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THE EFFECTS OF RACE-CONSCIOUS JURY SELECTION ON PUBLIC CONFIDENCE IN THE FAIRNESS OF JURY PROCEEDINGS: AN EMPIRICAL PUZZLE

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I. INTRODUCTION

Regulating the selection of criminal juries has never been particularly easy for the Supreme Court, and it will soon become even more difficult. For

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several decades, the Court struggled to define and secure the criminal defendant's Sixth Amendment, equal protection, and due process rights to be judged by juries chosen without discrimination.¹ Recently, dissatisfied with the inability of this defendant-centered approach to control discriminatory selection practices,² the Court turned its focus from the rights of defendants to the rights of potential jurors whose opportunities for jury service are affected by jury discrimination. In *Powers v. Ohio*,³ the Court held that a peremptory challenge based on race violates the equal protection right of the challenged veniremember not to have her opportunities for jury service determined by her skin color.⁴ *Powers* and its progeny⁵ have placed defendants in the secondary role of enforcers of jurors' equal protection rights, granting defendants relief whenever jurors' rights are violated. This shift away from litigant rights to juror rights solved some doctrinal problems but created others. One of these problems is the subject of this essay—the task of judging when, if ever, the Constitution permits racial preferences in jury selection.

The Court's heightened protection for potential jurors is on a collision course with increasingly popular race-conscious measures designed to secure representative juries. As more and more lawmakers recognize the dangers of ignoring the effects of racial underrepresentation on juries, selection methods that take account of race have proliferated. The race of potential jurors is

1. See *Holland v. Illinois*, 493 U.S. 474, 476-77 (1990) (applying defendant's Sixth Amendment right to jury drawn from a cross-section of community); *Taylor v. Louisiana*, 419 U.S. 522, 526-33 (1975) (same); *Batson v. Kentucky*, 476 U.S. 79, 84-89 (1986) (applying defendant's right to equal protection); *Castaneda v. Partida*, 430 U.S. 482, 492 (1977) (same); *Hobby v. United States*, 468 U.S. 339, 342-46 (1984) (applying defendant's right to due process); *Peters v. Kiff*, 407 U.S. 493, 496-505 (1972) (same).

2. Defendant-centered theories rely upon the assumption that jury discrimination raises the risk of an adverse verdict and thus harms a defendant personally. This premise is a troublesome justification for regulating a prosecutor's use of peremptory challenges to strike minority veniremembers when the defendant does not share the race or ethnicity of the excluded veniremembers. It also provides no basis for preventing white defendants from using their peremptory challenges to exclude minorities from juries. For commentary on the difficulties of reconciling defendant-centered theories with prohibitions against jury discrimination, see Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is it, Anyway?*, 92 COLUM. L. REV. 725, 726-27 (1992), and Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807 (1993).

3. 499 U.S. 400 (1991).

4. *Id.* at 409, 415 (holding that regardless of his own race, a defendant may object to a prosecutor's peremptory challenges which exclude jurors based on race).

5. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (holding that civil litigant has standing to raise the rights of African-American veniremembers struck by an opposing party); *Georgia v. McCollum*, 112 S. Ct. 2348, 2348 (1992) (holding that veniremember's equal protection rights are violated when criminal defendant exercises peremptory strikes on basis of race, and recognizing prosecutor's standing to raise those rights); *J. E. B. v. Alabama*, 114 S. Ct. 1419 (1994) (holding that litigant has standing to raise the equal protection rights of male veniremembers challenged because of their sex).

now considered by judges choosing trial venues, by jury commissioners selecting names for jury source lists, by jury clerks selecting names of qualified jurors, and by judges choosing grand jurors and grand jury forepersons.⁶ Defendants, the designated enforcers of colorblind jury selection, are already seeking relief from convictions and indictments by advocating expansive interpretations of the juror's right to be free from race-based treatment. One African-American defendant, for instance, successfully challenged his indictment by convincing an appellate court that the trial judge violated the rights of potential grand jury forepersons when the judge, attempting to remedy past discrimination against African-Americans, chose an African-American grand juror to serve as foreperson.⁷ Others have challenged race-conscious efforts to diversify jury lists,⁸ venires,⁹ and grand juries.¹⁰ Judging from the hostile reception the federal courts have extended recently to race-conscious efforts to influence the election of legislators,¹¹ proponents of race-conscious reforms in jury selection can anticipate serious judicial resistance to their efforts as well.

One way to negotiate between the interest of the defendant in securing a racially diverse jury and the interest of potential jurors in race-neutral treatment is to focus instead on a third interest, the interest of society in maximizing public confidence in the fairness of jury proceedings. In the equal protection parlance with which courts inevitably frame these questions, allocating opportunities for jury service among potential jurors on the basis of race should be permissible when it is narrowly tailored to advance the

6. 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, 719-29 (1993).

7. See *State v. Moore*, 404 S.E.2d 845, 846 (N.C. 1991) (holding that discriminatory selection of grand jury foremen violates North Carolina Constitution).

8. See, e.g., *Meders v. State*, 389 S.E.2d 320, 323 (Ga. 1990) (discussing challenge to computerized system of selecting jury list).

9. See, e.g., Matthew Kauffman, *Death Row Inmate Says Jury Selection Flawed*, HARTFORD COURANT, Dec. 3, 1993, at C1 (discussing case of African-American defendant who challenged his conviction by claiming that judge's effort to include more African-Americans in jury pool was illegal).

10. See, e.g., *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992), cert. denied, 113 S. Ct. 2433 (1993).

11. In *Shaw v. Reno*, 113 S. Ct. 2816 (1993), the Court held that a state's effort to create a voting district with a majority of African-American voters violates the rights of white voters unless the state can justify its use of race under strict scrutiny. *Id.* at 2825, 2832. Significantly, the Court cited recent jury cases when explaining the harm caused by the government's use of race to construct electoral districts, *id.* at 2822, 2827, a signal that the Justices who joined in the majority opinion are aware of the many parallels between the use of race in jury selection and redistricting.

The majority of a three-judge panel recently chose images of murder and Orwellian political and social oppression to describe the harm that may result when race is considered in constructing electoral districts. See *Hays v. State*, 839 F. Supp. 1188, 1192, 1206-07 (W.D. La. 1993) (concluding that white voters have the same standing as minority voters to challenge race-conscious districting after quoting from George Orwell's *Animal Farm*: "We reject out of hand the implication that although all are equal under the law, 'some . . . are more equal than others'"; and stating that just as the criminal law prohibits a person from using deadly force unless it is reasonably necessary under the circumstances, the Constitution prevents a state from using race except when necessary).

interest of the state in promoting public confidence in the fairness of jury proceedings.¹² Focusing on what is good for society rather than on the rights of jurors or the rights of defendants has at least two advantages. It directs our attention to a principled basis for deciding what to do when the interests advanced by these rights conflict, and it recognizes that social groups, large and small—not just individuals—are affected by jury procedures.

Yet conditioning the scope of rights upon the reaction their protection may trigger is a complex task. Judges must decide if race-conscious procedures that ensure greater racial diversity or representation will create more or less trust in the fairness of jury proceedings. Ostensibly, their decisions should be premised upon accurate information about public perceptions of those procedures. Like other uses of public sentiment to define legal rules,¹³ an appearance-of-fairness approach to evaluating affirmative action in jury selection raises questions of proof, precedent, and policy. Is a judge's personal assessment enough proof of public attitudes, or are studies of

12. Many race-conscious procedures are not necessary to preserve a defendant's constitutional rights, at least as those rights are presently construed by the Court. Consequently, if these proposals are to withstand strict scrutiny, they must be sufficiently related to another compelling interest. See King, *supra* note 6, at 745-53. In selecting institutional legitimacy as a compelling interest, I accept as valid the assumption that trust in legal authority is essential to a stable and peaceful society. More specifically, I assume that general and diffuse support for the criminal justice system is an important element of democracy, providing a buffer against greater lawless behavior. While theorists continue to debate whether law-abiding behavior is related to "trust" or "legitimacy" or to anything other than habit and self-interest, I am persuaded that the perceived legitimacy of legal institutions has an independent effect on obedience to law, even if that effect is not as significant as that of education or economic security. Compare Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 380-82 (claiming that legitimacy cannot be defined in the first place and even if it could, it has nothing to do with compliance at all, because the willingness of a person to follow the law is a product of habit and rational calculation of self-interest) and James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 469, 493 (1989) (arguing that "whatever special legitimizing powers courts have probably play only minor role in overall political equation") with Craig A. McEwen & Richard J. Maiman, *In Search of Legitimacy: Toward an Empirical Analysis*, 8 LAW & POL'Y 257 (1986) (rejecting Hyde's findings) and TOM R. TYLER, WHY PEOPLE OBEY THE LAW 30-39, 68 (1990) (reporting research demonstrating people who are confident that decision-making procedures are fair are more likely to obey the law, but that "personal morality is clearly a more important influence on compliance than legitimacy").

13. The Court has used public, community, or group reactions and attitudes to interpret the scope of various constitutional guarantees, including equal protection. See, e.g., Barbara J. Flagg, *The Algebra of Pluralism: Subjective Experience as a Constitutional Variable*, 47 VAND. L. REV. 273, 287-318 (1994) (describing constitutional cases in which Supreme Court Justices "have appealed to subjective experience as a ground of decision"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 359-63 (1987) (noting that courts evaluate the meaning attributed to governmental action when evaluating challenges under the establishment clause or when interpreting whether an individual has a "reasonable expectation of privacy" under the Fourth Amendment); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993) (stating that *Shaw* was concerned with "expressive harms").

particular rigor and specificity required?¹⁴ Does a determination of public sentiment in one case preclude a different determination in another case?¹⁵ Do the purposes of equal protection require that community attitudes be evaluated in particular ways? In this essay, I consider the insights that opinion polls and procedural justice research¹⁶ can offer judges who will consider such questions regarding jury selection procedures that take account of race.¹⁷

Existing research confirms that the product of affirmative action in jury selection—racially representative juries—can enhance perceptions of jury fairness. Little information is available, however, about reactions to race-conscious means of achieving this end. The research does not tell us whether or not litigants or observers would react negatively to various race-based means of obtaining racial representation, or whether potential negative reactions would cancel out or overshadow the positive reactions that representative results produce. Nor does it tell us whether public sensitivity to racial representation on juries or to the methods used to attain that representation would vary with locality, time, or case type. The available information does strongly suggest that responses to these procedures may differ among groups. The existence of group differences poses what is probably the most significant challenge for courts that assess the effects of race-conscious jury

14. See Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L. J. 703, 793-94 (1994) (raising this question concerning Court's use of public opinion to shape abortion rights doctrine).

15. See M. Kent Jennings, *Thinking About Social Injustice*, 12 POL. PSYCHOL. 187, 195 (1991) (observing that the justice concerns of Americans can shift radically in a short period of time, noting "the prominence" of these concerns "can rise rather quickly and then fade" due to "media attention and interest group efforts").

16. For one summary of procedural justice research, see E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 92 (1988).

17. The need for such an analysis became clear to me as I developed, for another article, guidelines for deciding which race-conscious procedures for selecting juries advance the appearance of justice and which do not. See King, *supra* note 6, at 767-74. I proposed six criteria for assessing whether a particular race-conscious jury selection procedure would improve or impair the public's trust in jury fairness. I suggested that a selection method that classifies potential jurors by race should be deemed necessary to achieve the compelling interest in advancing the appearance of fairness of jury proceedings when it 1) is adopted only after a determination that race-neutral methods for obtaining the same degree of representation are not feasible; 2) is adopted on a temporary basis so that its necessity and efficacy can be reassessed after a certain time; 3) is one that minimizes for individuals the stigmatic injury and other burdens that result when opportunities for jury service are conditioned on race or ethnicity; 4) avoids endorsing assumptions that the fair treatment of particular claims, cases, or litigants requires decision-makers of a particular racial composition; 5) avoids designating race as the most salient determinant of a fair juror; and 6) tends to increase, not decrease, the opportunities for jury service of members of historically disadvantaged groups. Emboldened by the Justices' own comfort in *Shaw* and other cases with predicting the attitudes and the behavior of Americans on little more than their own say-so, I left for a later project a complete analysis of empirical support for the predictive quality of criteria that would distinguish helpful and harmful uses of race in jury selection. See *id.* at 774 n.237.

selection on public confidence in the fairness of the jury proceedings—the challenge of deciding when and why the perceptions of some may be more significant than the perceptions of others.

II. THE RELEVANCE OF JURY COMPOSITION TO PERCEPTIONS OF JURY FAIRNESS

Jury selection procedures that increase racial representation on juries could improve the public image of our jury system as fair and unbiased in two ways. First, increasing the racial and ethnic diversity of juries can make particular jury decisions seem fairer to litigants and observers, which in turn can bolster support for the jury as an institution. Second, the jury may function as a “school for civic duty”¹⁸ in which jurors learn about the responsibilities of citizenship and form stronger bonds to their government and its institutions.¹⁹ In exposing more citizens to the experience of serving as jurors, jury selection procedures that are more inclusive could foster greater acceptance of jury proceedings. I will address the empirical support for these two theories in turn.

A. *The Effects of Racial Composition on Perceptions of Fairness*

The claim that reforming jury composition in particular cases can improve overall perceptions of the fairness of jury proceedings rests on three premises. First, it assumes that general perceptions of jury fairness are depen-

18. See Renee B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1357 (1994) (discussing view that use of jury service provides method of educating public about processes of democratic government).

19. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252 (J.P. Mayer & Max Lerner, eds. & George Lawrence, trans., 1966) (1935) (“Juries . . . instill some of the habits of the judicial mind into every citizen . . . [The jury] spreads respect for the courts’ decisions and . . . teach[es] men equity in practice, . . . [and] not to shirk responsibility for [their] own acts, and . . . make[s] all men feel that they have duties toward society”); FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 236 (Theodore D. Woolsey, ed., Philadelphia, J.B. Lippincott, 3d ed., 1901) (commenting that jury service:

binds the citizen with increased public spirit to the government of his commonwealth, and gives him a constant and renewed share in one of the highest public affairs, the application of the abstract law to the reality of life—the administration of justice; it teaches law and liberty, order and rights, justice and government, and carries this knowledge over the land; it is the greatest practical school of free citizenship);

Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1186-87 (1991) (arguing that judges often seized occasion to educate jurors about legal and political values); Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465 (1992) (noting that citizen service on juries in administrative proceedings could help cure public apathy and indifference for bureaucrats and agencies); *Duncan v. Louisiana*, 391 U.S. 145, 187-88 (1968) (Harlan, J., dissenting) (jury service fosters respect for the law and acceptance of criminal verdicts as just).

dent not only upon preexisting beliefs, but also upon exposure to individual jury proceedings. While several researchers have demonstrated that preexisting views about fairness and legitimacy determine "to an important degree" attitudes about institutions such as courts,²⁰ some research has shown that allegiance to or diffuse support for decision making institutions is not immune to the effects of individual experience. In the words of one team of researchers:

If citizens bring positive beliefs about courts, law, and government to their encounters, these attitudes serve to preserve a sense of attachment to the regime even in the face of such severe deprivations as imprisonment. On the other side of the coin, for citizens with negative predispositions, experience exaggerates their sense of alienation.²¹

In other words, education is not the only way to increase support for jury proceedings.²² We should be able to increase public trust of jury proceedings somewhat by improving the appearance of fairness in individual proceedings.

Second, jury composition can affect perceptions of the fairness of a jury proceeding only if those perceptions are based in part upon the proceeding itself, not simply upon the jury's decision. One of the central findings of procedural justice researchers is that procedures, independent of verdicts and sentences, influence the acceptance of criminal proceedings. Procedural

20. See, e.g., Tom R. Tyler et al., *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629, 645 (1989) (concluding that attitudes toward the regime and its authorities are to an important degree the product of general feelings developed over the life cycle, and stating that "to the extent that a regime can promote the development of widespread affective attachment, a cushion of support develops that enables the state to impose substantial burdens on citizens without losing their allegiance"); TYLER, *supra* note 12, at 67; E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 986 (1990) (noting that litigants' perceived satisfaction with procedure and outcome is "determined largely by subjective expectations and impressions rather than by objective features of litigation").

Some have argued that these learned attitudes *control* perceptions of fairness. E.g., Gibson, *supra* note 12 at 469; James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120 (1992) (concluding that institutional legitimacy stems largely from fundamental beliefs regarding liberty, social order, and democracy); Benjamin I. Page, Robert Y. Shapiro & Glenn R. Dempsey, *What Moves Public Opinion?*, 1987 AM. POL. SCI. REV. 23 (noting the significant impact that new commentators and new reports of experts have on public opinion); Jeffery J. Mondak, *Institutional Legitimacy and Procedural Justice: Reexamining the Question of Causality*, 27 LAW & SOC'Y REV. 599 (1993) (finding no evidence in 1992 survey of Pittsburgh residents that perceptions of procedural justice exert influence on perceptions of institutional legitimacy).

21. Tyler, et al., *supra* note 20, at 636-37; see also TYLER, *supra* note 12, at 67 ("[A]dult experience does influence legitimacy").

22. See generally Frances K. Zemans, *In the Eye of the Beholder: The Relationship Between the Public and the Courts*, 15 JUST. SYS. J. 722, 726, 738 (1991) (suggesting several strategies for achieving better communication with the public, and providing better services in order to build a constituency to enhance the perceived and actual quality of justice).

fairness can persuade participants and observers to accept an outcome as fair even when that decision is not the one they would have preferred.²³

Finally, jury composition appears to be a procedural feature that can affect perceptions of fairness. Research attempting to isolate just which procedural aspects seem to make the most difference in assessments of fairness is still in its early stages.²⁴ Nevertheless, there is some support for the claim that jury representativeness is one of those features that matters most to people when assessing the fairness of jury proceedings. In 1989 Tom Tyler conducted a telephone survey of several hundred randomly sampled Chicago residents who had various experiences with legal authorities ranging from calling the police to being a litigant. He found that assessments of the fairness of case outcomes depended largely on the perceived *neutrality* of the decision making procedures.²⁵ Anecdotal support for this claim is widespread. Many Americans attributed the acquittals in the state cases against the white police officers who beat motorist Rodney King to the lack of minority representation on the jury.²⁶ Judges, attorneys, journalists, and academics, whose views may be replicated to some degree in the public at large, have also frequently

23. See, e.g., Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES IN EXP. SOC. PSYCHOL.* 115, 122-35 (1992) (summarizing research in this area); TYLER, *supra* note 12, at 73-74 (citing studies that document independent effects of procedural as opposed to outcome-related issues); *id.* at 100 (concluding that the "cushioning effects of procedural justice are quite robust"); Jean M. Landis & Lynne Goodstein, *When is Justice Fair? An Integrated Approach to the Outcome Versus Procedure Debate*, 1986 *AM. B. FOUND. RES. J.* 675, 701-03 (1986) (concluding that procedural issues were more important than outcome issues in shaping sample inmates' perceptions of outcome fairness); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 *LAW & SOC'Y REV.* 621, 622 (1991) (noting a study which demonstrated that the legitimacy of the United States Supreme Court is based on the belief that it makes decisions in ways that are fair, not on agreement with those decisions); Tyler et al., *supra* note 20, at 641 (stating that the use of fair procedures can cushion the effects of negative outcomes, providing a means by which regimes may promote allegiances which impose burdens on their citizens). For a criticism of the external validity and predictive power of these findings, see Anne M. Heinz, *Procedural Versus Consequences: Experimental Evidence of Preferences of Procedural and Distributive Justice*, in *COURTS AND CRIMINAL JUSTICE: EMERGING ISSUES* 13 (Suzette M. Talarico, ed., 1985).

24. TYLER, *supra* note 12, at 92 (lamenting that "psychologists have devoted enormous efforts to examining the efficacy of the jury with respect to its problem-solving ability," but have "largely ignored the efficacy of the jury with respect to its legitimizing function").

25. Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 *J. PERS. & SOC. PSYCHOL.* 830 (1989). In order to score subjects' assessments of neutrality, Tyler asked subjects whether their treatment or the outcome of their interaction was influenced by their race, sex, age, nationality, or other personal characteristic, whether the authority did anything improper or dishonest, whether the authorities favored one party over another, whether the decision-makers had the information they needed, and whether the decision-makers brought the problem out into the open. *Id.* at 832-33.

26. See Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 *MICH. L. REV.* 63, n.3 (1993).

expressed the belief that racial representation on juries is related to fairness.²⁷

B. *The Effects of Jury Service on Perceptions of Fairness*

Despite its impressive pedigree, the claim that service as a juror increases trust in jury proceedings is not entirely consistent with the results of some empirical research. Most studies have documented that those who serve as jurors gain more positive attitudes towards jury service or the jury system.²⁸ Yet other research suggests that service as a juror tends to *decrease* trust in the jury system. Some researchers have concluded that for most citizens who come into contact with the legal system, “familiarity breeds contempt.”²⁹ A survey of over 1500 Californians in 1992, for example, found that “jurors tend to be more knowledgeable, but no more confident” in the courts than the general population.³⁰ Anecdotal accounts of jury service also disclose that some jurors experience decreased confidence in jury proceedings, either

27. See King, *supra* note 6, at 764 n.208 (noting assertions by attorneys, judges, journalists, and others that racial composition is an essential ingredient of jury fairness); King, *supra* note 26, at 81-82, 87, 89-90, 95-96 (summarizing judicial predictions about when racial discrimination in jury selection will affect verdicts).

28. See Daniel W. Shuman & Jean A. Hamilton, *Jury Service—It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors*, 46 SMU L. REV. 449, 459 (1992) (citing three studies showing that jury service seems to increase, or at least not negatively affect, attitudes about jury service itself); Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 287 (Robert E. Litan, ed. 1993) (reviewing studies and concluding that participation stimulates a commitment to a specific jury and its verdict that is powerful enough to include the system as a whole); see also June Louin Tapp, *The Jury as a Socialization Experience: A Socio-Cognitive View*, in 2 ADVANCES IN FORENSIC PSYCHOLOGY AND PSYCHIATRY 1, 6 (1987) (concluding that jury service will assist jurors to mature in their “intellectual sophistication, ethical awareness, and critical compliance”); Valerie P. Hans & Neil Vidmar, *Jury Selection*, in THE PSYCHOLOGY OF THE COURTROOM 39, 43-44 (Norbert L. Kerr & Robert M. Bray, eds., 1982) (citing studies demonstrating that jury participation has a positive effect on attitudes toward the jury as an institution, and suggesting that because of their relative lack of participation in and contact with jury service, “members of underrepresented groups are likely to hold more negative attitudes toward the jury and toward the criminal justice system in general”); Rosann Greenspan, *Gaining Public Trust in the Criminal Justice System* 23-25 (unpublished paper, University of California, Berkeley) (noting anecdotal evidence of the “educative and symbolic value of jury service as a civic experience”) (on file with author).

29. Austin Sarat, *Studying American Legal Cultures, An Assessment of Survey Evidence*, 11 LAW AND SOC'Y REV. 427, 438-41 (1977) (claiming that support for local trial courts “is eroded by experience with or knowledge about them” especially for litigants); Austin Sarat, *Support for the Legal System: An Analysis of Knowledge, Attitudes, and Behavior*, 3 AM. POL. Q. 3, 15 (1975) (finding that the more the person knows about the legal system, the more dissatisfied he is likely to be no matter what his level of education); see also Lettow, *supra* note 18, at 1358 (suggesting that without the power of presentment, grand jurors “learn not respect for, but frustration with, the system if they feel their efforts . . . are considered unworthy of official recognition”).

30. YANKELOVICH, SKELLY, AND WHITE/CLANCY SHULMAN, STATE OF CALIFORNIA, SURVEYING THE FUTURE: CALIFORNIANS' ATTITUDES ON THE COURT SYSTEM 22 (1992) [hereinafter STATE OF CALIFORNIA].

because of race discrimination in selection practices³¹ or because of the casual attitudes of other jurors.³²

These contradictory findings indicate that we need more information about what it is about jury service that may create disillusionment in jurors. Although the research suggests that racially diverse juries are perceived as more fair than unrepresentative juries, it is less clear that calling more citizens to jury service will inevitably increase public trust in the jury system.

III. BEYOND RELEVANCE: MISSING PIECES IN THE EMPIRICAL PUZZLE

Knowledge that racially representative juries are generally perceived as more fair than unrepresentative juries is of limited value to judges who must evaluate whether a given race-conscious selection procedure will improve or impair perceptions of fairness. In particular, very little empirical guidance presently exists to assist judges in assessing when racially diverse juries are essential to the appearance of fairness and if and when race-conscious selection will detract from those fair appearances.

31. See, e.g., Leigh B. Bienen, *Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials*, 68 IND. L.J. 1333, 1346 (1993) (quoting juror who characterized the prosecutor's efforts to exclude African-Americans from the African-American defendant's jury as "shocking and puzzling . . . the most crude, the most brainless, racial discrimination in action").

32. See, e.g., *id.* at 1341 (quoting a juror in a capital case who stated that she was "really bothered" and "bugged" by the willingness of other jurors to give in just because the judge informed them that further deliberations would require the jury to be sequestered, and who said, "That's what scared the pants off of me right there"); Joseph L. Hoffman, *Themes of Moral Responsibility in the Sentencing Decisions of Capital Jurors*, 12-13 (paper presented at a University of Virginia School of Law Faculty Workshop) (stating that when asked what she remembered most about her experience as a juror, one woman answered, "How casual and how light some people treated what they were doing [I]t bothered me that people were so casual with that kind of responsibility").

A study of nearly 2000 adults in 1977 also revealed that greater actual knowledge of and experience with courts correlated with lower confidence in courts and higher perceived need for court reform, but also found that people with any experience with state courts were slightly less likely to agree that unequal treatment of whites and blacks was a serious and frequent problem: 18% compared to 19%. Of those who had served as jurors, only 42% regarded their experience as favorable, while 40% regarded the experience as neutral or unfavorable and 18% were uncertain. NATIONAL CENTER FOR STATE COURTS, *STATE COURTS: A BLUEPRINT FOR THE FUTURE* 26, 48 (Theodore J. Fetter, ed., 1978) [hereinafter *STATE COURTS*].

Few Americans learn what they know about courts from serving on juries. *Id.* at 18-19 (only 12% of respondents indicated that jury service was their principal source of information about courts); see also THE HEARST CORPORATION, *THE AMERICAN PUBLIC, THE MEDIA & THE JUDICIAL SYSTEM: A NATIONAL SURVEY ON PUBLIC AWARENESS AND PERSONAL EXPERIENCE* 21 (1983) (reporting that of the nearly 1000 respondents, 80% reported rarely or never getting information about courts from jury service, compared to 18% who stated that they frequently or sometimes get information about courts from "having been a juror" and that 59% reported rarely or never receiving information from "people who you know who have been jurors"); STATE OF CALIFORNIA, *supra* note 30, at 6 (reporting that only 21% of those polled stated that they had ever served on a jury).

A. The Pervasiveness and Strength of the Effects of Racial Composition on Perceptions of Fairness

Research linking jury composition to assessments of fairness is not so plentiful or varied that judges can divine from it whether racial diversity on juries is important to judgments about fairness in all cases, or rather just in some. For instance, although a 1992 survey of 401 state and federal judges revealed that 34% of them “concluded that race probably affects the verdict of an all-white jury when one of the parties on trial is black,”³³ it is not clear whether these judges would anticipate the same effects if the victim was African-American, or if the defendant was white, or if either the victim or defendant was a member of some other ethnic or racial minority. The importance that those who assess fairness place on a jury’s racial representation may vary by case type, as well as by the racial identity of participants.³⁴ A random sampling of Evanston, Illinois residents, for example, revealed that they felt that jury trials, and, presumably, the representativeness that went along with them, were much more important in murder cases than in cases involving lesser crimes.³⁵ Again, without more information about when racial composition on a jury matters to assessments of fairness, judicial predictions that racial representativeness on juries is always essential to perceptions of fairness remain untested.³⁶

B. The Effects of Other Procedural Features, Such as Race-Conscious Selection Methods, on Perceptions of Fairness

Research is also lacking concerning other features of jury proceedings that may provide assurances of fairness to observers and participants despite the

33. Gary A. Hengstler, *How Judges View Retrial of L.A. Cops*, 79 A.B.A. J. 70, 71 (1993).

34. King, *supra* note 26, at 87 nn. 82-87 (noting various predictions that juror race played a decisive role in particular cases).

35. LIND & TYLER, *supra* note 16, at 92. Other research shows that “the importance of procedural justice remains similar or increases as the stakes grow.” TYLER, *supra* note 12, at 105. Courts and other lawmakers have already recognized that juror race may be more salient to impartiality or at least to the appearance of impartiality in murder cases. See, e.g., *Blair v. Armontrout*, 916 F.2d 1310, 1351-52 (8th Cir. 1990) (noting “especially influential role” that race plays in sentencing decisions in capital cases), *cert. denied*, 112 S. Ct. 89 (1991); TASK FORCE ON RACIAL COMPOSITION OF THE GRAND JURY, OFFICE OF THE HENNEPIN COUNTY ATTORNEY, FINAL REPORT 27 (1992) (recommending system that would guarantee that at least two jurors on every 23-member capital grand jury would be members of minority groups).

36. While there is very little research testing the circumstances under which litigants, observers, and others *believe* racial representation on juries to be essential to fairness, there has been more research exploring when racial composition actually changes jury decisions. King, *supra*, note 26, at 80-99 (summarizing studies). If perceptions of fairness correlate closely with the influence of juror race on jury decisions, which I suspect they do, we could look to this research for guidance about when racial composition is essential to perceptions of fairness.

lack of racial representativeness, or may undermine the appearance of fairness advanced by racial representativeness. For instance, while some evidence suggests that existing preferences for representative juries may be offset by cost concerns,³⁷ no research has examined whether those who believe that jury proceedings are fairer when the jury is racially representative would consider jury proceedings equally fair if they knew that racial representation was achieved by selection practices that are race-conscious rather than by procedures that are race-blind.

1. *The Relevance of Attitudes Towards Other Types of Affirmative Action*

Research into public attitudes towards other kinds of affirmative action may not be particularly helpful in predicting attitudes towards racial preferences in jury selection. Empirical studies of attitudes toward race-based selection procedures in employment and higher education have found that these selection procedures become objectionable to many when they are perceived as placing more weight on a candidate's group membership than on her qualifications or merit.³⁸ Whether the public would respond similarly to race-conscious jury selection is unknown.

On the one hand, jury service, unlike higher education or employment, is probably not perceived by most as a privilege that should be allocated by merit. Not that long ago, juries may have been expected to be more like judges—the most conscientious, educated, upright, law-abiding citizens in the district who deserved their blue-ribbon nickname. States excluded members of less privileged or educated groups by disqualifying those who did not pay taxes or own property, wage-earners, women, and racial and ethnic minorities.³⁹ But any expectation that jurors should have special expertise or qualifications has probably weakened as the Court has, over time, invalidated many of these criteria.⁴⁰ As expectations about who is entitled to vote have

37. See Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 *LAW & HUMAN BEHAV.* 333, 350 (1988) (noting that “[s]ubjects . . . appeared to trade off concerns with cost and procedural quality”).

38. See Rupert W. Nacotse, *But Do They Care About Fairness? The Dynamics of Preferential Treatment and Minority Interest*, 8 *BASIC & APPLIED SOC. PSYCHOL.* 177 (1987) (concluding that when group membership is the most salient selection criterion, the selector is perceived as less committed to fairness than the selector would be if group membership is used only to select among qualified candidates); LIND & TYLER, *supra* note 16, at 165 (citing studies finding greater likelihood of viewing racial preference as fair when preferred group members were deemed qualified for the position). For a recent overview of literature and research concerning reactions to affirmative action, see SUSAN D. CLAYTON & FAYE J. CROSBY, *JUSTICE, GENDER, AND AFFIRMATIVE ACTION* 20-29, 104 (1992).

39. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 *U. CHI. L. REV.* 867, 878 (1994) (summarizing jury qualifications in eighteenth and nineteenth century America).

40. Indeed, these formal qualifications were not always enforced. *Id.* at 879-82 (collecting accounts of service by jurors who appeared to be unqualified under then-existing criteria).

become more egalitarian, expectations about who is entitled to be a juror may have shifted as well, particularly since jurors are commonly drawn from voting rolls.⁴¹

On the other hand, despite the elimination of merit-based qualifications for voting, a sizeable proportion of the public may still prefer to limit the franchise to the most informed. A survey of thousands conducted between 1976 and 1979 found that 77% of "liberal" and 68% of "middle-of-the-road" respondents thought that all adult citizens, "regardless of how ignorant they may be" should be allowed to vote, while only 56% of "conservatives" thought so. A fourth of the "conservatives" responding thought that "only people who know something about the issues" should be able to vote.⁴² Such sentiments about voting qualifications may be a sign that many citizens believe that merit-based qualifications should continue to control one's opportunities for jury service as well. Moreover, jury qualifications have resisted reform longer than voting qualifications.⁴³ In sum, we know very little about whether or not "merit-based" public opposition to other forms of racial preferences would exist in the context of jury selection.⁴⁴

41. For a general discussion of constitutional and statutory limitations on voting, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1084-95 (2d ed. 1988) (discussing limitations of the franchise to those "primarily interested" in the election, those who pay poll tax or pass literacy tests, and long-time residents).

Lately, the idea that everyone is equally qualified to judge his or her peers has influenced discussions of judicial selection in the form of proposals for lay-judges. See, e.g., Patrick Tuite, *British Smart in Using Lay People to Judge Minor Disputes*, CHICAGO LAW., Sept. 1992, at 17. The use of race in judicial selection may raise questions about perceived fairness that are similar to those in the jury context. For instance, multi-judge courts that include minority judges may be perceived as less likely to treat litigants unfairly, cf. BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT: THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS 89-110 (discussing the "black seat" on the United States Supreme Court), but I found no empirical studies that attempted to test this hypothesis or that examined whether or not the use of race in selecting those judges affected perceptions of fairness.

42. HERBERT MCCLOSKEY & ALIDA BRILL, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES* 25, 283 (1983).

43. See Alschuler & Deiss, *supra* note 39, at 878; King, *supra* note 6, at 715 n.22 (listing statutes in Georgia, Arkansas, and Alabama that still disqualify those who lack good character, intelligence, or sound judgment). The Court's egalitarian reform has not reached as far in the jury context as it has in the voting context. The cross-section requirement of the Sixth Amendment allows for disproportionate exclusion of groups in order to accommodate significant state interests. It also does not include a mandate that everyone be tapped for jury service, only that those who are selected possess characteristics that represent the community from which they are drawn. See *Duren v. Missouri*, 439 U.S. 357, 367 (1979).

44. Because jury service differs from employment or educational opportunity, litigants' success or failure in defending race-conscious employment practices as essential to advance the appearance of fairness may have little impact on the outcome of challenges to affirmative action in jury selection. See Mike Hudson, *Black and Blue*, SOUTHERN EXPOSURE, Winter 1990, at 16 (discussing relationship between presence of African-Americans on police force and police-community relations); *Hayes v. City of Charlotte*, 10 F.3d 207, 213 (4th Cir. 1993) (declining to decide whether promoting public

2. *Perceptions of Varied Uses of Race During the Selection Process*

Even if Americans expect that jurors should be qualified by criteria other than race, we do not know whether the public would still perceive unfairness if race was only *a* factor rather than *the* factor used to select jurors. Some research suggests that the use of gender as a factor in employment decisions might be perceived as fairer than hiring or promotion policies that focus primarily on gender;⁴⁵ the same may be true for race. In addition, there appears to be no empirical research that attempts to test the prediction that the use of race in jury selection will deepen existing distrust of other-race jurors, either by leading more people to believe that the fairness of decisions and institutions depend on the race of decision makers, or by strengthening the conviction of those who already hold this belief.⁴⁶ Finally, there is as yet no empirical research that might tell us whether methods of jury selection that consider race as a criterion early in the process—at the jury districting or the qualification stage, for instance—would be perceived differently than procedures used after summoning.

In brief, the empirical information regarding public reactions to juries and to jury selection procedures is still too sparse to assist judges who seek to determine whether a particular race-conscious selection technique helps more than it hurts. Current research leaves room for various alternative theories about the optimum procedures for attaining diffuse and enduring trust in the fairness of jury proceedings.⁴⁷ The empirical plausibility of various contradictory predictions suggests that judges should at least pause and reflect before leaping to conclusions about how people will react to jury selection methods that consider race.

IV. GROUP DIFFERENCES IN PERCEPTIONS OF FAIRNESS

Existing research does clearly suggest, however, that perceptions of jury fairness differ significantly depending on the perceiver, so that judgments

respect for police is compelling interest that might justify promotion decisions in police department that are race-based).

45. See, e.g., Nacotse, *supra* note 38, at 187 (finding, in an experiment testing perceptions of fairness of affirmative action policy for women, that subjects rated as fairer the procedure that gave less weight to sex).

46. The Court in *Shaw* predicted that voter redistricting which is obviously race-based will have similar effects. *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1993). See also CAROL SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICAN INTERESTS IN CONGRESS* 203 (1992) (arguing that “race relations suffer when ‘electoral remedies’ favor one racial group over another or in environments where candidates can engage in racially polarizing tactics without fear of defeat”). Yet no reported research supports or refutes the racial-balkanization theory, either in the redistricting or in the jury selection context.

47. For instance, the information is consistent with the criteria that I outlined in note 17 *supra* for assessing the effects of a race-conscious procedure on perceptions of fairness, but it also does not rule out alternative hypotheses.

about which selection procedures appear fairest could also involve judgments about whose perceptions are most important. There are at least two group differences that existing studies suggest may be significant: differences between the perceptions of litigants and the perceptions of jurors; and differences between the perceptions of minority group members and the perceptions of majority group members.

A. Litigants' Perceptions vs. Jurors' Perceptions

Litigants and potential jurors may react differently to race-conscious selection procedures designed to ensure more minority participation on juries. While few researchers have attempted to measure the differences, if any, between the perceptions of fairness of third parties and those of disputants,⁴⁸ one study has suggested that litigants and non-litigants may have different priorities in assessing fairness.⁴⁹ In addition, research about attitudes towards affirmative action in other contexts suggests that race-conscious methods of selecting juries may be more acceptable to litigants than to potential jurors. The studies have concluded that some racial preferences are more palatable to Americans than others. Two authors summed up their findings this way: "If any government involvement is believed to be needed, the closer it is in content to assuring equal opportunity the greater is the degree of public support The more it looks like direct redistribution, the greater is the opposition."⁵⁰ Equal opportunity may mean very different things to litigants and jurors. For a litigant, equal opportunity might mean a chance equal to that of other litigants of obtaining a favorable verdict, or an equal chance to be judged by a jury containing jurors of his race or group. For a potential juror, however, equal opportunity may mean that the probability that she will receive a seat on a jury is no better or worse than the probability that any other citizen will receive the same seat. To borrow an image used by the Court to describe discrimination in jury selection, we

48. Most researchers investigating questions of procedural fairness have attempted to measure the perceptions of disputants. LIND & TYLER, *supra* note 16, at 123 (noting that in recent years few studies have looked at the nondisputants' judgments of fairness).

49. See, e.g., Pauline Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. EXP. SOC. PSYCHOL. 13 (1978) (concluding that to maximize procedural preferences of both third parties and disputants, decision control should rest with third parties and litigants should control the process of presenting evidence); cf. Landis & Goodstein, *supra* note 23, at 710 (suggesting that defendants who go to trial may have unrealistic expectations of trial outcome that, when dashed, generate perceptions of procedural unfairness); LIND & TYLER, *supra* note 16, at 123 (noting that procedures designed to fit the preferences of some groups of disputants may be contrary to the preferences of society, where the interests of the population at large differ from those of the disputants).

50. See JAMES R. KLUEGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY: AMERICANS' VIEW OF WHAT IS AND WHAT OUGHT TO BE 293 (1986).

resent it when the deck has been stacked against us,⁵¹ but whether or not a deck appears stacked will depend on what game we are playing.

B. The Perceptions of Minority Group Members vs. the Perceptions of Majority Group Members

Not only may perceptions of the fairness of jury selection procedures differ depending on the perceiver's role in the jury proceeding, but they may also vary with the racial identity of the perceiver. While some studies have found little or no correlation between a person's race and that person's perceptions of procedural justice,⁵² other information indicates that there are significant differences among racial groups, both in the level of confidence they have in the fairness of jury proceedings and in the aspects of those proceedings that inspire or undercut such confidence.

Researchers have found, for instance, that procedure, as opposed to outcome, has less of an influence upon the assessments of fairness of people who have low levels of support for legal authorities than it has upon the fairness assessments of others.⁵³ Two researchers concluded that "it is possible that black defendants will perceive unfairness regardless of the procedural factors operating in their cases."⁵⁴ Another researcher found that

51. *Holland v. Illinois*, 493 U.S. 474, 481 (1990) ("to say that the Sixth Amendment deprives the State of the ability to 'stack the deck' in its favor is not to say that each side may not, once a fair hand is dealt, use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side"); *J. E. B. v. Alabama*, 114 S. Ct. 1419, 1427 (1994) ("Discriminatory use of peremptory challenges may create the impression that . . . the 'deck has been stacked' in favor of one side.").

52. See, e.g., Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 *LAW & SOC'Y REV.* 483, 496-97 (1988) (finding that race is not a significant predictor of perceptions of procedural fairness); Lind et al., *supra*, note 20, at 966-67 (finding differences in race, gender, income, and employment status made no difference in outcome satisfaction reported by a litigant or satisfaction with process reported for various dispute resolution mechanisms including trial, settlement, and arbitration); Darlene Walker et al., *Contact and Support: An Empirical Assessment of Public Attitudes Toward the Police and the Courts*, 51 *N.C. L. REV.* 43, 76 (1972) (finding no relationship between race and levels of satisfaction of persons who have had contact with courts).

53. Tom R. Tyler, *Intrinsic Versus Community-Based Justice Models: When Does Group Membership Matter?*, 46 *J. SOC. ISSUES* 83, 89 (1990); see also Kenneth A. Rasinski, *What's Fair Is Fair—Or Is It? Value Differences Underlying Public Views About Social Justice*, 53 *J. PERS. & SOC. PSYCHOL.* 201, 206 (1987) (finding, after interviewing hundreds of Chicago households by telephone, that respondents with conservative values and no more than a high school education considered both procedural and distributive concerns important in assessing fairness, while college-educated conservatives based their judgments of fairness solely on procedural fairness, liberals with less education considered procedural fairness concerns most important, and college-educated liberals based their judgments of fairness solely on distributive fairness).

54. Landis & Goodstein, *supra* note 23, at 705; see also John J. Berman, *Parolees' Perceptions of the Justice System: Black-White Difference*, 13 *CRIMINOLOGY* 507, 513 (1976) (concluding that the opinions of African-Americans regarding courts were based on more than personal experience because African-Americans had consistently lower opinions about the fairness of courts in general, but did not perceive their own court treatment to be any less fair than the treatment of whites).

minority residents of Chicago were more likely than white residents to consider whether the legal authority had been polite to them or had shown respect for their rights when assessing fairness.⁵⁵

Other studies that have found self-interest to be a strong predictor of opposition to affirmative action policy⁵⁶ suggest that minority group members are more likely to perceive selection policies that preference minorities to be fairer than whites perceive them to be.⁵⁷ Indeed, in a study reported in 1988, a sample of white undergraduate students indicated that they believed that juries in which racial minorities were overrepresented were not as fair as juries in which minorities were represented in proportion to their percentage in the community.⁵⁸

In several studies of perceptions of criminal defendants, a significant percentage of African-American defendants indicated that they believed that they had not been treated as fairly as white defendants.⁵⁹ But the resentment and distrust is not limited to defendants. Minority jurors and non-jurors alike appear more likely than whites to believe that the criminal justice system is biased against members of minority groups.⁶⁰ A study

55. Tyler, *supra* note 25, at 833, 835 n.4.

56. See Jack Citrin & Donald P. Green, *The Self-Interest Motive in American Public Opinion*, in 3 RESEARCH IN MICROPOLITICS 1, 12 (Samuel Long, ed., Jai Press, 1990).

57. For example, the authors of one study measuring the reactions to affirmative action efforts in employment found that by varying information about past discrimination, they could manipulate perceptions of subjects that the recipient of affirmative action was stigmatized, and found that "stigma will occur only in the absence of some indication of past discrimination." Rupert W. Nacoste & Darrin Lehman, *Procedural Stigma*, 17 REPRES. RES. IN SOC. PSYCHOL. 25, 35 (1987). This finding suggests a hypothesis: Those who believed that procedures for jury selection had in the past unjustly discriminated against African-Americans, as jurors or litigants, would be less likely to regard selection efforts that preference minorities as unfair. See KLUEGEL & SMITH, *supra* note 50, at 211-13 (concluding that attitudes toward affirmative action are shaped by "racial effect" or "antiblack hostility," by self-interest, and by the degree to which a person believes current distribution systems are fair, noting that "blacks more than whites are suspicious of how fairly the stratification order does work in fact"); CLAYTON & CROSBY, *supra* note 38, at 23-27 (collecting studies).

58. MacCoun & Tyler, *supra* note 37, at 347.

59. Researchers have found that African-American prison inmates and parolees have a greater tendency than white inmates to perceive unfair treatment at the hands of participants in the criminal justice system, that inmates of both races who go to trial are more likely than those who plead guilty to view their treatment as unfair, and that a greater percentage of African-American inmates than white inmates are convicted after trial. See Berman, *supra* note 54, at 510-11 (reporting that when parolees were asked, "What percentage of police officers harass parolees?" African-American parolees averaged 53.4%, compared to an average of 24.6% for white parolees); *id.* at 512 (finding that African-American parolees had much lower confidence in the fairness of court decisions than did white parolees. When asked, "What percentage of court decisions are fair?" African-Americans answered, on average, 33.4% compared to the average of 49.7% for whites); Landis & Goodstein, *supra* note 23, at 697-98, 704 (finding greater dissatisfaction with the fairness of court decisions among African-American parolees than white parolees).

60. African-Americans have consistently expressed significantly less trust than whites in various aspects of the criminal justice system. See Landis & Goodstein, *supra* note 23, at 710 (stating that existing research "generally agrees that blacks are more likely than whites to report negative

reported in 1992 found that African-Americans who have served as jurors tend to perceive the criminal justice system as slightly less fair than other African-Americans who have not served as jurors. This is in direct contrast to the increase in perceptions of fairness experienced by most Caucasians and Hispanics after jury service.⁶¹

Recent surveys and opinion polls also show disparities in perceptions of fairness between African-Americans and whites. A poll of Americans conducted in May of 1992, after the acquittals in state court of the officers charged with beating African-American motorist Rodney King, revealed that 45% of African-Americans, compared to only 12% of whites, attributed the acquittals to racism rather than to prosecution errors, inadequate evidence, or loyalty to police.⁶² The poll also revealed that 84% of African-Americans, compared to only 43% of whites, agreed that the system favors whites over African-Americans.⁶³ Furthermore, 78% of African-Americans, compared to 25% of whites, said that African-Americans cannot get justice in this country.⁶⁴ In the same year, another poll of hundreds of people who had served as jurors in criminal cases revealed that 67% of African-American jurors but only 33% of white jurors believed that the trials of minority defendants ("blacks, Hispanics, and Asians") are not as fair as those afforded to their white counterparts.⁶⁵ A 1992 survey of over 1,500 Californians found that African-Americans tend to be more familiar with, but less confident in, the state courts and more concerned than whites about courts treating minorities fairly.⁶⁶ In April 1993, 68% of African-Americans polled

evaluations of their experiences with the criminal justice system," and citing sources); Shuman & Hamilton, *supra* note 28, at 455-56 (citing sources finding that race influences perceptions of fairness in judicial system).

61. See *supra* text accompanying notes 28-32 (discussing effect of jury service on perceptions of fairness). See also Assaad E. Azzi, *Procedural Justice and the Allocation of Power in Intergroup Relations: Studies in the United States and South Africa*, 18 PERS. & SOC. PSYCHOL. BULL. 736, 744 (1992) (concluding, after asking American and South African university student subjects how many seats of a hypothetical legislature their assigned ethnic group was "entitled to," that "group-level procedural justice concerns with regard to group representation are more salient to minorities than to majorities, producing preferences for [equal representation] in the former and for [proportional representation] in the latter"). In a later study, the same author concluded that minority group members are "more sensitive" than majority group members "to potential asymmetries in decision-making power at the group level." Assaad E. Azzi, *Implicit and Category-Based Allocations of Decision-Making Power in Majority-Minority Relations*, 29 J. EXP. SOC. PSYCHOL. 203, 223 (1993).

62. *Polls Show Racial Splits on King Verdict*, UPI, May 4, 1992, available on LEXIS, Nexis Library, UPI File.

63. *Id.*

64. Richard Morin, *Polls Uncover Much Common Ground on L.A. Verdict*, WASH. POST, May 11, 1992, at A15.

65. *Racial Divide Affects Black, White Panelists*, NAT'L L. J., Feb. 22, 1993, at S8. The poll also found that two out of three African-American jurors believed that African-American defendants unfairly get the death penalty more often than white defendants.

66. STATE OF CALIFORNIA, *supra* note 30, at 22. The survey also concluded that "Hispanics (and/or

by Reuters said that the justice system was biased, compared to only 33% of whites.⁶⁷ In November 1993, an opinion poll was conducted in a Florida community where an all-white grand jury had decided not to indict a white police officer for the shooting death of an African-American man. Almost one half of the African-American residents interviewed thought that race played a part in the jury's decision, while 68% of whites interviewed said that race was not a factor.⁶⁸

These studies and polls suggest significant differences between the fairness perceptions of whites, or majority group members, and those of African-Americans, or minority group members. Such differences make sweeping predictions about the ways in which "Americans" or the public would react to jury selection procedures overly simplistic and insensitive. One conclusion consistent with this data is that minority members would be less likely than majority members to view as unfair race-conscious efforts to increase minority representation on juries.

V. HOW EMPIRICAL INFORMATION CAN ASSIST COURTS ASSESSING JURY SELECTION PROCEDURES THAT CONSIDER RACE

A. *Helping to Frame the Normative Questions*

The limited empirical information available suggests that courts should avoid assuming that everyone, regardless of his race or status, would agree about the fairness or unfairness of a particular procedure. Assertions about reactions to race-conscious procedures should be examined critically in order to identify who might react in what ways and how strong that reaction might be. Empirical studies can help focus a court's attention on the complexity of this task, and on the harder questions about whose perceptions should carry the most weight and why.⁶⁹ Stated differently, in determining whether the use of race in jury selection is sufficiently related to promoting the appearance of fair proceedings, courts should acknowledge that not everyone's perceptions will be identical and should offer some reason for preferring the perceptions

Spanish-speaking Californians) are less familiar and knowledgeable, but slightly more confident" in the fairness of state courts. *Id.*

67. *Most Blacks Say Too Few Convicted in King Beating Case*, REUTERS, Apr. 19, 1993.

68. Jim Ross, *Race Divides Opinions on Bunch Case, Poll Says*, ST. PETERSBURG TIMES, Nov. 21, 1993, at A1. Earlier polls demonstrated African-Americans have long had less trust in ability of courts to treat African-Americans and whites equally. See STATE COURTS, *supra* note 32, at 40 (1977 national survey of nearly 2000 adults revealed that 49% of African-Americans and 34% of Hispanics compared to only 15% of whites responded that unequal treatment of African-Americans and whites by courts was serious and frequent problem).

69. As Professor David L. Faigman put it, "Social science does not make the difficult policy choices easier; its value lies in making the difficult choices clearer." David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L. J. 1005, 1094 (1989).

of some over those of others.⁷⁰ Moreover, judges should keep in mind that they are, as a group, less likely to perceive or acknowledge inequity in the court system than the general public.⁷¹

What might some of these reasoned rankings of perceptions look like? Judges may choose several alternative theories to prioritize various perceptions. Without endorsing any, let me suggest seven possibilities: 1) a judge may choose to value the perceptions of minority groups over those of majority groups, reasoning that any application of the equal protection clause must acknowledge its special role in protecting minority interests;⁷² 2) a court may strike the opposite balance, placing greater weight on the perceptions of the majority, reasoning that in order for our democracy to survive, an institution like the jury system must ultimately have the support of a majority of citizens; 3) a court may prefer to rely on the preferences of a random sampling of local community members on the theory that because the jury is a voice for a particular community, the community's definition of fair procedure should prevail;⁷³ 4) or a judge might, as a sort of compensation for past wrongs, grant special significance to the preferences of groups that have suffered most from

70. The task that judges would have in implementing an appearance-based approach to evaluating jury selection methods that are race-based is similar to the suggestion by Professor Charles Lawrence that judges use "interpretive judgment" in determining whether or not a particular governmental policy conveys a symbolic message to which our culture attaches racial significance. He notes that this is judgment that courts already exercise when evaluating the meaning that our culture gives to practices that may raise establishment clause concerns, or when interpreting whether an individual has a "reasonable expectation of privacy." Lawrence, *supra* note 13, at 359-63. Professor Lawrence observed,

In short, it would not be a bad thing for judges to base constitutional decisions on their own sense of what values best reflect our cultural tradition, so long as the conflicting perspectives competing to define those values are made explicit. The search to define those values could then serve a clarifying, rather than a mystifying, role.

Id. at 386. See also Martha Minow, *Equalities*, 88 J. PHIL. 633, 640 (1991) (advocating, in the context of jury discrimination, exposing the contrast between the perceptions of different social groups and the choice of "whose understandings to credit").

71. See STATE COURTS, *supra* note 32, at 53 (national survey of 194 state judges in 1977 finding that only three percent felt that unequal treatment of African-Americans and whites in courts was a serious or frequent problem compared to 19% of nearly 2000 members of the general public). Fifteen years later, this disparity persists. See STATE OF CALIFORNIA, *supra* note 30, at 7 (noting that although 34% of the Californians polled thought that unequal justice was the "main issue facing the California court system in the next thirty years," only 16% of the attorneys placed inequality at the top of their list—instead 53% of attorneys thought overcrowded courts was the worst of the 11 alternative problems listed); *id.* at 12, 14, 17, and 23 (noting that biggest gap perceived by general population is failure of courts to treat minorities the same as everyone else, while attorneys think the system is already delivering equal treatment, and are more confident in courts than non-attorneys).

72. Cf. Flagg, *supra* note 13, at 324-25 (suggesting that when interpreting constitutional provisions that protect pluralism, such as the Establishment Clause, courts should credit subjective experiences that diverge from those of the average person).

73. See Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 55 MD. L. REV. 107, 120 (1994) (explaining benefits of allowing locally drawn juries to enforce and interpret laws "according to local preferences").

jury discrimination in past; 5) courts may prefer to value the beliefs of those who are most fully informed about jury selection methods, alternatives, and statistics either because serious disagreement could be moderated by sufficient education or because informed opinions are more worthy than uninformed opinions;⁷⁴ 6) alternatively, if a judge is concerned that the ultimate goal of the jury system is to promote compliance with social norms, she may rely on the attitudes of those whose adherence to law is most likely to be undermined by perceptions of jury unfairness, reasoning that jury reforms should target those most in need of incentives to obey; 7) finally, judges may prefer their own assessments of fairness because of their training and experience. These are the kinds of difficult choices that courts should be considering when they use any appearance-based theory to define the scope of rights, such as the approach that the Court adopted in *Shaw* to evaluate electoral districting or the approach I have proposed for evaluating race-conscious methods for selecting juries.

B. Two Illustrations

To illustrate how empirical information may be considered by courts that try to predict how particular selection procedures may be received by the public, and how inconclusive that information is, consider two novel proposals for reforming jury selection. These proposals would no doubt be challenged under the equal protection clause if they ever became law. They both allow state decision makers to take race into account in the jury selection process, and thereby limit, to some degree, a person's opportunity to serve on a jury because of his or her race. In order to determine whether either of these proposals is sufficiently related to society's interest in promoting the appearance of fairness in jury proceedings, a court must first understand what messages about jury fairness each procedure sends to those who are selected or rejected for jury service. It must also consider how fair the procedure will appear to the defendant, the victim, and various social and

74. Professors Richard H. Pildes and Richard G. Niemi suggest that *Shaw* makes social perceptions about voting districts the key to the legality of districting decisions, but that "courts must decide which social perceptions to deem 'reasonable.'" Pildes & Niemi, *supra* note 13. They also note:

[T]he relevant social perceptions would have to be ones the legal system could legitimately credit; only perceptions that are properly informed, for example, and generated under normatively appropriate conditions could plausibly be relevant. Thus, the relevant social perceptions would have to reflect acceptance of governing law, such as the [Voting Rights Act] itself, as well as awareness of relevant general facts, such as, perhaps, the way in which redistricting routinely operates.

Id. at 536-37. See also Tyler & Mitchell, *supra* note 14, at 794 (noting that low expectations and lack of knowledge about alternatives and the effects of those alternatives may "constrain or degrade people's social judgments").

racial groups, and then decide whether it has the net effect of improving confidence in the fairness of jury proceedings.

The first proposal is the creation of Lindsay Jones, an attorney formerly with the Minnesota Attorney General's office, now working for the Minnesota Urban League. Mr. Jones has recommended the use of what he calls "jury seat districts." He proposes subdividing metropolitan jury districts into twelve smaller subdistricts, one district for each jury seat.⁷⁵ Race and ethnicity would be taken into account when drawing seat district lines, but it would not be the only factor. Other factors would include geographic residence, economic status, language, and other cultural features. Census tracts, council districts, or other neighborhood lines could serve as district lines. Veniremembers would be summoned at random from each district, and each jury must ultimately contain one juror from each district.

Community members and litigants might conclude that the plan does a better job than existing random selection and voir dire practices in insuring that every jury, not just every venire, reflects a cross-section of the community, thereby increasing overall confidence in the fairness of jury proceedings.⁷⁶ Potential jurors will understand that they are being rejected or selected for jury service because of where they live, but they may not resent it as much as if they had been selected or rejected exclusively because of their race or ethnicity. Finally, to the extent that a defendant's acceptance of a jury as fair depends upon the presence of his racial peers on that jury, the seat-district proposal increases the probability that members of formerly underrepresented groups will serve, thus increasing the appearance of fairness to minority litigants.

Yet in other ways the procedure may undermine the perception of juries as fair. By limiting the number of jurors from each discrete community to only one per trial, community members or others who believe that additional representatives of that community should have had at least the opportunity to sit on the jury may feel that the policy enforces a sort of tokenism: "You can have a representative, but only one." Conversely, litigants—whose perceptions of jury fairness are enhanced by allowing them control over who sits on the jury⁷⁷—may regard the seat-district proposal as less fair than existing procedures because it forces them to accept as jurors people they might have preferred to exclude with peremptory challenges. In addition, because the reason for selection or non-selection is so obvious to jurors and

75. Mr. Jones calls his proposal a "multi-pool stratification model" of jury selection. See Lindsay R.M. Jones, *Democratizing the Jury Selection Process: A Multi-Pool Stratification Model* (draft proposal 1993 on file with author).

76. See *supra* notes 20-27.

77. See, e.g., Lind et al., *supra* note 20, at 957-58 (citing sources establishing that litigant control affects assessments of fairness); LIND & TYLER, *supra* note 16, at 94-101.

potential jurors, it might create more feelings of unfairness in both litigants and potential jurors than a plan for using race-based districting to construct a qualified wheel or venire. More broadly, any jury selection policy that identifies as relevant discrete communities or groups, may reinforce divisions between those communities and groups, or sow distrust of other juries that lack representation from each community or group.⁷⁸

Indeed, to the extent that race-conscious electoral districting and race-conscious jury districting can be equated, we might expect the Court, at least, to assume that each would produce similar confidence-eroding effects. In the Court's view, districting practices that suggest that race and not geography is the key determinant of belief and behavior should be avoided because they deepen distrust of other-race representatives.⁷⁹ But there are two other features of plans for race-conscious jury districting that reduce the likelihood of the balkanizing effects predicted by the Court in *Shaw*. The Court feared that representatives elected by one racial group would fail to seek interracial solutions and would instead increase racial competition for resources in order to please their constituents. Even if these predictions about legislators were accurate⁸⁰ and even if such competition were undesirable, juror "representatives" are not motivated by the same incentives as legislators. They are not beholden to "constituents" for their livelihood or status, or even for their opportunity to serve on the jury. Their individual preferences and votes may

78. While this effect would not necessarily make juries chosen from jury seat districts appear less fair, it may impair confidence in the fairness of other jury systems that do not insure proportional representation on every trial jury, or affect the relationships between residents of jury seat districts in other contexts.

79. When legislators shape electoral districts to include particular percentages of minority voters, the districts may end up looking like "bug splats," snakes, or slashing Z's. According to the Court, these "bizarre" shapes make *race*, not geography, the most salient feature of electoral politics, driving home the message to voters and representatives alike that race predicts political belief and behavior. *Shaw*, 113 S. Ct. at 2827. Jury districting has similar geographically based traditions. Thus, a seat-districting proposal may avoid the criticism levelled by the Court at racially gerrymandered voter districts if the seat districts are tidy and compact, bounded by lines that were selected not to divide races but to identify communities defined by more than racial features. *Id.*

On the other hand, if the balkanizing effect that the Court in *Shaw* predicts is triggered not by departures from geographically tidy districts coupled with race-consciousness, but by departure from prior *norms* of districting coupled with race-consciousness, the seat-district proposal is more vulnerable. Voting districts are tinkered with after every census in an effort to accommodate the principle of one-person, one-vote. *See* TRIBE, *supra* note 41, at 1063-74 (discussing reapportionment). There is no similar tradition, and, consequently, no expectation, that vicinage boundaries be changed. Any effort to adjust these boundaries is likely to stand out as unusual. Additionally, any proposal to draw districts that will define who sits in a particular jury seat, as opposed to who might be drawn for service in a particular court would be especially novel, maybe even more novel than efforts to divide districts from which several representatives are elected at large into smaller single-member districts.

80. *See* A COMMON DESTINY, BLACKS AND AMERICAN SOCIETY 244-58 (Gerald D. Jaynes & Robin M. Williams, Jr., eds., 1989) (discussing African-American elected officials' responsiveness to African-American community concerns); SWAIN, *supra* note 46, at 207-25 (same).

not even become known.⁸¹ Thus, the decline in cross-racial confidence so feared by the Court in *Shaw* is not as likely in the jury context. Also absent from the jury context is the risk that those who draw the district lines using race do so to further their own self-interest. Because incumbent legislators may try to retain their seats by minimizing the political power of particular racial groups, the Court is particularly wary of departures from norms in voter districting. Those who draw jury district lines have no similar motivations. In other words, the consideration of race when defining jury districts does not risk undermining public confidence in the fairness of jury deliberation in the same ways that race-conscious districting may risk undermining public confidence in the fairness of the legislative process.

This brief analysis of the jury-seat-district proposal in light of existing empirical information demonstrates the range of its possible effects on perceptions of jury fairness. It also shows how crucial value choices will be when deciding whether, on balance, the overall effect of the policy is positive. For example, after cataloging the probable responses to the seat-district plan, one judge might reason that the increased divisiveness that the plan may cause outweighs the positive effects it may have on the support of litigants and community members who will gain previously underrepresented peers on juries. Another judge might decide that because it is more important to improve the confidence of minorities in jury proceedings, the plan's benefits exceed its costs.

Consider a second proposal, offered by Professor Deborah Ramirez, which I call the litigant-chosen mini-venire proposal.⁸² Each litigant would be permitted to help select from an ordinary venire, already screened for cause, a group of potential jurors that essentially serves as a mini-venire. Assuming that each litigant is entitled to six peremptory challenges, each litigant would select six veniremembers for the mini-venire, and the judge would select the remaining twelve or so mini-veniremembers at random from the larger venire. No mini-venire member would be told who picked her. The first twelve to enter the jury box would be chosen at random from the mini-venire by the judge. Voir dire would proceed as usual, complete with *Batson* protection. The race-conscious feature of this proposal is each litigant's ability to use race to select which six veniremembers she would like in the mini-venire.

Because this plan allows the *litigants* to select half of the venire from which the jury is drawn, it may increase significantly litigant confidence in jury

81. In particularly sensitive cases, even jurors' identities can be kept secret during the trial from their fellow community members.

82. See Deborah A. Ramirez, *A Brief Historical Overview of the Use of the Mixed Jury*, 31 AM. CRIM. L. REV. 1213 (1994). Professor Ramirez calls her solution the "affirmative peremptory choice."

verdicts.⁸³ Also, by using a mini-venire containing only the number of veniremembers that would be required to fill the jury box if each side exercised all of its peremptories, and by requiring veniremembers to be screened for cause before the mini-venire is chosen, the litigant-chosen mini-venire plan may increase the probability that litigants will end up with someone they really wanted on the jury. For example, if a litigant feels that it is important to have African-Americans on her jury, the plan makes it more probable that she would get them. Not only does the plan have the potential of increasing litigant perceptions of fairness, it may minimize other harmful perceptions of unfairness that might result from race-conscious selection procedures. This is because it makes race an optional—not mandatory—criterion for selection,⁸⁴ and because mini-veniremembers cannot be sure who picked them, the plan makes any use of race less obvious than it would be if race was used more openly.

Nonetheless, the use of race as a criterion for inclusion in the mini-venire may, in particular cases, be quite obvious to the jurors and to the judge, as well as to opposing litigants, and may create the same resentments in individual veniremembers that the Court has noted result when veniremembers are excluded because of race.⁸⁵ Allowing litigants to “include” jurors because of their race, but not “exclude” them may also trivialize or undercut the symbolic message of the *Batson* prohibition. A judge assessing the constitutionality of such a selection method would have to weigh these concerns and conclude which are more serious; a trying responsibility—yet unavoidable after the Court’s recent emphasis on shielding jurors from race-based treatment by those who select juries.

VI. CONCLUSION

The use of race in jury selection may soon be judged by the impressions that it makes. Judges who moderate disputes between advocates and opponents of selection practices that consider race will have to recognize those impressions and make choices about whose understandings should count most. Social science studies and public opinion polls can help a judge to understand how different groups may perceive selection procedures, so that the judge does not inadvertently overlook the perceptions of persons unlike himself. Ultimately, however, the questions judges must answer are not merely descriptive, they are also normative. When perceptions conflict, judges must decide whose trust is most essential to cultivate. Deliberation and principle, not simply statistics, are required for the task.

83. Litigants tend to be more satisfied with a decision-making process when they have some control over procedural aspects of that process. *See supra* notes 49 & 77.

84. *See supra* text accompanying note 45.

85. *E.g.*, *Georgia v. McCollum*, 112 S. Ct. 2348, 2353 (1992) (racially discriminatory challenges subject jurors to “open and public racial discrimination”).

