AFFIRMATIVE ACTION IN JURY SELECTION: RACIALLY REPRESENTATIVE JURIES, RACIAL QUOTAS, AND AFFIRMATIVE JURIES OF THE HENNEPIN MODEL AND THE JURY DE MEDIETATE LINGUAE

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I. INTRODUCTION

In July 1995, the University of California Board of Regents voted to end affirmative action based on race and gender in admissions, hiring, and contracting. Recently, the Equal Opportunity Act introduced by the Republicans would abolish three decades of affirmative action programs initiated by President Johnson in 1965. Given these actions, Americans will have another opportunity to decide whether racial preferences should be terminated from all federal programs.

While the question of preferential treatment of racial minorities has divided the nation and even some minority communities themselves, affirmative action in jury proceedings and trials has yet to receive much-deserved attention. This article examines public perceptions of possible application of affirmative action in criminal jury proceedings, focusing on the uses of mandatory racial quotas in criminal jury trials. We examine two different types of racially mixed juries—the jury "*de medietate linguae*" and the Hennepin jury model—and we analyze the political implications of affirmative mechanisms ensuring minority participation on juries. This Article argues that an affirmative mechanism to secure racially-representative juries is essential to both the appearance and substance of fairness in

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criminal jury proceedings, and that maximizing the essence of legitimacy of jury verdicts is a compelling governmental interest.

In the bitter aftermath of the Rodney King verdict, many African-Americans exhibited deep anger and issued grave warnings that without social and legal equity, white America could expect chaos ("No justice, no peace!").[1] Their voices articulated the high cost of social unrest when the verdict was perceived as being racially biased. A poll conducted immediately after the acquittal of the four white police officers revealed that forty-five percent of African-Americans, compared to only twelve percent of whites, attributed the acquittals to racism and lack of African-American jury participation rather than to prosecutorial errors, inadequate evidence, or loyalty to police.[2] If the King jury had included African-Americans, the public might have been willing to accept a decision from a racially-mixed jury, more than the verdict of a predominantly white jury.[3] Similarly, a racially-mixed jury's

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1 See Norm R. Allen, Jr., Rodney, Rage, and Racism, 12 Free Inquiry 52, 52-3 (1992); Jenifer Warren and Martha Groves, Verdicts Spark Protests, Violence Across California, L.A. Times, May 1, 1992, at A3 (describing riots in protest of the King verdict); Charles Whitaker, The Rodney King Wake-Up Call: Which Way America? Ebony, July 1992, at 116, 118-20.

2 Elka Worner, L.A. Being Pieced Back Together, UPI, May 4, 1992, available in Lexis, Nexis Library, UPI File. See generally Richard Morin, Polls Uncover Much Common Ground on L.A. Verdict, Wash. Post, May 11, 1992, at A15 (explaining racial splits on the King verdict). The jury found all four officers not guilty of assault charges, acquitted three of using excessive force, and deadlocked on the excessive force charge against the remaining officer. See A Juror Describes the Ordeal of Deliberations, N. Y. Times, May 6, 1992, at A23. See also George J. Church, The Fire This Time, Time, May 11, 1992, at 20, 22 (indicating that the poll conducted after the first verdict showed 92% of blacks, but only 62% of whites, would have voted to convict if they had been on the jury); Richard Lacayo, Anatomy of an Acquittal, Time, May 11, 1992, at 30 (suggesting the outcome was decided when trial was moved to the overwhelming white community of Simi Valley).

3 The jury members were not all white; there were ten whites, one Hispanic, and one Asian. Id., at 31. However, after the defense's request for a change of venue was granted, the trial site was moved from Los Angeles Central Superior Court, where the majority of prospective jurors were African Americans, to Simi Valley Superior Court, where a large number of Los Angeles police officers lived. Id. at 30. As a result, the King jury included three persons who had worked as military security guards or patrol officers, three jurors who were members of conservative national organizations such as the National Rifle Association, and a juror who was the brother of a retired police officer. Id. at 31. With close associations with law enforcement agencies, those jurors were more likely to share the life experiences and morals that may have been underlying factors in the crime in question. For greater discussions of jury deliberations and verdicts, see Hiroshi Fukurai, Race, Social Class, and Jury Participation: New Dimensions For Evaluating Discrimination in Jury Service and Jury Selection, 24 J. of Crim. Just. 71 (1996) [hereinafter Fukurai, Race, Social

verdict might have permitted both the minority and the white communities to focus on preventing and punishing crime and violence, rather than concentrating on divisive questions of whether the racial composition of the jury diminished the fairness of the verdict.

In criminal trials involving sensitive and unmistakable elements of racism, there is a wide-spread consensus that a racially-mixed jury offers many benefits. Many scholars, judges, and litigants argue that a racially-mixed jury may become a critical lever to overcome racial biases, improve the fairness of trial proceedings, and enhance public respect and acceptance of criminal and civil verdicts.[4]

Those advocating racially-balanced juries assert that minority representation on the jury panel minimizes the distorting influence of race and generates possibilities for a fairer and more legitimate verdict.[5] As Deborah Ramirez has noted, "[t]o the extent that persons of color can contribute points of view that may not be readily apparent to majority jurors, the deliberative process may be substantially fairer and wiser."[6] Similarly, mixed juries enhance the educational role of jury service by requiring jurors of different racial and ethnic backgrounds to work together as equals, debunking racial stereotypes and offering long-term

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Class, and Jury Participation]. See also Hiroshi Fukurai, A Representative Cross-Section of the Population: Rethinking The Representative Jury Requirement 3 (unpublished manuscript, on file with the author) [hereinafter Fukurai, Representative Cross-Section].

4 See Sheri Lynn Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1616-49 (1985) (discussing racial prejudice and its influence on the decision-making of criminal juries). See also Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 Cornell L. Rev. 1, 110-115 (1990) (discussing the racial make-up of juries and its influence on jury verdicts); Fukurai, Representative Cross-Section, supra note 3, at 4.

5 Colbert, supra note 4, at 112-15 (examining jury studies to show that the influence of race is minimized when the jury is racially mixed).

6 Deborah A. Ramirez, The Mixed Jury and the Ancient Custom of Trial by Jury *De Medietate Linguae*: A History and a Proposal for Change, 74 B.U. L. Rev. 777, 798 (1994). See also Reid Hastie et al., Inside the Jury 125 (1983) ("[I]f the defendant is black, it may be desirable to oversample from the black population" in order to create racially mixed juries); Nancy J. King, Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection, 68 N.Y.U. L. Rev. 707, 751-52 (1993); Donna J. Meyer, A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection, 45 Case W. Res. L. Rev. 251, 255 (1994). See also Georgia v. McCollum, 505 U.S. 42, 61 (1992) (Thomas, J., concurring) ("Simply stated, securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial."); Colbert, supra note 4, at 110-13.

benefits for civil society. In general, this is one of the avenues for American democracy to embrace diversity and elicit diverse points of view through the operation of many decision-making bodies.

Some advocates of mixed juries also argue that enhancing the legitimacy of jury verdicts, especially in cases involving race or racism, fosters and promotes social peace.[7] Such peace is attained by legitimizing the police and courts in the eyes of those living under their authority. The respect that racial minorities hold for the judicial system depends on their faith in the ability of the system to impanel a fair jury.[8] In other words, the public is demanding that a jury not only be fair, but that it appear fair and legitimate.

Current jurisprudence, however, offers no specific 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, [9] it does not guarantee that the criminal jury will in fact reflect an accurate cross section of the community. Minorities may remain underrepresented in the venire or jury box, even without invidious discrimination.[10] The Supreme Court has stated that a party is entitled to an impartial jury, not a representative one.[11]

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7 See Albert W. Alschuler, Racial Quotas and the Jury, 44 Duke L.J. 704, 706 (1995) (describing public unrest when a white defendant was acquitted by an all-white jury); King, supra note 6, at 763-74; see also Meyer, supra note 6, at 262 n.77 ("The recent riots in Miami and Los Angeles following acquittals of police officers by all-white juries accused of beating and killing black arrestees, support the need for affirmative inclusion of minorities on petit juries to support the legitimacy of verdicts in racially motivated cases."); Ramirez, supra note 6, at 781.

8 Hiroshi Fukurai et al., Race and the Jury: Racial Disenfranchisement and the Search for Justice 4 (1993) [hereinafter Fukurai et al., Race and the Jury] ("The persistent underrepresentation of racial minorities has contributed to public distrust and lack of faith in the legal system."); King, supra note 6, at 767.

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

10 Fukurai, Race, Social Class, And Jury Participation, supra note 3, at 82; see generally Hiroshi Fukurai & Edgar W. Butler, Sources of Racial Disenfranchisement in the Jury and Jury Selection System, 13 Nat'l Black L.J. 238, 252 (1994) (arguing that juror screening questions are a factor creating racially imbalanced representation).

11 *McCollum*, 505 U.S. at 59 (recognizing that a defendant has a right to an impartial jury, but cannot disqualify a person as an impartial juror based on race).

Past jury studies substantiated that racial minorities have been systematically excluded from jury service, creating wide-spread mistrust and lack of faith in one of America's great institutions.[12] This Article examines affirmative action mechanisms to secure racially representative juries. Specifically, the Article focuses on the possible use of racial quotas as one affirmative action procedure for ensuring minority representation in jury trials. First, this Article explores logistical problems and procedural deficiencies of current jury selection procedures that systematically exclude racial minorities from jury service, and argues that application of racial quotas in jury selection is essential to the structure of fairness and legitimacy in criminal jury proceedings. Second, the Article focuses on jury research with two different models of mixed juries and examines the public's perception of fairness and legitimacy of such racially mixed juries in both criminal proceedings and jury verdicts. Third, we present empirical studies to add substance to the discussion of public attitudes towards an affirmative action mechanism in jury selection and trials. Lastly, the Article discusses whether affirmative action efforts in jury trials should become a compelling governmental issue—demanding a policy of reform in attempting to make jury decisions equitable and just.

II. Obstacles To The Formation Of Mixed Juries

Current jury selection procedures could feasibly generate racially mixed juries. Unfortunately, these procedures do not accomplish this for several reasons. Racial and ethnic minorities have been consistently underrepresented on both state and federal juries because an array of logistical and mechanical difficulties hampers the creation of mixed juries at each stage of jury selection.[13]

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12 See Jon M. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 32 (1977) ("Discrimination bred by prejudice has contributed to widespread mistrust by black people of most of the (white-dominated) institutions of power, and most particularly the agencies of law enforcement."); Fukurai & Butler, supra note 10, at 253 ("blacks and other ethnic and racial minorities have learned to mistrust the fairness inherent in most white-dominated institutions of power, such as law enforcement agencies and court decisions through racially-discriminant juries."). See generally Johnson, supra note 4, at 1613.

13 See generally Fukurai et al., Race and the Jury, supra note 8, at 39-80 (examining procedural difficulties associated with the jury selection system).

First, many states and almost all federal circuits rely on voter registration lists as a potential source of juror names, even though reliance on such lists results in significant under-representation of minorities because minority voter registration rates are lower than those of their white counterparts. While Congress finally recognized a need to improve registration rates and passed the National Voter Registration Act of 1993,[14] few serious efforts have been made to ensure that voter registration lists are fully inclusive of the eligible population. Some states, including California, refused to implement the act.[15] Use of voter rolls to create jury pools is estimated to exclude up to one-third of the adult population, skewing the jury pool to under-represent racial minorities, low-income citizens, the elderly, and women.[16]

Second, jury lists are not updated frequently. Clearly, frequent updating of these lists is crucial to maintaining a representative list of the general population. However, federal law only requires that jury lists be updated every four years.[17] Such a lengthy period between updates

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14 Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 42 U.S.C. §§ 1973gg (1995)).

15 Reynolds Holding of the San Francisco Chronicle reported that:

> Governor Wilson and the governors of eight other states—Illinois, Pennsylvania, South Carolina, Michigan, New Hampshire, Louisiana, Mississippi and Virginia—have challenged motor voter in court. Federal judges have upheld the law in Illinois and Pennsylvania. No decisions have been reached in the other cases.
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> [In August, 1994], Wilson ordered state agencies to comply with the law only to the extent that the federal government covered the costs of compliance. Almost no federal money has been made available for that purpose.
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> In December, voting rights organizations sued Wilson for not implementing the law, and the governor responded by challenging the law's constitutionality in his own lawsuit. The federal government then sued California for flouting the January 1 deadline for implementation.

Reynolds Holding, Appeals Court Upholds State Motor Voter Law, San Francisco Chronicle, July 25, 1995, at A12. The three lawsuits were combined, and in May, Judge Ware upheld the motor voter law, ordering the state to implement it immediately. Id. at A11. Wilson appealed, and his arguments were rejected by a federal appeals court in July 1995. Id.

16 Fukurai et al., Race and the Jury, supra note 8, at 18-19; see also Darryl K. Brown, The Means and Ends of Representative Juries, 1 Va. J. Soc. Pol'y & L. 445, 454 (1994) (reviewing Hiroshi Fukurai et al., Race and the Jury: Racial Disenfranchisement and the Search for Justice (1993)).

17 28 U.S.C. §1863(b)(4) (1994).

accentuates the problem with using only voter registration lists, which already under-represent racial minorities. If updating is done every four years, for instance, those who were seventeen years old at the time of the last updating will not be included in the list until they are twenty-one—a violation of federal, and sometimes state, laws on eligibility for jury service.[18]

Third, many jury selection systems qualify jurors by requiring them to complete a jury qualification questionnaire. Minorities complete and return these questionnaires at a lower rate than whites.[19] Further, a disproportionate number of questionnaires mailed to minorities are returned undelivered because minorities generally are more mobile than whites and are more likely to move without leaving a forwarding address.[20]

Fourth, many states permit jury selectors to disqualify potential jurors based on purely subjective criteria, such as whether the person possesses "natural faculties," "ordinary intelligence," "sound judgment," or "fair character."[21] In this manner, a large proportion of racial minorities may be deemed unqualified to serve on juries and thus excluded from the venire.[22]

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18 Cynthia A. Williams, Jury Source Representativeness and the Use of Voter Registration Lists, 65 N.Y.U. L. Rev. 590, 615 (1990) (concluding that 14% of blacks, 52% of Hispanics, 28.7% of those with annual income less than $5,000, and 20.9% of those with annual incomes between $5,000 to $9,999 would be systematically excluded from jury service if voter registration lists were used as a sole source list).

19 Fukurai et al., Race and the Jury, supra note 8, at 21 (noting that "the large proportion of blacks who do not respond to jury qualification questionnaires or summonses have been classified as 'recalcitrants' and eliminated from subsequent jury selection procedures.").

20 Brown, supra note 16, at 456; Fukurai, Race, Social Class, and Jury Participation, supra note 3, at 82.

21 See, e.g., Cal. Penal Code § 893(a)(2) (West 1985) (detailing qualifications of grand jurors, who are selected with criteria similar to trial jurors); 705 Ill. Comp. Stat. 305/2 (West 1992); Tenn. Code Ann. § 22-2-302 (a)(1) (1994). See also Carter v. Jury Comm'n, 396 U.S. 320, 332 (1970) ("The States remain free to confine the selection [of jurors] to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character.").

22 Nijole V. Benokraitis, Institutional Racism: An Empirical Study of Blacks and Jury Selection Process in Ten Southern States 38 (1975) (unpublished Ph.D. dissertation, University of Texas (Austin)) (on file with the author). For example, in Cassell v. Texas, 339 U.S. 282 (1950), the Court held that the key-man selection process was discriminatory. Id. at 287-88. The Court reasoned that the jury commissioners' stated practice of choosing only those with whom they were personally acquainted and rationalization that they knew no

Fifth, although current jurisprudence describes the right to serve on a jury as a privilege of citizenship, most citizens, including minorities, view it as a burden rather than an opportunity.[23] Because juror fees may not compensate jurors adequately for jury service, many potential jurors, particularly unskilled and blue-collar workers who are paid on the basis of actual hours worked rather than on a salaried basis, will provide judges with persuasive and very compelling economic hardship excuses.[24] Minorities are disproportionately represented in low-skilled, blue-collar jobs, and are disproportionately excused because of the economic hardship that jury service would present. As a result, minorities are almost always underrepresented in the jury venire and jury box.[25]

Sixth, even if fairly represented in the venire, racial minorities will not always be fairly represented on a petit jury, by virtue of being a statistical minority.[26] The smaller the percentage of the population that the minority comprises, the more often that minorities will not be

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eligible blacks in the county (though blacks made up approximately one-seventh of the eligible jury population) constituted a breach of the commissioners' duty to "familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color." Id. at 289. In Patton v. Missouri, 332 U.S. 463 (1947), the Court found that no blacks "had served on a criminal court grand or petit jury for a period of thirty years." Id. at 466. Out of a total adult population of 34,821 in the county and an adult black population of 12,511, only about 25 blacks met the basic jury requirement of being a qualified elector. Id. at 465, 467. In Smith v. Texas, 311 U.S. 128 (1940), the Court found that between 1931 and 1938, grand jurors' lists in Harris County, Texas included 512 white individuals but only 18 blacks. Id. at 129. Of them, 13 black jurors were placed at the end of the list, from which names were sequentially drawn. As a result, only five blacks participated on grand juries during this period, and the same individual served in three separate instances; thus, only three individual blacks actually served. During the same period, 379 whites served as grand jurors. Id.

23 See, e.g., Duren v. Missouri, 439 U.S. 357, 376-77 (1979) (Rehnquist, J., dissenting) (noting the burdens of jury service and comparing jury selection to conscripting armies); see also King, supra note 6, at 736 n.115.

24 See Coramae R. Mann, Unequal Justice: A Question of Color 173 (1993) (discussing that many minorities try to avoid jury duty because they cannot afford to lose hourly wages while serving); see also Hiroshi Fukurai & Edgar Butler, Organization, Labor Force, And Jury Representation: Economic Excuses and Jury Participation, 32 Jurimetrics J. 49, 67 (1991) (asserting that blue-collar workers serving as jurors will lose income due to the underfunding of the court system).

25 See Fukurai, Representative Cross-Section, supra note 3, at 3, 27.

26 See, e.g., Peter A. Detre, A Proposal For Measuring Underrepresentation in the Composition of the Jury Wheel, 103 Yale L.J. 1913, 1927-30 (1994).

fairly represented, even if a truly random selection method is employed throughout jury selection stages. Consequently, even a purely random selection technique may not create minority representation on the petit jury.[27]

Lastly, although current constitutional jurisprudence regulates the use of peremptory challenges and supposedly prevents litigants from exercising them in order to exclude racial minorities from the petit jury, simply requiring that litigants provide reasons for all peremptory challenges still falls short of guaranteeing that parties challenging potential jurors will provide the true reasons of racism—as well as sexism, xenophobia, and ageism—for their challenges. While the Supreme Court in *Batson v. Kentucky* ruled that peremptory challenges could not be exercised in a racially discriminatory manner,[28] some attorneys are able to circumvent the law.[29] More specifically, to the extent that the Supreme Court allows any race-neutral explanation to rebut claims of discrimination, the *Batson* doctrine will allow litigants to eviscerate its principles by fabricating racially neutral explanations for excluding potential jurors on the basis of race.[30]

Moreover, jury studies show that a number of legal and non-legal factors operate together to cause the under-representation of racial minorities on the jury. Relying on current color-blind jury selection procedures—in effect leaving the racial composition of the jury to chance—almost always leads to racially disproportionate representation. One way to guarantee a mixed jury is through a race-conscious selection policy or its equivalent, the "jurymandering" method.[31] Jurymandering is the use of an affirmative mechanism, such as a racial quota, to engineer mixed juries that may not occur under current jury selection procedures. Further, the focus on an affirmative action policy shifts the discussion of race-conscious selection methods from the rights of defendants or the rights of excluded jurors to a third inter-

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27 See Brown, supra note 16, at 455; Johnson, supra note 4, at 1656.

28 476 U.S. 79, 97-98 (1986).

29 Susan N. Herman, Why The Court Loves *Batson*: Representation-Reinforcement, Colorblindness, and the Jury, 67 Tul. L. Rev. 1807, 1830-31 (1993).

30 Id.

31 See Jeff Rosen, Jurymandering, New Republic, November 30, 1992, at 15.

est—the interest of society in maximizing public confidence in the fairness and legitimacy of jury proceedings.[32]

Allocating opportunities for jury service among potential jurors on the basis of race may be permissible when it is designed to advance the interest of the state in promoting public confidence in the fairness and legitimacy of jury proceedings.[33] No court, no legislature, no jury, and no city wants to endure the kind of urban uprisings that erupted after the 1992 Rodney King beating trial.

Before examining affirmative action mechanisms to ensure racially mixed juries, the history of racial quotas in jury trials and race-based jury selection procedures requires closer examination. Two types of racial quotas in jury proceedings exist in the Anglo-Saxon tradition of law: (l) the jury "*de medietate linguae*," or the party jury model, in which half of the jurors come from the majority and the other half from minority groups, and (2) the Hennepin County model, in which the extent of juries' racial representativeness reflects respective proportions of both majority and minority groups in the general population.

III. The Mixed Jury And Racial Quotas

A. The Jury "De Medietate Linguae" Model

The jury "*de medietate linguae*" was originally created to deal with Jews in twelfth century England.[34] The term literally means jury of the "half tongue" because the jury selection method applied to people who were considered alien or foreign.[35] Due to mass riots and violence in 1190 against wealthy and influential Jews who were considered the King's property, King Richard I enacted a charter that gave

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32 For further discussions of the relationship between the rights of defendants and the rights of excluded jurors, see generally Barbara Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum. L. Rev. 725 (1992).

33 Albert W. Alschuler, "Equal Justice: Would Color-Conscious Jury Selection Help? Yes: A Racially Diverse Jury is More Likely to Do Justice," A.B.A. J., Dec. 1995, at 36.

34 See Ramirez, supra note 6, at 784 n.36 and accompanying text. See also Marianne Constable, The Law of the Other: The Mixed Jury and Changing Conceptions of Citizen, Law, and Knowledge 17-21 (1994).

35 Ramirez, supra note 6, at 781 n.23.

Jews the right to the jury *de medietate linguae*, a half-Jewish jury.[36] Though England subsequently banished all Jews in 1290, they were replaced as the King's financial agents by foreign merchants from Italy who were also given the privilege of a trial *de medietate linguae*—a trial heard by a jury composed half of their own countrymen and half of English persons qualified to serve as jurors.[37]

Although the extension of trial by juries *de medietate linguae* from Jews to alien merchants served to prevent diminution of the King's resources, the jury provided substantive fairness and protection against unfair verdicts derived from prejudice against Jews and other aliens in England. After the expulsion of the Jews, for instance, the mixed jury privilege provided foreign merchants with the perception of substantial fairness and equity in disputes involving foreigners.

The *de medietate* concept, also known as a party jury, had wider applications. For instance,

> [W]hen [an English] university scholar was indicted . . . for 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.[38]

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 Neighbourhood.'"[39] The right of juries *de medietate linguae* in England endured until 1870, when Parliament passed the Naturalization Act. The Act permitted aliens to serve on juries and to acquire, hold, and dispose of property in the same manner as a England-born citizen, eliminating the need for the mixed jury privilege.[40]

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36 See id. at 784.

37 Id. at 785.

38 James C. Oldham, The Origins of the Special Jury, 50 U. Chi. L. Rev. 137, 169 (1983).

39 Id.

40 See Ramirez, supra note 6, at 786-87.

American colonies and the courts also experimented with the use of juries *de medietate linguae* after English settlers brought their laws to North America.[41] 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*.[42] For instance, as early as 1674, the courts in the Plymouth colony used mixed juries composed of half Native Americans and half colonists.[43] The mixed jury was used in early colonies as a way to ensure substantive fairness and to enhance the legitimacy of jury verdicts.[44] A jury study, for instance, notes that "[t]he mixed jury . . . was important to the colonists as the natives' perception of unfairness may have triggered bloody unrest or, at least, social tension."[45]

Since independence and 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 1936, in dictum and without analysis" in *United States v. Wood*.[46] The Court declared, "[T]he 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."[47]

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41 Id. at 790.

42 Id. In a footnote, Ramirez provides helpful background sources on this historical point:

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

Id. at 790 n.85.

43 Id. at 790 n.86.

44 Id. at 791.

45 Id.

46 Id. at 793 & n.105-06.

47 United States v. Wood, 299 U.S. 123, 145 (1936).

At the state court level, possible applications of juries *de medietate linguae* have been reviewed and discussed. For instance, the Massachusetts Supreme Court examined the applicability of the jury *de medietate linguae* in 1986.[48] Article 12 of the Massachusetts Declaration of Rights, drawn from Magna Charta chapter 39, guarantees to defendants that

> no freeman shall be taken or imprisoned, or be disseised 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.[49]

The defendants argued that Article 12 provided them the right to a trial by jury *de medietate linguae*, and that as a result its requirements of citizenship and command of the English language were unconstitutional.[50]

The court, however, held that the right to a trial by jury *de medietate linguae* was not of constitutional magnitude and that therefore the requirements that jurors speak and understand English and be United States citizens did not violate either the Sixth Amendment or the Equal Protection Clause of the Constitution.[51]

Unfortunately, the United States Supreme Court and the Massachusetts court did not explore fully English common law or statutory history, nor did they discuss the wisdom or practicality of the mixed jury. Thus, the debate on the jury *de medietate linguae* ceased, and the mixed jury disappeared from American law.

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 from the majority and half from the minority group. Similarly, the fixed quota of the jury composition is derived from the acknowledgments that prejudice existed against the minority

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48 Commonwealth v. Acen, 487 N.E.2d. 189 (Mass. 1986).

49 Id. at 191 (quoting Whitcomb's Case, 120 Mass. 118, 120 (1876)).

50 Id.

51 Id. at 192, 195.

group and that an ordinary jury would not necessarily produce a fair result.[52] The fixed quota is viewed as an essential feature of the jury trial because it ensures the appearance of fairness and justice in jury verdicts. While the mixed jury principle originally may have developed out of economic concerns of England during the medieval period, its wisdom and practice in both England and the United States had broader implications for 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 its 1990 Census, approximately nine percent of the adult population is minority (4.59% African-American, 2.22% Asian-Pacific Islander, 1.10% Native American, and 1.12% Hispanic).[53] While the Hennepin County model focuses on the grand jury, this affirmative action principle can be extended easily to the petit jury.

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

> [I]f, 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

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52 See Constable, supra note 34, at 118-20, 127 (arguing that alien claimants could justify a mixed jury on impartiality grounds).

53 Ramirez, supra note 6, at 804 n.170.

> 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.[54]

While it is impossible to estimate how widespread the Hennepin County race-balancing model of jury selection is, five states, including California, do not require that grand juror names be drawn randomly from the grand jury venire. Instead, these states allow judges or jury commissioners the discretion to select who will actually serve as final jurors.[55]

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 in the general population, thus requiring that different numbers of minority jurors be selected for the jury box.

Besides the two types of mixed juries and racial quota experiments in the Anglo-Saxon tradition of law, social science research also offers a different version of racially mixed juries. Jury dynamics research shows that without a minority of at least three jurors, group pressure is simply too overwhelming. "[O]ne or two dissenting jurors eventually

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54 King, supra note 6, at 726 (quoting Task Force on Racial Composition of the Grand Jury, Office of the Hennepin County Attorney, Final Report 45 (1992)).

55 In California, Penal Code § 888 defines the function of the grand jury, and § 903.3 requires that each jurisdiction or county appoint jury commissioners who are responsible for compiling lists of those qualified to serve as grand jurors. Cal. Penal Code § 888 (West Supp. 1996); Cal. Penal Code § 903.3 (West 1985). 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." Cal. Penal Code § 903.3 (West 1995). Moreover, § 903.4 allows judges to disregard these lists and select anyone from the county that they find suitable and competent to serve as grand jurors. Cal Penal Code § 903.4 (West 1985). 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.

Id. (emphasis added).

and inevitably accede to the majority's view."[56] Those findings suggest that a reasonable compromise between the jury *de medietate linguae* and the Hennepin model, especially applied in a jurisdiction with small minority populations, is to assure three minority jurors in order to preserve not only the appearance of fairness, but also the legitimate viability of deliberations and verdicts in jury trials, as well.

Existing research confirms that the product of such affirmative action in jury selection for racially mixed juries can enhance perceptions of jury fairness. However, little information is available about reactions to race-conscious means of achieving this end. For instance, the research does not tell us whether the potential jurors would react negatively to racial quota methods of obtaining racial representation, or if potential negative reactions to racial quotas would cancel out or overshadow the positive reactions that racially mixed jury verdicts may produce.

The next section of this Article examines whether an affirmative action mechanism to secure racially representative juries is essential to the appearance of fairness in criminal jury proceedings. Specifically, the Article examines the two types of mixed jury models and how the general public views the applicability of racial quotas and race conscious affirmative action policies in jury proceedings and trials.

IV. Research Methods

A. Sample

In the spring of 1995, the authors organized a telephone survey to examine the public's perceptions of the criminal justice system and criminal jury proceedings. The research site was Santa Cruz County, California.[57] Modern sampling techniques (random digit dialing, or

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56 Johnson, supra note 4, at 1698 (citing Michael J Saks, Jury Verdicts: The Role of Group Size and Social Decision Rule 16-18 (1977)). See also Ballew v. Georgia, 435 U.S. 223, 231-39 (1978) (reviewing articles and studies critical of the six person jury and refusing to uphold a five-person jury); Norbert L. Kerr & Robert J. MacCoun, The Effects of Jury Size and Polling Method on the Process and Product of Jury Deliberation, 48 J. Personality and Soc. Psychology 349, 351 (1985) ("minorities of one were particularly vulnerable to the influence of a unanimous majority").

57 The 1990 U.S. Census shows that Santa Cruz County has the adult population of 175,030 (78.0% whites, 0.9% African Americans, 0.6% Native Americans, 3.4% Asian and

RDD) were employed to maximize the representativeness of the sample of adult respondents. Our survey included more than 50 questions of attitudinal measures on the criminal justice system, jury participation, and the death penalty.[58]

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 its effects on people's perceptions of the issue of crime and justice. Thus, within the limitations imposed by survey research methodology, we sought to pose our questions in the general legal context that they might be posed to jurors in court. A total of 327 respondents were contacted, and their responses were carefully coded, computerized, and analyzed.[59]

Pacific Islanders, 17.0% Hispanics, and 0.1% other racial and ethnic groups). Department of Finance, California State Census Data Center, Report C90-PL-1, Table 4: Population and Percent Distribution for Persons 18 Years or More 52 (1990).

58 A total of 24 students enrolled in a group tutorial course participated in the telephone survey of Santa Cruz residents. We asked each student to complete ten 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.

59 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. See U.S. Department of Commerce, 1990 Census of Population, Social and Economic Characteristics, Metropolitan Areas 311 (1993). With a 95% confidence interval with error margins of plus or minus five percent, we inserted the following parameters into the equation to estimate the sample size, n, necessary to achieve the desired confidence interval.

$n = ((1.96)^2 p*q)/E^2$

where p=.22 and q = l-p = .78

E = 0.05 (error margins)

The estimate sample size was 264. After completing standardized procedures to insure interval validity of the survey and with each student completing ten 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%. For greater discussions on the estimation of sample size, see R. Lyman Ott et al., Statistics: A Tool for the Social Sciences 231-35 (1992).

B. Measurements

The following three questions were used to obtain the public's reaction to mixed juries and jury verdicts' fairness and legitimacy. Those questions asked for an 'agree' or 'disagree' response to: (1) "the racial makeup of the jury should reflect the racial makeup of the community," (2) "a racial quota needs to be imposed on the jury to increase minority participation," and (3) "decisions reached by racially diverse juries are more fair than decisions reached by single race juries."[60] The first question is designed to address the usefulness of racially representative juries proposed under the Hennepin model and the public's perception of statistically engineered racial heterogeneity based on racial compositions in the community. The second question focuses on possible imposition of racial quotas in the selection of juries with or without regards to racial compositions in the general population.[61] Since both Hennepin and *de medietate linguae* models require the use of racial quotas, the second question is designed to examine the public's perception of racial quotas to increase minority jury participation. The third question examines whether the public thinks that racially heterogeneous juries are able to generate fairer and more legitimate verdicts than racially homogeneous juries.

Two additional questions also examine perceptions of the jury system and its judicial effectiveness and usefulness in criminal jury proceedings. Specifically, those questions required an 'agree' or 'disagree' answer to: (1) "The jury is one of the most democratic institutions" and (2) "The bench trial where a single judge makes a decision is better than the jury trial." Jury studies suggest that approximately eighty percent of all jury trials in the world take place in the United States.[62] Those two questions provide additional reference

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60 Grammatically speaking, the sentence should have used the term, "fairer" rather than "more fair." However, because we used telephones to interview respondents, we decided to use the latter term, as it was considered clearer and less ambiguous than the former.

61 Florida courts, for instance, rely on six person juries for non-capital criminal trials, and 12 person juries for capital criminal cases. Fla. Stat. Ann. § 913.10 (West 1996).

62 Valerie P. Hans & Neil Vidmar, Judging The Jury 31 (1986). Different nations are now considering the resurrection of trial by jury. For example, on October 21, 1991, the Supreme Soviet of the Russian Federation approved the abolition of the traditional court with "people's assessors" and replaced it with a jury trial system as part of an overall judicial reform initiative. Stephen C. Thaman, The Resurrection of Trial by Jury in Russia, 31 Stan.

points to determine how Californians currently view the legitimacy of the jury trial and its verdicts and, given the alternative mechanism of the bench trial, how people would react to a different judicial system.

C. Results

Table 1 shows the public's perception of racially mixed juries, the legitimacy and fairness of jury verdicts reached by mixed juries, and the public's confidence in the jury system. With respect to the merit of racially heterogeneous juries, 67.3% of respondents agreed that "Decisions reached by racially diverse juries are more fair than decisions reached by single race juries." The groups that showed greater agreement with the fairness of racially mixed juries' verdicts included the following: Women (73.2%), the young (77.3% of the respondents from eighteen to twenty-nine years of age), blacks (91.6%), Hispanics (75.0%), the single (72.3%), the unemployed (70.7%), those with a high school education or less (73.0%), and non-registered voters (75.0%).

Jurors with the following political and ideological backgrounds agreed on the merit of engineering racially mixed juries and their verdicts: those who opposed "three strikes" legislation (75.3%), did not believe that O. J. Simpson is guilty (72.7%), believed that gun related crimes are the most serious crime in California (71.4%), and did not own firearms (69.7%). With respect to attitudes about criminal justice and the death penalty, respondents with more favorable opinions of racially mixed juries' verdicts included those who believed that the death penalty is administered fairly (70.0%), that minorities receive the death penalty more (71.8%), that our criminal justice system is democratic (70.2%), and that capital punishment is wrong (69.5%).

In evaluating racially mixed jury models, respondents overwhelmingly supported racially representative juries in which the racial composition of the juries reflects the racial composition in the community (78.6%) over the fixed racial quota model (39.7%). While a large proportion of respondents favored the racially representative juries proposed under the Hennepin model, numerous groups opposed the model, including those sixty years of age or older (65.9%), other racial

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J. Int'l. L. 61, 61-62 (1995). In December 1993, "the first Russian jury since the October Revolution of 1917 convened in the region of Saratov." Id.

groups (53.8%), the retired (64.7%), jurors who served in criminal jury trials (63.8%), and those who believed that racially mixed juries do not offer fairer verdicts than single race juries (62.9%). The findings showed that the elderly and those who served in criminal jury trials and did not view racially mixed juries as generating fairer verdicts were less likely to feel that the jury's racial makeup should reflect that of the general population.

For the use of fixed and mandatory racial quotas in jury selection, the majority of the following groups felt the need to impose racial quotas to increase minority participation in juries: women (50.0%), the young (53.3%), blacks (50.0%), Hispanics (57.8%), those with a high school education or less (59.2%), the unemployed (50.0%), non-registered voters (55.0%), those opposing the death penalty (50.5%), and those who believed that racially mixed juries lead to fairer verdicts (52.4%). All the groups examined show a statistically significant difference in their approval of racially representative juries over an affirmative juries model with fixed racial quotas.

With respect to people's confidence in the democratic principles of jury trials and preference for jury trials over bench trials, in which judges are fact finders, the majority of respondents felt that the jury is one of the most democratic institutions (64.6%), especially blacks (81.8%), single people (72.7%), the unemployed (75.0%), those who disagree that poor persons receive the death penalty more than affluent defendants (82.5%), those who believe that our criminal justice system is democratic (78.4%), and those who believe that the death penalty is administered fairly (74.3%). In other words, those who believe that criminal justice proceedings are functioning properly and without racial discrimination are more likely to feel greater confidence in the jury system as one of the most democratic institutions. Thus, those who have less confidence in the criminal justice system and who believe that the death penalty is imposed in a racially disproportionate manner are less likely to feel that the jury system is a democratic institution.

TABLE 1
THE PUBLIC'S PERCEPTIONS OF RACIALLY MIXED JURY MODELS AND JUDICIAL SYSTEMS

	Racially Mixed Jury Models			Judicial Systems	
Variables	Mixed Jury Verdicts	Representative Juries	Mandatory Racial Quotas	Jury	Bench
Total Population	67.35%	78.69%	39.78%**	64.61%	25.68%**
DEMOGRAPHIC BACKGROUNDS					
Gender					
Male	59.26	78.52	27.38**	67.47	23.82**
Female	73.21	78.52	50.00**	62.50	27.82**
Age					
18 thru 29	77.36	84.75	53.33**	60.38	28.00**
30 thru 59	65.96	79.82	35.16**	66.30	24.15**
60 and Over	52.78	65.91	32.43**	64.86	25.81**
Race/Ethnicity					
White	65.10	80.56	35.42**	63.82	23.40**
Black	91.67	75.00	50.00**	81.82	63.64**
Hispanic	75.00	81.82	57.89**	63.16	23.53**
Others	60.00	53.85	45.45*	63.64	0.0**
Marital Status					
Married	60.00	72.82	33.33**	59.57	30.86**
Single	72.34	82.69	41.40**	72.73	27.66**
Others	69.39	83.33	51.02**	65.45	16.33**
Language Proficiency[1]					
Very Well	65.70	78.85	36.75**	66.29	26.38**
Well or Not Well	80.95	77.27	65.00**	50.00	18.75**
SOCIO-ECONOMIC BACKGROUNDS					
Education					
H.S. or Less	73.08	67.74	59.26*	55.56	30.77**
Some College	66.67	83.33	36.36**	75.34	24.29**
College	65.79	76.47	41.67**	52.00	34.15**
Post Graduate	51.52	74.36	20.00**	65.71	15.15**
Employment Status					
Employed	65.25	80.15	36.44**	62.10	24.14**
Unemployed	70.79	80.95	50.00**	75.00	34.29**
Retired	57.14	64.71	34.38**	70.00	16.00**
Residential Arrangement					
Rent	71.01	86.84	43.37**	56.16	29.85**
Own	61.32	72.73	36.97**	69.23	24.76**
Others	85.71	77.78	62.50**	80.00	0.00**
JURY BACKGROUNDS					
Prior Jury Service					
Civil	64.29	85.29	29.17**	71.43	25.00**
Criminal	62.07	63.89	25.00**	65.63	30.00**
Never served	60.42	81.03	42.55**	68.63	31.82**
Salary Compensation					
Yes	63.64	75.00	30.19**	62.07	23.40**
No	63.86	79.59	42.17**	70.11	23.17**
Registered Voters					
Yes	66.47	78.64	35.95**	65.71	26.09**
No	75.00	79.17	55.00**	55.00	22.22**

	Racially Mixed Jury Models			Judicial Systems	
Variables	Mixed Jury Verdicts	Representative Juries	Mandatory Racial Quotas	Jury	Bench
POLITICAL AND IDEOLOGICAL BACKGROUNDS					
O.J. Simpson Jury Verdict					
Guilty	64.10	78.02	35.62**	64.47	37.31**
Not Guilty	72.73	69.44	54.84**	64.52	17.86**
Three Strikes Legislation					
Yes	60.49	73.33	37.53**	63.53	30.00**
No	75.31	82.11	44.16**	63.53	26.19**
Most Serious Crimes					
Gun Related Crimes	71.43	78.38	40.00**	60.18	27.12**
Sexual Molestation	60.00	71.88	32.73**	68.33	20.37**
Others	65.08	83.12	44.93**	64.18	28.13**
Firearm Ownership					
Yes	57.14	71.93	32.65**	66.00	29.41**
No	69.70	79.62	42.54**	63.89	24.60**
CRIMINAL JUSTICE AND DEATH PENALTY ATTITUDES					
Death Penalty is Fairly Administered[2]					
Yes	70.00	70.45	42.86**	74.36	39.39**
No	66.17	81.10	38.35**	61.43	24.24**
Poor Person Receive More Death Penalty[3]					
Yes	67.63	80.98	39.23**	58.04	27.34**
No	66.67	70.59	38.64**	82.50	21.05**
More Minorities Receive Death Penalty[4]					
Yes	71.84	80.99	44.09**	65.09	24.75**
No	58.33	68.12	34.43**	66.07	25.49**
Oppose Death Penalty[5]					
Yes	69.57	84.75	50.50**	56.25	22.22**
No	66.67	76.73	37.50**	67.88	26.19**
Criminal Justice System is Democratic[6]					
Yes	70.24	78.35	33.33**	78.41	24.00**
No	62.89	82.14	43.68**	51.55	27.78**
Mixed Jury Verdicts are More Fair					
Yes	na	86.51	52.48**	65.74	26.53**
No	na	62.90	20.37**	58.18	28.00**

Notes: The five questions are phrased as: (1) "decisions reached by racially diverse juries are more fair than decisions reached by single race juries;" (2) "the racial makeup of the jury should reflect the racial makeup of the community;" (3) "a racial quota needs to be imposed on the jury to increase minority participation;" (4) "the jury is one of the most democratic institutions;" (5) "the bench trial where a single judge makes a decision is better than the jury trial."
1: The level of respondents' language proficiency was rated by interviewers.
2: The question is phrased as: "The death penalty is always administered fairly."
3: "A poor person is more likely to receive the death penalty than a wealthy person."
4: "A minority person is more likely to receive the death penalty than an Anglo."
5: "Do you oppose capital punishment?"
6: "Our criminal justice system is democratic."
* $p < .001$ ** $p < .0001$

Regarding the substitution of jury trials with bench trials, a small proportion of potential jurors felt that bench trials offer a better decision-making process than jury trials. Blacks are, however, a notable exception—63.6% felt that bench trials are better. While the overwhelming majority of blacks felt that the jury is one of the most democratic institutions (81.8%), they also felt that the bench trial might be a better judicial system than the jury trial, perhaps reflecting their objections to the Rodney King verdicts rendered by a predominantly white jury.

The present analysis also relied on ordinary least square regression analyses to examine the public's perception of the difference between race-conscious affirmative jury selection procedures and traditional colorblind random jury selection methods. Some individuals may endorse the idea 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, the supporters of colorblind random selection may also favor racially representative juries and endorse jury decisions reached by racially mixed juries. Thus, the next section examines individual perceptions of race conscious or race-neutral preferences by simultaneously incorporating the questions concerning representative juries, jury decisions reached by racially integrated juries, and the use of mandatory racial quotas.

Table 2 shows ordinary least square regression analyses of the public's perceptions of racially mixed juries, racially representative juries, and mandatory 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 non-standardized and standardized ordinary least square regression coefficients for criterion variables and demonstrates whether respondents feel that jury verdicts reached by racially heterogeneous juries are fairer than decisions rendered by single race juries. The third and fourth columns also show regression coefficients for the question of racially representative juries and the use of mandatory racial quotas to engineer racially integrated juries. The last two columns then examine respondents' opinions on the fairness and legitimacy of the current judicial systems.

Empirical analyses show that all of the regression coefficients for the questions of racially mixed juries (i.e., coefficients for the first

three rows and the second through fourth columns) are positive, suggesting that the fairness of racially mixed juries' verdicts, the support for racially representative juries, and the importance of mandatory racial quotas to create racially heterogeneous juries are all closely intertwined in the same causal direction.

For instance, regression analyses show that, keeping respondents' socio-demographic and ideological backgrounds constant and neutral, individual respondents who support both racially representative juries and mandatory racial quotas tend to feel that racially mixed juries render fairer decisions than single race juries. The relationship is statistically significant (.261 and .218 for standardized coefficients with $P < .01$ and $< .05$ for representative juries and racial quotas, respectively). This finding also suggests that opponents of affirmative action in jury selection and of mandatory racial quotas are less likely to feel that racially mixed juries lead to fairer jury decisions. Similarly, those who endorse racially mixed jury decisions are more likely to support racially representative juries (.278 for a standardized regression coefficient with $P. < .01$), as well as the use of racial quotas to increase minority jury participation (.188 with $P < .05$).

Empirical findings thus suggest that when race, sex, and other socio-economic or socio-political backgrounds are held constant, individuals who favor racially representative juries are more likely to support the use of mandatory racial quotas as the mechanism for producing this result. While racial quotas for the Hennepin model may vary depending upon the jurisdiction, both Hennepin and *de medietate linguae* models require the use of mandatory racial quotas to create racially integrated juries. Thus, those two structures of affirmative juries are likely to gain greater support from those who favor racially representative juries and racially mixed decision making processes by guaranteeing the allocation of jury seats to members of racial and ethnic minorities. On the other hand, Hennepin and *de medietate linguae* jury models are less likely to gain support from those who oppose the use of mandatory racial quotas because they believe that racially mixed juries do not necessarily lead to fairer decisions and that the racial makeup of juries does not need to reflect racial compositions of the community.

TABLE 2

ORDINARY LEAST SQUARE REGRESSION ANALYSES OF RACIALLY MIXED JURIES, RACIALLY REPRESENTATIVE JURIES, MANDATORY RACIAL QUOTAS, AND JUDICIAL SYSTEMS

	Racially Mixed Jury Models						Judicial Systems			
Variables	Mixed Jury Verdicts		Representative Juries		Mandatory Racial Quotas		Jury		Bench	
RACIALLY MIXED JURIES										
Mixed Jury Verdicts	—	(—)	.260	(.278)***	.178	(.188)**	.044	(.048)	−.016	(−.020)
Representative Juries	.279	(.261)***	—	(—)	.147	(.145)	−.066	(−.067)	.055	(.064)
Mandated Racial Quotas	.229	(.218)**	.176	(.179)	—	(—)	−.076	(−.078)	.065	(.077)
DEMOGRAPHIC BACKGROUNDS										
Gender (male=1, female=0)	−.040	(−.013)	−.005	(−.001)	−.501	(−.185)**	−.006	(−.002)	.061	(.025)
Age	.018	(.217)	−.077	(−.100)	.003	(.042)	.001	(.023)	−.001	(−.017)
White (white=1, others=0)	−.177	(−.050)	−.726	(−.221)	.348	(.105)	.485	(.151)	−.252	(−.089)
Black/Hispanics (black/hisp=1; others=0)	−.231	(−.059)	−.332	(−.091)	.085	(.023)	.316	(.088)	−.504	(−.161)
Married (married=1; others=0)	.067	(.023)	.240	(.089)	.449	(.164)*	.414	(.156)	−.174	(−.075)
Language Proficiency[1]	−.463	(−.076)	.147	(.026)	−1.142	(−.199)**	−.219	(−.039)	.442	(.091)
SOCIO-ECONOMIC BACKGROUNDS										
Education (actual years)	−.039	(−.040)	−.004	(−.005)	.136	(.148)	.079	(.089)	.047	(.060)
Employment Status (full-time=1; others=0)	.087	(.026)	−.081	(−.026)	.090	(.029)	.162	(.054)	.401	(.153)
Residential Arrangement (own=1; others=0)	−.078	(−.026)	.416	(.152)	−.151	(−.054)	−.126	(−.047)	−.075	(−.032)
JURY BACKGROUNDS										
Prior Jury Service (yes=1; no=0)	−.080	(−.025)	.320	(.108)	.303	(.101)	−.066	(−.022)	−.110	(−.043)
Salary Compensation (yes=1; no=0)	.576	(.197)**	−.115	(−.042)	−.398	(−.143)	−.446	(−.166)*	.398	(.169)
Registered Voters (yes=1; no=0)	−.057	(−.013)	.129	(.032)	.209	(.051)	.562	(.143)	−.032	(−.009)
SOCIO-POLITICAL AND IDEOLOGICAL BACKGROUNDS[2]										
O.J. Simpson Jury Verdict	−.094	(−.081)	.217	(.200)**	−.089	(−.081)	.042	(.040)	.144	(.153)
Three Strikes Legislation (yes=1; no=0)	−.210	(−.073)	.257	(.095)	−.141	(−.051)	.071	(.027)	−.136	(−.059)
Most Serious Crimes (Gun Crimes=1; else=0)	.432	(.097)	.113	(.027)	.325	(.077)	−.532	(−.131)	−.753	(−.212)*

Variables	Racially Mixed Jury Models						Judicial Systems			
	Mixed Jury Verdicts		Representative Juries		Mandatory Racial Quotas		Jury		Bench	
Firearm Ownership (yes=1; no=0)	.138	(.043)	.003	(.001)	.018	(.006)	.344	(.117)	–.327	(–.127)
CRIMINAL JUSTICE AND DEATH PENALTY[2]										
Fairly Administered[3]	.228	(.194)*	–.080	(–.073)	–.123	(–.110)	.130	(.120)	.099	(.104)
Poor Person[4]	.111	(.106)	–.043	(–.044)	–.109	(–.110)	–.086	(–.090)	.040	(.048)
Minorities[5]	.043	(.043)	–.057	(–.060)	.137	(.144)	.205	(.222)**	.093	(.115)
Oppose Death Penalty[6]	–.084	(–.025)	–.065	(–.021)	–.063	(–.020)	–.330	(–.109)	–.194	(–.073)
Democratic Justice System[7]	.056	(.055)	–.103	(–.108)	–.072	(–.074)	.275	(.292)***	–.047	(–.057)
Intercept	–.226		1.440		3.769		–.379		2.170	
R^2	.314		.269		.406		.312		.147	

Notes: Figures in parenthesis show standardized regression coefficients.
1: The level of respondents' language proficiency was rated by interviewers in an ordinal fashion (1: "very well," 2: "well," 3: "not well," and 4: "not at all").
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: The question is phrased as: "The death penalty is always administered fairly."
4: "A poor person is more likely to receive the death penalty than a wealthy person."
5: "A minority person is more likely to receive the death penalty than an Anglo."
6: "Do you oppose capital punishment?"
7: "Our criminal justice system is democratic."
* p<.10 ** p<.05 *** p<.01 **** p<.001

V. DISCUSSION

The findings show that while the majority of respondents agree that racially-mixed juries are more likely to generate fairer and more legitimate verdicts than single-raced juries and that the racial composition of the jury should reflect the racial composition in the general population, they do not support application of strict racial quota standards in the jury selection process. Minority groups, particularly blacks, are also skeptical of jury trials, showing less faith in the jury's ability to render fair and legitimate verdicts.

While survey findings show that the public accepts the fact that race is an important identifier in criminal justice proceedings and supports a conception of the jury as the peers of the defendant, the majority of respondents are less likely to support an affirmative jury with fixed racial quotas in order to increase racial minorities on the jury.

Similarly, the implicit assumption of juries *de medietate linguae* in England was to impanel fellow community members; "de medietate peers" refer to individuals belonging to the same community, and the shared law of a community that linked alien parties and jurors. The Hennepin model, on the other hand, assumes that "peers" are to be members of the same race. In interpreting different conceptions of peers, the public seems to be less willing to accept quotas or ceilings to secure jury participation by racial minorities. Our survey, however, fails to uncover whether racial quotas are seen as "limiting" rather than "enhancing" minority jury participation. Similarly, more research is needed to examine the source of the public's rejection of affirmative, progressive policies to preserve the intent and spirit of racial preferences in jury selection and to engineer racially heterogeneous juries.

Because the current jury selection procedures fail to generate racially mixed juries and because society needs to enhance the legitimacy of jury verdicts, current jurisprudence on juries may still need to offer racially conscious remedies to guarantee minority representation on the jury. Those who oppose affirmative action argue that affirmative programs do not promote, but actually retard, the goal of racial equality and violate equal protection standards.[63] Opponents of af-

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63 For example, Senate majority leader Bob Dole was quoted as saying, "Too often, the laudable goal of expanding opportunity is used by the federal government to justify dividing

firmative action also argue that the programs inadvertently increase the level of hostility directed toward minority groups and reinforce stereotypes of minorities as inferior.[64]

The image of inferiority and the stigma felt by minority members due to affirmative action policies have even divided minority groups themselves. For instance, Shelby Steele, a black associate professor at San Jose State University, states that he no longer applies for affirmative action research grants and wishes to shake the stigma commonly associated with affirmative action, noting that, "[A] liability of affirmative action comes from the fact that it indirectly encourages blacks to exploit their own past victimization as a source of power and privilege."[65] Ward Connerly, a black business person and architect of terminating affirmative action programs at the University of California, also expressed similar views on the negative impacts of affirmative action on minorities' self-images and self-assessments.[66] It is un-

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Americans. . . . That's wrong, and it ought to stop. You don't cure the evil of discrimination with more discrimination." Louis Freedberg, Dole Ready to Kill Affirmative Action: He Weighs In With New Bill On Hot Issue, S.F. Chron., July 27 1995, at Al. California Governor Wilson has also filed suit against the state's Constitutional officers on this basis. See Robert B. Gunnison, Wilson Sues His Own State: New Attempt to Halt Affirmative Action, S.F. Chron., Aug. 11, 1995, at Al.

64 Alex M. Johnson, Jr., Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law, 84 Cal. L. Rev. 887, 924-25 (1996).

65 Shelby Steele, The Content of our Character: A New Vision of Race in America 118 (1990).

66 Willie Brown & Ward Connerly, Choosing Sides, 26 Black Enterprise 156, 157 (1995) (Connerly argued that "many black Americans remain enslaved to affirmative action and its premise that you can't succeed without me. . . . Blacks . . . perpetuate the self-defeating and corrosive myth that we cannot do it without help from someone else—and we all too often don't even try."). Melissa Furman, a student at the University of California, Riverside, for example, stated in support of Connerly that "If I were given special status because of my minority status, I would feel inferior." Edward Epstein, Affirmative Action Backers Mobilize: Plans for Big Protest if UC Guts Programs, S.F. Chron., July 20, 1995, at A13. It was also reported that Connerly's business has sought out and won government contracts:

> While Connerly claims he never has won contracts because he is a black man, he has signed affirmative-action affidavits for contracts he won before minority set-asides were law. Connerly figures race had nothing to do with his winning the contracts, but didn't want to lose them by refusing to sign the forms.

Debra J. Saunders, The High Price of Critical Thought, S.F. Chron., June 16, 1995, at A29. One reporter notes that:

certain whether the majority or the minority is correct about affirmative action policies. However, possible conflicts should not afflict a proposal to create racially mixed juries, because the implication of affirmative action policies in jury selection is radically different from affirmative action programs in other areas.

First, it is not difficult to argue that racial diversity on juries is more important than racial diversity in other contexts. The jury performs a special task shared only by the judge. The jury assigns criminal liability and at times determines whether individuals should live or die. Due to methods of jury selection, minorities have been historically excluded from jury panels and thus denied this power.[67] The targets of affirmative action in other contexts such as admissions, hiring, and even legislatures lack this distinguishing feature.[68]

From a legal standpoint, race conscious remedies may not always violate equal protection. For instance, the Supreme Court has upheld such remedies in school desegregation cases[69] and redistricting cases.[70] While the allocation of scarce goods and resources is embedded in other affirmative action programs, this is not at issue in jury selection. One would not expect that the acknowledgment of minority's rights to participate in jury trials would increase hostility toward the same minority groups. Since minorities are not viewed as being provided spe-

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> [T]he racism that views black students as inferior has grown more subtle, if not less pervasive. In Georgia, for example, nearly 8 percent of the white students are classified as 'gifted' while only 1.5 percent of black students are deemed so. In order to believe those numbers are the outcome of a system based on pure merit, you have to believe that Georgia has an extraordinarily high percentage of gifted white kids, since experts believe fewer than 5 percent of the nation's students are truly gifted.

Cynthia Tucker, As I See It: Minority Students Can Fight Back, S.F. Chron., July 29, 1995, at A20.

67 Robert Blauner, Racial Oppression In America 187-88 (1972); Mann, supra note 24, at 171-74.

68 Elected officials, for example, may have the power to oppress racial and ethnic minorities, but they are easily checked by the courts. They certainly do not have the power to sentence individuals.

69 See, e.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28, 30 (1971).

70 See, e.g., United Jewish Orgs. v. Carey, 430 U.S. 144, 165 (1977).

cial benefits instead of "earning" them, no implications concerning their abilities would be rational.

Another distinguishing feature of affirmative action in engineering racially heterogeneous juries is that the beneficiary of affirmative action policies in jury selection is narrowly and personally tailored, unlike affirmative action programs in other areas. Racially mixed juries specifically benefit criminal defendants, not potential criminal defendants or suspects in the general population. The amount of benefit given to each defendant is the same; no one gets "more" than he or she deserves.

The broader implication of affirmative action principles also helps preserve respect and confidence in the jury system. The mixed jury epitomizes the principle that the judgment of a person must be made according to the law or custom of that person's community or by those who share in those customs and belong to the same community.[71] Thus, the change of venue—moving trials to other jurisdictions where cases are tried by non-community members (like the Rodney King assault trial)—may not offer solutions to cases that involve highly sensitive issues of race and racism.[72] Affirmative mechanisms for racially mixed juries then promote greater legitimacy of jury verdicts and advance the interest of society in enhancing public confidence in the fairness of jury proceedings.

Affirmative action and racially mixed juries also help eliminate racially biased guilt adjudication. Empirical evidence on racial prejudice and adjudication processes provides additional rationale for supporting affirmative action programs in jury selection. Jury studies show that jury deliberations are often infected by racial prejudice, and in death penalty studies, statistics show that the determination to impose the death penalty also reflects racial bias.[73] The findings show

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71 For greater discussions of positive law and personal law involving mixed juries, see Constable, supra note 34, at 25-27 (1994).

72 In order to ensure juror participation from the community where the crime took place, Professor Van Ness has proposed a rule that would guarantee that half of the jury would come from the receiving venue and the other half from the sending venue. For greater detail, see Daniel W. Van Ness, Preserving A Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases, 28 J. Marshall L. Rev. 1, 53-55 (1994).

73 William J. Bowers & Glenn L. Pierce, Arbitrariness and Discrimination Under Post-*Furman* Capital Statutes, 26 Crime & Delinquency 563, 585-86 (1980); Craig Haney, The

that the victim's race was an important determinant of culpability,[74] and that black defendant/white victim combinations were the most likely to result in the imposition of the death penalty in non-racially mixed juries.[75] Racially mixed juries, however, were found to eliminate more of the effects of such racial bias on the determination of guilt than single-race juries.[76]

Other possible alternatives to racial quotas in eliminating racial bias from jury selection and adjudicating processes have been proposed, including educating jurors about the impact of racism on jury verdicts.[77] This proposal requires judges to allow expert testimony on the impact of racism on jury verdicts and to provide juries a meaningful charge that the potential effects of prejudice and bias in jury deliberations may be considered in order to educate jurors on the identification and neutralization of their own unconscious biases.[78] However, such instructions may not guarantee that trial jurors take such educational efforts seriously or are able to deliberate without being affected by their own stereotypical images of minority defendants.

Besides affirmative action policies in jury selection, there are no racially neutral measures available to accomplish the same end.[79] For

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Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process, 15 Law & Hum. Behav. 183, 196 (1991).

74 Johnson, supra note 4, at 1634-35.

75 David C. Baldus et al., Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and Correction, 51 Wash. & Lee L. Rev. 359, 361-62 (1994).

76 Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, 16 Hamline L. Rev. 477, 573-74 (1993) (concluding that the presence of a fair cross section on grand juries decreases "the risks of miscommunication and racial or cultural bias in the process of receiving testimony and deliberation" and that "[t]he ethnic, racial and sexual makeup of a jury affects the outcomes of cases").

77 Herman, supra note 29, at 1851-52.

78 Id. Herman further suggests "[e]very jury in a capital case in the area surveyed in the McCleskey study should be told about the results of that study" on jury verdicts infected by racial prejudice. Id.

79 Some legal scholars also suggest other affirmative mechanisms to secure mixed, heterogeneous juries. During voir dire, for instance, peremptory inclusions would allow attorneys and defendants to define the group of jurors to be included in the final jury, rather than peremptorily striking groups of undesirable or biased jurors for their sides. Meyer, supra note 6, at 276-89. For a discussion of other affirmative mechanisms, see Nancy J. King, The Effect of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Pro-

instance, recognizing the right to a bench trial would not accomplish the same goal,[80] as judges may also unconsciously factor race into their determinations of guilt.[81] Even where judges do not let race affect their verdicts, bench trials are not substitutes for racially neutral jury trials because the rate of acquittals in jury trials is substantially higher.[82] With bench trials as their only alternative, black defendants would still be disadvantaged due to their race. After the acquittals of four white police officers by a predominantly white Rodney King jury, a majority of blacks felt that bench trials may be a better judicial system than a system of trial by jury. But the reality is that black defendants may not receive the same benefits from bench trials than they would from racially mixed juries.

Given the many benefits of racially mixed juries, legislative actions to ensure racially heterogeneous juries are needed to rectify the problem of under-representation of racial minorities. Legislative actions, including the 1968 Jury Selection and Service Act,[83] may be more effective and less problematic than judicially created race-conscious remedies. Obviously, no city in the United States wants to see the kind of urban uprisings that immediately followed the Rodney King jury's verdicts. Since legislative actions are designed to reflect the public's concerns, the job of fashioning a remedy is more properly reserved for legislators. However, because of the current "tough-on-crime" legislative climate, such legislative actions are less likely. In

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ceedings: An Empirical Puzzle, 31 Am. Crim. L. Rev. 1177, 1200 & n.82 (1994) (discussing Deborah Ramirez's "affirmative peremptory choice" proposal); Deborah Ramirez, Multicultural Empowerment: It's Not Just Black and White Anymore, 47 Stan. L. Rev. 957, 977 (1995). While such affirmative remedies can be effective methods in engineering racially heterogeneous juries, targeted groups for peremptory inclusions may not be defined on the basis of race because of the selector's discretion to determine targeted populations. Such affirmative mechanisms may thus be susceptible of abuse in "not including" large numbers of racial minorities from serving on juries.

80 See Singer v. United States, 380 U.S. 24, 34 (1965) (indicating that defendants do not possess the right to a bench trial).

81 See Donald C. Nugent, Judicial Bias, 42 Clev. St. L. Rev. 1, 5, 34-45 (1994) (explaining the covert nature of bias in courts).

82 See Harry Kalven, Jr. & Hans Zeisel, The American Jury 59 (1966); Barry C. Feld, Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court, 69 Minn. L. Rev. 141, 245 (1984) ("juries are more likely to acquit than are judges").

83 See the Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (codified as amended at 28 U.S.C. §§ 1861-1869 (1994)).

California, for example, four important political events in the last two years have made it almost impossible to implement race-conscious remedies to engineer racially mixed juries—the passage of three propositions: 184 ("three-strikes"), 187 (anti-immigration), and 209 (California Civil Rights Initiative eliminating affirmative action); and, the University of California Board of Regents' decision on affirmative action.

Passed overwhelmingly by voters in November 1994, Proposition 184 "allows 25 years to life sentences for anyone convicted of three felonies."[84] A large proportion of "three-strikers" have been racial minorities.[85] Proposition 187 bars public education and non-emergency health and social services to illegal immigrants,[86] most of whom are Mexican and/or Hispanic.[87] Similarly, in July 1995, the University of California Board of Regents voted to end affirmative action in admissions, hiring, and contracting on the basis of race and gender.[88] In August 1995, Governor Pete Wilson sued his own administration and other constitutional officers to enjoin the use of affirmative action and racially preferential programs, calling the issue a "matter of urgent statewide concern."[89] And in November 1996, Californians also approved Proposition 209, a controversial measure to prohibit state and local governments from using race- and gender-based programs in hiring, education, and contracting in California.[90]

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84 Clarence Johnson, S.F. Board Urges Caution on "3-Strikes": D.A. Advised to Use Discretion in Prosecutions, S.F. Chron., July 11, 1995, at A18.

85 Id.

86 Reynolds Holding, Prop. 187 Debate Continues in Federal Court: Hearing Ends with No Hints From Judge on Decision, S.F. Chron., July 27, 1995, at A13.

87 Kevin R. Johnson, Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class, 42 U.C.L.A. L. Rev. 1509, 1545-46 (1995) ("The stereotypical 'illegal alien,' the term that replaced 'wetback,' is a Mexican who has snuck into the United States in the dark of night. . . . Despite the stereotype, only about thirty-nine percent (1.3 million) of the total [number of undocumented immigrants in 1992] were from Mexico.").

88 Susan Yoachum & Edward Epstein, U.C. Scraps Affirmative Action: Regents' Vote Gives Wilson Major Victory, S.F. Chron., July 21, 1995, at A1.

89 Gunnison, supra note 63, at A1.

90 Edward W. Lempinen & Pamela Burdman, Measure to Cut Back Affirmative Action Wins, S.F. Chron., Nov. 6, 1996, at A1.

The passage of those propositions had great social and judicial consequences. Then-San Francisco Supervisor Terence Hallinan, who currently serves as San Francisco District Attorney,[91] once argued that the three strikes law is working a tremendous hardship on the courts, noting that seventy percent of persons receiving "three strikes" are African American and that seventy-five percent of those are nonviolent offenses.[92] Dramatic increases in the number of criminal jury trials are expected in the near future because few defendants are willing to enter guilty pleas, even for nonviolent offenses. Thus, the legislature and the courts need to consider progressive actions on the affirmative mechanism of racially mixed juries to ensure adequate protection for minority defendants in particular and the advancement of the interests of society in general.

While legislative actions would be less problematic than judicial actions, they are very unlikely in current political and social climates that oppose any race-conscious remedies to rectify racial discrimination. Although such remedies historically have been left to the legislature, today's courts may have to devise their own remedies in the criminal procedure areas. A judicially-created remedy may be more necessary to protect racial minorities than affirmative action programs in other areas. Such race-conscious remedies may be of even greater significance in highly publicized criminal cases that involve sensitive issues of race and racism. The courts need to carefully consider the merit and consequences of race-conscious, affirmative action measures

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91 Bill Wallace, Victorious New DA Talks About Change: Hallinan May Name Female Top Deputy, S.F. Chron., Dec. 14, 1995, at A19.

92 See Johnson, supra note 84, at A18. Johnson writes:

> Hoping to prevent the possibility of a life sentence for someone who steals a pizza, the San Francisco Board of Supervisors yesterday endorsed a resolution urging the district attorney to pursue only "serious violent" offenses under the state's "three strikes" law. By a unanimous vote, the board took an official slap at Proposition 184, which allows 25 years to life sentences for anyone convicted of three felonies. The law was passed statewide in November. But it was soundly defeated in San Francisco, where 57 percent of voters rejected it. . . . The resolution is not legally binding, and the district attorney's office insists that only serious offenses are currently being pursued as possible "three strikes" violations. But the office could not explain why older black men seem to be the primary target.

Id.

to prevent discrimination in jury selection, restore the public's confidence in the jury system, improve the fairness of trial proceedings, and enhance public acceptance of jury verdicts, particularly because the stakes are higher in the criminal justice system than in other program areas. The progressive court action on affirmative action to engineer racially heterogeneous juries must be not postponed.

VI. Conclusion

It may be too naïve to suggest that the use of affirmative action policies in the jury selection for the Rodney King beating trial of white police officers would have prevented the uprisings that followed their acquittal. The public outrage and riots that followed the verdict demonstrated an alienation from the criminal justice system felt by large numbers of racial minorities. Four urban riots in Miami in the 1980s[93] also support the need for affirmative inclusion of racial minorities on juries to preserve and restore the public's confidence and the legitimacy of verdicts in racially motivated cases.

Current jury selection procedures, however, do not provide much protection to members of racial minorities in cases that involve highly sensitive issues of racism. In fact, from the source list to the discriminatory use of peremptory challenges, current jury selection procedures systematically and continuously eliminate a large proportion of racial minorities from service on juries.

Despite the importance of racially mixed juries in criminal trials, the U.S. Supreme Court has been reluctant to recognize and accept social-scientific findings in promoting racially heterogeneous decision making bodies. For instance, the Court has summarily rejected a right to a racially mixed jury in *Apodaca v. Oregon*,[94] declaring that there is

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93 Three jury trials in Florida in the 1980s triggered large-scale civil disturbances and urban uprisings after all-white juries acquitted all white defendants charged in the death of African Americans: Arthur McDuffie in 1980; Nevel Johnson in 1982; and Clement Anthony Lloyd in 1989. Barry v. Garcia, 573 So. 2d 932, 933 n.1 (Fla. 1991) (summarizing the history of the Miami riots). Even prior to 1980, there were a significant number of urban uprisings in Miami. From August 1968 to July 1979, for instance, there were at least thirteen significant civil disturbances involving violent confrontations between African Americans and whites in Dade County, Florida. Id. A significant percentage of them involved attacks on police officers. Id.

94 406 U.S. 404 (1972).

no right to the inclusion of racially similar jurors in trials.[95] Similarly the Court has refused to recognize any constitutional right to proportional racial representation on juries.[96]

Judicial systems in foreign countries including several African nations, "mindful of the realities of racial prejudice, have recognized some variation of [the] right" to racially mixed juries.[97] Similarly, earlier English law provided alien defendants with juries composed of six jurors of their own group and six English citizens; this system continued until the late nineteenth century. [98] This practice was also mimicked in the new world colonies, but eventually faded into obscurity.[99]

Our findings suggest that the public may not view strict racial quota standards favorably, and may challenge their implementation. However, the public also favors racially neutral principles of jury verdicts rendered by racially mixed juries over single race juries, embracing democratic notions of diversity and diverse perspectives in making collective and unified judgment in criminal trials.

We argued that affirmative action policies in jury selection and jury trials are radically different from affirmative action programs in other areas. While legislative actions would be less problematic than judicial actions, our analyses suggest that legislative actions are very unlikely, especially in current political and social climates that tend to oppose any race-conscious remedies to correct racial discrimination. We further argue that court-initiated actions may be needed to energize the public debate concerning the importance of racially mixed juries, the use of mandatory racial quotas, and implications regarding 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

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95 Id. at 413.

96 See Holland v. Illinois, 493 U.S. 474, 480 (1990); see also Taylor v. Louisiana, 419 U.S. 522, 538 (1975); Ballard v. United States, 329 U.S. 187, 192 (1946).

97 Johnson, supra note 4, at 1696.

98 Id.

99 Id.

and to improve the public's respect and confidence in the jury system and jury verdicts.