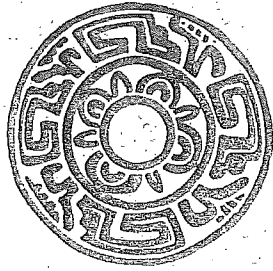


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FURTHER AFFIRMATIVE ACTION STRATEGIES  
FOR RACIAL AND ETHNIC EQUALITY IN THE  
JURY SYSTEM: THE CASE STUDY OF THE  
EUGENE "BEAR" LINCOLN TRIAL AND THE  
NATIVE AMERICAN JURY

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Working Paper No. 22  
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THE CASE STUDY OF THE EUGENE "BEAR" LINCOLN TRIAL AND THE NATIVE  
AMERICAN JURY

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## ABSTRACT

This article examines possible applications of two affirmative action strategies in jury selection -- affirmative jury structures and affirmative peremptory inclusion -- in order to create racially mixed juries. I contend that, with the use of affirmative jury structures such as de medietate linguae jury, the Hennepin jury, and social science models, the court can effectively design three specific forms of racially mixed tribunals by requiring varying mandatory racial quotas to ensure the allocation of jury seats to racial minorities.

Affirmative peremptory inclusion is a procedural jury selection strategy in voir dire to neutralize the biasing effect of race-based peremptory challenges so that a racially mixed jury is achieved through affirmatively choosing, rather than peremptorily excluding, potential jurors who share the same racial and ethnic background as the defendants. In order to illustrate the importance of affirmative jury selection structures and peremptory inclusion, this paper specifically focuses on People of the State of California v. Eugene "Bear" Lincoln (no. c12632), the recent criminal trial and racially explosive case that received extensive national attention and international media coverage. The present author participated in the Lincoln trial as a defense jury consultant in assessing the extent of racial discrimination in jury selection at Mendocino County Superior Court, California. The critical analysis of the Lincoln case demonstrates that racially diverse tribunals may be the only effective and equitable solution to increase public's perceptions of trial fairness and verdict legitimacy in racially sensitive trials.

## AFFIRMATIVE ACTION JURIES

In the eyes of many marginalized segments of the community, an all white jury that convicts and sentences a racial minority defendant or acquits a white defendant against overwhelming evidence of his guilt is deeply disturbing. The fact that a jury is all white has the powerful effect of racializing the jury proceeding. Even in earlier times in the south, following the Civil War, a series of the similar atrocities continued in the Ku Klux Klan's epidemic of violence against blacks and white Republicans, and lynching frenzy has gone unpunished by all white juries.[1] "It is notorious that practically never have white lynching mobs been brought to court in the South, even when the killers are known to all in the community and are mentioned in name in the local press," Gunnar Myrdal's 1944 work on race relations once declared (Myrdal, 1944, pp.552-553).

Despite the history of racially discriminatory practices and distorting influences of all white juries in convicting and sentencing racial minority defendants in the Deep South, the American jury also had the long history of instituting and utilizing the race-conscious system to create racially heterogeneous tribunals to try the minority defendant (Ramirez, 1995). In the Northeast coast of America, from the early Sixteenth century to the beginning of the Twentieth century, the affirmative strategy to create racially mixed juries had been both recognized and tried (Oldham, 1998). One consistent feature of the affirmative use of jury selection over more than three centuries had been that most criminal trials involved racial minority victims; and the perceived fairness of the jury verdicts were considered to be an important element for maintaining peace in the local community. A large number of the affirmative jury involved Native American defendants because strong animosity and racial hostility against the Native Indians continued to exist within the white community. Such jury trials adhered to features similar to today's use of race-conscious affirmative action in jury selection and those trials securing half of the jury seats for the members of racial minorities (Ramirez, 1994).

Natives' jury participation was not unique in North America, but was found in other British colonies as well. When the criminal case involved European or American defendants, the Barbados court allowed a racially mixed tribunal that included up to six European or American jurors in the twelve-member jury. The Nigerian courts also relied on the affirmative jury in criminal cases with non-native defendants. The racially mixed jury in Gold Coast and North Borneo similarly permitted the majority participation of non-native jurors in criminal cases involving non-native defendants (Brown, 1995, p. 115, pp.150-152; see generally Ramirez, 1995). As recent as the early 1970s, petit and grand juries in Okinawa were also made up of both Americans and Japanese-Okinawans to adjudicate both civil and criminal matters. Racially mixed juries were considered to be an important element of increased public awareness and respect in the administration of justice in Okinawa (Fukurai and Krooth, 1998).

From English colonial times in 1671 up until 1911, in North America, the right to a racially mixed jury was also recognized in Massachusetts, Pennsylvania, New York, Virginia, South Carolina, and Kentucky (Ramirez, 1994, p.790).[2] In 1675, for instance, when the Plymouth court tried three Native Indians allied with King Philip and accused of murdering an Indian named John Sassamon, the jury of Englishmen and six Indians jointly adjudicated the case, sentencing the defendants to death (Kawashima, 1986, p. 131; Ramirez, 1994). The colonial courts in the Seventeenth and Eighteenth centuries also frequently relied on the use of split juries composed of Indians and white colonists (Kawashima, 1986).

After Independence, in 1788, Thomas Jefferson also recognized both the need for peace with Native Indians and the practice of racially mixed tribunals, stating in the letter to James Madison, that "[i]n disputes between a foreigner and a native, a trial by jury may be improper. But if this exception cannot be agreed to, the remedy will be to model the jury, by giving affirmative jury selection, in civil as well as criminal cases" (Koch & Peden, 1944). In theory, then, Jefferson advocated the affirmative use of jury selection in both

civil and criminal cases, and earlier American courts relied on the racially mixed jury to adjudicate the criminal case involving Native American defendants.

Today, strong resentment and hostility against the Native Americans still exist (Cross, 1998). Racial discrimination against the Indian population is found in the marketplace for employment, housing, and business as well as institutionally through law enforcement and the judicial system (Martella, 1994; Baca, 1997). When a trial involves a Native American defendant accused of killing a white person and the minority defendant is tried by an all white jury, the minority community often questions the legitimacy of jury deliberations and verdicts.

This paper explores the possible application of specific affirmative action strategies in jury selection -- affirmative jury structures and affirmative peremptory inclusion -- to create racially mixed tribunals and examines perceived legitimacy and integrity of jury deliberations and verdicts in a criminal case that involves an unmistakable element of racism. In order to illustrate the importance of the affirmative action strategy to achieve the racially diverse jury in a racially sensitive trial, this paper specifically focuses on People of the State of California v. Eugene "Bear" Lincoln (no. c12632), the recent criminal trial which received extensive national attention and international media coverage. Accused of murdering a white police officer on an Indian reservation of Mendocino County, California, Bear Lincoln's trial touched on both tangible and unmistakable elements of racism. The case was racially charged from its beginning -- the minority defendant arguing that he was ambushed by two white deputies, while the police maintained that one of the officers was shot by the defendant when trying to escape. The community residents' perception of the potential verdict was also split along racial lines, the overwhelming majority of white jurors believing the defendant guilty, while the same proportion of Native Americans felt that the defendant was either probably or definitely not guilty. During jury selection, the prosecution's peremptory challenge eliminated all Native Americans in the



jury pool, the defendant was tried by the all white jury, and the white jury's verdicts of part acquittal and part deadlock angered both white residents and Native Americans.

In the first section of this paper, the focus is placed on the historical evolution of the interracial hostility between the white and American Indian communities, providing detailed analyses of the case background. The second section reviews and examines defense counsel's pre-trial strategies to increase the likelihood that Native American jurors would be present on both the master lists and the jury panel. Defense strategies clearly faced logistical problems as well as limitations of traditional jury selection procedures in creating racially diverse juries, because the Court has expressed reluctance, refusing to consider the merit of affirmative selection methods in general, yet concentrating on the unacceptability of the prosecution's exercise of racially based peremptory challenges.

The third section explores the specific application of two affirmative action strategies: (1) affirmative jury structures with mandated uses of racial quotas to ensure the jury seat allocation for racial minorities, and (2) affirmative peremptory inclusion as an effective voir dire strategy in affirmatively choosing, rather than peremptorily excluding, potential jurors who share the same racial and ethnic background as the defendants. The final section of this paper discusses how affirmative action policies in jury selection require less time for voir dire, illustrating greater flexibility of the inclusive approach than the traditional exclusive approach of peremptory challenges in jury selection.

The critical analysis of the Lincoln case and affirmative strategies for creating racially diverse juries illustrate that affirmative action in jury selection, with the use of mandated racial quotas and peremptory inclusion, may be the only effective and equitable solution to decrease the public's mistrust of jury verdicts rendered by the single race jury, as well as to increase communities' perceived legitimacy of jury trials, their deliberations, and verdicts.

### Trial Backgrounds:

This case is a bitter reminder that racial hatred and discrimination still haunt the landscape of race relations in the U.S. The case demands attention to the police state that prevails on Indian reservations and Native Americans' quest for justice. Eugene Allon "Bear" Lincoln, a Wailaki Indian from the Round Valley Indian Reservation, Mendocino County, California, was accused of killing Deputy Sheriff Bob Davis in April, 1995.

What happened on the lonely road of the Indian reservation on the night of April 14, 1995 may never be known for certain. What is known is that a series of three fatal shootings left two Native Americans and a white deputy sheriff dead, resulting in an intensive manhunt for the alleged "cop" killer, as well as charges of a police cover-up, and civil rights violations against the residents of the Round Valley Indian Reservation, one of ten federally recognized Native American reservations in Mendocino County. To fully understand the impact of the incident on the Indian community and its relationship to reservation law enforcement, it is necessary to put local reservation life in historical perspective.

Due to differing levels of associations with the outside white community, two main factional groups exist within the Indian community in Mendocino: Traditionalists and assimilationists. Traditionalists, many of them educated and returned to live in the community, are more interested in striving to preserve and restore traditional cultures, assert tribal sovereignty and political self-determination, and attain economic and social independence from outside white communities. As leaders in the traditionalist movement in the reservation, Bear Lincoln, his wife Edna, and his cousin Pat Lincoln were considered instrumental in reviving traditional culture and religious practices. On the other side were assimilationists who were connected with the Christian church and integrated into the local non-Indian, white community. Local police had more frequent and friendlier contacts with the assimilationists; and traditionalists felt that the general white community in the county favored assimilated Indians much more than traditional groups of Native

Americans who continuously sought political and economic self-determination for the reservation.

The law enforcement officials' differential treatment was evidenced in the handling of family members of Richard Allen Davis, whose name was later known nationally and internationally as the abductor and killer of Polly Klaas. Before his arrest, Davis was staying with his sister and her family in a home rented from a tribal member on the Coyote Valley Reservation in Mendocino County. After the alleged drug dealing and other misbehavior by Davis and his sister on the reservation, traditionalist members on the reservation tried in vain for two years to stop the drug-related activity. They reported numerous times to both local and federal police, and tried to evict her and her family from the Indian reservation. The local police, however, never responded to the calls or attempted to question or investigate them. It was only after the arrest of Richard Allen Davis that the FBI removed his sister and her family from their home for questioning, so that investigations of drug activities and a search for illegal substances could take place (Goldberg-Ambrose, 1977, p.1430).

When teenage boys of the traditionalist Lincoln and Peters families had a fight with teenage boys of the assimilationist Britton family in 1995, the first incidence of homicide between them left a backwash of hostilities. A month before the killing, 16 year old Byron Peters had been severely beaten by several members of the Britton family. In retaliation, Byron Peters shot at a truck driven by 20 year old Justin Britton, which later resulted in Byron Peters' arrest ("100 year old clan feud is behind 3 Mendocino County killings," 1995). Complaints also continued against members of the Britton family and their traditionalist allies, including several incidents in which shots were allegedly fired outside the Peters' family home. The sheriff's department, however, made no arrests in those incidents and only asked the Britton family to stop the harassment against the traditionalist Peters and Lincoln families.

On April 14, 1995, the day of the killing, Byron's father, traditionalist Leonard "Acorn" Peters, got into a fight with young Neio Britton, later leaving the scene with another traditionalist friend, Eugene "Bear" Lincoln. In retaliation, Leonard Peters' brother Arylis Peters then went looking for Neil Britton, but instead encountered Neil's father, Eugene Britton in the high school parking lot. After a heated confrontation, Britton climbed into his car, and Arylis Peters shot him through the car's back window. The Mendocino County sheriff's Department was immediately notified of the incident when witnesses named Arylis Peters as the gunman in that shooting. The next morning, Peters was arrested.

Three hours after the first shooting, while searching after dark on a remote road for Arylis Peters, two white sheriff's deputies Bob Davis and Dennis Miller shot and killed Arylis Peters' brother Leonard "Acorn" Peters, 44, who bore little physical resemblance to Arylis. Deputy Miller said that he and Bob Davis shot Peters after he allegedly refused orders to put down a gun and began shooting at them.

Moments after Peters was shot, according to Deputy Miller, a shot was fired by an unseen assailant from nearby bushes, and Deputy Davis died in the ensuing shoot-out. A massive police manhunt was launched that night for Davis' unknown assailant. Over 24 hours later, investigators announced that they suspected Eugene "Bear" Lincoln who lived nearby. Nobody saw Lincoln at the shooting scene, but the police reported that they had found his hat at the shooting scene.

Mendocino police tried to find Bear Lincoln on and outside the Indian reservation in such a zealous manhunt that many Native Americans on the reservation accused law enforcement of warrantless searches involving police brutality and civil rights violations. Comparisons were made between the Lincoln case at Round Valley and the 1975 police behavior on the Pine Ridge Reservation, which ended with Native American Leonard Peltier convicted of killing FBI agents. Similar to the Pine Ridge incident, police were

accused of warrantless searches, excessive uses of force, brutality of elders, pointing guns at children, and false arrests.[3]

Lincoln went on the run after it was allegedly reported that a shoot-to-kill order was issued by Mendocino County Sheriff. Despite a massive manhunt and a \$100,000 reward from California Governor Pete Wilson, a soon-to-be Republican candidate for president, Lincoln eluded capture for four months. Acting less than 24 hours after receiving a request from Mendocino county Sheriff Jim Tuso, Wilson posted the maximum reward allowed under the state penal code for cases involving the killing of a law enforcement officer.

On August 16, 1995, four months after the killing, Eugene "Bear" Lincoln finally gave himself over to the custody of the San Francisco Police Department at the office of criminal defense attorney J. Tony Serra. Serra had previously won a new trial and acquittal for Patric "Hooty" Croy, another Indian man who had been sent to death row for killing a deputy in Shasta County, California; and on retrial, the jury found that Croy acted in self-defense (Talbot, 1990). At Lincoln's surrender, over fifty members of the press as well as an equal number of his family and supporters were on hand as witnesses. Serra and his paralegal led the unique ceremony which opened with a prayer and the American Indian Movement (AIM) anthem -- "Wesley Bad Heard Bull's song" -- with the beating of a drum. In addressing the gathering, Serra stated that Lincoln:

is not surrendering: he's challenging. He's submitting to the legal jurisdiction because he will be vindicated. Our perspective of the case is that [Leonard] Acorn [Peters] was murdered and with Bear, there was an attempted murder. So we are not here submitting or surrendering. We're here challenging. We believe that we have a very strong case. We believe that when all the facts are out, he will be vindicated. He will be found not guilty. This will be a historical symbol and we invite the litigation (Heimann, 1995).

Bear Lincoln's cousin Pat Lincoln spoke on behalf of Lincoln's family and his community: "[T]here are many things which have happened since April 14th. We have been persecuted by the police. There have been warrantless searches. Guns have been pulled on children. Our elders have been abused. We have cried out to the world: 'Somebody help us.' ... Our brother Acorn was murdered. Who killed him? Why did they do it? On our own reservation, he was subjected to this. We are angry. It is just like it was in the 1800s" (Heimann, 1995).

Two weeks after his surrender, on August 30, after Lincoln pleaded not guilty to two counts of murder stemming from an exchange of gunshots with Mendocino County deputy sheriffs on the Round Valley Indian Reservation, he was arraigned in Mendocino County Municipal Court in Ukiah, facing six felony charges and special circumstance allegations. Charged for the murder of the deputy, Lincoln was also charged under the legal theory of vicarious liability in the death of his friend, Leonard Peters who was killed by deputies during the alleged shoot-out. Although Lincoln did not kill Peters, Lincoln was considered to be responsible for Peters' death because he allegedly initiated the gunbattle (Snyder, 1995).

Though the grand jury indicted Lincoln after his surrender, in November, a Mendocino County judge dismissed a grand jury indictment because the prosecution failed to tell the grand jury about earlier "inconsistent statements" made by a key witness, Deputy Sheriff Dennis Miller. Miller initially told investigators that he and Davis saw a lone fire on a reservation road while searching for a suspect in the earlier murder of Eugene Britton. Subsequently, however, Miller told the grand jury that he saw two figures on the road before the shooting, and the District Attorney erred in failing to provide the grand jury with Miller's initial contradictory statement. The District Attorney then promptly refiled charges against Lincoln who remained in jail on a no-bail hold.

Meanwhile, on April 9, 1996, alleging that law enforcement agents violated their civil rights during a manhunt at the Round Valley Indian Reservation, approximately 50

traditionalist members of reservation's Lincoln and Peters families filed a \$10 million class action lawsuits in federal court (Snyder, 1996a). The defendants in the litigation were officers from the FBI, the Bureau of Indian Affairs, the California Highway Patrol, and various local police jurisdictions, who broke into homes without warrants, held adults, children, and infants at gunpoint and committed other violations (Snyder, 1996a). Believing that Leonard Peters was ambushed in the dark by the white deputies when they mistook him for his brother, Arylis Peters, and that law enforcement personnel were engaging in a cover-up of their mistake, Leonard Peters' family filed a wrongful death claim against Mendocino County, maintaining that deputies shot an innocent man during their search for Arylis Peters (Wilson, 1995a). Peters' widow testified that she believed that he was unarmed and he was night-blind as a result of diabetes, stating that there was no way for him to be threatening officers with a gun in the dark (Wilson, 1995a).

On June 18, the defense filed with a court a required brief summary of the case, asserting that:

(1) Mr. Lincoln did not provoke this incident in any manner, (2) the prosecution will not be able to prove beyond a reasonable doubt that any shot fired by Mr. Lincoln was responsible for killing deputy Davis, (3) every action taken by Mr. Lincoln was done in self-defense, (4) that a cover-up ensued, which included the making of false statements and reports by deputy Miller regarding the incident, and the negligent and/or intentional failure of investigating officers to preserve evidence at the scene, and (5) law enforcement personnel failed to follow proper police procedures beginning with the Britton homicide investigation and continuing throughout the Davis/Peters homicide investigation, which included acts of misconduct, unlawful searches, and excessive force, fueled by a bias and prejudice against Indian people ("Native man framed for police murder," 1997).

The defense was weakened somewhat, as material and forensic evidence was limited, when no bullet fragments had been removed from deputy Davis' body for forensic testing and his body was cremated and the ashes were sprayed over the ocean. But as the

defense got underway, pretrial motions covered a number of important issues, including: a request for a venue change to obtain fairer and more impartial jurors and to reduce the likelihood of an all white jury; a jury compositional challenge to establish a prima facie case of discrimination against Native American jurors; a request to use Indian tribal lists to improve Native American's jury representation; and a request for an extended voir dire session so that, during a sequestered voir dire session, the defense could examine individual jurors' possible biases and prejudice against the defendant and his participation in the alleged crime.

As witnesses presented testimony about the history of racial discrimination and periodic genocide of Native Americans in Mendocino County, Indian attorney and tribal judge Lester Marston recounted that Native Americans have great skepticism about the fairness of any government-related agencies, including criminal justice and judicial systems; and they requested that the court and the jury commissioner make a more concerted effort to reach out for Native Americans to serve on the jury. Marston also testified that more than 90 percent of Northern California tribes died within a short time after white colonists began arriving in large numbers in the 1840s and 1850s; and that many Indians now living in Mendocino have relatives, who were alive only a few decades ago when public policy until 1910 to exterminate them meant that they were hunted down and killed.

For almost 150 years, the Round Valley, the largest Indian Reservation in California, has been witness to racism, murder, and the unspeakable horrors of genocide. More of a concentration camp than resettlement area, Native Americans were driven to the reservation from throughout the Redwood Empire of Northern California. As white settlers poured into the valley in 1850s, the genocide of Indians continued, Marston testified. As there were few white women in the region, many young Native women were also raped, indicating the two years after the reservation was established in the Round Valley, twenty percent of the people were found to have venereal disease. Also common



was kidnapping of their children, who were highly esteemed as house-servants, regularly fetching fifty dollars for a child who could cook, and up to a hundred dollars for a "likely young girl," suggesting that the reservation provided white slave-traders with a ready supply of merchandise (Elliot, 1995). Marston's testimony echoed and reflected the studies of historical genocide and racial discrimination against Native Americans in Northern California, Columbia University student Amelia Susman visiting the Round Valley in 1937, reporting that the valley was as segregated as the Deep South and that whites made no secret of their claims to superiority, and only spoke well of Indians when they were servants (Susman, 1976; see generally Heizer, 1993).

This was the backdrop for jury selection, that finally began on April 15, 1997, lasting three months, with the summoning of over 3,800 potential jurors. Based on their answers to a written questionnaire or due to requests to be excused on the basis of hardship, the overwhelming majority of the jury candidates had been excused. For the first five weeks, only 383 juror candidates remained for individual questioning by the judge and the attorneys for both sides. During the actual voir dire stage of jury selection, however, the systematic use of the prosecution's peremptory challenges eliminated all three potential Native American jurors, as well as two other racial minority jurors who had survived from the original panel. These race-based peremptory challenges left an all white jury -- five male and seven female. And all five alternate jurors were white as well.

In order to control media publicity of the case, the court issued a gag order, prohibiting prosecutors and defense attorneys from making any public statements about the case. Yet, from the moment the Mendocino grand jury indicted Bear Lincoln, his supporters maintained a continuous vigil outside the courthouse, fearing that, given the anti-Indian sentiments in law enforcement and white communities, vengeful conviction would be a likely outcome of the trial. Many long-scheduled Lincoln support rallies were held in front of the courthouse in order to increase public awareness of the case and win public support for the defendant. Two days before the trial near Covelo, Mendocino,

defense attorney Tony Serra also held a rally, telling the large crowd that, in response to the gag order imposed by the court, "We are angry! We, on the legal team, are angry and frustrated that we have been forced by the system to give up one constitutional right, the First Amendment, in order to secure another constitutional right: Our right to a fair trial. ... what we ask that you do is, you speak on our behalf. You take the facts, take the evidence, you take what occurs in court, and you disseminate it. You be our voice. You be, ultimately, Bear Lincoln's voice" (Wilson, 1997b). A day before the opening day of the trial, 250 people also participated in a public gathering, featuring speeches by nationally known American Indian Movement (AIM) field director Dennis Banks, former congressman Dan Hamburg, and Round Valley Indians for Justice leader Cora Lee Simmons, among others. Banks proclaimed, "America is going to be watching what happens here in Ukiah. AIM will commit all its resources to this trial. We will commit people to come here to monitor the trial. Ukiah is going to be America. We're going to watch you, Ukiah" (Wilson, 1997b). [4]

The trial began on July 29, 1997, covering a wide array of racially sensitive and explosive issues -- long-standing tensions and racial conflicts between law enforcement and Native Americans on the reservation, police misconduct including warrantless searches, physical abuses of the defendant's family, neighbors, and residents on the reservation.

Jury tampering was in evidence, that, in the courtroom hallway, a white court bailiff had falsely disclosed to one of the male jurors that Lincoln had confessed to the killing. The juror immediately reported the incident to the judge, later testifying, "we are having a conversation. It seems to come almost out of the blue, ... after he said that, it was like everything else in my brain stopped. ... Then he said that I shouldn't say he said it because it wasn't a good idea" (Wilson, 1997a). In response to the bailiff's misconduct, Defense counsel Serra declared,

that is outrageous! ... Does it take a rocket scientist to know that you cannot communicate with a juror, one, in any respect, and two, to tell them that someone

has confessed, and three, to tell them falsely that someone has confessed! What an outrage! If I had done that, if any member of our legal team had done that, if any Indian had done that, they would be arrested, they would be jailed, they would be prosecuted to the full extent of the law. Why? Why didn't that happen? Ask yourself that, I'm sure you'll come up with a lot of meaningful answers" (Wilson, 1997e)

The defense also accused a white bailiff of taking advantage of crowded conditions in the courtroom, as he tried to eavesdrop on the conversations at the defense table and spy on notes passing between Lincoln and his attorneys. The defense asked the court that the bailiff be held in contempt and that the matter be investigated by the district attorney or the California Attorney General's office for felony prosecution (Syder, 1997b).[5]

The prosecution meanwhile tried to eliminate a juror who showed signs of empathy towards one of the defense witnesses. Using evidence of a sworn declaration by Sheriff's Correctional Transportation Officer Nalini Gupta, the prosecutor filed a motion accusing one of the jurors of being "teary eyed" during part of the defense opening statement, and showing other signs of empathy during Bear Lincoln's mother's testimony that she was told by officers the night of killing -- "Turn your fucking lights off; get your fucking hands up or we'll blow your fucking heads off," detailing further profanity and rough treatment at the hands of officers who told her to walk faster. When she protested that she was crippled, a CHP officer said, "Fuck the cripple," and shoved her to the wet ground and handcuffed her (Wilson, 1997c). Defense attorney DeJong stated, "My own sense of fair play is offended by this motion, this procedure, even the fact that this motion was made in this way. We picked the jury; we did it fair and square [though they are all white]. The prosecutor is trying to exercise yet another preemptory challenge under the guise of this motion" (Wilson, 1997d).

The evidence against Bear Lincoln was both weak and un-corroborated. Many regular trial observers agree that a murder conviction was unlikely, as the prosecution had not come even close to proving the charges beyond a reasonable doubt. California

Department of Justice criminalist Joyce Pardo presented DNA evidence, linking slain deputy Bob Davis to a trail of blood spots, suggesting that after the shootout, Davis traveled from the shooting scene almost to Lincoln's gate and back, which was not explained in the scenario told by surviving deputy Dennis Miller, who maintained that Davis was killed by the initial shootout (Wilson, 1997e). There was no evidence that any bullet fired by Lincoln struck or killed deputy Bob Davis, and the prosecution was not able to rule out that Davis was in fact killed accidentally by his partner's own bullet. The prosecution's case was mostly circumstantial at best: Lincoln was there and fired a bullet; and Davis was struck and killed by a bullet (Wilson, 1997e).

The defense argued that Lincoln fired only in self-defense after he was shot at and had seen his best friend killed without warning by unseen assailants. Davis, the defense said, was killed by a bullet after the defendant returned fire with a single shot, while being fired on a second time by Deputy Dennis Miller with a fully automatic M-16. Miller fell down; but just before, he felt the impact of rocks struck by the defendant's single shot. And since the defendant fired only one shot and it struck rock, it could be ruled out as the shot that killed Deputy Davis. Rather, the deadly bullet might have to come from Miller's spray of automatic fire as he fell down, unless there was another unknown person at the scene firing another gun. But no other shell casings were found. Davis' blood was also found at the scene of the shootout, leading to the gate of Lincoln's house, suggesting that Davis was still alive and had tried to capture the defendant long after the initial exchange of gunfire (Wilson, 1995b). It seemed likely that there would be acquittal on all charges including all felony counts.

#### Jury Verdicts and the Aftermath:

Throughout the trial, Lincoln supporters had held daily demonstrations outside the downtown Ukiah courthouse, pounding drums and waving placards. In the courtroom, Lincoln continued to wear a traditional Indian "ribbon shirt" with colorful embroidery and

multicolored ribbon ornamentation, displaying his adherence to Indians beliefs in cultural and political independence, responding to his loyal supporters outside the courtroom. Before the verdict was to be read, the District Attorney called for the SWAT team to surround the courthouse, in order to prepare for potential racial riots and community disturbances.

After deliberating for three days, on September 24, 1997, jury foreperson Eileen Urich declared Lincoln innocent of separate murder charges stemming from the April 14, 1995 shootouts that left two men dead. But as the jury deadlocked on allegations of manslaughter; Aaron Williams, the chief prosecutor of the case, immediately announced that the prosecution would seek a retrial (Geniella, 1997d).

Soon after the verdict, approximately 100 people, including Lincoln, his dozen-member defense team, family members and political and social activists gathered outside the courthouse for a petition drive calling on District Attorney Susan Massini to drop further prosecution plans for which a retrial was set for February 6, 1998.

Post-verdict interviews revealed that two white members would not budge from their belief that Lincoln should in some way be held responsible for the deaths of Davis and Peters, with their split vote resulting in the deadlock on manslaughter charges. Both of the holdout jurors revealed in deliberation that they had a bias against Lincoln before the trial started and expressed their concerns about how they would face their friends and associates if they voted for total acquittal when so many of the public had been persuaded of Lincoln's guilt (Wilson, 1998). Shellie Vanoven of Willits, who voted for the complete acquittal of all charges admitted, "we were very frustrated and disappointed that we had to give up [on a deadlock]" (Geniella, 1997c).[6] Five members of the Lincoln jury also held a press conference at the Ukiah courthouse. But as only five of the 12 member jury were willing to be interviewed after the verdict, no records exist as to the actual breakdown of split votes on the manslaughter charges.

The Native American community was also dissatisfied with the hung jury on the manslaughter charges as well as the jury's failure to issue a complete acquittal. White residents were meanwhile enraged, hostility emanating throughout the community. Official harassment began right after the verdict was announced, as Lincoln and his supporters were on their way to waiting cars, and Sheriff's detective Alvin Tripp, who is white, climbed from his parked car, confronted Lincoln, and shouted, "You lie with a forked tongue. You know what I mean" (Callahan, 1997).

In the verdict aftermath, a crank call to a radio station threatened that the Ku Klux Klan would mete out vigilante justice (Elliott, 1997). Phyllis Davis, wife of Bob Davis, denounced the verdict as a "major miscarriage of justice" (Geniella, 1997a). Declaring that Bob Davis had won military medals and decorations during three tours of duty in Vietnam and subsequent assignments to Lebanon and Grenada, she added, "it's hard for me to believe we were sitting in the same courtroom" (Geniella, 1997a). She responded to the acquittal and the role of the defense team; "this case wasn't about race ... they [Lincoln's lawyers and his supporters] have used it to further their own careers and promote their political causes" (Geniella, 1997b).

Chief Prosecutor Aaron Williams hotly declared, "people getting away with murder is a cliché, but in this case that man got away with it. ... It sickens me" (Geniella, 1997b). He could not accept the not guilty verdict of first degree murder because of reasonable doubts, adding "when the not [guilty] verdicts for the second degree murder were read, I was floored" (Geniella, 1997a). Lincoln supporters were apprehensive, fearing that his acquittal might lead to his lynching. Cora Lee Simmons, a spokeswoman for Round Valley Indians for Justice (RVIJ), said that she expected Lincoln to go into seclusion, suggesting that "people have to get used to the idea [of his release]" (Callahan, 1997).

#### DEFENSE STRATEGIES TO INCREASE THE LIKELIHOOD OF A RACIALLY DIVERSE JURY

Given the nature of the case's racial sensitivity and community hostility, the defense initially devised a number of pre-trial strategies to increase the likelihood of placing Native American jurors in the jury box. Though their strategical efforts failed to secure a racially mixed jury at the close of jury selection, it is of great importance to review the defense strategies and analyze their failure in order to understand how it might be possible to create an affirmative jury selection procedure to ensure a racially diverse jury in a racially sensitive trial.

Defense efforts in the Lincoln trial may well reflect typical pre-trial strategies employed by most defense attorneys in criminal cases with heightened racial overtones. The most notable defense strategies included the following:

- (1) arguing for the use of supplemental lists to be included in the source lists in order to increase a number of Native Americans to be summoned and appear at the courthouse to improve the likelihood of placing Native Americans in the final jury;
- (2) examining the racial composition of venired jurors who appeared at the courthouse and were assigned for the actual trial, suggesting that Native Americans' underrepresentation in the master list led to their underrepresentation in the jury pool and the diminishing likelihood of their presence in the final jury under the existing method of jury selection, (3) arguing for a change of venue to a more racially diverse community in order to decrease the probability of empaneling an all white jury; and (4) presenting to the court different options for race-based affirmative action in jury selection, including the de medietate jury, the social science model, and the Hennepin model, so that the court might consider the merit of such affirmative action strategies to create a racially mixed jury.

To educate the judge about the racially sensitive nature of the case and racially demarcated perceptions of the potential trial outcome, it was important to suggest affirmative action strategies, in hopes that the court would rule favorably in a number of race related pre-trial motions, increasing the likelihood of Native Americans' presence in both jury pools and the final jury.

### Tribal Lists as Supplements for Source Lists:

The defense's first strategy to increase the likelihood of Native American jury representation was to ask the court to consider the use of supplemental tribal rolls as part of the master list. Though the master list of potential jurors is compiled from DMV (Department of Motor Vehicle) and ROV (Registrar of Voters) lists in California, the defense argued that Native Americans are less likely to be identified by those two lists because those who are registered on Indian reservations do not need to own state-issued drivers' licenses to drive in and out of their reservation. The tribal-issued license is legally sufficient for the driving privilege in the state. Similarly, because their own tribal elections are considered far more important than municipal or state elections and indigenous voting is more likely to influence their tribal lives, tribal Indians are less likely to register to vote for general public elections. Consequently, their names are less likely to be included in the master list, leading to a significant deficit in their representation in jury pools or venires.

Significant underrepresentation of Native American jurors in the master list was statistically documented. Table 1 shows the number of Native American residents living in eight federally recognized reservations and the number of residents whose names were not included in the master list. The tribal lists identified a total of 5,577 Indian residents on the reservation, and 1,291 residents had a county address and were thus considered to be eligible jury candidates. The 1996 master list for jury service, however, failed to identify 693 (53.7%) of those eligible Indian residents on the reservation, suggesting that the majority of reservation residents in eight federally recognized tribes were not included in the master list for jury service. The extent of Native Americans' underrepresentation could have been even much greater than 54%, if the analysis had covered the tribal lists of two additional Indian reservations that refused to provide the tribal membership information because of their deep distrust of any government-related agencies, including criminal justice and judicial bodies. Despite overwhelming evidence of Native Americans' significant



exclusion from the master list, however, the court denied the defense request that the tribal lists be used as a supplemental roll for jury service.

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Table 1 Here  
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Jury Panels and a Lack of Native American Jurors in the Jury Pool:

The defense then moved to establish a prima facie case of discrimination against Native American jurors, showing that the jury selection system itself was racially biased, asking the court's permission to distribute a jury survey questionnaire at the courthouse in order to examine racial compositions of jury panels. After the court granted the motion, the questionnaire was distributed to potential jurors who appeared at the courthouse between April and December of 1996.

The jury questionnaires were used to reveal both jurors' self-identification of race and the degree of racial exclusion and inclusion on the jury panel. Table 2 shows the 27 jury panels during the eight month survey period, as well as Native Americans' jury representation at the courthouse. The survey findings show that of 2,042 potential jurors who appeared at the courthouse, fifty jurors identified themselves as Native American (the third and fourth columns), indicating that 2.44% of the jury pool was comprised of Native American jurors (the fifth column). In order to establish statistical disparity for Native American's representation at the jury panel, the defense decided to rely on the 1990 U.S. census figure of 3.61% as the base figure for the Native American's percentage in the jurisdiction. While a more accurate estimate of Native Americans populations in the jurisdiction was higher than the census figure of 3.61% (the sixth column), the defense relied on the census figure to compute disparity figures, arguing that the statistical disparity indicates the most conservative estimate of Native Americans' underrepresentation on the jury panel.[7] The use of more accurate figures for Native American populations in the

jurisdiction would obviously lead to an even greater disparity of their representativeness on the jury pool.

In examining the degree of Native American representation on jury panels, statistical analyses show that the absolute disparity of negative 1.16% (the seventh column) and the comparative disparity of negative 32.17% (the eighth column), indicating that approximately one of three Native Americans in the community was excluded from jury service at the jury panel stage of the selection process. The Z score (the last column) also reveals that the underrepresentation of Native Americans was statistically significant, showing that the likelihood of their underrepresentative disparity taking place by pure chance was two in one thousand. All statistical tests indicated that Native Americans were significantly and systematically underrepresented in the jury panel at the Mendocino Superior courthouse.

The 1996 finding of the significant underrepresentation of Native American jurors was not an anomaly, however. A previous 1991 jury compositional challenge case in Mendocino County showed that, between July, 1989 and February 1990, a total of 1,100 potential jurors appeared at the courthouse, while only 28 of them were Native American -- a mere 2.33% of the jury pool. During the same period, 1,146 (95.5%) of the jurors in the pool were white.[8] The 1989-90 figure of Native American's representation was almost identical to that of the 1996 representation (2.44%), suggesting that Native Americans have been consistently underrepresented in the jury pool at the Mendocino Superior Courthouse. As the overwhelming majority of potential jurors in the pool have been white, this is both statistical and legally compelling proof that, given the very small percentage of Native Americans in the jury pool, the chance for a racially diverse, Lincoln jury was exceedingly slim. It may also suggest that judges in Mendocino County should be required to take legal-notice of the use of statistical methods in designing the procedures for securing a representatively balanced jury pool. The court, however, ruled that the defense failed to establish the prima facie case of discrimination, declaring that the existing

jury selection method did not lead to the systematic exclusion of Native American residents in Mendocino County from serving on the jury.

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Table 2 Here  
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A Change of Venue Motion:

As the survey finding indicated the paucity of Native Americans in the jury panel, the defense feared that any remaining Native Americans from the jury venire would be subsequently eliminated by the prosecution's race-based peremptory challenges. Given the long history of racial discrimination against Native Americans in Mendocino County, defense council filed a change of venue motion, suggesting that the Native American defendant was unlikely to receive a fair trial, unlikely to be tried by a group of impartial jurors, and likely to face an all white jury. From a preliminary report by a jury expert, it was clear that pretrial publicity was "extremely high" and prejudicial, with some 142 newspaper articles appearing in just the first ninety days following the shootings on April 14, 1995. The defense showed that a community survey indicated that 92.7 percent of a representative sample of eligible jurors already recognized the case.

Table 3 shows the 1996 Mendocino community survey results, revealing the extent of the public's awareness and knowledge of the case and the defendant. The survey found that 81.6% of the representative sample of the county residents were aware that the defendant was at large for four months before turning himself into the legal authorities. Though the defendant was never convicted of an earlier charge of murdering a two-year-old girl, 13.2% of eligible jurors felt that Lincoln had been previously convicted of murder. Similarly, more than one of five county residents (21.8%) watched "America's Most Wanted," in which the defendant was portrayed as a dangerous "cop-killer" who was on the run. Almost three of four eligible jurors who made a prejudgment on the trial outcome

believed that the defendant was either probably or definitely guilty (21.1% for definitely guilty and 53.3% for probably guilty). The survey results reflected the conservative nature of Mendocino's eligible jurors, with the majority of residents agreeing that a defendant had to prove his or her innocence, though, under the law, the prosecution or the state must shoulder the burden of proof (43.3% for strongly agree and 12.1% for somewhat agree).

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Table 3 Here  
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The defense also argued that the potential jurors' prejudgment on the trial outcome differed significantly in terms of their identified race and whether or not they had access to prejudicial information (see Table 4). Approximately 80% of prospective white jurors felt that the defendant was either probably or definitely guilty (23.0% and 56.4%, respectively), while almost the same percentage of eligible Native American jurors believed that the defendant was probably or definitely not guilty (50.% and 27.8%, respectively). With regard to gender, however, the potential jurors' prejudgment of the trial outcome did not differ significantly, though males were slightly more likely than females to feel that the defendant was guilty (76.2% and 72.4% for male and female, respectively).

Pretrial publicity and strong beliefs on the race relations between Indian and non-Indian communities also seem to exert significant influences on their prejudgment. Almost thirty percent of the representative sample of eligible jurors with prejudicial knowledge of Lincoln's previous murder conviction believed that the defendant was definitely guilty (29.7%). Similarly, 34.4% of those who watched a TV program supported the definite guilty verdict for the defendant.

Eligible jurors who said that they did not feel the presence of historical racial tensions between Indian and non-Indian communities or who held no prejudice against Indians believed that defendant was definitely guilty (41.2% and 43.9%, respectively).

On the contrary, county residents who are aware of historical conflicts and racial prejudice felt that defendant was not guilty (26.3% and 33.6%, respectively). Prejudicial pre-trial publicity and perceived racial tension and prejudice in the community thus had a significant impact on county residents' prejudgment of the case. From the standpoint of race and its relation to prejudgment, the racial identification of eligible jurors seems to almost determine the trial outcome.

By showing empirical evidence of significant underrepresentation of Native Americans on the jury panel, the defense argued that the racially demarcated trial outcome might require the use of a race-based affirmative jury selection method in order to ensure the presence of Native American jurors as the defendant's peers, thereby increasing the public's respect for and the legitimacy of the jury trial and the verdict. Due to the small Native American population in the jurisdiction, a statistical probability alone would not guarantee even one single Native American juror in the jury box, suggesting that at least eight percent of the population would be necessary to ensure at least one juror representative in the twelve member jury. The defense argued that, given the scarcity of Native Americans in the summons and panel stages of jury selection, almost all available jury candidates for the Lincoln jury would be white. The court, however, denied the merit of considering the potential use of affirmative action in jury selection. Ultimately as the defense feared, the prosecutors' race-based peremptory challenges eliminated all Native American jurors from the venire pool, creating an all white jury to try this Native American defendant.

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Table 4 Here  
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#### AFFIRMATIVE JURY STRUCTURES AND PEREMPTORY INCLUSIONS

The attempts to increase the likelihood of placing Native American candidates in the Lincoln jury reflect typical pretrial strategies employed by defense attorneys in racially sensitive trials and in interracial criminal cases. Courts, however, routinely deny the overwhelming majority of such defense strategies. Other than legally mandated ROV and DMV files, no California's court has ever allowed the use of supplemental lists, such as welfare rolls, telephone registration lists, Native American tribal lists, or utility rolls, to increase jury representation of racial minorities. Jury studies show that such supplemental lists increased significant numbers of blacks, Hispanics, Native Americans, and the poor for inclusion in the master list (see generally Fukurai et al., 1993).

The U.S. Supreme Court has yet to extend cognizable status to Native Americans to be protected against discrimination in jury selection. Although the Court has given cognizable and protective status to blacks (Strauder v. West Virginia, 100 U.S. 306, 1880), Hispanics (Hernandez v. Texas, 347 U.S.475, 1954), and women (Taylor v. Louisiana, 419 U.S. 522, 1975), as well as upheld their cross-sectional representation at the jury panel stage of jury selection, the Court has failed to recognize Native Americans as a distinct group in the community that needs legal protections against discriminatory jury selection procedures. The Court also has recognized blacks, Hispanics, and women as minority groups that need protection against discriminatory uses of peremptory challenges in voir dire (see generally, Fukurai et al., 1993). Native Americans, however, have not been given the same cognizable protective status against the abuse of peremptory exclusion in voir dire.

As demonstrated in the Lincoln trial, the defense strategies failed to increase the likelihood of empaneling racial minority jurors in the jury panel or the final jury. Given the conservative court's approach to the defense's attempt to increase the likelihood of these minority jurors -- and even in cases in which the court has granted defense motions such as a jury compositional challenge or a change of venue motion -- defense strategies have routinely failed to secure a racially diverse jury.

The following section examines the four distinct types of affirmative action strategies to create racially mixed juries: (1) the jury de medietate linguae, (2) the Hennepin jury, (3) the social science model, and (4) peremptory inclusive selection. The specific applications of race-conscious affirmative mechanisms are of great significance because our society and legal institutions are genuinely committed to correct and eliminate past and present discrimination in jury selection. In order to enhance the public acceptance of the jury system and jury verdicts and increase the appearance of justice and fairness of the jury system, affirmative action in jury selection may be the only means to achieve those goals.

(1) The Jury "De Medietate Linguae" Model

The concept of the jury "de medietate linguae" originated in the treatment of Jews in twelfth century England (Constable, 1994, pp.18-21). The term literally means jury of the "half tongue" in Latin because the jury selection method applied to people who were considered alien or foreign and spoke different languages. The English viewed the Jews as aliens in race, religion, and culture and considerable animosity existed against the Jews because they were known as the anti-Christ and "Christ-killers" (Quinley and Glock, 1972, pp.94-109) and "they were darker-skinned and spoke a mysterious and foreign language" (Ramirez, 1994, p. 783).

William the Conqueror had initially imported Jews to England from Rouen, France, where they had been compelled to act as financial agents for the Crown (Ramirez, 1994). Once arrived in England, the Jews then took up residence in the larger towns that were also centers of royal administration. In 1090, Emperor Henry IV gave the Jews a charter to settle in Worms, and in 1096, the First Crusade spread to the Rhineland, resulting in the forced conversion and massacre of Jews throughout the area (Johnson, 1987, pp.205, 207-08). In an attempt to convert Jews to Christianity, Jews were required to reside in the *Domus convervarum* and were assigned the role of tax collectors as part of various strategies devised to integrate Jews into Christian society (Stacey, 1992). Yet a significant problem encountered was the issue of apostasy. For instance, they continued to live by

virtue of the king to secure them from religious accusers who repeatedly claimed that the Jews killed Christian children and drank their blood.[9]

Here and elsewhere, a deeper logic prevailed, for the emergence of the already unpopular Jews as money-lenders in the twelfth and early thirteenth century only added to the animosity towards them. As Christian debtors could not or would not repay their debts, they seized upon the unpopularity of the Jews as a convenient means of extricating themselves from their predicament. A riot or massacre might fortuitously destroy the records of the transaction, precluding the King, as owner of the Jews, from claiming retribution, completely canceling the debtor's obligation (McCall, 1979, p. 281).

Caught between scheming debtors and the King, the Jews relied on the Crown for protection. And in the throes of mass riots and violence in 1190 against wealthy and influential Jews who were considered the King's property, King Richard I enacted a charter on April 10, 1201, giving Jews the right to the jury de medietate linguae -- a half-Jewish jury (Wishman, 1986, p.31).[10] The jury de medietate linguae was granted to Jews to protect the Crown's property interest in Jews and their effects (Massaro, 1986, p.550, n238).[11] Though England subsequently banished all Jews in 1290, foreign merchants from Italy and Germany soon became the King's financial agents replacing the Jew, and they were also given the privilege of a trial de medietate linguae -- a trial by a jury composed of half of their own countrymen and the other half with English persons qualified to serve as jurors.[12]

While the extension of trial by juries de medietate linguae to Jews and later alien merchants served to prevent diminution of the King's resources, the jury provided substantive fairness and protection against unfair verdicts derived from prejudice against Jews and other aliens in England. After the expulsion of the Jews, for instance, the mixed jury privilege provided foreign merchants with the perception of substantial fairness and equity in disputes involving foreigners. The heterogeneous nature of the jury was intended to insure foreign merchants a fair trial without the possibility of local prejudice.



Those courts applied law as they perceived it, almost regardless of the source of law, in order to achieve commercial fairness (Potter, 1958, p.188).

The right of juries de medietate linguae in England endured until 1870, when Parliament passed the Naturalization Act which permitted aliens to serve on juries and to acquire, hold, and dispose of property in the same manner as a England-born citizen, thereby eliminating the need for the mixed jury privilege (Ramirez, 1994, p.789).

American colonies and the courts also experimented with the use of juries de medietate linguae after English settlers developed their sense of equity, justice, and laws. At various times between 1674 and 1911, a number of states including Kentucky, Maryland, Massachusetts, Pennsylvania, New York, Virginia, and South Carolina each provided for juries de medietate linguae. As early as 1674, the courts in the Plymouth colony used mixed juries composed of half Native Americans and half colonists.[13] The mixed jury was used in early colonies as a way to ensure substantive fairness and enhance the legitimacy of jury verdicts. "[The mixed jury] was important to the colonists as the natives' perception of unfairness may have triggered bloody unrest or, at least, social tension," one jury study notes (Ramirez, 1994, p.790).

Since independence and the passage of the Bill of Rights in 1789, the U.S. Supreme Court has discussed the right to a jury de medietate linguae only once, in United States v. Wood (1936), in dictum and without analyses, declaring that:

the ancient rule under which an alien might have a trial by jury de medietate linguae, 'one half denizens and the other aliens' -- in order to insure impartiality -- no longer obtains.[14]

At the state court, potential applications of juries de medietate linguae have also been reviewed and discussed. The Massachusetts Supreme Court in 1986, for instance, examined the applicability of the jury de medietate linguae.[15] Article 12 of the Massachusetts Declaration of Rights drawn from Magna Charta, c.39, entitles the

defendants to explicit rights, viz.: "no freeman shall be taken or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed or exiled, or other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land." The defendants argued that Article 12 afforded them the right to a trial by the jury de medietate linguae and that the statutory requirements of citizenship and command of English were unconstitutional.[16]

The court, however, held that the right to the jury de medietate linguae was not of constitutional magnitude in this case and that the requirement that jurors speak and understand English and be U.S. citizens withstood constitutional challenges raised under the Sixth Amendment and equal protection clause.[17]

Unfortunately, the U.S. Supreme Court and the Massachusetts court did not fully explore the roots of the jury de medietate linguae in English common law or statutory history, nor did they discuss the wisdom or practicality of the mixed jury as a jury of peers. Thus, the debate on the jury de medietate linguae ceased and the mandatory mixed jury disappeared from application under American law.

The equitability of a mandatory balanced jury must not be ignored, however. The essential feature of the de medietate linguae model is that regardless of the composition of aliens or minority groups in the general population, the composition of the mixed jury is considered to be fixed: Half of the jury come from the majority and the other half from the minority group. Similarly, the fixed quota of the jury composition is derived from the acknowledgment that prejudice existed against the minority group and an ordinary jury composition using the traditional method of selection would not necessarily produce a fair result. The fixed quota is viewed as an essential feature of jury composition to ensure both the appearance and substance of fairness and justice in jury verdicts. While the mixed jury principle may have originally developed out of economic concerns of England during the medieval period, its wisdom and practice in both England and the U.S. had broader implications on the fundamental notion of fairness in jury proceedings and jury verdicts.

## (2) The Hennepin County Model

Another model of racially mixed juries is found in the courts of Hennepin County, Minnesota, where, according to the 1990 U.S. Census, approximately nine percent of the adult population is minority (4.59% African-Americans, 2.22% Asian-Pacific islanders, 1.10% native Americans, and 1.12% Hispanics). While the Hennepin County model focuses on the grand jury, this affirmative action principle can be easily extended to the petit jury.

The Hennepin model is different from the juries de medietate linguae model in that the racial quota for the minority is derived on the basis of the proportional minority composition in the general population. Thus, the racial distribution of the Hennepin model is not fixed, but remains changeable depending on the volatile racial compositions in the jurisdiction. In Hennepin County, the grand jury consists of 23 members; thus, nine percent of the 23 grand jurors is specifically reserved for minority groups, requiring that at least two minority grand jurors sit on every 23 member grand jury. The Hennepin model works as follows.

after randomly selecting the first 21 grand jurors either only one or no minority persons appear on the panel, selection [shall] continue down the list of 55 randomly selected and qualified persons until there are at least two minority persons out of 23 on the grand jury. If no minorities appear in the list of 55 potential grand jurors, another 55 qualified persons should be selected until the goal of at least two minority jurors is obtained. If random selection of the first 21 grand jurors yields two or more minority persons, the selection should simply proceed to the next two persons on the list (Smith, 1993).

Besides setting up the proportional allocation of the jury to racial minorities, the task force proposal for the Hennepin model also recommended additional race-neutral reforms to increase the representativeness of grand juries, including: (1) integrating lists from the Immigration and Naturalization Service of recently naturalized citizens and tribal

membership rolls into source lists; (2) raising the jury fee to \$30 per day; and (3) establishing a day-care center for jurors' children (Smith, 1993).

While it is impossible to estimate how widespread race-balancing of juries is, such as proposed in the model of Hennepin County, five states including California do not require that grand juror names be drawn randomly from the grand jury venire and instead allow judges or jury commissioners the discretion to select who will actually serve as final jurors (Fukurai, 1998).[18]

While the *de medietate linguae* model requires the fixed, equal division of jury seats for both majority and minority groups, the Hennepin model assumes that the mixed jury is created to reflect the minority composition in the general population, thus requiring that different numbers of fixed minority jurors be selected for the jury box.

### (3) Social Science Models

Besides the two models of mixed juries and racial quota experiments in the Anglo-Saxon tradition of law, social science research also offers a different version of the racially mixed juries. The important question about the previous two jury models is the number of racially similar jurors to which a defendant should be entitled. The jury *de medietate linguae* entitles the defendant to six jurors of twelve, or half of the total number of jurors in jurisdictions using smaller juries.[19] The possible disadvantage of the *de medietate* model is that six jurors of the defendant's race might be difficult to obtain in some areas. Further, a split jury system may offer an incentive for the state to elect the use of smaller size juries, a change generally deemed undesirable (Kaye, 1980, p.1004). The naive response to practical difficulties is to limit the defendant's right to one juror similar to defendant's race. However, jury research demonstrates that, in case of a split vote during deliberation, a single dissenting juror rarely succeeds in hanging a jury, or reversing its predisposition (Kalven and Zeisel, 1966, p. 463).

More recent psychological studies show that without a minimum of three minority jurors, they may not withstand the group pressure, suggesting that one or two dissenting

jurors eventually accede to the majority's opinion (Saks, 1977; Hastie et al., 1983; Kerr and MacCoun, 1985; Hastie, 1993; See also Ballew v. Georgia, 435 U.S. 223, 231-39, 1978). Behavioral studies suggest that a reasonable compromise between the jury de medietate linguae and the Hennepin model, especially applied in a jurisdiction with small minority populations, is to assure three minority jurors in order to preserve, not only the appearance of fairness, but the legitimate viability of deliberations and verdicts in jury trials as well. Jury research shows that a minimum of three members of a racially minority are necessary to offset the group pressures of the dominant white jurors during jury deliberation (Johnson, 1985, p.1698).

It seems likely that were this proposal to operate as planned by including three racially similar jurors, the incidence of hung juries may increase in those cases where an all-white jury would have acquitted a white defendant (see generally Vollers, 1995 for Beckwith trials). Based on social scientific findings, the jury requires at least ten racially similar jurors to make acquittal the predicted jury verdict. The difficulties in obtaining a unanimous verdict then place greater burdens on both majority and minority groups to work out their differences, possibly preventing wrongful convictions. In most criminal cases involving minority defendants, the strength or weakness of the evidence will result in a unanimous verdict just as it does in most cases involving white defendants (Black, 1989, p. 30, 32). It is only in marginal evidence cases that the jury would expect to find some different verdicts than would be obtained under the current color-blind system.

Thus, if representativeness is the key to impartiality, a race neutral verdict may be achieved when at least three minority jurors are selected to judge a criminal case that involves the rights of the same racial defendant, comprising at least 25% of trial jurors in twelve-member juries. One legal commentator argues that the Court could create for minority defendants, accused of interracial capital crimes, a right to a jury that includes jurors of the defendant's race (Johnson, 1985). If at least three jurors were of the same race as the defendant, one of the group could "hang" a jury otherwise prone to imposing a

racially motivated death sentence. This approach allows the race at risk to fight against the majority's group pressure.

(4) Affirmative Peremptory Inclusion:

To empanel racial minorities in the final jury through the race-based exercise of peremptory challenges by the prosecution poses unique methodological problems. After screening for qualification, eligibility, excuses, and challenges for cause, if peremptory challenges are still procedurally allowed, as they have been under the current jury selection process, Native American jurors would be eliminated before a mandated one-fourth racial quota can ensure their presence in the final jury. In other words, the formation of affirmative juries -- the *de medietate linguae* jury, the Hennepin jury, and the social science model -- requires either the complete abolition or some restrictive usage of peremptory challenges so as not to impair affirmative selection of minority jurors to produce a racially mixed jury.

Initially proposed by Altman (1986) as an alternative to peremptory challenges to empanel the final jury, this innovative *voir dire* strategy requires that both sides may exercise their challenges for cause to enlist twelve jurors in order of preference. The judge then initially selects any juror whose name appears on both parties' lists, regardless of how the juror was ranked. Alternating between both lists, the judge proceeds to take the highest-rated juror from each list until a complete panel is assembled.

Many legal commentators and jury studies advocate the elimination of the peremptory challenge system, suggesting that, if the courts truly mean to eliminate racial discrimination in the jury selection process, the elimination of peremptory challenges is the only effective remedy (King, 1993; Ramirez, 1994; Hoffman, 1997). Once eliminating the discriminatory effects of peremptory challenges on minorities' jury representation, affirmative peremptory inclusion is considered to be an important strategic alternative to peremptory challenges.

The present proposal for affirmative action in jury selection is a strategic departure from previous debates, which called for the complete elimination of peremptory challenges in favor of an alternative jury selection approach such as affirmative peremptory inclusion. Rather, the present study suggests allowing both peremptory challenges and peremptory inclusion to co-exist during voir dire. After screening for qualifications, excuses, exemptions, and cause challenges, the present method requires that both sides select a fixed number of jurors from the qualified jury pool. The specific number of these peremptory inclusions may depend on the availability of targeted potential jurors in the qualified jury pool. For example, in a jurisdiction where the targeted racial minority population in the community is very small, like Mendocino County, the availability of Native Americans in the qualified jury pool would be significantly limited. In the Lincoln trial, there were only three Native American jurors who survived from the initial jury panel, indicating that the minimally required six jurors for the *de medietate linguae* jury were not available.

As suggested previously, in a jurisdiction with a small number of minority jurors, the number of jurors to be selected should be at least three in order to ensure viable jury deliberations as proposed by the social science model requiring that in the jury selection, both sides prepare a preferential list of three potential jurors in the pool, making up six peremptorily chosen jurors by both sides. The jury seats for the six remaining jurors and alternatives would be filled by randomly selecting the jurors from the qualified jury pool. If both sides identified the same jurors in their preferential list, seven or more remaining jurors would be randomly selected from the qualified jury pool. In a trial which may last a month or more, a large pool of alternative jurors might be necessary and those jurors would also be selected randomly from the qualified jury pool. For the final jury, peremptory challenges may be exercised in the selection of those remaining jurors.

The present study proposes the affirmative selection of three jurors as the minimal number of required jury seats to be filled for each side. The number of peremptory inclusions should thus range from three to six in order to assure the minimum condition for

viable jury deliberations. As the social science model argues, the inclusion of at least three jurors would ensure a race neutral verdict to “judge a criminal or civil case that involves the rights” of a minority defendant (Colbert, 1990, p.124). This suggests that jury representation of three minority persons in the twelve-member jury is the compromise between the harm of having one or no racially similar jurors, and the impracticability of obtaining a jury evenly balanced along racial lines (Bell, 1980, pp.273-274).

It is my contention that the affirmative peremptory choice can protect those impacted by race or whatever interest the parties deem important in given trials. If political representation is important to the party, then the attorney can make the selection based on potential jurors' political beliefs or affiliations. While race plays an important role in the public's perception of the legitimacy and integrity of jury trials and verdicts impacting many race-sensitive and publicized trials, each side should be allowed to consider race as only one of many criteria in forming a jury, suggesting that whatever were considered to be significant cognizable characteristics in a given case may become the basis of peremptory choices. Each side can generate its own criteria with the combination of important cognizable factors such as race and political affiliation (see generally Ramirez, 1994).

Peremptory choices in the Lincoln jury might have concentrated on the criteria of race and the degree of Native American's assimilation to the white community, for example. Although those parameters may not necessarily reflect the jurors' views and attitudes towards the guilt or acquittal of the minority defendant, peremptory inclusion can nevertheless allow both parties to engage in critical evaluations of jurors' potential biases and prejudice.

Peremptory inclusion does not always create the tendency towards polarized jury deliberations, leading to hung juries. Speculative concerns exist that affirmative inclusive selection may possibly increase the instances of hung juries. This suggests that the minimum for a cohesive unit in forming strong opinions may be at least fulfilled by seating three affirmatively chosen jurors, though the selection criteria may have been based on the



both parties' predisposition towards selecting prospective jurors based on race or other cognizable characteristics. The problem of hung juries, however, may be overexaggerated. For example, we need to question whether or not the possibilities for a hung jury itself presents a significant problem in jury deliberations. Attorneys' peremptory inclusion is inevitably exercised on imperfect knowledge of jurors' opinions and probable behavior in the deliberation process, so the assessment of an increase in hung juries is undoubtedly overstated. Furthermore, challenges for cause presumably have removed demonstrably biased and prejudiced individuals prior to the system of peremptory inclusion, reducing the likelihood of split jury decisions.

The debate on the problematic nature of hung juries is also distorted because it reveals the judicial system's long-standing bias in favor of more homogeneous, all white juries. While such single-race juries may reach verdicts on a consistent basis, there is no reason to assume that these outcomes are legitimate, lawful, or free of racial prejudice and other biases. Jury research showed that the small six-member jury is less likely to render hung jury verdicts than the twelve-member jury, because small sized juries are more likely to be homogeneous in race, gender, social class, opinions, and attitudes than the twelve-member jury (Cocke, 1979; Kaye, 1980; Roper, 1980). In case of conflict resolution, a hung jury is an expression of substantive or emotive disagreements over the evidence and the nature of the case, not necessarily a negative result. Rather, after jurors reach differing conclusions as they evaluate the same evidence and testimony, a hung jury may provide a positive result, suggesting that there is not consensus among the community that the defendant is guilty.

The system of peremptory inclusion also provides the positive effect of preventing miscarriages of justice in cases with weak evidence, especially involving members of racial minorities. Coke (1994) suggests that the prosecution normally makes racialized, calculated decisions and risk assessments about which cases to bring to trial -- based in part on their knowledge that most jury panels are predominantly white and pro-prosecution.

The system of peremptory inclusion and racially diverse tribunals will force the prosecution to assess the merit of the case and the credibility of their criminal charges, or to make efforts to strengthen the state's evidence, as the government rightfully bears the burden of proving guilt beyond a reasonable doubt (pp. 385-386).

Peremptory inclusion will allow the defendant to attempt to achieve representation of his or her peers on the final jury. These peers might look like the accused, perhaps better understand the defendant's circumstances, and respond to the state of mind and conditions of the defendant. The peremptory inclusionary approach enhances the public's perceived legitimacy of the jury, deliberations, and verdicts by balancing the defendant's personal rights to a fair trial with the minority community's interests. Due to the straightforward process of peremptory inclusion, less time would be spent for voir dire jury selection, so that the inclusionary approach would allow greater processing and disposing capability of jury trials than traditional jury selection procedures.

#### AFFIRMATIVE PEREMPTORY INCLUSION AND FILL-IT-UP QUOTA METHODS:

Affirmative peremptory inclusion, as the present analysis proposes, is conceptually and methodologically different from the so called back-loading selection methods currently being utilized by the court for the Hennepin's racially diverse jury. The Hennepin model asks for proportional jury representation by filling in the jury boxes as individual minority members became qualified and are brought into the courtroom from the jury pool, suggesting that no priority is given among jury candidates in the qualified jury pool for occupying the required number of jury seats. As long as the court assigns the required number of jury seats to the member of racial minorities in the exact order as they were brought into the courtroom, then the Hennepin selection method for the final jury is complete.

The Hennepin mode of jury selection has a number of procedural problems and logistical deficiencies. First, the agents of conducting affirmative inclusive jury selection

should be both the defense and the prosecution, not the court. The active participation by both parties in jury selection is essential as America's courts are based on an adversarial system, and allowing the affirmative jury selection by opposing parties would help maintain the logic that the final verdict will be determined after opposing views are fully articulated and carefully debated by affirmatively selected jurors. Peremptory inclusion nevertheless preserves the ability of both parties to exclude biased, partial, and unfavorable jurors. By contrast, judge's views or decisions are not necessarily race- or gender-neutral, as the judge is also a person with individual biases and proclivities based on his or her race, gender, and socio-economic backgrounds (Myer and Jesilaw, 1996).

Affirmative inclusive selection allows both sides to determine the variability and characteristics of jurors for the required number of jury seats. While race remains one of the most salient factors in jury selection in many racially sensitive trials, the critical task of ascertaining one's racial identity is not a simple, but a very complex task, suggesting that both objective or subjective evaluations of one's race do not necessarily correspond to the person's self-determined racial identity. For example, one's racial self-identity does not always reflect or correspond to actual racial ancestry, so that jurors with the same racial identity may often fail to share similar life-experiences, social values, and traditional customs -- the critical elements and significant criterion for jurors accurately imputing the defendant's motives and understanding racially sensitive issues surrounding a case (Fukurai and Davies, 1998).

As evidenced in the pre-trial public poll in the Lincoln case, survey analyses revealed that approximately 20% of Native Americans felt that the defendant was either probably or definitely guilty (22.3% for guilty verdicts), suggesting that even the same racial identity does not always carry the same, uniform attitudes towards a defendant. Although race may remain an important determinant of how the public views the legitimacy of a trial and its verdict, the affirmative inclusion system allows the defense and

prosecution to identify and determine the cognizable characteristics for the selection of final jurors.

Unlike the Hennepin selection method, the affirmative inclusion method can allow both parties to assign individual jurors to be chosen for the required numbers of jury seats in the final jury. This affirmative approach is a significant departure from the Hennepin method. Under the social science model, if the defense wishes to ensure the inclusion of at least three Native American jurors, the defense can affirmatively choose them, while the prosecution may also affirmatively select an equal number of white jurors from the pool, suggesting that affirmative peremptory inclusion insures a minimum condition for viable and dialectic jury deliberations because, regardless of other six remaining jurors to be chosen randomly from the pool, each side has at least three jurors to make sure that their views are considered and fully articulated in the deliberation process. Another advantageous aspect of the affirmative selection method is that selecting three jurors by both sides insures a greater degree of group autonomy and self-determination, without being overwhelmed by the majority group's pressure during the jury deliberation process.

#### THE NEED FOR PROGRESSIVE LEGISLATIVE AND COURT ACTION

Given the many benefits of racially mixed juries, legislative actions to ensure racially heterogeneous juries are needed to rectify the underrepresentation of racial minority jurors. In assessing the readiness and effectiveness of legislative and court-initiated legal actions, legislative actions, including the 1968 Jury Selection and Service Act, may be more effective and less problematic than judicially designed race-conscious remedies (generally see Fukurai et al., 1993). Since legislative actions reflect public concerns, the job of fashioning a remedy is more properly reserved for legislators. In the current climate of anti-crime and get-tough legislative policies, however, such legislative reforms seem unlikely. In California, for the past several years, important political events have made it almost impossible to implement any race-conscious remedies to rectify racial

discrimination. These measures include the passage of three propositions 184 (three-strikes), 187 (anti-immigration), 209 (California Civil Rights Initiative eliminating affirmative action), and the University of California Board of Regents' decision on affirmative action.

Passed by voters overwhelmingly in November 1994, Proposition 184 allows 25-years-to-life sentences for anyone convicted of three felonies, and a large proportion of "three-strikers" have been racial minorities (Johnson, 1995). Proposition 187 bars public education and non-emergency health and social services to illegal immigrants, as Mexicans and/or Hispanics have been considered to make up most of such immigrants (Holding, 1995b). In July, 1995, the University of California Board of Regents voted to end affirmative action in admissions, hiring, and contracting on the basis of race and gender. Governor Pete Wilson also filed suit in Sacramento in August 1995 against his own administration and other constitutional officers to prohibit them from carrying out affirmative action and racially preferential programs, calling the issue a "matter of urgent statewide concern" (Gunnison, 1995). And in November 1996, Californians also approved Proposition 209, a measure to prohibit state and local governments from using race- and gender-based programs in hiring, education, and contracting in California (Fukurai et al., 1997).

The passage of these propositions had wider social and judicial consequences, too. Then-San Francisco Supervisor Terence Hallinan, who later served as San Francisco District Attorney, argued that the three-strikes-law worked a tremendous hardship on the courts, noting that 70% of persons receiving "three strikes" were African American and 75% of these were nonviolent offenses (Johnson, 1995). As of December 1996, 74.7% of California's "3-strikers" were non-white (43.9% black and 27.1% Hispanic) (Clark, Austin, and Henry, 1997). The 1997 National Institute of Justice report also indicates that violent criminals including those convicted of first- and second-degree murders and rape charges only accounted for mere 1% of California's "3-strikers" (see Exhibit 7 of the NIJ

report prepared by Clark, Austin, and Henry, 1997). Dramatic increases of criminal jury trials were also expected in near future, as few defendants were willing to enter guilty pleas, even including nonviolent offenses.[20] As remediation and reform, given the procedural simplicity and conceptual clarity of the affirmative jury selection approach, the legislature and the courts need to consider progressive actions on the affirmative mechanism to ensure racially mixed juries as a protective shield for minority defendants in general and for advancing the interest of society at large.

Positive and progressive legislative action would be more direct and inclusive than judicial case-by-case decisions. However, such legislation is highly unlikely in the prevailing late 1990s or early 2000s political and social climate, weighing against any race-conscious remedies to rectify racial discrimination (Haney, 1998). Although such remedies have been historically left to the legislature, today's courts may have to devise their own remedies in criminal procedure areas. While the proposed remedy of imposing affirmative mechanisms to ensure racially mixed juries does not foreclose legislative initiatives, a judiciary-created remedy may be essential to protect racial minorities, more so than affirmative action programs in other areas. Such race-conscious remedies may be of even greater significance in highly publicized criminal cases that involve sensitive issues of race and racism. As the seriousness of the consequences at stake argue more strongly for intervention by the courts than does any program in other areas, the courts need to carefully consider the merit and consequences of race-conscious, affirmative action measures to prevent discrimination in jury selection, thereby restoring the public's confidence in the jury system, improving the fairness of trial proceedings, and enhancing the public's acceptance of jury verdicts.

## CONCLUSIONS

The present analysis has shown that final verdicts by the all white jury failed to satisfy Native American communities in the case of Bear Lincoln. His supporters felt that

Lincoln was the one who initiated litigation and created the opportunity to call on the court to critically assess local law enforcement's discriminatory practices against Native Americans in the community. The mixed verdicts of acquittals and hung decisions, however, failed to reflect the sentiments shared by the Native American population. Even the white community refused to show the support for the verdicts rendered by an all white jury, as the overwhelming majority of whites felt that the defendant was guilty and criticized the jury's failure to secure the conviction of the alleged "cop killer."

Using the Lincoln case as a classic example emphasizing the perceived legitimacy and integrity of jury deliberations and verdicts in a racially explosive case, this paper examined potential applications of affirmative action in jury selection -- affirmative jury structures and affirmative peremptory inclusion -- as well as the importance of affirmative defense strategies in placing minority members on the jury panel and venire, neutralizing the biasing effects of race-based peremptory challenges.

Affirmative jury structures can effectively form racially mixed juries through the use of mandated racial quotas to ensure the allocation of jury seats to racial minorities. However, a specific form and application of affirmative juries must consider the availability of racial minority jurors in a given jurisdiction. For instance, given the scarcity of Native American jurors in Mendocino County, the Hennepin model in itself would be unable to secure the presence of Native Americans in the final Lincoln jury, because their respective proportion among eligible jury populations in the community did not reach 8% (a minimum statistical probability to place at least one juror among a twelve-member jury). Thus, the use of proportional affirmative jury selection effectively eliminates any chance of Native American jurors being included in the Lincoln jury.

The jury *de medietate linguae* also poses problems, as only three Native Americans survived from the initial jury panel after screened for excuses, qualifications, and challenges for cause. In fact, the final qualified jury pool only included five non-white jury

members, making it impossible to empanel the minimum of six minority jurors required for the *de medietate linguae*.

The Lincoln case also illustrated the logistical difficulty and procedural deficiencies of the current jury selection system, especially when the logistical problems are compounded with a tiny proportion of racial minorities in the jurisdiction. Given the scarcity of available Native Americans for the trial, the social science model appears to be the only possible jury structure in the Lincoln case. Peremptory inclusion is also an effective *voir dire* strategy to create a racially mixed jury, so that the final jury is chosen by affirmatively selecting from the eligible pool the jurors who share the same racial and socio-cultural background as the accused. In a Lincoln case, affirmative selection of three Native American jurors by the defense counsel could have created the racially mixed jury, possibly changing the trial outcome and affecting the public perception of trial fairness and verdict legitimacy.

I leave the readers with an excerpt by defense attorney Tony Serra on his views on the prospect for a new trial on the deadlock charges in the Bear Lincoln case. His views on those issues reflect his actual experiences in the trial, detailing the hardship and difficulties faced by the defense in trying to ensure and secure a fair and just trial for his client.

In the post-verdict interview, Serra declared:

[T]his case should not be retried. This is the time to reunify. This is the time to come back together. This is the time to build bridges, not to destroy bridges. And if the District Attorney seeks to go forward, she will do nothing but create hostility and acrimony in this county. So if she intends to go forward, she should be denounced. All of you in many forms should make your voices heard. You should communicate with her and with other public officers. You should denounce any prospect of a retrial. Let us go forward; let us go forward in peace, as Bear has said (Wilson, 1997e).

A new trial for Bear Lincoln was nonetheless set to begin in January of 1999.[21]



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## NOTES

1. The term, "black" or "African American," is used interchangeably in this paper. The term, "Native American" is also used in the paper to designate a distinct "racial" group as defined in both the original and the revised versions of Directive 15 issued by the Office of Management and Budget in 1977 and in 1998 respectively (for discussions of the governmental definition of race and racial groups, see Fukurai and Davies, 1998).
2. Jury research indicates that "two centuries ago the Puritans of our Plymouth colony used now and then, out of policy, when they were trying a case relating to an Indian, to add Indians to the jury, as in a criminal case in 1682" (Thayer, p.307).
3. The Lincoln family's press release on April 20, 1995, for instance, included the following incidents of police misconduct:
  - (1) Pulling the Lincoln family from a pickup truck and placing guns at their heads, including five year old child, a three year old and two infants;
  - (2) Throwing the sixty-five year old crippled mother of Bear Lincoln to the ground and verbally and physically abusing her, leaving her severely bruised;
  - (3) Knocking out the windows of the Bear Lincoln's mother's home and discharging firearms in her home, hitting the cradleboard of one of the infant grandchildren;
  - (4) Entering at least fifty homes without warrants or consent, with guns cocked, searching each room;
  - (5) Pointing a machine gun at a ninety-nine year old elder as the police searched her house and her young grandchildren watched in horror;
  - (6) Pulling a ninety-five year old man out of his truck at gunpoint and roughing him up for no reason;
  - (7) Stopping countless vehicles at gunpoint;

- (8) Interrogating minors in their homes while their parents were away at a press conference;
- (9) Searching homes while only minors were present, with guns pointed at the minor children;
- (10) Taking minors into custody without their parents' knowledge or consent;
- (11) Throwing a mentally disabled man to the ground and harassing him (Goldberg-Ambrose, 1997, pp.28-29).

4. At one of supporting rallies for the defendant, Serra criticized the instance of prosecutorial misconduct and the racially biased nature of the charges against the defendant, stating that:

Why was the death penalty here charged? Think about that. Why was there a death penalty case? As has been accurately indicated, this could never have been, by any imagination of law student or law professor or any lawyer, anything more than heat of passion manslaughter. ... This case should have never been charged death penalty. That's number one. Two. He surrendered himself; he was not a person who ran because he feared the judicial system, because he feared evidence. He ran because he had a bona fide fear that he would be killed; a well founded and rational fear based on his historical knowledge and on his present predicament. So, when he surrendered himself, why wasn't he given bail? Oh, it's their right in a capital case to deny bail, but why wasn't this a special situation? Why, when he turned himself in, when he invited the litigation, when he said "I do not surrender. I come to vindicate myself, I come to challenge," why wasn't he given bail? Who's going to give him back two-and-a-half years of his life? Why did he have to sit for two-and-a-half years in a cold jail; bad food; threatened by law enforcement personnel; thrown into holes for contrived and artificial reasons? ... Why were we gagged? Is it because of the O.J. case? Should that promulgate a complete, enveloping, the most dire form of gag order that has ever been witnessed in this state, and I infer presumably throughout the United States, where the defendant cannot speak, where his lawyers cannot speak, where his family cannot speak, where any potential witness cannot speak? The prosecution listed 135 witnesses; half of them he listed so they would not speak out. ... We had so limited spokespersons from the core of the case; why did they do that? And isn't it peculiar that that occurred after they had free rein for approximately four months? They could deliver any type of message through the media to the populace that they desired. On television, America's Most Wanted portrayed him as the most heinous

type of defendant, on the flee, a cop-killer with a dreadful record. They, in essence, laced the case with potential bias and prejudice. And when we came into the case, when we surrendered him, when we wanted to tilt it so that we could get a fair trial, so that the populace understands that there are two sides to the story, we're gagged. We're gagged so completely that there's no remnant of First Amendment left. Ask yourself why did that happen; why did they want to silence him; who was behind that? Judge Golden was not a bad judge, but Judge Golden is influenced by the same factors that all people that are subjected to media exposure are influenced by (Wilson, 1997e).

5. In his post-verdict interview, Serra reflected his views on the bailiff's misconduct, arguing that:

During the process of jury selection, a sheriff standing outside the door of the courtroom told a prospective juror who was a potential leader, he said why, why, and I paraphrase, he said words to the effect, "Why are we even having this trial? Bear Lincoln has confessed." He whispered that into the ear of the juror, who went in and took the seat and was so outraged, he pointed and he said, "That man just told me that Bear Lincoln confessed. Is that right? Is that allowed?" He was outraged. And then that sheriff was brought in, and the judge said, "Identify the sheriff who said that," and he pointed his finger at him. And then thereafter what happened? They whitewashed it; they covered it up; nothing happened. They gave it to the Attorney General to investigate, and that office assigned it to an officer who was going on vacation for two weeks. And when that officer came back, someone else wasn't available. And so it trailed, and so it lagged, and finally we were given a little letter that the investigation has been completed, and the deputy made a mistake, but there was no criminal intention, and therefore, he is exonerated (Wilson, 1997e)

6. Wanda Bennet of Ukiah said "We just couldn't get beyond a reasonable doubt. ... We started deliberating with the feeling that everyone involved had become caught up in a terrible tragedy," adding that the panel was troubled by a lack of physical evidence to sort out what happened in two shootouts (Geniella, 1997c). Dorene Burdick, a businesswoman from Mendocino, said, "[M]ost of us are outraged that this case was even brought to trial in the first place. They were on the lookout for an armed and dangerous Indian ... and they had their triggers ready. ... They created the war zone, and he [Lincoln] had every right to defend himself and flee for his life" (Snyder, 1997a). Burdick also

stated the earlier impressions that the jury was mostly swayed by reasonable doubt “whitewashed the real strength of our decision. They called it a credibility contest. Well, it was no contest for us. ... even if we are scoffed at as being a white and rural jury,” adding that “this trial has brought at least five new activists to help the local Indian community in working to act as watchdogs over the justice system” (Snyder, 1997a).

7. The 1989-90 figures were supplied by Professor Ed Bronson, Professor of Political Sciences at California State University, Chico.

8. The defense’s fear of having the all white Lincoln jury was well founded. For example, the composition of Native Americans in Mendocino County is very small. According to the 1990 census, Native Americans comprised mere 3.61% of the adult population in the jurisdiction. The 1990 census undercounted Native Americans especially in the Indian reservation. While the proportion of eligible Native Americans reported by the 1990 census was adjusted and recomputed by incorporating other supplemental lists in obtaining an accurate estimate of Native American jurors in Mendocino County, the Indian proportion of the community residents was still small. Nevertheless, the defense attempted to show to the court the accurate estimate of the Native Americans in the jurisdiction and show the extent to which the existing source lists failed to include Indians who reside in the reservation. Without the accurate estimate of Native American jurors in the jurisdiction, for example, defense counsel could not accurately assess the extent of Native Americans’ jury representativeness in the superior court. Tribal representative reports were supplied from the Bureau of Indian Affairs, including the list of ten federally recognized tribes and their full tribal membership. Incorporating the new information into the computation of Native American’s proportions in the jurisdiction, approximately five to six percent of the adult populations in the county were found to be Native American, suggesting the 1990 U.S. Census underestimated the true Native American population in Mendocino County by fifty to eighty percent. Nevertheless, the Native American constituted a very small percentage of the prospective jury pool in the jurisdiction.

9. Rehnquist, dissenting the majority opinion, noted burdens of jury service and compared jury selection to conscripting armies.

10. Tursio v. United States, 634 A.2d 1205 (D.C. 1993) (holding that the prosecutor did not carry the burden of proof required by step two of Batson when 90% of his challenges were used to strike whites); People v. Dabbs, 596 N.Y.S.2d 893 (App. Div.

1993) (finding that the prosecutor's explanation for a challenge based on a black female's employment was, in reality, based on a stereotypical perception that the juror would be sympathetic to minorities); People v. Duncan, 582 N.Y.S.2d 848 (App. Div. 1992) (finding the prosecutor's explanation for excusing a black prospective juror insufficient to rebut an inference of purposeful racial discrimination).

11. The term, "jurymandering" was coined by Jeffrey Rosen. See Rosen (1992).

12. For further discussions of intertwined relations between the right of defendants and the right of the excluded jurors, see Underwood, 1992.

13. See Act of 1786, no. 1326, 4 Stat. S.C. 746 (conferring right to a mixed jury); Respublica v. Mesca, 1 U.S. (1 Dall.) 73 (1783) (upholding a Pennsylvania defendant's right to a mixed jury); Wendling v. Commonwealth, 143 Ky. 587 (1911) (recognizing discretionary judicial authority to award a jury de medietate linguae); People v. McLean, 2 Johns. 380 (N.Y. Sup. Ct. 1807) (upholding a New York defendant's request for a trial de medietate linguae); Richards v. Commonwealth, 38 Va. (11 Leigh) 690 (1841) (holding that while a person has the right to a mixed jury, the court has complete discretionary authority to grant or deny the request).

14. 299 U.S. at 132-33 (citing Crawford v. United States, 212 U.S. 183 1908).

15. Commonwealth v. Richard Acen, Jr and Commonwealth v. Alberto Penabriel (396 MASS. 472, 487 N.E.2D 189 1986). In separate trials, defendants were tried and convicted in the Suffolk county Superior Court. Appeals were consolidated for purposes of briefing and oral argument in the appeals court. One defendant's application for direct appellate review was granted, and second case was transferred to the Supreme Judicial Court on Court's own motion.

16. *Id* at 396 MASS. 472, 473, 487 N.E.2D 189, 191.

17. *Id* at 396 MASS. 472, 475, 479, 480, 487 N.E.2D 189, 191, 194, 195.

18. In California, Penal Code Section 888 covers the formation of the grand jury, and Section 903.4 requires that each jurisdiction or county appoint jury commissioners who are responsible for compiling lists of those qualified to serve as grand jurors. Section 903.3 also specifies that

superior court judges shall examine the jury list submitted by jury commissioners, and may select "such persons, as in their opinion, should be selected for grand jury duty." However, Section 903.4 also allows judges to disregard these lists and select anyone from the county they find suitable and competent to serve as grand jurors. Section 903.4 specifically states:

The judges are not required to select any names from the list returned by the jury commissioner, but may, if in their judgment the due administration of justice requires, make all or any selections from among the body of persons in the county suitable and competent to serve as grand jurors regardless of the list returned by the jury commissioner (emphasis added).

19. See Ballew v. Georgia, at 231-39, reviewing articles and studies critical of the six-person jury and refusing to uphold a five-person jury.

20. For the effect of the "three strikes and you're out" law, see Craig Haney (1998).

21. Through numerous legal maneuvers by both defense and prosecution, the new trial was finally set to begin in January, 1999 (Wilson, 1998). Meanwhile, the political climate began to change in Mendocino, California. District Attorney Susan Massini was upset in the 1998 November election by Norman Vroman, who indicated that unless there is something in the case files he does not know about, "it would be a waste of county money to continue the case." In response, Massini said that before she leaves office, she indicated that she planned to ask the state attorney general to review the case for possible prosecution at that level (Geniella, 1998).

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Table 1

## Indian Service Populations and Jury Representation in the Master List

| Reservation             | Population <sup>1</sup> | Total Eligible <sup>2</sup> | No. Included | No. Excluded |
|-------------------------|-------------------------|-----------------------------|--------------|--------------|
| Coyote Valley           | 302                     | 48                          | 27           | 21           |
| Guidiville              | 125                     | --                          | --           | --           |
| Hopland                 | 353                     | 338                         | 64           | 274          |
| Laytonville             | 504                     | 87                          | 48           | 39           |
| Manchester/Point Valley | 253                     | 188                         | 107          | 81           |
| Pinoleville             | 259                     | 93                          | 48           | 45           |
| Potter Valley           | 341                     | --                          | --           | --           |
| Redwood Valley          | 135                     | 44                          | 29           | 15           |
| Round Valley            | 3,013                   | 368                         | 215          | 153          |
| Sherwood Valley         | 292                     | 125                         | 60           | 65           |
| Total                   | 5,577                   | 1,291                       | 598          | 693 (53.7%)  |

Note: Some tribes, such as Hopland, provided lists in 1989 for the Whitlock case (People v. Whitlock), but would not provide lists to the defense at this time, fearing county involvement in their business. Hopland, for example, would only give us their list with names only. Both were provided. Similarly, the Guidiville and Potter Valley refused to provide any information on their tribal enrollments in any governmental matter including the Lincoln case.

1: The tribal populations were supplied by Ray Frei at Bureau of Indian Affairs office in Sacramento on December 27, 1996. The information shows the population figure (latest available, 1995) by reservation of federally recognized tribes in Mendocino County. Two other reservations, Noyo River and Yokayo, are not federally recognized and thus eliminated from the analysis.

2: Because a large number of tribal members live around the county boundary, total eligible jurors were identified by only tribal members whose residential addresses are within the boundary of Mendocino County.

TABLE 2  
MENDOCINO COUNTY PETIT JURY COMPOSITIONS OF NATIVE AMERICANS:  
APRIL 30, TO DECEMBER 16, 1996<sup>1</sup>

| Date  | Total Jurors <sup>2</sup> | Native American Jurors | Native American % | Native American Adults (%) <sup>3</sup> | Disparities |             | Z Score  |         |
|-------|---------------------------|------------------------|-------------------|---|-------------|-------------|----------|---------|
|       |                           |                        |                   |   | Absolute    | Comparative |          |         |
| 1     | 4-30-96                   | 62                     | 0                 | 0.00%                                   | 3.61%       | -3.61%      | -100.00% | -1.523  |
| 2     | 5-21-96                   | 53                     | 1                 | 1.88                                    | 3.61        | -1.72       | -47.73   | -0.672  |
| 3     | 5-28-96                   | 99                     | 2                 | 2.02                                    | 3.61        | -1.58       | -44.03   | -0.847  |
| 4     | 6-18-96                   | 64                     | 3                 | 4.68                                    | 3.61        | 1.07        | 29.84    | 0.462   |
| 5     | 7-8-96                    | 40                     | 1                 | 2.50                                    | 3.61        | -1.11       | -30.74   | -0.376  |
| 6     | 7-9-96                    | 48                     | 1                 | 2.08                                    | 3.61        | -1.52       | -42.29   | -0.567  |
| 7     | 7-22-96                   | 52                     | 3                 | 5.76                                    | 3.61        | 2.15        | 59.81    | 0.834   |
| 8     | 7-29-96                   | 80                     | 3                 | 3.75                                    | 3.61        | 0.14        | 3.87     | 0.067   |
| 9     | 8-12-96                   | 85                     | 1                 | 1.17                                    | 3.61        | -2.43       | -67.41   | -1.202  |
| 10    | 8-14-96                   | 45                     | 1                 | 2.22                                    | 3.61        | -1.38       | -38.44   | -0.499  |
| 11    | 8-26-96                   | 70                     | 1                 | 1.42                                    | 3.61        | -2.18       | -60.42   | -0.978  |
| 12    | 9-9-96                    | 55                     | 1                 | 1.81                                    | 3.61        | -1.79       | -49.63   | -0.712  |
| 13    | 9-16-96                   | 46                     | 2                 | 4.34                                    | 3.61        | 0.73        | 20.43    | 0.268   |
| 14    | 9-23-96                   | 47                     | 1                 | 2.12                                    | 3.61        | -1.48       | -41.06   | -0.544  |
| 15    | 9-30-96                   | 243                    | 7                 | 2.88                                    | 3.61        | -0.72       | -20.20   | -0.609  |
| 16    | 10-2-96                   | 249                    | 8                 | 3.21                                    | 3.61        | -0.39       | -11.00   | -0.335  |
| 17    | 10-7-96                   | 105                    | 2                 | 1.90                                    | 3.61        | -1.70       | -47.23   | -0.936  |
| 18    | 10-8-96                   | 79                     | 4                 | 5.06                                    | 3.61        | 1.45        | 40.25    | 0.692   |
| 19    | 10-15-96                  | 107                    | 2                 | 1.86                                    | 3.61        | -1.74       | -48.22   | -0.965  |
| 20    | 10-21-96                  | 62                     | 0                 | 0.00                                    | 3.61        | -3.61       | -100.00  | -1.523  |
| 21    | 10-28-96                  | 44                     | 2                 | 4.54                                    | 3.61        | 0.93        | 25.91    | 0.332   |
| 22    | 11-12-96                  | 38                     | 0                 | 0.00                                    | 3.61        | -3.61       | -100.00  | -1.192  |
| 23    | 11-13-96                  | 38                     | 0                 | 0.00                                    | 3.61        | -3.61       | -100.00  | -1.192  |
| 24    | 11-18-96                  | 51                     | 1                 | 1.96                                    | 3.61        | -1.64       | -45.68   | -0.631  |
| 25    | 11-19-96                  | 68                     | 0                 | 0.00                                    | 3.61        | -3.61       | -100.00  | -1.595  |
| 26    | 12-9-96                   | 67                     | 1                 | 1.49                                    | 3.61        | -2.11       | -58.65   | -0.929  |
| 27    | 12-16-96                  | 45                     | 2                 | 4.44                                    | 3.61        | 0.83        | 23.11    | 0.300   |
| Total |                           | 2042                   | 50                | 2.44                                    | 3.61        | -1.16       | -32.17   | -2.813* |

1: Figures are based on the 1990 U.S. Census.

2: Prospective jurors who refused to identify race and/or who identified more than one categories were excluded from analyses.

3: Percent-Native American adults were computed for individuals who are 18 or over in Mendocino County.

\*: Statistically significant at 0.002 probability level (i.e., the likelihood exhibited disparity would occur by chance was two in one thousand, i.e., one in five hundred).

Table 3

Mendocino County Community Survey on the Bear Lincoln Case:  
Likely Trial Outcomes and Criminal Justice Attitudes

| Questions   | Responses           | N   | Percentage | Valid Percentage |
|---|---------------------|-----|------------|------------------|
| <b>HAVE YOU READ, SEEN, OR HEARD IF:<sup>1</sup></b>  |                     |     |            |                  |
| 1. the defendant, Bear Lincoln, was at large for four months before turning himself in to the authorities? <sup>2</sup>   | Yes                 | 315 | 78.9       | 81.6             |
|   | No                  | 71  | 17.8       | 18.4             |
|   | Don't Know          | 13  | 3.3        | --               |
| 2. Bear Lincoln had previously been convicted of murdering a two-year-old girl?   | Yes                 | 52  | 12.9       | 13.2             |
|   | No                  | 341 | 84.6       | 86.8             |
|   | Don't Know          | 10  | 2.5        | --               |
| 3. the victim, Deputy Bob Davis, was a Viet Nam war hero?   | Yes                 | 173 | 42.9       | 44.6             |
|   | No                  | 215 | 53.3       | 55.4             |
|   | Don't Know          | 15  | 3.7        | --               |
| 4. There was a television story about this case on a program called "America's Most Wanted." Did you see that broadcast?  | Yes                 | 87  | 21.5       | 21.8             |
|   | No                  | 312 | 77.2       | 78.2             |
|   | Don't Know          | 5   | 1.2        | --               |
| 5. Do you believe there is a history of tension between Indians and non-Indians in Mendocino County?  | Yes                 | 333 | 75.9       | 84.7             |
|   | No                  | 60  | 13.7       | 15.3             |
|   | Don't Know          | 46  | 10.5       | --               |
| 6. Do you believe there is some prejudice against Indians in Mendocino County?  | Yes                 | 302 | 68.6       | 77.6             |
|   | No                  | 87  | 19.8       | 22.4             |
|   | Don't Know          | 51  | 11.6       | --               |
| 7. Based on what you have read, heard, or seen about the case, do you believe that the man accused, Bear Lincoln, is definitely guilty, probably guilty, probably not guilty or definitely not guilty of the first degree murder of Deputy Davis. | Definitely Guilty   | 51  | 13.0       | 21.1             |
|   | Probably Guilty     | 129 | 32.8       | 53.3             |
|   | Probably not Guilty | 44  | 11.2       | 18.2             |
|   | Definitely not Glt. | 18  | 4.6        | 7.4              |
|   | Don't Know          | 51  | 38.4       | --               |
| <b>CRIMINAL JUSTICE ATTITUDE QUESTIONS</b>  |                     |     |            |                  |
| 8. Even the worst criminal should be considered for mercy.  | Agree strongly      | 66  | 15.1       | 16.2             |
|   | Agree somewhat      | 104 | 23.8       | 25.6             |
|   | Disagree somewhat   | 64  | 14.6       | 15.7             |
|   | Disagree strongly   | 173 | 39.6       | 42.5             |
|   | Don't Know          | 30  | 6.9        | --               |

Table 4

Mendocino County Community Survey on the Bear Lincoln Case:  
Community Perceptions on the Likely Trial Outcome

| Trial Outcomes                                  | Pre-Trial Publicity |        |        |        |                     |       |                   |       |                      |       |                 |       |                      |       |                        |       | Race Relations |  |  |  |
|---|---------------------|--------|--------|--------|---------------------|-------|-------------------|-------|----------------------|-------|-----------------|-------|----------------------|-------|------------------------|-------|----------------|--|--|--|
|   | Race                |        | Gender |        | Hiding <sup>1</sup> |       | Girl <sup>2</sup> |       | Vietnam <sup>3</sup> |       | TV <sup>4</sup> |       | Tension <sup>5</sup> |       | Prejudice <sup>6</sup> |       |                |  |  |  |
|   | White               | Indian | Male   | Female | Yes                 | No    | Yes               | No    | Yes                  | No    | Yes             | No    | Yes                  | No    | Yes                    | No    |                |  |  |  |
| THE MAN ACCUSED, BEAR LINCOLN, IS: <sup>7</sup> |                     |        |        |        |                     |       |                   |       |                      |       |                 |       |                      |       |                        |       |                |  |  |  |
| Guilty Definitely <sup>8</sup>                  | 23.0%               | 5.6%   | 23.0%  | 19.0%  | 18.8%               | 34.6% | 29.7%             | 18.8% | 25.2%                | 16.2% | 34.4%           | 15.8% | 17.9%                | 41.2% | 13.8%                  | 43.9% |                |  |  |  |
| Guilty Somewhat                                 | 56.4                | 16.7   | 53.2   | 53.4   | 53.6                | 50.0  | 56.8              | 52.3  | 52.3                 | 56.4  | 45.9            | 56.5  | 55.8                 | 38.2  | 52.7                   | 49.0  |                |  |  |  |
| Not Guilty Somewhat                             | 15.7                | 50.0   | 16.7   | 19.8   | 19.3                | 11.5  | 8.1               | 20.8  | 14.4                 | 20.5  | 13.1            | 20.3  | 17.9                 | 20.6  | 22.8                   | 7.0   |                |  |  |  |
| Not Guilty Definitely                           | 4.9                 | 27.8   | 7.1    | 7.8    | 8.2                 | 3.8   | 5.4               | 8.1   | 8.1                  | 6.8   | 6.6             | 7.3   | 8.4                  | 0.0   | 10.8                   | 0.0   |                |  |  |  |

Note: 1996 Mendocino County Community Survey.

1. "Have you read, seen, or heard if the defendant, Bear Lincoln, was at large for four months before turning himself in to the authorities?"
2. "Have you read, seen, or heard if Bear Lincoln had previously been convicted of murdering a two-year-old girl?"
3. "Have you read, seen, or heard if the victim, Deputy Bob Davis, was a Viet Nam war hero?"
4. "There was a television story about this case on a program called 'America's Most Wanted.' Did you see that program?"
5. "Do you believe there is a history of tension between Indians and non-Indians in Mendocino County?"
6. "Do you believe there is some prejudice against Indians in Mendocino County?"
7. "The authorities have charged a man named Eugene 'bear' Lincoln with the murder of Sheriff's Deputy Bob Davis. Based on what you have read, heard, or seen about the case, do you believe that Bear Lincoln is definitely guilty, probably guilty, probably not guilty, or definitely not guilty of the first degree murder of Deputy Davis?"
8. Respondents who said "don't know" or refused to answer the question were excluded from the analysis.

Continued.

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| Questions   | Responses         | N   | Percentage | Valid Percentage |
|---|-------------------|-----|------------|------------------|
| 9. Regardless of what the law says, a defendant in a criminal trial should be required to prove his or her innocence. | Agree strongly    | 179 | 40.9       | 43.3             |
|   | Agree somewhat    | 50  | 11.4       | 12.1             |
|   | Disagree somewhat | 44  | 10.0       | 10.7             |
|   | Disagree strongly | 140 | 32.0       | 33.9             |
|   | Don't Know        | 25  | 17.3       | --               |
| 10. It is better for society to let some guilty people go free than to risk convicting an innocent person.            | Agree strongly    | 99  | 22.8       | 27.6             |
|   | Agree somewhat    | 97  | 22.4       | 27.0             |
|   | Disagree somewhat | 62  | 14.3       | 17.3             |
|   | Disagree strongly | 101 | 23.3       | 28.1             |
|   | Don't Know        | 75  | 17.3       | --               |
| 11. The plea of insanity is a loophole allowing too many guilty people to go free.                                    | Agree strongly    | 260 | 59.6       | 62.4             |
|   | Agree somewhat    | 64  | 14.7       | 15.3             |
|   | Disagree somewhat | 49  | 11.2       | 11.8             |
|   | Disagree strongly | 44  | 10.1       | 10.6             |
|   | Don't Know        | 19  | 4.4        | --               |

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Note: 1996 Mendocino County Community Survey.

1: Respondents who refused to provide answers were excluded from the analysis.

2: Analysis of questions, 1 through 4 and 7 only included respondents who recognized the case.





