but collectively, just as a feast to which many contribute is better than a dinner provided out of a

147. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2048–49 (2010).

148. *Id.* at 2120–21.

149. *Id.* at 2121.

single purse."[150] So far, Aristotle is making only a numbers argument, but notice his explanation:

> For each individual among the many has a share of excellence and practical wisdom, and when they meet together, just as they become in a manner one man, who has many feet, and hands, and senses, so too with regard to their character and thought. Hence the many are better judges than a single man of music and poetry; for some understand one part, and some another, and among them they understand the whole.[151]

The idea here is that different people can bring different perspectives to a task, and as a group can "understand the whole" better than those who understand "only one part" when isolated from others.[152] As Jeremy Waldron later puts it in his interpretation of the above passage:

> [Aristotle's] view is that deliberation among the many is a way of bringing each citizen's ethical views and insights . . . to bear on the views and insights of each of the others, so that they cast light on each other, providing a basis for reciprocal questioning and criticism and enabling a view to emerge which is better than any of the inputs and much more than a mere aggregation or function of those inputs.[153]

More recently, numerous political theorists have made similar arguments. Iris Young, for instance, has argued that "social group differentiation, especially the experience derived from structural differentiation," is "a resource" that we need to draw on.[154] She explains that "[c]ommunication of the experience and knowledge derived from different social positions helps correct biases derived from the dominance of partial perspective over the definition of problems or their possible solutions" and that "inclusion of different social groups in . . . decision-making increase[s] . . . the store of social knowledge available to participants" and also "increase[s] the likelihood of promoting justice" by taking "interests of all . . . into account."[155]

Jon Elster similarly, albeit with a different emphasis, notes that "a *diverse group* of decision makers . . . may produce better decisions than a group of individually excellent decision makers" due to "the *exchange of information* among decision makers, each of whom may possess specialized knowledge."[156] Robert Goodin, too, argues that "[w]here people have only very different and very partial views on the overall situation . . . the truth is sometimes better found . . . in the union—the conjunction—of their reports."[157] Elizabeth Anderson also observes that "individuals are most familiar with the effects of problems and policies on themselves and those close to them, information about these effects is also asymmetrically distributed . . . according to their geograph-

150. ARISTOTLE, POLITICS 66 (Stephen Everson ed., 1988).
151. *Id.*
152. For a survey of similar arguments, see Landemore, *supra* note 87, at 59–64.
153. JEREMY WALDRON, THE DIGNITY OF LEGISLATION 106 (1999).
154. YOUNG, *supra* note 94, at 83.
155. *Id.*
156. JON ELSTER, SECURITIES AGAINST MISRULE: JURIES, ASSEMBLIES, ELECTIONS 279 (2013).
157. ROBERT GOODIN, REFLECTIVE DEMOCRACY 140 (2003).

ic location, social class, occupation, education, gender, age, race, and so forth."[158] Diversity of perspectives enables the system "to pool this asymmetrically distributed information."[159] In addition, diversity is valuable not only because it enables pooling of information from different perspectives but also because it can "remove some of the distortions" of what Cass Sunstein has called "group polarization,"[160] a phenomenon where "like-minded people, insulated from others, move in extreme directions simply because of limited argument pools and parochial influences."[161]

So, many people sing the praises of diversity, but what does all this mean for our purposes? Recall that the question on the table is what obligations jurors have when facing moral questions, and the answer to that question in turn depends on how jurors are to contribute to the legal institutions for which they are recruited. And the options that we are considering are either jurors ought to identify where the broader community stands on particular moral questions or jurors ought to answer moral questions by applying their own individual moral beliefs. If it is the case that the criminal jury is to "stand in" for the community, then the first option seems more correct. What the discussion of virtues of diversity in group deliberation show, however, is that an attempt to identify where the "community" stands on various moral questions when interpreting and enforcing moral elements of crime definitions would be a counterproductive use of jurors as a social resource. When different jurors work on a common task, they can, as a group, reach better decisions than they would if they were to make decisions individually, precisely because of the different perspectives they bring to it. Given that it is the ways in which the jurors differ from one another that contributes to decision-making, the appropriate way for jurors to contribute to the task is by bringing their individual perspectives and beliefs, as opposed to the beliefs of "the community," whatever that may be.

In short, even if all the talk of the jurors being "community representatives" implies that jurors need to take into account what "the community's" views are, the way in which we deploy jurors to speak for the community is precisely by asking them *not to speak for the community but for each to speak for himself or herself*. We are recruiting them as *individuals* with individual views, perspectives, and beliefs, not as *representatives* or *fiduciaries* (with all the attendant obligations the terms imply). We should look at jurors in this way and ask for individual perspectives as they deliberate, and jurors correspondingly should participate by giving their own views as opposed to attempting to replicate "the community perspective" because individuals, by bringing individual perspectives, bring diversity to the group, and diversity in turn contributes to better decisions. Jurors, in other words, cooperate and advance the system most effectively by being themselves and not by attempting to shoulder the

158. Elizabeth Anderson, *The Epistemology of Democracy*, 3 EPISTEME 8, 11 (2006).

159. *Id*.

160. Cass R. Sunstein, *Deliberative Trouble?: Why Groups Go to Extremes*, 110 YALE L.J. 71, 110 (2000).

161. *Id.* at 105.

burden of serving as "representatives," and their political obligations as jurors are best fulfilled when they bring their personal beliefs to the task. It further follows, then, that when jurors face moral questions as they enforce criminal laws, they should similarly consult their individual moral beliefs and not the beliefs of the community.

B. Reconsidering Why Jurors Should Mirror the Community Perspective

1. Expressive Dimension of Punishment

If, as argued above, the criminal law addresses "public wrongs" that "merit a public, communal response" and delivers "authoritative, communal condemnation of such wrongs,"[162] the criminal jury's job would be to deliver such communal condemnations. Numerous legal scholars have described the role of the criminal jury in just such terms. Kim Taylor-Thompson, for instance, has said that the point of the jury is "to bring the considered judgment of the community to bear on significant questions of justice."[163] Stephanos Bibas says that "[t]he jury serves as the chorus of a Greek tragedy, 'the conscience of the community,'" and that "[i]t applies the community's moral code, pronounces the judgment, and brands or exonerates the defendant."[164] Ronald Wright has argued that "[o]ne of the primary functions of a jury" is "to express the moral sentiment of the community in applying the law."[165]

But how is all this supposed to work? As even a jury enthusiast like Nancy Marder, who has argued that juries "bring their sense of community norms into the process of applying the law to the facts," acknowledges, "[t]here are different levels of community, and each may differ in its response to a jury's verdict," and "[a] decision that angers one group in a community may appease another."[166] If this is the case, then a juror who attempts to in fact identify "the community" and report its views on this or that may be at a loss as to how to go about doing his or her job.

The answer to this question should now be clear: There is no need for each juror to understand where "the community" stands on a given issue. The jury does "stand in" for the community, but the jury performs that role through

162. DUFF, PUNISHMENT, *supra* note 131, at 80.

163. Taylor-Thompson, *supra* note 84, at 1277.

164. Bibas, *supra* note 84, at 1401.

165. Wright, *supra* note 84, at 1375–76 (describing "[o]ne of the primary functions of a jury" as "to express the moral sentiment of the community in applying the law").

166. Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1060–61 (1995). For a similar concern, see Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1376–77 (2012). Another source of worry is that even if there were such a single "community" view, it is unclear whether jurors are well-equipped to discern it. Jason M. Solomon, *Juries, Social Norms, and Civil Justice*, 65 ALA. L. REV. 1125, 1173–76 (2014). For a parallel criticism in the context of the debate over popular constitutionalism, see Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 127–28 (2010) (questioning the wisdom of relying on the idea of "public opinion"); Pozen, *supra* note 147, at 2121 (claiming "[t]he notion that judicial decisions ought to 'mirror popular views' is, in fact, quite a few steps away from being a workable principle of jurisprudence").

people acting not as representatives but as individuals with personal moral beliefs on the relevant issue. Therefore, all this talk about the jury speaking for the community can confuse the issues because jurors ought not see themselves as representing the community or having constituents. They should only speak for themselves. Of course, they should have a clear understanding that the question they are asked to answer is what is appropriate for the community to condemn through criminal law, but the question always should be understood as implicitly being accompanied by the phrase "in your view," as opposed to "in the community's view."

2. Democracy

What about the argument based in democracy? The basic idea, as mentioned above, is that in a democratic society like ours, laws are enacted through the democratic process, and, if done well, the laws should reflect the viewpoint of "the people." Does this not mean that when jurors enforce moral elements, they ought to attempt to find out what the people believe and apply such beliefs?

The answer is no. It is not the case that democracy requires government actors to replicate the people's perspective at every stage of every government action. As argued above, a democratic society assigns different roles to different parts of the system, but those roles do not necessarily make direct references to the people because it is not the case that a democratic government has to have democracy in every part of the government. In the jurors' case, the jurors are serving the cause of democracy by participating in the process of adjudication as individual jurors with individual beliefs who are exercising interpretive powers delegated to them by the legal system. By speaking only for themselves, they are engaging in democratic governance, and the concept of democracy does not require that they take the further step of identifying and applying the people's perspectives on individual legal questions.

3. Notice

As to the problem of notice: this concern, too, need not be addressed by asking jurors to replicate the community perspective. This Article is about vague and evaluative terms like "unjustifiable," "reasonable," "depraved," and "cruel." It may be the case that the notice aspect of law would improve if jurors attempted to find the community perspective when deliberating and deciding. The standard, however, is not to give as much notice as possible, but to give sufficient notice to serve as a fair warning. Vague terms may be problematic from the rule of law perspective, but at the same time, vagueness in the criminal law can serve a legitimate function, in addition to the functions already mentioned above.

We may have indeterminate terms as a way of warning citizens to stay well away from questionable practices, to proceed with care, to think about the purposes of the laws they may be coming close to violating, to deliberate about

the meaning of words like "cruelty" and "reasonable," and so on. Indeterminate terms can be useful law enforcement devices because they induce people to stay away from gray areas and make it difficult for citizens to identify the areas in which they can engage in dubious behaviors and "get away with it." In fact, familiar ordinary moral terms with vague contours may give citizens more information as to what not to do than precise technical legalese that spells out in detail what is prohibited.[167] Given all this, as long as the jury's interpretations of moral terms are within the range of reasonableness, there is sufficient, *fair* notice despite the state's use of vague terms, even if some of these interpretations may end up being minority views.

4. Culpability

As mentioned above, the culpability argument in favor of the view that jurors ought to reflect the community perspective is based on the notion that we should not be too demanding of individuals. The concern is valid, but it does not mean that jurors should be asked to attempt to mirror the community in order to be fair to individuals. Each of the jurors, in his or her deliberation, can ask how to set the legal standard so that the law does not demand too much from the people and answer it according to his or her individual beliefs about what is appropriate for the state to demand from its citizens. This concern, like the question about the appropriateness of the state punishing certain conduct, can be incorporated into each juror's individual deliberation. Again, by bringing individual perspectives to the question of how the state ought to treat its citizens, jurors would be helping the legal system come to better decisions on the question of culpability.

VII. CONCLUSION

This Article has examined the ways in which jurors are to approach moral questions in criminal cases. More specifically, this Article has asked whether a juror, when making moral judgments, should follow his or her individual moral beliefs or identify and implement the community's perspective.

Many things said about the criminal jury appear to support the view that the jurors are to attempt to replicate the community's perspective. It is often said, for instance, the criminal jury serves as the community's conscience, representative, or fiduciary, and such formulations suggest an obligation on the part of the jurors to reproduce the community's perspective. This Article has argued that despite the popularity of such accounts, they are either too indeterminate to imply an obligation on the part of the jurors to reproduce the commu-

167. *Cf.* John Gardner, *On the General Part of the Criminal Law*, *in* PHILOSOPHY AND THE CRIMINAL LAW 205, 246 (Antony Duff ed., 1998) ("[W]hat causes confusion and difficulty in the *administration* of the law . . . can be the very same thing that makes the law vivid and accessible to people outside the courtroom, on the way back from the pub or driving on the motorway or carrying the takings to the bank."); John Gardner, *Rationality and the Rule of Law in Offences Against the Person*, 53 CAMBRIDGE L.J. 502, 511–20 (1994); Jeremy Horder, *Criminal Law and Legal Positivism*, 8 LEGAL THEORY 221, 236–37 (2002).

nity's perspective, or are in conflict with the fundamental role obligation of jurors to adjudicate fairly and accurately. We may, in fact, be better off jettisoning the talk of the jury as the community's conscience, representative, or fiduciary, at least in this context. We should instead embrace the notion that jurors fulfill their roles in the criminal justice system most effectively when they vote as individuals, not as representatives, by applying legal standards to particular situations and bringing a diversity of viewpoints to the task.