

University of Chicago Law School

## Chicago Unbound

---

Journal Articles

Faculty Scholarship

---

1995

### Racial Quotas and the Jury

Albert W. Alschuler

Follow this and additional works at: [https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

#### Recommended Citation

Albert Alschuler, "Racial Quotas and the Jury," 44 *Duke Law Journal* 704 (1995).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# RACIAL QUOTAS AND THE JURY

ALBERT W. ALSCHULER†

## I. SOME HISTORY

Few statements are more likely to evoke disturbing images of American criminal justice than this one: “The defendant was tried by an all-white jury.”

This statement might bring to mind the Scottsboro boys—uneducated African-American youths riding on a freight train through Jackson County, Alabama, in 1931; victors in a fight with white youths on the train; charged after their arrests with raping two white women; rushed to judgment before all-white juries; and sentenced to death.<sup>1</sup> The state’s denial of effective counsel to these defendants led to the Supreme Court’s decision in *Powell v. Alabama*,<sup>2</sup> in which the Court held for the first time that the Constitution affords a right to counsel in state capital proceedings. Following the ruling in *Powell*, following another Supreme Court decision three years later condemning racial discrimination in the selection of a Scottsboro defendant’s jury on retrial,<sup>3</sup> and following a supposed rape victim’s repudiation of her charges, further retrials before all-white juries produced new convictions. Pleas from Franklin and Eleanor Roosevelt for gubernatorial pardons proved unavailing. The last of the Scottsboro defendants to be released from prison was paroled in 1950. That same year, Alabama sought the extradition of another who had escaped to Michigan.<sup>4</sup>

---

† Wilson-Dickinson Professor, the University of Chicago Law School.

I gratefully acknowledge the research support of the Leonard Sorkin Faculty Fund and the Sonnenschein Fund, the outstanding research assistance of Scott Yut, and the helpful comments of Vikram David Amar, Penelope Bryan, Linda Chavez, Elena Kagan, Dan Kahan, Randall Kennedy, Nancy King, A.J. Kramer, Michael McConnell, Tracey Meares, Deborah Ramirez, Jeffrey Rosen, Stephen Schulhofer, and Richard Uviller.

1. The case of the youngest of the nine defendants, a 13-year-old, ended in a mistrial. Some jurors voted to accept the prosecutor’s recommendation of a life sentence while others insisted upon the death penalty.

2. 287 U.S. 45 (1932).

3. *Norris v. Alabama*, 294 U.S. 587, 596–99 (1935).

4. See DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 412–13 (1969); JAMES E. GOODMAN, *STORIES OF SCOTTSBORO* 380–81 (1994).

One also might think of an earlier time than Scottsboro and of the Ku Klux Klan's epidemic of violence against African-Americans and white Republicans in the years following the Civil War. Senator John Sherman, a supporter of the Ku Klux Act of 1871, recited a series of atrocities in the South and noted that "from the beginning to the end in all this extent of territory no man has ever been convicted or punished for any of these offenses, not one."<sup>5</sup> One of several southern judges who offered evidentiary support for Sherman's allegations declared, "In nine cases out of ten the men who commit the crimes constitute or sit on the grand jury, either they themselves or their near relatives or friends, sympathizers, aiders, or abettors . . . ."<sup>6</sup>

Sherman later supported the 1875 federal statute that outlawed racial discrimination in state jury selection.<sup>7</sup> Like other Republican leaders, he recognized that all-white juries would serve as instruments of oppression not only when African-American litigants came before them but also when white jurors closed their eyes to the use of terror and violence to enforce America's racial caste system. As an African-American commentator said in 1912, the problem is "not so much that the negro fails to get justice before the courts" as that "too often . . . the . . . white man . . . escapes it."<sup>8</sup> Gunnar Myrdal's landmark 1944 study of race in America declared, "It is notorious that practically never have white lynching mobs been brought to court in the South, even when the killers are known to all in the community and are mentioned by name in the local press."<sup>9</sup>

---

Although the Scottsboro defendants escaped execution, the link between all-white juries and racial disparity in the imposition of capital punishment in the South has been incontestable. Between 1930 and 1977, of the 62 men whom Georgia executed for rape, all but four were African-Americans. See *McCleskey v. Kemp*, 481 U.S. 279, 332 (1987) (Brennan, J., dissenting) (citing Brief for Petitioner at 56, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444)).

5. CONG. GLOBE, 42d Cong., 1st Sess. 157-58 (1871).

6. *Id.* (quoting Judge Russel).

7. Federal Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336-37 (codified as amended at 18 U.S.C. § 243 (1988)).

8. EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE NINETEENTH-CENTURY AMERICAN SOUTH* 179 (1984) (quoting William H. Thomas, *The Negro and Crime*, Speech at the Southern Sociological Congress, Nashville (May 1912)).

9. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 552-53 (1944).

One's thoughts might turn to a time more recent than Scottsboro—the summer of 1955, when in Money, Mississippi, Emmett Till, a fourteen-year-old African-American visitor from Chicago, accepted a dare to speak to a white woman.<sup>10</sup> “Bye, Baby,” he said. Several days later, Till's mangled body was discovered in the Tallahatchie River. Roy Bryant, the husband of the white woman, and J.W. Milam, the woman's brother, were charged with Till's murder. The principal evidence against them was the testimony of an African-American, Mose Wright. An all-white jury took slightly more than an hour to acquit the defendants. One juror explained, “If we hadn't stopped to drink pop, it wouldn't have taken that long.”<sup>11</sup> Following the defendants' acquittal, they sold their story to a journalist for \$4,000. Bryant and Milam said that they had meant merely to frighten Till but “had” to kill him when he refused to beg for mercy.<sup>12</sup> During the next decade, as large-scale civil rights activity came to the South, all-white juries failed to convict the defendants accused of killing Medgar Evers, Viola Liuzzo, and Lemuel Penn.<sup>13</sup>

Talk of all-white juries might evoke a time still closer to the present. In Miami in 1980, four white police officers were tried on charges that they had beaten to death an African-American arrested for a traffic offense. The defendants' attorneys, acting together, struck every potential African-American juror, and the all-white jury that their challenges produced acquitted the officers. The Miami riots followed. Four years later, another Miami police officer was charged with manslaughter in the death of an African-American suspect. Again, the defense attorney's strikes produced an all-white jury; again the defendant was acquitted; and again the acquittal sparked public outcry.<sup>14</sup>

In thinking of race and juries, the events of April 29, 1992, are likely to be close to mind. On that date, a California jury with no African-American members failed to convict any of four Los

---

10. See JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965*, at 39-52 (1987).

11. STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* 42 (1988).

12. WILLIAMS, *supra* note 10, at 42.

13. For an indication of the strength of the evidence in one of these cases, see Michal R. Belknap, *The Legal Legacy of Lemuel Penn*, 25 *HOW. L.J.* 467 (1982).

14. See William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 *SUP. CT. REV.* 97, 153-54.

Angeles police officers of misconduct despite the fact that most of these officers had been videotaped kicking and beating Rodney King, an African-American suspect, as he lay on the ground. The jury's decision triggered the worst race riot in American history,<sup>15</sup> two days of violence that cost fifty-eight lives and nearly one billion dollars in property damage.<sup>16</sup>

Two conclusions about juries composed entirely of members of America's majority race seem almost too obvious to mention. First, in many communities, these juries are mistrusted; and second, the mistrust has deep historical roots.<sup>17</sup>

## II. THE HENNEPIN COUNTY QUOTAS

A year before the 1992 Los Angeles riots, an all-white grand jury in Minneapolis, Minnesota, exonerated Dan May, a white police officer who had shot and killed Tysel Nelson, a seventeen-year-old African-American suspect.<sup>18</sup> The grand jury's no-bill of Officer May and the protests and tension that followed were among the circumstances that prompted a Hennepin County task force to recommend,<sup>19</sup> and the Minnesota Supreme Court to approve,<sup>20</sup> a plan for abolishing all-white grand juries in Hennepin County. Governments can reduce the likelihood of all-white juries in many ways,<sup>21</sup> but there is only one way to end them. The

15. William Julius Wilson, *Crisis and Challenge: Race and the New Urban Poverty*, U. CHI. REC., Dec. 8, 1994, at 2, 4.

16. See Seth Mydans, *Prosecutor Seeks Retrial of Officer in King Beating*, N.Y. TIMES, May 14, 1992, at A20; Neal R. Peirce, *Look Homeward, City of Angels*, 24 NAT'L J. 1250 (1992). Mayor Tom Bradley of Los Angeles voiced the sentiment of many Americans when he said of the videotape, "We saw what we saw. What we saw was a crime." Bill Boyarsky, *Ashes of a Mayor's Dream*, L.A. TIMES, May 1, 1992, at B2. A federal court jury composed of nine whites, two African-Americans, and one Latino later convicted two of the officers involved in the beating of violating Rodney King's civil rights. See Jim Newton, *Koon, Powell Get 2 1/2 Years in Prison*, L.A. TIMES, Aug. 5, 1993, at A1; Jim Newton, *Racially Mixed Jury Selected for King Trial*, L.A. TIMES, Feb. 23, 1993, at A1.

17. This mistrust in fact extends to some juries not composed entirely of members of America's majority race. See *infra* note 117 and accompanying text.

18. Jill Hodges, *Officer Cleared in Shooting: Grand Jury Brings No Charges in Death of Tysel Nelson*, MINNEAPOLIS STAR TRIB., Mar. 27, 1991, at A1.

19. HENNEPIN COUNTY ATTORNEY'S TASK FORCE ON RACIAL COMPOSITION OF THE GRAND JURY, FINAL REPORT 45 (1992) [hereinafter HENNEPIN COUNTY FINAL REPORT].

20. See Maureen M. Smith, *Pilot Plan to Assure That Each Grand Jury Has Two Minorities*, MINNEAPOLIS STAR TRIB., Oct. 29, 1993, at B6. Prior to the supreme court's action, a majority of Hennepin County's 54 district judges had voted to support implementation of the Task Force proposal.

21. For example, governments can use more inclusive jury source lists, eliminate or

Hennepin County Task Force proposed racial quotas.<sup>22</sup> Because the use of quotas in selecting petit jurors would not pose significantly different constitutional issues from those raised by their use to select grand jurors, the Hennepin County proposal offers a

---

restrict peremptory challenges, increase jury size, reconfigure the geographic vicinages from which jurors are drawn, take steps to encourage or enforce compliance with jury summonses, make jury service more convenient or remunerative, require judges to take racial demography into account when ordering a change of venue, or "oversample" minorities in sending jury summonses and questionnaires. See Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 752-56, 771-72 (1993). In December 1993, the Hennepin County District Court, following a recommendation of the Hennepin County Task Force, HENNEPIN COUNTY FINAL REPORT, *supra* note 19, at 58, began a day-care program for the children of grand and petit jurors. Smith, *supra* note 20.

22. HENNEPIN COUNTY FINAL REPORT, *supra* note 19, at 45. The Task Force proposal remains unimplemented. Officials are following potentially relevant constitutional litigation in Georgia, seeking a formal amendment of the Minnesota Jury Management Rules, MINN. R. 628.41 (1992), and attempting to devise and to secure the approval of procedures for testing the proposal's constitutionality.

In *Vasquez v. Hillery*, 474 U.S. 254 (1986), the Supreme Court reaffirmed earlier rulings that racial discrimination in the selection of a grand jury cannot be harmless error. The habeas corpus petitioner in *Vasquez* had been indicted 23 years before his case came before the Supreme Court. He had been found guilty beyond a reasonable doubt by a properly constituted trial jury. The Court nevertheless set aside his conviction because the grand jury that indicted him had been selected in a discriminatory manner. *Id.* at 266. In light of Supreme Court decisions like *Vasquez*, a ruling forbidding on constitutional grounds the use of racial quotas in jury selection would jeopardize the conviction of any defendant indicted by a grand jury selected partly through the use of such a quota. Although Michael O. Freeman, the Hennepin County Attorney, supports the proposal of the Hennepin County Task Force, he is reluctant to implement it in all cases and thus run the risk that his office later would lose many convictions of fairly tried defendants. Freeman's office has considered whether the proposal might be implemented for just one grand jury—a grand jury that would hear less serious cases than those considered by other Hennepin County grand juries. Even if partial implementation of the proposal were feasible, however, customary plea-negotiation practices in minor felony cases might make the generation of a test case unlikely, see *Tollett v. Henderson*, 411 U.S. 258, 266 (1973) (holding that the entry of a competently counseled guilty plea bars challenge to the composition of a grand jury); and for the County Attorney to withhold an otherwise appropriate plea agreement simply to generate a test case would seem unfair. Perhaps, if a judge refused on constitutional grounds to impanel a grand jury chosen in accordance with the Task Force proposal, a mandamus action filed by the County Attorney against the judge would provide a suitable vehicle for testing the proposal's constitutionality.

The Justices who joined the majority opinions in *Vasquez* and like cases apparently considered the retrial of improperly indicted but fairly tried defendants an important symbol of America's commitment to overcoming its history of racism. These Justices probably did not realize that their rulings would greatly inhibit all forms of color-conscious affirmative action in jury selection. I am as convinced as I was 20 years ago that these decisions are unfortunate. See Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 29-30 (1975).

useful vehicle for assessing the issues raised by affirmative action in the selection of both grand and petit jurors.<sup>23</sup>

Most felony prosecutions in Hennepin County are commenced by information rather than by grand jury indictment, but all first-degree murder cases must be submitted to a grand jury.<sup>24</sup> Although only 9% of the adults in Hennepin County are people of color, a majority of the homicide cases presented to the grand jury

---

23. The use of quotas to select petit juries would have been a more significant innovation in the criminal justice system. Grand juries no longer initiate most felony prosecutions; unlike most petit juries, they need not act by unanimous vote and typically may act by majority vote; their function is to determine the existence of probable cause rather than guilt beyond a reasonable doubt; they proceed without an adversary presentation of evidence; and they often seem dominated by the prosecutors who advise them. MARVIN FRANKEL & GARY NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 16-24, 67-71 (1977).

Perhaps the Hennepin County Task Force was asked to focus on grand rather than petit juries simply because all-white grand juries were a special source of controversy and concern. In addition, the fact that grand juries are substantially larger than petit juries may have made the grand jury seem a more appropriate body for the initiation of affirmative action measures.

In Hennepin County, in which 9% of the adult population are people of color, HENNEPIN COUNTY FINAL REPORT, *supra* note 19, at 27 (1990 census figures), the Task Force's proposal to include two "minority persons" on every 23-person grand jury, *id.* at 45, would not afford minority persons greater than proportional representation. The same statement could be made of a plan to include one minority person on every 6-person petit jury, but only if one were willing to "round up" a fraction not much greater than one-half. Treating adult population figures as the appropriate baseline, the expected number of minority persons on a 6-person Hennepin County petit jury is 0.54. *See* 51 MINN. STAT. ANN., Rule 802(i) (West 1993) (authorizing the use of six-person juries in misdemeanor prosecutions and in felony prosecutions with the defendant's consent). Even without rounding, proportional representation would yield one minority person on every 12-person petit jury, but guaranteeing the presence of one minority juror could suggest "tokenism"—or, perhaps, ineffectiveness, if one feared that a single minority juror often would lack reinforcement in jury deliberations. *See* HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 462-63 (University of Chicago Press 1971) (1966) (noting that 12-person juries with three or fewer first-ballot dissenters almost never hang); *see also* REID HASTIE ET AL., *INSIDE THE JURY* 106-08 (1983) (finding that in a study of simulated 12-person juries, single holdout jurors abandoned their positions 75% of the time).

Extension of the Hennepin County Task Force proposal to petit juries would require judges to draw substitute jurors from a list of minority persons whenever either peremptory challenges or challenges for cause reduced the number of minority persons below the required minimum. A lawyer's knowledge that a challenged minority juror would be replaced by another would reduce the lawyer's incentive to engage in racial discrimination in jury selection and would have some bearing on whether the lawyer had engaged in discrimination in fact. Implementation of the proposal would not otherwise affect a court's administration of the requirements of *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

24. MINN. R. CRIM. P. 8.01.

involve people of color as victims, suspects, or both. Specifically, in cases presented to Hennepin County grand juries since the end of 1989, 66% of all victims and 71% of all suspects have been members of racial or ethnic minorities.<sup>25</sup>

The methods used to select grand jurors in Hennepin County are almost certainly constitutional, yet the proportion of minorities on Hennepin County grand juries in recent years has been 5.3%, substantially smaller than the proportion of racial minorities in the adult population.<sup>26</sup> Moreover, the county's grand jury selection methods yield all-white grand juries nearly 40% of the time.<sup>27</sup> A striking fact, then, is that although 71% of the suspects whose cases come before Hennepin County grand juries are people of color, 40% of these suspects' cases are heard by bodies of twenty-three people that include no minority-group members.

Under the Task Force proposal, a questionnaire would ask prospective grand jurors whether they wished to identify themselves as "minority persons."<sup>28</sup> No one would probe the prospective jurors' responses or scrutinize their ancestry. Twenty-one of the grand jury's twenty-three members<sup>29</sup> would then be selected

---

25. HENNEPIN COUNTY FINAL REPORT, *supra* note 19, at 29.

26. *Id.* at 27. Hennepin County selects its jurors from driver's license, state identification card, and voter registration lists. These lists apparently include more than 98% of the eligible adult population. *Id.* at 9, 38. Minority-group members, however, change their places of residence more frequently than whites. King, *supra* note 21, at 714. The lists from which jurors are selected include people who have recently left Hennepin County, omit people who have recently come into the county, and provide incorrect addresses for some people who have recently changed residences within the county. See HENNEPIN COUNTY FINAL REPORT, *supra* note 19, at 38 (suggesting updating voter registration lists every two years instead of every four years). Minority-group members not only are less likely than whites to receive jury summonses and questionnaires but also are less likely to return them. See King, *supra* note 21, at 714. The members of minority groups also may be more likely than whites to be excused from jury service on grounds of financial hardship, responsibility for the care of another, and the like. For some not very helpful data on these questions, see HENNEPIN COUNTY DISTRICT COURT, EXCUSED JUROR STUDY: NOVEMBER 1993; HENNEPIN COUNTY DISTRICT COURT, EXCUSED JUROR STUDY: JUNE 1994 UPDATE; HENNEPIN COUNTY DISTRICT COURT, ANALYSIS OF HENNEPIN COUNTY JURY DATA: FURTHER EXPLANATION OF DATA PRESENTED TO THE CONFERENCE OF CHIEF JUDGES (1993).

27. Specifically, 26 of 66 grand juries since 1968. HENNEPIN COUNTY FINAL REPORT, *supra* note 19, at 27.

28. See *id.* at 45.

29. Minnesota, like most other states and the federal government, authorizes smaller grand juries, see MINN. R. CRIM. P. 18.03; MINN. STAT. ANN. § 628.41(1) (1993), but Hennepin County adheres to the number 23—the number of grand jurors that English law required from the 14th century until England abolished use of the grand jury in 1933. See Jon Van Dyke, *The Grand Jury: Representative or Elite?*, 28 HASTINGS L.J. 37,



at random from a list of fifty-five people qualified to serve.<sup>30</sup> If the questionnaires of at least two of these twenty-one jurors revealed that they were "minority persons," the remaining grand jurors would be selected in the same way that the first twenty-one had been. If, however, no minority persons or only one were included in the initial group, officials would draw one or two grand jurors exclusively from respondents who had identified themselves as minority persons. If necessary, the officials could turn to a second list of fifty-five people or a third or a fourth to ensure the presence of at least two minority persons on every Hennepin County grand jury.<sup>31</sup> Apart from these officials, no one would know whether a grand jury had been selected at random or partly through jurymantering.<sup>32</sup>

### III. OTHER QUOTAS

The Hennepin County proposal is one of a number of affirmative-action jury-selection measures currently under consideration or already in place in American jurisdictions. In Arizona, a bar committee has proposed dividing jury lists into subsets by race and drawing jurors from each subset.<sup>33</sup> Some Arizona judges currently strike trial juries that, in their view, do not include adequate numbers of minority jurors.<sup>34</sup> In DeKalb County, Georgia, jury commissioners divide jury lists into thirty-six demographic groups (for example, black females aged 35 to 44); they then use a computer to ensure the proportional representation of every group on every venire.<sup>35</sup>

---

38-41 (1976).

30. HENNEPIN COUNTY FINAL REPORT, *supra* note 19, at 45.

31. *Id.*

32. The term "jurymantering" is Jeff Rosen's. See Jeff Rosen, *Jurymantering*, NEW REPUBLIC, Nov. 30, 1992, at 15.

33. Jeff Barge, *Reformers Target Jury Lists*, A.B.A. J., Jan. 1995, at 26, 26.

34. *Id.* (noting that in order to include some Hispanic-Americans on an African-American defendant's jury, Judge B. Michael Dann once impaneled three successive juries). R. William Ide, then president of the American Bar Association, described in a recent *ABA Journal* column the proposals of an ABA task force to reduce racial and ethnic bias in the justice system. These proposals included "[c]hanging jury selection practices to ensure proportionate minority representation." R. William Ide III, *Eradicating Bias in the Justice System*, A.B.A. J., Mar. 1994, at 8.

35. Andrew Kull, *Racial Justice*, NEW REPUBLIC, Nov. 30, 1992, at 17, 18.

A Florida statute requires that, upon a motion of any party, every judge who orders a change of venue "give priority to any county which closely resembles the demographic composition of the county wherein the original venue would lie." FLA. STAT.

The Federal Jury Selection and Service Act of 1968<sup>36</sup> was designed to ensure a measure of racial balance in federal jury panels. The Act requires panels to be drawn from voter registration rolls or from lists of actual voters unless the use of these sources would lead to the substantial underrepresentation of a racial (or other) group. In that event, the Act orders courts to augment the voting rolls with other sources.<sup>37</sup>

For ten years, the U.S. District Court for the Eastern District of Michigan maintained a racially balanced jury wheel by sending extra jury questionnaires to areas in which African-Americans constituted 65% or more of the population. More recently, this court has sought demographic balance by removing from the jury wheel some questionnaires of whites.<sup>38</sup>

Similar color-conscious jury selection methods are in use in other jurisdictions to "balance the box"—that is, to ensure racial proportionality in the initial pool from which petit and grand juries are drawn.<sup>39</sup> Seeking racial balance in the wheels and boxes from which petit and grand jurors are drawn appears to be less controversial than seeking racial balance in juries themselves.<sup>40</sup> The reason for creating racially balanced jury pools, however, is presumably to make racially balanced juries more likely. Although departures from the principle of color-blindness may be less visible when they occur early in the jury selection process, they do not seem significantly different in principle.

To be sure, the demographics of particular jurisdictions may make it easier to achieve racial balance in large groups than in small groups. For example, DeKalb County, Georgia, plainly could not include representatives of thirty-six demographic categories on a jury of only twelve people. After attaining a balance in a jury pool that would be unattainable in a jury, officials might reasonably leave to chance the extent to which particular groups were represented on juries.<sup>41</sup> In the absence of demographic con-

---

ANN. § 910.03(2) (West Supp. 1995).

36. Pub. L. No. 90-274, 82 Stat. 53 (codified as amended at 28 U.S.C. §§ 1861-1878 (1988)).

37. See *id.* § 1863(b)(2); *Foster v. Sparks*, 506 F.2d 805 app. at 815-19 (5th Cir. 1975) (study by Judge Walter P. Gewin, *An Analysis of Jury Selection Decisions*).

38. See King, *supra* note 21, at 722-23.

39. Randall Kennedy, *The Racial Rigging of Juries*, AM. EXPERIMENT, Fall 1994, at 1; see King, *supra* note 21, at 719-26.

40. See King, *supra* note 21, at 726.

41. See *infra* Section VIII(B); see also *Batson v. Kentucky*, 476 U.S. 79, 86 n.6

straints, however, the use of quotas to select juries seems no more objectionable than the use of quotas to select jury pools. If, for example, a county's population were two-thirds white and one-third black, providing that only the initial pool need reflect this balance would seem a hesitant and ineffective way of making juries more representative. Exorcising the specter of the all-white jury altogether would appear more sensible. Nevertheless, for some observers, the use of quotas in jury selection apparently becomes less troublesome when there remains a sporting chance that these quotas will not achieve their objective.<sup>42</sup> These observers may share to some degree the posture of some opponents of affirmative action in jury selection—hoping for racial balance on juries, at least in some cases, but unwilling to act directly to bring it about. Somewhat like champions of the ordeal, these observers appear to trust the gods of Fate, Luck, and Statistics.<sup>43</sup>

#### IV. THE VENERABLE QUOTA

The determination of jury membership by demographic quotas is not new. Before the end of the twelfth century, English charters promised Jews that disputes between Jews and English subjects would be resolved by juries composed half of Jews and half of Englishmen.<sup>44</sup> These charters originated the English jury *de medietate linguae*—a jury composed half of Englishmen and half of the countrymen of an alien party.<sup>45</sup> The use of mixed juries in cases

(1986) (“[I]t would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogenous nature of our society.”).

42. Color-conscious jury selection methods tend to be less visible at the early stages of the process partly because they are less effective. A jurisdiction like Hennepin County might send jury questionnaires to minority-group members at a higher rate than to whites (because minority-group members are less likely to receive and return them, *supra* note 26), and this measure might produce a pool of prospective jurors in which the proportion of minority jurors matched the proportion of minority-group members in the county's adult population—say, 10%. The random selection of 23 grand jurors from a large pool engineered to ensure 10% minority-group membership would yield all-white grand juries 9% of the time. Report by Steven D. Penrod to the County Attorney's Office, Hennepin County, Minnesota (1994) (on file with author).

43. The phrase “Fate, Luck, and Statistics” is appropriated from Andrew G. Deiss, *Negotiating Justice: The Criminal Jury Trial in a Pluralist America* 23 (1995) (unpublished manuscript) (on file with author).

44. See MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* 4-5, 18, 96-97, 145 (1994).

45. Following England's expulsion of the Jews in 1290, juries *de medietate linguae*

involving aliens remained a feature of English law for 700 years.<sup>46</sup>

Members of the Plymouth Colony employed a similar procedure in 1674 when they added six Indians to a jury of twelve colonists to try three Indians for murder.<sup>47</sup> In 1823—in one of several recorded cases of early American jurymaning—Chief Justice John Marshall impaneled a jury *de medietate linguae* to try an alien charged with piracy and murder.<sup>48</sup>

Apparently no African-Americans served on juries in the United States before 1860.<sup>49</sup> When Reconstruction governments

were used primarily in cases involving alien merchants. See Lewis H. LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841, 848-50 (1976); Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of "de Medietate Linguae": A History of a Proposal for Change*, 74 B.U. L. REV. (forthcoming Nov. 1994); 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, 35-37 (1994); see also Peter J. Nelligan & Harry V. Ball, *Ethnic Juries in Hawaii: 1825-1850*, 34 SOC. PROCESS IN HAWAII 113 (1992) (describing the use of mixed juries to resolve disputes between natives and foreigners in 19th-century Hawaii).

46. Ramirez, *supra* note 45.

47. *Id.*

48. *United States v. Cartacho*, 25 F. Cas. 312, 312-13 (D. Va. 1823) (No. 14,738).

The jury *de medietate linguae* may not seem closely analogous to the procedures proposed by the Hennepin County Task Force. The aliens who served on juries *de medietate linguae* were ineligible to serve on other juries, and the analogous treatment of the members of minority groups might disqualify them from serving on juries in cases involving white litigants while guaranteeing that they would constitute half of all jurors in cases involving minority litigants. This procedure would treat minority-race jurors, like the aliens who served on juries *de medietate linguae*, as less than full members of the community. The history of the jury *de medietate linguae* could be cited to support the claim that demographic jurymaning is permissible, but this history is consistent with the proposition that demographic distinctions among citizens are rarely appropriate.

England, however, did use mixed juries in some cases in which all of the parties were English. Burgesses sometimes obtained juries composed half of burgesses; disputes concerning church patronage were tried before juries composed half of clerics and half of laymen; and university scholars were tried for serious crimes by juries composed half of freeholders and half of matriculated laymen. James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 168-69 (1983). Early in the 19th century, Jeremy Bentham recalled the "genius of some now forgotten statesman" who had invented the jury *de medietate linguae* and proposed the use of "half-and-half" juries composed of six gentlemen and six yeomen. See JEREMY BENTHAM, *THE ELEMENTS OF THE ART OF PACKING, AS APPLIED TO SPECIAL JURIES, PARTICULARLY IN CASES OF LIBEL LAW* 222-26 (Garland Publishing 1978) (1821); Van Ness, *supra* note 45, at 32-35, 45.

49. The first African-Americans ever to serve on a jury in America were apparently two who sat in Worcester, Massachusetts, that year. LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860*, at 94 (1961).

In 1718, however, the Attorney General of Maryland agreed that "negro Jem," charged with murder, should be tried by a jury *de medietate linguae*. WILLIAM KILTY,

ended the exclusion of African-Americans in the South, they sometimes mandated racial quotas as well. The first African-Americans selected for jury service in the South were the six impaneled along with six whites to try Jefferson Davis for treason. Although this racially balanced jury was discharged when the government elected not to prosecute,<sup>50</sup> in at least a few southern jurisdictions, judges and other officials ensured that the earliest integrated juries were composed half of blacks and half of whites.<sup>51</sup>

In South Carolina, where the state legislature required that grand and petit juries reflect the racial composition of the counties in which they sat,<sup>52</sup> an observer declared in 1869, "The sensation is peculiar . . . to see a Court in session, where former slaves sit side by side with their old owners on the jury, where white men are tried by a mixed jury, where colored lawyers plead, and where white and colored officers maintain order."<sup>53</sup> Statesmen of the generation that wrote and ratified the Fourteenth Amendment apparently did not consider racially balanced juries discriminatory.<sup>54</sup> Nevertheless, when a black defendant argued in 1879 that

---

STATUTES FOUND APPLICABLE 152 (1811) (citation supplied by Deborah Ramirez). It is uncertain whether Jem's race triggered the decision to grant his request for a mixed jury and whether his jury included African-Americans. My colleague Richard Ross suggests that racial attitudes in Maryland in the early 18th century make these possibilities unlikely and that "negro Jem" could well have been a subject of the Netherlands, France, or Spain.

50. See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 106 (1994) (citing *The First Integrated Jury Impaneled in the United States, May 1867*, 33 NEGRO HIST. BULL. 134 (1933)).

51. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 358 (1988); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 50 n.234 (1990).

52. JOEL WILLIAMSON, *AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861-1877*, at 334 (1965).

53. *Id.* at 329-30 (citing N.Y. TIMES, June 14, 1869, at 5).

54. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985):

[R]ace conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection. This history strongly suggests that the framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups.

The Thirty-Ninth Congress submitted the Fourteenth Amendment to the states in its current form (with its guarantee that no state shall "deny to any person within its jurisdiction the equal protection of the laws") rather than in the language proposed by Thaddeus Stevens: "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color." ANDREW KULL,

the Constitution required his jury venire to be one-third black, the Supreme Court unanimously rejected his contention.<sup>55</sup>

Language in some of the Supreme Court's recent opinions—notably *City of Richmond v. J.A. Croson Co.*<sup>56</sup> and *Shaw v. Reno*<sup>57</sup>—indicates that the Court would depart from the probable “original intention” of Reconstruction statesmen and would subject Hennepin County-style affirmative action to strict scrutiny. Some academic commentators have suggested that the Hennepin County proposal is unconstitutional.<sup>58</sup> I believe, however, that a court attuned to the virtues of judicial restraint and local initiative ought to uphold the Hennepin County plan. In supporting this position, my goal will be not to repeat familiar arguments about affirmative action but to emphasize that affirmative action in the context of

THE COLOR-BLIND CONSTITUTION 67 (1992).

55. *Virginia v. Rives*, 100 U.S. 313, 322–23 (1879):

It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz. a right to have the jury composed in part of colored men.

*Cf. Fay v. New York*, 332 U.S. 261, 291 (1947) (“Even in the Negro cases, this Court has never undertaken to say that a want of proportionate representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution.”).

That a claim of constitutional entitlement to the use of racial quotas was seriously pressed in 1879 may indicate that the people who wrote and ratified the Fourteenth Amendment were far from endorsing an ideal of color-blindness. Indeed, a federal district judge, Alexander Rives, had accepted the defendant's claim. *See Rives*, 100 U.S. at 335 (Field, J., concurring). Judge Rives once observed that in his own court he had “always ordered mixed juries” and had “not discovered that harm has resulted from it . . . .” 7 CHARLES FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–1888* pt. 2, at 442 (1987) (quoting a statement reported in the *Richmond Dispatch*, Dec. 12, 1878).

56. 488 U.S. 469, 486–93 (1989).

57. 113 S. Ct. 2816, 2824–25, 2829 (1993).

58. *See King*, *supra* note 21, at 760–75 (approving of some color-conscious jury selection methods but apparently disapproving of Hennepin County-style quotas); Memorandum from Dan Farber to Carl Warren (Oct. 8, 1991), in *HENNEPIN COUNTY FINAL REPORT*, *supra* note 19, app. (doubting that the Hennepin County proposal could satisfy the standards of *Croson* but “personally find[ing] the proposal quite reasonable”); Letter from Fred L. Morrison to Louis N. Smith 3 (Oct. 8, 1991), in *HENNEPIN COUNTY FINAL REPORT*, *supra* note 19, app. (“[I]t would appear that the proposal would have to meet the ‘strict scrutiny’ test. None of the rationales put forward seems to reach this high level of necessity.”). *But see* Letter from Shari Lynn Johnson to Michael O. Freeman 2 (Oct. 22, 1991), in *HENNEPIN COUNTY FINAL REPORT*, *supra* note 19, app. (“The strict scrutiny standard can be met.”); Letter from Roy L. Brooks to Michael O. Freeman 3 (Oct. 21, 1991), in *HENNEPIN COUNTY FINAL REPORT*, *supra* note 19, app. (“[T]he Task Force's proposal . . . should survive constitutional scrutiny under the Equal Protection Clause.”).

jury selection presents a different issue from any that the Supreme Court has considered.

### V. JURIES ARE DIFFERENT

The Supreme Court has recognized that the importance of representative juries justifies a departure from the standards employed in equal protection litigation to test assertedly discriminatory governmental action. The Court has held that in criminal cases the systematic exclusion of an identifiable group from jury venires violates a "fair cross-section requirement" implicit in the Sixth Amendment right to jury trial. In 1940, the Court wrote, "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community,"<sup>59</sup> and in 1975 the Court declared, "[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."<sup>60</sup> Although the fair cross-section requirement does not truly require that either juries or jury venires include a cross-section of the population (a result that would require the use of demographic quotas),<sup>61</sup> the Court's test of discrimination under the Sixth Amendment looks less to purpose and more to effect than does the test of discrimination that the Court employs in cases arising under the Equal Protection Clause.<sup>62</sup>

---

59. *Smith v. Texas*, 311 U.S. 128, 130 (1940).

60. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

61. In *Taylor*, 419 U.S. at 538, the Court declared that the fair cross-section requirement does not require "that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." Disregarding the fair cross-section requirement's grounding in the Sixth Amendment right to an impartial jury (and not to an impartial jury panel), the Court also has said that the requirement extends only to the panels from which juries are selected, not to the juries themselves. *Lockhart v. McCree*, 476 U.S. 162, 174 (1986). Even in the selection of jury panels, the Court has condemned only the "systematic" exclusion of distinctive groups. *See id.*; *Duren v. Missouri*, 439 U.S. 357, 364 (1979). "Systematic" exclusion probably does not encompass repeated "accidental" exclusion. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 185 n.127 (1989) ("[W]ere the luck of the draw to yield a jury, a jury panel, or even five consecutive jury panels composed entirely of wealthy Republican women golfers, their selection probably would not violate the Constitution.").

62. *See Duren*, 439 U.S. at 368 n.26 (noting that in equal protection cases, statistical disparity is evidence of discriminatory purpose that may be rebutted, but that "in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement . . ."); WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE*

Juries are distinctive both because affirmative action in jury selection has special virtues and because it is likely to prove less costly to individuals and society than affirmative action in other contexts. Emphasizing the distinctive virtues, Vikram David Amar has noted the kinship between jury service and voting. He contends that color-conscious jury selection can extend participation in public affairs more widely and that race-conscious measures to promote civic participation are easier to square with the Constitution than other affirmative action measures.<sup>63</sup>

The distinctive lack of harm of race-conscious jury selection methods becomes evident upon a review of the ways in which racial classifications can injure people. A person challenging an affirmative action program typically has been denied a tangible benefit—a job, a promotion, a government contract, or admission to an educational program—largely on the basis of race. Jury service is in one sense a job, albeit a job that pays less than two dollars per hour,<sup>64</sup> and some jurors find their courtroom experience rewarding. Nevertheless, most prospective jurors attempt to avoid service,<sup>65</sup> and because jurors are selected mostly on the basis of chance, even prospective jurors who would prefer to serve have little personal expectation or claim to be chosen.

Who might have served on Hennepin County grand juries in the absence of the county's efforts to achieve racial balance can never be known. Anyone on the list of qualified jurors might have been chosen if selection had proceeded at random. Even if some displaced majority-race juror could learn who he was, however, he

---

§ 21.2(c)-(d), at 835-38 (student ed. 1985); see also *Casteneda v. Partida*, 430 U.S. 482, 510 (1977) (Powell, J., dissenting) (suggesting that the fair cross-section requirement invalidates some practices not condemned by the Equal Protection Clause).

63. See Vikram D. Amar, *Jury Service as Political Participation Akin To Voting*, 80 CORNELL L. REV. (forthcoming 1995) (noting also a work-in-progress by Amar and Alan Brownstein that will explore the issue in greater detail). Cf. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.").

64. See MINN. STAT. ANN. § 593.48 (West 1988) (authorizing the payment of \$15 per day to jurors).

65. See STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM 14* (1994). Most Americans who are sent jury summonses never appear at the courthouse because their summonses are not delivered, they ask to be and are excused, or they ignore the summonses. Two-thirds of the prospective jurors who do appear do not serve because they ask to be and are excused, lawyers challenge them, or they are never sent to a courtroom. See *id.* at 243 n.1.



would be unlikely to conclude that the county's racial classification had denied him a significant tangible benefit.<sup>66</sup>

Apart from any loss of tangible benefits, a racial classification can injure by stigmatizing, demeaning, or reinforcing group stereotypes. Again, however, a white person displaced from a grand jury in order to permit two minority group members to serve along with twenty-one members of the displaced juror's own race would be unlikely to conclude that his race had been branded inferior, that he had been judged not good enough to serve, or that he had

---

66. Jury service differs in this respect even from the other major form of citizen participation in government, voting. Unlike a prospective juror, everyone qualified to vote has a right to vote (not just a right to be free of invidious or irrational discrimination in the selection of voters from a pool of prospects). Someone with a right to vote may have a sense of personal injury when geographic gerrymandering or other governmental action has deliberately given him less "voice" in the affairs of government than has been accorded others who differ from him in skin color. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."); see also *Johnson v. Grandy*, 114 S. Ct. 2647, 2663 (1994) (holding that preventing dilution of the votes of a racial minority does not demand dilution of the votes of the racial majority and that color-conscious geographic districting whose predictable effect is proportional representation does not offend the Voting Rights Act).

*Shaw v. Reno*, 113 S. Ct. 2816, 2829-30 (1993), held that racial gerrymandering can violate the Constitution even when it produces no vote "dilution"; this gerrymandering can unconstitutionally segregate the voters of different races in different voting districts. The Hennepin County Task Force proposal, however, far from segregating the members of different races, would bring them together on grand juries.

A prospective white juror in Hennepin County could not reasonably claim denial of a voice in government to which she was personally entitled, but she might note some asymmetry in the treatment of her racial group. This juror might assert an attenuated (or "diluted") form of vote dilution. Under the Task Force proposal, whites would be limited, roughly, to proportional representation. HENNEPIN COUNTY FINAL REPORT, *supra* note 19, at 45-46. Hennepin County grand juries could never be much more than 90% white. But the luck of the draw might yield a grand jury of more than 10% "minority persons"—even, in truly flukish circumstances, 100%. In other words, although the Hennepin County quotas would never reduce the number of minority persons below the number that random selection would have yielded, they sometimes would reduce the number of whites below this level. This asymmetry might appear troublesome if one viewed random assignment as the relevant baseline, disregarding asymmetry in the distribution of racial and ethnic groups. Nevertheless, the danger that minorities would gain more power than whites under the Hennepin County proposal is insubstantial, and the lack of a more rigorous form of proportional representation is not the feature of the Hennepin County proposal that its critics are likely to find most objectionable. Cf. *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 (1977) ("[A]s long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgment of their right to vote on grounds of race.").

personally been evaluated on the basis of crude group stereotypes.<sup>67</sup>

Affirmative action programs sometimes are thought to stigmatize, not members of the majority race, but the programs' intended beneficiaries. These programs may appear to give special consideration to people who would not have qualified for a benefit on the basis of merit alone. Jury selection rests less on merit than on chance, however, and a racial quota would merely supplement one mechanism for promoting community representation (random selection) with another (deliberate racial balance). This sort of affirmative action would not imply that unqualified or marginally qualified people had been given a special boost.

Apart from any injury that affirmative action programs may inflict on displaced majority-group members or the programs' intended beneficiaries, these programs sometimes appear to divert governmental or private enterprises from their primary missions and to injure the public. As the potential patients of brain and heart surgeons, for example, we might well be concerned if we concluded that medical schools were admitting students who they doubted would be as successful surgeons as the ones they turned away. There is, however, no reason whatever to suppose that grand juries designed to include two minority-group members would accomplish their purposes less effectively than grand juries selected entirely at random. To the contrary, these grand juries probably would achieve their goals better. Ensuring the presence of minority-race jurors seems as likely or more likely to enhance the quality of grand juries' performance than other departures from random selection that the Supreme Court has upheld—for example, requirements that jurors be upright, intelligent, and well regarded in their communities.<sup>68</sup>

Grand and petit juries should to a considerable extent reflect the will of the community, and their judgments should command community respect.<sup>69</sup> By marshaling a substantial body of opinion

---

67. In this respect, the Hennepin County proposal does not differ from other affirmative action measures. These measures rarely, if ever, brand or stigmatize whites.

68. *E.g.*, *Turner v. Fouche*, 396 U.S. 346, 353-55 (1970) (upholding a Georgia statute giving commissioners discretion to eliminate anyone found not "upright" and "intelligent"); *Carter v. Jury Comm'n*, 396 U.S. 320, 331-37 (1970) (upholding an Alabama requirement that jurors be "generally reputed to be honest and intelligent . . . and . . . esteemed in the community for their integrity, good character and sound judgment").

69. See *infra* text accompanying notes 132-37; cf. 2 JAMES WILSON, *The Subject Con-*

in support of their rulings, juries help to assure all members of the community that the awesome power to accuse and convict people of serious crimes is exercised in a legitimate way. The principal reasons for impaneling a reasonably large body of jurors are in fact to ensure a diversity of viewpoints, to increase the likelihood that the jury will represent all elements of the community, to promote group deliberation, and to enhance the public's acceptance of grand jury rulings. Ensuring some diversity of race and ethnicity is likely to promote all of these objectives as well.

The proponents of affirmative action in jury selection sometimes have emphasized the appearance of justice as much as (or more than) the substance of justice.<sup>70</sup> The Supreme Court has said that the "need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes."<sup>71</sup>

Jeffrey Abramson has cautioned, however, against an overemphasis on appearances, cosmetics, and public relations: "This attempt to justify the cross-sectional ideal by reference to its contribution to the appearance rather than the actuality of justice is disturbing. It makes the purpose of the cross-sectional theory a

---

*tinued—of Juries, in THE WORKS OF JAMES WILSON 503, 537 (Robert G. McCloskey ed., 1967) ("The grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered.")*

Efforts to determine what communities jurors represent sometimes have provoked intense dispute. The anti-Federalists who opposed ratification of the Constitution objected to the jury trial provision of Article III, Section 2, on the ground that it extended vicinage too broadly and so permitted defendants to be tried by jurors who were not truly members of their own communities. The Sixth Amendment responded to the anti-Federalists' objection by narrowing the vicinage of federal jury trials. See FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 25 (1951). Moreover, as scholars have emphasized in recent years, communities need not be defined solely in geographic terms. See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994). Current affirmative action proposals are part of a continuing effort over the centuries to define and redefine the representative role of juries.

70. See, e.g., King, *supra* note 21, at 762 (declaring "(1) that maximizing the appearance of fairness of criminal jury proceedings is a compelling governmental interest, (2) that fair racial representation on juries is vital to the appearance of fairness in criminal jury proceedings, and (3) that in some circumstances race-conscious selection practices may improve, not impair, this appearance" (footnote omitted)).

71. *Georgia v. McCollum*, 112 S. Ct. 2348, 2354 (1992) (footnote omitted).

nakedly political one, bent on popularizing the verdict . . . ."<sup>72</sup> Even after the disturbances following the Rodney King verdict, it is more important that justice be done than that it be seen to be done.<sup>73</sup> Nevertheless, public confidence in the legal system remains (other things equal) preferable to the alternative. That the Hennepin County proposal might make some members of minority groups less likely to view American criminal justice as an alien system is among the proposal's virtues. As Andrew Deiss has observed, even Americans whose own view of the videotape evidence initially persuaded them of the guilt of the police officers who beat Rodney King probably would have seen the officers' acquittals as just (or at least as acceptable) if these verdicts had been rendered by an all-African-American jury. One measure of a jury system's success may be the extent to which it inspires the members of a diverse community to say of verdicts that depart from their predilections, "I guess I was wrong."<sup>74</sup>

Diverse viewpoints are more important to a jury's performance than diverse skin color, but promoting diversity of race and ethnicity may provide a more workable means of ensuring diverse viewpoints than attempting to probe viewpoints directly through questionnaires, voir dire examinations, and the like. The experiences of members of different racial and ethnic groups tend to differ in ways that may affect their perceptions of some issues that come before juries.<sup>75</sup> Not only would the direct probing of the

---

72. ABRAMSON, *supra* note 50, at 125.

73. Compare the too grand, too English, and too often quoted statement of *Rex v. Sussex Justices*, [1924] 1 K.B. 256, 259: "[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done."

74. See Deiss, *supra* note 43, at 51.

75. See, e.g., Jim Ross, *Race Divides Opinions on Bunch Case, Poll Says*, ST. PETERSBURG TIMES, Nov. 21, 1993, at A1; *Most Blacks Say Too Few Convicted in King Beating Case*, Reuters, Apr. 19, 1993, available in LEXIS, News Library, Reuna File (reporting that twice as high a percentage of African-Americans as of whites consider the justice system biased). Both of these sources and others suggesting racial differences are cited in Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1192-95 (1994).

The Florida Supreme Court recently ordered an evidentiary hearing in a civil case in which one member of an all-white jury reported that some of his fellow jurors had compared a black witness to a chimpanzee, used racial epithets, and joked that the plaintiffs' children probably were drug dealers. *Powell v. Allstate Ins. Co.*, No. 83,625, 1995 Fla. LEXIS 24, at \*1-\*3 (No. 83,625, Jan. 19, 1995). Even when the presence of one or more minority-race jurors does not affect the quality of a jury's deliberations, it is likely to inhibit this sort of dialogue.

attitudes of prospective jurors be burdensome and invasive of their privacy, but it also would pose a risk of governmental viewpoint discrimination. This risk seems insubstantial when jury selection rests on objective demographic indicators of social experience and when no group is assured more representation than its share of the population.

In short, the Hennepin County quotas would present few of the difficulties that prompt concern about other affirmative action programs and about racial classifications in general. These quotas would not deprive individuals of significant tangible benefits; they would not brand any group as inferior or evaluate any individual on the basis of racial stereotypes; and far from diverting the grand jury from its central mission, they would be likely to enhance the grand jury's achievement of its objectives.

## VI. PEREMPTORY CHALLENGES AND RACIAL BALANCE

Ironically, the Supreme Court Justices who appear most likely to disapprove the Hennepin County proposal have expressed sympathy for a more invidious procedure that they believe may contribute in some circumstances to racially balanced juries. In *Georgia v. McCollum*,<sup>76</sup> the Supreme Court held that the Constitution forbids defense attorneys as well as prosecutors from exercising peremptory challenges to exclude prospective African-American jurors on the basis of race.<sup>77</sup> An *amicus curiae* brief submitted by the NAACP in support of the *McCollum* ruling suggested that the use of peremptory challenges by minority defendants to exclude prospective white jurors should be treated differently. The brief declared, "The only possible chance the defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race."<sup>78</sup> Justice O'Connor, dissenting in *McCollum*, quoted this language with approval.<sup>79</sup> Justice Thomas, concurring in *McCollum* only on the ground that precedent compelled the Court's result, declared, "I am certain that black criminal defendants will

---

76. 112 S. Ct. 2348 (1992).

77. *Id.* at 2359.

78. Brief of Amicus Curiae NAACP Legal Defense and Education Fund, Inc. at 9-10, *McCollum v. Georgia*, 112 S. Ct. 2348 (1992) (No. 91-372).

79. *McCollum*, 112 S. Ct. at 2364 (O'Connor, J., dissenting).

rue the day that this court ventured down th[e] road" of using the Constitution to restrict peremptory challenges.<sup>80</sup>

An unrestricted regime of peremptory challenges of the sort apparently favored by Justice Thomas and other Supreme Court Justices<sup>81</sup> is far more likely to produce all-white juries and other forms of racial imbalance than a regime in which discrimination in the exercise of peremptory challenges is forbidden. One need not be a great mathematician to recognize that when both sides have an equal number of challenges,<sup>82</sup> an advocate seeking the exclusion of a minority group is more likely to achieve her objective than an advocate seeking the exclusion of the majority.<sup>83</sup>

Even the asymmetrical regime of challenges favored by the NAACP, permitting defendants to challenge prospective jurors on racial grounds only when the jurors are white, would produce racial balance only by happenstance and only on the basis of a partisan attorney's stereotypical judgment about the members of a racial group. A defense attorney representing an African-American defendant who challenges white jurors on the basis of race has concluded (perhaps accurately) that minority-group jurors are more likely than whites to favor her client's position. This advocate does not seek diversity, balance, more effective group deliberation, greater public confidence in the fairness of the justice system, or any other public good. Her goal, like that of every other advocate, is victory for her client. Although this advocate might be unlikely to secure the presence of more than two or three minority-group members on a twelve-person jury, she probably would if she could. Indeed, if luck permitted her to eliminate all prospective white jurors, she probably would consider this racial banishment a victory.<sup>84</sup>

---

80. *Id.* at 2360 (Thomas, J., concurring); see also *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2095 (1991) (Scalia, J., dissenting) ("Both sides have peremptory challenges, and they are sometimes used to *assure* rather than to *prevent* a racially diverse jury.").

81. See *J.E.B. v. T.B.*, 114 S. Ct. 1419, 1436 (1994) (Scalia, J., dissenting); *Powers v. Ohio*, 499 U.S. 400, 417 (1991) (Scalia, J., dissenting); *Batson v. Kentucky*, 476 U.S. 79, 137 (1986) (Rehnquist, J., dissenting).

82. Only 15 of 51 American jurisdictions afford defendants more peremptory challenges than prosecutors in noncapital felony cases, and only seven provide more challenges to defendants in misdemeanor cases. JON VAN DYKE, *JURY SELECTION PROCEDURES* 282-84 (1977).

83. See *Commonwealth v. Soares*, 387 N.E.2d 499, 515-16 (Mass. 1979) (noting that unrestricted peremptory challenges produce "a jury in which the subtle group biases of the majority are permitted to operate, while those of the minority have been silenced").

84. The Supreme Court has rejected the views of Chief Justice Rehnquist and Justice-

The Hennepin County plan does not depend on the uncertain outcome of partisan race wars (or race games) in the courtroom, and it does not rest on any judgment about how the members of racial groups are likely to vote in particular cases.<sup>85</sup> Unlike the strategies of partisans, this plan is designed to promote the public objectives of more effective grand jury deliberation and enhanced public confidence in grand jury rulings. The Hennepin County proposal rests on only one group judgment—that the members of racial minorities are likely to have (or sometimes may have, or may reasonably be seen by the public as having) distinctive experiences and perspectives that can improve a grand jury's performance. If the Supreme Court Justices who have defended the racially based exercise of peremptory challenges by either defense attorneys or prosecutors were to condemn the Hennepin County proposal as discriminatory, they surely would have things topsy-turvy. Peremptory challenges can convey to excluded jurors the messages that Hennepin County's quotas do not—that someone (a lawyer or perhaps a judge<sup>86</sup>) disfavors the jurors' racial or ethnic groups, that this person has judged the jurors not capable or trust-

---

es Thomas, Scalia, and O'Connor and has forbidden both prosecutors and defense attorneys from exercising peremptory challenges on racial grounds. *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992); *Batson*, 476 U.S. at 89. Until courts or legislatures abolish the peremptory challenge, however, the ban on racial discrimination will remain reasonably easy to evade. See Alschuler, *supra* note 61, at 170-79. One virtue of racial quotas is that they reduce the incentive of lawyers to engage in racial discrimination whenever the elimination of a minority juror would bring the number of minority jurors below the required minimum. Discrimination in this situation would merely lead to the replacement of one minority juror by another.

85. The proposal does rest on the perception that the members of racial minorities are likely to have distinctive perspectives, and of course these perspectives may lead minority group members to vote differently from whites. The proposal does not, however, rest on any prediction of the direction or magnitude of racial differences in voting patterns, let alone on any prediction of racial differences in particular cases. The general sense of racial difference that informs the proposal bears little resemblance to the crude racial judgments that are likely to inform the exercise of peremptory challenges.

86. Peremptory challenges often are not exercised openly in the courtroom. After opposing lawyers have told a judge which prospective jurors they wish to strike, the judge simply informs these jurors that they have been excused. See CATHY E. BENNETT & ROBERT B. HIRSCHHORN, *BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS* § 17.21 (1993); JAMES J. GOBERT & WALTER E. JORDAN, *JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY* 329 (2d ed. 1990). Cf. *Georgia v. McCollum*, 112 S. Ct. 2348, 2356 (1992) ("Regardless of who precipitated the jurors' removal, the perception and the reality . . . will be that the court has excused jurors based on race . . .").

worthy enough to serve, and that the jurors have been evaluated on the basis of crude group stereotypes.

Rulings on the use of peremptory challenges and other jury qualification issues sometimes give judges a sub rosa opportunity to engage in color-conscious jury selection, and their efforts to achieve racial balance may prove more costly than openly acknowledged forms of affirmative action. In the second trial of the police officers accused of beating Rodney King (the federal court trial), Judge John G. Davies refused to permit the defendants to challenge peremptorily an African-American who had failed to disclose that he lived in South Central Los Angeles, near the center of the rioting that had followed the first King verdict. The defendants' lawyers feared that this prospective juror had omitted the information deliberately in an effort to make his way onto the jury and to remedy the perceived injustice of the first King verdict. Although Judge Davies ruled that the lawyers lacked a racially neutral reason for their challenge, he might have had another reason for retaining the challenged juror. As George Fletcher noted, "[N]o one—not the defense, not the prosecution, not the judge—dared to go to trial without fair 'community' representation on the jury."<sup>87</sup>

A more striking illustration of the dangers of sub rosa affirmative action came in the case of Timothy L. Baugh, an African-American charged with fourteen rapes in Hennepin County. After one of the two African-Americans on the panel of prospective

---

87. GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 54-55 (1995). Even in a federal district with a large minority population, color-blind jury selection might have yielded an all-white jury; the jury that Judge Davies impaneled included only two African-Americans and one Latino. *See supra* note 16. One wonders how many Americans who profess support for a color-blind Constitution would have been unperturbed by the selection of an all-white jury in the second King trial.

Prosecutors in the case of O.J. Simpson could have set the case for trial in the area of Los Angeles County where the murders of Nicole Brown Simpson and Ron Goldman occurred, but these prosecutors evidently preferred a trial in downtown Los Angeles, where the likelihood that the jury would include African-Americans was greater. Randall Sullivan, *Unreasonable Doubt* (pt. 2), ROLLING STONE, Dec. 29, 1994, at 130, 149. Public opinion polls indicated that African-Americans were much less likely than whites to favor the prosecutors' position, *id.* at 144, but apparently no one (not the elected Los Angeles County District Attorney, in any event) wished to run the risk of an overwhelmingly white jury in a racially sensitive case. On July 19, 1994, the Los Angeles County District Attorney met with 15 African-American leaders who expressed concern that Simpson would not receive a fair trial and who urged the district attorney not to seek the death penalty. *Id.* at 143.



jurors revealed that she knew three of the defendant's prospective alibi witnesses, Judge Robert Lynn permitted prosecutors to challenge this juror peremptorily.<sup>88</sup>

The one African-American still on the panel sometimes answered questions in ways that were difficult to follow. When, for example, this juror was asked why he had checked both yes and no to the question, "Under our system of justice a defendant is innocent until proven guilty beyond a reasonable doubt. Do you agree with that principle?," he replied in part, "You can't really go on facts that much because that's one of the reasons I got stabbed because she was being—okay, that facts was I done it, but I didn't do nothing and come to find out I didn't do nothing. The facts not always right."<sup>89</sup> Asked once more to explain, the juror said, "Let's see, okay, like I did a couple crimes, but then, okay, I did some of them and—I did most of them, I did do some of them and I didn't do some and half of the times, you know, the facts are there, but it's not there."<sup>90</sup>

Other statements were more clear, however. For example, when the juror was asked, "What do you think of the criminal justice system?," he replied, "It sucks."<sup>91</sup> And when a prosecutor asked how severely one of the juror's friends had been injured during an assault, he said,

A Not too bad, she just, you know, just basically sex though.

Q It was sex?

A Yeah.

Q So this was kind of a rape situation sort of?

A Yeah.<sup>92</sup>

Judge Lynn refused to dismiss the prospective juror for cause and also refused to allow a peremptory challenge by the prosecutor. Perhaps the judge doubted that Minneapolis prosecutors would have challenged a white juror who voiced the same views of rape and of the criminal justice system as this African-American juror.

---

88. State v. Baugh, SIP No. 93027320, CA No. 93-1304, Partial Transcript (Motions) at 26-27 (Hennepin County, Minn., Dist. Ct. Sept. 28, 1994).

89. State v. Baugh, SIP No. 93027320, CA No. 93-1304, Partial Transcript (Juror Greg Davis) at 7 (Hennepin County, Minn., Dist. Ct. Sept. 28, 1994).

90. *Id.* at 41.

91. *Id.* at 34.

92. *Id.* at 60.

More probably, however, the judge accepted an extralegal argument against exclusion advanced by the defense attorney. Although the Constitution prohibited this lawyer from taking race into account in exercising his own peremptory challenges,<sup>93</sup> he apparently saw no need to preserve the pretense of color-blindness while arguing about his opponent's challenges: "This is our last chance. We don't have any more opportunities to have a black person on this jury. . . . I ask this Court to let this juror stand."<sup>94</sup>

Following selection of the challenged juror, a Minneapolis television station broadcast his mug shot. (Seven months earlier, the juror had been arrested for aggravated robbery. He had, however, been released without the filing of a formal charge.) The juror then told the court, "I cannot go on the jury."<sup>95</sup> Six other jurors reported that they had learned about the broadcast, all of them by disregarding the judge's instructions not to watch television. Judge Lynn then dismissed the jury and began jury selection anew.<sup>96</sup>

A racial quota would have permitted Judge Lynn to evaluate the prosecutor's challenge on its merits without concern that permitting the challenge would have yielded an all-white jury. Such a quota could have assured the judge that dismissal of the challenged juror would have led only to the replacement of this minority juror with another.

## VII. QUOTAS AND FEDERALISM

Recent Supreme Court decisions have indicated that the constitutionality of affirmative action programs depends in large mea-

---

93. *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), may not have condemned unambiguously the racially based challenge of white prospective jurors, but the Supreme Court's subsequent ruling that the gender-based challenge of either a woman or a man is unconstitutional leaves little room for distinguishing one racially grounded challenge from another. See *J.E.B. v. T.B.*, 114 S. Ct. 1419, 1422 (1994).

94. *State v. Baugh*, SIP No. 93027320, CA No. 93-1304, Partial Transcript (Juror Greg Davis) at 69 (Hennepin County, Minn., Dist. Ct. Sept. 28, 1994).

95. Mike Sweeney, *Pretrial Publicity Spurs Dismissal of Baugh Jury*, ST. PAUL PIONEER PRESS, Oct. 4, 1994, at 1A. Among the many people who had approached the juror following the news broadcast was a stranger who said, "I know you're going to hang him, right?" *Id.*

96. See Doug Grow, *Judge's Reasoning in Baugh Case Isn't New: Blame Media*, MINNEAPOLIS STAR TRIB., Oct. 4, 1994, at B3; Sweeney, *supra* note 95, at 1A; Margaret Zack, *Judge Dismisses Whole Jury for Rape Trial*, MINNEAPOLIS STAR TRIB., Oct. 4, 1994, at A1.

sure on whether they were approved by Congress or by state or local legislative bodies. In *Metro Broadcasting, Inc. v. FCC*,<sup>97</sup> the Supreme Court considered federal legislation and said that encouraging diverse radio and television programming was an appropriate governmental objective.<sup>98</sup> The Court held, moreover, that promoting the minority ownership of radio and television stations was an appropriate means of furthering this legitimate goal of diversity.<sup>99</sup> The case for employing color-conscious measures to promote the expression of diverse perspectives in the jury room seems at least as compelling as the case for employing color-conscious measures in the allocation of broadcast licenses. Promoting the sound administration of justice seems fully as important as promoting a choice of music and talk shows. *Metro Broadcasting*, however, is not on point in evaluating the constitutionality of the Hennepin County proposal for one reason: in judging affirmative action efforts, the Supreme Court has turned ordinary concepts of federalism on their head.<sup>100</sup>

In Justice Brandeis's classic language, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>101</sup> Nevertheless, the Supreme Court has afforded the federal government more freedom to experiment in the creation of affirmative action programs than local governments, subjecting only the efforts of local governments to "strict scrutiny."

In *Richmond v. J.A. Croson Co.*,<sup>102</sup> the Court attempted to justify this approach by emphasizing Congress's power under Sec-

---

97. 497 U.S. 547 (1990).

98. *Id.* at 567.

99. *Id.* at 567-68; see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.").

100. In addition, the Supreme Court maintained that *Metro Broadcasting* concerned the constitutionality of a racial "preference" rather than a racial quota. *Metro Broadcasting*, 497 U.S. at 599. Among the policies that the Court upheld in *Metro Broadcasting*, however, was one that limited all "distress sales" of broadcast facilities to minority-controlled enterprises—a requirement that might have been characterized as a 100% quota. *Id.* at 598-99.

101. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

102. 488 U.S. 469 (1989).

tion V of the Fourteenth Amendment to enforce that Amendment.<sup>103</sup> How an affirmative action program that would *violate* the Fourteenth Amendment when approved by a state legislature could become an appropriate means of enforcing the Amendment when approved by Congress was, however, a mystery.<sup>104</sup> Later, in *Metro Broadcasting*, the Court exempted the federal government's race-conscious allocation of broadcast licenses from strict scrutiny despite the fact that Congress's powers under Section V of the Fourteenth Amendment plainly had no bearing on the issue.<sup>105</sup> Talk of federalism in *Croson* and *Metro Broadcasting* may have been designed primarily to alibi the Supreme Court's vacillation on affirmative action issues.<sup>106</sup>

In 1947, an opinion for the Court by Justice Jackson took a different view from the one expressed in recent cases:

We . . . will not use [the Fourteenth] Amendment to standardize administration of justice and stagnate local variations in practice. The jury system is one which has undergone great modifications in its long history and it is still undergoing revision and adaptation to adjust it to the tensions of time and locality. . . . The states have had different and constantly changing tests of eligibility for service. Evolution of the jury continues even now, and many experiments are under way that were strange to the common law. . . . Well has it been said of our power to limit state action that "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation."<sup>107</sup>

At a time when the jury and other democratic institutions may be faltering and when racial mistrust runs high, Justice Jackson's warning of the danger of restricting the remedial efforts of local governments seems especially apropos.

---

103. *Id.* at 486-96.

104. *See id.* at 518 (Kennedy, J., concurring in part and concurring in the judgment).

105. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990); *see also Croson*, 488 U.S. at 522-24 (Scalia, J., concurring in the judgment) (offering a Madisonian justification for inverting the view of federalism expressed by James Madison in *THE FEDERALIST* NO. 45, at 313 (Jacob E. Cooke ed., 1961)).

106. *See* Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 *HARV. L. REV.* 1436, 1437 (1987) (suggesting that such wavering has been characteristic of the Court's approach to many constitutional issues of our time).

107. *Fay v. New York*, 332 U.S. 261, 295-96 (1947) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)) (citations omitted).

VIII. SOME QUESTIONS AND PROBLEMS<sup>108</sup>A. *Racial Matching*

Shari Lynn Johnson has proposed that every African-American, Native American, or Hispanic-American defendant be entitled to the inclusion of three "racially similar" jurors on a jury of twelve.<sup>109</sup> The Hennepin County proposal, however, does not attempt to match the races of jurors and defendants, and contrary to common assumptions, its principal objective is not to assure every minority defendant a jury of his "peers."<sup>110</sup>

The presence of minority-race jurors may be especially important when minority-race defendants are on trial, but the value of inclusive jury selection procedures is not limited to the cases of these defendants. The discussion of verdicts by all-white juries with which this Article began mentioned only one prosecution in which the defendants were members of a racial minority, that of the Scottsboro boys. Most of these troublesome verdicts came in cases in which the defendants were white. In recent years, cases in which white law enforcement officers have been accused of mistreating minority suspects have been a special source of concern. White jurors may tend to view the victimization of nonwhites as less serious than the victimization of members of their own racial group. This danger seems fully as strong as the danger that white jurors will be biased against minority defendants.<sup>111</sup> Indeed, ver-

---

108. When I presented an early version of this paper to the Center for the New American Community of the Manhattan Institute, questions focused on a hypothetical African-American tourist from Massachusetts arrested and charged with a crime in Montana, a state with no significant African-American population. Could an all-white Montana jury give this defendant a fair trial? If so, couldn't an all-white jury in Massachusetts afford the defendant a fair trial as well? Would the inclusion of Native Americans from Montana on this African-American defendant's jury assure him a fair trial? If African-Americans truly have distinct perspectives that ought to be heard, shouldn't Montana bus in African-American jurors from somewhere else? This Part considers the constitutional issues suggested by these questions and a few other issues as well.

109. Shari L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1698-99 (1985). Compare Colbert, *supra* note 51, at 124 ("[A] race neutral verdict is achieved when at least three black jurors are selected to judge a criminal or civil case that involves the rights of a black person.").

110. See *infra* note 132.

111. See DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 185 (1990) (revealing that the killers of white victims are more likely to be sentenced to death than the killers of nonwhite victims and that the race of the victim affects the likelihood of capital punishment more than the race of the defendant); William C. Heffernan, *The Majoritarian Threat Posed by the Jury*, 25

dicts by all-white juries sometimes have been problematic even when both the defendant and his asserted victim were white; consider cases in which white jurors tolerated violence against white Republicans following the Civil War and against white civil rights workers a century later.

Moreover, the inclusion of minority jurors can make juries fairer and more effective in cases that do not present racially sensitive issues. Justice Marshall wrote for the Supreme Court in *Peters v. Kiff*:

[W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case . . . .<sup>112</sup>

Affirmative action in jury selection has value in cases other than those with minority defendants. Moreover, efforts to match jurors and defendants by race and ethnicity could prove difficult and unbecoming. These efforts would require courts to confront such questions as whether Mexican-Americans are sufficiently similar in background and culture to Puerto Ricans to merit affir-

CRIM. L. BULL. 79, 80-82 (1989) (emphasizing that the tyranny of the majority can infect jury trials just as it does other democratic institutions and that the risk of this tyranny is as great for unpopular victims and those who identify with them as it is for criminal defendants).

Jeffrey Abramson has summarized some findings of the University of Chicago Jury Project of the 1950s:

In regard to black defendants, the study suggested two conclusions about jury verdicts. First, all-white juries had trouble taking seriously violence within the black community, especially within the black family. They treated black defendants in such cases as parents treat children, dismissing their crimes as "what one expects from a Negro." Second, all-white juries reacted with severity to black defendants charged with violence against whites, convicting them in disproportionate numbers.

ABRAMSON, *supra* note 50, at 110 (discussing Dale W. Broeder, *The Negro in Court*, 1965 DUKE L.J. 19) (footnotes omitted).

112. 407 U.S. 493, 503-04 (1972); *cf.* *Ballard v. United States*, 329 U.S. 187, 193-94 (1946) ("The truth is that [men and women] are not fungible; a community made up exclusively of one is different from a community composed of both. . . . [A] flavor, a distinct quality is lost if either sex is excluded.").

mative inclusion on the juries of Puerto Rican defendants, whether Filipino-Americans are sufficiently similar in race and ethnicity to warrant their affirmative inclusion on the juries of Japanese-American defendants, and whether any prospective jurors are racially or ethnically similar to a defendant whose grandparents are African-American, Hispanic-American, Asian-American, and Native American.<sup>113</sup> As the United States grows more multiracial and multicultural,<sup>114</sup> troublesome issues of racial matching could arise more frequently.

### B. Racial Grouping

Affirmative action in jury selection does not require the racial matching of jurors and defendants. It does, however, require specification of the appropriate group for distinctive treatment. In seeking an end to all-white grand juries, the Hennepin County proposal treats "minority persons" as the relevant group.<sup>115</sup> This choice might appear problematic in some situations—for example, one in which two Asian-Americans but no African-Americans have been selected to serve on a grand jury considering the alleged abuse of African-Americans by the police.

Few members of racial and ethnic minorities consider themselves part of an undifferentiated "minority group."<sup>116</sup> The first Rodney King jury included two "minority persons" (a Latino and an Asian-American),<sup>117</sup> but the inclusion of these jurors did not forestall the rioting, anger, and recrimination that followed the jury's verdict. Indeed, the inclusion of these minority jurors did not prevent some journalists from describing the jury as all-white.<sup>118</sup>

---

113. See Alschuler, *supra* note 61, at 191–92.

114. The number of children living in families in which one parent is white and the other is African-American, Asian-American, or Native American has tripled since 1970. See Deborah A. Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. (forthcoming 1995) (citing BUREAU OF THE CENSUS, 1990 DATA ON INTERRACIAL HOUSEHOLDS (1994)); see also Julie C. Lythcott-Haims, Note, *Where Do Mixed Babies Belong? Racial Classification in America and Its Implications for Transracial Adoption*, 29 HARV. C.R.-C.L. L. REV. 531 (1994).

115. HENNEPIN COUNTY FINAL REPORT, *supra* note 19, at 27.

116. See Johnson, *supra* note 109, at 1698 (citing empirical data "which show[] that minority group members replicate the majority's view of all racial minorities except their own").

117. See Jacqueline Soteropoulos, *With Juries, Appearances Matter; Experts Say Minority Representation Low*, TAMPA TRIB., Dec. 5, 1994, Florida Metro Section, at 1.

118. See, e.g., *All-White Jury to Hear Trial of Police in Beating Case*, ORLANDO SEN-

The appropriateness of grouping minority persons together may depend partly on the extent to which the members of racial and ethnic minorities sense commonalities with one another and on the extent to which other audiences perceive these commonalities as well. Appropriate grouping may depend more fundamentally, however, on the demographics of particular jurisdictions.

Suppose, for example, that the expected number of African-Americans on a randomly selected jury in Lake Wobegon County, rounded to the nearest whole number, is none. Suppose that the expected number of Hispanic-Americans also is none, that the expected number of Native Americans is none, and that the expected number of Asian-Americans is none. Suppose, however, that if the members of these four racial and ethnic groups were joined together, the expected number of "minority persons" on each jury would be one or, with only slight upward rounding, two. Providing for the inclusion of one or two "minority persons" on every jury in Lake Wobegon County would ensure some minority representation in every case while, in effect, using random methods to determine which groups would be represented in particular cases. Specification of the appropriate group for distinctive treatment may vary with the racial and ethnic characteristics and the social experiences of particular jurisdictions, and officials who understand local conditions seem best suited to draw the necessary lines.

### C. *Nonracial Groups*

In 1979, Douglas R. Schmidt, an attorney for Dan White, succeeded in keeping homosexual men and women off the jury that tried White for murdering George Moscone, the mayor of San Francisco, and Harvey Milk, a San Francisco supervisor and prominent gay activist.<sup>119</sup> The jury accepted White's partial defense of diminished capacity (often called "the Twinkie defense" because a defense expert testified that junk food was one of the influences

---

TINEL TRIB., Mar. 3, 1992, at A15; Herb Caen, *Monday Short Line*, S.F. CHRON., May 4, 1992, at B1; Lou Cannon, *L.A. Police Dept.: 'Dragnet' It Isn't*, WASH. POST, Mar. 29, 1992, at A3; Jorge Casuso, *Video of L.A. Beating Shown As Trial Begins*, CHI. TRIB., Mar. 6, 1992, at A4; Michael Prowse, *Wounds Run Deep: America's Racial Tensions Are at Snapping Point*, FIN. TIMES, May 2, 1992, at 9.

119. See FLETCHER, *supra* note 87, at 34 ("Since the candidates for the jury had to declare their marital status, it was not too difficult to ferret out probable gays . . .").



that had deprived White of the capacity to act with malice). The Dan White verdict brought to the streets 5,000 gay men who marched on city hall, smashed windows, and overturned and burned eight police cars.<sup>120</sup>

In 1991, William Kunstler sought a "third world jury of non-whites, or anyone who's been pushed down by white society,"<sup>121</sup> to try El-Sayyid Nosair for killing Meir Kahane, the founder of the Jewish Defense League and an Israeli ultranationalist. The jury that acquitted Nosair of killing Kahane included no Jews,<sup>122</sup> and the judge who presided at the trial declared that its verdict was "against the overwhelming evidence and . . . devoid of common sense and logic."<sup>123</sup> Jews in both New York and Israel took to the streets to protest this verdict.<sup>124</sup>

One year later (during the same year as the first Rodney King verdict), a Brooklyn jury with no Jewish members<sup>125</sup> acquitted Lemrick Nelson, Jr. of killing Yankel Rosenbaum during a violent encounter between African-Americans and Jews.<sup>126</sup> Rosenbaum had identified Nelson, an African-American teenager, as his attacker, and the murder weapon had been found in Nelson's possession. Thousands of Hasidic Jews gathered in protest.<sup>127</sup>

As these cases reveal, the members of nonracial groups may feel aggrieved when no members of their groups sit on the juries that resolve cases drawing their strong interest and concern. Nevertheless, in a reasonably small body like a jury, ensuring proportional representation by race, gender, sexual orientation, handicap, religion, nationality, wealth, and age would be impossible. The Hennepin County Attorney, Michael O. Freeman (who appointed the Hennepin County Task Force and who strongly supports its proposals), reports that he personally would draw the line at race and accept any political consequences that follow.

This line seems appropriate. No other group in America can recite a history of mistreatment by juries comparable to the mis-

---

120. *Id.* at 1, 15, 260.

121. ABRAMSON, *supra* note 50, at 145.

122. See FLETCHER, *supra* note 87, at 75-79.

123. *Id.* at 85.

124. *Id.*

125. Jews constitute 16% of the Brooklyn population and about 20% of the population eligible for jury service. *Id.* at 92.

126. *Id.* at 103.

127. See ABRAMSON, *supra* note 50, at 103; FLETCHER, *supra* note 87, at 90, 103.

treatment of African-Americans that the opening section of this Article chronicled in part. One hundred fifteen years ago, in *Strauder v. West Virginia*,<sup>128</sup> the Supreme Court recognized the distinctiveness of this mistreatment. Noting the prejudice with which whites regarded African-Americans,<sup>129</sup> the Court held that the exclusion of African-Americans from jury service violated the right of African-American litigants to equal protection of the laws. At the same time, the Supreme Court declared that the exclusion of members of nonracial groups from jury service (women, for example) did not violate the equal protection rights of litigants who belonged to these groups.<sup>130</sup> The Court considered racial discrimination *sui generis*.<sup>131</sup> In places other than Hennepin County, different histories, different demographics, and different social issues might prompt the affirmative inclusion of members of some nonracial groups on juries. Once more, the difficult task of grouping and line-drawing seems best left to state and local governments.

#### D. *Representation or Diversity*

The Hennepin County proposal might enhance the sense of minority-group members and others that minorities are represented in jury proceedings. It also might promote the expression of diverse viewpoints in the jury room and enhance the quality of jury deliberations. Although the proposal furthers both objectives and forces no choice between them, the two goals are not identical.<sup>132</sup>

---

128. 100 U.S. 303 (1880).

129. *Id.* at 309-10.

130. *Id.* at 310 (“[A state] may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this.”); see *Minor v. Happersett*, 88 U.S. 162 (1874) (holding unanimously that the Fourteenth Amendment did not extend the vote to women).

131. Although the Supreme Court has not required any sort of proportional representation on juries as a matter of constitutional law, it has said that the case for the proportional representation of African-Americans is stronger than the case for the proportional representation of groups defined only by their economic circumstances. See *Fay v. New York*, 332 U.S. 261, 291 (1947).

132. A third objective of the Hennepin County proposal might be more fully assuring minority defendants that they will be tried by “juries of their peers” through the inclusion of racially and ethnically similar jurors. This objective might conflict with either of the others, but promoting greater identity between defendants and jurors at the cost of representation of the community is not likely. Few, for example, would deliberately include either a disproportionate share of high school dropouts on the juries that try high

The claim that jurors serve in a representative capacity seems in one sense uncontroversial. When community moral judgments are too varied and complex to be translated into precise rules, legislatures may delegate to juries the task of ensuring that criminal judgments accord with the community's sense of justice. The Supreme Court has said for more than fifty years, "[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community.'"<sup>133</sup> The Court's most recent opinion on jury selection reiterated this theme: "The diverse and representative character of the jury must be maintained . . ."<sup>134</sup> Although American juries now lack the formal power to resolve questions of law that many American juries once possessed,<sup>135</sup> vague standards of substantive criminal law (for example, in cases presenting questions of homicide, fraud, obscenity, causation, self-defense, and necessity) invite and require the exercise of a *de facto* lawmaking power. The exercise of this power seems appropriate only if juries in some sense represent their communities. Moreover, juries authorized to determine the length of prison sentences (in a few states) and to decide whether to impose the death penalty (in many) plainly have been afforded their awesome powers on the assumption that they represent their communities.

In another sense, however, the claim that jurors serve in a representative capacity seems troublesome: no individual juror should be expected to represent anyone other than herself. If Hennepin County's jury selection methods encouraged minority-race jurors to view themselves not simply as independent citizens, but as representatives of a race or a people, that effect would be

---

school dropouts or a disproportionate share of Ph.D.'s on the juries that try Ph.D.'s. When the goal of including jurors whom defendants are likely to recognize as their peers conflicts with the goal of representing the community, community representation is likely to prevail. Again, however, the Hennepin County proposal does not carry any of the possible justifications for affirmative action in jury selection to the point that it conflicts with any of the others.

133. *Glasser v. United States*, 315 U.S. 60, 86 (1942) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)); see *Ballew v. Georgia*, 435 U.S. 223, 237 (1978); *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970).

134. *J.E.B. v. T.B.*, 114 S. Ct. 1419, 1424 (1994). *But see* *Holland v. Illinois*, 493 U.S. 474, 480 (1990) (declaring that the Sixth Amendment guarantees an impartial jury, not a representative one).

135. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 902-21 (1994).

regrettable.<sup>136</sup> The proposition that jurors both represent others and act independently may seem contradictory, but perhaps the contradiction can be resolved if *juries* but not *jurors* act as community representatives. The selection of a sufficiently large body of jurors through sufficiently inclusive means may permit every juror to vote her conscience while still providing some assurance that the jury's collective judgment accords with general community sentiments.<sup>137</sup> The Hennepin County proposal reflects the same ambivalence concerning representation that characterizes most

---

136. Jeffrey Abramson, an opponent of the use of racial quotas in jury selection, has written that the issue turns primarily on whether one views juries as "deliberative" or "representative." See ABRAMSON, *supra* note 50, at 8. Abramson has said, "The ideal of the cross-sectional jury rejects th[e] common-law view of impartial deliberation. It sees individual jurors as inevitably the bearers of the diverse perspectives and interests of their race, religion, gender, and ethnic background." *Id.* at 100-01. In Abramson's view, "The new purpose of the cross-section becomes to give voice or representation to competing group loyalties, almost as if a juror had been sent by constituents to vote their preferred verdict." *Id.* at 102. He observes, "Surely the jury has not survived all these centuries only to teach us that democracy is about brokering justice among irreconcilably antagonistic groups." *Id.* at 8; *see also id.* at 245-47.

The vision that informs the Hennepin County proposal, however, is not one of selfish interest-group politics. Such a vision, extended to the jury room, might yield only hung juries and compromise verdicts. Instead, the vision of politics that the Hennepin County Task Force hoped to implement more fully in the jury room is one that has been described by Robert Hughes:

The social richness of America, so striking to the foreigner, comes from the diversity of its tribes. Its capacity for cohesion, for some spirit of common agreement on what is to be done, comes from the willingness of those tribes not to elevate their cultural differences into impassable barriers and ramparts, not to fetishize their "African-ness" or *Italianità*, which make them distinct, at the expense of their Americanness, which gives them a vast common ground.

ROBERT HUGHES, *CULTURE OF COMPLAINT: THE FRAYING OF AMERICA* 20 (1993). As Abramson notes, "[J]urors cross demographic boundaries to reach unanimous verdicts in cases every day." ABRAMSON, *supra* note 50, at 104. Abramson's two models of the jury do not seem incompatible; juries can be *both* deliberative and representative. Indeed, the principal reason for making juries more representative is to improve the quality of their deliberations. *But see infra* text accompanying note 141 (arguing that affirmative action measures must be bounded by concepts of proportional representation even when they are designed primarily to improve the quality of jury deliberations).

137. James Madison suggested that elected officials should seek to advance the welfare of the community rather than to promote the views of their own constituents. See THE FEDERALIST No. 10, at 60-61 (Jacob E. Cooke ed., 1961). This position echoed that of Edmund Burke, who maintained that legislators should regard themselves as trustees rather than as delegates—that is, as people trusted by the electorate to exercise independent judgment rather than as people chosen to implement the electorate's own legislative goals. See EDMUND BURKE, *BURKE'S POLITICS* 28 (Ross Hoffman & Paul Levack eds., 1949); HANNAH PITKIN, *THE CONCEPT OF REPRESENTATION* 171-72 (1967). Jurors certainly should sense no greater obligation to act as representatives than legislators and other elected officials do. They probably should sense substantially less.

views of the jury; it is not intended to compromise or restrict the independence of jurors.

Adding diverse perspectives to the jury room could in some circumstances conflict with the goal of promoting effective representation of the community. If, for example, a rural county with a tiny minority population were to include one or two minority-group members on every jury (perhaps even importing some of these jurors from an urban neighborhood outside the county), this measure might enhance the expression of distinctive viewpoints while making juries less representative of the county's population.<sup>138</sup>

The extent to which governments can legitimately sacrifice representation to enhance the quality of jury deliberations is unclear.<sup>139</sup> For example, in an effort to improve the performance of juries, a state might mandate the affirmative inclusion of some jurors on nonracial bases. This state might require that every jury include one college graduate, that every jury impaneled to hear a tax prosecution include two accountants, that half of the jurors hearing a medical malpractice case be members of the medical profession, that a jury hearing a mercantile dispute be composed mostly of merchants, and that every jury include a licensed member of the bar. Some of this state's mandatory inclusions might be constitutional, while others might seem inconsistent with a concept of jury trial that state and federal constitutions should preserve.<sup>140</sup>

---

138. The likelihood that any political agency would in fact vote to make juries less representative in order to enhance diversity seems exceedingly small.

139. Compare cases cited *supra* note 68 with *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 223–25 (1946) (using the Supreme Court's supervisory power to strike down an exclusion of daily wage earners from jury service and declaring that the Court would not "breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged").

140. Common law courts sometimes impaneled juries of experts, which "ranged from panels of cooks and fishmongers to the all-female jury panel impaneled to ascertain whether a female defendant was pregnant." Oldham, *supra* note 48, at 139; see also 1 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 93–99 (1992) (describing Lord Chief Justice Mansfield's use of merchant juries in commercial cases). Even apart from the use of "special" juries, property qualifications and other devices were intended to make common law juries more "qualified" than "representative." See Oldham, *supra* note 48, at 140–64. But see *Thiel*, 328 U.S. at 223–24 (declaring that democratic nature of jury system makes wealth irrelevant to qualification for jury service).

One danger posed by the nonrandom inclusion on juries of people with special qualifications is that of ideological jury-stacking. This danger seems most pronounced when the likelihood of distinctive viewpoints is itself considered a qualification for service and when officials may guarantee some favored groups greater-than-proportional representation. The Constitution probably should limit the government's ability to place its thumb on the scales in the marketplace of ideas established in most jury deliberations.<sup>141</sup> Even if diversity rather than representation is the principal objective of the Hennepin County proposal, proportionality may remain an essential constraint.

The principal purpose of the Hennepin County proposal is not to enhance any group's aggregate voting power. It is to guarantee that minority voices will be heard in every case rather than loudly in one, softly in another, and not at all in a third depending on the luck of a random draw. Nevertheless, the appropriate baseline for judging proportional representation is probably the percentage of minority-group members in the adult population rather than the proportion of minority-group members who have served on a county's juries in the past.<sup>142</sup> Within the limits of proportionality set by this baseline, the Hennepin County proposal could increase the number of minorities on grand juries. Hennepin County has,

---

141. *But see* Lockhart v. McCree, 476 U.S. 162, 178 (1986) (declaring that "an impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts,'" so that the exclusion of all Republicans might be permissible if the Democrats and Libertarians who remained on a jury were fair-minded people who would conscientiously apply the law to the facts).

142. The underrepresentation of minorities on juries seems at least partly attributable to circumstances for which the government may bear responsibility—for example, the government's inability to deliver jury summonses and questionnaires to minority-group members at the same rate as to whites. In light of its responsibility for part of the underrepresentation of minorities, Hennepin County's decision to treat adult population figures as the relevant baseline for judging proportionality seems at least constitutionally permissible. HENNEPIN COUNTY FINAL REPORT, *supra* note 19, at 27. Other baselines would be more problematic; a county might, for example, provide that the proportion of minority-group members on its grand juries should approximate the proportion of minority-group suspects or victims in the cases that grand juries consider.

In voting rights cases, the Supreme Court generally has referred to adult population figures in assessing whether minorities have been over- or underrepresented. *See, e.g.,* Thornburg v. Gingles, 478 U.S. 30, 38-39 (1986). In *Johnson v. De Grandy*, 114 S. Ct. 2647, 2662 n.18 (1994), the Court declined to decide whether the appropriate baseline for judging the representation of Latinos in Florida was the percentage of Latinos in the state's entire population, in the state's population of adult residents, or in the state's population of adult citizens. The Court did not mention the percentage of Latinos in the state's population of registered (or actual) voters as a possible baseline.

however, bounded diversity with a fair and sensible principle of proportionality.

### IX. THE DOWNSIDE

The preceding Part considered some possibly troublesome aspects of Hennepin County's proposed methods of jury selection. The principal objection to these color-conscious methods, however, is simply that they are color-conscious. A program grounded on the perception that the members of different races have different viewpoints may make it more likely that racially distinctive viewpoints will persist. This program may encourage people to view themselves and others in racial terms.<sup>143</sup>

For the most part, the Hennepin County proposal competes, not with tangible opposing interests, but with an ideal of color-blindness.<sup>144</sup> And the Supreme Court's decisions on the importance of color-blindness have vacillated.<sup>145</sup> In cases named *Bakke*,<sup>146</sup> *Stotts*,<sup>147</sup> *Wygant*,<sup>148</sup> *Croson*,<sup>149</sup> and *Shaw v. Reno*,<sup>150</sup> the Court has struck down color-conscious affirmative action measures under either the Equal Protection Clause or Title VII. In cases named *Green*,<sup>151</sup> *Swann*,<sup>152</sup> *Barresi*,<sup>153</sup> *Carey*,<sup>154</sup>

143. Justice O'Connor wrote for the Supreme Court in *Shaw v. Reno*, 113 S. Ct. 2816, 2832 (1993):

Racial classifications of any sort pose the risk of lasting harm to our society. . . . Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.

144. Without endorsing an ideal of color-blindness, however, one might object to racial quotas simply on the ground that they make race—one characteristic among many—too important. Deborah Ramirez has made this point eloquently: "I am Latino. But I am also a mother, lawyer, teacher, wife. I don't like being reduced to one aspect of myself." Letter to author from Deborah A. Ramirez (Aug. 19, 1994) (on file with author).

145. See *Shaw*, 113 S. Ct. at 2824 ("This Court never has held that race-conscious state decisionmaking is impermissible in all circumstances.").

146. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

147. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

148. *Wygant v. Jackson Bd. of Educ.*, 478 U.S. 1014 (1986).

149. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

150. 113 S. Ct. 2816 (1993).

151. *Green v. County School Bd.*, 391 U.S. 430 (1968).

152. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

153. *McDaniel v. Barresi*, 402 U.S. 39 (1971).

154. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

*Weber*,<sup>155</sup> *Fullilove*,<sup>156</sup> *Sheet Metal Workers*,<sup>157</sup> *International Ass'n of Firefighters*,<sup>158</sup> *Paradise*,<sup>159</sup> and *Metro Broadcasting*,<sup>160</sup> the Court has upheld color-conscious affirmative action measures or has itself mandated color-conscious remedies for past discrimination. Nancy King has commented, "[T]he cases give . . . the impression that just when the Court gets going . . . , it forgets its destination . . . ."<sup>161</sup>

As the judiciary has found itself unable to provide leadership on the issue, the two other branches of government, usually with less ambivalence, have concluded that race cannot be disregarded. President Clinton campaigned for office on a promise to make his cabinet and the rest of his administration look like America.<sup>162</sup> Following his election, the President sought to fulfill his promise partly by making repeated efforts to ensure that the Attorney General of the United States would, for the first time, be a woman.<sup>163</sup> Clinton's predecessor in the White House, a member of a different political party, made obvious efforts to ensure continued African-American representation on the Supreme Court.<sup>164</sup> Congress has repeatedly approved minority set-asides and preferences, measures that seem more likely to be the result of troublesome rent-seeking behavior than jury-selection quotas, which do not distribute the government's wealth.<sup>165</sup>

155. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

156. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

157. *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986).

158. *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).

159. *United States v. Paradise*, 480 U.S. 149 (1987).

160. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

161. King, *supra* note 21, at 766.

162. See Judy Keen, *Clinton to Be Held to Vow of Diversity*, USA TODAY, Nov. 13, 1992, at A1.

163. See Ruth Marcus, *Clinton Nominates Reno at Justice*, WASH. POST, Feb. 12, 1993, at A1.

164. See Maureen Dowd, *The Supreme Court: Conservative Black Judge, Clarence Thomas, Is Named to Marshall's Court Seat*, N.Y. TIMES, July 2, 1991, at A1.

165. See, e.g., Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (codified in significant part at 42 U.S.C. §§ 6705(e)-6707(j) (1988)) (upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980)); Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329-31 (1987) (upheld in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)); Act of Nov. 14, 1983, Pub. L. No. 98-151, 97 Stat. 964, 970 (uncodified foreign aid appropriation); Act of Jan. 6, 1983, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100 (uncodified highway construction appropriation); see also 42 U.S.C. § 2000e-17 (1988) (authorizing government contracts with employers who implement affirmative action programs).



Presidents and other elected officials are not color-blind, and in that respect they are not very different from the rest of us.<sup>166</sup> One wonders how many American universities, colleges, high schools, research institutes, television talk shows, Y.M.C.A.'s, Rotary Clubs, and church groups conduct forums on racially sensitive issues (for example, the use of color-conscious methods in jury selection) without deliberately including one or more minority-group speakers on their programs. Why do these groups act to ensure racial and ethnic diversity among their speakers when they do? The planners of public programs probably do not expect minority-group participants to speak for racial or ethnic groups rather than presenting their own carefully considered positions. Nevertheless, these planners may sense that the experience of being a member of a minority group in America is distinctive—a something and not a nothing. This experience may contribute to what a speaker has to say, and the participation of people with this experience may help to keep the rest of us from floating too far out to sea. What is true of Rotary Club programs in Massachusetts and Montana is equally true of grand juries in Minnesota, and when Presidents are elected to office on the basis of promises to make their administrations look like America, making Hennepin County grand juries look like Hennepin County seems legitimate and appropriate.

Americans are not color-blind. They cannot be. The Constitution does not require them to pretend to be. The Constitution requires only that the government not stigmatize or otherwise disadvantage people on the basis of race (at least not without a sufficiently compelling reason for doing so). The jury selection methods proposed in Hennepin County do not stigmatize or disadvantage people on the basis of race, and I believe that they are constitutional.

---

166. Note, for example, the sub rosa efforts of trial judges to avoid all-white juries described *supra* text accompanying notes 87-96.