The Yale Law Journal

To: All J.D. Candidates
From: Volume 119 Notes Committee (Jorge Camacho, Caroline Edsall, Scott Hartman, Jim Ligtenberg, Eric Sandberg-Zakian, Mark Shawhan, Ben Taibleson, and Liz Tulis).
Re: Notes Submission Process

We encourage you to submit a Note for publication in Volume 119 of the *Yale Law Journal*. Publication in the *Journal* allows student authors to share their ideas with the legal community and to contribute to legal scholarship.

Volume 119 of the *Journal* will be accepting Notes for all eight of its issues; each issue will generally contain between one and three Notes. As detailed below, all Notes must be submitted through the *Journal*'s electronic submission process. You may submit your Note through the electronic system at any time. On each review date, the Notes Committee will begin reviewing the Notes that have been submitted to the system. **The first review date for Volume 119 is Wednesday, March 4, 2009**. Notes submitted **after 5:00 p.m.** on the review date will not be considered until the next review date. The review dates for Volume 119 are:

March 4
April 2
May 1

There will also be three drop dates in Fall 2009, TBA.

The Notes Committee reviews submissions anonymously. To preserve anonymity, all questions regarding the Notes submissions process should be directed to Managing Editor Leslie Pope (leslie.pope@yale.edu).

The *Journal* will extend an offer of membership on the *Journal* to 1L and 2L authors who are not already members if their Notes are accepted for publication. Please note that authors who have previously published a Note in any volume of the *Journal* may not publish a Note in Volume 119.

What Is a Note?

A Note is a student-written piece of legal scholarship. Successful Notes typically share the following three characteristics. First, a good Note is **original**. It should advance a particular area of legal scholarship beyond its current state. The best Notes are insightful and creative. Notes can take a variety of forms, and need not be "mini-articles."

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Second, a good Note is **well supported**. The Note should provide persuasive evidence for each of its conclusions and acknowledge the limits of its arguments. Authorities should support each step in the argument. Citations should be complete and unambiguous.

Finally, a good Note is **well written and well organized**. Concise, effective prose and clear, logical presentation are essential. A Note should clearly convey its thesis and the relevance of each section.

Although many Notes begin as Substantials or SAWs, good Notes are different from most Substantials and SAWs in a couple of ways. First, Notes need not contain a lengthy literature review, and should proceed quickly to original analysis. Second, Notes should be directed at a broad legal audience, not one professor.

Notes published in previous volumes of the *Journal* provide examples of excellent student scholarship and may serve as a useful guide. If the style or substance of your Note deviates from these examples, however, do not be discouraged. Notes published in previous volumes have been extensively edited and revised; even the most polished submissions benefit from this process. In addition, Notes we have published in the past should not be taken to encompass the whole range of topics or styles or lengths the Notes Committee hopes to publish. Volume 119 is particularly interested in encouraging shorter submissions this year.

Who Can Submit a Note?

We are strongly committed to publishing a wide variety and large number of Notes this year, and we encourage *all* current J.D. or M.S.L. students (other than those who sit on the Notes Committee or participate in the editing process for that Committee) to submit a proposal or draft. These eligible students may publish up to one Comment and one Note within Volume 119, but cannot publish more than one of either.

Journal Membership

The *Journal* encourages non-*Journal* members to submit Notes. If you are a 1L or 2L who is not currently a *Journal* editor and your Note is accepted, the *Journal* will extend you an offer to become an editor. If you accept your offer of membership, you will be required to fulfill the responsibilities required of all First Year Editors. You will receive assignment credit for the editing work you put in on your Note. If you have additional questions about the time commitment, you will have an opportunity to ask them before accepting the membership offer.

2Ls whose Note is accepted at the third fall drop date, prior to slating, will join 119's First Year Editor class and have an opportunity to slate. 2Ls who have Notes accepted after the last fall drop date will be extended an offer to join as a First Year Editor for Volume 120.

Developing Your Note

You are strongly encouraged to work with a Notes Editor as you develop your Note. Notes Editors are available to provide substantive, stylistic, and organizational advice at any

stage of the writing process—from formulating an idea to polishing a completed piece. They are also available to answer any questions you may have about the Notes submission process.

Although in past volumes "Notes Development Editors" worked separately from Notes Editors to help students develop their pieces and did not participate in the Notes Committee's selection process, Volume 119 has merged the two roles. **Do not email a Notes Editor directly** to request his or her assistance in developing your submission. Instead, email Managing Editor Leslie Pope (leslie.pope@yale.edu). In your email, include a brief description of your Note's topic or proposed topic and any preferences you have about working or not working with a particular Editor. Please also indicate if any Notes Editors would be able to identify you as the author of the submission, and thus be forced to recuse themselves from considering your submission. Leslie will assign you a Notes Editor with these considerations in mind.

In order to provide thorough feedback, the Notes Editors ask that you give them one week to read over your piece. And while the Notes Editors are always available to answer quick questions or discuss ideas, the two or three days preceding a review date will be particularly busy.

Anonymity: Discussing Your Note

Because the Notes acceptance process is anonymous, you should refrain from discussing your Note with members of the Notes Committee other than a Notes Editor assigned through the Notes development process described above. To that end, **please do not discuss your Note with Jorge Camacho, Caroline Edsall, Scott Hartman, Jim Ligtenberg, Eric Sandberg-Zakian, Mark Shawhan, Ben Taibleson, or Liz Tulis**. Committee members who can identify a submission's author with confidence must recuse themselves from considering that piece. Too many recusals may disadvantage a Note or even preclude its publication. Any questions regarding the acceptance process should be directed to Managing Editor Leslie Pope.

Also, be sure that your identity is not revealed on the cover page, in the footnotes, or in any other part of your Note. We suggest using the "search and replace" feature to change all occurrences of your name to "Author."

Note Format

The Notes Committee is seeking Notes that are **15,000 words or less**. The Committee will consider submissions **up to 17,500 words**, although please keep in mind that every additional word over 15,000 words must justify itself. **There is no minimum length for Notes.** The Volume 119 Notes Committee is making a concerted effort this year to publish shorter pieces on a diverse array of subjects.

The word count must include text and footnotes, but need not include the Abstract, Table of Contents, or Statement of Originality. Please note that for some word-processing software, including footnotes in the word count may require changing the default options. The text of your Note should be in 12-point Times New Roman font and double-spaced. Footnotes should be in

10-point Times New Roman font and single-spaced. All pages should be consecutively numbered with 1-inch margins.

Please pay careful attention to spelling, *Bluebook*ing, and other similar technical details, as a neat and careful presentation will invariably affect the Committee's impression of the Note. Also, please do not include any information in the Note itself or in the accompanying materials that might disclose your identity.

Statement of Originality

The Statement of Originality is a **very important** part of a Note's submission. Each submitted and resubmitted Note should be accompanied by a thorough, detailed explanation of what makes the Note original and how the Note stands apart from existing literature on the topic. Besides helping the Committee appreciate the Note's strengths, the statement can guide the Committee during its independent assessment of the Note's originality. Of course, every piece of scholarship relies on what has come before, so the statement should also discuss the Note's major sources and intellectual debts, including both cited and uncited scholarship that may be useful in understanding the background for your topic. Do not merely list your sources, but explain them and distinguish your argument from those of other authors. A well-prepared statement of originality can significantly increase a Note's chances of acceptance.

Please do not be intimidated by the Statement of Originality! Instead, think of it as a chance to pitch your novel idea to an inexpert audience. Feel free to supply ideas or material that would contribute to an appreciation of your argument but that were not emphasized in the Note itself. There is no minimum or maximum length for the statement. The average length is three to four single spaced pages. Statements should err on the side of over-inclusiveness, especially with regard to the scope of the extant literature. Be sure to check both legal and non-legal books and periodicals, as well as both online and printed sources. Two sample statements are appended to this memorandum. If you decide to enlist the aid of a Notes Editor in developing your submission, he or she will be available to help with your Statement of Originality.

For a tutorial on preemption checking, see the following website: http://www.law.yale.edu/library/preemption.asp.

Even beyond the acceptance process, every Note author is expected to stand behind his or her Note as **original and accurate**. If it is discovered after acceptance that the Note does not meet these standards, the piece will not be published.

Acceptance Process

Every member of the Notes Committee will read your Note provided that you comply with the submissions guidelines, in particular the word limit. They will discuss your Note at length before deciding whether to accept it. Any member of the Committee who knows the identity of an author with confidence cannot participate in the discussion or the decision to accept the Note for publication.

All students submitting Notes will be notified promptly after the Committee's decision. Students whose work is not accepted will receive an email message indicating the decision. This will be followed shortly by a Response Memorandum providing feedback and evaluation. Please note that **most Notes have been accepted only after revision and resubmission,** so students whose Notes are not accepted are strongly encouraged to work with a Notes Editor to revise their Notes and resubmit at a future review date.

Resubmission Memorandum

All authors who are resubmitting Notes they submitted previously must include with their Note submission materials (a) a copy of the Response Memorandum they received from the Notes Committee (this includes Revise and Resubmit letters from prior volumes), and (b) a Resubmission Memorandum. The Resubmission Memorandum should describe how the Note has changed since the prior submission, and why these changes have improved or strengthened the Note. A page or so should suffice.

Submitting Your Note

The *Yale Law Journal* only accepts student Note submissions through our website, http://ylj.yalelawjournal.org/authors/index.html. **Emailing the Managing Editor materials does not constitute proper submission; all documents must be uploaded through our website.** Students having difficulty with the submission process should email Managing Editor Leslie Pope with questions. **However, if you are having difficulty with the submissions system, you must contact Leslie Pope at least 24 hours in advance of the submission deadline.**

To submit on our website, go to http://ylj.yalelawjournal.org/authors/index.html and register for an account. Once your account has been created, log in and click on the "Submit Work" hyperlink; after that, check the "Student Note" bubble and click on "Continue." Follow the instructions on that screen to submit all required documents.

Submission materials must include the following and be uploaded into the appropriate fields on our website (preferably in Microsoft Word format):

1. **Submission field**. You must upload the submission, without your name on it, into this field. The document must include a **Table of Contents** and a **Cover Page**. The Cover Page should include:
    a. The last four digits of your Social Security Number (in the upper-right hand corner);
    b. The title of your piece (in the upper-left hand corner);
    c. The word count (including footnotes);
    d. An abstract that does not exceed 100 words;
    e. Whether you submitted *this* Note before; and
    f. Whether you published a Note in the *Journal* before.
2. **Statement of Originality field**. You must upload your Statement of Originality, without your name on it, into this field.

3. **Submission Form field**. You must upload your Submission Form into this field. The Submission Form will only be accessible by Managing Editor Leslie Pope, who alone will know the identity of any author whose submission is not accepted. The rest of the information requested in the memorandum will be used for data collection purposes only. The Submission Form can be found at the end of this memo. Complete it, delete the rest of this memo, and upload to our submissions system.
4. **R&R 1, R&R 2, R&R 3 fields**. If you have previously submitted your Note, you must upload the original version of any previous Revise and Resubmit Letter(s) associated with your submission. If you alter or fail to upload a Revise and Resubmit letter from a prior version of your current submission, then the Notes Committee will not consider your submission.
5. **Resubmit Memo 1, Resubmit Memo 2, Resubmit Memo 3 fields**. If you have previously submitted your Note, you must upload a Resubmission Memorandum for each Revise and Resubmit Letter. The Resubmission Memorandum should describe how the Note has changed since the prior submission, and why these changes have improved or strengthened the Note. A page or so should suffice.

The Notes Committee will not consider submissions that contain identifying information about the author. Prior to uploading any documents, double-check to make sure that you have removed all self-identifying references from your documents (except the Submission Form, which is the only document that should contain identifying information). Please right-click all documents to be submitted (except the Submission Form), click on properties, and delete your name from all relevant fields under the Summary tab. Because Committee members who can identify a submission's author must recuse themselves from considering that piece, accidentally leaving in identifying information may disadvantage a submission or even preclude its publication in Volume 119.

Please note that the Notes Committee will not review submissions that depart from any of the submissions guidelines contained in this memo.

Questions

If you have any questions about any aspect of the Notes process, please talk to Managing Editor Leslie Pope (leslie.pope@yale.edu). We are eager to work with you and read your Notes. We appreciate your interest in participating in the Notes process.

Sample Statement of Originality # 1

This note discusses a persistent problem of Fourth Amendment analysis: the question of whether police searches and seizures which are justified on pretextual grounds present a viable Fourth Amendment issue or not. The Supreme Court's most direct statement on such pretext claims comes from *Whren v. United States*,[1] where Justice Scalia argues that "[s]ubjective intentions play no role in ordinary, probable-cause Forth Amendment analysis."[2] This note argues that *Whren*'s rule against subjective tests of police intentions is a profound mistake, rooted in a more general mistake in our approach to Fourth Amendment analysis as a whole. My argument is that is order to vindicate our intuitions about the wrongness of pretextual police action, we need to shift our understanding of the Fourth Amendment away from the language of privacy *rights* – introduced famously by Warren and Brandeis as the "right to be let alone"[3] – and refocus our attention on the idea that police are beholden by the Constitution to exercise their investigatory powers in a responsible manner. If we do so, we can not only see why pretextual police behavior is deeply problematic, but bring greater coherence to our Fourth Amendment jurisprudence as well.

Whren has garnered quite a bit of academic discussion. Since it concerns both racial profiling and traffic stops – two issues which present their own persistent problems – much scholarly attention has focused in on it to these extents.[4] Also, in the immediate aftermath of the *Whren* decision there was considerable academic uproar against it, as well as efforts to refute its logic under the prevailing case law.[5] Many of these immediate arguments attacked *Whren* for enacting a bright-line rule against subjective analysis when ordinary Fourth Amendment "balancing" would have been a viable approach capable of capturing problematic examples of pretext.[6] This note does not overlap with these approaches.

Since *Whren*, it has become clear that its logic is extremely well entrenched, and the point of this note is therefore *not* to convince readers that, under current case law, *Whren* and its progeny were wrongly decided. Instead, this note takes the converse approach, arguing that if

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[1] Whren v. United States, 517 U.S. 806 (1996)
[2] *Id*. at 813 (emphasis added).
[3] Samuel Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)
[4] For a discussion of *Whren* focusing on racial profiling, see, for example, Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439 (2004); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002); Alberto B. Lopez, *Racial Profiling and* Whren: *Searching for Objective Evidence of the Fourth Amendment on the Nation's Roads*, 90 KY. L.J. 75 (2002). For a discussion of *Whren* focusing on the unique problems of traffic stops, see, for example, Wayne R. LaFave, *The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004); Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535 (2002).
[5] *See, e.g.*, Kenneth Gavsie, Note, *Making the Best of* Whren: *The Problems with Pretextual Stops and the Need for Restraint*, 50 FLA. L. REV. 385 (1998); David O. Markus, Whren v. United States: *A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91 (1998); Geoffrey S. Kay, Note, Whren v. United States: *The Constitutionality of Pretextual Stops*, 58 LA. L. REV. 369 (1997); Diana Roberto Donahoe, *"Could Have," "Would Have:" What the Supreme Court Should Have Decided in* Whren v. United States, 34 AM. CRIM. L. REV. 1193 (1997).
[6] *E.g.*, Donohoe, *supra* note 5.

we want to understand why *Whren* and its progeny strike us as so intuitively wrong, it will be necessary to reconceptualize our understanding of the Fourth Amendment. This argument "against *Whren*" – which, in fact, only uses *Whren* as a platform to attack our current conceptions of the Fourth Amendment – is thus quite apart from the majority of the literature surrounding *Whren* and other cases involving purportedly pretextual police activity.

That said, there are a few articles that have concerned themselves centrally with the notion of pretext in Fourth Amendment law, and whether our entire understanding of pretextual police activity may be off base. Among these is Professor Yeager's *The Stubbornness of Pretexts*,[7] and articles such as Sherry Colb's *The Qualitative Dimension of Fourth Amendment "Reasonableness*."[8] Colb's work is not quite in point – although a reconsideration of Fourth Amendment doctrine is offered, the view is that a shift from "quantitative" balancing to "qualitative" balancing is required. Not only is this a somewhat difficult concept to deploy, but it does not track the rights/responsibility distinction that I am trying to introduce.

Yeager's work, which is perhaps the most focused account of the status of subjective intentions in Fourth Amendment law, also takes a different approach from the one used by this note. Professor Yeager attempts to argue against *Whren* and its progeny by differentiating between subjective police intentions which are truly internal and "hidden," and subjective police intentions which have particular external manifestations that are constitutionally problematic. He calls the former "pretext" arguments and says that *Whren* is correct that they are not a problem, while the latter category do present a real constitutional issue. In my note, I address this problem of the "wholly internal subjective intention" through a but-for cause requirement in my proposed test. This is a different approach. Yeager would ask whether the traffic stop really was conducted as a traffic stop, or whether the *behavior* of the police made clear that it was really a drug search. I would ask whether the traffic stop would have happened *but for* the policeman's desire to effect a drug search – a different question entirely.

Furthermore, Yeager does not address what is ultimately at the heart of my note: how our rights-based rhetoric surrounding privacy and the Fourth Amendment precludes us from a healthy consideration of ill-motivated police action. Although Yeager and I, and perhaps others, have overlapping discussions of the kinds of pretext claims that appear in *Whren*, this note is the first to argue that, to truly understand what is problematic about pretext, we will have to change our vocabulary for addressing Fourth Amendment problems. That makes it wholly unique from the conclusions of those like Yeager, who have a nuanced account of pretext claims but not of what their persistence teaches us about the problems with our Fourth Amendment jurisprudence generally.

In addition to some modest overlap with the scholarship on "pretext," this note also engages with scholarly pieces which generally argue for a government responsibility orientation towards constitutional analysis. This focus on responsible government behavior is often called "purposivism," because it requires scrutiny of the purposes that animate government action to know whether it was undertaken responsibly or in derogation of constitutional duties. Although

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[7] Daniel B. Yeager, *The Stubbornness of Pretexts*, 40 SAN DIEGO L. REV. 611 (2003)
[8] Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642 (1998).

this tack has been applied to the First Amendment,[9] as well as the Fourteenth Amendment,[10] I do not believe it has ever been applied to the Fourth Amendment. This, at the very least, makes this note original and unique.

I do borrow some from theorists who focus *generally* on constitutional analysis through the lens of skepticism of government power rather than of individual rights. The theorist to whom I am most indebted in this regard is probably Richard Fallon, whose relevant work is discussed in the text of the note.[11] Fallon does not apply this insight to the Fourth Amendment with any depth, however, and I also take issue with some of his conclusions about the merits of balancing tests. In any event, though his work and other theoretical approaches to rights are generally helpful, they are not squarely on point.

In sum, while the literature on *Whren* appears extensive, no one has yet used the persistent problem of pretext claims to discuss the *basic* failing of our Fourth Amendment analysis to classify these claims in the correct, power-skeptical terms. This note therefore makes a unique contribution to the literature on *Whren*, and on the Fourth Amendment generally, and thus cannot be regarded as preempted by the existing literature.

[9] Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).
[10] *See, e.g.*, Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 118 HARV. L. REV. 1470 (2004).
[11] *See* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 360.

Sample Statement of Originality # 2

This Note proposes a new way of understanding the Sixth Amendment's fair cross-section (FCS) requirement for criminal juries. This project is significant because virtually every commentator to address the issue agrees that the Supreme Court's justification of FCS doctrine is unpersuasive, incoherent, or both. On the one hand, some critics argue that early FCS precedents were wrong to argue that jury impartiality depends on the racial and gender composition of individual petite juries. This critique has only grown stronger since *Batson v. Kentucky* applied the equal protection clause (EPC) to prohibit race-based peremptory strikes during voir dire. On the other hand, other critics view FCS doctrine as an unwelcome half-measure best replaced by more aggressive forms of race-conscious jury selection. As this second group rightly points out, current FCS doctrine turns a blind eye to many prevalent forms of juror exclusion, thereby undermining the jury's democratic character.

The Note proposes a third way: construing FCS doctrine as a means of enfranchising eligible jurors. While holding true to the legal principles animating the American criminal jury and other areas of constitutional law, including EPC jurisprudence, an enfranchisement-based approach also highlights opportunities for progressive reforms. As proof of this last claim, the Note's Part III studies the most important recent FCS case, *United States v. Green*, as a case study in jury disenfranchisement. In November 2006, just this month, the jury selection reform envisioned in *Green* was just voted in by the judges of the District of Massachusetts. Because *Green* grappled with issues of racial underrepresentation common in juries across the country, the novel remedy it spawned is bound to become a focal point for future scholarship.[1] The Note offers the first study of this important recent development in the field.

The Note draws on a variety of source types, including: scholarship arguing for "jury affirmative action," or other race-conscious juror selection; [2] the growing body of empirical research on the exclusionary effects of various jury selection techniques; [3] social science studies

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[1] To give some context, the Hennepin County jury selection proposal is a focal point in academic literature, even though it was never implemented and Minnesota courts refused to require its use on equal protection grounds. *See* Hennepin County v. Perry, 561 N.W.2d 889 (Minn. 1997). Perhaps the second most discussed jury selection program is race-conscious selection system briefly implemented in the Eastern District of Michigan but ultimately struck down on equal protection grounds in United States v. Ovalle, 136 F.3d 1092 (6th Cir. 1998). In contrast, the remedy propounded in *Green* is about to be implemented in the District of Massachusetts and, in light of its race-blindness, is certainly constitutional.

[2] *See* HIROSHI FUKURAI AND RICHARD KROOTH, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION, 73-76 (2003); Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L. J. 704, 725 (1995); Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. Rev. 707 (1993); *see also* Joshua Wilkenfeld, *Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of* Grutter v. Bollinger, 104 COLUM. L. REV. 2291 (2004); Eric M. Albritton, *Race-Conscious Grand Juror Selection: The Equal Protection Clause and Strict Scrutiny*, 31 AM. J. CRIM. L. 175, 212 (2003); Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L.REV. 353, 369 (1999); Anthony Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998); Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273 (1996); Tanya E. Coke, Note, *Lady Justice May be Blind, But Is She a Soul Sister? Race Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327 (1994).

[3] John P. Bueker, *Jury Source Lists: Does Supplementation Really Work?*, 82 CORNELL L. REV. 390, 430 (1997); Andrew J. Lievense, *Fair Representation In Juries in the Eastern District of Michigan*, 38 U. MICH. J. L. REFORM 941 (2005); Fukurai and Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT'L BLACK L.J. 238, 245 (1994); Ted C. Newman, *Fair Cross-Sections and Good Intentions*, 18 JUST. SYS. J. 211

on the implications of racial and gender diversity in petite juries;[4] theoretical work relevant to jury impartiality and political representation;[5] doctrinal studies that view FCS doctrine in the context of other areas of constitutional law; [6] and some secondary historical accounts related to the origins and development of the American jury.[7] Of course, the Note also relies on a large number of judicial opinions, including jury cases in the Supreme Court[8] and elsewhere.[9] With

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(1996); Cohn and Sherwood, *The Rise and Fall of Affirmative Action in Jury Selection*, 32 U. MICH. J. L. REFORM 323 (1999); Akhil Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996); Kurt M. Saunders, *Race and Representation in Jury Service Selection*, 36 DUQ. L.REV. 49 (1997); Robert G. Boatright, *Why Citizens Don't Respond to Jury Summonses, and What Courts Can Do About It*, 82 JUDICATURE 156 (1999); Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79, 108 (2004).

[4] *See* Justin Levinson, *Suppressing the Expression of Community Values in Juries: How Legal Priming Systematically Alters the Way People Think*, 73 U. Cin. L. Rev. 1059 (2005); Samuel Somers and Phoebe Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003); Leslie Ellis & Shari Seidman Diamond, *Race Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KEN L. REV. 1033 (2003); John Gastil et al, *Civic Awakening in the Jury Room: A Test of the Connection between Jury Deliberation and Political Participation*, 64 J. POL. 585 (2002); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261 (2000); Kenneth S. Klein, *Unpacking the Jury Box*, 47 HASTINGS L.J. 1325, 1328-34 (1996); Scott W. Howe, *Juror Neutrality or an Impartiality Array?* 70 NOTRE DAME L. REV. 1183, 1243 (1995).

[5] *See* Edward S. Adams & Christian J.Lane *Constructing a Jury That is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L.REV. 703, 709-10 (1998); Nancy S. Marder, Juries, Justice, and Multiculturalism, 75 S. CAL. L. REV. 659, 692 (2002); Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 53 (1994); John D. Jackson, *Making Juries Accountable*, 50 Am. J. COMP. L. 477 (2002); Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent 'Yes,'* 51 J. POL. 628 (1999); Andrew G. Deiss, *Negotiating Justice: The Criminal Trial Jury in Pluralist America*, 3 U. Ch. L. Sch. Roundtable 323 (1996); Marth Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1204 (1992).

[6] *See* Heather Gerken, *Second Order Diversity*, 118 HARV. L. REV. 1099, 1115 (2004); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it Anyway*? 92 COLUM. L. REV. 725, 733 (1992); Andrew Kull, *Racial Justice: Trial by Cross-Section*, NEW REPUBLIC, Nov. 30, 1992; Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945 (1998); Eric Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 144 (1996); Steven A. Engle, *The Public's Vicinage Right*, 75 N.Y.U. L. REV. 1658, 1702; Mitchell S. Zuklie, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101; Emily A. Ramsey, People v. Hubbard: *Interpreting the Fair Cross-Section Requirement of the Sixth Amendment*, 52 J. URBAN & CONTEMP. L. 418 (1997); Peter A. Detre, A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel, 103 YALE L.J. 1913 (1994); Barbara A. Babcock*, A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139 (1993).

[7] JEFFREY ABRAMSON, WE THE JURY (2000); RANDOLPH JONAKAIT, THE AMERICAN JURY SYSTEM (2003); AKHIL AMAR, THE BILL OF RIGHTS (1998); JACK N. RAKOVE, ORIGINAL MEANINGS.

[8] *See* Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357, 364 (1979); *id*., at 371 (Rehnquist, J., dissenting). *See also* Campbell v. Louisiana, 523 U.S. 392, 398 (1998); J.E.B. v. Alabama, 511 U.S. 127, 134 (1994); Powers v. Ohio, 499 U.S. 400, 407 (1991); Holland v. Illinois, 493 U.S. 474 (1990); Lockhart v. McCree 476 U.S. 162, 162-163, (1986); Ballew v. Georgia, 435 U.S. 223 (1978); Peters v. Kiff, 407 U.S. 493 (1972); Castaneda v. Partida, 430 U.S. 482, 494 (1977); Carter v. Jury Comm. of Greene City, 396 U.S. 320, 329-30 (1970); Ballard v. United States, 329 U.S. 194 (1946); Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946).

[9] Very roughly arranged from most to least important: United States v. Jackman, 46 F.3d 1240 (2nd Cir. 1995); *id.* (Walker, J., dissenting); United States v. Osario, 801 F. Supp. 966 (D. Conn 1992); United States v. Cecil, 836 F.2d 1431, 1445-49 (4th Cir. 1988) (en banc); Michigan v. Smith, 463 Mich. 1999 (2000) (Cavanaugh, J., concurring); Blair v. People, 101 P.3d 508 (Cal. 2004); Blair v. United States, 14 Cal.Rptr.3d 602 (Cal. Ct. App. 2004); People v. Hubbard, 217 Mich.App. 459 (Mich Ct. App. 1996); Azania *v.* Indiana, 778 N.E.2D 1253 (Ind. 2002); State v. Gibbs, 254 Conn. 578, 758 (2000); Kramer v. Union Free School District. 395 U.S. 621 (1969); United States v. Green, 435 F.3d 1265, 1271 (10th Cir. 2006); United States v. Hafen, 726 F.2d 21 (1st Cir. 1984); United States v.

one important exception described below, no published work has entertained the possibility that FCS doctrine might be explained in light of jury enfranchisement.

Vikram Amar's *Jury Service as Political Participation Akin to Voting*

The Note's greatest intellectual debt is to Vikram Amar's important 1995 article entitled "Jury Service as Political Participation Akin to Voting."[10] As Amar himself puts it, his basic point is that "the link between jury service and other rights of political participation such as voting is an important part of our overall constitutional structure, spanning three centuries and eight amendments."[11] Because Amar's essay is this Note's closest kin, I will describe the differences between the two works at some length. In particular, the two pieces differ in topic, method, and conclusion.

First, Amar's essay concerns itself with jury law generally, including both FCS and equal protection doctrines, over a period of centuries. In contrast, the Note focuses on current FCS doctrine, and so is able to consider that body of law in far greater detail. For example, Amar's practical suggestions are almost entirely limited to the question of what kinds of groups should receive constitutional protections under the Impartiality and Equal Protection Clauses. That is an important question, but it directly bears on only one aspect of FCS doctrine, namely, the distinctiveness prong. In contrast, the Note discusses how all three FCS prongs—distinctiveness (Section II.2), substantial underrepresentation (Section III.1), and systematic exclusion (Section II.3)—can be understood in light of an enfranchisement conception of jury legitimacy.

Second, the two pieces employ very different methodologies. The Note explores the constitutional values animating the contemporary criminal justice system. At various points, the Note argues that a commitment to juror enfranchisement, and not jury demography, comports with important features of widespread jury selection practice, recent equal protection jurisprudence, and even the nuances of FCS doctrine itself. In contrast, Amar primarily employs an originalist methodology. For example, Amar relies heavily on the nineteenth-century notion that certain amendments protected only civil rights (e.g., the Fourteenth) whereas others (e.g., the Fifteenth) were concerned with political rights like jury service. Amar's approach has the advantage of offering a wealth of historical insights. However, it also has important disadvantages. For example, Amar makes no use of social science research bearing on either jury

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Pion, 25 F.3d 18 (1st Cir. 1994); United States v. Royal, 174 F.3d 1 (1st Cir. 1999); United States v. Shinault, 147 F.3d 1266, 1272 (10th Cir. 1998); Thomas v. Borg, 159 F.3d 1147, 1150 (9th Cir. 1998); United States v. Hsia, 125 F. Supp. 2d 6, 8 (D.D.C. 2000); United States v. Rodriguez, 588 F.2d 1003 (5th 1979); People v. Bartlett, 393 M.Y.S.2d 866 (1977); United States v. Dixon, 2006 WL 278258 (ED LA 2006). *See also* United States v. Raszkiewicz, 169 F.3d 459, 463 (7th Cir. 1999); United States v. Fletcher, 965 F.2d 781, 782 (9th Cir. 1992); United States v. Canfield, 879 F.2d 446, 447 (8th Cir. 1989); Ford v. Seabold, 841 F.2d 677, 681-82 (6th Cir. 1988); Barber v. Ponte, 772 F.2d 982, 986-87 (1st Cir. 1985); Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983). See also Johnson v. McCaughtry, 92 F.3d 585, 593 (7th Cir. 1996); United States v. Gelb, 881 F.2d 1155, 1161 (2d Cir. 1989); United States v. Test, 550 F.2d 577, 582 n.4 (10th Cir. 1976); Zicarelli v. Dietz, 633 F.2d 312, 320 (3rd Cir. 1980); *Cerrone v. People*, 900 P.2d 45, 52 (Colo. 1995); United States v. Maxwell, 160 F.3d 1071, 1075 (6th Cir. 1998); Ford v. Seabold, 841 F.2d 677, 682 (6th Cir. 1988); Barber v. Ponte, 772 F.2d 982, 1000 (1st Cir. 1985); Cox v. Montgomery, 718 F.2d 1036, 1038 (11th Cir. 1983); Davis v. Greer, 675 F.2d 141, 146 (7th Cir.); United States v. Potter, 552 F.2d 901, 905 (9th Cir. 1977); United States v. Test, 550 F.2d 577, 591 (10th Cir. 1976); United States v. Olson, 473 F.2d 686, 688 (8th Cir.); United States v. DiTommaso, 405 F.2d 385, 391 (4th Cir. 1968); United States v. Rodriguez-Lara, 421 F.3d 932, 945 (9th Cir. 2005).

[10] Vikram Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 252-54 (1995); see also Amar and Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 Stan. L. Rev. 915 (1998) (drawing on *Jury Service* in critiquing recent equal protection jurisprudence).

[11] Amar, *Jury Service*, 80 CORNELL L. REV. at 206.

demography or contemporary jury selection practice. In contrast, the Note grapples with these issues in Parts I and III, respectively.

Finally, the Note advances unique conclusions. Amar's main practical suggestion is that FCS and equal protection clause doctrines should protect the same types of groups whose electoral votes are safeguarded by explicit constitutional provisions—namely, race (Fifteenth), gender (Nineteenth), class (Twenty-fourth), and age (Twenty-Sixth) groups. In contrast, the Note defends courts' widespread but poorly articulated reluctance to accept FCS claims on behalf of groups defined by non-permanent characteristics, including age (Section II.2). At the same time, the Note also explores the possibility that FCS protections should extend to groups defined by quasi-permanent characteristics not enumerated in the constitution, such as geography. I therefore suggest that an FCS claim could be brought by disenfranchised residents of particular cities (Section II.2) or counties (Section III.2). The Note arrives at these distinctive conclusions largely because it alone explores the *limitations* in the juror-as-voter analogy (Section III.1). Consequently, the Note develops an independent conception of jury as opposed to electoral enfranchisement.

Conclusion

This Note offers a fresh look at a fascinating area of law that lies at the intersection of criminal procedure, equal protection clause jurisprudence, and political theory. The project's motives are both doctrinal and practical. Doctrinally, an enfranchisement approach to FCS doctrine solves two widely discussed puzzles: Why does the FCS requirement extend only to venires, and not to petite juries?[12] And, How can FCS doctrine's race-consciousness be constitutional in light of the Court's more recent race-blind equal protection jurisprudence?[13] Practically, the Note's timely discussion of *United States v. Green* offers the first analysis of the latest legal efforts to increase minority representation in federal juries.

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[12] *See* Heather Gerken, *Second Order Diversity*, 118 HARV. L. REV. 1099, 1115 (2004) ("[A]lmost any theory that would explain why we care about a pool that mirrors the population would also favor a jury that does the same."). *See also Duren*, 439 U.S. at 371 (Rehnquist, J., dissenting) ("[I]f 'that indefinable something' [associated with women jurors] were truly an essential element of the due process right to trial by an impartial jury, a defendant would be entitled to a jury composed of men and women in perfect proportion to their numbers in the community."); Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L.REV. 353, 369 (1999) ("[W]hile the Court's decisions interpreting a fair cross-section requirement as part of the Sixth Amendment's guarantee of an impartial jury suggests that representativeness is critical to the jury's function, the Court's subsequent limitation of the fair cross-section requirement to the venire state suggests instead that representativeness is not crucial to the jury's function.").

[13] *See* Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945 (1998) ("A defendant is thus placed in a strange position: he is entitled to a jury drawn from a fair cross section specifically because it increases the odds that different groups and perspective will be represented in the jury pool, which in turn helps ensure that he panel is impartial; when actually seating a jury, however, he may not take those same characteristics into account."); Amar, *Jury Service*, 80 CORNELL L. REV. at 210. ("[T]he two analyses [EPC and FCS] are in a great deal of tension: whereas the Sixth Amendment 'flavor' approach values a group's input into the jury process because the group has characteristics that make it different from other groups in society, the Court's recent Equal Protection Clause cases deny any relevant differences between the excluded and included groups at all.").