

## CHAPTER 13

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# Embracing Affirmative Jury Selection for Racial Fairness

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"You'd almost *have* to be black to understand. All their grievances, all their distrust of the system, all the beliefs people had in the evil of the system. Suddenly, it all turned out to be true."

—Clarence Dickson, the highest-ranking black administrator in the Miami Police Department, in responding to the 1980 acquittal verdict of four white police officers in the murder trial of Arthur McDuffie, a black motorist, by the all-white jury (Porter & Dunn, 1985, p.48.)

"They kill with love."

—Innocent black death row inmate John Coffery, telling the head guard, Paul Edgecome (played by Tom Hanks), before facing his own electrocution in *The Green Mile*.

### INTRODUCTION

The fact that an all-white jury that convicts a black defendant or acquits a white defendant against overwhelming evidence of his guilt is deeply disturbing. The fact that a jury is all white has the powerful effect of racializing the jury proceeding. In reality, however, a black defendant in most jurisdictions is often confronted by white police officers, indicted by an all-white grand jury, prosecuted by a team of all-white district attorneys, convicted by a predominantly, if not all, white jury, sentenced by a white judge, denied appeals by white state appellate court jurists and white federal judges, and executed by a team of white prison officials. Such criminal proceedings and jury trials carry a long-lasting impression

of racial inequality in the criminal justice system. Race, then, becomes a critical emblem by which members of a minority race carefully assess trial fairness, verdict legitimacy, and the quality and integrity of the criminal justice system.

Social scientists and legal scholars have long recognized the barriers and impediments to overcome the legal system's procedural failings, moral inequities, and judicial injustices (Fukurai, Butler, & Krooth, 1993; King, 1993). Yet, even today, almost all legally prescribed arguments and defense motions that attempt to mount the claim of racial discrimination in jury trials have had a limited scope, dealing only with racial disparities in the composition of the jury pool *before* jurors are ultimately chosen for the final criminal jury. Surprisingly, the U.S. Supreme Court has never discussed or addressed the *necessity* of introducing procedural means or legal arguments to ensure racial equality in the makeup of *final* juries.

In most criminal trials, it is fairly clear that the laws calling for equitable jury selection have been systematically undermined, politically manipulated, and legally entangled in procedures that prohibit defense counsel from initiating actions to compel courts to empanel racially diverse final juries. The result has been the general absence of racial diversity in such juries, leading to discriminatory, racialized trials and convictions. And to date, there has been a litany of abuses, ensuring that final juries will be skewed away from an equitable balance of racial minorities in criminal cases involving minority defendants (generally, see Fukurai et al., 1993). Drawing on the critical race theory, this chapter provides more racially localized remedial strategies and mechanisms to create racially diverse juries. Examined here are four different types of affirmative jury selection strategies, using race for the wider administration of equity and fairness, arguing that the racial components of the jury structure is the sociopolitical and legal expression of power, as well as more profound, underlying conflicts by race, class, and gender. The jury as a potential democratic forum within the frame of this larger political and racialized system is clearly on the cutting edge in the pursuit of essential fairness, equality, and racial justice. And the U.S. Supreme Courts' extremely narrow debates on racial jury composition reflect the social and racial struggle to dominate a body of peers in our time, especially by racial makeup.

Those four methods of empanelling racially diverse juries include the following: (1) the split jury, or 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 proportional jury (the Hennepin model), in which the extent of juries' racial representativeness reflects respective proportion of both majority and minority groups in the general population; (3) the quarter jury (the social science model), in which the jury must have at least three minorities in the twelve-member jury to resist successfully the group pressure of the white majority in jury decision-making processes, and

(4) peremptory inclusion, in which the final jury is chosen by affirmatively selecting from the eligible pool those jurors who share the same racial, sociocultural, and other cognizable background characteristics as those of the defendants.

Those affirmative jury selection strategies are not entirely new remedial programs. The first affirmative jury model (jury *de medietate linguae*) appeared in twelfth century England, and the original jury was composed of half English and half Jewish members of the local community. This equitable jury system lasted until the end of the nineteenth century. In the United States, this *medietate* jury, which was brought by colonists, was also extensively used in northeastern states until the beginning of the twentieth century.

Similarly, Hennepin County, Minnesota, recently relied on the affirmative jury selection method to ensure the proportional racial representation in the composition of the final grand jury. The other two models—the quarter jury and affirmative peremptory inclusion—were also proposed by social scientists, legal scholars, and legislators, and their merits and possible applications in the empanelment of the final jury are also currently debated and evaluated in a number of jurisdictions in America.

Those affirmative jury selection methods are designed to neutralize logistical problems and structural biases inherent in the current jury selection methods and to provide an internal check in the criminal justice system to ensure proper and fair performances by governmental agencies, including judges, prosecutors, and the police. The first three types of affirmative jury structures may be seen as the formative configuration of the racialized jury box, whereas affirmative peremptory inclusion is a procedural strategy taken in courtroom to attain the ideal racial balance in the jury box. The following sections provide a detailed account of the four specific types of affirmative jury selection strategies.

## THE SPLIT JURY (*DE MEDIETATE LINGUAE*) MODEL

The ancient jury *de medietate linguae* made its historical appearance as a narrowly defined conception of equity, with the judging group composed of representatives of an accused's peers. For the jury *de medietate linguae*, the peers are in most cases defined in terms of the defendant's own racial and national identity.

The concept of the jury *de medietate linguae* first originated in the treatment of Jews in twelfth century England (Constable, 1994). The term literally means jury of the "half tongue" because the jury selection method applied to people who were considered alien or foreign and spoke different languages. The English viewed the Jews as aliens in race, religion, and culture, and considerable animosity existed against the Jews because they

were known as the anti-Christ and Christ-killers (Quinley & Glock, 1972, pp. 94–109) and because “they were darker-skinned and spoke a mysterious and foreign language” (Ramirez, 1994, p. 783).

The emergence of the already unpopular Jews as moneylenders in the twelfth and early thirteenth century only added to animosity toward them. When 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, thereby canceling the debtors' obligations and precluding the King, as owner of the Jews, from claiming retribution (McCall, 1979, p. 281).

Caught between scheming debtors and the King, the Jews relied on the Crown for protection. And in the throes of mass riots and violence in 1190 directed against wealthy and influential Jews who were clearly the King's property, King Richard I enacted a charter on April 10, 1201, giving Jews the right to the jury *de medietate linguae*—a half-Jewish jury (Wishman, 1986, p. 31). Thereafter the jury *de medietate linguae* was granted to Jews to protect the Crown's property interest in Jews and their effects (Massaro, 1986, p.550, n238). Though England subsequently banished all Jews in 1290, foreign merchants from Italy and Germany soon became the King's financial agents replacing the Jews, and the newcomers were 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 Englishmen qualified to serve as jurors.

The *medietate* jury also provided substantive fairness and protection against unfair verdicts derived from prejudice against ethnic minorities in England. Even after the expulsion of the Jews, the mixed jury privilege provided foreign merchants a perception of substantial fairness and equity in disputes involving aliens. The international composition of the jury was intended to ensure foreign merchants a fair trial without the possibility of local prejudice. These courts applied law as they perceived it, almost regardless of the source of law, in order to achieve transnational commercial benefits and fairness.

The *de medietate* concept also had wider applications. For example, when 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 (Oldham, 1983). 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 (Oldham, 1983, pp. 168–169).

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

Drawing on English tradition, the American colonies and courts also experimented with the use of juries *de medietate linguae* after English settlers developed their sense of equity, justice, and laws. At various times between 1671 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 Plymouth colony used mixed juries composed of half Native Americans and half colonists. In 1675, when the Plymouth court tried three native Indians allied with King Philip and accused of murdering an Indian named John Sassamon, the jury of Englishmen and six Indians jointly adjudicated the case, sentencing the defendants to death (Kawashima, 1986, p. 131; Ramirez, 1994). The mixed jury was used in the early colonies as a way to ensure substantive fairness, enhance the legitimacy of jury verdicts, and prevent native upheaval. "[The mixed jury] was important to the colonists as the natives' perception of unfairness may have triggered bloody unrest or, at least, social tension," one jury study notes (Ramirez, 1994, p.790).

Since independence and the passage of the Bill of Rights in 1789, the U.S. Supreme Court has discussed the right to a jury *de medietate linguae* only once, in *United States v. Wood* (1936), in dictum and without analyses, declaring that "the ancient rule under which an alien might have a trial by jury *de medietate linguae*, 'one half denizens and the other aliens'—in order to insure impartiality—no longer obtains."

The application of juries *de medietate linguae* has also been reviewed and discussed. The Massachusetts Supreme Court in 1986 examined the applicability of the jury *de medietate linguae*, having to compare the denizen with the noncitizen alien. Article 12 of the Massachusetts Declaration of Rights drawn from Magna Charta, c.39, entitles denizen 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 in this case argued that Article 12 calling for "lawful judgment of peers" afforded them the right to a trial by jury *de medietate linguae*, contending that the statutory requirements of a jury composed by citizenship and command of English were unconstitutional.

The court, however, held that the right to the jury *de medietate linguae*

was not of constitutional magnitude in this case, and that the requirement that jurors speak and understand English and be U.S. citizens withstood constitutional challenges raised under the Sixth Amendment and the Constitution's equal protection clause.

Yet, neither the U.S. Supreme Court nor the Massachusetts Supreme Court fully explored the roots of the jury *de medietate linguae* in English common law or statutory history; nor did they discuss the wisdom or practicality of the mixed jury as a jury of peers. Thus, the debate on the jury *de medietate linguae* ceased, and the mandatory mixed jury disappeared from application under American law.

It is important to note that the use of the split jury was not only found in northeastern America, but it was also extensively used in other British colonies as well. When the criminal case involved European or American defendants, the Barbados court, for instance, allowed a racially mixed tribunal that included up to six European or American jurors in the twelve-member jury. The Nigerian courts also relied on the trial *de medietate* in criminal cases with nonnative defendants. The racially mixed jury in Gold Coast and North Borneo similarly permitted the majority participation of nonnative jurors in criminal cases involving nonnative defendants (Ramirez, 1994). As recent as the early 1970s, petit and grand juries in Okinawa were also made up of both Americans and Japanese-Okinawans to adjudicate both civil and criminal matters. The mixed juries were considered to be an important element of increased public awareness and respect in the administration of justice in Okinawa (Japanese Federation of Bar Associations, 1992).

In our time, the equitability of a mandatory balanced jury must not be ignored. 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 should come from the majority and the other half from the minority group. Similarly, the fixed measure of the jury's composition is derived from an acknowledgment that *prejudice* has historically existed against the minority group, and an ordinary jury composition using the traditional method of selection would not necessarily produce a fair result (Constable, 1994). The fixed allocation of jury seats is thus viewed as an essential feature of the jury's composition to ensure both the appearance and substance of fairness and equity in jury verdicts. Though the concept and application of the mixed jury principle may have originally developed out of the economic concerns of England during the medieval period, its wisdom and practice in England, the United States, and other former British colonies held broader implications concerning the fundamental notion of fairness in jury proceedings and legitimacy of jury verdicts.

## THE PROPORTIONAL JURY (HENNEPIN COUNTY) MODEL

Another model for racially diverse juries is found in the courts of Hennepin County, Minnesota, where, according to the 1990 U.S. Census, approximately 9 percent of the adult population was minority (4.59 percent blacks, 2.22 percent Asian-Pacific islanders, 1.10 percent Native Americans, and 1.12 percent Hispanics). Though the Hennepin County model focuses on the grand jury, this affirmative action principle can easily be extended to the petit jury.

The Hennepin model is different from the juries *de medietate linguae* model in that the allocation of jury seats for the racial minority is derived from the proportional minority composition of the general population. The racial compositional distribution of the Hennepin model is not fixed, but remains changeable depending on the gyrating racial composition in the jurisdiction.

In Hennepin County, the grand jury consists of twenty-three members; thus, 9 percent of the twenty-three grand jurors is specifically reserved for minority groups, requiring that at least two minority grand jurors sit on every twenty-three-member grand jury. The allocation process works as follows:

[If] 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. (Office of the Hennepin County Attorney, 1992, p. 45)

Besides setting up the proportional allocation of the jury to racial minorities, the task force proposal for the Hennepin model also recommended additional race-neutral reforms to increase the representativeness of grand juries, including (1) integrating lists from the Immigration and Naturalization Service of recently naturalized citizens and from tribal membership rolls into source lists; (2) raising the jury fee to \$30 per day; and (3) establishing a day-care center for jurors' children (Smith, 1993, pp. 55-58). The U.S. District Court for the Eastern District of Michigan also maintains a racially stratified venire by sending extra jury questionnaires to areas in which black residents constitute at least 65 percent of the population, as well as removing questionnaires returned by white residents (Saunders, 1997). This stratified method, however, only improves the black jury representation in jury panels, not the final jury itself. Although it is impossible to estimate how widespread such racially proportionate

juries are, following the Hennepin County model five states including California do not require that grand juror names be drawn randomly from the grand jury venire and instead allow judges or jury commissioners the discretion to select who will actually serve as final jurors (Fukurai, 2000). Though the *de medietate linguae* model requires the equal distribution of jury seats for both majority and minority groups, the Hennepin model assumes that the mixed jury is created to reflect the minority composition within the general population, thus requiring that varying numbers of minority jurors be selected for the jury box.

### THE QUARTER JURY (SOCIAL SCIENCE) MODEL

Besides the two types of mixed juries and racial participation in the Anglo-Saxon tradition of law, social science research offers a different version of racially diverse juries. For the previous two jury models, the central issue is the number of jurors who are similar in race or national origin to the defendant and to which a defendant should be entitled in equity for a fair-minded verdict. The classical jury *de medietate linguae* thus entitles the defendant to six jurors of twelve, or half of the total number of jurors in jurisdictions using smaller juries. But 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. In a jurisdiction with a very small minority population, random selection would not secure the presence of a sufficient number of minority prospective jurors in a qualified jury pool for the final jury. A split jury system may also offer an incentive for the state to elect the use of smaller size juries, a change generally deemed undesirable (Kaye, 1980, p. 1004). And the nativist response of denizens to practical difficulties in picking a jury is to limit the defendant's right to one juror similar to the defendant's race. Yet, jury research demonstrates that a single dissenting juror rarely succeeds in either hanging a jury, blocking a verdict, or reversing its predisposition (Kalven & Zeisel, 1966, p. 463).

Recent psychological studies show that without a minimum of three minority jurors, they may not be able to withstand the group pressure of the majority, suggesting that one or two dissenting jurors eventually accede to the majority's opinion (Saks, 1977; Kerr & MacCoun, 1985; see also *Ballew v. Georgia*, 1978). Behavioral studies also suggest that a reasonable compromise between the *medietate* jury and the proportional Hennepin model, especially applied in a jurisdiction with small minority populations, is to secure three minority jurors in order to preserve not only the appearance of fairness, but also the legitimate viability of jury deliberations and verdicts. A minimum of three members of racial minority jurors are thus viewed as necessary to offset the group pressures of the dominant white jurors during jury deliberation, suggesting that one or even two jurors are unlikely to maintain their own judgment of the proper and fair



dict in the face of opposition by the remaining majority jurors (Johnson, p. 1698).

representativeness is the key to impartiality, a race-neutral verdict be expected when at least three minority jurors are selected to judge a criminal or civil case that involves the rights of a defendant with the same minority racial characteristics and backgrounds. Professor Johnson (1985) argues that the Court could create for defendants accused of inter-racial capital crimes a right to a jury that includes jurors of the defendant's race.

If at least three jurors were of the same race as the defendant, one of the defendant's group alone could hang a jury otherwise prone to imposing a racially motivated death sentence. As a member of a minority race historically victimized by discrimination, this approach allows the defendant to have a juror who can understand and 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 fairer decisions, on the assumption that minority jurors are better able to correctly judge the character of a defendant with a similar racial heritage and experiences; and (3) increase society's faith in the fairness of the jury system (Johnson, 1985, pp. 1706-07).

An equitably balanced jury thus provides the indispensable condition for rendering a just verdict that holds legitimacy in the eyes of both minority communities and the public at large. Three minority members in the jury box do appear to constitute the minimum number of minority jurors needed to maintain the fairness of jury deliberations and to increase the societal acceptance of jury verdicts by the general community.

### AFFIRMATIVE PEREMPTORY INCLUSION

Now we will slightly switch our perspective. Empanelling racial minorities in the final jury through the race-based exercise of peremptory challenges by the prosecution poses unique methodological problems for the defense. The peremptory challenge is a process used by both prosecution and defense attorneys to remove, without cause, objectionable prospective jurors from serving on juries. In criminal trials with black defendants, prosecutors exhibited the tendency to use peremptory challenges against black prospective jurors, suggesting that the likelihood of black jurors chosen for the final jury remains minimal.

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 system—black and other minority jurors would likely be systematically eliminated from serving on the final jury. In other words, the formation of affirmative jury structures, such as split, proportional, and/or quarter juries, would require either the restrictive usage, if not the complete abolition, of peremptory chal-

lenges so as not to impair the jury representation of racial minorities in the final jury.

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

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

The proposal for affirmative jury selection is a strategic departure from previous debates, which called for either the complete elimination of peremptory challenges or Altman's peremptory inclusive strategy in favor of an alternative jury selection approach, such as affirmative peremptory inclusion. Rather, this chapter suggests allowing both peremptory challenges and peremptory inclusion to coexist during jury selection. After screening for qualifications, excuses, exemptions, and cause challenges, the proposed method requires that both sides select a fixed number of jurors from the qualified jury pool. A challenge for cause is a process used by a presiding judge to remove a jury candidate, if it is revealed that, for some reason (e.g., deep-rooted racism and/or sexism), a prospective juror is unable or unwilling to set aside preconceptions and pay attention only to the evidence. 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 minority groups in the qualified jury pool would be significantly limited.

As stated earlier, in a jurisdiction with a small number of minority jurors, the number of minority jurors should be at least three in order to ensure viable jury deliberations as proposed by the social science model. From a practical standpoint, the selection procedure requires that both sides prepare a separate preferential list of three potential jurors in the pool, making up a total of six peremptorily chosen and identified jurors by both parties. The remaining jury seats for the six jurors and alternates 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 remaining jurors would be randomly selected from the qualified jury pool. In a trial that may last weeks or more, a large pool of alternate jurors might be necessary and those jurors would also be selected randomly from the qualified jury pool. For the final jury, peremptory challenges can still be exercised in the selection of those remaining jurors as normally done under the current jury selection procedure.

This author also proposes the affirmative selection of three jurors as the minimum number of required jury seats to be filled for each side. The number of peremptory inclusions should thus range from three to six in order to ensure the minimum condition for viable jury deliberations. As the quarter jury model proposes, the inclusion of at least three jurors would ensure a race-neutral verdict to "judge a criminal or civil case that involves the rights" of a minority defendant (Colbert, 1990, p. 124). This suggests that jury representation of three minority persons in the twelve-member jury may be the reasonable compromise between the harm of having one or no racially similar jurors, and the impracticability of obtaining a jury evenly balanced along racial lines (Bell, 1980, pp. 273-274).

Speculative concerns, however, may still exist that affirmative inclusive selection may possibly increase the instances of hung juries. Would the inclusion of a racial minority in a traditionally white-dominated jury increase the incidence of hung juries in those cases where an all-white jury would have acquitted a white defendant? Based on social science studies on group dynamics in jury deliberation, the jury may require at least ten racially similar jurors to make acquittal a predictable jury verdict. In such a case, a unanimous verdict would require both majority and minority members of the jury to work out their differences, possibly preventing wrongful convictions. As happens in most cases involving white defendants, as well as in many criminal cases involving minority defendants, the strength or weakness of the evidence will usually result in a unanimous verdict. It is only in cases where there is marginal evidence that the mixed jury might be more expected to argue with sharply divergent opinions than under the current color-blind system.

The debate on the problematic nature of hung juries is also seriously distorted because challenges for cause presumably will have removed demonstrably biased and prejudiced individuals prior to the system of peremptory inclusion, thereby reducing the likelihood of split jury decisions. Another dominant narrative for potential problems of hung juries also reveals the judicial system's long-standing bias in favor of more homogeneous, all-white juries. Even though such single-race juries may reach unified judgments on a consistent basis and in a shorter period, there is no reason to assume that these outcomes are genuinely fair, lawful, or free of racial prejudice or other biases. Jury research has shown that the small six-member jury is less likely to render hung jury verdicts than the twelve-member jury, because smaller juries are more likely to be homogeneous

in race, opinions, and attitudes than twelve-member juries (Cocke, 1979; Kaye, 1980; Roper, 1979). In case of conflict resolution, a hung jury is an expression of substantive or emotive disagreements over the evidence, the testimony, and the nature of the case—not necessarily a negative result. Rather, after jurors reach differing conclusions as they evaluate the same evidence and testimony, a hung jury may provide a truly realistic result, suggesting that there is not a consensus among the community that the defendant is guilty.

The system of peremptory inclusion also provides the positive effect of preventing miscarriages of justice in cases with weak evidence, especially involving members of racial minority defendants. Coke (1994, pp. 385–386) suggests that the prosecution normally makes racialized, calculated decisions and risk assessments about which cases to bring to trial—based in part on their knowledge that most juries are predominantly white and pro-prosecution. The system of peremptory inclusion and racially diverse tribunals will then force the prosecution to assess the merit of the case and the credibility of the criminal charges, or to make efforts to strengthen the state's evidence and testimony, as the government rightfully bears the burden of proving guilt beyond a reasonable doubt.

Peremptory inclusion will likely bring about a small revolution in equity, allowing the defendant to attempt to introduce the internal checks-and-balances mechanism against racialized trial proceedings by forcing the representation of his or her peers on the final jury. Since these peers may look like the accused, perhaps better understand the defendant's circumstances, and respond to the state of mind, conditions, and backgrounds of the defendant, credibility of evidence and strength of testimony *as well as race-neutral preparation and presentation of such evidence* may become critical concerns of both police and prosecutors. For example, police and prosecutors may be deterred from pursuing racially discriminatory investigations, evidence gathering, and overcharging criminal acts by the public's perception of fairness and by empanelling racially diverse juries. In trials monitored by black jurors today, when presenting evidence and putting witnesses on the stand, prosecution's trial strategies may be similarly altered in preparing, introducing, and arguing. Racially diverse tribunals may also exert a significant influence over judges' performance, including evaluations of racial fairness in peremptory challenges, taking the recommendations of jury forepersons, making assessments of culpability, and sentencing determinations.

The peremptory inclusionary approach also enhances the public's perceived legitimacy of the jury composition, its deliberations and verdicts by balancing the defendant's personal rights to a fair trial with the minority community's interests. Another benefit of the peremptory inclusion is that, due to the straightforward process of peremptory inclusion, less time would be spent for jury selection, so that the inclusionary approach

would allow more rapid processing and disposition of jury trials than by following traditional jury selection procedures.

## SUMMARY AND CONCLUSION

Racial and ethnic minorities continue to be substantially underrepresented on the vast majority of both state and federal courts (Fukurai et al., 1993). 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 (Fukurai, 1999). One problem of the race-conscious method to ensure minority representation on juries, however, is that there are no clearly defined formulas to determine the extent of minority participation.

This chapter reviewed the history of the Anglo-Saxon tradition of laws, as well as social science research on jury representativeness. Four specific models of affirmative jury selection methods to create racially diverse juries—the split jury (*de medietate linguae*), the proportional jury (the Hennepin County model), the quarter jury (the social science model), and affirmative peremptory inclusion—were also examined. The chapter argued that an affirmative action mechanism to secure racially diverse juries is essential to the appearance, the substance, and the public's perception of trial fairness and verdict legitimacy in criminal jury proceedings. It was further argued that racially diverse tribunals provide a mechanism of internal checks to ensure fair and proper performance by government agencies, thereby enhancing the legitimacy and integrity of the judicial decision-making process and trial verdicts.

The proposal for race-conscious affirmative jury selection is certainly controversial and unsettling to some. But constructive debates and reasoned disputes about the application of affirmative jury selection may lead to even deeper social and political considerations surrounding the issue. With the public, legislatures, and the legal community discussing the question and its implications, one may envision the emergence of a more equitable jury system through the implementation of procedures that represent the various racial and ethnic segments of our national community.

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