
The Jury As Constitutional Identity

Andrew Guthrie Ferguson*

The jury once existed at the core of American constitutional identity. At the founding, jury service and voting were twin political rights, equal in stature and importance. During the battles for racial equality and gender equality, advocates explicitly linked demands for voting and jury service as symbols of constitutional equality. The jury became a democratic, participatory symbol in our constitutional system, and the juror became a constitutional actor with constitutional responsibilities. Today, however, from summons to verdict, modern jurors are largely unaware of this constitutional connection. Worse, the combination of well-meaning jury streamlining programs, limiting jury instructions, and a historic shift in the role of juries has created essentially a “task-oriented” juror. Jurors do not consider their identity outside of the particular task presented at the courthouse.

This article examines how we ended up limiting the role of the juror in society. Particularly, it addresses the loss of constitutional identity and how jurors no longer view themselves as constitutional actors. This article then looks to reclaim a sense of constitutional identity. The article argues that, first, citizens must re-conceptualize “being a juror” as an important, ongoing, constitutional status, not a discrete task; and, second, citizens must embrace that being a juror requires engagement before and after the actual jury duty. Potential citizen-jurors should be encouraged to educate themselves about the constitutional role of the jury prior to serving. Experienced jurors who have served should be encouraged to reflect on and teach others from this experience. Courts and communities should promote this civic investment in the on-going jury role. So conceived, being a juror will not begin or end with the actual service, but will be seen as part of a continuum of civic life.

* Copyright © 2014 Andrew Guthrie Ferguson. Associate Professor of Law, University of the District of Columbia David A. Clarke School of Law. 2004 LL.M. Georgetown University Law School, 2000 J.D. University of Pennsylvania Law School. With thanks to Professors Nancy Marder, Howard Wasserman, Giovanna Shay, Meghan Ryan, and Anna Roberts. This Article was presented at the Law & Society Conference in May 2013.

TABLE OF CONTENTS

INTRODUCTION	1107
I. A CONSTITUTIONALLY-ORIENTED JUROR	1115
A. <i>The Founding Era and Beyond</i>	1116
B. <i>The Reconstruction Era and Beyond</i>	1121
C. <i>The Nineteenth Amendment and Beyond</i>	1127
D. <i>A Constitutional Identity</i>	1131
II. A TASK-ORIENTED JURY.....	1135
A. <i>From Law-Finders to Fact-Finders</i>	1136
B. <i>Standardized Jury Instructions</i>	1140
C. <i>Jury Streamlining Efforts</i>	1144
D. <i>Result: A Task-Oriented Institution</i>	1150
III. THE POTENTIALITY OF JURY SERVICE	1152
A. <i>Changing the Expectations of Jury Service</i>	1152
1. <i>Reimagining the Importance of Jury Service</i>	1153
2. <i>Expanding the Temporal Understanding of Jury</i> <i>Service</i>	1154
B. <i>The Benefits of Changing the Expectation of Jury Service</i> . 1155	
1. <i>Reputational Benefit</i>	1155
2. <i>Educational Benefit</i>	1157
3. <i>Process Benefit</i>	1160
4. <i>Systemic Benefit</i>	1162
C. <i>Strengthening Juror Identity</i>	1166
1. <i>Formal Constitutional Education Efforts</i>	1166
2. <i>Informal Juror Networks</i>	1169
CONCLUSION.....	1170

I have on my desk at this moment twelve five-by-seven ruled index cards. On each of them the same two words appear: “not guilty.” . . . The twelve cards represent the potent residue of the most intense sixty-six hours of my life, a period during which I served as the foreman of a jury charged to decide whether Monte Milcray was guilty of murdering Randolph Cuffee. During that period, twelve individuals of considerable diversity engaged in a total of twenty-three hours of sustained conversation in a small, bare room. We ran the gamut of group dynamics: a clutch of strangers yelled, cursed, rolled on the floor, vomited, whispered, embraced, sobbed, and invoked both God and necromancy. . . . During significant stretches in this trying time, we considered two weeks of testimony . . . and struggled to understand two things: what happened in Cuffee’s apartment on the night of August 1, 1998, and what responsibilities we had as citizens and jurors.

— *A Trial By Jury*¹

INTRODUCTION

In his memoir about his experience as a jury foreman, D. Graham Burnett isolates the two questions at the center of every jury trial: first, how should jurors determine the facts and, second, how should jurors understand their role as citizens in a constitutional democracy. The duality of fact-finder and participatory citizen has always existed during jury service.² Jurors must decide the case, and they must do so within a special constitutional role.

Today, there is little debate about the first role of the juror as fact-finder.³ In every state and federal court in America, jury instructions guide jurors to find the facts.⁴ The “role of the jury” instruction has been standardized to a single task: jurors apply the law to the facts.⁵

¹ D. GRAHAM BURNETT, *A TRIAL BY JURY* 11-13 (2001).

² See Chris Kemmitt, *Function over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 109 (2006).

³ “Today, with a few notable exceptions, it is well-accepted that the judge instructs the law, and the jury determines the facts in evidence and applies the law as instructed.” Judge Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. REV. 135, 147 (2000); see *Shannon v. United States*, 512 U.S. 573, 579 (1994) (“The jury’s function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged.”).

⁴ See *infra* Part II and accompanying notes.

⁵ See, e.g., 1-1 ARKANSAS MODEL JURY INSTRUCTIONS — CRIMINAL § 101 (2d ed. 1994) (“It is your duty to determine the facts from the evidence produced in this trial.

The United States Supreme Court has reaffirmed this limited, task-oriented role in cases dating back over a century.⁶ The result is that citizens called to jury service justifiably focus on the discrete, problem-solving nature of the job.⁷ For most people, jury service means going to a particular place (federal or state court) to participate in a specific event (criminal or civil trial). Jurors do not prepare for it. Jurors do not consider their role or identity outside of the task presented at that particular time and place.

In contrast, the second role of the juror as a constitutional actor has largely been forgotten.⁸ While court systems promote the abstract ideal of the participatory citizen, there is little effort to link jury service to constitutional identity. Inside the court system, from jury summons through final instructions, jurors are not educated about their historic, constitutional role.⁹ Outside of the judicial system, there is almost no recognition that the identity of the juror might extend beyond the courthouse.¹⁰ The identity of the juror as connected to the broader constitutional responsibilities of citizenship has been lost.¹¹

The result is precisely the opposite of the jury envisioned by those who drafted the United States Constitution. At the time of the founding, jurors were not mere fact-finders, but equal participants in a constitutional structure of shared power.¹² Some Founding Fathers

You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law.”); 1 CHARGES TO JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE IN NEW YORK § 3:2 (2013) (“We are both judges in a very real sense. I am the judge of the law and you, Ladies and Gentlemen, are the judges of the facts. I now instruct you that each of you is bound to accept the law as I give it to you.”).

⁶ See *Sparf v. United States*, 156 U.S. 51, 90-91 (1895).

⁷ See *infra* Part II.

⁸ See Jenny E. Carroll, *The Jury’s Second Coming*, 100 GEO. L.J. 657, 673-74 (2012) (“In drafting the Constitution, the Founders cemented the role of the jury as a political and constitutional actor.”).

⁹ Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 U. COLO. L. REV. 233, 238 (2013).

¹⁰ To be clear, this does not mean that court systems and jury task forces or commissions have not sought to improve jury service. But that almost all of the efforts are focused on improving jury service during the time of jury duty, and not before or after that time.

¹¹ See *infra* Part II.

¹² Douglas A. Berman, *Making the Framers’ Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L.J. 887, 893 (2010) (“In short, the Framers were eager to create a permanent role for juries in the very framework of America’s new system of government. The Constitution’s text was intended to make certain that the citizenry could and would serve as an essential check on the exercise of the powers of government officials in criminal cases.”); Alan Hirsch, *Direct*

considered the right to serve as a juror more fundamental to their constitutional and political identity than the right to vote.¹³ To identify as a full citizen meant to be a participating voter and juror. It was a lifetime status, not an isolated task.¹⁴ This understanding of constitutional identity reappeared in the movements to expand political rights to those disenfranchised from the original constitutional promise.¹⁵ To be a juror was a symbol of constitutional equality before and after the debates over the Reconstruction Amendments and the Nineteenth Amendment.¹⁶ Advocates for constitutional equality risked discrimination, arrest, and death to gain the right to participate in jury service.¹⁷ After the Civil Rights Movement, the right to serve on a jury became a badge of citizenship, not because it was necessary to find facts in a particular case, but because equal participation represented full citizenship.¹⁸

Democracy and Civic Maturation, 29 HASTINGS CONST. L.Q. 185, 210 (2002) (“The Framers recognized that the vote would not be enough to restrain government officials. Accordingly, the Constitution also gives the People, in their respective roles as jurors and militia members, crucial responsibility for administering justice and protecting national security.”).

¹³ See Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed., 1958) (“Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.”).

¹⁴ See Kenneth Starr, *Luncheon Speech*, 24 PEPP. L. REV. 829, 832 (1997) (“From the pamphleteers of the Revolution to the Antifederalists and to Tocqueville, I think we can clearly identify roles for the jury going beyond the functional, practical need for achieving hopefully a just outcome in a particular case. We can thus view the jury as a check on official power, a way of bringing the public into the judicial branch and educating the jury, the people, about the law and the values of the rule of law.”). As will be discussed in detail, a juror’s constitutional identity involved recognition that jury service: (1) was of equal importance to any of the other political rights in a democracy; (2) required work and knowledge to prepare for the experience; (3) was an ongoing responsibility that stretched beyond the actual service on a jury; and (4) was connected to and reinforced by other parts of the constitutional system.

¹⁵ See *infra* Part I (discussing the history of jury service inclusion).

¹⁶ See *infra* Part I.

¹⁷ See *infra* Part I.B-C.

¹⁸ Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1430 n.62, 1485-86 (1991); cf. Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 948-49 (2002) (describing how advocates of sex equality sought to recognize women as equal citizens in the constitutional order). See generally *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (“Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.”).

This Article examines how we ended up inverting the role of the jury in society. Particularly, it addresses the loss of constitutional identity and why jurors no longer view themselves as constitutional actors. It argues that this loss of constitutional identity has come at a cost to the jury's reputation, its power in the constitutional structure, its efficiency in processing cases, and its role as an educative institution. This loss has contributed to a growing apathy toward jury service, in particular, and the jury, in general. This Article then looks to reclaim the civic and constitutional identity valued by the Framers and those who fought for political equality during other constitutional moments in history. It seeks to broadly reframe the debate to rebuild the image of the juror in America.

This project of "juror renewal" is urgently needed. In raw numbers, jury use has decreased in criminal and civil trials.¹⁹ Currently, approximately 95% of criminal cases are resolved short of trial, let alone a jury trial.²⁰ The number of civil juries has experienced a similar decline.²¹ Fewer trials results in fewer citizens identifying as

¹⁹ The statistics from federal courts show a slow decline just over the past few years, but a much larger decline over the last few decades. As but one benchmark for the decrease in the number of jury trials, the federal courts report annual statistics of the number of juries selected. A comparison of the last reported five years (2007–2011) with the reported years from 1993–1997 shows a significant decrease. Compare U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 2011, at 44 tbl.S-15, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/tables/S15Sep11.pdf> (showing a decline from 6,193 juries selected in 2007 to 5,565 juries selected in 2011), with U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 1997, at 62 tbl.S-17, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1997/tables/s17sep97.pdf> (showing a decline from 11,112 juries selected in 1993 to 9,771 juries selected in 1997). As one judge recently summarized: "In 1962, there were about 5,800 civil trials in the federal district courts. In 2004, there were only about 4,000 civil trials, despite the fact that five times as many cases were filed. . . . The same story is playing out in the state courts. The available data shows that the number of jury trials fell by one-third between 1976 and 2002, with less than 1% of cases being disposed of by a jury in 2002." Hon. Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 318-19 (2012); see also Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 208-11 (2005).

²⁰ *Padilla v. Kentucky*, 559 U.S. 356, 372 n.13 (2011); see also T. Ward Frampton, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary By State*, 100 CALIF. L. REV. 183, 190 n.46 (2012) ("Overall, for the period 1976–2002, the number of criminal jury trials has declined by 15 percent (from 42,049 to 35,664) while the number of bench trials has declined by 10 percent (from 61,382 to 55,447)." (quoting Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL L. STUD. 755, 764 (2004))).

²¹ Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 9 ("In the [state] courts of general jurisdiction of 22 states (and the District of Columbia) that contain

jurors. In addition, a number of high profile criminal acquittals and excessive civil damage awards have led to sensationalized media coverage demonizing the jury.²² This, in turn, has led to direct attacks on jurors as being incompetent or erratic.²³ These cases, encouraged by interests seeking to reduce litigation expenses from tort and class-action lawsuits, have resulted in several decades of negative juror stories.²⁴ While numerous studies and scholars have warned about the “vanishing trial,” few have concerned themselves with the “vanishing juror.”²⁵

To fulfill this project of juror renewal, this Article proposes a new way of viewing jury service — not simply as a task to be completed, but as an ongoing constitutional identity. Being a juror is a status like being a voter or elected official.²⁶ It suggests embracing the “potentiality of

58 percent of the U.S. population, the portion of cases reaching jury trial declined from 1.8 percent of dispositions in 1976 to 0.6 percent in 2002 The absolute number of jury trials is down by one-third.”); *see also id.* at 10 (“On the criminal side, the trial rate has moved in the same direction in the state courts as in the federal courts. From 1976 to 2002, the overall rate of criminal trials in courts of general jurisdiction in the 22 states for which data is available dropped from 8.5 percent of dispositions to 3.3 percent.”).

²² For example, the murder prosecution of O.J. Simpson brought national attention to what many thought was an incorrect criminal verdict. High damages actions in cases involving consumer lawsuits, like the McDonald’s hot coffee lawsuit, have brought attention to tort suits. *See* Andrea Gerlin, *A Matter of Degree: How a Jury Decided that a Coffee Spill Is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, at A1.

²³ *See, e.g.,* Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 733 (1991) (“Chief Justice Warren Burger of the United States Supreme Court led the critics, suggesting that jurors lack the abilities required to deal with the complex issues often presented in federal civil trials.”); Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy*, 6 PSYCHOL. PUB. POL’Y & L. 788, 790 (2000) (cataloging public criticism of juries in America).

²⁴ Michael Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DEPAUL L. REV. 221, 231 (1998) (“Daniel Bailis and Robert MacCoun’s content analysis of several major publications reveals that their choice of stories to report systematically distorts the impression created of the types of cases that are litigated and the outcomes of the cases, especially the amounts awarded.” (citing Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide*, 80 JUDICATURE 64, 64-67 (1996))).

²⁵ Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1255-56 (2005); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL L. STUD. 459, 461 (2004); Margo Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. DISP. RESOL. 35, 36; Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 89 (2006).

²⁶ Traditionally, voting, jury service, and being elected to public office were

jury service” — a shift in perception that focuses on the juror beyond just the moments in the courthouse. Right now, assuming other qualifications, most adult citizens are potential jurors.²⁷ Before jury service, those citizens were potential jurors. After jury service, those citizens are again potential jurors. Yet, most citizens do not consider that there is any ongoing juror role outside the courthouse. No one prepares for jury service.²⁸ Few citizens engage the court after their jury service ends. The potentiality of jury service confronts this limited conception of being a juror. It broadens the focus along a continuum of civic life. It also recognizes that this potential status requires some action on our part — primarily education and reflection — to prepare for this constitutional responsibility. In developing this constitutional awareness about the jury, citizens will be able to reclaim a sense of constitutional identity that will strengthen the reputation, efficiency, and institution of the jury.²⁹

This Article builds on numerous scholarly critiques of the limited, fact-finding role of the jury.³⁰ In recent years, scholars have called for a greater jury role in legal interpretation,³¹ sentencing,³² habeas corpus,³³

considered the core political rights in the U.S. Constitution. See Cristina M. Rodríguez, *Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old-Boys' Network in Nineteenth-Century America*, 108 YALE L.J. 1805, 1834-36 (1999).

²⁷ See generally Juror Qualifications, Exemptions and Excuses, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/JuryService/JurorQualifications.aspx> (last visited Dec. 26, 2013).

²⁸ From the perspective of the litigant whose life or property interests are at stake, this lack of preparation represents a remarkable lack of foresight on the part of the juror. After all, before that particular jury was selected, each one of those citizens was a potential juror. We are all potential jurors every day of our lives. Yet, we compartmentalize this constitutional duty and minimize a core constitutional responsibility to the detriment of the legal system.

²⁹ See *infra* Part III.

³⁰ See, e.g., Rachel Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 57 (2003) (discussing the jury's fact-finding role during sentencing); Jon P. McClanahan, *The 'True Right' to Trial by Jury: The Founders Formulation and Its Demise*, 111 W. VA. L. REV. 791, 795 (2009) [hereinafter *True Right*] (scrutinizing the historical evolution of the jury's ability to decide legal issues); Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353, 354 (2004) (analyzing the Supreme Court's decision in *Sparf* and its effect on the role of the jury); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 441 (1996) (examining modifications that would enhance the jury's fact-finding role).

³¹ Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 FLA. L. REV. 549, 583 (2012).

³² Barkow, *supra* note 30, at 48-65; Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 322 (2003).

and even judging the morality of certain criminal laws.³⁴ Much of the focus has been on the lost “law-finding” or “law interpreting” role of the jury.³⁵ Left unexamined, however, has been how relatively recent changes to reduce the burden on jurors, to streamline the jury selection process, and to make jury service more user-friendly have also affected the constitutional identity of jurors.³⁶ This Article seeks to trace how this increasingly limited role for juries has negatively impacted constitutional identity.

Part I explores the idea of constitutional identity — of how being a juror became intertwined with the status of being a citizen. This role begins at the founding with clear expressions of the connection between juror and citizen in the constitutional debates. As Alexis de Tocqueville famously observed on the value of jurors, “It would be a very narrow view to look upon the jury as a mere judicial institution; for however great its influence may be upon the decisions of the courts, it is still greater on the destinies of society at large.”³⁷ This original understanding reappears at other constitutional moments including the ratification of the Reconstruction Amendments, the Nineteenth Amendment, and throughout Supreme Court cases addressing the importance of juror participation.³⁸

Part II sets out the contrasting modern reality of a task-oriented jury. Over the last century, several important, and in many cases beneficial, developments have shaped the role of juries. First, court opinions have reduced the responsibilities of juries in deciding legal issues.³⁹ The broad powers of Founding Era juries have been limited to

³³ Berman, *supra* note 12, at 891.

³⁴ Carroll, *supra* note 8, at 663 (redefining the term nullification post-*Apprendi*); Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 433-34 (1998); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 880 (1999) [hereinafter *Myth of the Nullifying Jury*]; Anne Bowen Poulin, *The Jury: The Criminal Justice System’s Different Voice*, 62 U. CIN. L. REV. 1377, 1392 (1994).

³⁵ Raoul Berger, *Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser*, 1990 BYU L. REV. 873, 889-90; Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 379; Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 584 (1939).

³⁶ See *infra* Part II.

³⁷ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 282 (Phillips Bradley ed., Henry Reeve trans., 1945) (1838).

³⁸ See *infra* Part I.B.

³⁹ See, e.g., *Shannon v. United States*, 512 U.S. 573, 579 (1994) (emphasizing the jury’s role as a fact-finder while largely dismissing the jury’s role in sentencing). *But see* *United States v. Polizzi*, 549 F. Supp. 2d 308, 407-08 (E.D.N.Y. 2008) (documenting several cases in which courts acknowledged the jury’s formerly

much more restricted tasks.⁴⁰ Second, formalized jury instructions have reinforced this task-oriented role. Jurors are now almost uniformly instructed about their limited role during jury trials.⁴¹ In addition, court systems have sought to reduce the burden on potential jurors. In recent decades, programs such as “one day, one trial” have been adopted by many states.⁴² Court systems have curtailed professional exemptions and broadened the jury pools, expanding the jury venire and dispersing the burdens of serving.⁴³ Jurors have internalized these improvements, with a begrudging acceptance that they are willing to do their civic duty as long as it is not too time consuming. The unanticipated result of these otherwise positive jury improvements, however, is that potential jurors approach jury service with an understanding that their task is limited in scope, time, and role.⁴⁴ Jurors now see their jobs as functional, not formative.

Part III sets out the theory of “the potentiality of jury service” in an attempt to reclaim the constitutional identity of jury service within a modern jury system. Primarily, it looks to the educative potential in thinking about jury duty in preparation for the actual service. The potentiality of jury service involves two component parts: first, a reconceptualization of jury service as an important, ongoing, constitutional status, not a discrete task; and second, recognition that because being a juror is an ongoing identity, it requires ongoing investment in terms of education and reflection before and after the actual moments in the courthouse. Changing the expectations of jury identity offers several concrete benefits, including improving constitutional literacy and legal knowledge, strengthening democratic practice and engagement, uplifting the image of the juror and the

predominant power to control verdicts and sentences).

⁴⁰ McClanahan, *True Right*, *supra* note 30, at 799; Middlebrooks, *supra* note 30, at 354.

⁴¹ See Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 451 (2006) [hereinafter *Bringing Jury Instructions*] (discussing the widespread use of formalized jury instructions); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1102-03 (2001) (describing the role of defining technical terminology during the jury instruction process).

⁴² Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216, 217 (1996).

⁴³ Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 355 (1996); see Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 909, 922-23 (2003) [hereinafter *Introduction to the Jury*].

⁴⁴ See *infra* Part II.

institution of the jury, and opening up a dialogue about other ways to encourage civic engagement.⁴⁵

Finally, Part IV offers a brief conclusion that in order to improve jury service, a new understanding of juror identity is necessary. By re-conceiving jury service to reflect a broader constitutional role, courts and citizens can reclaim the power of the juror in America.

I. A CONSTITUTIONALLY-ORIENTED JUROR

The juror was a central figure in the creation of America. As individual hero,⁴⁶ collective voice of protest,⁴⁷ or part of an institution that symbolized a democratic, local, and leveling power, jurors intertwined themselves with the American character.⁴⁸ The United States Constitution was, after all, not simply the founding charter for a government, but also a statement of American identity.⁴⁹ The “American juror” began as an archetype, representing an independent participant in a community-centered institution.⁵⁰ Part myth, part aspiration, the juror-as-active-citizen ideal has been held up as an example that self-government can work.⁵¹ While this ideal has been

⁴⁵ See *infra* Part III.

⁴⁶ WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY’S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY 70 (2002); see JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 25 (1994); Joe Jamail, *The Presentation of an Ethical Jury Trial*, 47 S. TEX. L. REV. 357, 363-64 (2005) (discussing the history of the *Bushel* trial).

⁴⁷ See William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. ST. B.J. 48, 49 (1996).

⁴⁸ See Cecil et al., *supra* note 23, at 728 (“Lay participation in debates concerning public policies is a touchstone of a democracy. The Constitution enshrines this value not only by providing for a system of elected representatives, but also by recognizing the right to trial by jury.”); Young, *supra* note 25, at 69 (“No other legal institution sheds greater insight into the character of American justice.”).

⁴⁹ See ANNE-MARIE SLAUGHTER, THE IDEA THAT IS AMERICA 1-5 (2007).

⁵⁰ Andrew G. Deiss, *Negotiating Justice: The Criminal Trial Jury in a Pluralist America*, 3 U. CHI. L. SCH. ROUNDTABLE 323, 333-34 (1996).

⁵¹ See Robert Mark Savage, *Where Subjects Were Citizens: The Emergence of a Republican Language and Polity in Colonial American Law Court Culture, 1750–1776*, at 4 (2011) (unpublished Ph.D dissertation, Columbia University), available at <http://academiccommons.columbia.edu/catalog/ac:131400> (“Americans believed their juries to possess, inherently, a *republican* character. Juries continued to embody the voices of ‘the people,’ broadly speaking, within the machinery of the state. This republican character of the American jury held such attraction that, by the 1830s, the power of the jury had already become enshrined in national memory as both a political weapon and as a means of community coherence, as well as a potent symbol of liberty itself.”); *id.* at 48 (“Colonial law court culture was about teaching colonists how to participate in the construction, legitimization and use of power. The lessons

undercut by a history of exclusion and unfair application, the sense that the jury is a uniquely democratic institution remains a recurring theme in cases and commentary about the American legal system.⁵²

Jury trials, of course, predated the United States Constitution, but their almost universal acceptance in the colonies⁵³ and then the newly formed states⁵⁴ made them a central point of agreement in establishing the constitutional principles of government.⁵⁵ Juries served as a reminder that citizens were the ultimate decision-makers in a democratic society.⁵⁶ In parallel importance to the other democratic rights of voting and serving as an elected official, jury service was a responsibility that required on-going engagement, education, and an understanding of the constitutional structure.

This section attempts to show that jury service was part of a constitutional identity in three different eras: the framing of the United States Constitution and the Bill of Rights, the Reconstruction Amendments through the Civil Rights Movement, and before and after the Nineteenth Amendment. In each case, those drafting or seeking to amend the Constitution considered jury service directly connected to constitutional identity.

A. *The Founding Era and Beyond*

An analysis of the jury as constitutional identity must begin with the language of the United States Constitution. Textually, the jury stands alone in its prominence.⁵⁷ The right to a criminal jury trial is the only

learned in that 'school' — in that law court culture — could transform the people involved. In particular, colonial court culture offered an opportunity for subjects to act as citizens.”).

⁵² See *infra* Part II.B-C.

⁵³ See Jack Pope, *The Jury*, 39 TEX. L. REV. 426, 445 (1961) (recognizing that the jury trial came over with the colonists of the Massachusetts Bay Colony in 1641); Smith, *supra* note 30, at 423-24.

⁵⁴ Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994).

⁵⁵ THE FEDERALIST No. 83, at 509 (Alexander Hamilton) (Garry Wills ed., Bantam Books 2003) (1788) (“The friends and adversaries of the plan of the [Constitutional] convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.”).

⁵⁶ For more on the central role of juries at the founding, see Ferguson, *supra* note 9, at 242-53.

⁵⁷ See U.S. CONST. art. III, § 2; U.S. CONST. amend. VI. See generally NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 80 (2007) (noting the similar treatment of the right to vote and the right to serve as a juror for persons with felony

constitutional right to be included in both the original text and the Bill of Rights.⁵⁸ The initial failure to include an explicit right to a civil jury trial almost defeated constitutional ratification, as the Anti-Federalists took this omission as portending a new form of tyranny.⁵⁹ Thus, the Seventh Amendment's right to a civil jury complements the Sixth Amendment's right to a criminal jury, and the Fifth Amendment's right to indictment by Grand Jury.⁶⁰ As Akhil Amar has written, "If we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury. Not only was it featured in three separate amendments (the Fifth, Sixth, and Seventh), but its absence strongly influenced the judge-restricting doctrines underlying three other amendments (the First, Fourth, and Eighth)."⁶¹ This textual influence was not by accident, as the history and symbolism of the jury led those drafting the Constitution to agree on its central place in the constitutional structure.⁶²

As a historic matter, juries had been well accepted in the colonies and the states.⁶³ While varying in use and prestige, all jurisdictions had a jury system.⁶⁴ Further, because of the restrictive qualifications for jury service limited by race, gender, and class, those white, male, property-owning citizens served to elevate the status of jurors.⁶⁵ As some scholars have recognized, the founding juror was also quite literally the same person one might elect to be a local or state representative or be in a leadership position in the community.⁶⁶ The

convictions); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 114 (1986) (contrasting how deeply imbedded the right to a jury trial is in the United States in contrast with England, Canada, and other countries).

⁵⁸ See U.S. CONST. art. III, § 2; U.S. CONST. amend. VI.

⁵⁹ Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 292 (1966); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 598 (1993).

⁶⁰ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991).

⁶¹ *Id.*

⁶² See Berman, *supra* note 12, at 893; Hirsch, *supra* note 12, at 210; Starr, *supra* note 14, at 832; Letter from Thomas Jefferson to the Abbé Arnoux, *supra* note 13, at 283.

⁶³ Alschuler & Deiss, *supra* note 54, at 871 n.17 (describing the variation in jury use in the colonies).

⁶⁴ *Id.*

⁶⁵ Gene Schaerr & Jed Brinton, *Business and Jury Trials: The Framers' Vision Versus Modern Reality*, 71 OHIO ST. L.J. 1055, 1064 (2010) ("At the time the Sixth Amendment was ratified, jury service was limited to men in every state; and in every state but Vermont, jury service was also limited to property owners or taxpayers.").

⁶⁶ Savage, *supra* note 51, at 61 ("[T]he evidence suggests that jury service frequently was a steppingstone to further social and political responsibility, beginning

jury was considered an equal governing institution, in part because it was populated by the same sort of people in the actual governing institutions.⁶⁷ Jurors were thus linked to political power, which in early America was seen as citizen-based constitutional power.

Symbolically, this role resonated with a new American self-image.⁶⁸ Juries had played a role in the American Revolution, with colonial juries nullifying British prosecutions and protecting American interests.⁶⁹ The denial of the right to a jury trial even made it into the list of grievances against the British Crown in the Declaration of Independence.⁷⁰ For a new government predicated on democratic self-government and motivated by a fear of arbitrary central power, the jury as a local, citizen-based institution had much appeal.⁷¹ Juries were participatory, predicated on equality and due process, and devoted to protecting accountability and liberty.⁷² These values were constitutional values, and this identity of what it meant to be a constitutional citizen became associated with jury service.⁷³

in the early public lives of these men.”).

⁶⁷ Brent Tarter & Wythe Holt, *The Apparent Political Selection of Federal Grand Juries in Virginia, 1789–1901*, 49 AM. J. LEGAL HIST. 257, 263 (2007) (“Full biographical details are not available for all of the grand jurors, but it is evident that the grand jury members were on the whole more respectable than representative. Every grand jury included several men who were or recently had been members of Virginia’s General Assembly or of Congress, and more than a few served prominently in one or the other legislative body or as governor after they were on the grand jury.”). This provides a real insight about why the Founder’s might have trusted grand juries. If you had the people who were not only of the caliber to be elected representatives, but were in fact elected representatives, you make it easier to delegate authority to them. *Id.* at 263-65 (listing the family backgrounds of the first grand jurors).

⁶⁸ See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 614-15 (Univ. of N.C. Press 1998) (1969).

⁶⁹ McClanahan, *True Right*, *supra* note 30, at 799-800 (“As the struggle between Britain and colonial America escalated in the time leading up to the Revolution, colonial juries played a vital role in mounting opposition to oppressive British control. . . . Colonial juries, equipped with this relatively unchecked power to render general verdicts, refused to convict defendants accused of violating British laws, in particular those involving seditious libel and trade restrictions.”).

⁷⁰ THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

⁷¹ See generally Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397 (2009) (describing the jury system and its historical appeal).

⁷² See ANDREW GUTHRIE FERGUSON, *WHY JURY DUTY MATTERS: A CITIZEN’S GUIDE TO CONSTITUTIONAL ACTION 6-7* (2013).

⁷³ Schaerr & Brinton, *supra* note 65, at 1055-56 (“During the Founding Period, the right to jury trial enjoyed a level of esteem bordering on religious reverence. As one delegate to Virginia’s convention considering ratification of the federal Constitution put it, that right was generally regarded as an ‘inestimable privilege, the most important which freemen can enjoy[.]’” (citing Journal Notes of the Virginia

In fact, some Anti-Federalists argued that the right to a jury was even more central to the new government than the right to vote.⁷⁴ This sentiment was echoed by Thomas Jefferson and others who felt that the jurors' influence on the judicial system was more critical to democratic freedoms than the voters' influence on the legislature.⁷⁵ In the hierarchy of political rights, the jury trumped voting in importance.

From this beginning, jury service became a valued civil⁷⁶ and political right.⁷⁷ Legally, it became a definitional part of the identity of an American citizen.⁷⁸ To be a full citizen meant to accept the constitutional rights and responsibilities of citizenship.⁷⁹ These definitions, identifying citizens and excluding others, while negative in many ways, did have the effect of linking jury service and constitutional rights.⁸⁰

Ratification Convention Proceedings (June 24, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1494 (John P. Kaminski & Gaspare J. Saladino eds., 1993)).

⁷⁴ "The trial by jury is . . . more necessary than representatives in the legislature; for those usurpations, which silently undermine the spirit of liberty, under the sanction of law, are more dangerous than direct and open legislative attacks . . ." Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 220-21 (1995) [hereinafter *Jury Service*] (quoting Essays by a Farmer (IV), reprinted in 5 THE COMPLETE ANTI-FEDERALIST 36, 38 (Herbert J. Storing ed., 1981); see Barkow, *supra* note 30, at 56 ("The Maryland Farmer, an Anti-Federalist, described the jury as 'the democratic branch of the judiciary power — more necessary than representatives in the legislature.'").

⁷⁵ See Letter from Thomas Jefferson to the Abbé Arnoux, *supra* note 13.

⁷⁶ See Barkow, *supra* note 30, at 54 ("For Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights." (quoting WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 96 (1994))).

⁷⁷ See Amar, *Jury Service*, *supra* note 74, at 204 (arguing that "jury service, like voting and office holding, was conceived of as a political right").

⁷⁸ See Alschuler & Deiss, *supra* note 54, at 877-78 ("Even before the triumph of universal suffrage, at least half and perhaps three-quarters of the white adult male population were qualified to vote. Most, though not all, of these voters were probably eligible for jury service as well.").

⁷⁹ See Tarter & Holt, *supra* note 67, at 257 ("Juries were understood to be the most intimate and useful way in which citizens took part in their own governance, in the adjudication of civil and criminal controversies."); see also Amar, *Jury Service*, *supra* note 74, at 218 ("Jury service was understood at the time of the founding by leaders on all sides of the ratification debate as one of the fundamental prerequisites to majoritarian self-government.").

⁸⁰ See Deiss, *supra* note 50, at 349 ("In the United States jury service has long been linked to the right to vote: from at least the late nineteenth century, state officials have used lists of registered voters to identify qualified jurors, and qualifications for jury service often paralleled those for suffrage. For example, both jurors and voters were

Finally, in creating the ground rules for democratic government, the Constitution also created expectations for citizens in that democratic republic. Citizenship meant active participation.⁸¹ Active participation itself entailed understanding the role to be played in the constitutional structure.⁸² Since founding jurors had lived through the Framing Era, they were familiar with the structural role of the jury as it had been debated for a generation.⁸³ In addition, it was recognized that the jury would serve as a place of continuing education about legal and constitutional matters necessary for that active citizenry.⁸⁴ Citizens would bring differing understandings about law, share it with other citizens, learn more, and then bring that enriched legal and constitutional knowledge back to their communities.⁸⁵ As Alexis de Tocqueville famously observed, the jury was a free “public school” where citizens could learn and practice their constitutional rights.⁸⁶ Like school, the learning would not all take place in the courthouse building, but would provide the lessons for a lifetime of civic participation.⁸⁷ Like formal education, this participatory process would shape a civic identity.

required to be freeholders. Generally, however, jury statutes made the pool of potential jurors shallower than the reservoir of voters by adding requirements of good character, sobriety, intelligence, and the like.”); *see also* Amar, *Jury Service*, *supra* note 74, at 205 (“[J]ury service eligibility historically has been tied to voter registration as a general matter.”).

⁸¹ *See* STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 33 (2006).

⁸² Savage, *supra* note 51, at 58-59 (“In Tocqueville’s view, the jury’s main pedagogical function was to ‘instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.’ In essence, here was the foundation of citizenship, laid by late-colonial American law court culture and its jurors — in the civic education of early Americans.”).

⁸³ *See* Blakely v. Washington, 542 U.S. 296, 305-07 (2004).

⁸⁴ *See* McClanahan, *True Right*, *supra* note 30, at 807 (“According to the Federal Farmer, service on a jury was the ‘means by which the people are let into the knowledge of public affairs — are enabled to stand as the guardians of each others rights, and to restrain, by regular and legal measures, those who otherwise might infringe upon them.’” (quoting Letters from the Federal Farmer, in 2 THE COMPLETE ANTI-FEDERALIST 320 (Herbert J. Storing ed., 1981))).

⁸⁵ *See* Daniel D. Blinka, *Trial by Jury on the Eve of Revolution: The Virginia Experience*, 71 UMKC L. REV. 529, 562 (2003).

⁸⁶ *See* 1 TOCQUEVILLE, *supra* note 37, at 285 (“The jury contributes powerfully to form the judgment and to increase the natural intelligence of a people; and this, in my opinion, is its greatest advantage. It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights . . .”).

⁸⁷ *See* Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226, 227, 230 (2008) (“Jury service itself educates the public about the law and the legal system and produces more positive views of the courts. What is more, jury service can

As can be seen, textually, historically, symbolically, legally, and practically, the juror became connected with the constitutional identity of America. This identity was participatory, engaged, and required constitutional understanding. In addition, it recognized that the jury was a space to engage constitutional principles, but it was not limited to that space. Jury service was but one of many participatory spaces to foster constitutional action.⁸⁸ And, while of course, the founding jury sanctioned exclusion based on race, gender, and class, those barriers became the focus of advocates seeking to correct the original discrimination to claim full constitutional identity.⁸⁹ These movements for equality are discussed in the next two sections.

B. *The Reconstruction Era and Beyond*

To simplify a complex and contested historical debate, the Reconstruction Amendments were, at base, about extending civil and political rights.⁹⁰ The prevailing thinking is that the Fourteenth Amendment guaranteed civil rights, precluding the caste-like apartheid of the post-Civil War South,⁹¹ and the Fifteenth Amendment guaranteed political rights including the right to vote, serve on juries, and hold elected office.⁹² Exactly to whom those rights were granted, and exactly where the line between civil and political rights should be

increase other forms of civic participation such as voting. Research done by the Jury and Democracy Project has discovered that citizens who vote only infrequently and then deliberate with fellow citizens in criminal jury trials are subsequently more likely to vote.” (citation omitted)); see also HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 3, 7 (1966) (noting the American jury “provides an important civic experience for the citizen”).

⁸⁸ See Savage, *supra* note 51, at 69-70 (“[I]n Virginia as in Massachusetts, jury service was also a typical preparation for higher public service. Jury duty introduced the king’s subjects to great responsibility and gave them sometimes enormous decision-making authority Jury service often was the first step toward larger social and political responsibility, giving men immediate authority over the lives and property of others, within the colonial law court culture.”).

⁸⁹ See *infra* Part I.B.

⁹⁰ See Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 71 (2011) (“Traditionally, political rights were thought to be those concerned with governance: voting, jury service, and holding office. . . . Political rights were bestowed on select citizens with especially good judgment; civil rights, on the other hand, were the natural rights to which every person, or at least every citizen including even children, was entitled.”).

⁹¹ *Id.* at 74-75 (“The prevailing understanding in 1868 was that Section One of the Fourteenth Amendment guaranteed equal civil rights, but it did not touch the subject of political rights, which remained the province of the states. Congressmen and senators expressed this view repeatedly.”).

⁹² *Id.*

drawn, is still debated by scholars.⁹³ For our purposes, this section takes a portion of the debate and looks at how jury service — as one of those rights — was connected to the movement for constitutional change before and after the Reconstruction Amendments.⁹⁴ As will be argued, the fight for racial equality was framed in terms of a struggle for equal constitutional status, including being a juror.

While it soon became part of the bundle of political rights granted by the Fifteenth Amendment, jury service initially was a central point of contention during the Reconstruction Era.⁹⁵ Proponents of the Reconstruction Amendments were required to finesse furthering the cause of equality with the practicalities of a racially-divided country.⁹⁶

⁹³ Note that there has been considerable academic debate about whether the Fourteenth Amendment includes the right to serve on a jury. Benno C. Schmidt, *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1423 (1983) (“The right to serve on juries without racial discrimination was conspicuous by its absence in the 1866 Act, leading proponents of the narrow ‘civil-rights-only’ scope of the fourteenth amendment . . .”). *But see id.* at 1425-26 (“The language of the Act could easily be read to embrace jury service. The 1866 Act itself was broader than its enumeration. Thus, even if it were accepted that section one of the fourteenth amendment guaranteed only the civil rights covered by the 1866 Act, it by no means follows that only the specifically enumerated rights were covered. The Act, after all, follows its enumeration with broad language guaranteeing ‘full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.’”).

⁹⁴ See Amar, *Jury Service*, *supra* note 74, at 206 (“[T]he voting-jury service linkage was recognized by the Framers in the 1780s, by those responsible for drafting the reconstruction amendments and implementing legislation, and still later by authors of twentieth century amendments that protect various groups against discrimination in voting. Moreover, each of the groups the Supreme Court has already determined should be protected against discrimination in jury service is also protected by one of the voting discrimination amendments.”).

⁹⁵ Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 916-17 (1998) (arguing that “the architects of the Reconstruction Amendments linked voting and jury service textually, conceptually, and historically and that these two should therefore be seen as part of a package of political rights and should be treated similarly for many constitutional purposes”); see James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 910-14 (2004) (recognizing that the need for African-Americans on juries was discussed in the debates over the Thirteenth and Fourteenth Amendments). *But see* Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 238 (1991) (“It is unclear whether the Reconstruction amendments’ drafters intended to prohibit racial discrimination in jury service, as they plainly did with regard to property ownership and voting; yet blacks’ right to serve on juries quickly was guaranteed by the Reconstruction Congress and then was endorsed resoundingly by the Supreme Court in *Strauder v. West Virginia*.”).

⁹⁶ See MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 191 (2004) (recognizing that those seeking passage of the early Reconstruction Amendments walked a delicate line, promoting

Most early debates completely ignored the jury issue for fear of political backlash.⁹⁷ Later debates, informed by the experience of communities experimenting with racially mixed juries,⁹⁸ argued for jury service to be included as part of the promise of constitutional equality.⁹⁹

Post-Reconstruction, there were moments of progress where African-Americans served on juries.¹⁰⁰ “Almost one-third of the citizens called for grand jury service in New Orleans between 1872 and 1878 were African-Americans — a percentage that matched the percentage of African-Americans in the population of Orleans Parish generally.”¹⁰¹ Briefly in the Upper Piedmont area of South Carolina, African-Americans could serve on juries and be represented in jury pools.¹⁰² But, these fleeting moments of equality were the exception, not the rule.

That jury service remained a central issue of debate can be seen both by those who used the prospect of racially mixed juries as a political argument against the Reconstruction Amendments, as well as those who sought to claim the mantle of supporting African-American

equality but not spelling out what equality would mean).

⁹⁷ Forman, *supra* note 95, at 912 (discussing the explicit reluctance of Congress to project the right for African-Americans to serve on juries before the Reconstruction Amendments: “These early [Congressional] debates are especially interesting for what was not argued. Nobody disputed that it would be inappropriate for Congress to grant blacks the right to serve on juries. The debate turned instead on whether the bill made sufficiently clear that it was not conferring such a right.”).

⁹⁸ See JAMES E. BOND, *NO EASY WALK TO FREEDOM, RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT* 156 (1997) (recognizing that in Virginia, during Reconstruction African-Americans served on juries, but also that after Virginia was restored to the Union, and despite Federal court efforts, African-Americans were excluded from jury service); Alschuler & Deiss, *supra* note 54, at 886 (“During Reconstruction, African-Americans in some jurisdictions regularly served on juries.”); Forman, *supra* note 95, at 930 (“In Washington County, Texas, where blacks were approximately 50% of the population, blacks constituted about 30% of those who served on juries between 1870 and 1884.”).

⁹⁹ Forman, *supra* note 95, at 927 (quoting Vermont Republican Senator George Edmunds, “What, sir, is more necessary to peace and security in the administration of justice in the southern States . . . than that [colored people] should have the constitutional right to participate in the administration of justice?”).

¹⁰⁰ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 102 (2010); Alschuler & Deiss, *supra* note 54, at 886 (“In 1867, the military commander of South Carolina declared every taxpayer or registered voter to be eligible for jury service. Since the military itself had registered virtually every adult African-American male, integrated juries became common in this district.”).

¹⁰¹ Alschuler & Deiss, *supra* note 54, at 886.

¹⁰² W.J. MEGGINSON, *AFRICAN-AMERICAN LIFE IN UPPER PIEDMONT SOUTH CAROLINA 1870–1900*, at 284 (2006).

equality.¹⁰³ For example, during the Virginia Constitutional Convention of 1868, Virginia Representative “Charles Porter introduced a resolution, stating that voting, office-holding and jury service should be open to all. He declared that jury-service was a right.”¹⁰⁴ These debates responded to African-American leaders who had directly advocated for jury rights as a symbol of equal rights.¹⁰⁵ As the Reverend James W. Hood argued after the Civil War, the priorities for constitutional equality were the right to testify, the right to serve on a jury, and then the right to vote:

First, the right to testify in courts of justice, in order that we may defend our property and our rights. Secondly, representation in the jury box. It is the right of every man accused of any offence, to be tried by a jury of his peers Thirdly and finally, the black man should have the right to carry his ballot to the ballot box.¹⁰⁶

While these arguments did not carry the day into a clear statement of juror equality in the text of the Fourteenth or Fifteenth Amendments, the principles created the framework for such an understanding.

In fact, it took only a few short years after the passage of the Fifteenth Amendment to strike down most formal, legal restrictions forbidding African-Americans from serving on juries.¹⁰⁷ A general agreement emerged (at least in terms of constitutional principle, if not practice) that the Fifteenth Amendment protected the right to serve on juries regardless of race.¹⁰⁸ Once the Civil Rights Act of 1875 was passed forbidding jury discrimination in the states (and thus implicitly allowing all races to sit on juries), the connection between jury service

¹⁰³ See JOSEPH A. RANNEY, *IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW* 51 (2006) (detailing how jury service was tied up with suffrage both in a positive way in that it was argued that voting enfranchisement meant access to jury service, but also in a negative way in that the prospect of African-Americans on juries was an argument against enfranchisement).

¹⁰⁴ HAMILTON JAMES ECKENRODE, *THE POLITICAL HISTORY OF VIRGINIA DURING RECONSTRUCTION* 96 (J.M. Vincent et al. eds., 1904).

¹⁰⁵ Alschuler & Deiss, *supra* note 54, at 886.

¹⁰⁶ *Id.* at 886 (citing LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 505 (1980)).

¹⁰⁷ See RANNEY, *supra* note 103, at 51 (finding that most restrictions of African-Americans in the laws of Southern states were removed by 1870).

¹⁰⁸ See AKHIL REED AMAR, *THE BILL OF RIGHTS, CREATION AND RECONSTRUCTION* 274 (1998); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 30 (2004) (finding that especially after the passage of the Fifteenth Amendment the understanding that political equality included jury service was embraced.).

and constitutional equality was complete.¹⁰⁹ The Supreme Court emphatically reaffirmed this vision with sweeping language in *Strauder v. West Virginia*,¹¹⁰ declaring racial discrimination in jury service a constitutional violation. As the Court stated:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others. The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure.¹¹¹

Jury service became a recognized badge of citizenship,¹¹² an identity that conveyed constitutional status.¹¹³

As is well known, the ideal of equality quickly faltered in practice, and new barriers to jury participation emerged.¹¹⁴ Most juries in the South remained all-white.¹¹⁵ Even in Midwest states, the situation was

¹⁰⁹ Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1168 (2011).

¹¹⁰ 100 U.S. 303, 305-07 (1880).

¹¹¹ *Id.* at 308.

¹¹² Marder, *Introduction to the Jury*, *supra* note 43, at 921 (“For African-American men and all women, who were excluded from jury service for much of our country’s past, jury duty now takes on added meaning. For those who once were excluded but who now can serve, jury duty is a hard-won badge of citizenship; it is an indicia of belonging and of counting as a citizen.”).

¹¹³ Amar & Brownstein, *supra* note 95, at 924 (“Access to ballots, juries, and offices was, in this sense, a mark of respect and belonging. An individual entitled to vote shared sovereignty on an equal basis with his fellow citizens.”); Robin Morris Collin, *Brown and Me: Brown’s Theory of an Educational Remedy for Citizenship*, 9 HOW. SCROLL SOC. JUST. L. REV. 73, 82 (2006) (“Citizenship allows democratic participation in the exercise of government. In the most basic sense, citizenship means the ability to exercise political rights. A democracy based upon pluralism requires dialogue across cultural, class and other differences.”); Ariela Gross, “Of Portuguese Origin”: *Litigating Identity and Citizenship Among the “Little Races” in Nineteenth-Century America*, 25 LAW & HIST. REV. 467, 469 (2007).

¹¹⁴ See Forman, *supra* note 95, at 915-17 (2004).

¹¹⁵ ABRAMSON, *supra* note 46, 109 (noting that in one Kentucky county in 1938, no African-American had been summoned for jury duty (grand or petit) for thirty-two years, even though one-sixth of the population was African-American and in

not much better.¹¹⁶ Many jurisdictions did not see racial progress for many, many decades.¹¹⁷ In fact, in certain cases, juries remained instruments of oppression and injustice, as racial discrimination tilted verdicts against minorities.¹¹⁸

Despite decades of unfair practice, juries remained a potent symbol of constitutional equality.¹¹⁹ Jury service became one of the central battlegrounds in the legal campaign to challenge desegregation laws.¹²⁰ The National Association of Colored People, Legal Defense Fund (NAACP-LDF) chose discriminatory jury practices to lead its litigation strategy in the South.¹²¹ Charles Hamilton Houston, the architect of the civil rights moment won his first Supreme Court case on a jury discrimination challenge.¹²² The civil rights leaders succeeded in getting the Federal Jury Selection Act of 1968 passed, which reaffirmed the policy of the United States that “all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation

Mississippi, a county had qualified only 25 out of 12,511 African-Americans for jury service, and no African-American had served in the last thirty years); BOND, *supra* note 98, at 241 (finding deep racism in Georgia and describing historical news accounts that predicted Whites would rather avoid jury cases that would be decided by mixed jury); Schmidt, *supra* note 93, at 1406 (according to Booker T. Washington, “[i]n the whole of Georgia & Alabama, and other Southern states not a negro juror is allowed to sit in the jury box in state courts” (quoting 3 THE BOOKER T. WASHINGTON PAPERS 29 (L.R. Harlan ed., 1974))).

¹¹⁶ See LESLIE A. SCHWALM, EMANCIPATIONS DIASPORA: RACE AND RECONSTRUCTION IN THE UPPER MIDWEST 29 (2009) (finding that Iowa, Minnesota, and Wisconsin also denied suffrage in the 1850s and 1860s).

¹¹⁷ See Alschuler & Deiss, *supra* note 54, at 894 (“A 1910 study found that African-Americans rarely served on juries in Florida, Louisiana, Mississippi, Missouri, South Carolina, and Virginia — and that they never served in Alabama and Georgia.” (citing GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 253-72 (1969))).

¹¹⁸ See Forman, *supra* note 95, at 898.

¹¹⁹ See *id.* (“[T]he jury was of central concern both before and after the Civil War.”).

¹²⁰ This battle began earlier than the formal civil rights movement. See LESTER C. LAMON, BLACK TENNESSEANS: 1900–1930, at 9 (1977) (describing how as early as 1905 in Tennessee, Robert L. Mayfield challenged exclusion of African-Americans from jury service, and again in 1907 John Early attempted to establish a test case to protest the discrimination). This was also true in the Midwest. SCHWALM, *supra* note 116, at 178 (detailing how advocates wished to obtain jury service as a part of the right to franchise).

¹²¹ See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2076 (2002) (discussing the NAACP’s successful challenge to racial exclusion in juries in *Norris v. Alabama*, 294 U.S. 587 (1935)).

¹²² *Hollins v. State of Oklahoma*, 295 U.S. 394, 395 (1935).

to serve as jurors when summoned for that purpose.”¹²³ As can be seen, in the battle for racial equality, jury service was framed as an issue of constitutional identity. To be an equal constitutional citizen meant being a participating juror, voter, and political agent.

C. *The Nineteenth Amendment and Beyond*

In an even more direct way, advocates for women’s suffrage linked jury service to constitutional citizenship.¹²⁴ During the efforts to amend the Constitution to what would become the Nineteenth Amendment, a clear call to constitutional identity was heard.¹²⁵ As Professor Vikram Amar has written, “There is much support for the proposition that the struggle for women’s suffrage was, from the outset, ‘also about the right to serve on juries.’”¹²⁶ This constitutional connection was emphasized as female Abolitionists recognized that the battle for racial equality would not necessarily result in gender equality. As Barbara Babcock has summarized:

The woman suffrage movement was born in the dawn of the realization that unless they were forced into it, neither politicians nor statesmen would ever go beyond the enfranchisement of black men. It took fifty-two years, roughly fifty national campaigns, and almost 1,000 state campaigns, as well as the whole adult life of many earnest women, to win the vote. From the beginning, their struggle was also about the right to serve on juries. The two causes were the twin indicia

¹²³ 28 U.S.C. § 1861 (2012); see Barbara Allen Babcock, *A Place in the Palladium: Women’s Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1147-48 (1993).

¹²⁴ See Gretchen Ritter, *Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment*, 20 LAW & HIST. REV. 479, 481 (2002) (“In the United States, jury service is historically tied to voting. In most states, a common qualification for jury service was the status of elector — that is, a citizen with the right to vote. This also fit with the nineteenth-century woman rights movement’s conception of citizenship. As equal voting citizens, women would obtain all of the rights and privileges of other first class citizens, including the right to serve on a jury.”).

¹²⁵ See Calabresi & Rickert, *supra* note 90, at 86 (“The legislative history of the Nineteenth Amendment reveals important things about its original public meaning in 1920: supporters of the Nineteenth Amendment believed and said that it would make women equal to men under the law. . . . The opponents’ objection to giving women the right to vote was that they were unfit for work outside of the home and that they were unable to serve in the military or on juries because of the damage this would cause to family life. This objection was soundly rejected.”).

¹²⁶ Amar, *Jury Service*, *supra* note 74, at 241 (citing Babcock, *supra* note 123, at 1165).

of full citizenship both in the minds of woman suffragists and in the attitudes of American society.¹²⁷

Just as had happened at the time of the founding, those interested in redefining constitutional identity used jury service as a symbol of constitutional equality.¹²⁸ Jury service and voting were purposefully linked in the minds and strategies of the advocates.¹²⁹ Participation in jury service was understood to convey a dignity interest that symbolized civic equality.¹³⁰ And it was this civic equality that was expected to translate into a public identity of equality.¹³¹ Only by embracing the hard work and responsibilities of citizenship were women able to claim full equality.¹³²

¹²⁷ Babcock, *supra* note 123, at 1164; see also AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 619 (2005) [hereinafter *AMERICA'S CONSTITUTION*] (citing a 1919 *New York Times* article quoting Susan B. Anthony as stating, in protest of her conviction for an unlawful vote attempt, "Had your honor submitted my case to the jury, as was clearly your duty, even then I should have had just cause of protest, for not one of those men was my peer . . . a commoner of England, tried before a jury of lords, would have far less cause to complain than should I, a woman tried before a jury of men." *Suffrage Wins in Senate: Now Goes to the States*, N.Y. TIMES, June 5, 1919).

¹²⁸ Calabresi & Rickert, *supra* note 90, at 76 ("On their face, the Fifteenth and Nineteenth Amendments only forbid disenfranchisement, but originally they were understood to have implications beyond that. . . . [T]hey were understood to guarantee full political rights, not simply the right to vote in elections.").

¹²⁹ See Ritter, *supra* note 124, at 498 ("For woman rights advocates, jury service and suffrage were not just civic activities but also markers of civic status. The role of voter and juror served not only to distinguish between citizens and noncitizens, but also between those citizens who had political rights and those without them.").

¹³⁰ See Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2183 (1993) ("The institution of the jury expresses a mutual faith among citizens who assign to each other a function otherwise reserved to professional judges and lawmakers: the power to determine wrongs, to remedy them, and to decide each others' fates. The expression 'a jury of one's peers' imbues jury service with a dignitary value.").

¹³¹ Women "sought jury service as one facet of a greater struggle for recognition in the public life of the community." Babcock, *supra* note 123, at 1172; Ritter, *supra* note 124, at 481 ("Jury service was democracy in action — it was direct governance by the citizens. Women's exclusion from this role suggested that, even with the vote, they had yet to obtain the status of equal citizens."); *id.* at 483 ("Citizenship, particularly in connection to the performance of substantial civic duties such as jury service, is regarded as a public identity.").

¹³² See Shirley S. Abrahamson, *Justice and Juror*, 20 GA. L. REV. 257, 266-67 (1986); Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference*, 46 STAN. L. REV. 1115, 1141 (1994) ("The connection between jury service and citizenship has long been emphasized by women's rights advocates. An important element of equality, commentators argue, is the right 'to share the basic obligations of public citizenship.'"); Ritter, *supra* note 124, at 506 ("Following the passage of the

Despite these arguments, the social movements seeking equal access to civic responsibilities had limited success.¹³³ Courts immediately curtailed women's right to serve on juries.¹³⁴ While the Nineteenth Amendment was ratified in 1920, and fourteen states granted the right to women to serve on juries, the constitutional changes did not open the courthouse doors in other states.¹³⁵ Courts distinguished the automatic right to vote from the privilege of sitting on a jury.¹³⁶ Voluntary systems of participation, opt-in systems, and a general gendered prejudice made enacting the promise of universal jury service a disappointing reality for much of the twentieth century.¹³⁷

Yet, activists still fought for jury equality, almost as "a second suffrage campaign."¹³⁸ The National League of Women Voters drafted

Nineteenth Amendment, woman rights activists of the 1920s focused on women's performance of citizenship. It was argued that women must not just enjoy the privileges of citizenship, but should also share in its duties.").

¹³³ This was so even in jurisdictions where access to jury service had preceded suffrage: Utah (1898), Washington (1911), Kansas (1912), Nevada (1914), California (1917), and Michigan (1918). *See infra* notes 135-138.

¹³⁴ Eskridge, *supra* note 121, at 2125-26 ("Women generally did not serve on juries before World War I. Once women gained the right to vote, some state courts construed their state jury service laws to include women because the laws tied jury venires to voting lists. Nonetheless, as the nation entered World War II, only thirteen states required the same jury service of women that they required of men; fifteen states allowed women to opt out of compulsory jury service; twenty states disqualified women as a class.").

¹³⁵ Ritter, *supra* note 124, at 503 (2002) ("Around the time that the Nineteenth Amendment was passed, fourteen states granted women the right to serve on juries. In half of these states, women were found to be automatically eligible for jury service once they became electors. In the other seven, new laws were passed that made women eligible to serve on juries. Yet despite vigorous campaigns by the League of Women Voters, the National Women's Party, and many other groups, during the rest of the decade, only one new state and the District of Columbia were added to the list of jurisdictions where women served on juries.").

¹³⁶ Grossman, *supra* note 132, at 1136-37 ("[C]ourts of several states held that neither the Nineteenth Amendment, nor parallel state constitutional provisions guaranteeing women's suffrage, entitled women to serve on juries. These holdings generally relied on a critical distinction: courts treated voting as an explicit right of citizenship, but they considered jury service either a privilege or a duty.").

¹³⁷ *See* Eskridge, *supra* note 121, at 2125-26 ("By 1961, only three states retained complete exclusions. Of the forty-seven states where women were eligible, twenty-one states had no special gender-based rules, eight states allowed women to be excused if their service would create hardships for their families, fifteen states and the District of Columbia allowed women to opt out for any reason, and three states permitted women to serve only if they opted in.").

¹³⁸ LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* 137 (1998).

a “Women’s Bill of Rights” which listed jury service as a top priority.¹³⁹ They also provided advice for local activists to allow women on juries.¹⁴⁰ Other women’s organizations tracked progress on the various state jury laws.¹⁴¹ As activist and future federal judge Burnita Shelton Matthews commented, “If there is one subject which all the woman’s organizations are agreed upon, it is, probably, jury service for women.”¹⁴² Before and after passage of the Nineteenth Amendment, women’s rights leaders specifically challenged jury service laws, seeking to reform access to jury duty as part of the larger struggle for constitutional equality.¹⁴³

In a similar pattern to racial discrimination, it was individual court cases, in the context of larger social movements that had the ultimate effect of changing the law.¹⁴⁴ Again, the arguments of constitutional identity were central to these challenges. As but one example, William Eskridge describes the litigation strategy challenging Florida’s jury service practices which resulted in the Supreme Court case *Hoyt v. Florida*:

Dorothy Kenyon persuaded the ACLU to befriend Hoyt on the appeal, the [ACLU’s] first major feminist Supreme Court

¹³⁹ *Id.* at 138 (“The League believed that the absence of women from juries was part of the larger problem of the way in which sex bias intruded on the equal administration of justice; they kept mandatory jury service statutes high on their agenda.”).

¹⁴⁰ KERBER, *supra* note 138, at 140 (describing the work done promoting state changes in Florida and other states); Grossman, *supra* note 132, at 1139-40 (“The National League of Women Voters, for example, provided practical suggestions for local actors to wage the fight for women’s jury service.”).

¹⁴¹ KERBER, *supra* note 138, at 141 (describing the work done by the New York State League of Women’s Voters, Women’s City Club, and National Woman’s Party); Grossman, *supra* note 132, at 1140 (“Women’s groups also disseminated voluminous information on the status of jury rights in each state, tracked progress and setbacks, and encouraged women to fight for their rights on the local level.”).

¹⁴² Ritter, *supra* note 124, at 503.

¹⁴³ Grossman, *supra* note 132, at 1139 (“Women’s rights advocates engaged in a nationwide struggle to change jury service laws; they provided instruction, information, and political advice to many women, and submitted lists of uniform requests and proposed jury bills to state legislatures. This campaign constituted part of a larger effort to promote women’s equality in all areas, including property, inheritance, guardianship, wage compensation, entry to professions, and election to public office.”).

¹⁴⁴ HOLLY J. MCCAMMON, *THE U.S. WOMEN’S JURY MOVEMENT AND STRATEGIC ADAPTION: A MORE JUST VERDICT 108-09* (2012) (describing state campaigns in Massachusetts and other states); Abrahamson, *supra* note 132, at 269 (“Campaigners for jury service for women were adamant in their belief that men and women should serve as jurors on equal terms.”).

filing. Her remarkable amicus brief argued that representation on juries is an important civil right, as illustrated by the experience of blacks, who did not achieve genuine citizenship until the Court required that they be invited to its burdens such as jury service.¹⁴⁵

These arguments and others demonstrated that equal constitutional status required equal opportunity to serve on a jury.¹⁴⁶ This message was finally adopted by the Supreme Court in *Taylor v. Louisiana*,¹⁴⁷ which prohibited gender discrimination in establishing the jury venire, and *J.E.B. v. Louisiana*,¹⁴⁸ which prohibited gender discrimination in jury selection.

D. A Constitutional Identity

While admittedly a sweeping analysis of several centuries of jury development, three themes appear in these foundational conceptions of the juror as constitutional citizen. First, the role of the juror in society was important — both to the legal system and to the political system. This elevated role stemmed directly from its connection to the Constitution. At the founding, jurors considered themselves constitutional actors within a constitutional system, and undertook the responsibilities that the role required. After the founding, during the battles for political and social equality, this elevated role served as a symbol of equal constitutional status. These battles for equality were fought to create a more diverse fact-finding body, but also because jury service involved a respected constitutional identity. The *potential right* to serve as a juror was as important as the actual service.

Second, this constitutional role was an ongoing role. The responsibility to serve as a juror was not satisfied by a single summons, but involved embracing the continuing status of being a citizen. This identity drew its power not simply for what a juror could decide in the courthouse, but what it meant to be invited as an equal participant in the constitutional structure.

¹⁴⁵ Eskridge, *supra* note 121, at 2127.

¹⁴⁶ See *supra* notes 127-137 and accompanying text.

¹⁴⁷ *Taylor v. Louisiana*, 419 U.S. 522, 531-32 (1975); see Ritter, *supra* note 124, at 483 (“Jury service may be regarded as either a political right, that is, as a form of democratic participation in the exercise of law and justice, or as a civil right — as a matter of individual protection against state authority. Woman rights activists of the nineteenth century understood this dual character of jury service, and thought of political and civil rights as intimately connected, with political rights providing a mandate for broader claims of civil rights.”).

¹⁴⁸ *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994).

Third, this important, ongoing, constitutional role required some work on the part of jurors before, during, and after jury service. The jury was an active body, which required equally active and educated jurors. This education involved an awareness of the constitutional role of the jury, as well as the responsibilities of citizens in a system of self-government.

The modern Supreme Court has acknowledged the juror's connection to constitutional identity and at least rhetorically reaffirmed its importance. Justice Kennedy's majority opinion in *Powers v. Ohio* presents the clearest example of this linkage.¹⁴⁹ Justice Kennedy begins the opinion by stating that "[j]ury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life."¹⁵⁰ Citing to *Strauder* and then the series of first generation cases that followed, the Court sets out the long-standing connection between the jury and constitutional citizenship.¹⁵¹ Quoting Alexis de Tocqueville about the jury's educative value and highlighting the jury's recognized importance in the constitutional structure, Justice Kennedy asserts:

Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. It "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law." Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.¹⁵²

In reversing Larry Joe Powers's conviction because racial discrimination infected the jury selection process, Justice Kennedy located the source of the violated right with the potential jurors struck

¹⁴⁹ *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

¹⁵⁰ *Id.* at 402.

¹⁵¹ *Id.* (citing *Virginia v. Rives*, 100 U.S. 313 (1880); *Ex parte Virginia*, 100 U.S. 339 (1880)). See generally *Brown v. Allen*, 344 U.S. 443, 470 (1953) ("Discriminations against a race by barring or limiting citizens of that race from participation in jury service are odious to our thought and our Constitution. This has long been accepted as the law."); *Smith v. Texas*, 311 U.S. 128, 130 (1940) ("For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.").

¹⁵² *Powers*, 499 U.S. at 407.

from the jury panel.¹⁵³ It was the potential juror struck from the jury venire (not the defendant) whose constitutional right had been violated by racial discrimination.¹⁵⁴ Finding third party standing, the Supreme Court located the harm as the reputational harm of excluding the potential juror based on racial discrimination.¹⁵⁵ Such exclusion undermined the potential juror's connection to the legal system and claim to constitutional equality.¹⁵⁶ It also risked undermining the legitimacy of the larger legal system.¹⁵⁷

In so linking potential jury service and constitutional identity, *Powers* reaffirms several central rhetorical and substantive claims that the Supreme Court has stood by in its jury decisions. First, the potential right to serve on a jury is a constitutional right.¹⁵⁸ Second, that this right is not merely the private right held by the defendant or juror, but connects to the public right for a jury free from

¹⁵³ Mr. Powers was white and the excluded jurors non-white, and thus the claim was not made that the constitutional injury was to Mr. Powers. Instead the Court stated, "Active discrimination by a prosecutor during this process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." *Id.* at 412.

¹⁵⁴ *Id.* at 413-15 ("A venire person excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard. This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror. . . . We conclude that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race.").

¹⁵⁵ *Id.* at 412 ("A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The *voir dire* phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case." (citation omitted)).

¹⁵⁶ *Id.*

¹⁵⁷ See *Johnson v. California*, 545 U.S. 162, 172 (2005) ("Undoubtedly, the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race. Yet the 'harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.'" (quoting *Batson v. Kentucky*, 476 U.S. 79, 87 (1986))).

¹⁵⁸ As some justices have criticized, this placement of the right with the potential juror "exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death." *Georgia v. McCollum*, 505 U.S. 42, 62 (1992) (Thomas, J., concurring).

discriminatory exclusion. Third, that the participatory aspect of jury service (even the potential for jury service) is an important component to our national identity.¹⁵⁹ These insights directly emerge from the conception of constitutional identity seen in the suffrage and civil rights movements, and inform discussion of “the potentiality of jury service” discussed in Part III.

It is also an image bolstered by the Supreme Court’s opinions discussing the historic role of jurors outside the equal protection context. In cases involving the importance of jurors deciding the facts to determine a sentence, the court has shown great respect to the historical link between the jury and the Constitution.¹⁶⁰ As Justice Scalia wrote in *Blakely v. Washington*, “[The right to a jury trial] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”¹⁶¹ It is a structural vision that posits the jury as outside the judicial branch, but necessary to the larger constitutional structure.

While undoubtedly the Court has provided some powerful rhetoric in support of this jury role, much appears to be aspirational rather than a reflection of the current reality.¹⁶² As an ideal, juries remain central to

¹⁵⁹ *Powers*, 499 U.S. at 406 (“The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.” (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922))).

¹⁶⁰ Vikram David Amar, *Implementing an Historical Vision of the Jury in an Age of Administrative Factfinding and Sentencing Guidelines*, 47 S. TEX. L. REV. 291, 293 (2005) (“The basic constitutional vision underlying the Booker/Blakely/Apprendi line of cases focuses on the centrality of the institution of the jury in our system of government of the people, by the people, and for the people.”).

¹⁶¹ *Blakely v. Washington*, 542 U.S. 296, 306 (2004); see also *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (“I feel the need to say a few words in response to Justice Breyer’s dissent. It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State — and an increasingly bureaucratic part of it, at that.) The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.”).

¹⁶² Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473, 1477 (1994) (“The text of the Bill of Rights serves both a commemorative function, as it reminds us of the founding aspirations from which our polity is derived, and a challenging function, as it exhorts us to respond to those aspirations in the present and as we construct the future.”).

the legal system. As a practical reality, jury trials are the exception not the rule. This limitation in the use of juries has had negative effects on juror identity and has created a less powerful institution with less involved citizens. This is the subject of the next Part.

II. A TASK-ORIENTED JURY

Today, in courts all over America there is a remarkable consensus on the role of the jury.¹⁶³ The jury finds facts.¹⁶⁴ It is a utilitarian, practical identity. As the Supreme Court has stated in the criminal context, “The jury’s function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged.”¹⁶⁵ In practice, this means that jurors listen to witnesses, evidence, and argument and make judgments based on the submitted information.¹⁶⁶ Then the jurors apply the law as provided by the judge to those facts and the standards of proof provided.¹⁶⁷ As described, it is a stand-alone responsibility that takes place at the courthouse and only on infrequent occasion. And while of course, the reality of finding facts is inexorably tied up with legal, moral, and personal judgments, in theory, the role of the jury remains narrowly framed.¹⁶⁸

Unquestionably, this role as fact-finder is important, central, and based on a long history of the fact-finding abilities of citizens.¹⁶⁹ This

Viewed thusly, the Constitution expresses a political-moral ideal, using aspirational rhetoric to articulate societal goals and values.”)

¹⁶³ See *supra* note 3.

¹⁶⁴ Kemmitt, *supra* note 2, at 112 (“The party line typically hewn to by modern American courts is that the jury exists merely to find facts: juries make factual determinations and judges sentence, end of story.”); Young, *supra* note 3, at 147 (noting that Georgia, Maryland, and Indiana have state law protections for jurors to decide the law, but they are in large measure ignored).

¹⁶⁵ Shannon v. United States, 512 U.S. 573, 579 (1994).

¹⁶⁶ See *infra* Part II.B. (discussing the role of the juror instruction). Each of the fifty states, the federal courts, and the District of Columbia has now established standard jury instructions that detail these responsibilities. Daniel William Bell, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81, 84 (2010) (“State and federal laws are widely available online, and all fifty states and the District of Columbia have posted ‘standard’ jury instructions on publicly-accessible websites.”).

¹⁶⁷ United States v. Gaudin, 515 U.S. 506, 514 (1995) (“[T]he jury’s constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence.”).

¹⁶⁸ Marder, *Myth of the Nullifying Jury*, *supra* note 34, at 909-15.

¹⁶⁹ From soon after the first ships landed near Plymouth in 1620 to the present day, jurors have resolved contested versions of events. Barkow, *supra* note 30, at 51 n.73 (“The only existing recorded law from the first five years of the Plymouth Colony, for example, is a list of criminal offenses and a provision for jury trials in all

Article seeks no quarrel with the successful mechanism for decision-making that is the modern jury.¹⁷⁰ Instead, this Article seeks to understand how a consensus emerged that this is the *only* role for jurors. Juries have become a task-oriented enterprise, limited in time and scope. This Article examines whether in emphasizing a modern, task-oriented process, jurors have lost a sense of constitutional identity.

This section focuses on three major changes that have affected the jury. First, it looks at the legal responsibility given to and taken from jurors over the last two hundred years. Through a series of court decisions in the latter part of the nineteenth century, juries were stripped of their law finding power, thus reducing their responsibilities. Second, it looks at the use of formalized jury instructions to standardize the role of the jury across the country. These instructions have had a dramatic impact on constitutional identity, because of what they affirmatively instruct jurors about their role. The final section examines the impact of jury duty reforms on shaping the identity of the jury. In the past several decades, new federal and state programs to make jury service more user-friendly and less time-consuming have swept the nation. Developments like “one day and one trial” systems have been remarkably effective in lessening the burden on citizens.¹⁷¹ However, at the same time, these improvements have reinforced the message that jury service is a limited, discrete, task-oriented job. As will be discussed, these natural and perhaps understandable changes to the jury, have had a negative impact on preserving a robust sense of constitutional identity.

A. *From Law-Finders to Fact-Finders*

As originally conceived, jurors in America did more than merely find facts.¹⁷² As a matter of practice, juries were empowered to interpret, if not decide, the law.¹⁷³ Because of the limited state of legal

criminal cases.”).

¹⁷⁰ J. GUNTHER, *THE JURY IN AMERICA* 230-31 (1988) (“We also have good reason to believe that juries are, on the whole, remarkably adept as triers of fact. Virtually every study of them, regardless of the research method, has reached that conclusion The capabilities of jurors — perhaps not as individuals but as a group — even appear to extend to cases of the greatest complexity.”).

¹⁷¹ See *infra* Part II.C.

¹⁷² Barkow, *supra* note 30, at 55 (“The Framers continued to believe that the criminal jury was much more than ‘a utilitarian fact-finding body.’”).

¹⁷³ Howe, *supra* note 35, at 592-96; see Carroll, *supra* note 8, at 670 (“This vision of jurors and their role as political actors is present in the Founders’ discussion of the

training and the immaturity of the legal system, jurors were encouraged to evaluate the merits of criminal law, and determine much of civil law.¹⁷⁴ As a result, lawyers routinely argued law to juries, and expected juries to understand these arguments.¹⁷⁵ Leading Founding Fathers such as Alexander Hamilton, John Adams, Thomas Jefferson, John Jay, and Chief Justice John Marshall all expressed support for the law-finding nature of the jury.¹⁷⁶ While scholars have counseled some caution in not overstating the law-finding power of the Framing Era jury, recognition of a broader jury role was part of the original design.¹⁷⁷

This outsized jury role arose not simply out of necessity, but constitutional intent. The jury existed as a check against government

Constitution and the role of the law in post-Revolutionary America. They conceived of the jury as the space where the law met the governed and, in so doing, became whole.”).

¹⁷⁴ R.J. Farley, *Instructions to Juries: Their Role in the Judicial Process*, 42 YALE L.J. 194, 202 (1932) (“In America by the time of the Revolution and for some time thereafter, the power to decide the law in criminal cases seems to have been almost universally accorded the jury and quite generally, it determined the law in civil cases.”).

¹⁷⁵ McClanahan, *True Right*, *supra* note 30, at 799 (“Among the greater powers given to colonial juries, the courts allowed lawyers to argue the validity of laws to juries.”).

¹⁷⁶ Middlebrooks, *supra* note 30, at 374-75; *see also* *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794) (Jay, C.J.); McClanahan, *True Right*, *supra* note 30, at 816 (“In the treason trial of Aaron Burr in 1807, Chief Justice Marshall declared in his jury instructions that ‘the jury have now heard the opinions of the court on the law of the case. They will apply that law to the facts and will find a verdict of guilty or not guilty as their own consciences may direct.’”).

¹⁷⁷ Stanton D. Strauss, *An Inquiry into the Right of Criminal Juries to Find the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 121-22 (1998) (“My conclusion is that the published records I have studied do not support the conventional wisdom. In fact, this data only proves that the criminal jury’s right in any real sense to determine the law was firmly established in one colony, offbeat Rhode Island. While there is sporadic evidence that criminal juries may have had some form of lawfinding authority at times in colonial Pennsylvania and New York, there is at least as strong an indication that they had no such right for much of the colonial era in Georgia, Maryland, and Massachusetts. For the most part, however, we just don’t know enough to say what lawfinding authority colonial criminal juries had.”); *see id.* at 213 (“Although that evidence includes statements by judges, lawyers, jurors, litigants, and others asserting that criminal juries had the right to determine what the law was, I have found no evidence that anyone claimed that these juries had the right to ignore what they deemed the applicable law.”); William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003, 1029 (2010) (“On the issue of the lawfinding power of colonial juries, the score is roughly tied with my research not yet completed: juries possessed ultimate power over the law in New England and Virginia, but not in the Carolinas, New York, and Pennsylvania.”).

power (both the prosecution and the courts).¹⁷⁸ In addition, it reflected the democratic, participatory ideals of the new constitutional structure.¹⁷⁹ As has been discussed, the jury represented a citizen-voice in parallel to the other constitutional power sources in society.¹⁸⁰ As has been well detailed by others, this law-finding role involved shaping verdicts to avoid certain punishments or even challenging the appropriateness of prosecuting certain crimes.¹⁸¹

Over time, however, this law-finding role became a contested issue in a maturing American legal system. Federal judges began restricting this power, reasoning that in a democratic society unelected jurors had no right to usurp the role of the legislature or the courts.¹⁸² Some states followed suit,¹⁸³ even as others continued to protect the historic

¹⁷⁸ *Blakely v. Washington*, 542 U.S. 296, 308 (2004) (“[T]he Framers put a jury-trial guarantee in the Constitution [because] they were unwilling to trust government to mark out the role of the jury.”); see *id.* at 313 (“Our Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.”).

¹⁷⁹ Akhil Amar has said juries were the “embodiments of late-eighteenth-century republican ideology.” AMAR, *AMERICAN’S CONSTITUTION*, *supra* note 127, at 234; see also Jon P. McClanahan, *Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States*, 37 N.C. J. INT’L L. & COM. REG. 725, 736 (2012) (“The Founders believed that there were two primary benefits to allowing citizen participation through jury service. First, the jury was seen as an educational tool, teaching citizens about the government and their rights and responsibilities. . . . Second, the Founders conceived of the jury as one part of the judicial branch, a type of ‘lower judicial bench’ in a bicameral judiciary.”).

¹⁸⁰ Barkow, *supra* note 30, at 34 (“From the outset, the criminal jury was designed to be part of our elaborate system of checks and balances, placing a check on the legislature and executive to ensure that no one received criminal punishment unless a group of ordinary citizens agreed.”).

¹⁸¹ See *id.* at 48-65; Iontcheva, *supra* note 32, at 321-22.

¹⁸² Farley, *supra* note 174, at 202 (“There is small room for doubt that the jury reached its zenith before 1835, when Justice Story, as circuit judge, instructing a jury, made a point upon which he had had a decided opinion during his whole professional life. He said that regardless of physical power and the necessity of compounding law and fact, the jury had no *moral right* to decide the law according to their own notions. On the contrary, he held it the most sacred constitutional right of every party accused of crime that the jury should respond as to the facts and the court as to the law.”); see also McClanahan, *True Right*, *supra* note 30, at 819-20 (“[I]t is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.” (quoting *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C. Mass. 1835))).

¹⁸³ Alschuler & Deiss, *supra* note 54, at 910 (“Between 1850 and 1931, the courts of at least eleven states (Connecticut, Georgia, Illinois, Louisiana, Maine, Massachusetts, New York, Pennsylvania, Tennessee, Vermont, and Virginia) rejected the view that juries should judge issues of law as well as fact.”).

jury power.¹⁸⁴ Adding to the turmoil, increasing economic pressures from a developing industrial economy furthered a call to have more predictable verdicts decided by established judges and not itinerant juries.¹⁸⁵ Jurors themselves were on occasion challenged as being erratic, uneducated, or incompetent.¹⁸⁶ In addition, the growing professionalism of judges and lawyers seeking to control the legal market added incentive to reduce reliance on non-professional citizen-jurors to decide the law.¹⁸⁷ Finally, some scholars have traced the parallel between the diversification of the jury venire to include women and people of color with the concomitant restriction of jury power, hypothesizing that such a restriction was a direct reaction to a more democratic jury pool.¹⁸⁸

In 1895, the United States Supreme Court ended the debate and settled the juror's role in the American legal system.¹⁸⁹ In *Sparf and Hansen v. United States*, the Supreme Court held that it was not error for a judge to instruct the jury that it must follow the court's instruction on the law. Justice Harlan wrote what stands as the controlling understanding of the jury role: "[I]t is the duty of juries in criminal cases to take the law from the court and apply that law to the

¹⁸⁴ McClanahan, *True Right*, *supra* note 30, at 816 ("By 1851, at least nine states had given juries the right to decide issues of law through constitutional provision or statute, and at least six other states had recognized the jury's right to decide issues of law by judicial decision."); *see id.* at 822 ("The Massachusetts legislature responded by enacting a statute explicitly giving criminal juries the right to decide questions of law and fact in criminal cases. . . . In Vermont, an 1849 supreme court decision affirmed the jury's right to decide the law in a manner contrary to that of the judge, rejecting the reasoning in *United States v. Battiste*.").

¹⁸⁵ Landsman, *supra* note 59, at 607 ("The judiciary came to believe that the jury was incapable of comprehending the new industrial reality. Judges also assumed that jurors were irremediably biased against corporate defendants. Based on these assumptions, judges sought to curtail the jury's authority."); Smith, *supra* note 30, at 445 ("However, over time, there was some feeling that juries tended to act irrationally and could not function well when the issues to be tried were complex. Thus, it is not altogether surprising that as legal principles (and society in general) grew increasingly complex, the role of the jury in adjudicating disputes decreased. Furthermore, one must not forget that two powerful interest groups had a vested interest in seeing certain aspects of the jury's power curtailed. Both judges and lawyers would fill the vacuum left by the erosion in the jury's power.").

¹⁸⁶ Smith, *supra* note 30, at 468-69.

¹⁸⁷ "Lawyers and judges eager to gain professional prestige and alliances with economically powerful commercial parties attempted to represent the law as an objective, neutral, and apolitical system." Middlebrooks, *supra* note 30, at 355.

¹⁸⁸ Marder, *Introduction to the Jury*, *supra* note 43, at 922-23.

¹⁸⁹ *Sparf v. United States*, 156 U.S. 51, 102 (1895).

facts as they find them to be from the evidence.”¹⁹⁰ In short, judges decide the law and juries decide the facts.¹⁹¹ This understanding remains the law of the land.¹⁹² Jurors identify themselves as mere fact-finders because the Supreme Court and other courts have told them to think that way.

This reduction in role was but one of several contributing factors to the change in constitutional identity.¹⁹³ Juries went from being an independent body with quasi-judicial, quasi-legislative powers, structurally apart from the judge, to becoming a fact-finding appendage of the court. Instead of deciding the entire case, jurors were only asked to decide a portion of the case. Instead of seeing themselves as a check on the judge and judicial system, they became a part of the judicial system. This meant reduced constitutional authority, and minimized any separate sense of constitutional identity.

B. Standardized Jury Instructions

The rise of standardized jury instructions also contributed to the narrowing of the jury role. Beginning in the 1930s, courts began to write down instructions on how jurors should consider evidence, how to deliberate, and how to decide a case.¹⁹⁴ The “role of the jury” instruction became a part of a comprehensive list of instructions to be read to all jurors.¹⁹⁵ Studying how these instructions influenced the task-oriented nature of the jury is the subject of this section.

Before looking at jury instructions in general and the “role of the jury” instruction in particular, it is necessary to mention a few contextual points that frame the larger discussion. First, as a matter of practice in early courts, a lack of formal, written jury instructions contributed to the broader law-finding role of the early jury.¹⁹⁶ Through much of the Founding Era and beyond, jury instructions

¹⁹⁰ *Id.* at 102-103.

¹⁹¹ *Id.*

¹⁹² Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1595 (2011).

¹⁹³ Citizens still sought equal treatment through equal political rights even after the 1895 *Sparf* decision formally disempowered juries. Finding facts as a representative member of a jury still carried significant constitutional import, and the literal and symbolic connection to constitutional power did not change.

¹⁹⁴ Marder, *Bringing Jury Instructions*, *supra* note 41, at 494 (“With the advent of pattern jury instructions in the 1930s, the judge prepared written instructions based on the pattern instructions and delivered them word for word to the jurors as they sat and listened.”).

¹⁹⁵ Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 52-53 (1997).

¹⁹⁶ See Farley, *supra* note 174, at 204-205; Ferguson, *supra* note 9, at 286-88.

were oral and usually the product of the individual judge or drafted by the parties.¹⁹⁷ In fact, because in early trials judges could comment on the evidence, the instructions came with editorializing or specific suggestions by the judge.¹⁹⁸ Further, without a sophisticated system of transmitting appellate decisions, “the law” remained less formalized than it is now¹⁹⁹ and jurors brought their own sense of the law to court.²⁰⁰ Thus, the move to formalized jury instructions encouraged a move to a more restricted role for jurors.²⁰¹

As a general matter, standardized, “pattern” jury instructions are now common in all federal and state courts.²⁰² These instructions are

¹⁹⁷ Farley, *supra* note 174, at 204-205 (“Under the common law, instructions were oral and before the statutory change it was incumbent upon the person excepting to get them reduced to writing, for recordation was discretionary with the trial judge.”).

¹⁹⁸ Judith L. Ritter, *Your Lips Are Moving . . . but the Words Aren’t Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 190 (2004) (“The first indications of judicial instructions to jurors might better be termed judicial recommendations. Much of the exchange could be described as judicial marshaling of the evidence. Trial courts would sum up the testimony and frequently express personal opinions regarding witnesses’ credibility.”); *see also* Smith, *supra* note 30, at 442-43 (noting that the practice of judges commenting on evidence was mostly over by 1913, when forty-one states or territories had abandoned the practice through constitutional provision, statute, or judicial decision).

¹⁹⁹ *Cf.* Young, *supra* note 3, at 147 (“According to one treatise published in 1877, many states required jury instructions be in writing in order to prevent uncertainty as to their language and terms.” (citing JOHN PROFFATT, A TREATISE ON TRIAL BY JURY 416 (1877))).

²⁰⁰ Ritter, *supra* note 198, at 188-89 (recognizing the “era from the seventeenth century through much of the nineteenth century, when jurors took it upon themselves or in some settings were even encouraged to determine questions of law as well as questions of fact [during which] there was a commonly held belief that jurors already knew the law as well as anyone else.”); Roger Roots, *The Rise and Fall of the American Jury*, 8 SETON HALL CIR. REV. 1, 5-6 (2011) (“Common citizens of early America were known to have been highly interested in and knowledgeable about legal issues. Nearly 2,500 copies of Blackstone’s *Commentaries* were sold in the colonies in the ten years prior to the Revolution.”).

²⁰¹ Finally, it should be recognized that *Sparf* was, itself, a jury instructions case. The precise issue in *Sparf* was whether a judge had erred in instructing the jury that their role was to apply the facts to the law as given by the judge. Thus, when states began the process of writing down instructions, the “role of the jury” instruction could be derived straight from a Supreme Court decision. *See Sparf v. United States*, 156 U.S. 51, 59-61 (1895).

²⁰² Ritter, *supra* note 198, at 192 (“[F]or quite a number of years now American trial courts have been delivering relatively uniform jury instructions.”); ADMINISTRATIVE OFFICE OF THE UNITED STATES DISTRICT COURT, HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 3, *available at* <http://www.nynd.uscourts.gov/pdf/trialhandbook.pdf> (“The judge in a criminal case tells the jury what the law is. The jury must determine what the true facts are. On that basis the jury has only to determine whether the defendant is guilty or not guilty as to

usually the product of court-led committees. As Professor Nancy Marder has written,

Pattern jury instructions are created in different ways. They can be written by a committee of lawyers and judges, as is the practice in Illinois, by a committee of judges, as was the practice in California, or by a judge, who collects his own and other judges' instructions, refines them, and ultimately makes them available to all judges by publishing them.²⁰³

Notably, in each of the possibilities judges play a central role, with trial judges making the first drafts, other trial judges rewriting them, and appellate judges essentially editing the language of these instructions through their published opinions.

The resulting jury instructions determine the official word of how jurors understand their role.²⁰⁴ In most cases, jury instructions are the only guide provided to inform jurors of their jobs. Thus, it is important to study the various jury instructions to see how modern jurors understand their role inside and outside of court. As will be discussed, there is a remarkable consistency across jurisdictions, with jurors relegated to a very specific role.²⁰⁵

First, most jury instructions tell jurors to find the facts. The jury's "duty" is to determine the facts.²⁰⁶ It is the jury's "exclusive province"

each offense charged. What happens thereafter is not for the jury's consideration, but is the sole responsibility of the judge.").

²⁰³ Marder, *Bringing Jury Instructions*, *supra* note 41, at 458-59.

²⁰⁴ *Id.* at 451 (recognizing that jury instructions "are the sole vehicle by which judges instruct jurors on the law and on their tasks before the jury begins its deliberations").

²⁰⁵ In fact, one federal handbook for jurors so clearly divides the fact-finding role of the jury in contrast to the law-giving role of the judge that a commentator analogized it to the Taylorism model of building Model-T cars, with jurors as the factory workers. See Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 966-67 (2010) ("This division of labor between the modern jury and judge is so complementary that the federal juror handbook tells jurors that they and the judge are a team. Conjuring images of Henry Ford's assembly line, with each worker doing his part to build a great American car, the handbook tells jurors that 'through . . . teamwork . . . judge and jury . . . working together in a common effort, put into practice the principles of our great heritage of freedom.'").

²⁰⁶ See, e.g., STATE BAR OF ARIZONA, ARIZONA PATTERN JURY INSTRUCTIONS — CRIMINAL 1 (3d ed. 2010) ("It is your duty to determine what the facts are in the case by determining what actually happened. Determine the facts only from the evidence produced in court."); ARKANSAS SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, MODEL JURY INSTRUCTIONS — CIVIL 103 (2013) ("(b) It is my duty as judge to inform you of the law applicable to this case by instructions, and it is your duty to accept and

to “determine what the real facts were.”²⁰⁷ In almost every jurisdiction, the division between jury and judge is clear. As the New York State criminal jury instruction reads: “We are both judges in a very real sense. I am the judge of the law and you, Ladies and Gentlemen, are the judges of the facts.”²⁰⁸ Jury instructions, thus, provide a clear demarcation of role.²⁰⁹ Judges provide the law that juries must accept

follow them as a whole, not singling out one instruction to the exclusion of others. You should not consider any rule of law with which you may be familiar unless it is included in my instructions. (c) It is your duty to determine the facts from the evidence produced in this trial. You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law.”); 2 GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS: CRIMINAL CASES 0.01.00 (4th ed. 2013) (“The jury has a very important role. It is your duty to determine the facts of the case and to apply the law to those facts. I will instruct you on the laws that apply to this case, but you must determine the facts from the evidence.”).

²⁰⁷ CONNECTICUT PRACTICE SERIES, CRIMINAL JURY INSTRUCTIONS § 2.1 (4th ed. 2013) (“In the performance of our duties, yours and mine, you as the jury and I as the court have separate functions. To put it briefly, it is my duty to state to you the rules of law involved in the decision of this case and it is your duty to find the facts. You alone are responsible for determining the facts. It is your exclusive province to deal with the evidence and determine what the real facts were, and to reach the final conclusion as to the guilt or innocence of the accused. By applying the law, as I give it to you, to the facts as you find them to be, you will arrive at your verdict. You must perform that duty with strict regard to the law as given to you by the court, because the court alone is responsible for stating the law and the legal principles involved.”).

²⁰⁸ 1 CHARGES TO JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE IN NEW YORK § 3:2 (2013).

²⁰⁹ See, e.g., MASSACHUSETTS SUPERIOR COURT, CRIMINAL PRACTICE JURY INSTRUCTIONS § 1.5 (2013) (“My responsibility as the judge is to give you all the law that you need to know in order to solve or resolve the issues placed before you on this jury. You must take the law as I give it to you. You have no option whatsoever in that regard. You as jurors are the sole factfinders in this case. Many of you have had life experiences that may have touched on similar type matters as have appeared in this case. Perhaps some of you over the years have read novels concerning this type of thing and this type of case, or have seen television programs, or a variety of other sources. Sometimes jurors, by exposing themselves to a variety of things during the course of their lives, develop ideas about what they would like the law to be or develop ideas in their own mind about what the law is. You do not have that option. You must take the law as I give it to you and apply that law, and that law alone, to the facts as you and you alone collectively find those facts to be.”); PENNSYLVANIA SUPREME COURT, CRIMINAL INSTRUCTIONS SUBCOMMITTEE, PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 7.05 (2005) (“It is my responsibility to decide all questions of law. Therefore, you must accept and follow my rulings and instructions on matters of law. I am not, however, the judge of the facts. It is not for me to decide what are the true facts concerning the charges against the defendant. You, the jurors, are the sole judges of the facts. It will be your responsibility to consider the evidence, to find the facts, and, applying the law to the facts as you find them, to decide whether the defendant has been proven guilty beyond a reasonable doubt.”).

without question.²¹⁰ Juries are merely required to apply the instructions to the facts.²¹¹ With only minimal variation,²¹² these instructions frame the understanding of the juror role.

The unsurprising result of these almost uniform instructions is that jurors see themselves as fact-finders and nothing more. Jurors swear an oath to follow those instructions, and the courts presume they follow that oath.²¹³ Since jury instructions are silent about any broader constitutional duty, jurors are left without any other conception of a different role.²¹⁴ As such, jurors adopt a more limited vision of the jury — a vision that focuses on what the juror is expected to do in the courthouse, not who a juror is expected to be in a constitutional democracy.

C. Jury Streamlining Efforts

In the last several decades, jury reform movements have made marked improvements in the process of jury service.²¹⁵ These reforms

²¹⁰ SUPREME COURT OF COLORADO, COLORADO JURY INSTRUCTIONS, CRIMINAL 3:01 (1993) (“It is my job to decide what rules of law apply to the case. . . . You must follow all of the rules as I explain them to you. Even if you disagree or don’t understand the reasons for some of the rules, you must follow them. No single rule describes all the law which must be applied. Therefore, the rules must be considered together as a whole. During the course of the trial you received all of the evidence that you may properly consider to decide the case. Your decision must be made by applying the rules of law which I give you to the evidence presented at trial.”).

²¹¹ See TENNESSEE JUDICIAL CONFERENCE PATTERN JURY INSTRUCTION COMMITTEE (CRIMINAL), CRIMINAL 1.08 (2013) (“You are the exclusive judges of the facts in this case. Also, you are the exclusive judges of the law under the direction of the court. You should apply the law to the facts in deciding this case. You should consider all of the evidence in the light of your own observations and experience in life.”); UTAH SUPREME COURT, UTAH JURY INSTRUCTIONS, CR202 (2013) (“You have two main duties as jurors. The first is to decide from the evidence what the facts are. Deciding what the facts are is your job, not mine. The second duty is to take the law I give you in the instructions, apply it to the facts, and decide if the prosecution has proved the defendant guilty beyond a reasonable doubt.”).

²¹² See CIVIL INSTRUCTIONS COMMITTEE, INDIANA PATTERN JURY INSTRUCTIONS CRIMINAL INSTRUCTION 13.03 (3d ed. 2007) (“Under the Constitution of Indiana you have the right to determine both the law and the facts. The Court’s instructions are your best source in determining the law.”).

²¹³ See UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, THE JUROR’S SOLEMN OATH, available at http://www.nysd.uscourts.gov/jury_handbook.php?id=7 (“Members of the Jury, you will rise, hold up your right hands, and be sworn to try this case.”).

²¹⁴ See Ferguson, *supra* note 9, at 240.

²¹⁵ Munsterman, *supra* note 42, at 216 (“Beginning in the 1960s the pace of jury system change accelerated. Fueling efforts were the development of court Management, challenges to the representativeness and the randomness of the jury

were necessitated by citizen complaints that jury service took too long and court systems were too inefficient.²¹⁶ By most measures these reform projects have been quite successful. Juror waiting time has been cut down.²¹⁷ Jurors are summoned less often.²¹⁸ And, in combination with better outreach and a wider jury pool, the burden of jury duty has been spread to more citizens who previously had been exempted or excluded.²¹⁹

Yet, the benefits of efficiency have had consequences on juror self-perception. One consequence involves the largely unintended effect that jury service marketing campaigns have focused on the limited nature of jury service. In promoting the fact that jury duty is less of a burden, court administrators have also promoted the fact that jurors only have a short-term, discrete responsibility to the court.²²⁰ As will be discussed, jury streamlining projects like “one day, one trial” by their nature reinforce the task-oriented sense of jury service. Again, the point is not to criticize these efforts (making jury duty more pleasant is a good thing), but examine the consequences to juror identity from the change.

selection process, the desire to make jury systems mindful of the citizen’s time and the cost to communities, and the availability of automation.”); *see also* Young, *supra* note 3, at 148.

²¹⁶ See THE CIRCUIT COURT OF JEFFERSON COUNTY, TENTH JUDICIAL CIRCUIT OF ALABAMA, BIRMINGHAM DIVISION, JUROR HANDBOOK, available at http://10jc.alacourt.gov/forms/Handbook_April_2007.pdf (“We know that jury duty is inconvenient for most of you but it is one of the most important obligations of citizenship. We will do our best to make efficient use of your time here.”); Hillel Y. Levin & John W. Emerson, *Is There a Bias Against Education in the Jury Selection Process?*, 38 CONN. L. REV. 325, 330-31 (2006) (noting that in an effort to combat educated jurors from being excused, “A few [scholars] have suggested that jury duty be made more attractive by shortening terms of service or raising pay.”).

²¹⁷ Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty First Century*, 66 BROOK. L. REV. 1257, 1272 n.66 (2001) (recognizing that systems such as one-day, one-trial “show[] respect for a juror’s time and has gone a long way toward convincing prospective jurors to respond to their summons”).

²¹⁸ See generally Munsterman, *supra* note 42, at 218 (discussing the one-day, one-trial system).

²¹⁹ See Ellsworth & Reifman, *supra* note 23, at 792 (“[W]ith the increased representativeness of the jury pool and the growing prevalence of one-day/one-trial systems of jury service, America has gone a great distance toward full representativeness of the venire in the past few decades.”).

²²⁰ For example, courts advertise the task-oriented nature of jury service. In Ohio, the Hamilton County courthouse’s website reads, “Welcome to jury service. The performance of jury service is the fulfillment of a civil and moral obligation. Conscientious service brings its own reward in the satisfaction of an important task well done.” HAMILTON COUNTY JURY COMMISSIONER OFFICE, http://www.hamilton-co.org/common_pleas/jury_commissioner.htm (last visited Jan. 2, 2014).

The need for jury reform started well before the recent reforms. People have avoided jury duty since the advent of jury duty.²²¹ This has resulted in poor attendance²²² and a perception that certain classes of people could avoid service.²²³ For our purposes, the story of jury reform starts in the 1990s,²²⁴ with a series of studies that called for major jury improvements.²²⁵ The American Bar Association (“ABA”) and state jury commissions undertook comprehensive evaluations of how to improve the quality of the jury process.²²⁶ In fact, in the ten

²²¹ See Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 MICH. L. REV. 2673, 2678 (1996) [hereinafter *Juror Delinquency*] (“Early in the nineteenth century, jury avoidance was a continual nuisance for courts.”); *id.* at 2683 (“Fining those who failed to obey summonses appeared to be a universal response to jury dodging throughout the colonial period, and in the early 1800s statutes in most states authorized fines ranging from one dollar to \$250.”). However, a caveat to this reality is that wealthy jurors could on occasion buy their way out of jury service. *Id.* at 2684.

²²² See Joanna Sobol, *Hardship Excuses and Occupational Exemptions, The Impairment of the “Fair Cross-Section of the Community,”* 69 S. CAL. L. REV. 155, 158 (1998) (“Although jury duty is an obligation of citizenship, many people do not consider it as such, and millions have not fulfilled this duty when called to serve.”).

²²³ King, *Juror Delinquency*, *supra* note 221, at 2688 (“There is some basis for this perception that the middle and upper classes were fleeing from jury service during the decades between 1870 and 1940. Because the administration of jury summonses remained a one-man operation in most jurisdictions, it was not difficult to use money or other influence to gain an exemption from jury service, and some of the well-to-do took advantage of the opportunity to avoid being summoned. Many others simply ignored their summonses or relied on the liberal granting of excuses, sometimes making illegal payments or lying for the privilege.”).

²²⁴ See *id.* at 2685-86 (“In the decades between the Civil War and World War II, inconvenience and financial loss still topped the list of reasons for avoiding jury service, and courts and legislatures took their first steps to ease these burdens.”).

²²⁵ See Mark A. Behrens & Edward O. Gramling, *Improving the Jury System in Kansas: A Call for Jury Patriotism Legislation*, 13 KAN. J.L. & PUB. POL’Y 1, 1 (2003); Michael S. Mushlin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors*, 25 YALE L. & POL’Y REV. 239, 248 (2007) (“The movement to reform jury service was led by bar associations as well as commissions appointed by courts or legislatures to examine practices and make recommendations for change. The American Bar Association played a particularly important role and generated reform efforts in many states.”).

²²⁶ E.g., AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993); ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF TWELVE (1994), available at <http://supreme.state.az.us/jury/power12.htm> (Arizona); COUNCIL FOR COURT EXCELLENCE, DISTRICT OF COLUMBIA PROJECT, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEMS IN WASHINGTON, D.C. (1998) (Washington, D.C.); THE JURY PROJECT, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (1994) (New York); J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433 (1996) (California); see Munsterman, *supra* note 42, at 217-18 (“In 1978 a

years spanning 1997–2007, three-quarters of the states (38) appointed a jury reform body to oversee proposed changes.²²⁷ These commissions led to state reforms in dozens of jurisdictions.²²⁸

For example, Massachusetts became the first state to institute a “one-day, one-trial” system.²²⁹ A “one-day, one-trial” system is one in which a juror completes his or her service in one day if he or she is not selected to serve as a juror in a trial.²³⁰ For citizens in Massachusetts this meant that instead of being summoned for a period of 20–30 days, jurors only served for a single day or a single trial.²³¹ Nine states and the District of Columbia now have adopted a similar “one-day, one-trial model.”²³² These jurisdictions (Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Indiana, Massachusetts, and Oklahoma) make up over one quarter of the U.S. population.²³³ New York and South Carolina limit jury service to two–five days. Georgia, Kentucky, Maine, New Hampshire, North Dakota,

task force of representatives from the American Bar Association, the Conference of Chief Justices, the Conference of State Court Administrators, the National Association for Trial Court Administrators, The National Association for Court Administration, and the National Bar Association developed a set of jury standards. . . . As a result of the implementation of the standards states have introduced the use of multiple lists for juror selection, eliminated exemptions, changed their juror fees, reduced their term of jury service, often to one day/one trial, improved the automation support of the jury system, and improved the treatment of jurors through training for judges and administrative staff.”)

²²⁷ See HON. GREGORY E. MIZE, PAULA L. HANNAFORD-AGOR, & NICOLE L. WATERS, *THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 9* (2007).

²²⁸ See Marder, *Bringing Jury Instructions*, *supra* note 42, at 481 (listing efforts).

²²⁹ Munsterman, *supra* note 42, at 217. See generally Saks, *supra* note 24, at 225 n.16 (“A jurisdiction using a ‘one-day-one-trial’ jury system requires citizens called for jury service to serve only for a single day or, if chosen to sit on a jury, for a single trial.” (citing *JURY TRIAL INNOVATIONS* § II-2 (Thomas Munsterman et al. eds., 1997))).

²³⁰ Patricia Lee Refo, *A Roadmap for Trials: The Ethical Treatment of Jurors*, 36 *STETSON L. REV.* 821, 824 n.12 (2011) (quoting the AMERICAN BAR ASSOCIATION, GLOSSARY, http://www.abanet.org/publiced/glossary_o.html (last accessed Nov. 9, 2006)).

²³¹ Munsterman, *supra* note 42, at 217 (observing that Massachusetts moved from a twenty day jury service to a one-day, one-trial system); Pamela J. Wood, *Massachusetts Leadership in the American Jury System*, 55-SPG B. B.J. 13, 14 (2011) (“Massachusetts was the first in the country to implement the One Day or One Trial system statewide, in the 1980s. Jurors serve for one day or, if impaneled on a case, for the duration of one trial, after which they are disqualified from service for three years. This is a significant improvement over the prior system, under which jurors served for 30 days and might be impaneled on several trials during that time.”).

²³² MIZE ET AL., *supra* note 227, at 10.

²³³ *Id.*

Ohio, and Rhode Island limit jury service to six days-one month.²³⁴ These jurisdictions, making up almost half the U.S. population (46.7%), have all instituted some public notice to potential jurors about these efficiencies in jury service.²³⁵

These improvements directly target the problem of jury avoidance.²³⁶ Courts have long struggled with “juror yield” — meaning the percentage of people summoned to service who actually show up.²³⁷ Now because jurors can be certain that their time in court will be limited, more are willing to appear.²³⁸ While other barriers to service still exist,²³⁹ these streamlining processes have received a very positive response from both courts and citizens.

A quick review of these new jury streamlining campaigns shows how jury duty is marketed as easier, shorter, and less of a burden for citizens. Many jurisdictions that have adopted jury reform innovations overtly advertise this reduced burden of citizenship on publically available websites.²⁴⁰ Judges promote it directly to the public.²⁴¹ Court

²³⁴ *Id.*

²³⁵ *See id.* at 11.

²³⁶ *See* Richard Seltzer, *The Vanishing Juror: Why Are There Not Enough Available Jurors?*, 20 JUST. SYS. J. 203, 204 (1999) (noting that in 1999 the District of Columbia jury system “found that approximately 20 percent of jurors ignore the jury qualification questionnaire and another 40 percent did not receive it at all. Only 18 percent of potential jurors actually serve”); *see also id.* (“New York City had a nonresponse rate of 58 percent before they began an enhanced enforcement program.” (citing NEW YORK STATE UNIFIED COURT SYSTEM, JURY REFORM IN NEW YORK STATE: A PROGRESS REPORT ON A CONTINUING INITIATIVE (1996))).

²³⁷ Wood, *supra* note 231, at 14 (defining “juror yield” as the percentage of people summoned for jury service that actually appear at the courthouse); *see* Thomas L. Fowler, *Filling the Box: Responding to Jury Duty Avoidance*, 23 N.C. CENT. L.J. 1, 3 (1997–1998) (“Since colonial days, citizens have sought to avoid jury duty, and legislatures and court officials have searched for effective methods to secure their service.”).

²³⁸ *See generally* Wood, *supra* note 231, at 15 (“Under the One Day or One Trial system, about 90% of those who appear for jury duty in Massachusetts complete their service in one day, and over 95% are done in three days or fewer.”).

²³⁹ Susan Carol Losh, Adina W. Wasserman & Michael A. Wasserman, *Reluctant Jurors*, 83 JUDICATURE 304, 309 (2000) (“There are many obstacles to jury duty: poor public transit, conflicts with work or school, and child care expenses are just a few.”); *Refo*, *supra* note 230, at 668 (“Many courts across the country are innovating — the District of Columbia has a child care center in the courthouse, available for jurors and witnesses with child care needs.”).

²⁴⁰ *See, e.g.*, MACOMB COUNTY, MICHIGAN CLERK’S OFFICE PRESS RELEASE (Nov. 1, 2005), *available at* <http://macombcountymi.gov/clerksoffice/news/htm/OneDayOneTrialfirstdaysuccess.htm> (“Macomb County’s one-day, one-trial jury system started today and Macomb County Clerk / Register of Deeds Carmella Sabaugh reports a near record turnout. 188 jurors responded to a jury summons today. Daily juror attendance

systems actively engage reporters and news sources to publicize the changes.²⁴²

These successful innovations offer several insights for this Article. First, jury reforms were (and are) necessary to improve the overall jury system. However, the success of those reforms may have had unintended consequences that has reduced the status of the juror in society. These programs encouraged the perception that the burden of jury service is minimal. Almost all of the reform efforts have been implicitly or explicitly intended to reduce the investment of time and effort of jurors. Simply stated, advertising that jury service will not be “too inconvenient” does not elevate the status of jurors.²⁴³ Citizens have necessarily internalized the efforts of judges and court administrators to lessen the burden of serving. While it is true that juror improvement/appreciation efforts have resulted in a more juror-

averages 150. Today’s attendance percentage was the second highest ever recorded. The record is 191. Sabaugh attributes the better attendance to the new jury system. The new system shortens jury duty from one week to just one day for most jurors.”); SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, http://www.sdcourt.ca.gov/portal/page?_pageid=55,1406353&_dad=portal&_schema=PORTAL (last visited Jan. 2, 2014) (“The Superior Court uses the ‘One Day/One Trial’ program under California Rules of Court, rule 2.1002, which is intended to make jury service more convenient by shortening the time that a person is required to serve to one day or one trial.”).

²⁴¹ CIRCUIT COURT OF COOK COUNTY, MESSAGE FROM CHIEF JUDGE TIMOTHY C. EVANS, available at <http://cookcountycourt.org/jury/message.html> (“Jury service is a serious, meaningful and important responsibility. My goal is to make jury service convenient and easy. To accomplish this, I have instructed the Office of Jury Administration to implement innovative and streamlined practices designed to put the comfort and convenience of jurors first and foremost.”); *New Jury Duty System*, CORNERSTONE MEDIA ONLINE (Jan. 20, 2011), <http://www.russell-publications.com/articles/1293/new-jury-duty-system> (“In the on-going attempt to make jury duty less burdensome for citizens in Kankakee County, Chief Judge Kathy Bradshaw Elliott is pleased to announce the beginning of the one day/one trial system for jury duty.”).

²⁴² See Caitlin Francke, *Keeping Jurors from Being Boxed in “One-trial” System Reduces Service Time, Expands Prospect List*, BALTIMORE SUN (May 7, 1996), http://articles.baltimoresun.com/1996-05-07/news/1996128063_1_jury-pool-court-administrators-excused (“A new jury system makes it easier to fulfill your civic duty in Howard County, reducing the required service from one month to one week. The system — planned since last year and begun last week — means most residents will fill their sometimes dreaded duty in only one day.”); Bob Merrifield, *Jury Duty Revamped in Will County Courts*, CHI. TRIB. (Nov. 19, 1991), http://articles.chicagotribune.com/1991-11-19/news/9104140935_1_one-trial-system-jury-duty-jury-commission (detailing changes in county courts); see also Jan Hoffman, *Making Jury Duty Less Painful and More Efficient*, N.Y. TIMES (Apr. 7, 1994), <http://www.nytimes.com/1994/04/07/nyregion/making-jury-duty-less-painful-and-more-efficient.html> (reporting on improvements in New York State).

²⁴³ Or, in other words, the advertising is not “there is nothing more important you can do than be a constitutional citizen” but instead, “don’t worry, it won’t be hard and you can go back to more important things in life.”

focused experience, the message is still one of reduced burdens and expectations.

Second, these programs intentionally have focused attention on a limited timeframe. Program titles like “one-day, one-trial” suggest that the role is discrete and defined, not ongoing. There is no acknowledgment that being a juror involves a political or constitutional identity outside the courthouse.

Third, the perception has been created that jury service is something citizens do for the courts, not themselves — that jury trials are established by the court, not the Constitution. This is a significant shift in the source of jury power. In essence, juries have become seen as a fact-finding arm of the court, not a separate institution in the constitutional structure.

Finally, these modifications, emphasizing the easy or limited role of the jury, have discouraged any discussion that jurors might have responsibilities before jury service to understand and prepare for their role, or any connection after jury service to share that knowledge with the larger community. The perception remains that all you have to do is show up, which again limits the sense that jury duty is part of an ongoing civic identity.

D. Result: A Task-Oriented Institution

The result of these relatively recent changes in the jury system, in addition to larger systemic changes in role, has led to a task-oriented institution.²⁴⁴ While still an important task, this shrinking of role has undermined a broader sense of constitutional identity. In contrast to a constitutionally-oriented jury, the modern jury is perceived to require less effort, less time, no preparation, and is relatively unimportant in comparison to other responsibilities.

Of course, these changes discussed above are not the sole cause of the jury’s diminished status in society. Within the court system, rules of evidence and trial practice have also undercut a more engaged jury.²⁴⁵ Jurors are, by and large, passive recipients of information.²⁴⁶ Many trial procedures are not well explained to citizens. Outside court, financial pressures and other obligations of citizens have

²⁴⁴ See Ellsworth & Reifman, *supra* note 23, at 796 (recognizing that “task-oriented reforms have also recently emerged from some court systems and judges”).

²⁴⁵ Steven L. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 208 (1990) (discussing trial restrictions that seem to diminish the role of the jury and make the jury’s role more passive).

²⁴⁶ See Leigh Buchanan Blenen, *The Appearance of Justice: Juries, Judges, and the Media Transcript*, 86 J. CRIM. L. & CRIMINOLOGY 1096, 1113 (1996).

increased the cost of serving.²⁴⁷ Further, unlike voting, jury service involves no apparent self-interest, thus making the value of service harder to appreciate.²⁴⁸ Finally, there has been no national education project to explain why juries matter.²⁴⁹ While efforts to engage and uplift jurors continue in court systems and within bar associations, jurors have internalized the message of a weakened institution.

Why does this change in orientation matter? The consequences of this task-oriented role have tracked several troubling developments about the strength of the jury system. First, jurors have been challenged as not being up to the job.²⁵⁰ This, in turn, has led to a sustained attack on the jury, with some commentators celebrating the death of the civil jury.²⁵¹ The result has undermined jury participation rates, with jury yield numbers at embarrassingly low levels.²⁵² Finally, while it is difficult to measure citizen attitudes about jury service, it seems that jury service remains a dreaded duty²⁵³ that is representative

²⁴⁷ Judge Scott Donaldson, *Improving Jury Service*, 73 ALA. LAW. 190, 191 (2012) (discussing the problems of juror pay).

²⁴⁸ Losh et al., *supra* note 239, at 309 (“The ramifications of ‘jury economics’ extend beyond wages. Unlike other forms of civic involvement (e.g., voting), which partially draw on self-interest, the rewards of jury duty involve the internal satisfaction of fulfilling a civic obligation.”).

²⁴⁹ *Id.* at 310 (“Jury duty is unfamiliar territory for most. Our youth are taught about other civic duties, most notably the vote, and public service advertising about voting is pervasive. Meanwhile, information about jury duty is confined to fiction, sensationalist trials, personal experience, or second-hand data.”).

²⁵⁰ Public polling of civil juries was quite negative with regard to awards of excessive monetary damages. *See, e.g.,* Saks, *supra* note 24, at 222 (citing VALERIE P. HANS, ATTITUDES TOWARD THE CIVIL JURY, IN VERDICT: ASSESSING THE CIVIL JURY SYSTEM 248 (Robert E. Litan ed., 1993)).

²⁵¹ *See* Jeffrey Robert White, *The Civil Jury: 200 Years Under Siege*, 36-JUN TRIAL 18 (2000) (detailing the various attacks on the institution of the jury from the perspective of the trial bar).

²⁵² Ted M. Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 SMU L. REV. 1813, 1816 (2001) (describing a survey in which “Dallas County officials mailed out 13,027 summonses in anticipation of the fifty-five civil and criminal trials scheduled to begin the week of March 6, 2000. An additional 585 people — not included in the mail-out figure — were expected to show up at the courthouse because they had answered summonses for earlier court dates but asked to reschedule to this date. Of the 13,612 who were supposed to show up for jury service, only 2214 did.”).

²⁵³ “Everyone loves jury service — just not this week.” Refo, *supra* note 230, at 667 (quoting Tom Munsterman from the National Center for State Courts); WASHINGTON STATE JURY COMMISSION, REPORT TO THE BOARD FOR JUDICIAL ADMINISTRATION 3 (2000), available at http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf (“The arrival of a jury summons in the mailbox is rarely greeted with enthusiasm: jury duty is inconvenient; it interferes with work; it does not pay well and may cause a loss

of a general decline in civic engagement.²⁵⁴ While such relationships are not necessarily causal (and are likely too complex to link), the solutions proposed in this Article seek to improve these negative attitudes. As will be discussed in the next section, a reframing of jury service to emphasize its constitutional character will address these concerns.

III. THE POTENTIALITY OF JURY SERVICE

The question to be answered is how to reclaim the benefits of the jury's traditional, constitutional identity without running up against the real problems that caused the courts to limit the role of the jury in the first place. The proposed answer is not to disturb the changes made to improve the modern jury. Instead, this Article looks to affect jury service *before* and *after* the event and, thus, to reframe it as an ongoing, constitutional identity. In a separate article, I have proposed re-crafting jury instructions (within the jury experience) to facilitate a similar goal.²⁵⁵

Becoming aware of the potentiality of jury service involves two interrelated steps. First, it requires a change in perception so that being a juror is seen as an important, on-going constitutional identity, and not simply a discrete task. Recognition of this constitutional connection will have tangible benefits for the reputation and effectiveness of juries. Second, it requires personal and civic engagement before and after jury service. Potential jurors should be encouraged to educate themselves about the constitutional role of the jury prior to serving. Jurors who have served should be encouraged to reflect on and teach others from this experience. Courts and communities should promote this civic investment in the jury role. So conceived, being a juror, will not begin or end with the actual service, but will be seen as part of a continuum of civic responsibilities.

A. *Changing the Expectations of Jury Service*

This Article seeks to reframe the idea of jury service into a broader constitutional identity. This involves shifting the expectations of modern jurors back to a more constitutionally-oriented focus. The first part of this section sets out the “what” and “why” — what is

of income; and it sometimes means waiting in a less than congenial or comfortable environment.”).

²⁵⁴ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 25 (2000).

²⁵⁵ See Ferguson, *supra* note 9, at 286-96.

meant by changing expectations and why it is important. The second section offers suggestions on “how” — how to make this potentiality of jury service an actuality.

1. Reimagining the Importance of Jury Service

The first change in expectation involves elevating the juror’s importance in society. From the Revolutionary War to the Civil Rights Movement, the right to serve on a jury was a marker of full constitutional citizenship.²⁵⁶ Then, as now, jury duty was a constitutional duty. Yet, how many ordinary citizens waiting in line at the local courthouse would risk death or arrest to protest for the right to serve on a jury? How many citizens even know about the battles to establish jury service as a constitutional right? Without a sense of constitutional identity, the average citizen will understandably overlook the importance of the experience. The first step then is to make jurors aware of the value of jury service by reminding them of this past constitutional connection. This is not a mere history lesson, but a linkage to the constitutional mythology of America. If citizens see jury duty as constitutional duty, it becomes of elevated importance.

This constitutional linkage will not only shape how potential jurors react to the summons, but will shape how jurors act during jury service. Jurors are not mere fact-finders, but fact-finders within a constitutional structure. As such, they must see that jury service is a connecting point to the larger constitutional system.²⁵⁷ Simply stated, a juror that has embraced this constitutional identity will approach jury duty with the understanding that he or she has been deputized to act in a constitutional system. It is a great and unfamiliar power. It is also a democratic power. It instills a heightened sense of seriousness, purpose, and respect for the institution.²⁵⁸ After all, as a juror you are symbolically sitting in the seats of those who fought for the right. It might not change the outcome in any particular case, but it will improve and legitimize the process and the ultimate decision.

To be clear, while there may be some perceived overlap with theories that have tried to reclaim the law-finding nature of the jury, this proposal stops well short of that argument. The idea is not to give the jury the authority to decide the law, but the vision to understand

²⁵⁶ See *supra* Part I.A-B.

²⁵⁷ See *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); see also *Taylor v. Louisiana*, 419 U.S. 522, 532 (1975).

²⁵⁸ See *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

its role within the constitutional structure. An informed juror can both understand the history and original power of the jury and still find the facts as instructed. Judges, lawyers, and legal historians sit on juries all the time and do not alter their decisions because they know about the history of the jury. Yet, this contextual understanding of the role of the jury may well enrich the experience by placing the juror's decision in a larger constitutional framework.²⁵⁹

2. Expanding the Temporal Understanding of Jury Service

The second change in expectation involves considering jury service as a status or identity that extends beyond the time at the courthouse. It looks at the responsibilities of a citizen as a *potential* juror.

Before jury service, all potential jurors know that as actual jurors they will be called on to do certain actions within an established system. That role will require certain knowledge, including some understanding of substantive law, procedural rules, and the constitutional structure of decision. Recognizing this reality, one would think that jurors would prepare for the event by learning about it. Yet, there is no institutional educational program for jurors prior to service and most jurors do not educate themselves. The reason for this lack of preparation turns on the fact that jurors do not see their job as having quite yet begun. Being a juror is equated with the courthouse, not an identity outside those courthouse responsibilities.

Another way to think about what an ongoing constitutional identity might mean is to ask the question: why among the twin political rights of voting and jury service, has jury service not attached to our modern identity? After all, when citizens consider what it means "to be a voter" they are not simply focused on checking the box (or pulling the handle) to vote in a voting booth. The physical act of voting does not delimit the identity of being a voter. Instead, their identity as voters includes all of the educative and identifying qualities that go into voting before choosing a candidate. At least in the ideal,²⁶⁰ voters

²⁵⁹ This contextual understanding recognizes that the jury: (1) derives from a shared history and tradition; (2) embodies shared values of fairness, equality, accountability, deliberation, liberty, dissent; (3) expresses collective beliefs of process and decision; (4) requires participation in shared rituals; (5) is based on a shared language; (6) represents a collective responsibility for all similarly situated citizens; (7) involves local community power; and (8) perpetrates a recognizable and achievable self-image. Each of these factors adds weight to the responsibility of the juror.

²⁶⁰ It is well recognized that voting participation in America is not near the ideal. Local election turnouts are usually under 50% of eligible voters. According to the Pew

educate themselves about the issues, weigh personal and political values, and balance party affiliations, personal self-interest, and public virtue all before (and sometimes after) they vote. Being a participatory voter in a democracy is part of our identity before and after the act of voting; being a participatory juror in a democracy is not. Yet, all citizens are also potential jurors.²⁶¹ All citizens, thus, should have a responsibility before and after the actual jury summons to educate themselves about this constitutional responsibility. That jury service, like voting, is a “badge of citizenship”²⁶² is not a new idea — the conceptual move here is to convince citizens that they are wearing that badge before they pin on the actual juror badge.

To make this shift complete, there also needs to be a change in expectation to counter the message that jury service has a defined end point. While part of jury service might end after one-day or one-trial, there are other parts that continue in terms of education, perception, and attitudes.²⁶³ This is the subject of the next section.

B. *The Benefits of Changing the Expectation of Jury Service*

What are the benefits of this changed expectation? After all, if one is satisfied with the fact-finding role of the modern jury, why do citizens need to be concerned about constitutional identity?

1. Reputational Benefit

There are several significant benefits to emphasizing the constitutional identity of the jury. The first is reputational. A broader conception of juror identity helps legitimize the jury process to a doubting public. One of the current complaints about the jury is that it is comprised of citizens not competent to handle the responsibilities.²⁶⁴ This attack on jurors spills over to attacks on the

Center, 61% of eligible voters voted in the 2008 presidential election (a 40-year high). PEW CENTER ON THE STATES, 2008 ELECTION IN REVIEW 4 (2008).

²⁶¹ *But see* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003) (observing that some groups, such as felons, are excluded as a matter of law).

²⁶² *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 234 (1974) (recognizing the right to vote as an “important badge of citizenship” (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

²⁶³ *See infra* Part III.B.4.

²⁶⁴ Ellsworth & Reifman, *supra* note 23, at 792 (“A major theme of popular criticism is that competent, responsible people rarely serve on juries; instead, American juries are made up of incompetent people — the uneducated, the jobless, the people who pay so little attention to the news that they have never heard of

jury system.²⁶⁵ The more jury service is seen as the work of constitutional actors, the more respect will be given the institution. This is true for two separate reasons (in addition to the already mentioned theory that anything is considered more important if “constitutionalized”).²⁶⁶ The first is that it shifts the focus from the people to the process. The focus becomes the stable constitutional process of jury decision-making, and not the actual people on the jury.²⁶⁷ Outlier decisions can be rationalized by process considerations, as we do with many generally good processes that have occasional problems.

Second, it repositions the jury within the larger democratic structure. Citizens see jurors, and jurors see themselves, as a powerful, generative part of the legal structure with significant constitutional power.²⁶⁸ Jurors represent the community, but they also represent a community voice in tension with governmental power. Attacking a jury verdict is a little like attacking democratic voting outcomes; you have no one to blame but yourself.

A related benefit is that an improved reputation may result in improved jury yields. As discussed earlier, one of the current realities of the modern jury system is a low turnout for summoned jurors to jury service.²⁶⁹ To efficiently function as a court system, courts need to encourage juror participation. With reduced participation from poor jury yields, certain citizens will be overburdened or there will be an inadequate number of jurors. The current poor yields have caused judges to complain,²⁷⁰ issue contempt citations,²⁷¹ and resort to public

litigants who are major public figures.”); Friedland, *supra* note 245, at 191-92.

²⁶⁵ Joseph C. Wilkinson, Jr., Frank D. Zielinski & George M. Curtiss, III, *A Bicentennial Transition: Modern Alternatives to Seventh Amendment Jury Trial in Complex Cases*, 37 U. KAN. L. REV. 61, 91 (1988). *But see* Cecil et al., *supra* note 23, at 764.

²⁶⁶ See *supra* text accompanying note 257.

²⁶⁷ See Friedland, *supra* note 245, at 195 (“This perception of fairness is as important to the proceedings as is actual fairness. A system perceived as inaccurate undermines the public’s confidence in the jury to reach fair — and accurate — results.”).

²⁶⁸ See Young, *supra* note 25, at 70 (“The very structural bedrock of our constitutional form of government confirms the centrality of the jury’s role.”).

²⁶⁹ See *supra* notes 236-238.

²⁷⁰ See, e.g., Jill Monier, *Courts Get Tough on Jury Duty No-Shows*, FOX 10 NEWS, July 20, 2013 (“‘I take jury service very seriously,’ said Judge Janet Barton, Superior Court Judge. Judge Janet Barton says 56 percent of people are not showing up for jury duty. ‘If we have sufficient numbers of no shows we could be in a position where we can’t empanel a jury. Defendants have speedy trial rights,’ said Judge Barton.”), available at <http://www.myfoxphoenix.com/story/22890240/2013/07/20/courts-get-tough-on-jury-duty-no-shows>.

service announcements directed at uplifting the perception of jury service.²⁷² If jury duty is considered a constitutional duty, this job of recruitment becomes slightly easier. Obviously, not everyone will feel patriotic about their civic duty, but the constitutional gloss of jury service may help in the margins.

2. Educational Benefit

The second benefit of a changed expectation focuses on the educational role of juries.²⁷³ Juries provide a place of civic learning for citizens where constitutional principles are translated into actual decisions.²⁷⁴ To be a moment of constitutional translation, the translator-citizens must be informed of the vocabulary, context, and underlying structure of the task at hand. Without an intentional focus on the constitutional role of the jury, jurors fail to appreciate how the institution of the jury teaches the skills of democracy or provides the opportunity to participate in the experiment of self-government.²⁷⁵ Without preparation, jurors simply miss the constitutionally created teaching moment, because they do not see themselves as anything other than problem-solvers. This education about constitutional identity could take place both before and after the actual jury service.

At a minimum, this educational focus should create more knowledgeable citizens about civic principles.²⁷⁶ People would be more likely to understand the constitutional structure and the relevant stakeholders and roles in the criminal justice system.²⁷⁷ It is actually

²⁷¹ See *id.* at 5.

²⁷² See *supra* notes 240-241.

²⁷³ Judith S. Kaye, *Why Juries? Looking Back, Looking Ahead*, 1:2 J. COURT INNOVATION 184, 186 (2008) (“Jury service is an opportunity like no other to educate the public about the justice system. This will, for many people, be their only real-life encounter with the courts.”); see also Hon. B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1244-45 (1993) (recognizing the teaching parallels of jury service and formal education).

²⁷⁴ See JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY* 4 (2010); 1 TOCQUEVILLE, *supra* note 37, at 285.

²⁷⁵ *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

²⁷⁶ Seth Schiesel, *Former Justice Promotes Web-Based Civics Lessons*, N.Y. TIMES, June 9, 2008, at E7 (“Knowledge about our government is not handed down through the gene pool. Every generation has to learn it, and we have some work to do.” . . . ‘The overwhelming consensus coming out of that conference [on constitutional literacy],’ [Justice Sandra Day O’Connor] reported, ‘was that public education is the only long-term solution to preserving . . . a robust constitutional democracy.’”).

²⁷⁷ In fact, one of the innovations that has been developed over the years in some jurisdictions is to instruct the jury before the case begins on the legal terms that will be at issue. Marder, *Bringing Jury Instructions*, *supra* note 41, at 498-99 (“Among its

somewhat striking that we impose essentially no prerequisites or qualifications (save age and citizenship)²⁷⁸ to decide on the life, liberty, or property of litigants.²⁷⁹ In an era in which average Americans regularly flunk the United States citizenship test,²⁸⁰ it might be necessary to provide some basic education before jury service. This information is not meant to exclude, but equalize.²⁸¹ Obviously, one of the virtues of the modern jury is the diversity and backgrounds of the various individuals participating. However, from a constitutional knowledge perspective, most jurors are equally ignorant.²⁸² Adding some constitutional instruction before arriving in court would level the playing field during deliberations.

But its real value would be its impact on improving the jury process. Constitutional knowledge will create a better deliberative experience. Much of jury instruction discussions revolve around difficult legal concepts such as “beyond a reasonable doubt,” “the burden of proof,” “negligence,” or “reasonableness.”²⁸³ Why should a juror be confronted with thinking about such legal terms for the first time in the jury room? It would create better jury deliberations if people had

reforms were preliminary jury instructions in which judges give jurors background about the relevant substantive law or standards of proof as well as other matters that might be useful. The goal is to ‘assist jurors in organizing and understanding the evidence as they hear it, improve their recall, and reduce the chances of their applying an erroneous rule to the evidence.’ Empirical studies have found that instructions at the beginning and end of the trial help jurors to focus on relevant evidence and remember it, to follow the law, and to feel more satisfied with their jury experience.”).

²⁷⁸ There are also residency requirements, certain English literacy requirements, and the requirement that you not have criminal charges, or physical or mental impairments that might interfere with jury service. See 28 U.S.C. § 1865 (2012).

²⁷⁹ Felony convictions can also preclude individuals from jury service. Kalt, *supra* note 261, at 67.

²⁸⁰ Previous covers of *Newsweek* and the *ABA Journal* decried the woeful state of “civics” knowledge among the American public. See Mark Hansen, *Flunking Civics: Why America’s Kids Know So Little*, ABA JOURNAL (May 1, 2011), available at <http://www.abajournal.com/magazine/article/civics/>; Brian Braiker, *Dunce-Cap Nation*, NEWSWEEK, Sept. 4, 2007 (discussing the “disheartening results” of a Newsweek poll on Americans’ knowledge of current events, history, and cultural literacy).

²⁸¹ “I know of no safe depository of the ultimate powers of society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion.” Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), available at <http://www.yamaguchy.com/library/Jefferson/Jarvis.html>.

²⁸² The statistics and studies on civic knowledge in America are quite troubling. Eric Lane, *Are We Still Americans?*, 36 HOFSTRA L. REV. 13, 15 (2007).

²⁸³ Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, And Comprehension Issues*, 67 TENN. L. REV. 701, 705 (2000); Marder, *Bringing Jury Instructions*, *supra* note 41, at 507 n.259; Tiersma, *supra* note 41, at 1101-10.

thought about the terms before they were asked to apply those difficult concepts in a real case with real consequences.²⁸⁴ Scholars have long recognized that jurors do not magically grasp complex concepts in the law by reading form jury instructions.²⁸⁵

Social science research provides ample evidence that the greatest weakness of juries is their lack of understanding of the law. Most surprising jury decisions are not the result of a careful analysis of the law and a principled—or even an unprincipled—decision to ignore it, but of an inability to figure out what the instructions mean in the first place. Jurors work hard to understand the instructions, spending 20 percent or more of their deliberations discussing the law, feel frustrated, and sometimes ask for help but rarely get it. They finally muddle through with what seems like a plausible interpretation, an interpretation that is often incorrect.²⁸⁶

Some jurors start out misinformed and some end up completely confused in their understandings.²⁸⁷ While we can hope this erroneous understanding is cured by careful jury instructions and reasoned arguments by counsel, this does not always occur.²⁸⁸

Finally, juror education would personally empower jurors who might otherwise not fully contribute to deliberations due to unfamiliarity, confusion, or a fear of showing ignorance in front of their peers. For a first-time juror without any prior experience, context, or legal training, the concepts and responsibilities can be overwhelming.²⁸⁹ Early juror education can help remove the feeling of disempowerment. Specific knowledge about jury service will give jurors confidence to debate and discuss difficult issues. Finally, the focus on outside learning necessarily shifts some of the deliberation to

²⁸⁴ Julianna C. Chomos et al., *Increasing Juror Satisfaction: A Call to Action for Judges and Researchers*, 59 *DRAKE L. REV.* 707, 719 (2011) (“Often, jurors know very little about the law relevant to a case prior to the end of a trial, and they may not understand the instructions they are given. This can add to the stress of jury service. Research shows this stress may be alleviated by a more thorough pretrial orientation on the relevant law of the case.”).

²⁸⁵ Tiersma, *supra* note 41, at 1101-10.

²⁸⁶ Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 *U. MICH. J.L. REFORM* 213, 222 (1999).

²⁸⁷ Ellsworth & Reifman, *supra* note 23, at 800 (noting that “jurors often come into court with their own (frequently erroneous) preexisting knowledge frameworks about the law”).

²⁸⁸ *See id.* at 798-800.

²⁸⁹ *See id.*

the community context of what and where jurors learned about the jury. In so doing, it links the experience in court to the educational experience outside of court, reinforcing that these are democratic lessons useful for and related to other civic purposes.

3. Process Benefit

Juror instruction about role also yields procedural benefits. One of the most striking commonalities from studying jurors' self-reported experiences is that jury service is disorienting.²⁹⁰ This disorienting experience can be remedied by actual orientation.²⁹¹ By orientation, I do not mean instructions on the basics of where to show up, what to bring, what to wear, how long it will take, etc. This is necessary, but not sufficient. Even with a smart video or live instruction, jurors are still disoriented by the process, because they are being asked to do something they have never done before. Lawyers and judges might be used to the deliberative process of applying law to facts, reasoned discussion, and weighty decisions based on a rule of law, but not everyone is so trained.²⁹² The question is how to overcome this disorienting sense and learn from it.²⁹³

Again, instruction of what to expect both procedurally and personally would help orient jurors to the experience.²⁹⁴ In some

²⁹⁰ See Chomos et al., *supra* note 284, at 712 ("Lack of information regarding jury service may be a source of stress and dissatisfaction for many jurors.").

²⁹¹ *Id.* at 712-13 (2011) ("Overall, jurors have positive perceptions of orientation materials. For instance, jurors who were randomly selected to view a juror orientation videotape had significantly higher knowledge of courtroom procedures, felt more comfortable and confident in their role as jurors, and had more positive attitudes toward jury service than jurors who did not view the videotape." (citing Gregory S. Bradshaw et al., *Fostering Juror Comfort: Effects of an Orientation Videotape*, 29 LAW & HUM. BEHAV. 457, 461-63 (2005))).

²⁹² Christopher N. May, "What Do We Do Now?": *Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 870 (1995) ("What it comes down to is that these juries did not know how to apply the law to the facts. I have been teaching law for more than twenty years; the problem that these juries faced is identical to that which confounds most law students — sometimes well into the second year. Lay jurors, who have received no more than an hour or two of legal instruction, cannot be expected to perform better than those who have studied diligently for months. It is all too easy for those of us who are lawyers or judges to forget what the world looked like before we entered law school.").

²⁹³ See Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 40-42 (1995); Deborah Schatz, *The Trials of a Juror*, 49 N.Y. ST. B.J. 198, 199 (1977) (recounting the personal experience of a juror who felt "nervous and disoriented").

²⁹⁴ Cf. HON. JOSEPH T. CLARK, REPORT AND RECOMMENDATIONS OF THE SUPREME COURT OF OHIO TASK FORCE ON JURY SERVICE 13 (2004), available at <http://www.ohio.gov>.

jurisdictions before the advent of the jury reforms, when long jury service was the norm, it would fall on the more experienced jurors to explain to the new jurors what to expect.²⁹⁵ In other jurisdictions, a more formal briefing system — poorly titled an “indoctrination process” — would be provided.²⁹⁶ Handouts or other materials were provided on a regular basis.²⁹⁷ These processes were both eventually changed, in part, because of the concern that past jurors might prejudice future jurors about the experience, or information would be provided to jurors without the parties present. This is, obviously, still a real concern. However, it would be minimized if the orientation happened well before the moment of jury duty so as to not interfere with the court’s established process.

Such an orientation process is supported by learning theory that shows that providing information about the jury before actual service benefits jurors’ comprehension.²⁹⁸ At least within the jury trial context, early jury instructions increase comprehension.²⁹⁹ Such findings are not surprising and are seen in other educational contexts in which orientation is critical to substantive comprehension and procedural satisfaction.³⁰⁰

supremecourt.ohio.gov/Publications/juryTF/jurytf_proposal.pdf (“The Task Force recommends that jurors are entitled to receive preliminary instructions on some aspects of the law and procedure prior to the taking of evidence in a case. Consistent with the previous recommendation, these instructions should be provided to the jury in writing. Fundamentally these instructions should include an introduction of the parties and their claims, guidance on the governing legal principles and information on the role of the jury.”).

²⁹⁵ See Daniel Schorr, *A Newsman’s Reflection on Jury Service*, 2 LITIG. 24, 24 (1976).

²⁹⁶ D.E. Buckner, *Annotation, Indoctrination by Court of Persons Summoned for Jury Service*, 89 A.L.R.2d 197, 201 n.1 (1963).

²⁹⁷ See Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Bias*, 44 CONN. L. REV. 827, 861 (2012) (“[J]uror orientation programs are ‘haphazard and vary from state to state, county to county, and court to court . . .’ Many courts play a videotape or DVD in the room where potential jurors sit and wait for jury service, or, more typically, for dismissal. Prospective jurors pay more attention to the videos than to the juror handbooks that were previously the norm.”).

²⁹⁸ See Elizabeth Najdovski-Terziovski et al., *What Are We Doing Here? An Analysis of Juror Orientation Programs*, 92 JUDICATURE 70, 70 (2008) (“[W]hile there is a plethora of research on juror comprehension and decision making, the literature on juror orientation is virtually nonexistent.”). Of course, the instruction discussed is within the context of the jury service, but the same principles of orientation apply.

²⁹⁹ Dann, *supra* note 273, at 1249.

³⁰⁰ See, e.g., Paula Lustbader, *You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly Over the Rainbow*, 47 WASHBURN L.J. 327, 346 (2008).

4. Systemic Benefit

Thinking of jury service along a continuum of civic life also changes the lessons to be learned. Citizens may begin to see jury service as an iterative process, learning from past experience and connected to the larger civic structure. Scholars who have studied early juries saw this same interchange with knowledge gained on jury service rubbing off on experiences outside of jury service. “The courthouse doors swung both ways. Jurors brought their common knowledge and left instructed. Having witnessed the court’s activities, they imparted the lessons learned to their community.”³⁰¹ Or as Tocqueville famously stated: “I do not know whether the jury is useful to those who have lawsuits, but I am certain it is highly beneficial to those who judge them; and I look upon it as one of the most efficacious means for the education of the people which society can employ.”³⁰²

Considering jury duty as a constitutional identity would open up a discussion along a continuum, recognizing that many citizens will be repeat players in the system.³⁰³ Currently, we treat these jurors as if they had never served, failing to use their experience and knowledge from prior service.³⁰⁴ Ignoring that jurors are repeat players in the jury system has several negative impacts.

First, we assume that there are no best practices to learn from the jury experience.³⁰⁵ This is probably untrue as a matter of practice, as successful deliberations share many similarities in terms of attitudes of civility, open-mindedness, attention to detail, etc.³⁰⁶ This assumption is certainly untrue as a matter of scholarly research into deliberative

³⁰¹ Blinka, *supra* note 85, at 562.

³⁰² 1 TOCQUEVILLE, *supra* note 37, at 285.

³⁰³ See Shari Seidman Diamond, *Beyond Fantasy and Nightmare, A Portrait of the Jury*, 54 BUFF. L. REV. 717, 735 (2006) (“In an analysis of over a thousand qualified members of the jury pool in Cook County, Diamond and Casper found that 18.1% of jurors reported that they had previously served on a jury.”).

³⁰⁴ This is similar to the way juries used to operate when they heard case after case and developed an expertise in the subject matter area. See Smith, *supra* note 30, at 460.

³⁰⁵ Marder, *Bringing Jury Instructions*, *supra* note 41, at 503 (“Judges tend not to instruct juries on how they should conduct their deliberations, but this is one area in which jurors have expressed the need for some guidance.”).

³⁰⁶ See Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589, 1619 (2006) (“Jury service also may help to inculcate in jurors traits necessary to good citizenship, specifically, the willingness to compromise, to see another person’s perspective, and to accept the need for change. They practice engaging in individual and collective self-rule — informed, norm-governed judgment — lessons they bring with them into the wider world.”).

decision-making.³⁰⁷ While there are arguments to be made about not wanting to influence jury deliberations with past experiences, the system loses out by not studying what works and why. Experiential building blocks are developed in each jury experience — skills that can be of use in future service or in other constitutional pursuits. Expanding the idea of the juror as being a repeat player impacted by past jury experiences, and capable of reflecting on those experiences, would open avenues to improve the jury experience for all potential jurors.

Second, treating jury duty as a task to be completed (without any continuing systemic connection) results in a loss of the public voice of the juror. One of the repeated findings of jury scholars is that those citizens who have completed a jury trial (as an actual participating juror) have a positive feeling about the experience.³⁰⁸ Yet, despite this reality, the overall societal attitude toward jury service is negative.³⁰⁹ One reason for this disconnect is that the positive voice of experience is never heard. In fact, there is no place in the modern jury system for

³⁰⁷ See, e.g., BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 40, 66 (2004); Erin York Cornwell & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 *LAW & SOC'Y REV.* 667, 669-670 (2011); Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 *LAW & CONTEMP. PROBS.* 205, 206, 217 (1989); David Schkade, Cass R. Sunstein & Reid Hastie, *What Happened on Deliberation Day*, 95 *CALIF. L. REV.* 915, 936-37 (2007). *But see* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go To Extremes*, 110 *YALE L.J.* 71, 102-03 (2000).

³⁰⁸ Chomos et al., *supra* note 284, at 709-10 (“[R]esearch shows Americans generally are positive about jury service, and this positive attitude increases after service. An NCSC study supports this conclusion, finding most jurors did not view jury service as a waste of time and were willing to serve on another jury in the future. These views were even more positive among those who actually served on a jury, as compared to those who were called but not selected. . . . The study also revealed the experience of jury service increased positive attitudes.”); *see also* WASHINGTON STATE JURY COMMISSION, *REPORT TO THE BOARD FOR JUDICIAL ADMINISTRATION*, at Recommendations 3 (July 2000), *available at* http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf (“Surprisingly, . . . citizens who have served on a jury in the past are rarely reluctant to serve again. Jurors are positive about their service and usually find the experience rewarding. They generally come away with a positive attitude towards the justice system.”).

³⁰⁹ *See* Judge Paul J. Garotto, *Jury Service — A Citizen’s Duty*, Speech before the Omaha Bar Association (Sept. 24, 1964), in 13 *NEB. ST. B.J.* 111, 112 (1964) (“Jury service is a duty that most citizens apparently seek to avoid, or wish they could. It is the kind of basic common experience that all citizens, bar none, should have at least once. . . . [S]itting through a trial as a member of the jury, and then seeking with the other eleven jurors to reach a just and fair and unanimous verdict is a very enlightening and enriching experience.”); *id.* at 113 (“What else do we have that can teach, exercise, and strengthen so much political, social, moral and religious virtue as does serving on a jury.”).

it to be heard. Jurors finish their job and silently dissolve back into society.³¹⁰ This is a loss for the court system as those stories of hard work, the pride of service, and the sense of accomplishment are all lost. Some jurors have life-changing positive experiences that no one except family or close friends hear about.³¹¹ The development of a public forum for post-trial positive jury reflections (with an eye toward future jurors) can only improve jury yields and attitudes about jury service in general.³¹²

At the other end of the experience spectrum, there are many jurors who have a difficult time deciding. Jurors regularly confront heart-wrenching, morally challenging, and tragic cases, which creates significant personal stress.³¹³ In addition, jurors may have to accept responsibility for sending a defendant to jail or even death. As Justice David Souter acknowledged: “Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal.”³¹⁴ Yet, despite the emotional investment and sometimes emotional trauma, the court system rarely provides space for reflection, catharsis, or healing. Some jurors report post-traumatic stress disorder-like symptoms,³¹⁵ and others less dramatically suffer doubts and questioning. This uncertainty and unsettledness could be addressed by a post-juror opportunity for discussion or reflection (if not counseling).³¹⁶

³¹⁰ *United States ex rel. McCann v. Adams*, 126 F.2d 774, 775-76 (2d Cir. 1942) (writing about the jury, Judge Learned Hand remarked, “The individual can forfeit his liberty — to say nothing of his life — only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came.”).

³¹¹ See Jack Kaplan, *In Praise of Juries: A Personal Experience*, 51 N.Y. ST. B.J. 384, 385 (1979) (“As the discussion wore on, the jury was slowly transformed before my very eyes into the most amazing instrument of justice I have ever seen. It was exhilarating. It left me profoundly proud to be an American and to have the privilege of participating in such an adventure.”).

³¹² See Sanford Levinson, *What Should Citizens (as Participants in a Republican Form of Government) Know About the Constitution?*, 50 WM. & MARY L. REV. 1239, 1247 (2009) (“Citizens in a constitutional republic must be able to engage in critical reflection about their government, a task far more important than being able to offer rote answers to questions about constitutional formalities.”).

³¹³ See CLARK, *supra* note 294, at 20 (“The Task Force recommends counseling services be made available to jurors after especially stressful trials.”).

³¹⁴ *Old Chief v. United States*, 519 U.S. 172, 187 (1997).

³¹⁵ See, e.g., Michael E. Antonio, “*I Didn’t Know It’d Be So Hard*”: *Jurors Emotional Reactions to Serving on a Capital Trial*, 89 JUDICATURE 282, 283 (2006) (comparing symptoms of jurors in a death penalty trial to PTSD symptoms).

³¹⁶ CLARK, *supra* note 294, at 2.

Sometimes jurors just have basic questions about things they saw and experienced, and want to ask questions about it to overcome the sense of disorientation and to achieve closure.³¹⁷ Such a forum would be beneficial for the experienced juror who may well be a juror again in the future, as well as, to prepare other potential jurors. Jurors can prepare for, contextualize, and understand the weight of this personal judgment. It will provide a moment to reflect on the past service which may contribute to future deliberations.³¹⁸

Finally, by ignoring the constitutional identity of jury service, jurors do not see the connection of their service to other democratic responsibilities.³¹⁹ With a sense of constitutional connection, jurors can become inspired to replicate their civic success in other civic forums.³²⁰ In fact, The Washington State Jury Project led by John Gastil has demonstrated a significant correlation between jury service and democratic engagement.³²¹ After an exhaustive study of jurors to determine whether their jury experience had any effect on other civic activities, the studies show that citizens who serve as jurors in criminal cases, also tended to vote more often, and participate in other civic-minded activities.³²²

³¹⁷ Chomos et al., *supra* note 284, at 728 (“After the trial is finished, jurors may have questions regarding aspects of the legal system or general comments about their experience as a juror. Failure to address these concerns may lead jurors to think the courts do not care about their opinions.”).

³¹⁸ See Collin, *supra* note 113, at 82 (“Madisonian democratic theory relies on the role of deliberation between interest groups in order to refine contemporary issues, and develop evolving local solutions.”).

³¹⁹ Iontcheva, *supra* note 32, at 342 (“Deliberative forums serve democracy more broadly in that they impart a sense of political purpose on the participants. By engaging ordinary citizens in government, deliberative democracy gives these citizens confidence about their ability to influence political decisions and thus increases their willingness to participate in politics even after the end of their jury service. Face-to-face deliberation thus reinforces the very skills and qualities on which it thrives.”).

³²⁰ *Id.* at 350 (“Studies of citizens’ juries show even more encouraging results — that not only a consensual outcome, but also mere deliberation, favorably changes jurors’ attitudes toward political activity. The evidence from these experiments reveals that some jurors are more civically active long after the jury process has ended.” (citing Graham Smith & Corinne Wales, *Citizens’ Juries and Deliberative Democracy*, 48 POL. STUD. 51, 60 (2000))).

³²¹ GASTIL ET AL., *supra* note 274, at 4; John Gastil, E. Pierre Deess & Phil Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585, 592 (2002); John Gastil & Phillip J. Weiser, *Jury Service as an Invitation to Citizenship: Assessing the Civic Value of Institutionalized Deliberation*, 34 POL’Y STUD. J. 605, 614 (2006).

³²² See sources cited *supra* note 321.

C. Strengthening Juror Identity

How can the current perception of jury service be changed without undermining the existing jury system? One answer involves looking at mechanisms of change outside of the current jury process. If viewed as a broader constitutional identity, potential jurors can take concrete steps to prepare for jury service before the actual summons. In addition, jurors who have finished their service can take steps to improve future jury experiences for both themselves and others in their community.

The following considerations make no claim to be exhaustive, merely exploratory, seeking to open up questions about how to capitalize on a broader vision of jury service. The suggestions primarily focus on education and reflection, but this emphasis does not mean to suggest that other more social or dynamic methods should not be tried. Developing the potentiality of jury service into a strong constitutional identity will, like the jury, be a collective effort.

1. Formal Constitutional Education Efforts

One straightforward proposal would be to educate citizens about the constitutional context.³²³ If a consequence of the task-oriented jury has been to lose a sense of larger constitutional connection, one direct remedy would be to teach that constitutional role to potential jurors.³²⁴ The history of juries in America is not a secret history. It should not be consciously hidden from modern jurors. Both the myth and reality could be explained in clear terms, similar to a high school civics textbook.³²⁵ Highlighting the jury's importance at constitutional moments, including the founding, as well as some of its tragic limitations in application, can only heighten the jurors' appreciation of their service.³²⁶ If crafted appropriately, there is nothing objectionable

³²³ Hirsch, *supra* note 12, at 209-10 ("Unless citizens develop sufficient knowledge, independence, and public-spiritedness, they cannot handle the responsibilities of self-government.").

³²⁴ "But how do we address the fact that New Yorkers for the most part are unaware of the role of the courts in their daily lives? That is a challenge I put to the Bar: help us build a citizenry that is better informed about all three branches of government, but especially about the courts, which of necessity — and, I must admit, habit — remain somewhat remote and detached." Judith S. Kaye, *My Life as Chief Judge: The Chapter on Juries*, 78-OCT N.Y. ST. B.J. 10, 11 (2006).

³²⁵ See, e.g., JAMIN RASKIN ET AL., *YOUTH JUSTICE IN AMERICA*, at xi (2005) (describing the Marshall-Brennan Constitutional Literacy Project and how high school students are learning about civics through selections of the Constitution).

³²⁶ See Ellsworth & Reifman, *supra* note 23, at 796 ("Providing relevant

about informing jurors of the historical and constitutional context of the jury's role.³²⁷

This education project could be done through technology, via the internet or mobile devices, or other media. It could include self-guided videos, interactive spaces of communication, and easily digestible information.³²⁸ Online, it would be available before court, at court, or after court.³²⁹ The content exists and could be distilled from other source materials.³³⁰ One could even use Supreme Court language (some of which was discussed earlier) to frame the brief introduction to the jury role.³³¹ This educational project need not be run by court systems, but could be hosted by local bar associations, non-profit organizations, or law schools. If courts wanted to control the material, they could include educational links in their jury summons or in any follow-up jury correspondence.³³²

information to prospective jurors before trial, thus increasing their familiarity with the legal system and the case at hand, may improve their performance during the actual trial.”).

³²⁷ Some judges choose to explain this history on their own initiative. Kim Forde-Mazuri, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 364 (1999) (“Trial judges have long recognized the educational importance of jury service, taking the opportunity to teach the jurors about the responsibility of civic virtue and self-government.”).

³²⁸ See CLARK, *supra* note 294, at 50 (“A jury service video should be professionally produced and geared for the average citizen who knows little about jury service. This film is not meant to be an orientation video, but instead should be educational, designed for schools and civic groups. It should be approximately 10 to 15 minutes and include such things as the historical origin, types of cases, trial stages, the jury's role and how jurors are selected, and close with a meaningful message pointing out how important jury service is to the American judicial system.”).

³²⁹ The federal district court in Massachusetts has begun a project to film jury instructions and other parts of the juror's experience and to provide those videos to all citizens on its website. U.S. Dist. Ct., Dist. of Mass., *Boston: Judge Information: Young, William G.*, USCOURTS.GOV, <http://www.mad.uscourts.gov/boston/young.htm> (last visited Dec. 28, 2013).

³³⁰ The American Judicature Society maintains an extensive public education website about juries. Am. Judicature Soc., *Homepage*, AJS.ORG, <http://www.ajs.org/jc/index.php/> (last visited Dec. 28, 2013). The American Bar Association also has many publically available materials to educate jurors about jury service. *Comm'n on the Am. Jury Project*, AM. BAR ASS'N, http://www.americanbar.org/groups/judicial/american_jury.html (last visited Feb. 12, 2014).

³³¹ Ferguson, *supra* note 9, at 288-96, app.

³³² See CLARK, *supra* note 294, at 5 (recommending that “[g]eneric public service announcements (PSAs) regarding jury service should be produced for statewide dissemination” and that “Poster/Billboard campaigns should be organized around the same theme or slogan as the PSAs”). One difficulty for courts controlling an interactive space of communication is that it would be both expensive to monitor and difficult to manage. Certainly, courts would not want inflammatory or prejudicial

Complementing this technological approach could be a court-sponsored education project in communities.³³³ This could be done through written materials or in person at the local courthouse, in schools, libraries, or public events. The constitutional basis of jury trials is a topic of relevance (if not obvious excitement) for citizens. While no one is proposing “jury duty lectures” about abstract constitutional principles, every year there are several high profile jury trials that gain national attention.³³⁴ These trials capture the interest of the public, and also provide a teaching moment for a deeper discussion on the role of the jury. Such media and cultural opportunities are present, although currently underutilized to discuss the constitutional role of juries outside the actual jury process.³³⁵ Adapting media stories about juries to constitutional discussions about juries would be an easy and engaging way to reconnect the constitutional identity of juries to their everyday practice.³³⁶

materials to be associated with the court system. Thus, it may be better to have any interactive space be located in an independent institution.

³³³ See Chomos et al., *supra* note 284, at 711 (“It is vital the courts and government work together to educate the American population about the importance of jury service and the history behind this civic duty.”); State of Connecticut Judicial Branch Jury Administration Jury Outreach Program, *available at* <http://www.jud.ct.gov/jury/outreach.pdf> (“The Jury Outreach Program offers Connecticut students and communities an opportunity to learn about one of the most important components of our system of justice. The program, which began in 2003, ensures that more people understand the role of jury service in a free society under law. Our speakers have visited over 215 high schools and community organizations throughout Connecticut and conducted nearly 13,000 presentations in front of well over 40,000 people.”).

³³⁴ Cable news devotes significant airtime to the trials of celebrities and scandalous criminal cases. Newspapers regularly cover local trials. From *12 Angry Men* to *Law and Order*, we are entertained by the efforts of ordinary citizens resolving the most elemental of human conflicts. See, e.g., Andrew Guthrie Ferguson, *The Zimmerman Trial and the Meaning of Verdicts*, ATLANTIC (July 12, 2013), <http://www.theatlantic.com/national/archive/2013/07/the-zimmerman-trial-and-the-meaning-of-verdicts/277724/>; Andrew Guthrie Ferguson, *Why the George Zimmerman Trial's All Female Jury Is News*, ATLANTIC (June 21, 2013), <http://www.theatlantic.com/national/archive/2013/06/why-the-george-zimmerman-trials-all-female-jury-is-news/277103/>.

³³⁵ See WASHINGTON STATE JURY COMMISSION, *supra* note 308, at Executive Summary ix (“Every opportunity should be taken to educate the public on the importance of jury service and to increase diversity on juries by extensive outreach to targeted communities. The implementation committee should coordinate efforts to accomplish this.”).

³³⁶ See *id.* at Recommendations 5 (“Public service campaigns should promote jury duty using a variety of media including radio, television, newspapers, and other means of public advertising, such as public transit, schools, court facilities, and local stores.”).

Of course, teaching about the jury may not be enough. Like the jury experience itself, success results from the transformative effect of participation in the process.³³⁷ Successful juries are engaged, impartial, deliberative, diverse, and clearly informed of the principles structuring the decision.³³⁸ For the potentiality of jury service to work, those same characteristics should guide any discussion of the constitutional role of the jury. Deliberative debates, discussions, seminars in local courthouses and law schools would be avenues to educate the pool of potential jurors about constitutional identity.

2. Informal Juror Networks

The second proposed approach would focus on networks of individuals with prior jury experience. This approach would involve experienced jurors sharing reflections and insights about the role of the jury with potential jurors. This network could grow organically through community or social media, and while it is likely such a group might need to be coordinated in some institutional manner, perhaps through civic organizations or bar associations, this network would provide three benefits in developing an ongoing juror identity.

First, a group of experienced jurors educating potential jurors about jury service would provide a mutually reinforcing educational experience.³³⁹ Experienced jurors could explain why juries matter to potential jurors, which in turn will necessitate those jurors to think about and learn why jury service matters to them. Potential jurors will be provided context about the role of the jury such that they are better prepared for the experience. As discussed, this idea of experienced jurors instructing new jurors is not new, and had been the practice in some states.

Second, this group of experienced jurors would, by definition, extend the time of jury service beyond the time in the courthouse. Asking jurors to contribute to jury service after their formal service has ended necessarily expands the responsibilities of the juror. Both symbolically and practically, jurors would be contributing to a conception of jury service that focuses on before and after the courthouse experience. The idea of juror identity along a continuum of civic life is thus encouraged and strengthened.

³³⁷ See, e.g., KALVEN, JR. & ZEISEL, *supra* note 87, at 3-4.

³³⁸ It also helps that jurors are locked in a room unable to leave or be distracted by family or modern technologies.

³³⁹ See *supra* Part III.B.2.

Third, by giving experienced jurors an opportunity to discuss jury service, you also create a new public voice to support the institution of the jury. As discussed, one of the reasons why jury service is generally maligned in the public's perception is that there are few positive stories to emerge from jury service. Jurors who have a positive experience are provided no forum to discuss this positive experience. Courts do not encourage jurors to talk about their experiences. There is no institutional space. Thus, the positive voices of jury experience get lost. Creating a space for jurors to talk about their experience within the jury process will provide a new voice in the dialogue about the worth of juries to society.

This imagined network need not be actual interpersonal meetings as social media technologies exist to allow this dialogue through other mediums. Virtually or in person, encouraging a dialogue about jury service after it has formally ended may well alter the image of the juror in society.

CONCLUSION

The potentiality of jury service offers a new way to conceptualize the role of the juror in society today. Throughout history, jury service has been a moment of "constitutional translation" — when ideals become reality through the practice of citizens. Jury service presents a focused moment of constitutional relevancy and participation. *Every year* approximately 15% of American citizens receive a jury summons.³⁴⁰ Over a third of all Americans serve on a jury in their lifetime.³⁴¹ Many citizens serve more than once. Yet, even in jurisdictions in which jury summons are a regular occurrence, most people consider jury duty a discrete event to be experienced and then put aside, not incorporated into their identity.³⁴² Jurors plan to focus their attentions during the necessary time, not before, not after, and probably (deep down) hope to escape the process altogether.³⁴³ Jury

³⁴⁰ MIZE ET AL., *supra* note 227, at 8.

³⁴¹ *Id.*

³⁴² In Washington, D.C., jurors receive summons almost every two years. This additional level of summoning does not appear to affect the level of juror excitement or involvement in any positive way. See Kathryn Alfisi, *Conversation with Judge Satterfield*, WASH. LAW. (Apr. 2012), available at <http://www.dcbart.org/bar-resources/publications/washington-lawyer/articles/april-2012-chief-judge.cfm> ("I want to try to do more for our citizens who are required to come to the courthouse for jury service. . . . As of now we call in people every two years.").

³⁴³ See Fowler, *supra* note 237, at 13; Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 61-63 (2001); Paul W. Rebein, Victor E. Schwartz &

service need not be so cabined to the task in court. As a historical reality and as an American ideal, the jury has played a broader, more encompassing role in the American identity. This ideal embraces the potentiality of citizen engagement based on an understanding of the jury's constitutional role. Only by re-conceiving jury service to reflect this constitutional role can we reclaim the power of the juror in America.