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Social De-Construction of Race and Affirmative Action in Jury Selection

Hiroshi Fukurai

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Hiroshi Fukurai†

ABSTRACT

Recent race riots offer powerful and disturbing images and evidence of the cost of ignoring the apparent unfairness of court decisions made by all white juries. In the eyes of many marginalized segments of the community, the conviction of a black defendant or acquittal of a white defendant by an all white jury, 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. In the post-Civil War south, a series of similar atrocities occurred when the Ku Klux Klan's frenzy of violence and lynching , targeting blacks and white Republicans, went unpunished by all white juries. "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.[1]

Today, issues of racially mixed juries and racial balance in cases involving inter-racial crimes pose unique challenges to our judiciary, our criminal justice system, and the community. This article examines possible applications of affirmative action in jury selection to create racially heterogeneous juries. Since race-conscious affirmative action must rely on the clear conceptualization of race and racial definitions, the article first presents critical analysis of the conceptualization and formulation of race and racial classification. Specifically, the first section of this article attempts to deconstruct racial identity as defined by government-defined racial categories, suggesting that race is a social construction and racial identity is subject to individual and societal manipulation. This allows many individuals to pass as members of different racial groups. The article then empirically examines public perceptions of the affirmative jury structures, focusing on the use of mandatory racial quotas to engineer racially heterogeneous juries in criminal trials, specifically the jury de medietate linguae, the Hennepin model, the social science model, and a peremptory inclusive selection method. The article finally argues that, given the strong endorsement for the Hennepin and social science models of affirmative juries, both legislative and court-initiated actions may be needed to energize the public debate concerning the importance of racially mixed juries, the size of mandated racial quotas, and implications regarding applications of affirmative action in jury proceedings.

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† Associate Professor of Sociology, University of California, Santa Cruz. Ph.D. & M.A., University of California, Riverside, 1985 & 1982; B.A., California State University, Fullerton, 1979. I am very grateful to Ian F. Haney Lopez for his helpful comments on the social deconstruction of race as well as John Brown Childs, G William Domhoff, and Richard Krooth for their critical comments on the earlier version of this article.

1. GUNNAR MYRDAL, AMERICAN DILEMMA 552 (1944).

INTRODUCTION

In 1964, two all white male juries had refused to convict Byron de la Beckwith, a fertilizer salesman and avowed white supremacist who publicly bragged about his killing of Medgar Evers, a legendary Mississippi black civil rights leader.[2] The defense twice managed to select an all white male jury in a jurisdiction that included a significant proportion of black residents.[3] It was not until 1994 that a racially mixed jury with eight blacks and four whites found de la Beckwith guilty of murdering Evers[4] Beckwith's conviction was then widely accepted and viewed as legitimate by both white and minority segments of the community.[5]

In Miami in 1980, four white police officers were tried on charges that they had beaten to death a thirty-three year-old, black insurance executive named Arthur McDuffie who had been arrested for a traffic violation. During jury selection, the defense attorneys struck every potential black juror, producing the all white jury that later acquitted the defendants.[6] The Miami riots followed and resulted in the death of eighteen people, $800 million in property damage, and 372 total arrests.[7] Four years

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2. MARYANNE VOLLER, GHOSTS OF MISSISSIPPI: THE MURDER OF MEDGAR EVERS, THE TRIALS OF BYRON DE LA BECKWITH, AND THE HAUNTING OF THE NEW SOUTH 356 (1995). The third trial revealed that four witnesses testified that they heard Beckwith brag, or indirectly admit to, killing Evers. *Id.* at 356-357. Dan Prince, who rented an apartment from Beckwith in 1986, testified that while he and Beckwith were talking about Evars' murder, Beckwith said that he had been tried twice for "killing that nigger." *Id.* He also stated that Beckwith then said, "I had a job to do and I did it and I didn't suffer any more than your wife if she was going to have a baby." *Id.* at 307. Peggy Morgan, who once rode in a car with Beckwith on the way to visit a mutual friend in the penitentiary, testified that Beckwith said "he killed Evers, a nigger, and he wasn't scared to kill again." *Id.* at 358. Mark Reiley, a prison guard who met Beckwith working as a prison guard in Louisiana, also testified that Beckwith shouted at a black nurse, "If I could get rid of an uppity nigger like Medgar Evers, I would have no problem with a no-account nigger like you. *Id.* at 362.

3. The term "black" is used instead of other terms or names such as African-American, Afro-American, or Negro because Directive No. 15 from the Office of Management and Budget specifically uses "black." *See* OFFICE OF MANAGEMENT AND BUDGET, RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING, DIRECTIVE NO. 15 (1977) [hereinafter DIRECTIVE NO. 15] (Providing that the black is a "person having origins in any of the black racial groups of Africa."). Because of the empirical analysis involving various racial categories, this paper uses the term, "black," as specified by the Federal governmental definition of race and racial classification. The term, "African-American," is only used in the analysis section where the question in the survey questionnaire specifically addresses the inclusion of "African-American" jurors in trials that involve "African-American" defendants. Similarly, while I would prefer terms such as civil disturbances, rebellions, or uprisings, the term "riot" is used in the article in order to make it compatible with media reports of the disturbances that followed racially controversial verdicts.

4. William Booth, *Jackson, Miss. : The City Time Remembers – Has It Really Changed Since the Murder of Medgar Evers?*, WASH. POST, Feb. 11, 1994, at B1.

5. *Id.*; Roland Smothers, *White Supremacist Is Convicted of Slaying Rights Leader in '63*, N.Y. TIMES, Feb. 6, 1994, at sec.1, col.1.

6. *Miami Still Shows Scars of Rioting*, NEWSWEEK, Dec. 15, 1980, at 20.

7. Barry v. Garcia, 573 So. 2d 932, 933 (Fla. Dist. Ct. App. 1991). During voir dire, defense counsel used their thirty-four peremptory challenges to remove all black jurors from the pool, resulting in an all white, six person jury. PORTER & DUNN, THE MIAMI RIOT OF 1980 (1985). During the trial proceedings, a police officer, who had been on the scene and was given immunity from prosecution in return for his testimony, stated that Alex Marrero, one of four charged officers, had struck McDuffie as if he were chopping wood with an axe, and that Marrero had said to other officers who were beating

later, another white Miami police officer was charged with manslaughter in the death of 20-year old black motorist Nevell Johnson.[8] The defense attorney's peremptory challenges produced an all white jury which later acquitted the defendant.[9] Word of the acquittal verdict quickly spread throughout the Miami area and sparked another racial riot in Miami in which two police officers were shot, and the police arrested more than 200 rioters, mostly young black males.[10] In yet another shooting death of a black motorcycle rider, Clement Anthony Lloyd, by a white Miami officer in 1989, riots erupted at the scene of the incident. This time, the defendant was tried in 1993 by a racially mixed six-member jury with three whites, two Hispanics, and one black, which again acquitted the defendant.[11] Unlike the previous two racially charged trials, there were no racial riots or uprisings after the acquittal verdict was announced by the racially mixed jury.[12]

McDuffie, "Easy, one at a time." *Id.* at 38-39. The immunized officer also stated that "I heard Sergeant Evans say... 'The bike needs more damage... go get in your car and ride up on it'... [Then] I saw a... police unit sitting on top of the motorcycle." *Id.* at 39. The chief medical officer also testified that McDuffie's head injuries were the worst he had seen in 3,600 autopsies, stating that the amount of force necessary to cause the fracture was the "equivalent of falling from a four story building and landing head first... on concrete." *Id.* at 38; John Crewdson, *10 Die in Miami Riot: Arson and Looting Persist for 2nd Day*, N.Y. TIMES, May 19, 1980, at 1.

8. Reginald Stuart, *Policeman Occupy Tense Areas in Miami After 300 Arrests*, N.Y. TIMES, March 17, 1984, at 6.

9. *Id.*

10. *Id.*

11. Larry Rohter, *Miami Is Tense But Relieved After Officer is Acquitted*, N.Y. TIMES, May 30, 1993, at 1.

12. The incident also resulted in the death of Allan Blanchard, another black passenger on the motorcycle. Continuing for three nights, large scale civil disturbances and uprising left one man dead, seven others shot, and 136 buildings burned and looted. Lozano v. Florida, 584 So. 2d 19, 20-21 (Fla. 1991). Lozano was found guilty of manslaughter in his initial trial, but that decision was overturned by a court of appeals which decided that the defendant had not received a fair trial due to the Miami jurors' fears of more rioting. Berta E.H. Truyol, *Building Bridges- Latinas and Latinos at the Crossroad: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994). On remand, the trial was transferred from Dade County to predominantly white Orlando in Orange County. *Id.* Similar to the previous two Miami trials, local newspapers described the defendant by name as a police officer, though a few reports mentioned his Colombian origins. Although at least one press report described him as white, none described him as Latino, and the media's message seemed clear: Lozano was a "white knight," a protector of the people. *See id.* In the wake of the Rodney King verdict, the venue was again changed to Tallahassee, which has a 24% black population, in an effort to reduce the chance of empanelling another all-white jury. William Booth, *Officer's Retrial Starts in Florida?*, WASH. POST, May 18, 1993, at A3. Subsequently, the venue was changed yet again, back to Orlando, a conservative, overwhelmingly white community, with a only ten percent black population. Mike Clary, *Miami Officer Acquitted: City Remains Calm*, L.A. TIMES, May 29, 1993, at A1. A close observer of the trial, nonetheless, suggested that an acquittal was the likely outcome, largely because the defense had more practice and experience from the previous mistrial case and witnesses' memories of the shooting had begun to fade after four years and were not perceived as credible or reliable. Larry Rohter, *Lozano Case Tests How Racially Balanced a Jury Must Be*, N.Y. TIMES, May 29, 1993, at 1, 5. Further, the public's perception was not as critical as in the previous two trials, because the six member jury was racially mixed, or at least included a juror who shared the same racial background with the victim. *Id.* Nevertheless, in order to prepare for possible rioting in black sections of Miami neighborhoods, National Guard units were called out prior to the verdict. On May 28, 1993, the acquittal verdict was announced, followed by only minor and sporadic disturbances after the acquittal verdict. Rohter, *supra* note 11.

The Beckwith and Miami cases are but two examples of jury trials in which the alleged crimes are racially motivated but the juries that tried white defendants failed to include any members who shared the race-ethnic or ideological characteristics of the victims. Perhaps due to changing times and perceptions, the third Beckwith trial in 1994 and the third Miami trial in 1993 provided exceptions to this pattern. In both instances, there was no racial violence and the verdicts were perceived to be widely accepted by the community.[13] Though the verdicts were different in each case—conviction in the former and acquittal in the latter—the public's perception of the fairness of the trial and the willingness to accept the jury verdict was much greater in the racially mixed tribunals than the all white, homogeneous juries. Those two examples also offer evidence of the intertwined relationship of race, jury composition, verdicts, and the public's perception of the integrity of the jury system and fairness of the jury verdict. The race of the victims and the accused all played a crucial role in influencing the public's respect and acceptance of criminal verdicts.

In criminal trials involving unmistakable elements of racism, there is a wide-spread consensus that a racially mixed jury offers many benefits. Scholars, judges, and litigants argue that a racially mixed jury may help to overcome racial bias, improve the fairness of trial proceedings, and enhance public respect and acceptance of criminal and civil verdicts.[14] Those advocating racially diverse juries argue that minority representation on a jury minimizes the distorting influence of race and generates a more fair and legitimate verdict.[15] To the extent that minorities can contribute points of view that may not be readily apparent to majority jurors, the deliberative process may be substantially fairer and wiser.[16]

Jury research shows that racially heterogeneous juries are more likely than single race juries to enhance the quality of deliberations.[17] A number of empirical studies of mock and actual juries show that racially mixed juries minimize the distorting risk of bias.[18] Jury research also suggests that the quality of the jury's discussion and deliberation is better in larger and more diverse groups than in

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13. Booth, *supra* note 4, at B1; Rohter, *supra* note 11, at 1, 25.

14. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (discussing racial prejudice and its influence on the decision-making of criminal juries); *Developments In the Law*, 101 HARV. L. REV. 1472 (1988) (discussing the harm of minority under-representation on juries); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990) (discussing the racial make-up of juries and its influence on jury verdicts).

15. *See* Colbert, *supra* note 14, at 112-115 (examining jury studies to show that the influence of race is minimized when the jury is racially mixed).

16. Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action*, 68 N.Y.U. L. REV. 707 (1993).

17. Hiroshi Fukurai and Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Action in Jury Selection*, 4 VA. J. SOC. POL. & L. 645, 663 (1997) (discovering that 67.3% of respondents to a survey agreed with the statement, "decisions reached by racially diverse juries are more fair than decisions reached by single race juries.")

18. PAUL JOHNSON, A HISTORY OF THE JEWS (1987); VALERIE HANS & NEAL VIDMAR, JUDGING THE JURY (1986).

smaller ones.[19] A jury which draws upon the varied experiences of its members is less likely to rely upon complacent but uninformed assumptions in its deliberation, suggesting that impartiality is not embodied in a single "impartial" juror, but achieved through the fair cross-sectional representation of a range of views and experiences. Racially integrated juries thus force us to examine, not whether whites, blacks, Hispanics, or Asians have a greater or lesser capacity for impartial decision-making, but whether the optimum conditions for the impartial deliberative process exist. Similarly, participation across racial groups is an important component of the truth-seeking function of the jury system because the jury is the means through which justice is realized.

Racially mixed juries also promote the educational function of jury service and create a civil benefit by requiring jurors of different racial and ethnic backgrounds to work together as equals and thereby debunk racial stereotypes.[20] In general, this is one of the reasons that American democracy embraces diversity and diverse points of view in many decision-making bodies.

Those advocating mixed juries also argue that enhancing the legitimacy of jury verdicts, especially in cases involving race or racism, fosters and promotes social peace.[21] The public's respect for the judicial system also depends on its faith in the ability of the system to impanel a fair jury. In other words, the public is demanding that a jury not only be fair, but it must be perceived fair and legitimate.

Current jurisprudence, however, offers no affirmative mechanism to guarantee minority representation on the jury. Although the Sixth Amendment's fair cross-section requirement forbids systematic discrimination in the creation of the jury venire and panel, it does not guarantee that the jury panel or the final jury will in fact reflect an accurate cross-section of the community.[22] Past jury research substantiated that racial minorities have been systematically excluded from jury service in the vast majority of both state and federal courts.[23] Minorities may remain underrepresented in the venire or jury box even without invidious discrimination.[24] The Supreme Court has stated that a party is entitled to an impartial jury, not a representative one.[25]

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19. Lucy M. Keele, *An Analysis of Six Versus 12-Person Juries*, TENN. B.J., Jan.-Feb., 1991, at 32-33; R. Scott Tindale, et al., *Asymmetrical Social Influences in Freely Interacting Groups: A Test of Three Models*, 58 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 438 (1990). *See Generally*, Richard S. Arnold, *Trial By Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA LAW REVIEW 1, 1-35 (1993) (Suggesting that jury members in the minority are far more likely to maintain their viewpoints and opinions if they are certain that at least one member of the jury agrees with them).

20. REID HASTIE, INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING (1993).

21. *See* King, *supra* note 16.

22. Duren v. Missouri, 439 U.S. 357, 360 (1979) (Holding that the systematic exclusion of women from jury service violates the Constitution's fair cross-section requirement).

23. *See* Johnson, *supra* note 14.

24. Hiroshi Fukurai & Edgar Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NATIONAL BLACK LAW JOURNAL 238, 238-275 (1994).

25. Georgia v. McCollum, 112 S.Ct. 2348, 2357 (1992) (recognizing that a defendant has a right to an impartial jury, but cannot disqualify a person as impartial based on race).

The Supreme Court has been reluctant to recognize the importance of the affirmative action approach to jury selection. However, the Court has been willing to reiterate the importance of representative and fair cross sectional ideals of the jury. For example, the Court once declared that a jury is more likely to fit contemporary notions of neutrality if it is composed of representatives of all segments and groups of the community, thereby creating a body that can reflect "the commonsense judgment of a group of laymen."[26] Indeed, the Court has declared that the jury cannot exercise such judgment "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."[27] The Court also stated that "our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class ... It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."[28] Justice Marshall reiterated the importance of representative juries in a frequently quoted passage from *Peter v. Kiff*:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[29]

From a sociological perspective, the jury structure in the U.S. is the social and legal expression of a wider, underlying conflict between race, class, and gender. Jury composition reflects the ongoing conflict leading to alternative ways to structure a body of peers in our time, especially by racial makeup. Given the overwhelming evidence of legal and extra-legal factors that lead to racially disproportionate juries, it may be of great importance to look at possible uses of affirmative action mechanisms to ensure racially and socially diverse juries.[30]

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26. Apodaca v. Oregon, 406 U.S. 404, 410 (1972).

27. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

28. Smith v. Texas, 311 U.S. 128, 85 (1940).

29. 407 U.S. 493, 503 (1972). While Justice Marshall was writing for only three Justices, his sentiments echo those of the Court in *Ballard v. U.S.*, 329 U.S. 187, 193 (1946), and are quoted approvingly by Justice White writing for the Court in *Taylor v. Louisiana*, 419 U.S. 522 (1975). In *Ballard* and *Taylor*, male defendants were challenging the exclusion of women; in *Peters*, a white defendant was challenging the exclusion of blacks. Thus, in each case the Court felt obliged to explain how a defendant could be injured by the exclusion of a group to which the defendant did not belong.

30. HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (1993). With respect to the public's perceptions on the importance of racially diverse juries, a recent study suggests that the public may not view strict racial quota standards favorably, and its possible implementation is more likely to meet greater challenges from the general public. Fukurai & Davies, *supra* note 17, at 663. The same study also shows that the public also favors racially neutral principles of jury verdicts rendered by racially mixed juries over single race juries, embracing democratic

The result of the Court's recent jury selection decisions suggests that current jurisprudence provides no affirmative mechanism to guarantee racial minority representation in jury trials. For instance, in highly publicized trials such as the Rodney King and Reginald Denny beating cases in Los Angles or criminal cases in Miami in which all-white juries acquitted white police officers in death of African Americans, there were no procedural mechanisms to request or ensure racially mixed juries or the inclusion of racially similar members in criminal juries.[31]

In response, a growing number of courts are beginning to experiment with the race-conscious jury selection method to increase minority participation. For instance, an affirmative action jury selection measure proposed in Hennepin County, Minnesota, requires that racial representation in the jury box reflect respective proportions of both majority and minority groups in the general population. Similar affirmative action measures are also currently under consideration or already established in some jurisdictions. In DeKalb County, Georgia, eligible jurors are divided into thirty-six classified groups, and jury commissioners rely on computer selection to obtain proportional representation of various demographic groups in jury venires.[32] Similarly, the Arizona bar committee has proposed juror classifications by race to obtain proportional jury representation.[33] While these race-conscious selection procedures are used to ensure proportional jury representation at jury panel or venire stages of jury selection, the Hennepin model of racial quotas remains unique as it sets proportional racial representation on the jury itself.

Historical research regarding the jury structure also shows that the recognition of the importance of racially mixed juries and affirmative action in jury selection did not begin with the Rodney King beating case or even with the civil rights revolution of the 1960s. The emergence of heterogeneous juries even predates the American experience of the jury trial. As early as the twelfth century, English law recognized the inherent danger in allowing members of a minority community to

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notions of diversity and diverse perspectives in making collective and unified judgment in criminal trials. Fukurai & Davies, *supra* note 17, at 663.

31. *See* Stuart, *supra* note 8, at A1; PORTER AND DUNN, THE MIAMI RIOT OF 1980 (1985). The recent criminal trial of O.J. Simpson had a predominantly black jurors because racial minorities constitute more than 60% of eligible jurors in Los Angeles County. Similarly, the jury selection method known as the "bulls-eye" program disproportionately increases the number of African Americans at the LA Central Courthouse, the site of the criminal Simpson trial, while causing significant deficits of minority jurors in all other thirty municipal and superior courts in the county. FUKURAI ET AL., *supra* note 30, at 56. Racial minorities' overrepresentation in the Los Angeles Superior courthouse does not reflect the reality of racial makeups in other superior and municipal courtrooms in Los Angeles County. The "bulls-eye" selection is both tortured and inequitable. Los Angeles Central Superior Court first draws available potential jurors who live closest to the courthouse, and then draws on residents from the concentric circles moving outward from it. Since the central courthouse is located in the heart of downtown where blacks and other ethnic minorities are predominant residents, racial minorities have dominated the jury pools. The deficiencies of the bulls-eye method is that this distance-based jury selection system leaves a very small number of racial minority jurors available to all the other remaining superior and municipal courts in Los Angeles, creating significant deficits in the representation of racial minorities. The civil Simpson trial at the Santa Monica Superior Courthouse, Los Angeles, for instance, had no black juror in its twelve member jury. H. Chiang, *O.J. Jury Forced to Start Over: Asian Alternate Replaces Dismissed Black Juror*, S.F. CHRON., Feb. 1, 1997, at A1.

32. Andrew Kull, *Racial Justice: Trial by Cross-Section*, 207 NEW REPUBLIC 17 (1992).

33. R. William Ide, III, *Eradicating Bias in the Justice System: Unequal Treatment Breeds Anger, Frustration in Minority Communities*, 80 ABA JOURNAL 8 (1994).

be tried entirely by English majority jurors and devised the jury system called the "jury de medietate linguae" in both civil and criminal cases involving minority members such as Jews, Italians, Germans, and other foreigners.[34]

This practice of having mixed juries of English natives and aliens endured throughout almost seven hundred years until it was finally repealed in 1870.[35] The quota for the mixed jury remained half for natives and the remaining half for foreigners, suggesting that the Court's color-blindness in jury selection and jury trials is a relatively recent concept.

Past jury studies substantiate the claim that racial minorities have been systematically excluded from jury service, thereby creating wide-spread mistrust and lack of faith in one of America's great institutions.[36] This article examines the following substantive issues of affirmative action policies in jury selection and new approaches to secure minority jury participation in criminal courts.

First, race-conscious affirmative action in jury selection must rely on the clear conceptualization of race and racial definitions to evaluate the effective applications of affirmative mechanisms for creating racially diverse juries. The critical analysis of race and racial classification is also of great importance because society routinely invents and adopts racial categories and classifications that have been found to closely intertwine with societal distributions of social opportunities and legal protections. Part I thus examines the most recent governmental concept of race and racial definitions and analyzes the extent to which racial identity is closely tied to racial experiences and ancestral backgrounds. Further, the first section of this article also focuses on how racial identity is constructed and maintained.[37]

Part II examines the three distinct types of jury representative models that have incorporated race-conscious affirmative action mechanisms and use racial quotas to increase minority jury participation. The three different structures of racially mixed juries include the following: (1) the "jury de medietate linguae" in which half of the jurors come from the majority and the other half from the minority groups; (2) the Hennepin jury model in which the extent of juries' racial representation reflects respective proportions of both majority and minority groups in the general population; and (3) the social science model of jury representation in which the jury must have at least three minorities to successfully resist the group pressure of the majority in jury decision-making processes. The final section of Part II then examines the possible application of an affirmative, peremptory inclusive approach to ensure the selection of racial minority jurors in the final jury and to create the three affirmative jury structures of racially mixed juries.

Part III presents empirical analyses of the public's perceptions on the use of affirmative action policies in jury selection. Since the subject of the jury structure

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34. Deborah H. Ramirez, *The Mixed Jury and the Ancient Custom of De Medietate Linguae*, 74 B.U.L. REV. 777, 783 (1994); Daniel W. Van Ness, *Preserving a Community Voice: The Case of Half-and-Half Juries in Racially-Charged Criminal Cases*, 28 J. MARSHALL L. REV. 1, 35 (1994).

35. Ramirez, *supra* note 34, at 783.

36. JOHNSON, *supra* note 14, at 1695; Nancy J. King, *The Effect of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings*, 31 AMERICAN CRIMINAL LAW REVIEW 1177, 1184 (1994).

37. *See* JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA (1996).

may reflect social and political expressions of conflicts by class, race, and gender, a number of socio-ideological and demographic variables are cross-referenced with the attitudes towards three affirmative action jury models. Finally, Part IV focuses on the public's perception regarding the fairness and legitimacy of such racially mixed juries in criminal proceedings and jury verdicts and examines whether affirmative action efforts in jury trials should become a compelling governmental and public issue—demanding a policy of reform in attempting to make jury decisions equitable and just.

I.
SOCIAL DE-CONSTRUCTION OF RACE AND RACIAL CLASSIFICATION

Race dominates our personal lives and our economic prospects. Race also permeates our politics, altering electoral boundaries, creating political and social alliances, determining the allocation of local, state, and federal funds, promoting policies of affirmative action and anti-discrimination legislation, and even influencing the conduct of law enforcement. From its inception, America has divided people along racial lines in determining the allocation of opportunities and resources.[38]

Despite the pervasive influence of race in our social, economic, and political lives, few seem to understand the amorphous nature of racial classification and the fluid concept of race and racial classification. Further, from a scientific point of view, the measurement of race is neither a reliable nor valid scientific instrument because racial definitions, a set of mono-racial classifications, and even data gathering methods in obtaining one's race are all subject to socio-political changes over time and varying standards of administrative efficiency and criteria adopted by different federal agencies.[39] Recent research suggests that race is a socially and politically constructed concept and that the categorization of race is structured, maintained, reproduced, and destroyed through the historical changes in the socio-political process.[40]

The general notion that race is a myth and is a socially and politically constructed concept has been widely expressed in the literature of sociology and socio-psychological studies.[41] Research shows that race is not a biological or genetic concept and that biological races such as "Negroid," "Mongoloid," and "Caucasoid" simply do not exit.[42] Specifically, the scientific critique of race focuses on the crudity of racial categorization in the following two areas: (1) the racial categories are biologically and genetically underinclusive, suggesting that the physical

38. Ian Haney Lopez, *The Social Construction of Race: Some Observations On Illusion, Fabrication, and Choice*, 29 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 1 (1994).

39. *See, infra,* subsequent discussion on the analysis of the reliability and validity of race and racial classification.

40. MICHAEL OMI, HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S (1986).

41. Lopez, *supra* note 38, at 29.

42. *Id.* at 13. *See also* Saint Francis College v. Al-Khazraji, 481 U.S. 504, 610 (1987).

characteristics and genetic makeups associated with any particular race are also found in other populations with other racial categorizations and (2) the racial identifications are overinclusive, arguing that more physical and genetic variations exist within a racially defined group than between populations assigned different racial categories.[43] Similarly, the studies found that genetic variations are generally more attributable to geographic separation of populations than any clear division among "racially" identified categories.[44]

Historical research also shows that biological divisions of race such as white, black, and Asian (or Caucasoid, Negroid, and Mongoloid) are rooted in the Euro-centric imagination of the Middle Ages which only encompassed Europe, Africa, and the Near East, thereby excluding from the three major races the people of the North American continent, the South American continent, the Indian subcontinent, East Asia, Southeast Asia, Oceania, and South Pacific.[45] The Supreme Court also reiterated the socio-political conception of race, stating that "[T]he particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. ... It has been found that differences between individuals of the same race are often greater than the differences between the 'average' individuals of different races. These observations and others led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature."[46]

The racial categories used by the U.S. government also reflect the mythical and ambiguous nature of racial definition and classification. Table 1 shows the governmental definition and census classification of race and racial categories between 1790 and 2000.[47] From the first 1790 census, the race questions appeared on every census. The analysis of the census classification of race shows that the federal government has struggled for the last two hundred years to categorize individuals into a set of mono-racial categories, and that the census has constantly adjusted and readjusted the list of available racial classifications and definitions. Table 1 also suggests that the racial division that we commonly use as black, Asian, American Indian, and so forth are relatively recent inventions and phenomena.

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43. LUIGI L. CAVALLI-SFORZA ET AL., THE HISTORY AND GEOGRAPHY OF HUMAN GENES (1994).

44. Masatoshi Nei and Arun Roychoudhury, *Genetic Relationship and Evolution of Human Races*, 14 EVOLUTIONARY BIOLOGY 1, 18 (1982); John Tooby and Leda Cosmides, *On the Universality of Human Nature and the Uniqueness of the Individual- The Role of Genetics and Adaptation*, 58 JOURNAL OF PERSONALITY 17, 35 (1990).

45. Lopez, *supra* note 38, at 12.

46. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 610 (1987).

47. While the racial categories for the year 2000 census have already been determined, a number of civil rights organizations, including the Association of Multi-Ethnic Americans (a national organization for people of multiracial backgrounds) are still pressuring Congress to adopt multi-racial checkoffs. Ramon G. McLead, *Tiger Woods: An Emplem For Census Issue Calls For A Multiracial Category on Form Gaining Momentum*, S.F. CHRON., April 24, 1997, at A4.

Table 1. Census Racial Classification between 1790 and 2000

1790 (Pennsylvania)[1]	1800 (Massachusetts)[1]	1810 (Massachusetts)[1]	1820
Free Whites All other persons Slaves	Free Whites, All other persons, except Indians not taxed. Slaves	Free Whites All other free persons except Indians, and taxed Slaves	Free Whites All other free persons except Indians, and taxed Slaves
1830	**1840**	**1850[2]**	**1860[3]**
Free White Persons Slaves Free Colored Persons	Free White Persons Slaves Free Colored Persons	White Black Mulatto	Identical to previous Census
1870[4]	**1880[5]**	**1890[6]**	**1900**
White(W.) Black(B.) Mulatto (M.) Chinese(C.) Indian(I.)	White(W.) Black(B.) Mulatto (M.) Chinese(C.) Indian(I.)	White Black Mulatto Quadroon Octoroon Chinese Japanese indian	White Black - Negro or of Negro descent Chinese Japanese Indian
1910[7]	**1920[8]**	**1930**	**1940[9]**
Identical to previous Census	Identical to previous Census	White Negro Mexican Indian Chinese Japanese Filipino Hindu Korean Other races, spell out in full.	White Negro Indian Chinese Japanese Filipino Hindu Korean Other races, spell out in full.
1950	**1960[10]**	**1970[11]**	**1980[12]**
White Negro Indian Chinese Japanese Filipino Other race-spell out.	White Negro American Indian Japanese Chinese Filipino Hawaiian Part Hawaiian Aleut Eskimo (etc.)?	White Negro or Black Indian (Amer.) Japanese Chinese Filipino Hawaiian Korean Other	White Negro or Black Japanese Chinese Filipino Korean Vietnamese Indian (Amer.) Print tribe Asian Indian Hawaiian Guamanian Samoan Eskimo Aleut Other- Specify

SOURCE: 200 Years of U.S. Census Taking: Population and Housing Questions, 1790-1990. U.S. Department of Commerce Bureau of the Census. See Appendix Section A for Notes.

Table 1. Census Racial Classification between 1790 and 2000. (Continued)

1990[13]		2000[14]
White		
Negro or Black		What is this person's race?
Indian (Amer.) Print the name of the enrolled or principal tribe		White
Eskimo		Black or African American
Aleut		American Indian or Alaska Native Asian
		Native Hawaiian or Other Pacific Islander
Asian or Pacific Islander (API)		Other race
Chinese	Japanese	
Filipino	Asian Indian	Is this person
Hawaiian	Samoan	Spanish/Hispanic/Latino? (ethnicity)
Korean	Guamanian	
Vietnamese	Other API-*	Hispanic or Latino:
		Cuban, Mexican, Purto Rican, South or Central
Other race (Print race)		American, or other Spanish culture or origin, regardless of race.
		Not Hispanic or Latino

SOURCE: 200 Years of U.S. Census Taking: Population and Housing Questions, 1790-1990. U.S. Department of Commerce Bureau of the Census. See Appendix Section A for Notes.

From 1790 to 1810, for example, the census distinguished only white, slave, and others. The 1830 census then divided "Negro" into slaves and free colored persons. The term, black, did not appear until the 1850 census when the slaves and the free colored persons were further divided into Mulatto and black, and the next 1870 census added Indian and Chinese, with Japanese added in 1890. The 1890 census also extended racial classification by including a total of eight racial groupings: white, black, Mulatto, Quadroon, Octoroon, Chinese, Japanese, and Indian. The definition of black included persons having three-fourths or more black blood. Mulatto was reserved for persons having from three-eighths to five-eighths black blood; Quadroon included those having one-fourth black blood; and Octoroon referred to persons with one-eighth or any trace of black blood.[48] The 1900 census definitions, however, eliminated Mulatto, Quadroon, and Octoroon and had only five racial categories. In the 1910 and 1920 census, Mulatto reappeared; but it disappeared again in 1930, while four new racial categories were added to the list, including Mexican, Filipino, Hindu, and Korean, along with the racial category called "other." The 1940 Census then eliminated Mexican, and the 1950 census also deleted Hindu and Korean. The 1960 census then added new racial categories such as Hawaiian, Part Hawaiian, Aleut, and Eskimo and reclassified Indian as American Indian; however, the 1970 census deleted Part Hawaiian, Aleut, and Eskimo and changed Negro to "Negro or black." Both the 1980 and 1990 Census added a number of new racial categories such as Guamanian, Samoan, and Vietnamese, reinstated Korean, Eskimo and Aleut as racially classified groups, and reclassified Indian as Asian Indian. With respect to ethnicity, Hispanics had never been considered an individual racial group, though "Mexican" was considered a racial category in 1930. It has not been used as such since that time. The 2000 census also recognizes Mexicans and other Hispanic categories as distinct ethnic, but not racial, groups.

48. JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOS IN THE UNITED STATES xii (1980).

Every census since 1790 relied on varying standards of racial classification and different sets of racial categories. The continuous struggle to invent and reinvent the set of racial categories by the federal government suggests that there is no universally established, concrete set of discrete characteristics which set people of different races apart and that future racial categorization may remain subject to further revision. The racial classification and categories used in the most recent 1990 and 1980 census are no exceptions. The most recent racial definitions and classifications have been defined by Directive No. 15, "Race and ethnic standards for federal statistics and administrative reporting," which was promulgated by the Office of Management and Budget (OMB) on May 12, 1977.[49] The directive, for example, specifies that the white refers to "[a] person having origins in any of the original peoples of Europe, North Africa, or the Middle East."[50] According to this definition, Iraq's Sadam Hussein and Libya's Moammar Kadafi are considered and classified as white by the U.S. federal government.[51] Similarly, Turkish immigrants, Armenian refugees, Lebanese, and Moroccans from the West coast of Africa can also be considered as white and members of the racial majority in America.

The same groups, however, are often not considered members of the dominant racial group outside the U.S.[52] In Holland where the Dutch are considered as white according to the U.S. governmental standards of racial classification, for example, Turks and Moroccans constitute two of the largest minority groups.[53] They have been discriminated against in employment, education, and housing, and affirmative action programs have been specifically established to assist them in attaining equal education and employment opportunities.[54] Further, Turks and their

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49. In 1998, the Office of Management and Budget (OMB) issued the revision to Directive 15, entitled "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity," announcing its decision concerning the revision of Directive No. 15 with the following two modifications: (1) The Asian or Pacific Islander category" will be separated into two categories -- "Asian" and "Native Hawaiian or Other Pacific Islander," and (2) the term "Hispanic" will be changed to "Hispanic or Latino." Section E of the OMB's revision provides information on the work that is underway on tabulation issues associated with the reporting of multiple race responses. *See* DIRECTIVE NO. 15, *supra* note 3.

50. Other racial groups and Hispanics as an ethnic group are defined in the following: American Indian or Alaskan Native: "A person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliations or community recognition"; Asian or Pacific Islander: "A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa"; Black: "A person having origins in any of the black racial groups of Africa"; and Hispanic: "A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race." *See* DIRECTIVE NO. 15, *supra* note 3.

51. *Id.*

52. American society generally does not regard individuals originating in the Middle East or North Africa as members of the white race. *See* St. Francis College, 481 U.S. at 604 (in which a U.S. citizen born in Iraq brought a claim under Title VII (42 U.S.C. § 1981), examining whether Arabs, who are taxonomically considered as white, are permitted to bring race discrimination claims under § 1981).

53. Sijiera deVries, Thomas F. Pettigrew, *A Comparative Perspective On Affirmative Action*, 15 BASIC AND APPLIED SOCIAL PSYCHOLOGY 179 (1994).

54. *Id.* at 181. There were 204,000 Turks and 169,000 Moroccans, constituting 1.3% and 1.1% of the Dutch population. Their unemployment rate was 42% and 44%, the highest among four major ethnic minorities (27% for Surinamese, 23% for Antillians/Arubans, and only 13% for Dutch). *Id.*

descendants have been discriminated against in Germany and they have been subject to continual racial attacks by neo-Nazis and skin-heads.[55] Similarly, under forty-two years of communist domination in Bulgaria, which suffered declining industrial productivity and increasing economic isolation from the world economy, the government began a program of discrimination against ethnic Turks in the final five years of communist rule. The discriminatory governmental program was reversed only after the institution of a democratic government following the end of communism.[56] In Japan, Iranians and other Middle Easterners are treated as a deviant minority group whose members are often considered to be involved in a variety of criminal activities, including drug trafficking, gambling, prostitution, and illegal sales of prohibited commodities including handguns.[57] They have also been subjected to selective prosecution by Japanese law enforcement agencies and have been discriminated against in housing and employment[58] The Kurds, the minority group in Iran and Iraq, have also been discriminated in Turkey and other Middle Eastern countries.[59] The irony is that when members of the Kurds migrated to the U.S., they began to share the same racial identity as Turks, Iranians, and Iraqis, transcending the ethnic and racial differences in their native countries.

Similarly, the category of "black" entails no universalistic standard or homogeneous unit of a certain, distinct racial group. In England, for example, South Asian immigrants from Bangladesh, Pakistan, and some parts of India are considered as black and placed at the bottom of the social hierarchy, even within the black community, because of their non-Christian religious beliefs and practices.[60] In the United States, on the other hand, the same group is classified as Asian and Pacific Islanders and constitutes the integral part of the so called "model minority" group.[61]

Physical appearance or visible phenotypical characteristics are not the only method of devising race and racial classification. In certain Latin American counties, the acquisition of wealth is most likely to determine one's racial categorization in

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55. Anna Tomforde, *Neo-Nazi Hate Shifts From Turks to Jews*, THE GUARDIAN, May 28, 1994, at 13; Marc Fisher, *Germans Link Deaths to Far-Right Climate*, WASH. POST, June 4, 1993, at A20; Craig R. Whitney, *Caldron Of Hate*, N.Y. TIMES, Nov. 13, 1992, at A1 (noting that Neo-Nazis killed five Turks in Solinger, Germany).

56. Rett R. Ludwikowski, *Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe*, 3 CARDOZO JOURNAL OF INTL. AND COMPARATIVE LAW 73 (1995).

57. Kunio Nishimuro, *Interpreting Justice: Foreigners and Crime in Japan*, LOOK JAPAN 41-4-7 (1995).

58. HIROMI MORI, IMMIGRATION POLICY AND FOREIGN WORKERS IN JAPAN (1997); Takamichi Kajita, *Characteristics of the Foreign Workers Problem in Japan*, 27 HITOTSUBASHI JOURNAL OF SOCIAL STUDIES 1 (1995).

59. Olivia Q. Goldman, *The Need for an Independent International Mechanism to Protect Group Rights: A Case Study of the Kurds*, 2 TULSA JOURNAL OF COMPARATIVE AND INTL. LAW 45 (1994).

60. *See* STEPHEN SMALL, RACIALIZED BARRIERS: THE BLACK EXPERIENCE IN THE UNITED STATES AND ENGLAND IN THE 1980S (1994); Nyta Mann, *What Race Wars?*, 7 NEW STATESMAN AND SOCIETY 12 (1994).

61. *See* RONALD TAKAKI, FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA (1987).

which one's wealth can make him/her become "white."[62] In the Caribbean, economic wealth and demographic conditions led to the development of a highly defined and sophisticated racial hierarchy based on one's wealth and skin color, while in the U.S. biracial stratification of race resulted in all blacks being classified as blacks due to the one-drop rule.[63]

The term, race, is also used differently in other societies. In Britain, for example, the court has recently declared that the Scots are a different race from the English because of their separate church and legal and educational systems.[64] In the litigation in which a senior English policeman brought a race discrimination case against the police for denying him a senior Scottish post because he was English, the unanimous decision of the tribunal affirmed that the English and the Scots are separate racial groups defined by reference to national origin.[65] Similarly, the Burakumin, the largest minority group, and historically-outcast people, in Japan, are visibly indistinguishable from the "average" Japanese, but they are considered a uniquely different race from the non-Burakumin population.[66] It has been concluded that the origins of discrimination against the Burakumin population, is based on increasingly institutional discrimination, abetted by racial theories designed to justify the emerging practice, transformed a partially segregated functional status group into a district outcast and racial minority.[67]

These examples show that race is a social and political construct derived from social, cultural, and historical experiences rather than biological or genetic characteristics. The federal government and the national census have repeatedly struggled to invent and reinvent a set of mono-racial categories to classify individuals for the last two hundred years. In America, the pressure to change the census to reflect new and emerging understandings of race and racial classification continues today. There has been substantial pressure on the OMB and the Census Bureau, for example, to make necessary changes to the existing racial categories to recognize different racial groups and racially mixed individuals.[68]

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62. THOMAS SOWELL, THE ECONOMICS OF POLITICS OF RACE 101 (1983).

63. *Id.* at 105.

64. Gillian Bowditch, *Scotts and English Are Different Races, Tribunal Decides*, HOME NEWS, at 4 (1997).

65. *Id.* The ruling also flies in the face of the previous industrial tribunal ruling in Glasgow in early 1997 that four airline stewards were discriminated against by British Airways because they were Scots. *Id.*

66. GEORGE A. DEVOS, WILLIAM WETHERALL, JAPAN'S MINORITIES (1983).

67. *See* HERMAN OOMS, TOKUGAWA VILLAGE PRACTICES: CLASS, STATUS, POWER, LAW, (1996). The Burakumin are deemed to be outcasts and of different race because their ancestors (up until the 19th century) were employed in professions that were considered ritually unclean, such as cattle herding and hide tanning. *Id.*

68. For example, Tiger Woods, Masters Golf Champion who is racially mixed, exemplifies the absence of racial categories to recognize racially mixed individuals. Tiger Woods once called himself "Cabliasian" because his ancestral race includes Caucasian, Black, American Indian, and Asian. Rob Morse, *In Cablinasia, Crustaceans and Kayo Rule*, S.F. CHRON., April 23, 1997, at A2; *See also* McLead, *supra* note 47, at A4. Various reclassification schemes currently used by the Census Bureau, including mother's race, first race mentioned, race of the head of household or the nearest neighbor, among others, were adopted as administrative purposes without carefully examining whether racial

Indeed, race is not a self-contained, independent concept or social phenomenon. Since race is constructed socially and politically, it is important to understand the complexity of how one's racial identity is derived and maintained. Since racial identity and group affiliation are closely linked, it is also important to examine how racial identity is de-constructed based on the notion of racial group memberships and ancestral race affiliation.

Table 2 shows the de-construction of race by one's self-identified race and reported racial ancestry. The information comes from the 1996 University of California-wide affirmative action survey that examined UC students' racial identity, racial affiliation, and ancestral backgrounds.[69] The first three columns of Table 2 show: (1) the six major racial categories; (2) total number of self-identified respondents for different racial groups; and (3) percentages of respondents in each racial group. For example, of 911 total respondents, 344 respondents identified as white, which is 37.8% of the total sample. Similarly, 30 respondents claimed that they are black (3.3%), while only 5 students said that they are Native American (0.5%). Similarly, 15.8% and 35.1%, and 7.5% of respondents claimed they were Hispanics, Asian and Pacific Islanders (Asian thereafter), and others, respectively.[70]

The next two columns (fifth and sixth columns) show the total count of ancestral race and the percentage of each racial ancestry identified by survey respondents. For instance, of 911 total respondents, 447 respondents said that they have white ancestry (49.0%). Similarly, while there were only 5 self-identified Native Americans in the sample, 135 respondents reported that they have Native Americans ancestors (14.8%). The total number of reported ancestors (1,293) also exceeded the total number of subjects in the study (911), indicating that on an average, an individual has approximately 1.4 different races in their ancestral background. Of 1,293 total ancestral backgrounds, the white race only accounted for 34.6% of all ancestors, along with 5.1%black, 10.4%Native American, 14.9%Hispanic, and 28.0%Asian.

The next five columns (seventh through eleventh) indicate the relation between self-identified race and racial ancestry and show several important findings. First, not all white respondents had white ancestry; only 96.5% of self-identified

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reclassifications make sense in the first place in categorizing racially mixed persons into a mono-racial group. The ambiguity of race and racial identification became increasingly problematic as people are becoming more multi-racial in their backgrounds. *See* Morse, *supra*, at A2 For example, if Tiger Woods declined to provide his racial identity, he may be classified as a member of Asian and Pacific Islanders because his mother who came from Thailand is classified as Asian (half Thai and half Chinese). *Id.* If he does not provide the racial identity of his mother, he may be reclassified as white because his nearest neighbor, Mark O'Meara, is a white professional golfer. *Id.* If he was born prior to 1930, he may have been classified black as his father is a self-identified black (half black, a quarter white and Native American, respectively). *See* McLead, *supra* note 47, at A4. In 1870, he would have been classified as Quadroon because of his mixed racial heritage and the rule of hypodescent (the "one-drop" rule).

69. In 1996, a representative group of college students at four University of California campuses (Berkeley, Irvine, Riverside, and Santa Cruz) were contacted to provide their responses to various questions involving racial quotas, racially mixed juries, and affirmative action in jury selection. The intent of the survey was to understand their knowledge on the current controversy and the debate surrounding the issue of affirmative action, their understanding of the importance of race's impact on social opportunities and legal protections, and their opinions on the present and future status of affirmative action policies and programs.

70. Affirmative Action Research Group (AARG) at the University of California, Santa Cruz, <http://socscisvr-01.ucsc.edu/Hiroshi/test>.

whites indicated that they had white ancestry, suggesting that 3.5% of self-identified whites did not have white ancestors, but nevertheless identified as white. Second, the one drop rule fails to separate whites from those who shared black and other minority ancestry; 5.5% of the self-identified white indicated that they had black ancestors, along with Native American (19.8%), Hispanic (4.7%), and Asian (3.8%) ancestors.

Third, black is a multi-racial and cultural group, showing one of the highest levels of racial mix among major racial groups (246.7%). Exactly half of blacks said that they had white ancestors, while all of them also indicated that they had black ancestors, along with Native American (66.7%), Hispanic (13.3%), and Asian (10.0%) ancestors.

Hispanics show similar levels of racial mix with whites. For Hispanics, the degree of the ancestral mix for blacks (5.5%), Native Americans (18.6%), Asians (2.1%), and other races (9.9%) are similar to those of self-identified whites (5.5%, 19.8%, 3.8%, and 9.7% for black, Native American, Asian, and other ancestors, respectively). Another similarity between whites and Hispanics is the percentage of self-identified whites and self-identified Hispanics who failed to have ancestors of their chosen races. For example, 3.5% of self-identified whites did not have white ancestors, while 3.4% of self-identified Hispanics did not have Hispanic ancestors, but nevertheless identified as white or Hispanic. For the self-identified Asian, the largest racial mix is found with white (7.8%), followed by Hispanic (4.3%) and others (2.8%). Only 0.3% of self-identified Asians had black and Native American ancestors, respectively.

Several important findings are also found from the last five columns (twelfth through sixteenth) which indicate the breakdown of racial ancestry by racial identity. First, everyone who had white ancestry did not identify as white, but only 74.4% of those with white ancestry identified as white, followed by 8.7% as Hispanics, 5.6% as Asian, 3.4% as black, and 0.9% as Native Americans. Second, everyone who shared black ancestors did not identify as black, either; only 45.5% of them identified as black, again providing empirical evidence to negate the widely-held belief of the persuasiveness of the one-drop rule. Indeed, 28.8% of them identified as white, followed by 12.1% for Hispanics, 1.5% for Asians and Native Americans, respectively. The finding suggests that, as far as racial identity of the black "descendant" is concerned, racial "emigration" or exodus from being "black" to "white" is the greatest, reflecting the societal emphasis on the whiteness as the socially privileged and valued racial identity in American society.

Third, similar to the relationship between self-identified race and racial ancestry, almost three out of four individuals who shared white and Hispanic ancestors declared white and Hispanic as their "component" race respectively (74.4% and 72.% for whites and Hispanics). Among the black descendants, the component race still is black (45.5% of them identified as black). Nevertheless, the figure is the smallest among all racial groups, except Native Americans (only 3.7% of Native American "descendants" identified as Native American).

Lastly, among the major racial categories for non-white descendants except blacks, the largest preferred racial identity is found to be white. Even among black descendants, as noted above, more than one of every four individuals with black ancestors identified as white (28.8%), not black, suggesting that the large proportion of black descendants are "passing" as a member of the racial majority, once again negating the underlying rationale of the one-drop rule applied to the black descendants.

Table 2. Racial Identity and Ancestral Backgrounds[1]

Race	Self-Identification N.	Self-Identification %	Ancestral Backgrounds N.	Ancestral Backgrounds % Responses	Ancestral Backgrounds % Cases
Race:					
1. White	344	37.8	447	34.6	49.0
2. Blacks	30	3.3	66	5.1	7.5
3. Native Americans	5	.5	135	10.4	14.8
4. Hispanics	144	15.8	192	14.9	21.1
5. Asian/Pac. Is.	320	35.1	363	28.0	39.8
6. Others	68	7.5	91	7.0	9.9
Total	911	100.0	1,293	100.0	141.9

SOURCE: 1995-1996 UC-Wide Affirmative Action Survey Conducted y the Affirmative Action Research Group (AARG) at the University of California, Santa Cruz. See Appendix Section B for Notes.

Table 2. Racial Identity and Ancestral Backgrounds (Continued)

Race	Self-Identification (%) Whites	Blacks	Nat. Am.	Hisp.	Asians[2]
Race:					
1. White	96.5	50.0	80.0	26.9	7.8
2. Blacks	5.5	100.0	20.0	5.5	.3
3. Native Americans	19.8	66.7	100.0	18.6	.3
4. Hispanics	4.7	13.3	20.0	96.6	4.3
5. Asian/Pac. Is.	3.8	10.0	20.0	2.1	98.8
6. Others	9.9	6.7	20.0	9.7	2.8
Total	140.2	246.7	260.0	159.4	114.3

SOURCE: 1995-1996 UC-Wide Affirmative Action Survey Conducted y the Affirmative Action Research Group (AARG) at the University of California, Santa Cruz. See Appendix Section B for Notes.

Table 2. Racial Identity and Ancestral Backgrounds (Continued)

	Ancestral Backgrounds (%)				
Race	Whites	Blacks	Nat. Am.	Hisp.	Asians
Race:					
1. White	74.4	28.8	50.4	8.3	3.6
2. Blacks	3.4	45.5	14.8	2.1	.8
3. Native Americans	.9	1.5	3.7	.5	.3
4. Hispanics	8.7	12.1	20.0	72.5	.8
5. Asian/Pac. Is.	5.6	1.5	.7	7.3	87.4
6. Others	7.2	10.6	10.4	9.3	7.1
Total	100.1	100.0	100.0	100.0	100.0

SOURCE: 1995-1996 UC-Wide Affirmative Action Survey Conducted y the Affirmative Action Research Group (AARG) at the University of California, Santa Cruz. See Appendix Section B for Notes.

This "passing" is an important social phenomenon that demands greater scrutiny and careful examination. The above discussions, for instance, show that a substantial proportion of individuals are "passing" as members of the different racial group, illustrating the arbitrariness of the construction of race and racial identity. The analysis of the passing and the fluid conceptualization of "white" and its racial identity also suggests that the "passing" may take on the following three distinct forms. The first type of "passer" includes individuals who share black and other minority ancestry but identify as members of the white race. The one drop rule requires that those with black and minority ancestry be classified as members of their respective minority race. However, a large proportion of individuals are claiming their racial identity is white.[71]

The second type of the passing takes place when individuals identify as white without a trace of the white ancestral backgrounds. In other words, self-identified race does not necessarily reflect or predict one's ancestral race, suggesting that racial identity does not always guarantee that he/she has the racial ancestry of his/her chosen race. Blacks are sort of the only "error free" race in which all of the self-identified blacks indicated that they had the black ancestor, while white and other races include persons who failed to have the white ascendant or ancestors of their own identified race. Further, since the federal government is not required to verify one's race and ancestral backgrounds, many people are in fact "passing" as

71. The first type of "passer" is not uncommon. As noted earlier, the 1996 UC-wide survey found that 5.5% of white students indicated that they had black ancestors. Their views on race relations and affirmative action are also different from the other self-identified white students. For instance, one male student who identified as white but indicated that he had the black ancestor gave the following opinion: "I am for affirmative action because it is the only thing of its kind. In every dispute there must be a loser. White people have been on top for far too long and need to take a step down to the loser. I who appear white and am accepted as white feel that I am obligated to step down. I am perfectly willing to be the loser." The background of this student shows that he is a student at the University of California, Santa Cruz (UCSC) and his parents' annual income is between $50,000 to $79,000.

members of the dominant racial group for social and economic reasons, supporting the notion that race is a social and political construction.[72]

A third type of the passing is not focused on the previous discussion of race and racial classification. The majority of those who identified as Hispanic are "passing" as members of the white race.[73] For example, one source of confusion about race is the treatment of Hispanics and how the government defines and treats Hispanics as a racial group. Race can be defined in terms of a number of different criteria such as one drop rule, skin colors, wealth, national origins, and culture.[74] The Scots are considered as a different race from the English because of the national origin.[75] Similarly, the Hispanic classification in the U.S. census was devised based on the national origin in which individuals with the Spanish origin are classified as Hispanic regardless of race. The problem of classification schemes of race arises when the majority of Hispanics are identifying as white, but Hispanics as a racial group are considered and legally treated as racial minority.[76]

Table 3 shows the 1990 U.S. census information on the population breakdown by race and ethnicity. The 1990 census shows that there are 22.3 million Hispanics in America (9.0% of the U.S. population), and 11.55 million of them (51.7%) identified as white, closely followed by others (42.8%). Though Hispanics can be of any race, the number of Hispanics who identified their race as black, Native American, or Asian were very small (3.4%, 0.7%, 1.4%, respectively). However, when Hispanics are added to existing racial minority categories, as done routinely in the evaluation of racial discrimination and the need for affirmative action programs, Hispanics accounted for 9% of the total population. The addition of Hispanic as a racial group reduced the white population from 80.2% to 75.6% (see the last column in Table 3). Nevertheless, the proportion of blacks, Native Americans, and Asians almost remain the same (12.0% to 11.8% for black, 0.8% to 0.7% for Native American, and 2.9% to 2.8% for Asian, after Hispanics are introduced as one of six distinct racial minority categories).

If passing can be defined as those who are classified as racial minorities but who act and are treated as members of the racial majority, the majority of the Hispanic population is statutorily allowed to pass as a racial minority (51.7% of them identified themselves as white in the 1990 census), creating even greater problems in terms of data comparability and consistency. Furthermore, although the racial category may include Hispanic along with other governmentally defined racial

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72. TAMMY KO ROBINSON, UNIVERSITY OF CALIFORNIA, SANTA CRUZ, INTERNATIONAL ADOPTION SEMINAR (June 9, 1997). There are no concrete or universal sets of criteria for constructing one's racial identity. For example, sociologist Tammy Ko Robinson studied the racial identity of ten Koreans who had been adopted by white couples and found that all of them identified as white, not Asian. *Id.*

73. *See* Table 3, in which, according to the 1990 U.S. Census, 51.7% of those who identified themselves as Hispanic also identified their race as white; *See also* Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration*, 143 UNIV. OF PENNSYLVANIA LAW REVIEW 1595, 1658.

74. *See* Omi and Winant, *supra* note 40; Neil Gotanda, *A Critique of Our Constitution In Color-Blind*, 44 STANFORD LAW REVIEW 1 (1991).

75. *See* Bowditch, *supra* note 64, at 4.

76. *See* Table 3, *infra*, in which, according to the 1990 U.S. Census, 51.7% of those who identified themselves as Hispanic also identified themselves as white.

groups such as white, black, Native American, and Asian, self-identified white with Hispanic backgrounds can still claim to be Hispanics because racial categories still fail to differentiate the national origin from the definition of race based on physical characteristics or cultural notions. Clearly, Directive No. 15 is unable to distinguish people based on their physical appearances and how they are socially and economically treated.

Table 3. 1990 U.S. Census with Race and Ethnicity with and without Hispanic Origin

			Hispanic Origin		Non-Hispanic Origin		Hispanic as Race	
Response	No.	%	No.	%	No.	%	No.	%
Total Population	248.709[1]	100.0	22.354	100.0	226.364	100.0		
White	199.686	80.2	11.557	51.7	188.128	83.1	188.128	75.6
Black	29.986	12.0	.769	3.4	29.216	12.9	29.216	11.8
Native American	1.959	0.8	.165	1.7	1.793	0.8	1.793	0.7
Asian/Pac. Is.	7.273	2.9	.305	1.4	6.968	3.1	6.968	2.8
Others	9.804	4.0	9.555	42.8	.249	0.1	.249	0.1
Hispanic	--	--	--	--	--	--	22.354	9.0

Source: 1990 U.S. Census, United States Department of Commerce, Bureau of the Census, Washington, D.C. See Appendix Section C for Notes.

Hispanics from Mexico, Puerto Rico, Cuba, Central America, South America, and Spain all had different racial experiences in the U.S.[77] On occasion, Hispanics also included immigrants from Italy and Portugal.[78] Similarly, the Court held that Hispanics can also include persons with Spanish surnames, suggesting that spouses of interracial marriages, their children, and immigrants from the Philippines and their descendants can be legally included as Hispanic, though Directive No. 15 specifically classifies Filipinos as Asian and Pacific Islanders.[79]

77. *See* Lisette E. Simon, *Hispanics: Not a Cognizable Ethnic Group*, 63 UNIV. OF CINCINNATI LAW REVIEW 497 (1994).

78. Alex M. Saragoza et al., *History and Public Policy: Title VII and the Use of the Hispanic Classification*, 5 LA RAZA LAW JOURNAL 1 (1992); Carl J. Mora, *Letter to the Editor, Americans of Hispanic Origin*, N.Y. TIMES, Feb.25, 1985, at A16 (noting that "the term Hispanic fails to recognize the extremely rich ethnic and racial diversity of Latin Americans, for example, Argentines of Italian, German or French descent; Mexicans of Irish or Japanese ancestry; Cubans with Spanish, Lebanese African or Chinese forebears; Peruvians of English, Russian-Jewish or Inca lineage; Venezuelans of Polish or Uruguayan stock; Brazilians of Korean or Greek heritage – the varieties go on and on. And, of course, there are those many Latin Americans who are entirely or partly of African and American Indian ancestry with some of the above thrown in.").

79. For example, in jury composition challenge cases, the Court stated that Hispanics that are a distinct racial group in the community would include those with Spanish surnames. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 481 (1954) (becoming the first case in which the U. S. Supreme Court considered discrimination against Hispanics as evidenced by the exclusion of Mexican jurors. The

In order to differentiate "Hispanic" minorities from self-identified whites who act and are socially treated as white, it may be important to legally and politically recognize racial, social, and political categories such as Chicanos, Mexicanos, or other groups typically identifies as Hispanic who historically experienced racial discrimination in this country.[80] In the 1930 national census, for example, Mexicans were considered as a distinct racial, not ethnic, group, but the category has since disappeared. Unfortunately, none of the Hispanic subgroups are recognized as distinct racial groups in the 2000 national census, thereby making it virtually impossible to differentiate minority Hispanics who have experienced racial discrimination from self-identified Hispanic whites who continue to enjoy the legal protections and social property and privileges of whiteness in our society.

Race becomes an important conceptual tool and device because at stake in the current controversial debates about affirmative action are fundamental questions about what it means to be a member of a racial minority and who gets to decide. The power to name oneself is fundamentally critical to any individual and to any civil rights movement. The de-construction of race and racial identity suggests that race, no matter how the government tries to classify and reclassify individuals based on racial categories, is still a social construction. Therefore, it is undeniably subject to intentional manipulation, suggesting that race as a social construction generates social privileges and legal empowerment to continuously determine the allocation of social and legal resources.

The absence of any biological or genetic basis to race does not always lead to the conclusion that race is wholly a hallucination, phantasm, or simple imagination, however. Race has its social and historical roots and continuously perpetuates and reproduces its strength in the realms of social beliefs. While various physiological characteristics and unique features occur by chance, determining the allocation of resources by race is a social invention and the brainchild of humankind.

Hernandez court determined that, just as color can distinguish a person's race, Spanish names provide ready identification of members of Hispanic communities). *See also* Castaneda v. Partida, 430 U.S. 482 (1977) (asserting that that Mexican Americans were a clearly identifiable class and used the terms "Spanish-surnamed" and "Mexican American" as synonymous); People v. Tervino, 704 P.2d 719, 721 (Cal. 1985) (holding that "'Spanish surnamed' is sufficiently descriptive of a cognizable group" for purposes of abuses of peremptory challenges by the prosecution and concluding that "Spanish-surnamed" describes Hispanics in general).

80. While Directive No. 15 specifies Hispanic as an distinct ethnic, not racial, group, the problem of treating Hispanics as one of distinct racial groups is that the large proportion of individuals from Central and South America are indistinguishable physically and phenotypically from the "average" white person in the U.S., though they are classified as members of Hispanic groups by Directive No. 15 and other criteria employed by different federal agencies. In affirmative action programs, Hispanics are routinely considered as one of racial groups based on Spanish culture or national origin regardless of racial ancestry, and the term Hispanic remain problematic because the term generally encompasses immigrants from Spain, Cuba, Mexico, Central and South America, Italy, and Portugal, showing that the term include those classified as white by Directive 15. *See* Saragoza et al., *supra* note 78.

The 1960's social revolution and the era of racial upheavals led to the realization of distinct racial identity and the birth of strong race consciousness among a large number of Mexicans and they began to declare themselves as Chicanos. It then became their new racial and social identity. GUILLERMO FUENFRIOS, AZTLAN: ANTHOLOGY OF MEXICAN LITERATURE (1972). It is ironic that the national census has continually failed to recognize Chicanos and give them the legal status of distinct racial group warranting the governmental recognition in the census category of race. In fact, the 2,000 census only used the term, "Latino" which would be semantically and culturally the closest identity to the Chicano. However, the national census still treated it as an ethnic, not racial, group. *See* Table 1, *supra.*

The creation and application of affirmative action becomes important because affirmative action may be the only effective social policy and legal program that directly challenges and undermines the valued property of whiteness as a social and legal privilege.

The following section examines the four distinct types of affirmative action in jury selection in creating racially mixed juries. While race is a social construction and can be de-constructed by self-identity and racial ancestry, race still exists as a powerful social and legal phenomena. The specific applications of affirmative mechanisms and uses of mandated racial quotas 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 trial, affirmative action in jury selection may be necessary. The affirmative mechanisms for creating racially diverse juries include the following: (1) the jury de medietate linguae; (2) the Hennepin model; (3) the social science model, and (4) peremptory inclusive selection.

II.
FOUR STRUCTURES OF AFFIRMATIVE JURIES

A. *The Jury "De Medietate Linguae" Model*

The concept of "peers" has changed over the last eight hundred years. Historically significant to the concept of peers, same group membership and representation by a jury of one's peers is the ancient jury de medietate linguae model. In the jury de medietate linguae, the peers are, in most cases, defined in terms of the defendant's social and national identity.[81]

The concept of the jury "de medietate linguae" originated due to the treatment of Jews in twelfth century England.[82] 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."[83] Jews were, "darker-skinned and spoke a mysterious and foreign language."[84]

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.[85] Once they arrived in England, the Jews took up residence in the larger towns that were the 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,

81. Ramirez, *supra* note 34, at 785.

82. MARIANNE CONSTABLE, THE LAW OF THE OTHER 18 (1994).

83. HAROLD E. QUINLEY, CHARLES Y. GLOCK, ANTI-SEMITISM IN AMERICA 94 (1972).

84. Ramirez, *supra* note 34, at 783.

85. *Id.*

resulting in the forced conversion and massacre of Jews throughout the area.[86] 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.[87] A significant problem encountered was the issue of apostasy. For instance, they continued to rely on the king to secure them from religious accusers who repeatedly claimed that the Jews killed Christian children and drank their blood.[88]

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.[89]

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.[90] The jury de medietate linguae was granted to Jews to protect the Crown's property interest in Jews and their effects.[91] Though England subsequently banished all Jews in 1290, foreign merchants from Italy and Germany soon became the King's financial agents, replacing the Jew. These groups 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.[92]

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 owing to

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86. JOHNSON, *supra* note 18, at 205.

87. Robert C. Stacey, *The Conversion of Jews to Christianity in Thirteenth-Century England*, 67 SPECULUM: A JOURNAL OF MEDIEVAL STUDIES 263 (1992).

88. Dena S. Davis, *Ironic Encounter: African-Americans, American Jews, and the Church-State Relationship*, 43 CATHOLIC UNIV. LAW REVIEW 109, 121 (1993). The Jews were considered a form of property, too. Henry III, for example, had pawned the English Jews for a loan of five thousand silver marks to his brother, Richard of Cornwall. Richard, in turn, had secured his property interest by intervening to save 71 Jews after others had been executed on the vague suspicion of complicity in a ritual murder of an 8-year-old Christian child in 1255. The Jews were accused of having fattened-up the "little saint" on "milk and other childish nourishment" before crucifying him and gorging on his blood. *Id.* Christian holidays, especially Easter, were times for Jews to hide from the pogroms often triggered by the Easter sermon vilifying Jews as Christ-killers. *Id.*

89. ANDREW MCCALL, THE MEDIEVAL UNDERWORLD 281 (1979).

90. SEYMOUR WISHMAN, ANATOMY OF THE JURY: THE SYSTEM ON TRIAL 31 (1986).

91. Toni M. Massaro, *Peremptories Or Peers? Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. LAW REVIEW 501, 550 (1986). Although Jews played active roles in financing church activities, King Edward I hanged up to three hundred Jews, confiscated the assets of all other English Jews and expelled them from England. *See* JOHNSON, *supra* note 18, at 212.

92. Davis, *supra* note 88.

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.[93] The heterogeneous nature of the jury was intended to insure foreign merchants a fair trial without the possibility of local prejudice.[94] Those courts applied law as they perceived it, almost regardless of the source of law, in order to achieve commercial fairness. For example,

> The Chancellor in 1475 said: This suit is brought by an alien merchant who has come to conduct his case here; and he ought not to be held to sue according to the law of the land, to await trial by twelve men and other solemnities of the law of the land, but ought to sue here, and it ought to be determined according to the law of nature in the chancery, and he ought to be able to sue there from hour to hour and day to day for the speed of merchants ... besides the merchants, etc., shall not be bound by our statutes where statutes introduce new law, unless they are declaratory of ancient law, that is to say nature, etc ... but that will be according to the law of nature which is called by some the law merchant, which is universal law throughout the world.[95]

The jury de medietate linguae was not limited to the royal courts. Parliament also articulated the principle of the jury de medietate linguae in the 1354 enactment, stating:

> And that in all Manner of Inquests and Proofs which be to be taken or made amongst Aliens and Denizens, be they Merchants or other, as well before the Mayor of the Staple as before any other Justices or Ministers, although the King be Party, the one half of the Inquest or Proof shall be Denizens, and other half of Aliens, if so many Aliens be in the Town or Place where such Inquest or Proof is to be taken.[96]

An inquest to the staple court "was to consist wholly of aliens when both parties to the suit were aliens; wholly of denizens when both parties are denizens; and half of aliens and half of denizens when one party was an alien and the other a denizen."[97]

The de medietate concept, also known as a party-jury, had wider applications, too. For instance, when an English university scholar was indicted for

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93. CONSTABLE, *supra* note 82.

94. Ramirez, *supra* note 34, at 781 (citing the work of G.W. Hoon, *Commentary*, 1982 CRIM. L. REV. 681 (1982)).

95. HAROLD POTTER, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 188 (1958).

96. Statute of 28 Edward 3, ch. 13 (1354).

97. CHARLES GROSS, SELECT CASES CONCERNING THE LAW MERCHANT xxvii (1908).

treason, felony, or mayhem, the vice-chancellor of the university could claim jurisdiction, and the resulting trial was before the high steward and a jury formed "de medietate"—half from a panel of eighteen freeholders returned by the sheriff and half from a panel of eighteen matriculated laymen returned by the beadles of the university.[98] Similarly under a writ of jure patronatus concerning church patronage, the dispute could be tried by the bishop or by a specially appointed commission, before a jury of six clergymen and six laymen of the neighborhood.[99]

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.[100]

American colonies and the courts also experimented with the use of juries de medietate linguae after English settlers developed 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.[101] 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.[102]

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*, 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.[103]

At the state court level, potential applications of juries de medietate linguae have also been reviewed and discussed. In 1986, The Massachusetts Supreme Court examined the applicability of the jury de medietate linguae.[104] Article 12 of the

98. James C. Oldham, *The Origins of the Special Jury*, 50 UNIV. OF CHICAGO LAW REVIEW 137, 168 (1983).

99. *Id.*

100. Ramirez, *supra* note 34, at 789.

101. *See* Act of 1786, no. 1326, 4 Stat. S.C. 746 (conferring right to a mixed jury); Respublica v. Mesca, 1 U.S. 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. 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).

102. Ramirez, *supra* note 34, at 790.

103. 299 U.S. 132, 133 (1936).

104. *See* Commonwealth v. Richard Acen, Jr., 487 N.E.2d 189 (1986).

Massachusetts Declaration of Rights drawn from the Magna Carta, 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.[105] The court, however, held that the right to the jury de medietate linguae was not a constitutional right 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.[106]

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 American jurisprudence.

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 that the composition of a jury, 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 from the 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.

B. *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 determined 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 variable depending on the changing racial compositions in the jurisdiction. In Hennepin County, the grand jury consists of 23 members; thus, nine percent of the 23 posts are specifically reserved for minority

105. *Id.* at 191.

106. *Id.* at 191, 194, 195.

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.[107]

Besides setting up a system of proportional representation of minorities on the jury, 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.[108]

While it is impossible to estimate how widespread race-balancing of juries is, 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.[109]

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

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107. TASK FORCE ON RACIAL COMPOSITION OF THE GRAND JURY 45 (1992).

108. Louis N. Smith, *Final Report of the Hennepin County Attorney's Task Force On Racial Composition of the Grand Jury*, 16 HAMLINE LAW REVIEW 879 (1993).

109. Hiroshi Fukurai, *Key-man Selection Is Not Dead Yet: A Case Study of Grand Jury Selection in California* (1997) (on file with author); Hiroshi Fukurai, *Racial Empowerment in Grand Jury Indictment: Race, The Jury, and the Challenges of Social Control*, paper presented at the 1994 annual meeting of the American Society of Criminology. In California, Penal Code § 888 covers the formation of the grand jury, and § 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, § 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].

C. *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 version of the racially mixed juries. The important feature of 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.[110] 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 to use smaller juries, a change generally deemed undesirable.[111] The naive response to the practical difficulties is to limit the defendant's right to one juror of the 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.[112]

More recent psychological studies show that without a minimum of three minority jurors, minority jurors may not withstand group pressure, suggesting that one or two dissenting jurors eventually accede to the majority's opinion.[113] Behavioral studies suggest that a reasonable compromise between the jury de medietate linguae and the Hennepin model, especially 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 racial minority are necessary to offset the group pressures of the dominant white jurors during jury deliberation.[114] Moreover, one or even two jurors are unlikely to maintain their own "not guilty" verdict in the face of opposition by the remaining jurors, much less change the other's opinion—contrary to the Hollywood vision that a single juror was able to convince his fellow jurors to reverse their original guilty verdicts, as Henry Fonda did in Twelve Angry Men.[115]

It seems likely that were this proposal to operate as planned and include 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.[116] Based on social

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110. *See* Williams v. Florida, 399 U.S. 78 (1970) (approving juries as small as six people).

111. David Kaye, *And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury*, 68 CALIFORNIA LAW REVIEW 1004 (1980).

112. HARRY KALVEN, HANS ZEISEL, THE AMERICAN JURY 463 (1966).

113. MICHAEL J. SAKS, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE (1977). *See also* Ballew v. Georgia, 435 U.S. 223, 231 (1978)(refusing to uphold a five-person jury based on studies showing a six-person jury to be critical to effective jury deliberation).

114. Johnson, *supra* note 14, at 1698.

115. Sidney Lumet, the film's director, recently revealed that he "always felt Twelve Angry Men was romantic, and in a sense, unrealistic. I had no illusions even then. It's hard enough to find a jury with even a single unprejudiced person." David Margolick, *Again, Sidney Lumet Ponders Justice*, N.Y. TIMES, Dec. 31, 1989, v. 139, s.2.

116. *See* VOLLER, *supra* note 2.

science research, 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.[117] It is only in cases with marginal evidence that the jury would expect to reach a different verdict than would be obtained under the current color-blind system.

Thus, if representation 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. 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.[118] 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. Proponents of this remedy argue that such guaranteed racial quotas would (1) appease society's dissatisfaction with racially discriminatory peremptory challenges, (2) lead to more equitable and fair decisions, on the assumption that jurors are more able to correctly judge the character of a racially similar defendant, and (3) increase both the appearance of fairness of jury trials and societal acceptance of jury verdicts and enhance society's respect and faith in the integrity of the jury system.[119]

D. *Affirmative Peremptory Inclusive Approaches*

Designing an effective affirmative selection procedure to ensure that racial minorities are included in the final jury poses unique legal and 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, a significant proportion of racial minorities would still be eliminated before a mandated racial quota can ensure their presence in the final jury. In other words, the formation of affirmative jury structures such as de medietate linguae, Hennepin, and social science models requires either the complete abolition or some restrictive usage of peremptory challenges so as not to impair affirmative selection of minority jurors.

Affirmative peremptory selection, an alternative to peremptory challenges to empanel the final jury, enables both sides to exercise their challenges for cause to enlist twelve jurors in order of preference.[120] 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.

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117. DONALD BLACK, SOCIOLOGICAL JUSTICE 30 (1989).

118. *See* Johnson, *supra* note 14.

119. *Id.* at 1706.

120. *See* Ramirez, *supra* note 34.

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.[121] By eliminating the discriminatory effects of peremptory challenges on minorities and jury representation, affirmative peremptory inclusion is considered to be an important strategic alternative to peremptory challenges.

My proposal for affirmative action in jury selection is a strategical 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, I suggest 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, the availability of racial minorities in the qualified jury pool would be significantly limited, suggesting that 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. This would require both sides to prepare a preferential list of three potential jurors in the pool. The jury seats for the remaining six jurors and alternatives would then 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 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 can be exercised in the selection of those remaining jurors.

Affirmative peremptory inclusion, as I propose, is conceptually and methodologically different from the so called back-loading selection methods currently being used 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. 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 parties 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 an essential component of the American court system, which is based on an adversarial system. Allowing affirmative peremptory selection by opposing parties would help maintain the idea 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. Jury research also shows that the judge's views or decisions are

121. *See* King, *supra* note 16; Ramirez, *supra* note 34.

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.

Affirmative inclusive selection allows both sides to determine the variability and characteristics of jurors for the required number of jury seats. While race remains an important factor in many racially sensitive trials, the critical task of ascertaining one's racial identity is not a simple, but very complex task, suggesting that neither objective or subjective evaluations of one's race necessarily correspond to the person's self-determined racial identity. As I have demonstrated in the deconstruction of race by the official racial designation and racial ancestry, racial 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 cultures—the critical elements and significant criterion for accurately imputing the defendant's motives and understanding racially sensitive issues surrounding a case. Although race still remains an important determinant of how the public views trial fairness and verdict legitimacy, the affirmative inclusion system allows the parties to identify and determine the cognizable characteristics for the selection of final jurors.

Existing research confirms that the product of affirmative action in jury selection for racially mixed juries can enhance perceptions of jury fairness.[122] One legal analyst stated that affirmative measures such as race-conscious jury selection practices currently in use are justified when narrowly tailored to meet the state's interest in advancing the appearance of fairness in jury proceedings, provided that: (1) no color-blind measures are feasible, (2) the race-conscious method selected is temporary, subject to periodic review, and minimizes any resulting stigma to minority jurors, and (3) the measure increases rather than decreases the opportunity of minority groups to participate on jury trials and the chance for creating racially integrated juries.[123]

Past research, however, has failed to examine reactions to this race-conscious affirmative measure. Little information is available to show whether or not potential jurors would react negatively to racial quota methods of obtaining racial minority representation, or whether potential negative reactions to mandated racial quotas would cancel out or overshadow the positive reactions that racially mixed juries may produce. Similarly, there is little research has examining whether mathematically formulated quotas are perceived to impose a ceiling effect for minority applicants by setting a minimum, or for the racial majority by setting a maximum. Further, past research failed to clearly differentiate social race from self-identity of race or ancestral race. Since white identity, for example, is as much a social construct and fabrication as the identification of racial minorities, it is important to simultaneously consider the various components of socially constructed race. Present research thus incorporates both self-identification of racial membership and reported ancestral backgrounds in examining the application of affirmative action in jury selection.

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122. Johnson, *supra* note 14; Ramirez, *supra* note 34.

123. *See* Nancy J. King, *The Effect of Race-Conscious Jury Selection On Public Confidence In the Fairness of Jury Proceedings*, 31 AMERICAN CRIMINAL LAW REVIEW 1177, 1179 (1994).

The following section examines whether or not an affirmative action mechanism to secure racially integrated juries is essential to the appearance and substance of fairness in jury proceedings. Specifically, the following section examines three different types of affirmative action mechanisms for creating racially integrated juries – the Hennepin, de medietate linguae, and social science models of affirmative jury structures. Empirical analyses also focus on race and class differences relative to the perception of affirmative action measures in jury selection, the legitimacy of jury verdicts rendered by racially integrated juries, and the acceptance of mandated racial quotas as affirmative action mechanisms in jury selection.

III.
METHODOLOGIES

A. *Sample*

In the spring of 1997, a telephone survey was conducted to examine the public's perception on the criminal justice system and criminal jury proceedings. The research site was Santa Cruz County, California.[124] Modern random sampling techniques were employed to maximize the representativeness of the sample of adult respondents. Our survey included more than 50 questions of attitudinal measures on affirmative action in jury selection and the understanding of the criminal justice system, jury participation, and death penalty.[125]

The survey differed from other studies in the degree to which we attempted to employ more elaborate questions concerning the fairness and legitimacy of jury proceedings, jury trials, and jury verdicts as well as to explain to respondents the overall significance of the recent controversy over the O.J. Simpson trial and the importance that race had on people's perceptions on the issue of crime and justice. The survey also obtained information regarding respondents' self-reported race and racial ancestry. Thus, within the limitations imposed by survey research methodology, we sought to pose our questions in the general legal context, the way that questions might be posed to potential jurors in jury pools and venires or trial jurors in court. A total of 327 respondents were contacted and their responses were carefully coded, computerized, and analyzed.[126]

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124. The 1990 U.S. Census showed that Santa Cruz had an adult population of 175,030 (78% whites, .9% African-Americans, .6% Native-Americans, 3.4% Asian and Pacific Islanders, 17.0% Hispanics, and .1% other racial and ethnic groups).

125. A total of 21 students enrolled in the group tutorial course participated in the telephone survey of Santa Cruz residents. We asked each student to complete fifteen telephone interviews, after obtaining the telephone numbers from random-digit tables. In order to check for the external validity of the responses, we later contacted 20% of the respondents and asked some of the same questions in the original telephone interview.

126. The desired sample size was estimated in the following fashion. In a local poll, we wished to estimate the similar proportion of minorities to be represented in the sample. The 1990 Census information showed that the percentage of white adults in the county was 78%, suggesting that 22% of adult populations in the county were racial minorities. With a 95% confidence interval with error margins of plus or minus 5%, we inserted the following parameters into the equation to estimate the sample size, n, necessary to achieve the desired confidence interval.

B. *Measurements*

1. *Race*

Two different types of questions were asked to obtain information on respondents' self-identified race and their ancestral race: (1) "What is your race or ethnicity? Please identify only one group" and (2) "Considering your ancestors, would they include any of the following? Please identify all that apply."

The first question is designed to obtain responses to self-reported racial categories, and mirrors the racial classifications used in the last 1990 census. The second question asks respondents' ancestral backgrounds using the same racial categories in the 1990 census questionnaire. The respondents were given six possible options to identify their race or ethnicity: (1) white, (2) black, (3) Native American, (4) Latino, Chicano, Hispanic, (5) Asian & Pacific Islanders, and (6) others. Respondents who checked "others," were asked to specify racial groups in the question. The measurement of race and racial classification is identical to the most recent governmental standards that are specified in the OMB's Directive 15. The ancestral questions also relied on the same list of six categorized groups to obtain information on respondents' ancestral backgrounds.

2. *Three Affirmative Juries*

The following three questions were used to obtain the reactions to mixed juries and jury verdict's fairness and legitimacy. Those questions included: (1) "the racial makeup of the jury should reflect the racial makeup of the community", (2) "if racially mixed juries are called for, they should have half majority and half minority jurors", and (3) "Some research says that without at least three minority jurors, group pressure may be simply too overwhelming. Thus if racially mixed juries are called for, juries should have at least three minority members." The first question is designed to examine the attractiveness of the Hennepin model and the public's perception of racially representative juries and statistically engineered racial heterogeneity based on population compositions in the community. The second question focuses on the jury de medietate linguae and the use of racial quotas to select juries with or without regards to racial compositions in the general population. The third question then measures respondents' perceptions of the social science jury structure model, requiring that at least 25% of jury seats be reserved for racial minorities.

$$n = \frac{(1.96)2\ p*q}{E2}$$

where p=.22 and q=1-p = .78
E = .05 (error margins)

The estimate sample size was 264. After completing standardized procedures to insure interval validity of the survey and with each student at least completing 15 telephone survey interviews, we obtained a total of 327 completed interviews, exceeding the required minimum sample size in order to insure the 95% confidence interval and error margins of 5%.

A number of questions also examine individual perceptions on affirmative action mechanisms in jury selection, their judicial effectiveness and usefulness in different types of trials, and the legitimacy of jury verdicts. Specifically those questions included: (1) "racial quotas to create racially mixed juries are discriminatory," (2) "racial quotas should be mandated to increase minority participation on juries," (3) "decisions reached by racially diverse juries are more fair than decisions reached by single race juries," and (4) "affirmative action is reverse discrimination." These questions examine the public's perception of the use of mandated racial quotas, the legitimacy of racially mixed juries, as well as whether racially heterogeneous juries are able to generate fairer and more legitimate verdicts than racially homogeneous juries. With respect to the use of mixed juries in racially sensitive trials, the following two questions examine the perceptions on the utility of racially heterogeneous juries: (1) "trials should include African American jurors when the defendant is African American" and (2) "the jury should have the power to ignore the law when they feel the law is inappropriate." Given the controversial verdict by the Simpson jury and other criminal juries in highly sensitive and publicized trials, these two questions provide additional reference points concerning how respondents currently view the legitimacy of the jury trial and the fairness of jury verdicts.

All questions are measured in a five point likert scale with the following attributes: (1) "strongly agree," (2) "somewhat agree," (3) "uncertain," (4) "somewhat disagree," and (5) "strongly disagree." The respondents' perceptions and opinions regarding the different jury structures, uses of racial quotas, and the fairness of racially mixed juries are examined in relation to respondents' race, gender, and social class backgrounds. Table 4 shows the basic descriptive statistics for the socio-demographic variations on the use of affirmative action in jury selection.

In more elaborate analyses of the relationship between socio-ideological backgrounds and the acceptability of three different structures of jury compositions, two additional statistical indices are reported. For example, skewness and kurtosis are measures of asymmetry and long-tailedness of the distribution curve.[127] The positive skewness index shows the frequency distribution to the right and the negative value for a skewed distribution to the left. Similarly, a negative kurtosis value shows a shorter tail than a normal distribution, while the positive value for a longer tail than a normal distribution. Because of the use of a five-point likert scale that is a near-continuous, ordinal measure, those two indices provide important information about the shape of variables' frequency distributions. With respect to interpreting mean scores of five-point likert measurements, a score of less than 3.0 suggests that, on average, respondents are more likely to agree with the question. If the score exceeds the value of 3.0, it suggests that respondents are more likely to disagree with the statement. The information on means, standard deviations, skewness, and kurtosis is reported in Table 5.

127. The expected value of the skewness is zero for a symmetric distribution. Similarly, the expected value of the kurtosis is zero for a normal distribution. A significant nonzero value of skewness is an indication of asymmetry - a positive value indicates a long right tail, a negative value a long left tail. For kurtosis, a ratio less than -2, for example, indicates shorter tails than a normal distribution; a ratio greater than 2 indicates longer tails than a normal distribution. W. DIXON, BMDP STATISTICAL SOFTWARE MANUAL 143 (1992).

C. *Results*

1. *Three Structures of Jury Models*

Table 4 shows respondents' views on the three structures of affirmative juries and the legitimacy of jury verdicts reached by racially mixed juries. With respect to the three different jury models, a large proportion of respondents favor the Hennepin (89.0%) and social science models (70.2%). The support for the jury de medietate linguae (48.6%) is lower than other jury structures.

Empirical analyses also suggest considerable variations in respondents' perceptions on racially mixed juries by race, gender, and social class. Asians (60.0%) are less likely than whites (90.2%), African Americans (85.7%), or Hispanics (87.5%) to favor Hennepin jury models. There are also differences in support for the jury the medietate linguae based on race, gender, and parental earnings, with whites (44.5%), males (39.4%), and those with post graduate education (30.7%) being less likely to favor the equal allocation of jury seats for both majority and minority jurors than Hispanics (75.0%), females (57.0%), and those with some college education (60.0%). With respect to the social science jury model, Hispanics (86.9%) are much less likely to favor the jury model of the mandated three minority seats in jury trials than whites (69.4%), African Americans (80.0%), or Asians (75.0%).

Table 4. Measures of Variables and Descriptive Statistics[1]

		Self-Identified Race			
Race	Total Population	Whites	Blacks	Hispanics	Asians[2]
Jury Structures					
(1) Hennepin Models	89.0	90.2	85.7	87.5	60.0
(2) Juries de Medietate Linguae	48.6	44.5	85.8	75.0	20.0
(3) Social Science Models	70.2	69.3	80.0	86.9	75.0
Affirmative Action Mechanisms					
(1) Racial quotas are discriminatory[3]	47.1	49.3	0.0	33.3	70.5
(2) Racial quotas should be mandated[4]	44.6	41.5	60.0	80.0	33.3
(3) Racially mixed juries' decisions are fairer[5]	68.2	68.3	50.0	82.6	83.3
(4) Affirmative action is discriminatory[6]	45.2	49.0	14.3	20.0	40.0
Trial Types and Affirmative Action					
(1) Mixed juries for African American defendant[7]	70.7	72.3	67.2	84.0	50.0
(2) Jury should have the power to ignore law[8]	34.5	30.8	33.3	60.8	0.0

See Appendix Section D for Notes

Table 4. Measures of Variables and Descriptive Statistics (Continued)

	Sex		Education			
Race	Male	Female	<= H.S.	Some Coll.	College	Post-Gr.
Jury Structures						
(1) Hennepin Models	85.8	90.1	84.4	86.4	88.8	93.1
(2) Juries de Medietate Linguae	39.4	57.0	58.3	60.0	37.3	30.7
(3) Social Science Models	60.3	79.1	70.7	75.5	71.9	58.9
Affirmative Action Mechanisms						
(1) Racial quotas are discriminatory[3]	57.6	37.8	39.1	45.9	44.0	59.2
(2) Racial quotas should be mandated[4]	36.8	51.4	50.0	48.5	47.8	28.3
(3) Racially mixed juries' decisions are fairer[5]	63.5	72.4	65.8	71.3	69.0	63.3
(4) Affirmative action is discriminatory[6]	51.2	39.8	54.3	38.9	47.7	46.5
Trial Types and Affirmative Action						
(1) Mixed juries for African American defendant[7]	63.1	77.3	59.2	69.0	77.6	74.8
(2) Jury should have the power to ignore law[8]	42.5	28.3	52.2	35.3	31.9	22.3

See Appendix Section D for Notes

2. *Affirmative Action and Racially Mixed Juries*

Respondents were asked about their views on affirmative action in jury selection and the uses of mandated racial quotas in criminal trials. The survey found that when respondents' racial and gender backgrounds are incorporated into the analysis, whites (49.3%), Asians (70.5%), and males (57.6%) are more likely to feel that racial quotas to create racially mixed juries are discriminatory than African Americans (0.0%), Hispanics (33.3%), or females (37.8%). There are also differences regarding support of racial quotas based on social class, with those with post graduate education (59.2%) being more likely to oppose the use of racial quotas

than those with less education (39.1% for those with high school education or less, 45.9% for those with some college, and 44.0% for college graduates).

There are also differences, based on respondents' backgrounds, in the support of using mandated racial quotas to increase minority jury participation. Hispanics (80.0%), blacks (60.0%), and women (51.8%) are most likely to favor the use of mandated racial quotas to create racially mixed juries, while men (36.8%) and those with post graduate education (28.3%) are least likely to favor this.

Respondents were also asked questions regarding the fairness of jury verdicts based on juries' racial compositions. Overall, 68.2% say they feel that decisions reached by racially diverse juries are more fair than decisions reached by single race juries, with Hispanics (82.6%), Asians (83.3%), and females (72.4%) being more likely to agree with the statement than whites (68.3%), blacks (50.0%) or men (63.5%). Similarly, those with post graduate education are least likely to agree with the statement (63.3%).

With respect to views on affirmative action, differences are also found across race and gender, with whites (49.0%), Asians (40.0%), and men (51.2%) more likely to feel that affirmative action is discriminatory than African Americans (14.3%), Hispanics (20.0%) or women (39.8%).

The survey examined respondents' opinions regarding whether the jury should include African Americans in a criminal case where the defendant is African American. The overwhelming majority of respondents (70.7%) agree that trials should include African American jurors when criminal defendants are African American. However, Asians (50.0%) are less likely than whites (72.3%), blacks (67.2%), or Hispanics (84.0%) to agree with race matching in criminal trials. Those with high school education or less (52.2%) are more likely to support the inclusion of African American jurors in trials involving African American defendants than those with higher education.

3. *Trial Types and Affirmative Action in Jury Selection*

Table 5 reports respondents' opinions regarding the three different structures of jury models, mandated racial quotas, and racially mixed juries. The first column shows the jury models and the questions on affirmative mechanisms and racial quotas. The second through fifth columns suggest the analyses of views on Hennepin jury models cross-referenced by the opinion on affirmative action mechanisms in jury selection. The sixth through ninth columns show the analysis for the jury de medietate linguae. The last four columns then show empirical examinations of the social science model. Those columns show the means, standard deviations, and two indices indicating the shape of a frequency distribution such as skewness and kurtosis.

Many important findings were gleaned by analyzing the three different jury structures by opinions on racial quotas, racially mixed juries, and affirmative action in jury selection. Those who feel that racial quotas are discriminatory are more likely to support the Hennepin model (1.80) than the de medietate linguae (3.32) or the social science model (2.84). Similarly, those who support mandated racial quotas for creating racially heterogeneous juries tend to support both the Hennepin model (1.66) and social science models (1.89) than the jury de medietate linguae model (2.49). Moreover, those who feel that jury verdicts rendered by racially mixed juries are more fair than those by single race juries are more likely to support the Hennepin

model (1.65) than the de medietate linguae or social science jury models (2.91 and 2.18, respectively).

The findings suggest that a clear division of preference exists between the Hennepin model and other two models, and that the Hennepin model is the most preferred model of affirmative jury structures. However, there are still large variations in individuals' support for different affirmative juries. Those who favor the use of mandated racial quotas tend to support both the Hennepin and social science models, which guarantee either proportional quotas or 25% of jury seats to racial minorities. On the other hand, those who share negative views on the use of mandated racial quotas are least likely to favor the de medietate model (3.77), which guarantees 50% of jury seats to racial minorities.

The survey found that those who support African American's jury participation in trials involving African American defendants are more likely than others to support both Hennepin and social science models of jury structures (1.67 and 2.25, respectively). With respect to the jury de medietate linguae, there are no significant differences between those who favor or oppose the inclusion of African American jurors in trials involving defendants of the same race (3.01 and 3.02, respectively).

4. *Jury Structures and Preferences*

Comparisons of jury structures with individual preferences suggest a number of important findings. For instance, while the differences are small, those who oppose the Hennepin model are more likely to support the de medietate linguae jury (3.06). Similarly, those who support the split-half de medietate model are more likely to favor the social science model (1.94) than those who oppose the de medietate linguae (3.16). While both groups still hold similar favoritism on the social science model (i.e., scores less than 3.0), the degree of their support for jury models with mandated fixed racial quotas is stronger for those individuals who favor the jury de medietate linguae. As the social science model sets the floor goals of selecting the minimum of three minority jurors, with the possibility of even greater minority participation, the finding suggests that those who support the social science model may also be willing to accept six minority jury participants (2.72).

The findings also suggest that those who support the social science model (1.53) also support the de medietate linguae more than those who oppose the social science model (4.14). As a negative kurtosis index indicates (-1.31), the frequency distribution is shorter than a normal distribution, suggesting that their opinions on the de medietate linguae are more likely to cluster around individual means and thus their opinions on the split half juries are more coherent and unified. The finding also shows that individuals who are willing to accept mathematically formulated numerical goals are more likely to support both the split half jury (de medietate linguae) as well as the one-fourth minority jury (a social science model) as an important race conscious jury selection method.

Table 5. Perceptions on Three Different Structures of Racially Mixed Juries[1]

		Hennepin Models		
Variable	Mean	SD[5]	Kurtosis	Skewness
Total Population	1.80	1.13	1.43	1.51
Affirmative Action Mechanisms:				
Racial Quotas[2]				
Discriminatory	1.80	1.21	1.89	1.70
Non-Discriminatory	1.80	1.11	0.80	1.35
Racial Quotas[3]				
Mandated	1.66	1.03	2.66	1.80
Non-Mandated	1.85	1.22	1.22	1.51
Racially Mixed Juries' Decisions[4]				
Fair	1.65	0.99	3.33	1.88
Unfair	2.04	1.30	-0.19	1.05
Affirmative Action[5]				
Discriminatory	1.75	1.06	2.10	1.61
Non-Discriminatory	1.74	1.15	1.77	1.65
Trial Types:				
Racially Mixed Juries for African American Defendants[6]				
Yes	1.67	1.00	2.59	1.74
No	2.01	1.33	1.77	1.65
Jury should have the power to ignore the law[7]				
Yes	1.76	1.25	1.14	1.56
No	2.342	1.279	0.699	-0.556
Affirmative Action Jury Models:				
Hennepin Models				
Yes	1.33	0.47	-1.50	0.72
No	4.47	0.51	-2.11	0.12
De Medietate Liguae				
Yes	1.82	1.20	1.00	1.44
No	1.78	1.10	2.07	1.65
Social Science Models				
Yes	1.61	0.98	3.68	1.98
No	2.04	1.40	-0.35	1.07
Socio-Demographic Backgrounds:				
Sex				
Male	1.82	1.24	1.25	1.55
Female	1.78	1.04	1.49	1.44
Race[8]				
Whites	1.71	1.07	2.44	1.75
African American	1.71	1.11	3.23	1.78
Hispanics	1.78	1.15	1.23	1.44
Asians/Pacific Islanders	3.14	1.35	-1.28	0.80
Annual Income				
H.S. or less	1.96	1.27	0.44	1.22
Some College	1.88	1.12	1.10	1.33
College	1.69	1.12	2.72	1.87
Post Graduate	1.59	1.04	3.88	2.06
Work				
Jury Service[9]				
Eligible	1.79	1.14	1.56	1.56
Not Eligible	2.08	1.00	-2.25	-0.19

See Appendix Section E for Notes

Table 5. Perceptions on Three Different Structures of Racially Mixed Juries (Continued)

De Medietate Linguae

Variable	Mean	SD	Kurtosis	Skewness
Total Population	3.11	1.46	-1.42	-0.02
Affirmative Action Mechanisms:				
Racial Quotas Discriminatory	3.32	1.47	-1.51	-0.15
Non-Discriminatory Racial Quotas	2.95	1.44	-1.36	0.09
Mandated	2.49	1.33	-1.02	0.48
Non-Mandated	3.77	1.37	-0.94	-0.70
Racially Mixed Juries' Decisions				
Fair	2.91	1.24	-1.36	0.18
Unfair	3.53	1.47	-1.34	-0.44
Affirmative Action				
Discriminatory	3.47	1.45	-1.26	-0.42
Non-Discriminatory	2.89	1.42	-01.29	0.23
Trial Types:				
Racially Mixed Juries for African American Defendants				
Yes	2.94	1.40	-1.30	0.13
No	3.51	1.60	-1.48	-0.45
Jury should have the power to ignore the law				
Yes	3.01	1.52	-1.52	0.10
No	3.026	1.102	0.073	-1.012
Affirmative Action Jury Models:				
Hennepin Models				
Yes	3.16	1.43	-1.40	-0.05
No	3.06	1.69	-1.76	0.10
De Medietate Liguae				
Yes	1.59	0.49	-1.90	-0.36
No	4.60	0.49	-1.85	-0.42
Social Science Models				
Yes	2.72	1.41	-1.25	0.34
No	4.14	1.30	0.34	-1.31
Socio-Demographic Backgrounds:				
Sex				
Male	3.39	1.49	-1.39	-0.32
Female	2.89	1.41	-1.27	0.21
Race				
Whites	3.22	1.45	-1.39	-0.13
African American	1.56	1.07	-2.71	1.52
Hispanics	2.30	1.46	-0.60	0.87
Asians/Pacific Islanders				
Annual Income				
H.S. or less	2.85	1.53	-1.48	0.27
Some College	2.80	1.43	1.26	-0.33
College	3.42	1.43	1.26	-.033
Post Graduate Work	3.57	1.36	-1.02	-0.51
Jury Service				
Eligible	3.11	1.48	-1.45	-0.02
Not Eligible	3.25	0.87	0.23	0.44

See Appendix Section E for Notes

Table 5. Perceptions on Three Different Structures of Racially Mixed Juries (Continued)

Social Science Models

Variable	Mean	SD	Kurtosis	Skewness
Total Population	2.55	1.40	-0.92	0.59
Affirmative Action Mechanisms:				
Racial Quotas				
Discriminatory	2.84	1.50	-1.38	0.26
Non-Discriminatory	2.28	1.32	-0.20	0.96
Racial Quotas				
Mandated	1.89	1.07	1.67	1.40
Non-Mandated	3.09	1.49	-1.47	0.06
Racially Mixed Juries' Decisions				
Fair	2.18	1.29	0.06	1.06
Unfair	3.18	1.45	-1.47	-0.06
Affirmative Action				
Discriminatory	2.92	1.48	-1.40	0.26
Non-Discriminatory	2.18	1.22	0.08	0.97
Trial Types:				
Racially Mixed Juries for African American Defendants				
Yes	2.25	1.31	-0.19	0.95
No	3.21	1.49	-1.40	-0.10
Jury should have the power to ignore the law				
Yes	2.57	1.45	-0.97	0.64
No	2.54	1.42	-1.00	0.58
Affirmative Action Jury Models:				
Hennepin Models				
Yes	2.45	1.36	-0.67	0.73
No	3.24	1.63	-1.61	-0.23
De Medietate Liguae				
Yes	1.94	1.13	1.00	1.27
No	3.16	1.47	-1.53	0.07
Social Science Models				
Yes	1.53	0.50	-2.01	-0.10
No	4.66	0.48	-1.58	-0.68
Socio-Demographic Backgrounds:				
Sex				
Male	2.89	1.48	-1.35	0.32
Female	2.29	1.28	-0.33	0.82
Race				
Whites	2.55	1.43	-1.01	0.59
African American	2.42	0.98	0.04	0.28
Hispanics	2.04	1.19	1.06	1.25
Asians/Pacific Islanders	2.57	0.98	0.04	-0.28
Annual Income				
H.S. or less	2.54	1.35	-0.79	0.56
Some College	2.42	1.31	-0.53	0.72
College	1.41	1.41	-0.82	0.71
Post Graduate Work	2.83	1.60	-1.54	0.27
Jury Service				
Eligible	2.54	1.42	-0.94	0.60
Not Eligible	2.75	0.87	0.23	-0.44

See Appendix Section E for Notes

The present analysis also relied on ordinary least square regression analyses to examine the public's perception on the difference between three types of race-conscious affirmative jury selection procedures. Some individuals may endorse the fact that the makeup of the jury should reflect the racial makeup of the community without favoring race-conscious affirmative methods suggested by the Hennepin model. Similarly, it is probable that the supporters of color-blind random selection may also favor racially representative juries and endorse jury decisions reached by racially mixed juries. The next section examines people's perceptions on race-conscious or race-neutral preferences by simultaneously incorporating the questions concerning three affirmative jury structures, representative juries, jury decisions reached by racially integrated juries, and the use of mandated racial quotas.

Table 6 shows ordinary least regression analyses of the public's perceptions on racially mixed juries, racially representative juries, and mandated racial quotas. The first column shows exogenous and criterion variables to explain the public's attitudes towards affirmative action mechanisms in jury selection. The second column shows both unstandardized and standardized regression coefficients for criterion variables to explain whether or not individual respondents favor the Hennepin model of affirmative juries. The third and fourth columns also show regression coefficients for the de medietate linguae and social science models.

Empirical findings suggest that among three models of affirmative juries, the negative regression coefficients involve both Hennepin and de medietate linguae models (regression coefficients in the first three rows), suggesting that individuals who support the Hennepin model are more likely to oppose the split half jury model of the jury de medietate linguae and vice versa. The Hennepin model and the de medietate linguae then represent opposite ends of the spectrum of views on the affirmative action jury. The findings also demonstrate that when the three models of affirmative juries are simultaneously considered, the social science model is more likely to draw support from individuals who favor both Hennepin and de medietate linguae models (.123 and .293, $p<.001$ unstandardized regression coefficients for Hennepin and de medietate models, respectively). This finding also suggests that individuals tend to view the social science model as a middle ground as well as a reasonable compromise between the jury de medietate linguae and the Hennepin model.

Regression analyses also show that, in keeping respondents' social and ideological backgrounds constant and neutral, both whites and racial minorities strongly support the ideal of proportional jury representation of the Hennepin model (-.598 and -.824, respectively). The relationship is statistically significant ($p <.05$ for both groups), suggesting that the Hennepin model is more likely to gain strong support across all racial groups. Similarly, the younger respondents and individuals with higher education are the greatest supporters of the proportional jury representative model (both coefficients are statistically significant at .05 and .10, respectively). Unlike the de medietate linguae, the Hennepin model does not rely on universally applied racial quotas across all jurisdictions. Since the Hennepin jury only requires that the racial makeup of the jury reflect racial compositions of local communities in jurisdictions with small minority populations, the Hennepin jury can legally exclude racial minorities from serving on juries.

Empirical findings also suggest that when race, sex, and other socio-economic or socio-political backgrounds are held constant, individuals who favor the social science models and endorse mandated racial quotas to increase minority participation are more likely to support the de medietate linguae model (.315 and

.358 with p<.001). Similarly, those who endorse the presence of African American jurors when the defendant is African American are more likely to support the split affirmative jury (.162 with p<.05).

Another important finding is that self-identified minorities (black and Hispanics, especially) are strong supporters of the split jury model, while individuals with white racial ancestry are strong opponents of the de medietate model (-.618 and .487 with p<.05, respectively), suggesting that regardless of self-identified race of individuals, those who claimed to have white ancestors are less likely to support the split jury model. The finding may reflect the strong opposition of the white descendants against racial minorities to gain their right to represent in jury trials. While the general population is least likely to support the de medietate linguae model among three affirmative juries (48.6%, see Table 4), the finding suggests that for racial minorities and those who favor the use of mandated racial quotas and support the inclusion of black jurors for the trial of black defendants, the de medietate linguae jury represents the ideal type of the affirmative jury structures.

While racial quotas for the Hennepin model may vary depending upon the jurisdiction, all three models of affirmative juries require the use of mandated racial quotas to create racially integrated juries. The ordinary least square regression analysis demonstrates that the de medietate linguae is likely to gain greater support from advocates of affirmative action policies in jury selection and individuals who favor the use of mandated racial quotas by guaranteeing the fixed percentage of jury seats to racial minorities. On the other hand, the Hennepin model is more likely to gain support from individuals who oppose affirmative action mechanisms because the Hennepin model does not rely on the same, universally applied racial quotas across all jurisdictions. The irony of the proportional jury representation is that, in communities with small minority populations, the Hennepin model can be effectively used to exclude racial minorities from serving on juries.

Table 6. Ordinary Least Square Regression Anlayses of the Hennepin Model, the Jure De Medietate Linguae and the Social Science Model[1]

Variables	Hennepin Model	De Medietate Linguae	Social Science Model
Jury Sructures[2]			
Hennepin Model	-- --	-.145 (-.106)	.123 (.093)
Juries De Medietate Linguae	-.125 (-.171)	-- --	.293 (.303)****
Social Science Model	.114 (.151)	.315 (.305)****	-- --
Affirmative Action Mechanisms			
Racial quotas are discriminatory[3]	-.067 (-.094)	.102 (.105)	-.065 (-.068)
Racial quotas should be mandated[4]	.006 (.009)	.358 (.351)****	.157 (.159)*
Racially mixed juries' decisions are fairer[5]	.049 (.062)	.049 (.045)	.104 (.098)
Affirmative action is discriminatory[6]	.089 (.123)	.005 (.005)	-.213 (-.223)***
Trial Types and Affirmative Action			
Mixed juries for African American defendant[7]	-.070 (-.092)	.162 (.156)**	.130 (.129)*
Jury has the power to ignore the law[8]	.059 (.081)	-.110 (-.110)	-.138 (-.142)*

See Appendix Section F for Notes

Table 6. Ordinary Least Square Regression Analyses of the Hennepin Model, the Jure De Medietate Linguae and the Social Science Model (Continued)

Variables	Hennepin Model	De Medietate Linguae	Social Science Model
Socio-Economic Backgrounds			
Self-Identified Race			
Whites (White=1; Nonwhite=0)[9]	-.598 (-.290)**	-.092 (-.032)	.185 (.068)
Minority (black/Hispanic=1; Others=0)[10]	-.824 (-.309)**	-.618 (-.169)**	.701 (.199)**
Ancestral Race			
Whites (White=1; Nonwhite=0)[11]	.010 (.004)	.487 (.150)**	-.051 (-.016)
Minority (Any Minority race=1; Others=0)[12]	-.121 (-.071)	.071 (.031)	-.056 (-.025)
Other Socio-Demographic Variables			
Sex (1=Male; 2=Female)	-.083 (-.050)	.111 (.049)	-.257 (-.118)
Age	.009 (.179)**	.000 (.006)	.006 (.090)
Education[13]	-.088 (-.164)*	.034 (.046)	.024 (.034)
Driver's License (1=Yes; 2=No)	-.297 (-.081)	.232 (.046)	.059 (.011)
Registered Voters (1=Yes; 2=No)	-.265 (-.102)	-.734 (-.208)***	.089 (.026)
Intercept	2.940	0.780	1.138
R2	.149	.473	.476

See Appendix Section F for Notes.

IV.
DISCUSSIONS

Empirical analyses of the three structures of jury representation show that, overall, the general population is more likely to support both Hennepin and social science models than the de medietate linguae model. There are, however, considerable variations by race, gender, and social class. Women are more likely than men to approve all three types of jury structures. Similarly, the majority of both Hispanics and blacks support the de medietate linguae model of jury representation. Generally, those from higher social class backgrounds (as measured by the level of education) are least likely to support the fixed and rigid use of mandated racial quotas in the de medietate and social science models.

With respect to the views on mandated racial quotas, whites, males, and those from the upper social class are most likely to feel that mandated racial quotas are discriminatory. However, it is ironic to find that a large proportion of whites (44.1%) also feel that racial quotas should be mandated to increase minority jury participation. Whites' support of the mandated racial quota is even greater than that of Asians (33.3%). Their mixed views on racial quotas suggest that, for whites, the greater benefits of mandated uses of racial quotas for increasing minority jury participation may be seen to cancel out the negative, discriminatory effects that racial quotas produce in creating racially mixed juries. Similarly, Asians are more likely than other racial groups to feel that racially diverse juries' decisions are more fair than the verdicts by single race juries. At the same time, they are least likely to

approve the race-conscious selection of blacks in trials involving only black defendants, suggesting that Asians may feel that jury selection should not necessarily rely on the race of defendants as a criterion in creating racially mixed juries. The racial matching equation, according to Asians, does not constitute the important element of creating racially integrated juries.

The analysis also produced an important finding with respect to racially differing views on the affirmative juries. For instance, in keeping the socio-demographic and ideological backgrounds constant and neutral, racial minorities' support for Hennepin and de medietate jury structures (especially, blacks and Hispanics) are found to be strong and statistically significant. The irony, however, is that in holding socio-demographic backgrounds constant, racial minorities are less likely to support the social science model (.701 and $p<.05$). Another important finding is that the impact of one's racial ancestry on the affirmative juries is found to be minimal, except for the de medietate model, in which individuals who had white ancestors are least likely to support the split jury model. The effect of ancestral race, however, is not found to be statistically significant for the proportional jury model or the social science model. Nevertheless, in keeping socio-economic and ideological backgrounds of individuals constant, those who claimed to have white ancestry are found to be the strongest opponent of the most radical application of mandated racial quotas in jury selection.

Empirical analyses show that those who feel that mandated racial mechanisms are discriminatory are less likely to support the de medietate linguae or social science models, in which both jury structures mandate 50% and 25% of jury seats for racial minorities, respectively. The view on the mandated racial quota thus tends to divide the respondents with respect to their support for different affirmative jury models. While the Hennepin model also relies on the use of racial quotas, its quotas are considered variable and changeable, depending upon the racial makeup of given jurisdictions. Thus, the Hennepin model may be a viable option for those who opposed the use of universally applied racial quotas across all jurisdictions. The problem of the Hennepin model, however, is that it becomes legally possible to have no jury seats for racial minority groups in communities with small racial minority populations. While those who support the Hennepin model also feel that jury decisions reached by racially mixed juries are more fair than the ones rendered by single-race juries, the Hennepin model also has the potential to deny minority jury participation and may not lead to a racially mixed jury.

In order to eliminate the possibility that no minority jurors serve in criminal trials because of small minority populations in the community, some jurisdictions have proposed minimum floor goals in an effort to ensure racially mixed juries, just like the ones proposed by social science models. For instance, Pennsylvania's "jury peer representation" bill has been proposed to mandate minimum representation of minorities in order to prevent racial discrimination in jury deliberations[128] The bill provides that if a defendant or victim is a member of a racially classified group representing 25% or more of a judicial district, and there is no juror from the same racial group, then three jurors of the victim's or defendant's race must be secured in the jury.[129] If the community has less than 25% population for the racial group, then

128. H.B. 1182, 177th Gen. Assem., Reg. Sess. (1993).

129. *Id.*

at least one or two seats are reserved for members of the same racial and ethnic minority jurors.[130] Similar to the social science jury model, mandated racial quotas in jury composition have been recognized by Pennsylvania as critical to maintaining the fairness and general acceptance of jury verdicts by the community. However, the potential shortcoming of Pennsylvania jury initiatives is that when the racial minority composition of a community is small, the proposal fails to require minimum numbers of minority jurors, which is considered crucial to offset the group pressure of the dominant white jurors during deliberation.

In Pennsylvania, both state legislatures and community action groups have been active in addressing the issue of minority underrepresentation. For instance, in addition to setting proportional racial representation on the jury itself, the General Assembly has also proposed legislation to require minimum minority compositions of jury pools and venires in trials involving racial minority defendants.[131] Similarly, Citizens Against Racism, a non profit organization, is searching for solutions to rectify black underrepresentation on criminal juries.[132]

In some jurisdictions, however, judges are more likely to exercise greater powers and discretion in creating racially mixed juries. In Ramsey County, Minnesota, Judge Lawrence Cohen recently held that a Hispanic defendant could not be tried from a jury pool of 113 potential jurors that included only one Hispanic.[133] Since the 1990 U.S. Census showed that 2.2% of county residents were Hispanic, Judge Cohen and the attorneys then agreed to supplement the jury pool with the names of two more Hispanic jurors who were already scheduled to appear at the courthouse the following week, in an effort to increase the chance for a racially mixed jury to try the Hispanic defendant.[134] In Erie County, Pennsylvania, African American church leaders were also asked to submit the names and addresses of their adult congregation for the master list. The submission of names added additional 251 African American parishioners, while 73 of them were registered voters and originally included in the master list. The inclusion of these minority parishioners has substantially increased African American participation in jury service.[135]

While a number of proposals have examined the possibility of creating more racially inclusive juries, many of those suggestions and proposals tend to focus on ensuring racially diverse pools at jury venire stages of jury selection, not the final jury itself. Because of discriminatory uses of peremptory challenges and purposeful exclusions of racial and ethnic minority jurors before they reach the jury box, those proposals may fail to guarantee minority jury participation in criminal trials.[136]

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130. *Id.* at §1(a)(1).

131. *Id.*

132. Bill McKinney, *Representation: Should Juries Have More Blacks?*, ERIE MORNING NEWS, Jan. 13, 1993, at C1.

133. *See* Minnesota v. Charles, No. K0-92-1621 (Minn. 2d Jud. Dist., August 10, 1992)

134. *Id.*

135. Stephanie Domitrovich, *Fury Source Lists and the Community's Need To Achieve Racial Balance On the Jury*, 33 DUQUESNE LAW REVIEW 39, 99 (1994)

136. Kenneth J. Melilli, *Batson In Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME LAW REVIEW 447 (1996). In the landmark study of post-

Present research proposes affirmative peremptory inclusion as an effective voir dire selection method to ensure the racially mixed jury structures such as de medietate linguae, Hennepin, and social science models. Speculative concerns, however, exist that affirmative inclusive selection may increase the instances of hung juries.

Peremptory inclusion does not always create the tendency towards polarized jury deliberations, leading to hung juries, suggesting that the minimum level of minority representation on a jury may be fulfilled by seating three affirmatively chosen jurors, though the selection criteria may be based on both parties' predisposition towards selecting prospective jurors based on race or other cognizable characteristics. I believe that the problem of a hung jury and the idea that a hung jury automatically represents a failure of the system may have been exaggerated. For example, we need to question whether or not the possibility for a hung jury itself presents a significant problem in jury deliberations. An attorneys' peremptory inclusion is inevitably exercised based on imperfect and incomplete knowledge of jurors' opinions, potential biases, 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 potential jurors prior to the exercise of peremptory inclusion, thereby 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 prejudice and historical bias in favor of more homogeneous, all white juries. While such single-race juries may reach verdicts on a consistent basis, there is no guarantee or reason to assume that these outcomes are legitimate or lawful. Jury research showed that the small six-member jury is less likely to result in hung juries than the twelve-member jury, because small sized juries are more likely to be homogeneous in race and opinions and attitudes than the twelve-member jury.[137] In terms of conflict resolution, a hung jury is not necessarily a negative result, a breakdown of the jury system, or a waste of economic or judicial resources. Rather, a hung jury may represent a positive result insofar as a racially mixed jury might reach differing conclusions as they evaluate the same evidence and testimony. This suggests that there is not a unified consensus or agreement among the community that the defendant is proven guilty beyond a reasonable doubt.

Batson peremptory challenges on jury representativeness, Melilli reviewed virtually all relevant reported decisions of every federal and state court applying Batson between April 30, 1986 (the date of the Batson decision) and December 31, 1993, concluding that many of the currently accepted bases for peremptory challenges such as economic and geographic criteria and attorneys' subjective judgments continued to exert a disproportionate impact on blacks and Hispanics. *Id.* at 501 The study revealed that among 1156 Batson complaints, 95% of them were logged against criminal prosecutors' uses of peremptory challenges and that blacks and Hispanics constituted 87.3% and 6.7% of targeted groups of peremptory challenges. The study also found that the vast majority of black and Hispanic jurors were removed by peremptory challenges because of group stereotyping such as prior criminal activities (31.6%) and unemployed (19.3%). *Id.* at 496 Melilli concluded his study, arguing that "Batson has provided us with the first opportunity to examine the reasons lawyers use peremptory challenges, and what has emerged is the legal version of the emperor's new clothes. ... It has also been revealed to be the refuge for some of the silliest, and sometimes nastiest, stereotypes our society has been able to invent." *Id.* at 503 Similarly, "the exclusion from jury service because of group stereotyping brands the excluded group members as inferior, insults individuals by reducing their worth as jurors to a cosmetic or trivial characteristics, makes underrepresented groups less accepting of the court system and its results, and injures society as a whole by frustrating the ideal of equal citizen participation in the jury process." *Id.* at 501.

137. Kaye, *supra* note 111.

The peremptory inclusion approach enhances the perceived legitimacy and fairness of the jury trial, deliberations, and verdicts by giving effect to the defendant's personal, racially-influenced interests as well as the minority community's interest at stake. Peremptory inclusion will allow the defendant to attempt to achieve representation of his or her peers on the final jury. Because of the straightforward process of peremptory inclusion, less time would be required for voir dire jury selection, so that the inclusionary approach may offer a more efficient trial than does the traditional jury selection procedure.[138]

Similarly, affirmative peremptory inclusion can become an important mechanism to prevent vengeful conviction of innocent minority defendants. Recent studies on jury nullification show that nullification can take either of two forms: merciful acquittal or vengeful conviction.[139] While many studies on nullification focus on merciful acquittal, it has also been used in an indisputably unjust manner, such as the well-documented history of all white Southern juries nullifying the law in cases of violent crimes by whites against blacks. The possibility of juries maliciously convicting innocent black and minority defendants is so haunting that even the Supreme Court has cited the possibility of such convictions as one reason to avoid explicitly informing federal juries of their de facto power to nullify the law.[140] In addition, a landmark two year study of capital punishment in the U.S. identified "[C]onviction demanded by community outrage" as a "main" cause of wrongful convictions.[141] Such victimization surges when issues of race and ethnicity are implicated, suggesting that white racism coupled with white hegemony of legal systems produced convictions and death sentences of every innocent black defendant in the study.[142] Rather than relying on all white juries and color-blind jury selection, the systems of peremptory inclusion and racially heterogeneous juries become an important mechanism to engineer the viable deliberation process by placing greater burdens on both majority and minority groups to work out any differences they may have. The racially integrated jury is also more likely to enhance the jury's negotiative and dialectic function, increase the opportunity of minority groups to participate in jury trials, and allow the race at risk to fight against the majority's group pressure in the deliberation process.

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138. *See* Ramirez, *supra* note 34. Ramirez contends 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.

139. NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF LAW 30 (1995); *See also* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994).

140. Sparf v. United States, 156 U.S. 51, 101 (1895).

141. Hugo Bedau, Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STANFORD LAW REVIEW 21, 56 (1987).

142. *Id.* at 63.

Past research also suggests that, in evaluating the application of affirmative action programs, a term, "quota" generally stirred deep negative emotions among some individuals, leading to their rejection of affirmative action programs in jury selection.[143] While fixed percentages are reserved for racial minorities such as 50% in the de medietate linguae and 25% in social science models, race-conscious mathematical goals may remain an important part of the remedial plan to solve the problem of jury discrimination.[144] The present analyses show that both Hennepin and social science models are overwhelmingly supported as the ideal types of racially mixed juries. While the endorsement for the jury de medietate linguae was less than the other two jury models, the findings suggests that equal jury participation by both majority and minority members was supported by those who favor the social science model and its use of mandated racial quotas and by those who believe that racially mixed juries' decisions are more fair than the verdicts rendered by single race juries.

The problem of the use of quotas as part of a remedial plan to rectify past discrimination in jury selection is that the mathematically derived goals may be seen as the setting of a minimum as a maximum. Hypothetically, if the number of minority jurors selected reached the fixed quota, it should not prevent the courts from further selecting minority jurors because the quota is a fixed mathematical goal. It sets the minimum for racial minorities, not the maximum number of minority jurors. Since a maximum number of minority jurors is imposed on the de medietate linguae model and even the Hennepin model, once the jurisdiction's racial makeup is established, the social science model may be the only viable option in creating the floor goals of minority representation.

CONCLUSIONS

Racial and ethnic minorities continue to be substantially underrepresented in the vast majority of both state and federal courts. The social costs of unrepresentative juries have prompted lawmakers and the courts to consider race-conscious methods to ensure minority representation, and a growing number of courts are beginning to experiment with the use of race-conscious methods to select jurors. The race-based selection procedures that the courts use and the legislatures have proposed are unlike efforts in the past that deliberately limited the opportunities of racial minorities to serve on juries. The courts and governmental proposals that consider race in selecting juries often pursue a different goal of increasing the minority jury participation on actual juries or in jury pools to levels that duplicate or surpass their percentages in local communities. One problem of the race-conscious method to ensure minority representation on juries is that there are no clearly defined formulas to determine the extent of minority participation. Similarly, little information is available about reactions to this race-conscious affirmative measure. Past jury research fails to prove whether or not the general public or potential jurors would react negatively to racial quota methods of obtaining racial representation, or

143. Richard L. Barnes, *Quotas As Satin-Lined Traps*, 20 NEW ENGLAND LAW REVIEW 865 (1995).

144. *Id.* at 865. The term "quota" also has attained notoriety and "much of the attack [on quotas] has been an urgent appeal to alleviate the injustice worked upon the majority group which suffers the impact of the remedy." *Id.*

whether potential negative reactions to racial quotas would cancel out the positive reactions that racially mixed juries may generate. Similarly, little research has examined whether mathematically formulated quotas are perceived to impose the ceiling effect for minority applicants by setting a minimum, or for racial majority by setting a maximum.

The article first examined the conceptualization and formulation of race and de-constructed the racial identity by the government-defined racial classification and reported racial ancestry in order to examine the effectiveness of race-conscious affirmative action policies. The analysis showed that race is social construction and racial identity is subject to individual and societal manipulation, allowing some individuals to pass as members of different racial groups. Empirical analyses also suggested that it is important to simultaneously consider de-constructed components of socially and politically defined race such as self-identification of racial membership and reported ancestral backgrounds in order to critically examine the public's perceptions of the effectiveness of race-conscious affirmative action programs. These programs are designed to challenge the valued property and racial privilege of whiteness in our society.

After reviewing the history of Anglo-Saxon traditions of laws as well as more social science research on jury representation, the article examined the different structures of affirmative juries and uses of racial quotas to create racially heterogeneous juries—the Hennepin model, the jury de medietate linguae, the social science model, and peremptory inclusive selection. Empirical analyses showed that individuals are overwhelmingly in favor of the Hennepin model, which requires that the jury's racial makeup reflects that of the community, and the social science model, which requires at least three minority jurors in order to form a racially mixed jury.

While the de medietate linguae model was not viewed as favorably as the other two models, those individuals favoring the social science model also supported 50% guaranteed minority jury seats. The findings also show that whites and those from upper social classes are most likely to feel that mandated racial quotas are discriminatory. At the same time, the analysis suggested that a large proportion of whites also feel that racial quotas may be mandated to increase minority jury participation. Their mixed views on racial quotas suggest that, for whites, the greater benefits of mandated uses of racial quotas for jury composition may cancel out the negative, discriminatory effects that racial quotas produce in creating racially mixed juries.

Given the strong endorsement for the Hennepin and social science models of affirmative juries, both legislative and court-initiated actions may be needed to energize the public debate concerning the importance of racially representative juries, the size of mandated racial quotas, applications of peremptory inclusive selection, and implications regarding possible uses of affirmative action in jury proceedings. Moreover, affirmative action policies and the benefits of racially mixed juries should be carefully considered and debated in order to increase minority jury participation and improve the public's respect and confidence in the jury system and jury verdicts.

APPENDIX

A. *Table 1Notes*

1. The early census acts prescribed the inquiries in each decennial census, but the U.S. Government did not furnish uniform printed schedules until 1830. In 1790, the marshals submitted their returns in whatever form they found convenient(and sometime with added information); from 1800 to 1820, the States provided schedules of varying size and typeface. There are separate schedules for "taxed or untaxed "Indians", depending on Census year. Racial information between 1790 and 1990 came from 200 Years of U.S. Census Taking: Population and Housing Questions, 1790-1990, U.S. Department of Commerce Bureau Of The Census

2. 1850
Census data includes 2 schedules, Schedule 1-Free Inhabitants..." and Schedule 2-Slave Inhabitants..."
Under heading 6, entitled "Color," in all cases where the person is white, leave the space blank; in all cases where the person is black, insert the letter B; if mulatto, insert M. It is very desirable that these particulars be carefully regarded.

3. 1860 Identical to 1850
Census data includes 2 schedules, Schedule 1-Free Inhabitants..." and Schedule 2-Slave Inhabitants..."

4. 1870
Color.-It must no be assumed that, where nothing is written in this column, "White" is to be understood. The column is always to be filled. Be particularly careful in reporting the class Mulatto. The work is here generic, and includes quadroons, octoroons, and all persons having any perceptible trace of African blood. Important scientific results depend upon the correct determination of this class in schedule 1 and 2.

Indians.-"Indians not taxed" are not to be enumerated on schedule 1. Indians out of their tribal relations, and exercising the rights of citizens under State or Territorial laws, will be included. In all cases write "Ind." in the column for "Color." Although no provision is made for the enumeration of "Indians not taxed," it is highly desirable, for statistical purposes, that the number of such persons not living upon reservations should be known.

5. 1880
By the phrase "Indians not taxed" is meant Indians living on reservations under the care of Government agents, or roaming individually, or in bands, over unsettled tracts of country. Indians not in tribal relations, whether full-bloods or half-breeds, who are found mingled with the white population, residing in white families, engaged as servants or laborers, or living in huts or wigwams on the outskirts of towns or settlements are to be regarded as a part of the ordinary population of the country for the constitutional purpose of the apportionment of Representatives among the States, and are to be embraced in the enumeration.

Color.-It must not be assumed that, where nothing is written in this column, "white" is to be understood. The column is always to be filled., Be particularly careful in reporting the class mulatto. The word is here generic, and includes quadroons, octoroons, and all persons having any perceptible trace of African blood. Important scientific results depend upon the correct determination of this class in schedules 1 and 5.

"Indian Division"
If this person is of full-blood of this tribe, enter "/" For mixture with another tribe, enter name of latter. For mixture with white, enter "W." with black, "B." with mulatto, "Mu."

6. 1890
Special Enumeration Of Indians.
The law provided that the Superintendent of Census may employ special agents or other means to make an enumeration of all Indians living within the jurisdiction of the United States, with such information as to their condition as may be obtainable, classifying them as to Indians taxed and Indians not taxed.

By the phrase "Indians not taxed" is meant Indians living on reservations under the care of Government agents, or roaming individually, or in bands, over unsettled tracts of country. Indians not in tribal relations, whether full-bloods or half-breeds, who are found mingled with the white population, residing in white families, engaged as servants or laborers, or living in huts or wigwams on the outskirts of towns or settlements are to be regarded as a part of the ordinary population of the country for the constitutional purpose of the apportionment of Representatives among the States, and are to be embraced in the enumeration.

The enumeration of Indians living on reservations will be made by special agents appointed directly from this office, and supervisors and enumerators will have no responsibility in this connection.

Many Indians, however, have voluntarily abandoned their tribal relations or have quit their reservations and now sustain themselves. When enumerators find Indians off of or living away from reservations, and in no wise dependent upon the agency of Government, such Indians, in addition to their enumeration on the population and supplemental schedules, in the same manner as for the population generally should be noted on a special schedule (7-917) by name, tribe, se, age, occupation, and whether taxed or not taxed. The object of this is to obtain an accurate census of all Indians living within the jurisdiction of the United States and to prevent double enumeration of certain Indians.

When Indians are temporarily absent from their reservations the census enumerators need not note them, as the special enumerator for the Indian reservation will get their names.

Color, Sex, and Age
Whether white, black, mulatto , quadroon, octoroon, Chinese, Japanese, or Indian, write white, black, mulatto, quadroon, octoroon, Chinese, Japanese, or Indian according to the color or race of the person enumerated. Be particularly careful to distinguish between blacks, mulattos, quadroons, and octoroons. The word "black" should be used to describe those person who have three-fourths or more black blood; "mulatto," those person who have form three-eighths to five-eighths black blood; "quadroon," those persons who have one-eight or any trace of black blood.

7. 1910
For census purposes, the term "black" (B) includes all persons who are evidently full-blooded negroes, while the term "mulatto" (Mu) includes all other persons having some proportion of perceptible trace of negro blood.

8. 1930
There were specific instruction for reporting race. A person of mixed White and Negro blood was to be returned as Negro, no matter how small the percentage of Negro blood; someone part Indian and part Negro also was to be listed as Negro unless the Indian blood predominated and the person was generally accepted as an Indian in the community. A person of mixed White and Indian blood was to be returned as an Indian, except where the percentage of Indiana blood was very small or where her or she was regarded as White in the community. For persons reported as American Indian in column 12 (color or race), columns 19 and 20 were to be used to indicate the degree of Indian blood and the tribe, instead of the birthplace of father and mother.
In order to obtain separate figures for Mexican, it was decided that all persons born in Mexico, or having parents born in Mexico, who were not definitely White, Negro, Indian, Chinese, or Japanese, would be returned as Mexicans (Mex).

Any mixture of White and some other race was to be reported according to the race of the parent who was not White; mixtures of colored races were to be listed according to the father's race, except Negro-Indian (discussed above).

9. 1940
With regard to race, the only change from 1930 was that Mexicans were to be listed as White unless they were definitely Indian or some race other than White.

10. 1960
The instructions for completing P5 (race or color) by observation directed that Puerto Ricans, Mexicans, or other persons of Latin descent would be classified as "White" unless they were definitely Negro, Indian, or some other race. Southern European and Near Eastern nationalities also were to be considered White. Asian Indians were to be classified as "Other," and "Hindu" written in.

11. 1970
If "Indian" (American), also give tribe
If "Other," also give race

12. 1980
Enumerators were no longer allowed to enter race (item 4) by observation, but were instructed to ask and mark the race with which the person most closely identified. If a single response was not possible, as in the case of a racial mixture, the mother's race was to be reported. If this was not satisfactory, the first racial group given was to be entered. In further contrast with 1970, "Brown," "," etc., could be entered as "Other" (unless one of the listed categories was chosen). If a person was unable to select a single group in the Spanish-origin question (7), and only part two was Spanish (as in "Irish-Cuban"), the "No, not Spanish/Hispanic" circle was to be filled. If more than one origin was reported in the ancestry question (13), all answers were accepted.

Is this person of Spanish/Hispanic origin or descent?

13. 1990
What is ...'s race? For example, White, Black, American Indian, Eskimo, Aleut or an Asian or Pacific Islander group such as Chinese, Filipino, Hawaiian, Korean, Vietnamese, Japanese, Asian Indian, Samoan, Guamanian, and so on. Fill ONE circle for the race the person considers himself/herself to be. If response if "American Indian," ask - What is the name of...'s enrolled or principal tribe? If response is an "Other API" group such as Cambodian, Tongan, Laotian, Hmong, Thai, Pakistani, and so on, fill the "Other API" circle and print the name of the group. If response is "Other race," ask - Which group does...consider (himself/herself) to be?

14. 2000
The racial and ethnic categories came 1998 from the Executive Office of the President, Office of Management and Budget (OMB), Office of Information and Regulatory Affairs, in a report entitled "Revision to the Standards for the Classification of Federal Data on Race and Ethnicity."

B. *Table 2 Notes*

1. Multi-response programs in SPSS/X are used for empirical analyses (SPSS Inc., 1990, pp.465-472)
2. Asians also include Pacific Islanders.

C. *Table 3 Notes*

1. The figure shows in million.

D. *Table 4 Notes*

1. Figures show % of respondents who either "strongly" or "somewhat" agreed with individual statements.
2. Asians also include Pacific Islanders.
3. "Racial quotas to create racially mixed juries are discriminatory."
4. "Racial quotas should be mandated to increase minority participation on juries."
5. "Decisions reached by racially diverse juries are more fair than decisions reached by single race juries."

6. "Affirmative action is reverse discrimination."
7. "Trials should include African American jurors when the defendant is African American."
8. "The jury should have the power to ignore the law when they feel the law is inappropriate."

E. *Table 5 Notes*

1. All variables are measured in a five-item likert scale: (1) strongly agree; (2) somewhat agree; (3) uncertain, (4) somewhat disagree; (5) strongly disagree.
2. "Racial quotas to create racially mixed juries are discriminatory."
3. "Racial quotas should be mandated to increase minority participation on juries."
4. "Decisions reached by racially diverse juries are more fair than decisions reached by single race juries."
5. "Affirmative action is reverse discrimination."
6. "Trials should include African American jurors when the defendant is African American."
7. "The jury should have the power to ignore the law when they feel the law is inappropriate."
8. Race refers to self-identified race.
9. "Jury eligibles" include the owners of automobiles or those who are registered voters or have California ID cards.

F. *Table 6 Notes*

1. Figures in parenthesis show standardized regression coefficients.
2. The questions are measured in a five-point likert scale (1: "strongly agree" 2: "somewhat agree" 3: "uncertain" 4: "somewhat disagree" and 5: "strongly disagree").
3. "Racial quotas to create racially mixed juries are discriminatory."
4. "Racial quotas should be mandated to increase minority participation on juries."
5. "Decisions reached by racially diverse juries are more fair than decisions reached by single race juries."
6. "Affirmative action is reverse discrimination."
7. "Trials should include African American jurors when the defendant is African American."
8. "The jury should have the power to ignore the law when they feel the law is inappropriate."
9. Whites include respondents who self identified as white.
10. Minorities include respondents who self-identified as either black or Hispanic.
11. Ancestral whites include individuals who had white ancestors regardless of self-identified race.
12. Minorities include individuals who had one or more of the non-white ancestral race.
13. Education is measured in a following scale: (1) grade or elementary; (2) some high school; (3) high school diploma; (4) trade, technical, or vocational school; (5) some college; (6) college degree; (7) post graduate work; (8) post college degree.

* $p<.10$ ** $p<.05$ *** $p<.01$ **** $p<.001$