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Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity

Deborah Ramirez

In 1994, Professor Jeffrey Abramson observed:

In the end, what is at stake is whether we want jurors to understand their task primarily in terms of deliberation or representation. I have argued that the deliberative ideal is preferred for the jury. Jurors recruited randomly from different corners of the community may never be able to practice perfectly the deliberations we ask of them. But we know at least why we cherish the jury when it aspires to act as the common conscience of the community and not
just as the register of our irreconcilable divisions.¹

Implicit in Professor Abramson's critique are two conclusions about jury deliberations. First, he suggests that since jurors' racial, religious, and ethnic background are irrelevant to their deliberative task, as a matter of social and legal policy we should be indifferent to these criteria when we select them. Second, he presumes that if we permit jurors to be selected on the basis of their racial, religious, or ethnic background, jurors may come to believe that their task during jury deliberation is to represent the views or interests of their particular group rather than impartially to determine the guilt or innocence of the defendant.

This essay will explore and challenge these two conclusions. My thesis is that the racial, religious, and ethnic diversity of the jury has a positive and important influence on the jury process. Accordingly, I believe we should select jurors in a way that encourages and enhances such diversity. While I recognize the danger that jurors who are chosen in part because of their racial,² religious, or ethnic affiliation may come to believe that they have a duty to represent their particular group in some fashion, I offer a procedure for enhancing juror diversity — affirmative peremptory challenges — that minimizes this danger as much as possible. In short, this article exposes the fallacy of believing that the best way to ensure a race-neutral jury verdict is through a race-neutral selection process. Its thesis is that a racially diverse jury is more likely to render a race-neutral verdict, because it is more likely to suppress racial bias in deliberations and to challenge inferences based on thoughtless racial stereotypes. Consequently, to best ensure race-neutrality in a jury's verdict, we need to acknowledge our racial differences in selecting that jury and take steps necessary to increase the likelihood of racial diversity among the twelve jurors who will render that verdict.

I. THE ADVANTAGES OF A RACIALLY MIXED JURY

Should we care about the racial composition of the jury and aspire to create a racially mixed jury? My own answer is yes. All else being equal, a racially diverse jury enjoys significant advan-

¹ Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 140–41 (Basic 1994).
² I use the word "race" in this article to include both racial and ethnic groups. Although for purposes of the census, Latinos are classified as an ethnic, rather than a racial group, I consider Latinos to be an ethnic group of mixed racial origin. I will include this group within the term "race."
tages.

One important advantage lies not in the process of jury deliberation but in the legitimacy of the jury's verdict. Simply put, when a jury is racially mixed, the verdict it reaches is more likely to be seen as fair, considered, and impartial than one reached by a verdict emerging from a racially homogenous jury.\(^3\) This country has a sad historical legacy of all-white juries that has brought distrust and cynicism to our justice system.\(^4\) Even if we would like to believe that the days are gone in which a white man could murder a black man with impunity because he knew that an all-white jury would never convict him of such a crime,\(^5\) we still must face the fact that a verdict reached by a homogenous jury is likely to evoke at best skepticism and at worst outrage from the unrepresented community. It is hardly surprising that statistical survey information indicates that a racially mixed jury can enhance the appearance of fairness.\(^6\)

The public's perception cannot be attributed solely to the historical residue of racism and intolerance. Rather, I submit that it reflects the public's quite accurate recognition that a racially diverse jury is likely to deliberate differently and more fairly than a homogenous jury. First, the presence of even one minority juror is likely to suppress the direct expression of racial bias or stereotypes and to mute any positive reinforcement of such views if they were expressed. Post-trial interviews with jurors suggest that the presence of a minority juror improves jury deliberations through what I will refer to as the "prejudice suppression effect."\(^7\)

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\(^3\) Hiroshi Fukurai and Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries Of The Hennepin Model and the Jury De Medietatae Linguae*, 4 Va J Soc Pol & L 645, 663 (1997) (noting that 67.3% of respondents to a survey agreed with the statement that "[d]ecisions reached by racially diverse juries are more fair than decisions reached by single race juries."); 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, 1182–85 (1994); Tom Tyler, *Client Perceptions of Litigation*, 24 Trial 40, 42–44 (July 1988) (discussing how lay conceptions of fair process vary depending on context, that one important aspect is believing oneself to be included and a part of the process, and that clients care not only about winning but whether the process by which problems are resolved is fair); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 Colum L Rev 725, 748–49 n 107 (May 1992) (noting a Florida governor's report indicating that one cause of riots was the exclusion of blacks from the jury, which caused Dade County black to distrust the criminal justice system).


\(^5\) Id at 706 (discussing cases in which white juries refused to convict a white man alleged to have killed a black man).

\(^6\) Fukurai and Davies, 4 Va J Soc Pol & Law at 663.

\(^7\) See Deirdre Golash, *Race, Fairness and Jury Selection*, 10 Behav Sci & L 155, 170 (1992) ("It is plausible that the presence of members of the defendant's or victim's racial
Since racial prejudice and stereotyping always impede accurate fact-finding, this is a truth-enhancing substantive reason in favor of a racially mixed jury. Moreover, the empirical support for this suppression effect resonates with my own life experience. Although by definition I have never been present when an all-male group discusses women, I have been in all-female settings when men are the topic of conversation, and the conversation does change when even a single, silent man joins the group. My male colleagues assure me that their experiences are similar.

In addition to enhancing the legitimacy of the verdict and suppressing the expression of prejudice, a racially diverse jury can sometimes affirmatively reduce or eliminate the racial prejudices and stereotypes that accompany jurors to the courtroom. At least one study has shown that with a racially mixed jury, jurors are more likely to respect different racial perspectives and to confront their own prejudice and stereotypes when such beliefs are recognized and addressed during deliberations. This prejudice reduction effect is yet another reason to believe that racially mixed juries enhance the truth-seeking function of jury deliberations.

A diverse group can be expected to inhibit the direct expression of racial bias in the jury room and thus to mute the social reinforcement of racial reasons for arriving at a particular verdict. For this purpose, representation on the jury by one member of the defendant's group and one of the victim's would be of primary importance.); Nancy J. King, Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions, 92 Mich L Rev 63, 80 n 56 (1993). Finally, most people's life experiences also confirm this phenomenon. Even the presence of one person of color may suppress the open expression of racial and ethnic prejudices by offering "insights into relevant cultural and social facts of which white jurors may be ignorant." Note, Out of the Frying Pan or Into the Fire? Race and Choice of Venue after Rodney King, 106 Harv L Rev 705, 709 (1993). See also Valerie P. Hans and Neil Vidmar, Judging the Jury 50–51 (Plenum 1986) ("The very presence of minorities would likely suppress the open expression of racial and ethnic prejudices."); John Guinther, The Jury in America 94 (Facts on File 1988) ("Presumably, were more black in juries in Chicago, their presence would mitigate white bias.").

Of course, one might argue that since jurors participating in a racially mixed jury are less likely to directly express racial bias during jury deliberations, they will also be less likely to confront their own racial biases and stereotypes.

During jury deliberations, one could imagine a two-step process taking place. In step one, a juror would express a racially biased point of view. In step two, those ideas might be considered and challenged. The "prejudice suppression effect" would inhibit the
Finally, racially diverse juries bring to their deliberations a broader range of life experiences that allow them to use their common sense more effectively when they evaluate the facts presented at trial. I will refer to this phenomenon as the "perspective-sharing" effect. Let me give some examples. In a case where a cross-racial identification is the critical evidence, a black juror may offer an important perspective concerning how many whites may look at blacks, and vice versa. Similarly, where the propriety of police conduct is at issue, black jurors may offer a quite different perspective on the conduct of a police force in a minority area. To the extent that a racially mixed jury facilitates the sharing of diverse perspectives, information, and experiences, that sharing may lead to a more thoughtful and informed verdict. While it may be debatable whether these points of view assist or divert the jury in reaching the truth, they certainly redefine and sharpen that search.10

For all these reasons, it is not surprising that the empirical evidence shows in some close cases, where small differences in perspective matter, the racial composition of the jury affects substantive outcomes and verdicts.11 This empirical evidence is extremely heartening. It shows that the racial composition of the
direct expression of racial bias, and therefore prevent this two-step process from occurring. This means that racial prejudice will neither be expressed or considered during the deliberation process. In my view, that would create a race-neutral deliberative process which is what the system should be striving to achieve. Just as we instruct jurors in criminal cases not to discuss or consider the defendant's failure to testify, we should also try to ensure that racial stereotypes and racial prejudice not be discussed or considered during the deliberative process. Indeed, if we discovered that jurors made racially biased statements and we could prove it, that, in itself, might be juror misconduct. See Commonwealth v Laguer, 36 Mass App 310, 311 (1993) (the expression of ethnic or racial bias on the part of one or more jurors, if proved, offends fundamental fairness and requires a new trial).

10 King, 92 Mich L Rev at 127 (cited in note 7) ("The life experiences that jurors of different races and ethnicities bring to jury deliberations include different interpretations of fact, different meanings for events, and different standards of behavior."); Note, 106 Harv L Rev at 709 n 32 (cited in note 7); Hans and Vidmar, Judging the Jury at 142 (cited in note 7) ("Minority jurors') perspective and knowledge would have increased jury competence to deal with the issues."); Johnson, 83 Mich L Rev at 1706 (cited in note 8) (noting that jurors of same race as defendant are more likely to interpret demeanor evidence correctly than are jurors of a different race). See also Dale W. Broeder, The Negro in Court, 1895 Duke L J 19, 30 (noting that when a black juror participated, the white members of the panel sometimes used her as an expert on black culture); Colbert, 76 Cornell L Rev at 114 n 561 (cited in note 8) ("Minority jurors would bring 'relevant insights' to juries' evaluations of the demeanor and credibility of black defendants and witnesses."); Cassell v Texas, 339 US 282, 301–02 (1950) (Jackson dissenting) (noting that the absence of a minority juror may have substantive effect on the outcome).

11 Hans and Vidmar, Judging the Jury at 138 (cited in note 7). See also Reid Hastie, Steven Penrod and Nancy Pennington, Inside the Jury 122 (Harvard 1983) (discussing ethnicity and jury selection).
jury is irrelevant where the evidence is overwhelming, as one would hope it would be. But it also shows that, in those close cases where the verdict is properly in doubt when the deliberations begin, the different perspectives and dynamics of a racially mixed jury can generate results that are different from those reached by homogenous juries. I would take this empirical evidence one step further. I submit that the verdict of a racially mixed jury in a close case is not only sometimes substantively different from that of a homogenous jury; it is more often than not fairer and more accurate. It is fairer because the verdict is less likely to be infected by racial bias and it is more accurate because it reflects a judgment and inferential findings based upon a broader range of life experiences.

II. ARE THE COSTS OF OBTAINING A RACIALLY DIVERSE JURY GREATER THAN THE BENEFITS OF OBTAINING IT?

If we decide that racial diversity in the petit jury is desirable, the next question is whether the benefits of having a mixed jury outweigh the costs of obtaining it. Just as changes made with the best of intentions sometimes lead to unanticipated adverse effects, we may alter jury deliberations by changing the way we select jurors. A racially diverse jury may be very desirable, but we may rationally decide that we cannot afford the dangers of ensuring diversity. At the very least, we need to examine closely whether creating a racially mixed jury solves one problem at the cost of creating another more serious one.

Since the question posed here is whether the means of achieving a racially mixed jury produces dangerous side-effects, we need to define carefully what means we are contemplating. There are three ways to achieve a racially diverse jury. One way to do so would be to increase the diversity of the jury venire. A second alternative would be to implement a quota system. A third way to achieve diversity would be to implement a new program of affirmative jury selection. Certainly, the surest way to ensure racial diversity is to use quotas. While the prospect of such quotas may seem far-fetched, it is hardly implausible. Indeed, for 600 years English law used quotas to create mixed juries. Beginning in the Twelfth Century, the legal principle called de medietatae linguae or "the jury of the half tongue"12 guaran-

teed Jewish civil and criminal defendants in England that one-half of their jurors would be fellow Jews. After the Jews were expelled from England and their economic role was taken over by alien merchants, this same right was extended to them. As England developed, so did the concept of de medietatae linguae, eventually becoming a right enjoyed by all aliens to a jury divided equally between English nationals and fellow countrymen.

When the English colonized the New World, they brought with them this principle of de medietatae linguae. Records of the Plymouth Colony in Massachusetts show that in 1674, when a Native American was tried for murder, he was given the privilege of a mixed jury comprised of half-colonials and half-Indians. De medietatae linguae ended in England by an act of Parliament in 1870, but it continued in certain states in this country until at least 1911.

While jury quotas are effective in producing a mixed jury and enjoy a long historical pedigree, they create more problems than they solve. Professor Abramson is correct to suggest that a quota system may make a jurors feel as if they represented the victim or the defendant, on the one hand, or the juror's own racial groups, on the other. This burden may divert jurors from focusing on the evidence and may interfere with their ability to render a fair and impartial verdict. We want jurors to be color-blind in their deliberations; we certainly do not want the jurors to focus on the race or ethnicity of the defendant or the victim when such factors have no bearing on the fair consideration of the evidence.

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13 Id at 784-85.
14 Id at 785.
15 Id at 790-91.
16 Ramirez, 74 BU L Rev at 790 (cited in note 12). While some critics might opine that this history is irrelevant to the present because the alien merchants were not citizens, and this mechanism was in place to compensate them for their non-citizenship status, see, for example, Danny J. Boggs, The Right to a Fair Trial, 1998 U Chi Legal F 1, nothing in the history of de medietatae linguae indicates that the right was bestowed upon non-citizens by a benevolent monarchy seeking to ensure due process for the Jews or for the alien-merchants. Rather, the history reveals that the Jews were despised and abused by the King. The right was accorded to the Jews only to protect the King's economic interests. The citizenship status of the Jews was irrelevant. Similarly, the right was accorded to the alien merchants because the merchants believed it was in their interest and they were powerful enough to force the King to provide it. See Ramirez, 74 BU L Rev at 785-86 (cited in note 12). Indeed, when the courts stopped furnishing the right to a mixed jury in disputes involving aliens, foreign merchants refused to do business in England, thereby forcing the restoration of the rights. Id at 777, 786. Refusing the merchants this right had nothing to do with their citizenship status — only with their economic power.
17 See Abramson, We, the Jury at 140 (cited in note 1).
18 There are instances, of course, where the race of a witness, defendant, or victim
Similarly, although jurors may understand intuitively what it means to represent the victim or the defendant, it is not at all clear what it would mean to represent a particular racial or ethnic group. That a juror's race or ethnicity may affect her perspective and life experience does not mean that one can identify a Black or Latino style of fact-finding. In addition, asking jurors to represent a particular racial group's point of view invites racial stereotyping.

Third, and dispositively, implementing a quota system would prove too difficult and demeaning. Assuming a quota were in place, who would be entitled to choose jurors of their race or ethnicity — the defendant or the victim? Would a quota be the entitlement of only minority jurors or would it be made available to all jurors? Would we permit a juror to be removed from the jury pool simply because his race is overrepresented on the panel? Even if we could overcome those problems, how would we decide how to classify jurors in order to implement the quota? Would we permit jurors to self-identify their race, or would we try to use another criterion? What would we do with jurors of mixed race? Would a black Latino be entitled to a quota of both black and Latinos, or of only one group? Would we sort the jurors into subpanels and permit strikes for cause and peremptory challenges separately for the black panel and the white panel? In short, no matter how well intentioned, any quota system would quickly deteriorate into a morass that would carry with it all the stupidity and insensitivity of Jim Crow. In sum, I oppose a quota system for two reasons. First, such a system seems inherently unworkable. Second, even if it were workable, we should not aspire to implement a system which requires the State to sort, identify and definitively determine the racial and ethnic status of all potential jurors. A quota system places unwarranted emphasis and primacy on the State-determined racial or ethnic identity of each juror. For the State to engage in that process would be demean


20 For a complete discussion of this issue, see id.
ing to the individual jurors and unseemly. It is simply out of the question.

III. BEYOND QUOTAS: ALTERNATIVE WAYS TO DIVERSIFY THE JURY

If we exclude quotas, we are left with essentially two alternatives. The least controversial alternative would be to do all we can to diversify the juror pool. If successful, this would increase the number of minorities who sit as jurors and would statistically increase the likelihood that some minorities would find their way onto petit juries.

A. Enhancing Minority Representation in the Jury Pool

There are identifiable, systemic sources of minority underrepresentation in the jury pool. First, many states and almost all federal jurisdictions draw their jurors from voter registration lists. Since minorities are underrepresented on those lists, minority representation on the jury venire can be increased by selecting jurors instead from street lists or motor vehicle lists, supplemented by welfare and unemployment lists. Since minority residents are more transient than their white counterparts, it would also be important to update these lists frequently.

Second, in most of the jurisdictions that qualify jurors by mailing them a jury questionnaire to complete, the return rate for minority jurors is lower than it is for whites. Not only do fewer minorities mail back the questionnaires, but fewer receive them; because minorities are more transient than whites, a larger pro-


Fukurai and Davies, 4 Va J Soc Pol & L at 651 n 19 (cited in note 3).
portion of minority jury questionnaires are returned undeliverable. Any successful program that would either increase the minority response rate or reduce the incorrect address rate would result in more minority jurors.

Third, the disproportionate racial impact of the criminal justice system affects both voter registration and juror service. In this country, one out of three black males between the ages of 20 and 29 is currently in prison, on parole, or on probation. A felony conviction permanently restricts the right to serve as juror in 31 jurisdictions, while the remaining 20 states permit juror service but impose varying restrictions. Changing the connection between criminal conviction and jury service, or easing the burden on a convict seeking restoration of rights, would help increase the number of minority jurors.

Fourth, many states still permit jury selectors to disqualify jurors for purely subjective reasons. In many states, juror selectors are asked to make subjective determinations about prospective jurors such as whether each potential juror has "natural faculties," "ordinary intelligence," "sound judgment," or "fair character." These purely subjective evaluations play an important role in determining the racial compositions of the jury pool.

Fifth, most, perhaps all, states compensate jurors inadequately for their jury service. In New York, for example, jurors are only paid $40 a day. The failure of the system to compensate jurors adequately means that fewer minorities are in the venire, for minorities are disproportionately represented in low paying jobs and are thus disproportionately excused because of

27 The most comprehensive source for this is US Department of Justice, Office of the Pardon Attorney, Civil Disabilities of Convicted Felons: A State-by-State Survey (Oct 1996). Also, "conviction in a federal or state court of a crime punishable by imprisonment for more than one year disqualifies an individual from serving on a federal grand or petit jury unless his civil rights have been restored." Id at 6. Kathleen M. Olivaes, Velmer S. Burton, Jr., and Francis T. Cullen, The Collateral Consequences of a Felony Conviction: A National Study of Legal Codes 10 Years Later, 60 Fed Probation 10, 13 (Sept 1996). Currently, in many states, the right can be restored only by a cumbersome and seldom-used pardon system. See id at A1–A7. See also Richardson v Ramirez, 418 US 24 (1974) (deeming that state civil disabilities for convicted felons pass constitutional muster).
29 Fukurai, et al, Race and the Jury at 52 (cited in note 21); Fukurai and Davies, 4 Va J Soc Pol & L at 651 (cited in note 3).
30 Abramson, We, The Jury at 232 (cited in note 1).
31 NY Jud Law § 621(a) (McKinney 1996).
economic hardship.\textsuperscript{32}

While it would be worthwhile to make a concerted effort to increase the number of minority jurors in the venire, such an effort, no matter how successful, will be of only limited value when there are few minorities in the venire pool. The smaller the percentage of the population the minority comprises, the more often minorities will not be fairly represented, even if a truly random selection system were employed throughout all of the jury selection stages.\textsuperscript{33} Consequently, for those jurisdictions, merely increasing minority representation in the venire will not ameliorate the problem of racial representation in the petit jury because even fully proportional representation will still leave few minorities in the venire. Therefore, if we are truly committed to increasing the racial diversity of our juries but are unwilling to accomplish this goal through racial quotas, we must do more than simply tinker with the existing system.

B. Affirmative Jury Selection

Having explored the first non-quota alternative, I now turn to the second. One way to obtain the benefits of a racially mixed jury without triggering the costs of racial quotas would be to create an affirmative mechanism allowing each litigant a limited opportunity to create a jury of his or her peers.\textsuperscript{34} My particular proposal would be to provide each litigant with a fixed number of affirmative peremptory choices.\textsuperscript{35} Each litigant would be allowed to use these peremptory choices to include his or her "peers" within the petit jury. This next section will describe how this basic procedure would operate within the context of jury selection.

In many ways, my affirmative selection process would mirror the current jury selection process. Like ordinary jury selection,

\begin{footnotesize}

\textsuperscript{33} For example, if an ethnic or racial minority group comprises only 5 percent of the population, even if the venire fully represents that population, the chance of getting even one minority group member in the petit jury is only \((1-.9512)^{10} \approx 0.46\) percent.


\textsuperscript{35} A more detailed version of this proposal is outlined in Ramirez, 74 BU L Rev at 806–08 (1994) (cited in note 12).
\end{footnotesize}
the process would begin by calling a venire to the courtroom. This large pool of potential jurors would then be subject to a limited voir dire conducted by a judge.\textsuperscript{36} Each party would then be allowed to make challenges for cause. After challenges for cause are exercised, the remaining potential jurors would be considered the "qualified venire."

The next step would be to create a second smaller group of jurors from the "qualified venire," which I will call the "relevant qualified venire." From that group a jury of twelve with two alternates will be left after both sides have exercised their peremptory challenges. Since, in my proposed system of jury selection, each party would be entitled to two negative peremptory challenges,\textsuperscript{37} a judge seeking to impanel a jury of twelve jurors and two alternates in a one-defendant case would need to select a "relevant qualified venire" of eighteen potential jurors. Up to this point, apart from the number of peremptory challenges, my system of jury selection does not differ significantly from the conventional process.

The difference lies in the selection of the "relevant qualified venire." Rather than having the court select potential jurors randomly, as is done now, each party would be allowed to select three potential jurors from the qualified venire to become part of

\textsuperscript{36} Although some states allow attorney-conducted voir dire, I prefer the federal court-conducted voir dire process. A court-conducted voir dire in the average criminal case takes 150 minutes. In sharp contrast, attorney-conducted voir dire lasts thirteen hours on average. Note, The Case for Abolishing Peremptory Challenges in Criminal Trials, 21 Harv CR-CL L Rev 227, 272 & n 217 (1986). In order that jury selection not contribute to the "overproceduralization" of the system, I prefer the relatively shorter and more efficient court-conducted voir dire procedure.

\textsuperscript{37} For all the reasons stated in Charles Ogletree, Just Say No!: A Proposal To Eliminate Racially Discriminatory Uses of Peremptory Challenges, 31 Am Crim L Rev 1099 (1994), I do not advocate the abolition of negative peremptory challenges. In particular, I am persuaded that the parties should have some means of excluding those jurors who are perceived by the parties to be most biased against them. If we were to abolish peremptory challenges altogether, parties would be totally dependent on the goodwill and sensibilities of the particular trial judge. Systemically, that would put an enormous amount of largely unchecked power in the hands of one individual. I want to provide each party with limited insurance against a bad or ill-considered "for cause" ruling by a judge. However, I believe that by reducing the number of negative peremptories, I reduce the risk that parties will use negative peremptories in a racially discriminatory manner, but continue to allow parties limited veto power of at least two potential jurors. I believe this keeps a certain balance of power between the judge and the parties.

\textsuperscript{38} Each state could determine how many fixed affirmative peremptory choices a party could exercise. I choose three because I want the number of affirmative peremptories to outnumber the negative peremptory challenges, and I am influenced by the empirical work indicating that the presence of at least three or more minority jurors is necessary to empower these minority jurors to express their opinions and share their ideas. See Johnson, 83 Mich L Rev at 1698–99 (cited in note 8).
the relevant qualified venire. The parties would do this by writing down the juror numbers of their affirmative peremptory choices and then handing them to the courtroom clerk, who would mix their names with the twelve that are randomly chosen. Thus, neither party would know which members of the relevant qualified venire were chosen by their opponent rather than randomly.

This proposal allows a party to exercise affirmative peremptory choices for any reason, including race. Parties would not need to explain their choices; indeed, if done well, the parties would be unable to discern which jurors were affirmatively selected and which were chosen randomly. At this point, the parties and the court will have created an eighteen member relevant qualified venire that is two-thirds randomly selected and one-third affirmatively selected.

At the next stage, both sides would be allowed to exercise two negative peremptory challenges. Of course, the Batson doctrine

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39 This system differs from a quota system in several important respects: (1) there is no guarantee of racial or ethnic representation; (2) each individual determines whether race should be considered in jury selection; (3) to the extent jurors are selected on the basis of race, the State has no role in identifying, sorting, defining or determining the racial identity of any potential juror; (4) during this jury selection process, race is a factor, but not the sole factor in determining the racial composition of the jury; (5) jurors will not be able to discern whether they were selected randomly or affirmatively; and (6) to the extent race matters, and an opponent can correctly identify and strike the three affirmatively selected jurors, the striking party may only strike two of those jurors. These strikes must be for non-racial reasons which can be articulated, and, of course, these strikes could not eliminate all three potential jurors. Thus, at least one racial minority would remain, and at least the suppression effect would preclude the direct expression of racial bias during deliberations.


40 I have chosen the number two for several reasons: (1) For all the reasons specified in Ogletree, 31 Am Crim L Rev at 1131–51 (cited in note 37), I do not advocate the total elimination of negative peremptory challenges; (2) by allowing only two negative peremptory challenges, I prevent the striking party from eliminating all three of the affirmatively selected jurors; (3) by keeping the number of negative peremptories small, I only allow the striking party to eliminate the jurors he or she believes are the most biased. It will not allow the striking party to sculpt or select the jury beyond this; and (4) finally, if race matters in a given case and, if the striking party is able to discern the identities of all three affirmatively selected jurors, and if the striking party articulates substantial, logical and significant reasons for striking two of the racial minority jurors, there will still be at least one racial minority juror left. That, in turn, ensures that the suppression effect will militate against the expression of racial bias during deliberations.
would cover this stage of the proceeding in order to ensure that neither side exercised its negative peremptory challenges in a racially discriminatory manner. This type of procedure provides minority parties with a fighting chance of securing racial representation on the jury, if the parties deem that important. It also allows each party to create its own vision of a “jury of . . . [its] peers” by selecting people it believes can fairly judge its case.

IV. IN ORDER TO REAP THE BENEFITS OF A RACIALLY MIXED JURY, WE MUST REQUIRE A UNANIMOUS JURY VERDICT

There is widespread consensus that a racially mixed jury offers many benefits. It enhances legitimacy, improves deliberation, reduces pre-trial prejudices, and promotes the exchange of different perspectives and ideas. These benefits only occur, however, when jurors can deliberate. When non-unanimous verdicts are allowed, the quality of deliberations diminishes and the voices and perspectives of those jurors with minority positions are muted. Non-unanimous verdicts would defeat the whole point of struggling for jury diversity because they would fail to ensure that all voices and perspectives were fully explored and fairly considered during the jury deliberation process. For these reasons, I believe that a unanimous verdict is essential to reaping the benefits of a racially mixed jury.

The United States Constitution does not require unanimous verdicts in criminal cases; as a matter of constitutional law, nine out of twelve jurors are enough to convict a defendant of a felony. Currently, however, only Louisiana and Oregon allow non-unanimous verdicts for felony criminal trials. Some jurists and scholars have called for statutory changes that would permit non-unanimous convictions in other jurisdictions, arguing that such a reform would shorten jury deliberations and would reduce the likelihood of a hung jury.

41 Unlike the Supreme Court, however, I would require that the race-neutral explanation be substantial, logical, and significant. Contrast Purkett v Elem, 514 US 765, 767–68 (1995).
42 See Part I. See also Ramirez, 74 BU L Rev at 797 nn 131–32 (cited in note 12).
43 See Johnson v Louisiana, 406 US 356, 357–58 (1972) (holding that a 9-3 vote is acceptable); Burch v Louisiana, 441 US 130, 137–38 (1979) (holding 5-1 not acceptable).
44 Sandra Day O’Connor, Juries: They May Be Broken, But We Can Fix Them, 44 Fed Law 20, 25 (June 1997).
45 Hastie, et al, Inside the Jury at 29 (cited in note 11) (“Unanimous juries had longer deliberation times and took more polls than majority rule juries.”).
46 Id at 22 (“... [H]ung or dead-locked final decision states are more common in unanimous than in majority decision conditions.”).
While I acknowledge that allowing non-unanimous verdicts is constitutional and has the virtue of reaching closure in a greater share of criminal cases, I nonetheless believe that such reform would harm our justice system. Empirical studies have established that non-unanimous juries pose certain dangers to the interests of justice. First, non-unanimous juries tend to conclude deliberations more quickly. Doubts of the dissenting jurors, even reasonable doubts, can be ignored when their votes are not needed to convict.

Second, non-unanimous jury verdicts change the deliberation process. Where unanimity is required, "minority faction members participate with greater frequency and are perceived as more influential." In addition, the quality of deliberation is more thoughtful and considered. Jurors charged with unanimity are more likely to believe that all arguments and facts relevant to the case "have been fully explored and that the deliberation has been thorough."

Third, jurors in courts requiring unanimity tend to view the jury decision-making process more favorably, perhaps because they believed the process was thorough. Their overall satisfaction with the process is higher than is the satisfaction of their counterparts on non-unanimous juries.

The fundamental problem with allowing a non-unanimous verdict is that it permits the members of the jury who are in the majority to ignore the voices and experiences of minority jurors by outvoting them. Such a result is anathema to the very nature and function of a jury. I support requiring a unanimous verdict because I believe that such a system encourages jurors to respect, confront, discuss, and resolve different points of view and positions during the deliberation process.

CONCLUSION

The goal of our jury system should be to ensure that jurors deliberate fairly and impartially in reaching a final verdict. That deliberative ideal is furthered when jurors engage in a fact-finding process that produces accurate results. As part of that ideal, the system should discourage decision-making based on

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47 Id.
48 Id.
50 Id.
51 Id.
race or thoughtless racial stereotypes.

The fundamental question is: How do we best achieve this deliberative ideal? Professor Abramson believes that the best way to obtain an impartial, race-neutral verdict is to adopt a race-neutral jury selection process. This article exposes the fallacy of this proposal's thesis by demonstrating how and why a multi-racial jury is more likely to embody the deliberative ideal and render an impartial, fair, and race-neutral verdict than its all-white counterpart.

A multi-racial jury functions differently than an all-white jury. First, the presence of even one racial minority on the jury suppresses prejudice. Second, when different racial groups deliberate together, there is some evidence that they are better able to overcome their individual biases. Third, the presence of diverse groups adds different voices, perspectives, and experiences to deliberations. Finally, a verdict rendered by a multi-racial jury is fairer, more accurate, and less likely to be infected by racial bias, thoughtless racial stereotypes, or racial misconceptions. Indeed, it is perhaps for these very reasons that the public correctly perceives a multi-racial verdict to be fairer and more legitimate.

This Article argues that the best way to reap the benefits of a multi-racial jury is by encouraging jury diversity through an affirmative jury selection process. The virtue of the affirmative peremptory system limned in this article is that it is transracial in its design. It allows all parties, regardless of race or ethnicity, to affirmatively select a jury of their peers. Because it allows each individual to determine the extent to which race matters, it is color-conscious. It allows inclusion, based upon race, but prohibits race-based juror exclusion. In contrast, however, to a quota system, it does not require the State to sort and identify all potential jurors by race.

Finally, this article argues that in order to preserve the benefits of a racially mixed jury, the criminal deliberative process must be unanimous. Having struggled long and hard to create diversity on the petit jury, allowing a non-unanimous verdict would undermine the benefits of a multi-racial jury by permitting majority jurors to ignore the perspectives, voices, and views of minority jurors simply by outvoting them. This result is contrary to the very nature and function of a deliberative process designed to ensure fairness and accuracy. In order to advance the deliberative ideal and equal justice, the system should require a

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Abramson, We, the Jury at 245–48 (cited in note 1).
unanimous verdict because such a verdict encourages jurors to respect, confront, discuss, and resolve differences during the deliberative process. Only then can we realize the promise of the deliberative ideal: impartial justice for all.