

## FIDUCIARY PRINCIPLES AND THE JURY

ETHAN J. LEIB, MICHAEL SEROTA & DAVID L. PONET\*

### ABSTRACT

*This Essay argues that because jurors exercise state authority with wide discretion over the legal and practical interests of other citizens, and because citizens repose trust and remain vulnerable to jury and juror decisions, juries and jurors share important similarities with traditional fiduciary actors such as doctors, lawyers, and corporate directors and boards. The paradigmatic fiduciary duties—those of loyalty and care—therefore provide useful benchmarks for evaluating and guiding jurors in their decision-making role. A sui generis public fiduciary duty of deliberative engagement also has applications in considering the obligations of jurors. This framework confirms much of what we know about the jury's form of political representation and also recommends some practical directions for jury reform.*

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\* Ethan J. Leib is Professor of Law at Fordham Law School; Michael Serota holds a J.D. from the University of California, Berkeley School of Law; and David L. Ponet is Parliamentary Specialist at the United Nations Children's Fund (UNICEF). Thanks to Fordham Law School for providing financial support and to the *William & Mary Law Review* for the invitation to write this Essay.

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## INTRODUCTION

The American jury has long been considered a political institution,<sup>1</sup> rooted in a deep tradition of representative self-government.<sup>2</sup> But in what sense is the jury part of our system of democratic *representation*? By applying random and compulsory juror selection procedures, the jury system seeks jury pools that reflect a given jurisdiction's diversity.<sup>3</sup> This is representation in its descriptive valence.<sup>4</sup> From this vantage point, the jury aspires to be among the most representative political institutions in American political life.<sup>5</sup>

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1. *E.g.*, ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835) ("The jury is ... above all a political institution, and it is from that point of view that it must always be judged."); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 470-71 (1997) (noting that, from the time of the founding, the jury's "function [as a political institution] ... was recognized by both proponents and opponents of jury trial").

2. *E.g.*, Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169 (1995) ("No idea was more central to our Bill of Rights—indeed, to America's distinctive regime of government of the people, by the people, and for the people—than the idea of the jury."); Smith, *supra* note 1, at 474 (noting the jury is "an organ of the people's original sovereignty").

3. *See generally About Jury Service*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/JuryService/about-jury-service.aspx> (setting forth federal jury selection procedures) (last visited Jan. 29, 2014); *Jury Selection, Trial and Deliberations*, NATIONAL CENTER FOR STATE COURTS, <http://www.ncsc.org/topics/jury/jury-selection-trial-and-deliberations/state-links.aspx?cat=Juror%20Information> (providing links for state jury selection procedures) (last visited Jan. 29, 2014).

4. *See, e.g.*, Martha L. Minow, *From Class Actions to Miss Saigon: The Concept of Representation in the Law*, 39 CLEV. ST. L. REV. 269, 290-91 (1991) ("At stake in the composition of juries is a conception of that decision-making body as a representative cross-section of the society. Achieving at least symbolic community participation in justice, this cross-section appearance provides the 'likeness' version of representation, the resemblance to the larger community."); Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1356 (2012) (describing "descriptive representation" as "the claim that the civil jury looks like the community from which it was drawn," and noting that, "[t]o the extent that twelve people can represent a cross section of the community on things like gender, race, and ethnic background, we say that the jury represents the community"); *see also* HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 89-91 (1967) (elaborating upon the concept of descriptive representation).

5. Jury selection procedures are imperfect, and there is a significant body of literature detailing their shortcomings. *See, e.g.*, Darryl K. Brown, *The Means and Ends of Representative Juries*, 1 VA. J. SOC. POLY & L. 445, 446 (1994) (stating that federal jury pools are under-representative in terms of race, ethnicity, age, and income level); Cynthia A. Williams, Note, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65

Yet diverse juries are not a sure path to justice.<sup>6</sup> Beyond descriptive representation that is so much a focus of jury scholarship<sup>7</sup> and jurisprudence,<sup>8</sup> there is also a normative component of political representation in the jury: it is generally believed that representatives stand in for, and must act in the interests of, those whom they represent.<sup>9</sup> This Essay explores the normative dimension of the jury's political representation.

Scholars and courts have not completely missed that jurors are political representatives in a normative sense, of course.<sup>10</sup> But they have not generally brought us back to basics to unpack fundamental political-theoretic concepts of democratic political representation that might illuminate this institution of representative self-government. Any proper understanding of the jury's representative function should have something to say about three basic questions

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N.Y.U. L. REV. 590, 614-15 (1990) (reporting that federal jury source lists under-represent low-income persons by approximately 20 percent).

6. See PITKIN, *supra* note 4, at 89 ("We tend to assume that people's characteristics are a guide to the actions they will take, and we are concerned with the characteristics of our legislators for just this reason. But it is no simple correlation; the best descriptive representative is not necessarily the best representative for activity or government."). *But see* Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781, 790-91 (1986) ("Because people with different life experiences have different perceptions and perspectives, what is important [for juries] is an overall quality of representativeness, not some objective standard of individual neutrality.... [T]he jury is not a scientific instrument but rather a body that, through its diversity, can be fair.").

7. See Laura Gaston Dooley, *Sounds of Silence on the Civil Jury*, 26 VAL. U. L. REV. 405 (1991); Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353 (1999); Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568 (2007); Mitchell S. Zuklie, *Rethinking the Fair Cross-Section Requirement*, 84 CALIF. L. REV. 101 (1996).

8. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation."); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) ("Trial by jury presupposes a jury drawn from a pool broadly representative of the community.").

9. *E.g.*, 3 EDMUND BURKE, *THE WORKS AND CORRESPONDENCE OF THE RIGHT HONOURABLE EDMUND BURKE* 354 (London, Francis & John Rivington, 1852) (noting the duty of representatives to seek the interests of their constituents); PITKIN, *supra* note 4, at 209-10 (noting the sense in which representing "means acting in the interests of th[ose] [that are being] represented").

10. See, e.g., Valerie P. Hans, *Juries as Conduits for Culture?*, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE* 80, 80 (David M. Engel & Michael McCann eds., 2009); Victoria A. Farrar-Myers & Jason B. Myers, *Echoes of the Founding: The Jury in Civil Cases as Conferrer of Legitimacy*, 54 SMU L. REV. 1857, 1860 (2001); Smith, *supra* note 1, at 470-74.

of democratic representation<sup>11</sup>: who is to be represented, how they are to be represented, and what institutional arrangements are likely to secure high-quality representation. Although these questions are a staple of political science and political philosophy as they pertain to elected officials, they have generally (although not entirely<sup>12</sup>) been overlooked in contexts in which lay citizens assume representative roles.<sup>13</sup>

These questions—who should be represented, how they should be represented, and which institutions can help guarantee representation—are not unique to democratic political representation. The private law asks these questions in relationships in which one actor or set of actors, a “fiduciary,” is charged with representing the interests of another or a class of others, a “beneficiary.”<sup>14</sup> The private law has developed a rich set of legal principles used to analyze and structure these representative relationships.<sup>15</sup>

11. See generally SUZANNE DOVI, *THE GOOD REPRESENTATIVE* (2007); BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* (1997); PITKIN, *supra* note 4, at 7 (providing a conceptual analysis and “a study in the history of political thought, tracing the treatment of representation by major political theorists”); NADIA URBINATI, *REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY* (2006); MÓNICA BRITO VIEIRA & DAVID RUNCIMAN, *REPRESENTATION* (2008); Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515 (2003); Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214 (2009); Nadia Urbinati, *Representation as Advocacy: A Study of Democratic Deliberation*, 28 POL. THEORY 758 (2000); Suzanne Dovi, *Political Representation*, STANFORD ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/political-representation> (last modified Oct. 17, 2011).

12. For accounts of how citizens serve as representatives, see Mark B. Brown, *Survey Article: Citizen Panels and the Concept of Representation*, 14 J. POL. PHIL. 203 (2006); Ethan J. Leib & David L. Ponet, *Citizen Representation and the American Jury*, in *IMPERFECT DEMOCRACIES: THE DEMOCRATIC DEFICIT IN CANADA AND THE UNITED STATES* 269 (Patti Tamara Lenard & Richard Simeon eds., 2012); Mark Stephan, *Citizens as Representatives: Bridging the Democratic Theory Divides*, 32 POL. & POL’Y 118 (2004); Mark E. Warren, *Citizen Representatives*, in *DESIGNING DELIBERATIVE DEMOCRACY* 50 (Mark E. Warren & Hilary Pearse eds., 2008).

13. For a recent effort at construing citizens voting in direct democracy as political representatives, see Michael Serota & Ethan J. Leib, *The Political Morality of Voting in Direct Democracy*, 97 MINN. L. REV. 1596 (2013). Citizen representation occurs not only in the jury but also within many experiments in deliberative and participatory democracy that use the jury as inspiration. See, e.g., ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* 23 (2004) (calling for a “Popular Branch” of government using stratified random samples of citizens); Ned Crosby et al., *Citizen Panels: A New Approach to Citizen Participation*, 46 PUB. ADMIN. REV. 170 (1986) (convening and reporting on the performance of Citizen Panels).

14. See *infra* Part I.B.

15. See *infra* Part I.B.

In general terms, fiduciaries exercise discretionary power over the legal and practical interests of beneficiaries. In fiduciary relationships, a beneficiary is vulnerable to a fiduciary's potentially predatory or self-dealing actions, yet must still repose her trust in the fiduciary. Because of the power dynamics in these relationships, the law traditionally imposes substantial duties upon fiduciaries as a way of keeping them in line and incentivizing them to prioritize their beneficiaries' interests above their own.<sup>16</sup> Here, we argue that the body of jurisprudence emerging from the law's engagement with these principles, fiduciary law, can be brought to bear on relationships of political representation in the public sphere, thereby shedding light on the jury's role as an institution of democratic representation.<sup>17</sup>

The Essay proceeds in three parts. Part I argues that although fiduciary principles have been developed and applied mostly in private law contexts, the same principles nonetheless apply to the exercise of state authority by public officials.<sup>18</sup> The characteristics

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16. See generally LEONARD I. ROTMAN, *FIDUCIARY LAW* (2005); J.C. SHEPHERD, *THE LAW OF FIDUCIARIES* (1981); L.S. Sealy, *Fiduciary Relationships*, 20 *CAMBRIDGE L.J.* 69 (1962); J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 *LAW. Q. REV.* 51 (1981); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 *U. TORONTO L.J.* 1 (1975).

17. Others have tried this exercise in the reverse direction by taking from political philosophy's accounts of representation to learn something about corporate forms of representation. See Andrew Verstein, *Trustee or Delegate? Understanding Representation to Illuminate Shareholder Governance and Regulatory Change*, 9 *EUR. CO. & FIN. L. REV.* 74 (2012).

18. See, e.g., EVAN FOX-DECENT, *SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY* (2011); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 *TEX. L. REV.* 441 (2010) [hereinafter Criddle, *Administration*]; Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 *UCLA L. REV.* 117 (2006) [hereinafter Criddle, *Foundations*]; Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 *QUEEN'S L.J.* 259 (2005); Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 *CALIF. L. REV.* 699 (2013) [hereinafter Leib, Ponet & Serota, *Judging*]; Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 *J. POL. PHIL.* 178 (2012) [hereinafter Leib & Ponet, *Representation*]; Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 *TEX. REV. L. & POL.* 239, 245 (2007) [hereinafter Natelson, *Judicial Review*]; Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1088-91 (2004) [hereinafter Natelson, *The Constitution*]; David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 *B.U. L. REV.* 1249 (2011) [hereinafter Ponet & Leib, *Deliberative Democracy*]; D. Theodore Rave, *Politicians as Fiduciaries*, 126 *HARV. L. REV.* 671 (2013). Much of this work was foreshadowed in Paul Finn, *The Forgotten "Trust": The People and the State*, in *EQUITY: ISSUES AND TRENDS* 131, 132 (Malcolm Cope ed., 1995).

of a fiduciary relationship—discretion, trust, and vulnerability—are also constitutive of relationships of political representation.

Part II then considers whether the fiduciary model of governance has application to the jury. We first explain why the jury's authorization to engage in discretionary state action<sup>19</sup> and apply the coercive force of the state—when viewed in the light of the concomitant vulnerability and need for trust by the populace—satisfy the tripartite indicia characteristic of a fiduciary relationship. We thereafter address two relational questions central to applying fiduciary principles to those representative relationships that involve multifarious actors: First, who, precisely, is the fiduciary? The juror as an individual? The jury as a group? Both the juror and the jury? Second, who, precisely, is the beneficiary? The litigating parties? The “people”? Both the litigating parties and the people?<sup>20</sup>

After concluding in Part II that both the individual juror *and* the petit jury as a whole are fiduciaries for “the people,” Part III considers the attendant fiduciary obligations that flow from this role. Part III specifies three public fiduciary duties—the *duty of loyalty*, the *duty of care*, and the *duty of deliberative engagement*—and discusses their potential application to the practice of juror representation. Some of these duties, upon further analysis, reflect long-established jury practices, whereas others are novel, suggesting potential avenues of jury reform.

Ultimately, we conclude that a fiduciary model of the juror and jury has much to add to our understanding of the jury. It not only illuminates the jury's role as a representative institution, but it also recommends ways of improving the orientation of jury service while providing the citizen-juror with practical guidance as to how to carry out her representative function.

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19. On the jury and state action, see *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991); Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 435 (2012).

20. For an essay about the difficulty of moving from the private law fiduciary relationship to a public frame, see Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91 (2013).

## I. FIDUCIARY POLITICAL THEORY

This Part explains why fiduciary principles provide a useful lens through which to understand power exercised by public officials. We highlight some basic questions raised by representative relationships in the public sphere and then explain how the private law of fiduciaries addresses some of these questions. We conclude this Part by setting forth the functional and historical arguments for viewing political representatives as public fiduciaries.

### A. *Political Representation*

Popular sovereignty and representative government share an uneasy relationship. What does it mean for “the people” to rule themselves when decisions are usually being made by a select few representatives? Ballot-casting is intermittent—every two, four, or six years—and hardly constitutes a regular, direct, or discrete form of self-rule—especially when one considers that many citizens vote for candidates who lose. And what of many bureaucrats and judges, who not only wield enormous authority, but were never elected and are often difficult to remove from office? Political theorists of democracy have grappled with these questions for centuries. Questions about which constituent or principal the representative is to serve—the district, the state, or the nation as a whole—as well as the function the representative is to play—as trustee, as delegate, or as mirror—abound.

Not surprisingly, then, political philosophers have attempted to expound accounts of representation that seek to provide norms and standards for evaluating and guiding representative performance.<sup>21</sup> Given how much power state officials wield in the name of “the people,” and how limited “the people” are in their ability to monitor and control representatives’ actions, some ethical precepts are necessary to help ensure that governors indeed act after the interests of the governed.<sup>22</sup> But where might such precepts be

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21. See Leib & Ponet, *Representation*, *supra* note 18, at 181-82 (discussing the shortcomings of these accounts).

22. See, e.g., Leib, Ponet & Serota, *Judging*, *supra* note 18, at 712.



found? One potential solution is to consider whether analogous situations of representation exist and, if so, to explore whether they have anything to teach us about the best way to think about the work that public officials do.

In the next Section, we explain how many of the challenges political representation pose are not unique to the public sphere. They surface in countless contexts in which one party (the representative) is charged with attending to the interests or assets of another party (the represented), but the principal cannot fully monitor or compel her representative's actions. The private law addresses these types of representational relationships through the application of fiduciary principles.

### *B. Private Fiduciaries*<sup>23</sup>

The private law routinely encounters similar questions about representation in which one actor is charged with representing and acting for the interests of another. Such relationships include, for example, those between attorneys and clients, agents and principals, trustees and beneficiaries, and corporate officeholders and shareholders.<sup>24</sup> In these relationships, one actor has been delegated legal authority to make decisions that bind another, giving rise to inquiries about the nature of the power relationship between the parties, the types of obligations that flow from the relationship, the particular interests to be represented—where beneficiaries are diverse—and how to incentivize or secure compliance by those serving in a representative capacity. The private law draws on fiduciary principles to craft governance regimes for these relationships of representation.

Generally speaking, a fiduciary relationship emerges in contexts in which one person (the fiduciary) has discretionary power over the legal or practical interests of another (the beneficiary).<sup>25</sup> The law

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23. This Section borrows from Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009); Leib & Ponet, *Representation*, *supra* note 18; and Leib, Ponet & Serota, *Judging*, *supra* note 18.

24. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1400 (2002).

25. See, e.g., Evan J. Criddle, *Proportionality in Counterinsurgency: A Relational Theory*, 87 NOTRE DAME L. REV. 1073, 1089 (2012); Paul B. Miller, *A Theory of Fiduciary Liability*, 56

requires those who manage the affairs and assets of beneficiaries to operate within strict legal and ethical requirements that demand fidelity to beneficiary interests. These requirements stem from the nature of the discretion afforded to the fiduciary, the trust reposed and presumed by the beneficiary, and the vulnerability to which beneficiaries are subject.<sup>26</sup> Accordingly, three indicia identify fiduciary relationships: discretion, trust, and vulnerability. Where these tripartite indicia exist, the private law imposes substantial obligations upon fiduciaries as a way of keeping them in line and incentivizing them to prioritize their beneficiaries' interests above the fiduciary's own.<sup>27</sup>

An important feature of fiduciary law is that it identifies fiduciary relationships and imposes fiduciary obligations differentially.<sup>28</sup> That is, once a particular relationship is identified as fiduciary, judges do not apply a one-size-fits-all approach: the way in which fiduciary obligations are enforced tends to be calibrated in a manner sensitive to the type of relationship at issue. In other words,

Although an agent, a trustee, a corporate director, a parent, and a lawyer can all be fiduciaries owing a duty of loyalty [the quintessential fiduciary duty] to their beneficiaries, that duty is enforced ... with varying degrees of strictness, according to the characteristics of the particular relationship at issue. This variance makes sense because, although these fiduciaries all exercise discretionary power over a beneficiary's assets or

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MC GILL L.J. 235, 235 (2011). According to Justice Wilson's judgment in *Frame v. Smith*: Relationships in which [] fiduciary obligation[s] have been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[1987] 2 S.C.R. 99 (Can.).

26. See FOX-DECENT, *supra* note 18, at 299 ("[P]ower and vulnerability are intimately related. The kind of vulnerability at issue arises .... on account of the fiduciary's unilateral power to affect the beneficiary's interests."); Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 810 (1983).

27. See sources cited *infra* note 34.

28. Leib, Ponet & Serota, *supra* note 20, at 93.

interests, the power structures that inhere in [these relationships] are qualitatively different.<sup>29</sup>

The judicial application of fiduciary duties is, however, complicated by the fact that it is not always clear whose interests a fiduciary is bound to pursue, and thus, *to whom* a fiduciary's duties apply. Sometimes the private law has a clear answer to the question. For example, in the case of a private law *agent*, the *principal's* interests are the priority, whereas in the case of a *guardian*, a *ward's* best interests are the relevant touchstone. But corporate law, where much modern fiduciary law gets expounded and developed by courts, can sometimes display some ambiguity about whom a representative represents.<sup>30</sup>

Corporate law has two traditional answers to the question of whom corporate representatives—directors always and managers generally—are supposed to represent in their administration and governance. Courts and commentators have not fully settled on which of the two answers is correct, but two classes of constituents are plausible beneficiaries for the protection of corporate fiduciaries<sup>31</sup>: shareholders and the “entity.”

The conventional and likely dominant “shareholder primacy” view holds that because the shareholders are the owners of the corporation, the corporation must be run for their benefit.<sup>32</sup> Accordingly, the shareholder primacy approach has a specific and unitary mapping of whose interests are represented by corporate representatives: the shareholders’.

The “entity” theory, by contrast, has a more complex and multifarious set of constituents whose interests are supposed to be represented by corporate governors. A corporation is run not only for the shareholders, under the entity view, but also for creditors, consumers, labor, and the public. In short, the *entity*, or institution, has interests that management ought to serve and represent;

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29. *Id.*

30. See Frankel, *supra* note 26, at 804-08.

31. This is the “Berle-Dodd” debate. See A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

32. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders.”).

representation is meant to protect the interests of *stakeholders*, not just *shareholders*.<sup>33</sup> Both of these models have judicial cases to support them<sup>34</sup>—and corporate law can be said to be ambivalent about these approaches to representation.<sup>35</sup>

To briefly recap, the private law envisions representative relationships founded upon a modicum of discretion, vulnerability, and trust. Where such indicia exist, the private law enforces a relational and context-sensitive set of duties that must guide the work of representatives. As this sketch demonstrates, the theory and practice of fiduciary law has much to say about the nature, obligations, and regulation of representation. In the next Section, we consider whether the private law's way of understanding and addressing the complexities of representation may help to illuminate representative relationships as they exist in the public-political sphere.

### C. Public Fiduciaries<sup>36</sup>

Whether the law of fiduciaries can shed light on political representation depends upon the extent to which ruler-ruled relationships exhibit characteristics similar to the relationships of trust that fiduciary law controls in the private law. A close consideration of the function and structure of relationships of political

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33. See generally William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992) (examining the competing "property conception" and "social entity conception" of the corporation); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (concluding that corporate law encourages directors to further the interests of "all stakeholders who comprise the corporate 'team'"). But see Renée B. Adams, Amir N. Licht & Lilach Sagiv, *Shareholders and Stakeholders: How Do Directors Decide?*, 32 STRATEGIC MGMT. 1331 (2011) (providing empirical evidence of directors' tendencies to decide in favor of shareholders).

34. The more controversial cases fall on the "entity theory" side. See *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1154-55 (Del. 1989); *Unocal Corp. v. Mesa Petrol Co.*, 493 A.2d 946, 954 (Del. 1985); *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, Civ. A. No. 12150, 1991 WL 277613, at \*1155-56 & n.55 (Del. Ch. Dec. 30, 1991). On the "shareholder primacy" side, see *Dodge*, 170 N.W. at 684.

35. See Allen, *supra* note 33, at 264 ("Two inconsistent conceptions have dominated our thinking about corporations.... Each conception could claim dominance for a particular period, or among one group or another, but neither has so commanded agreement as to exclude the other from the discourse of law or the thinking of business people.").

36. This Section borrows from Leib & Ponet, *Representation*, *supra* note 18; Leib, Ponet & Serota, *Judging*, *supra* note 18; and Leib, Ponet & Serota, *supra* note 20.

representation suggests that private law fiduciary principles are, indeed, relevant.

A distinctive feature of the fiduciary relationship—the inequality and asymmetry between fiduciary and beneficiary—maps well onto the relationship between public officials and those they govern. The fiduciary’s possession of greater expertise, information, and power than the beneficiary leaves the beneficiary vulnerable to the fiduciary’s predation.<sup>37</sup> Ultimately, a fiduciary rendering of public authority accords with the reality that government officials enjoy a wide berth of discretion in making decisions that affect the interests and resources of their entrustors, irrespective of the level or place they occupy in the hierarchy of government. Legislators, for example, have control over citizens by being able to criminalize their conduct, take their money for taxes, take their property for “public use,” and spend public resources in their name. Citizens are quite vulnerable to the potential abuse of such power, and yet they have little choice but to trust those who govern them.<sup>38</sup> The relationship between public officers and citizens, accordingly, reflects the three indicia that characterize a private fiduciary relationship: discretion, trust, and vulnerability.<sup>39</sup>

Understanding state actors as fiduciaries also enjoys a strong historical inheritance. Although fiduciary principles have their roots in the private law, a fiduciary rendering of public authority can be traced back to antiquity.<sup>40</sup> Sovereign institutions were thought to hold citizens’ interests in a public trust. When an arm of the sovereign exercised political power, that power was deemed to be constrained by fiduciary standards.<sup>41</sup> This deeply rooted understanding was premised on citizens’ vulnerability to the potential

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37. See Smith, *supra* note 24, at 1414 nn.57 & 62.

38. On elector trust of representatives, see WILLIAM T. BIANCO, *TRUST: REPRESENTATIVES AND CONSTITUENTS* (1994); and *DEMOCRACY AND TRUST* (Mark E. Warren ed., 1999).

39. The Supreme Court, at least at one time, seems to have shared this view. Consider: [T]he power or control lodged in the State ... is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896), *overruled by* *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

40. See Natelson, *Judicial Review*, *supra* note 18, at 245; Natelson, *The Constitution*, *supra* note 18, at 1097-1101.

41. See Criddle, *supra* note 25, at 1090-93.

abuse of discretionary governmental power and on citizens' need to repose trust in their governors and public institutions, sometimes by express delegation and sometimes without explicit conferral.<sup>42</sup> The founders of the United States—inheriting Greek, Roman, and British political theory and common law<sup>43</sup>—also recognized the relevance of fiduciary principles as applied to the public political sphere.<sup>44</sup> Indeed, the U.S. Constitution was thought to be designed as the fiduciary law of public power, delimiting governmental authority and directing it to the benefit of citizen-beneficiaries.<sup>45</sup>

In accordance with these functional and historical insights, there has been a recent flurry of scholarship under the rubric of what might be called “fiduciary political theory.” Scholars in this line of inquiry apply the principles of fiduciary law to the realm of public governance in order to better illuminate the representative relationships that exist therein. Important contributions in this growing field have demonstrated the extent to which fiduciary principles describe well, and can help to orient, the quality of representation public officers render—and are supposed to render—to those they rule. Such contributions reveal that fiduciary principles enhance our understanding of the representative obligations that inhere in elected office,<sup>46</sup> while also providing a useful frame for the representative relationships shared between non-elected public officials (for example, federal judges<sup>47</sup> and administrators<sup>48</sup>) and those subject to

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42. See *id.* at 1089-90.

43. See Natelson, *The Constitution*, *supra* note 18, at 1083-85 (“At the federal convention, ideals of fiduciary government were enunciated.”); see also Paul Stanton Kibel, *The Public Trust Navigates California’s Bay Delta*, 51 NAT. RESOURCES J. 35, 36 (2011) (“The origins of the public trust reach back centuries and millennium to old English and Roman law, yet the public trust continues to have far-reaching effects today throughout the United States.”); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 69 (2009) (“The public trust obligation is the oldest expression of environmental law, dating back to Justinian times and Roman law.”).

44. See Finn, *The Forgotten “Trust”*, *supra* note 18, at 135 (“[I]n the United States after the Revolution, the fiduciary status of public officials followed inexorably from the embrace in that country of the idea of popular sovereignty.”).

45. See TAMAR FRANKEL, *FIDUCIARY LAW* 284-87 (2011).

46. See, e.g., Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845 (2013); Leib & Ponet, *Representation*, *supra* note 18; Ponet & Leib, *Deliberative Democracy*, *supra* note 18, at 1255-61; Rave, *supra* note 18.

47. See Leib, Ponet & Serota, *Judging*, *supra* note 18.

48. See Criddle, *Foundations*, *supra* note 18.

their authority. But do fiduciary principles have anything to add to our understanding of the jury? We think so.

Peeling the iterative layers of representation in a modern democratic polity reveals that there are occasions when citizens are called into representative service. The American trial jury is the most notable occasion, as centuries of American political thought and jurisprudence reveal. It also raises the same theoretical quandaries of democratic representation that inhere in more traditional contexts: namely, who are these civic governors supposed to be representing and what normative benchmarks are to guide their work? Arguably, these paradigmatic questions of democratic representation are even more perplexing as applied to the jury, given its episodic and civic character. But it is for this reason that fiduciary political theory, with its emphasis on relational rather than formalistic characteristics of representation, may be useful to call into service. The balance of this Essay is devoted to exploring this possibility. We consider first in Part II whether fiduciary principles have application to the institution of the jury. Having answered that question in the affirmative, we then explore, in Part III, what such an application can teach us about the quality of representation jurors owe those whom they represent.

## II. THE JUROR & JURY AS FIDUCIARIES

This Part considers the extent to which fiduciary principles apply to the jury. We first explain how the representation rendered by juries exhibits discretion, trust, and vulnerability. Concluding that fiduciary principles are applicable to the jury, we address some of the relational complexities underlying this distinct understanding of jury service.

### *A. Discretion, Trust, and Vulnerability in the American Jury*

#### *1. Discretion*

Jurors surely possess significant discretion over the interests of their fellow citizens. Under the textbook definition of jury service, jurors apply the law to the disputes before them, which requires them to “assess credibility, find facts,” and, in civil cases, “determine

damages.”<sup>49</sup> All these tasks entail “considerable discretion.”<sup>50</sup> Juries have even more discretionary authority than is otherwise indicated by the textbook definition because the line between application and interpretation of legal norms is ambiguous.<sup>51</sup>

The interpretive discretion that inheres in the jury’s role is clearest in the context of civil litigation. Here jurors routinely apply legal concepts containing “a significant normative or evaluative component,”<sup>52</sup> such as negligence, lewdness, obscenity, and fair recompense, which entail the identification of community standards.<sup>53</sup> Similarly, discretionary situations also arise in the criminal arena; at times “[t]he only practical standard” in a given legal context may be “the jury’s sense of justice.”<sup>54</sup> For example, the causation requirement demands that jurors determine whether a particular result is “too remote or accidental in its occurrence to have a [*just*] bearing on the actor’s liability,”<sup>55</sup> and the criminal recklessness and negligence standards call upon the jury to determine whether an actor’s disregard of a risk “involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”<sup>56</sup> In both civil and criminal cases, then, jurors are authorized to make highly discretionary decisions based upon “social values, norms of behavior, and what we expect and have a right to expect from members of our society.”<sup>57</sup>

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49. *Perez v. Weingarten Realty Investors*, 881 S.W.2d 490, 497 (Tex. Ct. App. 1994) (Peeples, J., concurring).

50. *Id.*

51. *Cf.* RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 65 (2003) (“[A]pplying [a] legal norm in a particular situation requires an interpretation of that legal standard.”).

52. Solomon, *supra* note 4, at 1335-36.

53. *State v. Shapiro*, 300 A.2d 595, 606 (N.J. Super. Ct. Law Div. 1973).

54. *State v. Maldonado*, 645 A.2d 1165, 1179 (N.J. 1994).

55. MODEL PENAL CODE § 2.02(2)(b), 3(b) (1962) (emphasis added); *see* JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 189 (6th ed. 2012) (“The decision to attach causal responsibility for social harm to one, rather than to another, factor is made in a common sense manner, or by application of moral intuitions, public policy considerations, and/or a sense of justice.”).

56. MODEL PENAL CODE § 2.02(c)-(d).

57. Martin A. Kotler, *Social Norms and Judicial Rulemaking: Commitment to Political Process and the Basis of Tort Law*, 49 U. KAN. L. REV. 65, 90-91 (2000); *see also* Steven Hetcher, *The Jury’s Out: Social Norms’ Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 647 (2003) (noting the “pervasive role that social norms play in providing grist for the jury’s concrete application of the reasonable person standard ... in all situations in which lay jurors deliberate”); Martin A. Kotler, *Reappraising the Jury’s Role as Finder of Fact*, 20 GA. L. REV. 123, 133-34 (1985) (“[I]n a classic negligence case ... [d]etermining the reasonableness



Additionally, the coercive power of the state reinforces the exercise of juror discretion.<sup>58</sup> Jury verdicts are akin to lawmaking by state actors insofar as they impact legal, economic, and liberty interests. A verdict of guilt in a criminal case authorizes a judge to order the infliction of state-sanctioned punishment against a defendant. An acquittal constrains the state from taking punitive action against the accused, even when the law and the facts suggest that the defendant is guilty. And a civil verdict awarding damages will—should a party refuse to satisfy the judgment voluntarily—enable the state to coerce payment through various enforcement mechanisms. Whether liberty, money, or some other critical resource is at issue, the discretionary power that juries exercise is a classic place to invite fiduciary constraint.

## 2. Trust

Trust is also a foundational feature of jury service. As Dan Markel has observed, “[T]here is no popular consent to the service rendered by any particular juror in a particular case, and jurors have no accountability to each other or to citizens around them for how they deliberate and vote.”<sup>59</sup> And yet the difficulty of monitoring performance does not derogate from but rather reinforces and underwrites the necessity of trust reposed with jurors. As Evan Criddle has remarked, “[N]ot delegation per se, but rather the ... ex post identification of a confidential relation as one founded on trust” is paramount in defining fiduciary relationships.<sup>60</sup>

The fiduciary indicium of trust pervades the institution of the jury. In making the jury a constitutional command, for example, the Framers of the Constitution understood that they were entrusting

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of the defendant’s conduct is essentially a policymaking or legal decision.”).

58. See Kelly L. Cripe, Comment, *Empowering the Audience: Television’s Role in the Diminishing Respect for the American Judicial System*, 6 UCLA ENT. L. REV. 235, 274 (1999) (asserting that jurors should be accountable to their communities because they wield the coercive power of the state).

59. Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 445 (2005); see also Re, *supra* note 7, at 1574 (“[J]urors, unlike most community representatives, are neither elected nor appointed,” and thus “no accountability mechanisms constrain jury decision-making.”).

60. See Criddle, *Foundations*, *supra* note 18, at 126, 146 n.117.

much to the common sense of laypeople.<sup>61</sup> More probative, however, is how the architecture of the jury—that is, the state and federal rules that govern the operation of the jury—reinforce that trust by limiting accountability and transparency. For example, we trust that jurors will act as neutral arbiters by “ignor[ing] evidence that is heard at trial but is later ruled inadmissible,”<sup>62</sup> by “put[ting] aside their biases in deliberation,”<sup>63</sup> and by disregarding any other “considerations bearing on their judgment ... that the judge tells them to put aside.”<sup>64</sup> We also trust that jurors will be competent enough “to make extremely difficult decisions in even the most complex cases involving technical problems spanning diverse fields such as engineering, medicine, and commercial finance.”<sup>65</sup> Perhaps most importantly, we trust that jurors will not only “do the right thing, but to do it for the right reasons.”<sup>66</sup> In short, in light of how hard it is to overturn a jury’s verdict, “the entire jury system is predicated on juror good faith.”<sup>67</sup>

And yet, trust of jurors is not only an implicit feature of the jury architecture; both public officials and the public also appear actually to trust juries. Judges, for example, declare their trust of juries outright through their written orders and the occasional judicial law review article.<sup>68</sup> The people’s similar trust of juries can be seen in

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61. See Paul Butler, *In Defense of Jury Nullification*, LITIG. 46, 48 (2004); cf. Amar, *supra* note 2, at 1192 (“[B]ut sometimes reasonableness will call for a contextual, common sense assessment that defies broad categorization, and sometimes a jury will be the best body to make this common sense and democratic assessment.”).

62. Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 87 (1996).

63. *Id.*

64. United States v. Mazzone, 782 F.2d 757, 764 (7th Cir. 1986); see also State v. Muhammad, 678 A.2d 164, 179 (N.J. 1996) (“[W]e trust that those eleven jurors will adhere to the trial court’s limiting instruction and deliberate about the appropriate sentence without consideration of those aggravating factors that they found to exist beyond a reasonable doubt.”); State v. Silva, 600 A.2d 506, 510 (N.J. Super. Ct. App. Div. 1991) (“We must trust jurors to fairly consider whether the explanation diminishes the discrediting effect of silence, by refuting the assumption that silence is unnatural if the witness has truthful exculpatory information. Fair consideration of the explanation may not come easy to jurors of limited life experience, but their oath obliges them to try.”).

65. People v. James, No. 211331, 2001 WL 704159, at \*9 (Mich. Ct. App. Mar. 20, 2001) (Whitbeck, J., concurring in part and dissenting in part).

66. Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 992 (2003).

67. Strauss, *supra* note 62, at 87; see also Lang v. Jamrog, Civ. Case No. 04-40094, 2006 WL 3147745, at \*5 (E.D. Mich. Oct. 31, 2006) (“Trusting juries to follow the court’s instructions allows the criminal justice system to function.”).

68. *E.g.*, Columbus v. Freeman, 908 N.E.2d 1026, 1031 (Ohio Ct. App. 2009) (Tyack, J.,

the frequency with which individual litigants exercise their right to a jury.<sup>69</sup> It has furthermore been observed that minority groups “trust jurors more than they trust judges to decide the truth of their allegations of race and sex prejudice”<sup>70</sup> and that the public generally trusts juries more than judges to make the “ultimate ethical judgment”<sup>71</sup>: the decision to sentence a criminal defendant to death.<sup>72</sup> Of course, not everyone is so sanguine about juries, and some do indulge in much mistrust.<sup>73</sup> All the same, in light of the legal system’s design, citizens have no choice but to depend on juries to undertake their responsibilities in good faith and to use their power in the best interests of the public. Inviting fiduciary constraint can help draw out the structure and content of these obligations.

### 3. Vulnerability

Finally, the polity as a whole is vulnerable to jurors. Clearly, litigants are at the direct mercy of jurors, who can penalize them

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dissenting) (“[T]he courts should be trusting juries to reach the correct verdict in a given case.”); Hoffman, *supra* note 66, at 992 (“I trust jurors ... to be competent, to take their role seriously, and to apply the law as instructed. My trust is not a theoretical hope; it is borne from my experiences on the bench. In the two-hundred-plus jury trials over which I have presided, I can count on the fingers of one hand the cases in which I thought the jury was palpably wrong and/or hopelessly confused.”).

69. *E.g.*, Reginald Alleyne, *Arbitrators’ Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U. PA. J. LAB. & EMP. L. 1, 45 (2003) (“[I]n overwhelming numbers, individuals with claims in federal court prefer jury trials to non-jury trials.”); Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L.Q. 151, 151, 162-63 (2005) (“Federal criminal defendants almost always prefer a jury trial to a bench trial,” and “this preference for juries has [] significantly [increased] over time.”).

70. *Beesley v. Hartford Fire Ins. Co.*, 717 F. Supp. 781, 782 (N.D. Ala. 1989).

71. *See* LaTour Rey Lafferty, *Florida’s Capital Sentencing Jury Override: Whom Should We Trust to Make the Ultimate Ethical Judgment?*, 23 FLA. ST. U. L. REV. 463, 486 (1995) (“One should trust jurors, as community representatives, to make the ultimate ethical judgment.”).

72. *See, e.g.*, *Spaziano v. Florida*, 468 U.S. 447, 461 (1984) (“[T]he laws and practice in most of the States indicate a nearly unanimous recognition that juries, not judges, are better equipped to make reliable capital sentencing decisions.”); *cf.* McGarrahan, *State Ponders Changing Steps to Execution*, MIAMI HERALD, Mar. 3, 1991, at 6B (quoting Florida Governor Lawton Chiles as stating that in capital sentencing matters, “I trust jurors. I trust them if they vote for mercy or for death.”).

73. *See generally* WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 200-20 (1999) (criticizing the criminal jury); Reid Hastie & W. Kip Viscusi, *What Juries Can’t Do Well: The Jury’s Performance as a Risk Manager*, 40 ARIZ. L. REV. 901 (1998) (criticizing the civil jury).

financially, authorize punishment against them, and generally bring the coercive apparatus of the state to bear. Yet the discretion that juries exercise has implications beyond those in the courtroom. Consider that a criminal jury's guilty verdict impacts not only the interests of the accused, but also those of her family, friends, and the community in which she is embedded. The financial dependents of a convict, for example, may lose an essential source of economic and emotional support.<sup>74</sup> And a civil verdict awarding damages may have dire economic consequences for a party's financial dependents, clients, and employees.

The polity's vulnerability to jury discretion can also be a function of juror *inaction*. In the criminal context, for example, a jury's failure to convict a defendant otherwise guilty of a violent offense may mean that a dangerous individual is back on the streets, thereby placing the community at risk. And, in torts cases, the civil jury often serves as "the last defense" against powerful business interests "when government standards are weak, outdated, or set by the regulated industry."<sup>75</sup> Accordingly, the civil jury's failure to find guilt or award severe enough damages, thereby altering the manner in which corporations in a particular industry "balanc[e] the utility and the hazards of the[ir] products," may detrimentally impact the health of those who use and depend on them.<sup>76</sup>

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74. See, e.g., JEREMY TRAVIS ET AL., URBAN INSTITUTE, *FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY* (2005), available at [http://www.urban.org/uploadedpdf/310882\\_families\\_left\\_behind.pdf](http://www.urban.org/uploadedpdf/310882_families_left_behind.pdf). Taxpayers also pay an extraordinary amount of money to incarcerate a single individual. See, e.g., *California's Annual Costs to Incarcerate an Inmate in Prison*, LEGISLATIVE ANALYST'S OFFICE, [http://www.lao.ca.gov/laoapp/laomenus/sections/crim\\_justice/6\\_cj\\_inmatecost.aspx?catid=3](http://www.lao.ca.gov/laoapp/laomenus/sections/crim_justice/6_cj_inmatecost.aspx?catid=3) (last visited Jan. 25, 2014) (calculating that from 2008 to 2009 the per year cost to California's taxpayers of housing an inmate was \$47,102). Thus, in at least one sense, the entire polity is at the mercy of a criminal jury's discretion.

75. THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* 198 (2001).

76. CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA* 219-20 (2001). Michael Sandel provides an instructive example of how this works:

During the 1970s, the Ford Pinto was one of the best-selling subcompact cars in the United States. Unfortunately, its fuel tank was prone to explode when another car collided with it from the rear.... To calculate the benefits to be gained by a safer gas tank, Ford estimated that 180 deaths and 180 burn injuries would result if no changes were made. It then placed a monetary value on each life lost and injury suffered—\$200,000 per life, and \$67,000 per injury. It added to these amounts the number and value of the Pintos likely to go up in flames, and calculated that the overall benefit of the safety improvement would be \$49.5 million. But the cost of adding an \$11 device to 12.5 million vehicles

Lastly, the polity is vulnerable to the exercise of the jury's discretionary authority in the sense that systematic juror malfeasance, misfeasance, and nonfeasance can lead to the erosion of the legal system. Juries, for instance, might routinely fail to act with the attention and care required by failing to catalogue and process facts and apply relevant laws.<sup>77</sup> Or juries might regularly act in a subversive manner by deliberately ignoring facts, laws, instructions, or community values and mores.<sup>78</sup> Were these sorts of systematic behaviors to occur with any regularity, juries run the risk of undermining the efficacy and credibility of the justice system as a whole, thereby threatening the rule of law values of stability, uniformity, and predictability that a properly functioning system requires.<sup>79</sup>

Whether through action or inaction, then, jurors and juries leave the polity vulnerable to their legal decision making. And fiduciary constraint is an intuitive way of ensuring they take care that they properly serve their fellow citizens.

### *B. Mapping the Fiduciary Relationship in the Jury Context*

The foregoing analysis demonstrates that applying fiduciary constraint to the jury system's exercise of state authority coheres with the general understanding of fiduciary principles. However, we must first address some relational complexity. Establishing a fiduciary relationship requires identifying a relevant fiduciary and a relevant beneficiary or class of beneficiaries. This is one of the hardest and most underexplored areas of fiduciary political theory. But without this essential clarification, it is difficult to design or

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would be \$137.5 million. So the company concluded that the cost of fixing the fuel tank was not worth the benefits of a safer car.

MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 43-44 (2009).

77. See, e.g., Monica K. Miller & Brian H. Bornstein, *Juror Stress: Causes and Interventions*, 30 T. MARSHALL L. REV. 237, 243-44 (2004).

78. See Note, Richardson v. Marsh: *Codefendant Confessions and the Demise of Confrontation*, 101 HARV. L. REV. 1876, 1881 n.36 (1988).

79. See Brenner M. Fissell, *Jury Nullification and the Rule of Law*, LEGAL THEORY (forthcoming 2014), available at [http://www.academia.edu/4020315/Jury\\_Nullification\\_and\\_the\\_Rule\\_of\\_Law](http://www.academia.edu/4020315/Jury_Nullification_and_the_Rule_of_Law) (arguing that juries not following the law derogates from important rule of law values); see also Michael Serota, *Stare Decisis and the Brady Doctrine*, 5 HARV. L. & POL'Y REV. 415, 429 (2011) (noting the rule of law values of stability, uniformity, and predictability).

calibrate the specific duties that attach to state actors who are in relationships of political representation.<sup>80</sup>

Here are some possibilities in the jury context. It may be that the jury system as a whole is a fiduciary; it may be that each petit jury is a fiduciary; or perhaps each individual juror is a fiduciary. The beneficiary could be “the law” or the “legal system” or “the state”; one or the other or both of the litigants; or “the people,” variously understood. Ultimately, our view is that both individual jurors and the petit jury convened for any individual case are fiduciaries, with “the people” being the relevant beneficiary. Let us explain, starting with the relevant beneficiary.

With some reflection, it seems unlikely that the relevant beneficiary is an abstract entity such as “the law,” “the legal system,” or “the state.” In previous work, some have suggested that judicial adjudicators are trustees—or fiduciaries—for the law.<sup>81</sup> One might similarly think the jury or jury members represent the law or the state generally. But that way of specifying the beneficiary seems misguided. Political representation has an important relational dimension that involves a real standing in for other human beings; identifying the beneficiary in such abstract terms—the law, the system, the state—does not serve the core idea that the jury or jurors stand in for other human members of the community.<sup>82</sup> Moreover, a common thread in understanding the jury is that it is a bulwark *against* the state for the liberty of free citizens.<sup>83</sup> The jury

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80. We have identified this issue in recent work, Leib, Ponet & Serota, *supra* note 20, at 93-95 (noting the importance of identifying “the public fiduciary ... the actual beneficiary, and ... the right ways to enforce the constraints of the sui generis fiduciary relationships in the political sphere”), and are currently writing a paper trying to map these relationships, Ethan J. Leib, David L. Ponet & Michael Serota, *Mapping Public Fiduciary Relationships*, in THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew Gold & Paul Miller eds., forthcoming 2014).

81. See, e.g., Sarah M.R. Cravens, *Judges as Trustees: A Duty to Account and an Opportunity for Virtue*, 62 WASH. & LEE L. REV. 1637, 1639-40 (2005).

82. We acknowledge that if one were attracted to the abstract idea that adjudicators represent “the Law,” she might not find the fiduciary model of representation particularly useful.

83. *Johnson v. Louisiana*, 406 U.S. 356, 373-74 (1972) (Powell, J., concurring) (“It is this safeguarding function, preferring the commonsense judgment of a jury as a bulwark ‘against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,’ that lies at the core of our dedication to the principles of a jury determination of guilt or innocence.” (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1967))); *Duncan*, 391 U.S. at 156; THE FEDERALIST NO. 83, at 421 (Alexander Hamilton) (Ian Shapiro ed., 2009); see also 4

“guard[s] against a spirit of oppression and tyranny on the part of rulers”<sup>84</sup> and is essential in facilitating citizen resistance against an overreaching state.<sup>85</sup> Even when the jury is adjudicating a civil case, civil juries make statements about the state’s law when they process and adjudicate the facts. With that mission in view, it seems unlikely that the jury is best conceived of as a fiduciary for the state itself.

Does it, then, make sense to think of the parties to a litigation as beneficiaries of any fiduciary relationship? At first glance, this seems like the most intuitive framing given that the parties are the most directly vulnerable to the exercise of power by jury members. Yet, such a rendering raises complexities of its own. Consider, for example, that a core requirement of a fiduciary relationship is loyalty, and that the parties’ interests are perfectly adverse by design. One might therefore question how a jury or jurors could fulfill that requirement with respect to both parties in a given litigation. And yet, the same types of issues arise in the private law, where large groups of shareholders, whose preferences may collide, serve as the beneficiary of managerial fiduciary obligations. In many of these circumstances, the fiduciary should be even-handed among her adverse beneficiaries.<sup>86</sup> By analogy, one might say the jury is a fiduciary for the parties to a litigation and must be loyal to both and fair between them.

So, then, it does not take too much imagination to envision the litigants as beneficiaries in a fiduciary framing of the jury. But are they *the* beneficiary, that is, a singular and exclusive class of beneficiary unto themselves? Having considered the jury’s broadly representative function,<sup>87</sup> we think that such a conclusion is untenable. The polity as a whole, no less than the litigants to an individual dispute, is subject to the discretionary authority vested in juries; is vulnerable to abuse of such authority; and places

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WILLIAM BLACKSTONE, COMMENTARIES \*342.

84. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1780, at 559 (Melville M. Bigelow ed., William S. Hein & Co. 5th ed. 1994) (1891).

85. See *United States v. Polizzi*, 549 F. Supp. 2d 308, 322 (E.D.N.Y. 2008).

86. See Criddle, *Foundations*, *supra* note 18, at 131; FOX-DECENT, *supra* note 18, at 266 n.9. Consider also the ability of elected politicians to be loyal to large classes of citizens who support opposing political parties.

87. *E.g.*, Lafferty, *supra* note 71, at 487 (noting that jurors are “community representatives”); Re, *supra* note 7, at 1574 (same).

substantial trust, both structurally implied and actually reposed, in the jury.<sup>88</sup> We therefore think the parties to a litigation, rather than being independent beneficiaries, share their beneficiary status with the citizens of the polity; that is, “the people” themselves.

Understanding “the people” as the appropriate beneficiary has many virtues. To start, it reinforces the jury’s traditional role as a counterweight to legislative and common law power in elites and rulers as well as the idea that the jury stands in for the community and enforces the community’s norms.<sup>89</sup> It also facilitates a way to see the jury as standing in a relationship of political representation with the polity’s membership, whose laws are being enforced and tested in a given litigation. This way of identifying the beneficiary respects the relational dimension of political representation and confirms the jury’s channeling of “the people” into the legal system, thereby enabling “the people” to represent themselves in the application of law to individuals. Admittedly, this identification of the beneficiary begs questions about how broadly to delineate “the people.” Is it the people of the district, the people of the region, the people of the state, or the people of the nation?<sup>90</sup> But this is just the question representatives ought to be asking in any given context or trial; “the people” still serves as the relevant orientation for the relational obligation.

Accepting “the people” as beneficiary, who or what is best thought of as the fiduciary? It is difficult to see the jury system as a whole serving as the relevant fiduciary because the jury—as a “mini-legislature”—is supposed to be a stand-in for “the people.”<sup>91</sup>

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88. See *supra* Part II.A.2.

89. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 154-55 (1967) (“A right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government.”); AKHIL REED AMAR, *THE BILL OF RIGHTS* 88-89 (1998) (describing jurors as “provincials”); Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 *IND. L.J.* 397, 398 (2009) (claiming that the “original jury trial right was a community right, not the individual right we currently envision”); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 *NW. U. L. REV.* 877, 904 (1999) (discussing instances in which the jury can “bring their sense of community norms into the process of applying the law to the facts”); William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 *OHIO ST. L.J.* 1003, 1003-04 (2010) (characterizing juror power as the means for the local community to maintain its power to “enjoy to live by their own law rather than the law of some central authority”).

90. In various ways, we have been struggling with this question in previous work. See Ethan J. Leib, *Localist Statutory Interpretation*, 161 *U. PA. L. REV.* 897, 907 (2013); Leib, Ponet & Serota, *supra* note 20, at 93, 95-96.

91. See WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 357 (James Appleton Morgan ed.,



And since the jury system as a whole really does contain nearly all of “the people,” it seems incoherent to characterize the system as the relevant fiduciary. It is also unclear why one should treat the jury system as the relevant entity for fiduciary representation rather than the legal system or judicial system more broadly. In any event, the relational focus of fiduciary principles makes “systems” counterintuitive fiduciaries.

Instead, we might understand *each petit jury* as a fiduciary. These small groups are, after all, the mini-legislatures, serving as the representatives for “the people.”<sup>92</sup> This way of thinking clearly has its benefits: like a board of directors for a corporation, whose interests and shareholders are protected through fiduciary duties, small groups can be considered bound to protect a beneficiary or multiple beneficiaries. Indeed, when plaintiffs sue for a violation of the standard fiduciary duty of care, often they are pitching the relevant fiduciary as the board.<sup>93</sup>

Yet, many plaintiff suits for violations of the core fiduciary duty of loyalty are pitched at the level of an individual director; the relevant fiduciary obligation flows to each member of the board. Similar to the story we have been telling about the beneficiary side of the equation, attention to the relational dimensions of fiduciary-beneficiary dynamics also recommends thinking of each individual juror as a representative, even if it is also true that some fiduciary responsibility flows to the petit jury as a group or panel. For although it is black letter law that the Constitution requires the petit jury to be drawn from a representative sample of citizens,<sup>94</sup> it is almost surely the case that the duties of representation flow to each individual juror. In Part III, we explore the various fiduciary obligations that ought to be imposed on the juries and jurors.

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2d ed. 1994) (1875).

92. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (“[T]he Sixth Amendment comprehended a fair possibility for obtaining a jury constituting a representative cross section of the community.”).

93. *See, e.g.*, *Smith v. Van Gorkam*, 488 A.2d 858 (Del. 1985).

94. *Taylor*, 419 U.S. at 528 (citing *Williams v. Florida*, 399 U.S. 78, 100 (1970)); *Brown v. Allen*, 344 U.S. 443, 474 (1953).

### III. JURIES' AND JURORS' FIDUCIARY OBLIGATIONS

Having established the basic fit of the fiduciary model for juries and jurors in the previous Part, we now explore some practical ramifications. We specify the public fiduciary duties and then translate them for the jury context. From the most basic aspects of jury service, such as selection, impartiality, deliberation, and oaths, to more provocative issues such as jury nullification, note taking, witness questioning, and the jury's ability to be informed about mandatory minimum sentences, the fiduciary model helps address ongoing questions about the jury's institutional design. We proceed first by applying the basic private law fiduciary duties to the jury: the duties of loyalty and care. We then explore the duty of deliberative engagement, a uniquely public fiduciary duty.<sup>95</sup> This Part seeks both to confirm the jury-as-fiduciary model—by looking at current practices and understandings—and to suggest some areas in which we might use the model in service of reform to help jurors better perform their jobs as political representatives.

But first, one clarification: although we do not distinguish much in what follows between criminal and civil jurors,<sup>96</sup> our general model does not change between these contexts, even if the specific applications of the relevant duties might vary modestly by type of jury. This is consistent with how fiduciary law works in private law too: the category and duties supervene and the specific applications of the duties can be variable and calibrated according to context.<sup>97</sup>

#### A. *The Duty of Loyalty*

The core fiduciary duty, applicable to all fiduciaries, is the *duty of loyalty*, a duty of unselfishness. As one commentator has noted, “The keystone of the duty of loyalty is the legal obligation that the

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95. See Leib & Ponet, *Representation*, *supra* note 18, at 188-92; Ponet & Leib, *Deliberative Democracy*, *supra* note 18, at 1256-61; Alec Stone Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization*, 1 J.L. & CTS. 61, 67-68 (2013).

96. For reasons to treat the different kinds of juries separately, see Solomon, *supra* note 4, at 1337.

97. See Leib, Ponet & Serota, *supra* note 20, at 94.

fiduciary use her powers not for her own benefit but for the exclusive benefit of her beneficiary.”<sup>98</sup> The fiduciary is prohibited from self-dealing and is required to pursue the interests of her beneficiary above her own.<sup>99</sup> So “inflexible” is the duty of loyalty that it requires a fiduciary to be “undivided” and “undiluted” in her faithfulness.<sup>100</sup>

Transposing the duty of loyalty from the private law context to the jury requires little imagination. As public fiduciaries, juries convene to serve the interests of the people and are expected to remain faithful defenders of their beneficiaries. This understanding of the jury is nothing new. The Framers, for example, envisioned that juries would function as “centinels and guardians” of the people,<sup>101</sup> and scholars suggest that the jury’s primary function is to protect the polity against “the danger that government officials might attempt to rule in their own self-interest at the expense of their constituents’ sentiments and liberty.”<sup>102</sup> Only a public-interest-oriented jury, focused upon reinforcing the boundaries of limited government against rulers prone to overreaching, will actually be able to fulfill this basic function.<sup>103</sup> A jury focused instead upon

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98. Lynn A. Stout, *On the Export of U.S.-Style Corporate Fiduciary Duties to Other Cultures: Can a Transplant Take?*, in GLOBAL MARKETS, DOMESTIC INSTITUTIONS 46, 55 (Curtis J. Milhaupt ed., 2003).

99. See RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006) (describing a fiduciary’s duty “to act loyally for the principal’s benefit”); RESTATEMENT (SECOND) OF AGENCY § 387 (1958) (describing a fiduciary’s duty “to act solely for the benefit of the principal in all matters connected with his agency”).

100. *Birnbaum v. Birnbaum*, 539 N.E.2d 574, 576 (N.Y. 1989).

101. *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican*, in 2 THE COMPLETE ANTI-FEDERALIST 214, 50 (Herbert J. Storing ed., 1981) [hereinafter *The Federal Farmer*].

102. AMAR, *supra* note 89, at 82.

103. Although the underlying agency cost of representative government may be part of why we have a jury system, agency costs are also inherent in the very use of representatives, as the jury system does. By using one set of representatives (in the jury) to protect against another set of representatives (in the three branches of government), the precise risk of overreaching that jury rights are intended to check against are at risk in the execution of jury service. For wherever discretion over the interests of another has been delegated to an individual—even if that discretion was delegated for the purposes of monitoring an earlier delegation—there is the potential for abuse. See *id.* (describing this issue with regard to English judges of the star chamber). Any individual juror can abuse the power of her office to extort money or some other resource from those subject to her authority. Individual jurors, accordingly, are understood to be bound by a similar obligation of loyalty to those whose loyalty they are charged with policing.

furthering the material self-interest of its constituent members, or the partial interests of groups, is unlikely to cultivate the watchdog role at the core of the jury system's design.<sup>104</sup> Juries, accordingly, are already understood to be bound by an obligation of loyalty to their beneficiaries.<sup>105</sup>

One can see further evidence of the duty of loyalty in the jury's commitment to impartiality. Jury selection procedures reveal the seriousness with which impartiality must be pursued; discernible prejudice, pre-judgment, and/or a close personal stake in the matter to be adjudicated can all be predicates for the disqualification of a juror. "Challenges for cause" highlight the centrality of impartiality to the jury process. Even peremptory challenges—as long as they are not exercised in a prejudicial manner—contribute to the commitment to impartiality as we allow each side to a dispute to disqualify jurors that they think cannot fairly judge them. Ultimately, various conflict-of-interest checks control entrance to a jury as one would expect of new fiduciaries. Impartiality is reinforced not only through oaths upon being seated, which require jurors to behave in an unbiased fashion without fear or favor,<sup>106</sup> but it is also structurally ensured through mandatory service<sup>107</sup> and a "fair cross-section" requirement.<sup>108</sup>

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104. Jurors, accordingly, should *not* be understood to "act as spokespersons for competing group interests ... inevitably favor[ing] their own kind and vot[ing] according to narrow group loyalties." JEFFREY ABRAMSON, *WE, THE JURY* 8 (1994). Rather, the jury should be a site of communally situated rational discourse in which partial interests are filtered out. *Id.* at 8, 102.

105. *See, e.g., id.* at 8.

106. The actual words of the juror oath vary by jurisdiction, but all we have seen foreground the juror's need to be impartial and unconflicted. *See, e.g.,* OHIO REV. CODE ANN. § 2945.28 (West 2006) (criminal oath).

107. Fiduciary roles tend to be voluntary relationships rather than coerced ones. But in the case of the juror, the fiduciary role is forced upon citizens. *See* 28 U.S.C. §§ 1861-69, 1871 (2006). Mandatory service helps execute the vision that the jury as a body must be impartial and "loyal." If the jury system allowed only volunteers, it would not be able to guarantee impartiality in the same way. The imperfect fit on the mandatory service issue is similar to the imperfect fit of parents as fiduciaries, who also do not really get an opt-out. *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995) (developing a model of parents as fiduciaries that "best reduce[s] conflicts of interest within the parent-child relationship").

108. *See* Sanjay K. Chhablani, *Re-Framing the 'Fair Cross-Section' Requirement*, 13 U. PA. J. CONST. L. 931, 942-45 (2011) (discussing the development of the "fair cross-section requirement").

Having observed the extent to which the fiduciary duty of loyalty describes existing jury practices, we now consider its prescriptive import. The fiduciary duty of loyalty may have something important to say about the controversial jury practice of “nullification.” Judges acknowledge that juries in both the criminal and civil contexts sometimes ignore instructions, fail to apply the law in a technically accurate way, or bend it to their will in order to effectuate their sense of justice.<sup>109</sup> At first glance, such actions seem to contradict the juror’s duty of loyalty insofar as they amount to a *partial* application of the people’s law. However, careful scrutiny reveals a more complicated picture.

As a counterforce against overly harsh laws or overzealous prosecutors whose actions transgress the people’s sense of justice, one can view jury nullification as a kind of fiduciary check on the administration of justice. In the words of Judge Learned Hand, the jury “introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions.”<sup>110</sup> General statutes and rules may not serve beneficiary interests at the retail level. And the act of jury nullification may serve to channel loyalty to the public interest by conforming to the ethical intuitions of the people. Historically, this has meant that juries sometimes ignored the Fugitive Slave Act or refused to issue guilty verdicts during Prohibition, just as today they may selectively apply drug laws they perceive as unfair.<sup>111</sup> When a jury’s decision emanates from jurors’ commitment to being loyal to the public interest, nullification, rather than controverting fiduciary principles, may actually effectuate them.<sup>112</sup>

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109. See Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249, 1258-62 (2003) (recounting examples of jurors arguably disregarding the law); Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1622 (2001) (“[J]udges concede that juries occasionally ignore instructions.”).

110. United States *ex rel.* McCann v. Adams, 126 F.2d 774, 776 (2d Cir. 1942), *order set aside by* 317 U.S. 269 (1942), *stayed by* 63 S. Ct. 442 (1943).

111. Noah, *supra* note 109, at 1619.

112. The institution of the jury may have an educative function that reinforces loyalty in other domains of citizenship too. John Gastil has been leading path-breaking empirical research on the subject, studying the effects of the jury on its participants and their political life more generally. For a sampling of the papers published and forthcoming from his “The Jury and Democracy Project,” see *Writings*, THE JURY AND DEMOCRACY PROJECT, <http://www.la1.psu.edu/cas/jurydem/writings.html> (last visited Jan. 29, 2014). Seeing the jury

### B. *The Duty of Care*

The second basic fiduciary duty is the *duty of care*,<sup>113</sup> requiring of fiduciaries reasonable diligence and prudence.<sup>114</sup> Unlike the prohibitive duty of loyalty, the duty of care creates the affirmative obligation to employ reason-based decision making.<sup>115</sup> Yet, fiduciaries are provided substantial discretion in executing their role responsibilities; the “business judgment rule” grants a wide berth of freedom within the duty of care analysis.<sup>116</sup>

It is not hard to apply the duty of care to jurors and juries as fiduciaries. The idea that juries ought to fulfill their responsibilities with reasonable diligence and prudence is part and parcel of the conventional understanding of the jury. We expect jurors to engage in reasoned decision making through careful consideration about the cases before them. Juries are specifically authorized to resolve disputes between litigating parties and they are required to execute that job with care. Although litigants are not the direct beneficiaries of juries,<sup>117</sup> they are often indirect recipients of the command that juries resolve cases fairly and are the ones with standing to challenge the jury’s work.

Jurors do not simply vote on matters before them. Rather, they *deliberate* about what course of action to take individually and as a group. A jury might be able to avoid deliberating if it is hell-bent on refusing,<sup>118</sup> or it may achieve unanimity or the relevant supermajority on the first poll. But people widely assume and

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as educative goes back at least to de Tocqueville: “[T]he jury is both the most effective way of establishing the people’s rule and the most efficient way of teaching them how to rule.” DE TOCQUEVILLE, *supra* note 1, at 276.

113. See *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (defining duty of care in the context of corporate directors); see generally ROBERT CHARLES CLARK, *CORPORATE LAW* 123-36 (1986).

114. See Scott & Scott, *supra* note 107, at 2420 & n.66.

115. See *Bayer v. Beran*, 49 N.Y.S.2d 2, 5 (N.Y. Sup. Ct. 1944); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1047, 1049 n.8, 1062 (1991).

116. See Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 88-100 (2004) (exploring the latitude the business judgment rule provides corporate directors); Scott & Scott, *supra* note 107, at 2423-24.

117. See discussion *supra* Part II.

118. *But see Allen v. United States*, 164 U.S. 492, 501-02 (1896) (allowing judges to charge a deadlocked jury with a firm instruction to work toward a verdict through deliberation).

strongly desire that the vast majority of actual juries engage in some measure of reasoned deliberation. Indeed, some argue that the unanimity rule, in effect in forty-eight state criminal court systems and the federal court system,<sup>119</sup> conduces to and incentivizes deliberation.<sup>120</sup> In civil trials, only twenty-one states still require unanimity as a general matter, but the remainder require a supermajority to agree to a verdict as an attempt to ensure active deliberation.<sup>121</sup> Deliberation is essential to meeting a jury and juror's duty of care, and courts employ various design strategies to ensure it.<sup>122</sup>

The jury system is also structured to facilitate deliberation by stipulating for and enforcing juror secrecy and privacy.<sup>123</sup> Although some fiduciaries in private law are subject to duties of candor, disclosure, and accounting,<sup>124</sup> jury members are actually insulated from disclosure and accounting in order to make sure they execute their core task with diligence and care: the duty of care is more foundational in the constellation of fiduciary duties, and some protection from disclosure is necessary for the system to function properly.<sup>125</sup>

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119. Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 203 (2006).

120. See, e.g., REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 228-29 (1983).

121. Diamond et al., *supra* note 119, at 203 (reporting jury verdict requirements across the nation). For an argument that one could achieve deliberation in the jury without the symmetrical unanimity requirement (unanimity required for *both* conviction or acquittal) and, indeed, that the symmetrical unanimity requirement may be inimical to deliberation, see Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L.Q. 141, 168-93 (2006). For an exhaustive survey of the jury decision rules throughout the United States, see U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, STATE COURT ORGANIZATIONS, 233 tbl.42 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf>. For some comparative data, see Ethan J. Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 OHIO ST. J. CRIM. L. 629 (2008).

122. Though more strategies are potentially available, such as requiring a jury to wait several hours before issuing any verdict.

123. Consider Justice Cardozo: "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark v. United States*, 289 U.S. 1, 13 (1933).

124. See Leib, Ponet & Serota, *Judging*, *supra* note 18, at 738-40.

125. Just like legislators have some immunity to engage in fulsome debate through the "speech or debate clause," see U.S. CONST. art. I, § 6, cl. 1, juror fiduciaries get some immunities to protect their core job of deliberation.

We also know well that juries have a wide berth of discretion, consistent with a translation of the “business judgment rule,” applied to jury business. The business judgment rule is often thought to exist to enable risk-taking by a corporation’s management.<sup>126</sup> But there is a corollary with the jury, too: nullification and the finality of jury verdicts enable forms of legal risk-taking. Although judges generally review matters of law de novo—and jury verdicts, other than criminal verdicts of acquittal, of course, can be subject to post-verdict review for a narrow band of reasons—juries wield tremendous discretion and command substantial deference, consistent with what courts traditionally permit within the duty of care analysis.

The duty of care not only confirms the juries-as-fiduciaries model, but it also sheds light on some controversial prescriptions. To the extent that allowing juror note taking and allowing posing of questions to judges and witnesses remains controversial,<sup>127</sup> the account here would seem to be a modest thumb on the scales in favor of these prerogatives to help jurors execute their paramount duty of care with the diligence it warrants.<sup>128</sup>

### *C. Deliberative Engagement*

Public and private fiduciaries do not have identical fiduciary obligations. Private and public fiduciaries share the duties of loyalty and care we have just explored. But public fiduciaries also have

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126. David Rosenberg, *Supplying the Adverb: The Future of Corporate Risk-Taking and the Business Judgment Rule*, 6 BERKELEY BUS. L.J. 216, 217-18 (2009).

127. Some jurisdictions find these to be essential tools for juries, see California Rules of Court, Rules § 2.1031, § 2.10033, but virtually all jurisdictions will permit some of these tools to be used at the discretion of the trial judge, see AM. JUDICATURE SOC’Y, *Note Taking Statutes*, <http://www.ajs.org/judicial-administration/jury-center/jury-system-overview/jury-improvement-efforts/improving-trials/permitting-juror-note-taking/notetaking-statutes/> (last visited Jan. 29, 2014). Analysis of the support and opposition to these propositions, including some empirical data on the use of these tools, can be found in Mark A. Frankel, *A Trial Judge’s Perspective on Providing Tools for Rational Jury Decisionmaking*, 85 NW. U. L. REV. 221, 225 (1990); Larry Heuer & Steven D. Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256 (1996); Larry Heuer & Steven Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury* 85 NW. U. L. REV. 226 (1990); Smith, *supra* note 1, at 567-78.

128. For some recent discussion about the desirability of these tools, see Nancy S. Marder, *Two Weeks at the Old Bailey: Jury Lessons from England*, 86 CHI.-KENT L. REV. 537, 564-70 (2011) (finding these tools have been insufficiently adopted in the United States).



what we have elsewhere called a duty of deliberative engagement, rooted in dialogic imperatives implicated by fiduciary law but not strictly required of private law fiduciaries.<sup>129</sup> In prior works, we have described the duty of deliberative engagement as an affirmative obligation to engage in dialogue with the public fiduciary's beneficiary.<sup>130</sup> We have argued that the dialogic duty requires an effort to pursue a meaningful understanding, and concomitant consideration, of beneficiary preferences because fiduciaries are too likely to assume identity between their own interests and their beneficiaries' interests without actually consulting their beneficiaries.<sup>131</sup> Although the public fiduciary is authorized to act in place of beneficiaries—and to deploy her special expertise to stand in for beneficiaries—one of the duties of public fiduciary representation in a democracy is to remain responsive to one's beneficiaries by always keeping their best interests in view. And because any claim to fiduciary responsiveness demands, at the very least, due consideration of beneficiary preferences, public fiduciaries are obliged to solicit those preferences through a dialogic process of deliberative engagement. This duty has been applied to executive, legislative, and judicial state actors in other work,<sup>132</sup> and it is worth asking if there is any application to jurors or juries as state actors.

At first glance, many well-established features of the jury system seem in tension with the public fiduciary's duty of deliberative engagement. Juries, though rarely fully sequestered from society, are routinely instructed not to talk to members of the public about the details of the cases they hear until after the verdict, and they are often told explicitly that they may not use the Internet to do research.<sup>133</sup> Moreover, jurors are sometimes chosen precisely

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129. Leib, Ponet & Serota, *Judging*, *supra* note 18, at 740-52.

130. See Ponet & Leib, *Deliberative Democracy*, *supra* note 18, at 1256-57 (“[E]lected rulers or legislators must deliberatively engage the ruled on account of the fiduciary status in their unequal relationships with the beneficiaries.”); Leib & Ponet, *Representation*, *supra* note 18, at 190 (“[T]he fiduciary ... should actually talk with real constituents to the extent feasible to get a clearer sense of the interests she is supposed to be vindicating.”).

131. See Ponet & Leib, *Deliberative Democracy*, *supra* note 18, at 1256.

132. See *supra* note 18.

133. See, e.g., PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (Dec. 2009), available at <http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf>; Herbert B. Dixon, Jr., *Guarding Against the Dreaded Cyberspace Mistrial and Other Internet Trial Torpedoes*, *JUDGES' J.*, Winter 2010, at 37, 39; Marder, *supra* note 128, at 572-73.

because they have not been inundated with public opinion about a trial and, in fact, possess a desired level of ignorance about the world around them.<sup>134</sup> Thus, contrary to earlier applications of this public-oriented duty, an *absence* of deliberative engagement—rather than an affirmative dialogic imperative—lies at the heart of jury practice.

And yet, a consideration of the relational nature of fiduciary obligation suggests that a modified duty of deliberative engagement, calibrated according to the particularities of jury representation, might be a useful way to think through some jury practices and reform opportunities. At the outset, figuring out precisely how to design the right constraints and manifestations of the relevant fiduciary obligations for each kind of fiduciary is complex work. Fiduciary theory, both public and private, recognizes that relational differences between different fiduciary relationships compel variance in the application of the relevant duties.<sup>135</sup> For this reason, the duties agents owe to principals differ from those trustees owe to beneficiaries, and, more generally, the duties of public fiduciaries differ from those of private fiduciaries.

Similarly, the public fiduciary duty of deliberative engagement does not apply seamlessly across government actors. The citizen representative on the jury is embedded in an institution that needs to perform its primary duties of loyalty and care first and foremost, which, in the context of the jury trial, limits the duty of deliberative engagement to a form not as robust and bilateral as might be applied to democratically elected representatives. To get the kind of deliberation we want out of the jury, focused principally on the facts and law before it, it would not make sense to have too much direct contact between public opinion and the jury. A narrower duty, one that ensures the steady flow of material information into the jury room and facilitates clear juror pronouncements outwards, may nonetheless be appropriate.

To be sure, common practices already exist in the courtroom that are plausible approximations of this narrow duty of deliberative engagement: oral arguments by litigants' attorneys, which are wide-

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134. See, e.g., Fred H. Cate & Newton N. Minow, *Communicating with Juries*, 68 IND. L.J. 1101, 1103-05 (1993).

135. See Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 432-34 (1993).

ranging and may draw on community-oriented factors; narrative construction through the trial process; courtrooms open to the public; court-furnished jury instructions on the law; public decisions; special verdicts; and liberal standards for amicus curiae participation. These common practices validate and vindicate the jury's role as a fiduciary subject to the dialogic imperative, with information and deliberation flowing both into the jury's deliberation and outward to other state actors who must use jury decisions as input into further policy making.<sup>136</sup>

That some well-established jury practices reflect a duty of deliberative engagement is not to say, of course, that they all do. Design ramifications can still be drawn from this duty to help reform jury law. In a recent article, for example, former judge Nancy Gertner argues that it is important to provide jurors with more information on mandatory sentencing to give "intelligible content" to the jury function and to enable the jury to perform its task better by aligning punishment with community norms.<sup>137</sup> This seems like a proposal amenable to support through the jury's duty of deliberative engagement. Moreover, proposals to allow more post-verdict information gathering by litigants' attorneys and others seem like moderate ways to permit better information flow about whether jurors are, in fact, executing their other obligations well.<sup>138</sup> Even with some imposition on "finality" and some modest "chilling effect" on juror deliberations with additional disclosures about what is going on in the "black box" of the jury, the fiduciary model of the jury does highlight that some better bonding and monitoring between the people and the jury may be necessary.

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136. As we have shown elsewhere, the judge represents "the people" too and will be able to promote some deliberative engagement with relevant beneficiaries through her interactions with judicial peers, other branches, the public, and the jury itself. See Leib, Ponet & Serota, *Judging*, *supra* note 18, at 747-50.

137. Nancy Gertner, *Juries and Originalism: Giving "Intelligible Content" to the Right to a Jury Trial*, 71 OHIO ST. L.J. 935 (2010).

138. See, e.g., RULE REG. FLA. BAR 4-3.5(d)(4) (2013); *Haeberle v. Tex. Int'l Airlines*, 739 F.2d 1019 (5th Cir. 1984); Craig B. Willis, *Juror Misconduct: Balancing the Need for Secret Deliberations with the Right to a Fair and Impartial Trial*, 72 FLA. B.J. 20, 24 (1998); Benjamin M. Lawskey, Note, *Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and Its Verdict at the Expense of the Defendant*, 94 COLUM. L. REV. 1950 (1994) (proposing a model rule requiring judges to poll jurors with a series of questions to elicit evidence of any misconduct). For some critical notes on post-verdict revelations about jury deliberations, see Marder, *supra* note 128, at 556-61.

Relatedly, in previous work we have similarly argued that the judicial branch might utilize an ombudsperson's office to communicate with the public about judicial opinions that the average member of society could not otherwise understand in order to reinforce deliberative engagement from judge to the people.<sup>139</sup> The judicial branch could also utilize an ombudsperson's office to summarize jury findings for citizens in an easy-to-digest format. The average researcher—let alone the average citizen—cannot easily access knowledge about what is happening within jury trials. An ombudsperson's office could help make sure the jury and jurors keep in view that their work will be disclosed to their beneficiaries and therewith help them anticipate and think through their beneficiaries' interests better. Such disclosure would also help juries of the future understand how previous disputes were adjudicated in similar cases.

Finally, the duty of deliberative engagement may have something to say about the phenomenon of jury nullification, which serves not only to rein in the excesses of officials in all three branches but also constitutes an important signal to legislators that a law may be in need of alteration.<sup>140</sup> To wit, the jury system, although routinely discussed as a mechanism to adjudicate factual rather than legal or value questions, generates important general judgments about the law and values. Kalven and Zeisel's famous book on the American jury traced a series of value judgments made by juries: excusing defendants for the contributory fault of a victim (when it is not a legal excuse);<sup>141</sup> excusing defendants because the harm caused was *de minimis* (even when the law recognizes no *de minimis* exception);<sup>142</sup> excusing defendants because they are being subjected to unpopular laws;<sup>143</sup> excusing defendants because they have already been subjected to enough punishment;<sup>144</sup> considering

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139. See Leib, Ponet & Serota, *Judging*, *supra* note 18, at 743; Michael Serota, *Intelligible Justice*, 66 U. MIAMI L. REV. 649, 663-65 (2012). For a meditation on the dearth of public legal knowledge and the implications this has for our constitutional order, see Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. 1637 (2012).

140. Noah, *supra* note 109, at 1624.

141. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 242-57 (1966).

142. *Id.* at 258-85.

143. *Id.* at 286-97.

144. *Id.* at 301-05.

that the punishment for a conviction is too severe;<sup>145</sup> excusing defendants because other defendants are getting preferential treatment;<sup>146</sup> excusing defendants for improper conduct by the police (when such conduct is not a legal excuse);<sup>147</sup> and treating crime in subcultures differentially by applying standards appropriate (or inappropriate) to different cultural contexts.<sup>148</sup> These general political and legal judgments, in turn, filter to prosecutors and lawmakers, thereby influencing executive and legislative policy. From this perspective, then, the practice of jury nullification might be viewed as a form of deliberative output produced by citizen representatives regarding popular judgments on existing laws.<sup>149</sup>

#### *D. Is Juror Fiduciary Obligation Sufficiently Juridical?*

Having discussed the relational similarities between jurors and private law fiduciaries and specified the application of fiduciary duties to these citizen representatives, we pause to address an apparent quirk with the private-to-public translation. The jury-as-fiduciary model may read oddly because it seems to be a central feature of fiduciary *law* to create causes of action or credible threats of causes of action for *judicial* enforcement of fiduciary duties.<sup>150</sup> One traditionally thinks of fiduciary principles as *judicial* ones, which imposes judicially enforced duties upon fiduciary representatives. Yet, jurors are conventionally immune from civil liability for acts taken within the jury.<sup>151</sup>

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145. *Id.* at 306-12.

146. *Id.* at 313-17.

147. *Id.* at 318-23.

148. *Id.* at 339-44; *see also* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES 341 (2007) (finding that members of the general public, and thus juries, hold corporate actors to higher standards “because of their greater knowledge, resources, and potential for impact”).

149. Of course, because verdict forms do not contain a box for “nullification,” policymakers must interpret jury results over time.

150. *See generally* Paul B. Miller, *Justifying Fiduciary Remedies*, 63 U. TORONTO L.J. 570 (2013).

151. *See, e.g.*, *Bushell’s Case*, [1669] 124 Eng. Rep. 1006 (C.P.) 1009 (representing a canonical case holding that jurors cannot be prosecuted for their verdicts, and establishing one source of authority for the power of nullification); *see also* *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976) (grand jurors are immune); *White v. Hegerhorst*, 418 F.2d 894, 895 (9th Cir. 1969) (holding that jurors enjoy a version of judicial immunity); *Turpen v. Booth*, 56 Cal. 65, 67 (1880) (“No grand juror shall be held liable for damages.”).

The lack or unavailability of judicial enforcement of juror fiduciary duties need not be viewed as a stumbling block, however. Fiduciary *principles* are not solely juridical constructs. Rather, they derive from a more basic architectural insight about certain power relationships and their need for scaffolding to guard against excessive overreach or predation in the exercise of discretionary power. Judicial review is just one way—among other efforts at institutional design—to signal and frame the more basic moral norms that ought to guide the relationship. As others have noted, large-scale compliance with private fiduciary obligations is common because the relevant norms can and do function without judicial micromanagement.<sup>152</sup> Fiduciary law is, of course, designed to intervene in cases of substantial default; yet imperfect enforcement may, in fact, be desirable because, as many have assumed, fiduciary relations would fail with excessive judicial meddling.<sup>153</sup>

Even without direct civil actions against jurors and juries, however, it is possible to “enforce” fiduciary constraint among jurors in a manner. Impeaching verdicts is, of course, possible for large defaults of juror obligations,<sup>154</sup> and judges have supervisory authority over the work of the jury, which helps keep members focused on their tasks. The press helps oversee jury work, too.<sup>155</sup> Moreover, jurors can be disqualified or challenged for cause,<sup>156</sup> which helps ensure the jury-as-fiduciary model is more than mere rhetoric. Ultimately, the jury-as-fiduciary model both frames and helps orient our most immediate practice of deliberative and participatory democracy, which also—as with most democratic practice—relies on representatives with a lot of discretion. These citizen representatives, like any other political representative, need ethical guidelines so as to exercise their power with care and in the service of the best interests of the polity, regardless of whether those guidelines are universally enforceable by judges.

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152. See Stout, *supra* note 98, at 47-48, 65.

153. See Leib & Ponet, *Representation*, *supra* note 18, at 192.

154. See James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 ST. JOHN'S L. REV. 389, 406-12 (1991).

155. See Robert J. MacCoun, *Media Reporting of Jury Verdicts: Is the Tail (of the Distribution) Wagging the Dog?*, 55 DEPAUL L. REV. 539, 542-45 (2006).

156. See, e.g., FED. R. CIV. P. 47; FED. R. CRIM. P. 24.

## CONCLUSION

As an institution deeply woven into the fabric of popular governance, the American jury is a central site for political representation: the political representation *of* citizens *by* citizens. Just as the practice of political representation by elected and appointed officials raises numerous questions about the nature of the relationship between ruler and ruled and the various agency costs associated therewith, the jury occasions similar questions about the relationship between the governed and their governors. We continue to need better ethical frameworks to analyze, evaluate, and guide these relationships of vulnerability and power.

Many scholars have come to agree that the challenges of representation that appear in the public governance context share attributes with parallel difficulties in private law relationships. When representation can be characterized by some quantum of three indicia—discretionary power, trust, and vulnerability—the private law identifies these relationships as fiduciary and prescribes stringent duties to keep fiduciaries loyal to, caring of, and engaged with the interests of their beneficiaries. As we have explored here, these three relational characteristics are present in the relationship of democratic political representation generally and the jury specifically. What is more, the fiduciary duties that attach to the private fiduciary help frame the duties that representatives in the public domain owe their beneficiaries, the people. Casting juries as fiduciaries contributes to debates about how juries and jurors should comport themselves within the criminal or civil justice system as well as to the broader discussion of the place of the jury within the American architecture of representative democracy.