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Originally published as Nancy J. Kjøng, Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection in 68 N.Y.U. L. Rev. 707 1993.

NEW YORK UNIVERSITY LAW REVIEW

VOLUME 68

OCTOBER 1993

NUMBER 4

RACIAL JURYMANDING*: CANCER OR CURE? A CONTEMPORARY REVIEW OF AFFIRMATIVE ACTION IN JURY SELECTION

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Racial and ethnic minorities continue to be substantially underrepresented on criminal juries. At all stages of jury selection—venue choice, source list development, qualified list development, and jury panel and foreperson selection—traditional methods of selection exclude a disproportionate number of minorities. In response, a growing number of jurisdictions are employing race-conscious procedures to ensure that minorities are represented in juries and jury pools in proportions that equal or exceed their percentages in local communities. At the same time, the Supreme Court's most recent pronouncements on affirmative action and standing suggest that these reforms may be short-lived. Professor King suggests that the Court's current strict scrutiny standard can and should accommodate limited uses of racial classifications in jury selection. Specifically, Professor King contends that racially representative juries are essential to the appearance of fairness in criminal jury proceedings, and that maximizing the appearance of legitimacy is a compelling governmental interest. She claims that not all types of jurymantering further this interest, however, and proposes several features with which to distinguish measures which are likely to improve public confidence in the impartiality of the system from measures that are not likely to have this effect.

* The term "jurymantering" was coined by Jeffrey Rosen. See Jeffrey Rosen, Jurymantering, *New Republic*, Nov. 30, 1992, at 15. I do not use it in a pejorative sense. See T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588, 588 (1993) (noting derivation of term "gerrymander").

** Assistant Professor of Law, Vanderbilt University. My thanks to G. Thomas Munsterman of the National Center for State Courts and the many court administrators, judges, legislators, and state's attorneys around the country who responded to my inquiries, to the members of the Summoning and Qualification Subcommittee of The Jury Project in New York State, to all of those who offered their comments on this project, including Albert Alschuler, Robert Belton, James Blumstein, Anne Coughlin, Barry Friedman, Robert Rasmussen, and Nicholas Zeppos, and John Garvey and other participants in the University of Kentucky Randall-Park Faculty Colloquium. Lauren Degnan, Roger Martella, and Sandra Wilkinson provided able research assistance.

INTRODUCTION

Practically unnoticed, a growing number of courts are using race to select jurors. The race-based selection procedures they use are unlike efforts in the past, now denounced, that deliberately limited the opportunities of African Americans and members of other racial or ethnic minorities to serve on juries. Instead, courts that consider race when selecting juries today often pursue a different goal: to increase the representation of minorities on juries or in jury pools to levels that duplicate or surpass their percentages in local populations. Motivated by continuing defense challenges¹ and negative public reaction to juries and jury pools that fail

¹ Racial underrepresentation in jury source lists, venire, and grand juries still generates lengthy court battles, frequently in federal habeas corpus proceedings. Defendants continue to claim that procedures which produce a low proportion of minority jurors in their juries or jury pools amount to intentional discrimination or violate the sixth amendment guarantee to a jury drawn from a fair cross-section of the community. See *Duren v. Missouri*, 439 U.S. 357, 365 n.23, 368 (1979) (noting that "the fair-cross-section requirement involves a comparison of the makeup of jury venires or other sources from which jurors are drawn with the makeup of the community" and that once defendant shows underrepresentation, state bears burden of showing that "attainment of a fair cross section" would be "incompatible with a significant state interest"). Recent challenges to underrepresentation include *Floyd v. Garrison*, 996 F.2d 947, 949 (8th Cir. 1993) (involving sixth amendment challenge to underrepresentation of African Americans in venire); *United States v. Womack*, 985 F.2d 395, 397 (8th Cir. 1993) (same); *Ramseur v. Beyer*, 983 F.2d 1215, 1230 (3d Cir. 1992) (en banc) (involving equal protection challenge to grand jury selection), postconviction relief denied, 990 F.2d 185 (5th Cir.), cert. denied, 113 S. Ct. 2433 (1993); *Nickerson v. Lee*, 971 F.2d 1125, 1127 (4th Cir. 1992) (involving equal protection challenge to discrimination in selection of grand jury foreperson), cert. denied, 113 S. Ct. 1289 (1993); *Harris v. Texas Dep't of Criminal Justice*, 806 F. Supp. 627, 640 (S.D. Tex. 1992) (involving equal protection challenge to grand jury selection), cert. denied, 113 S. Ct. 3069 (1993); *Rutherford v. State*, 612 So. 2d 1277, 1278 (Ala. Crim. App. 1992) (involving equal protection challenge to discrimination in selection of grand jury foreperson); *Burleson v. Daphne*, 599 So. 2d 1251, 1251 (Ala. Crim. App. 1992) (involving sixth amendment challenge to underrepresentation of African Americans in venire); *People v. Cerrone*, 854 P.2d 178, 180 (Colo. 1993) (involving equal protection challenge to underrepresentation of persons with Spanish surnames on venire); *State v. Thomas*, 609 So. 2d 1078, 1080 (La. Ct. App. 1992) (involving equal protection challenge to discrimination in selection of grand jury forepersons); *State v. Jefferies*, 428 S.E.2d 150, 152 (N.C. 1993) (same); *State v. Evans*, 838 S.W.2d 185, 193 (Tenn. 1992) (involving equal protection challenge to underrepresentation of African Americans in venire), cert. denied, 1994 U.S. LEXIS 402; *Cantu v. State*, 842 S.W.2d 667, 678 (Tex. Crim. App. 1992) (involving equal protection challenge to underrepresentation of Hispanics and African Americans on grand jury), cert. denied, 113 S. Ct. 3046 (1993). For an analysis of the standards courts use to review such claims, see generally Nancy J. King, *Post Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63 (1993).

A number of these defense challenges succeed and result in retrials or resentencings. See, e.g., *Jefferson v. Morgan*, 962 F.2d 1185, 1187 (6th Cir.) (upholding equal protection challenge to underrepresentation of African Americans on grand juries), cert. denied, 113 S. Ct. 297 (1992); *Johnson v. Puckett*, 929 F.2d 1067, 1070 (5th Cir. 1991) (holding that discrimination in selection of grand jury foreperson violated equal protection clause), cert. denied, 112 S. Ct. 274 (1992); *Hollis v. Davis*, 912 F.2d 1343, 1346 (11th Cir. 1990) (holding that systematic exclusion of African Americans from grand and trial juries violated equal protection clause), cert. denied, 112 S. Ct. 1478 (1992); *United States v. Osorio*, 801 F. Supp. 966, 968 (D. Conn.

to reflect the racial diversity of their communities,² lawmakers and court administrators are turning to fixed percentages—what some would term racial quotas—to guarantee minority or ethnic representation in jury district populations, juror lists, venires, and juries themselves.³

At the same time that the social and litigation costs of unrepresentative juries have prompted lawmakers to consider race-conscious methods of ensuring representation, the United States Supreme Court's decisions on standing have made it easier for criminal defendants and civil litigants to challenge such practices,⁴ and its equal protection decisions have made those challenges more likely to succeed. In particular, the novel theory of equal protection injury that the Court adopted this past term in *Shaw v. Reno*,⁵ together with the uncompromising standards for reviewing race-based affirmative action efforts established by *City of Richmond v. J. A. Croson, Co.*,⁶ threaten every one of these recent race-conscious jury selection measures.

In this Article, I examine these initiatives, their purposes, and their vulnerability under *Shaw* and *Croson*.⁷ The most interesting conflict be-

1992) (finding equal protection and sixth amendment violations due to underrepresentation of racial and ethnic minorities on qualified wheel); *James v. Whitley*, No. CIV.A. 91-998-A, Magistrate Judge's Report at 20 (M.D. La. Oct. 27, 1992) (holding that discrimination in selection of grand jury foreperson violated equal protection clause); *Lee v. Alabama*, 1993 Ala. LEXIS 238, at *1 (Ala. Crim. App. Mar. 5, 1993) (finding that discrimination in selection of grand jury violated equal protection clause); *Flores v. State*, 783 S.W.2d 793, 794 (Tex. Ct. App. 1990) (finding that underrepresentation of Americans of Mexican descent on grand juries violated equal protection clause).

² See Charles L. Lindner, *Riots as a Response to the Law*, Nat'l L.J., Aug. 23, 1993, at 15 (describing several violent reactions); notes 203-10 and accompanying text *infra* (discussing public response to perceived unfairness of racially unrepresentative juries).

³ See, e.g., Administrative Office of the Courts, Judicial Council of Georgia, *Jury Commissioner's Handbook* 23 (5th printing 1992) [hereinafter *Georgia Handbook*] (noting that "balancing the box" "may help to reduce the time spent by the state defending challenges to the array, since in the last few years many of the challenges filed have asserted this ground"); Citizens Panel on Minority Jurors, Report Submitted to the Chief Judge of the Circuit Court of Kalamazoo County 5 (Feb. 8, 1993) [hereinafter *Kalamazoo Report*] (stating that although underrepresentation had been observed for some time, it was not until after first Rodney King verdict and its aftermath that judges "resolved to pursue the matter more vigorously").

⁴ See *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 113 S. Ct. 2297, 2303 (1993) (holding that in order for plaintiff to challenge minority set-aside program, it need only show "denial of equal treatment resulting from the imposition of the barrier not the ultimate inability to obtain the benefit"); *Georgia v. McCollum*, 112 S. Ct. 2348, 2357 (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); *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (holding that white defendant has standing to raise equal protection claim of African-American veniremembers excluded by prosecutor's race-based peremptories).

⁵ 113 S. Ct. 2816 (1993).

⁶ 488 U.S. 469 (1989).

⁷ The Supreme Court has not yet considered the constitutionality of more recent race-conscious jury selection reforms and has reviewed a similar practice purportedly intended to

tween the Court and proponents of these affirmative action efforts involves a dispute over how race-based jury selection affects public attitudes toward the justice system. The sponsors of race-conscious selection procedures believe that minority underrepresentation on juries ex-

achieve proportional representation only once, more than 40 years ago. See text accompanying notes 86-88 *infra*. Only a handful of reported cases, press reports, and opinion pieces have addressed recent race-conscious selection initiatives. See *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992), cert. denied, 113 S. Ct. 2433 (1993); *Meders v. State*, 389 S.E.2d 320 (Ga. 1990); *State v. Moore*, 404 S.E.2d 845 (N.C. 1991); Marla Dickerson, What Color Is a Jury of One's Peers?, *Detroit News*, May 23, 1993, at B1; Andrew Kull, Racial Justice: Trial by Cross-Section, *New Republic*, Nov. 30, 1992, at 17; David Margolick, As Venues Are Changed, Many Ask How Important a Role Race Should Play, *N.Y. Times*, May 23, 1992, at 7; Roger S. Worthington, Should Justice Peek? Police Trials Raise Questions About Juries' Makeup, *Chi. Trib.*, Aug. 29, 1993, at C1.

Legal commentators have not yet canvassed or evaluated these developments. One sampling of opinions on the subject reveals little agreement. Before officials in Hennepin County, Minnesota adopted their plan for reserving two of 23 seats on every capital grand jury for nonwhites, see text accompanying notes 67-68 *infra*, they solicited letter opinions from several well-known constitutional scholars. Three of the five professors responding assumed that the county's proposal would be subject to strict scrutiny if challenged, and all doubted that the proposal would withstand such scrutiny if challenged. See Letter from Albert Alschuler, Professor of Law, University of Chicago Law School, to Michael O. Freeman, County Attorney, Office of the Hennepin County Attorney (Oct. 18, 1993) (on file with the *New York University Law Review*) (arguing that proposal ought to survive strict scrutiny but probably would not, given the views of the current Court); Letter from Daniel Farber, Professor of Law, University of Minnesota Law School, to Carl Warren, Associate Clinical Professor, University of Minnesota Law School (Oct. 8, 1991) (on file with the *New York University Law Review*) (noting that strict scrutiny would apply); Letter from Fred L. Morrison, Professor of Law, University of Minnesota Law School, to Louis N. Smith, Deputy County Attorney, Office of the Hennepin County Attorney (Oct. 8, 1991) (on file with the *New York University Law Review*) (same). The other two commentators suggested that the proposal would be upheld under a lower level of scrutiny. See Letter from Roy Brooks, Professor of Law, University of San Diego School of Law, to Michael O. Freeman, County Attorney, Office of the Hennepin County Attorney (Oct. 21, 1991) (on file with the *New York University Law Review*); Letter from Sheri Lynn Johnson, Professor of Law, Cornell Law School, to Michael O. Freeman, County Attorney, Office of the Hennepin County Attorney (Oct. 22, 1991) (on file with the *New York University Law Review*); see also Randolph F. Treece et al., *Capital District Black Bar Association, How Far Have We Come Since the Magna Carta: Jury of One's Peers, Jury Panels, Minorities, and the Third and Fourth Judicial Districts 47-54* (1993) (suggesting that some race-conscious measures would be constitutional).

Judicial consideration of the racial demographics of jury districts before changing trial venues, described in text accompanying notes 39-44 *infra*, has received some recent attention in law reviews. See generally M. Shanara Gilbert, An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases, 67 *Tul. L. Rev.* 1855 (1993); Laurie L. Levenson, Change of Venue and the Role of the Criminal Jury, 66 *S. Cal. L. Rev.* 1533 (1993); Note, Out of the Frying Pan or Into the Fire? Race and Choice of Venue After Rodney King, 106 *Harv. L. Rev.* 705 (1993) [hereinafter *Out of the Frying Pan*]. Scholars have periodically debated the merits of racial quotas on trial juries, see note 74 *infra*; none has considered such proposals since the Court in *Croson* and *Shaw* hardened its position on the use of racial classifications to enhance minority opportunity. See Sheri Lynn Johnson, Black Innocence and the White Jury, 83 *Mich. L. Rev.* 1611 (1985) (proposing equal protection remedy to jury bias); Harold MacDougall, Note, The Case for Black Juries, 79 *Yale L.J.* 531, 537 (1970) (proposing proportional representation scheme for petit juries).

acerbates the suspicion and alienation that many people feel toward criminal proceedings, and that more inclusive selection procedures, even if they require classifying prospective jurors by race, are necessary to prevent further deterioration of public respect for the jury system. The Justices who joined the Court's majority opinion in *Shaw*, on the other hand, appear to have an entirely different understanding. In their view, any use of racial classifications to construct a decisionmaking body cannot improve the appearance of fairness of its proceedings and decisions but can only further promote racial divisiveness and distrust.

In this Article, I seek to reconcile these opposing positions by proposing a framework for evaluating race-conscious reforms in jury selection that is sensitive to this debate. My goal is not to displace the Court's latest equal protection doctrine but to understand and apply it in a new context. I consider what sorts of race-conscious selection methods are permissible today, assuming that the key features of the Court's modern equal protection cases—including strict scrutiny of both “benign” and “invidious” uses of racial classifications—remain intact.

In Part I, I review the reasons that minorities remain underrepresented on juries and the various race-conscious measures that many jurisdictions have embraced in order to counteract racially skewed juries and jury pools. Part II explains why proponents of these jurymantering schemes will soon face equal protection challenges and why they will have difficulty meeting the exacting standards of strict scrutiny, as long as the courts considering these challenges take the color-blind rhetoric in *Shaw* at face value. In Part III, I advise against such a wooden application of these cases in the jury context. I argue that because of the unique function and history of the criminal jury, race-consciousness at early stages of jury selection may be upheld when “reasonably necessary” to promote public confidence in the fairness of criminal jury proceedings.

I

A DESCRIPTION OF RACE-CONSCIOUS SELECTION PROCEDURES AND THE UNDERREPRESENTATION THEY ARE INTENDED TO CURE

The Court has been striking down attempts to exclude African-American citizens from juries for over a century.⁸ Yet in many jurisdic-

⁸ See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (holding that statutory exclusion of African Americans from jury service violated African-American defendant's right to equal protection); *Vasquez v. Hillery*, 474 U.S. 254, 262 (1986) (holding that intentional discrimination against African Americans in selection of grand jurors violated defendant's equal protection rights); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that prosecutor's use of peremptory challenges to exclude African Americans violated defendant's right to equal protection); see also *Castaneda v. Partida*, 430 U.S. 482, 495-98 (1977) (holding that under-

tions, jury selection policies that have survived constitutional challenges continue to produce juries and jury pools with percentages of African Americans and other racial or ethnic minorities that are smaller than the percentages of these groups in the adult population of the jury district.

A. *Why Minorities Are Still Underrepresented on Criminal Juries*

Any examination of the causes and extent of underrepresentation requires an overview of the process of selecting juries. Although selection methods vary widely, most involve four phases. First, jury districts are created by statute or court rule; in some cases prosecutors or judges may select a venue for a particular prosecution from among these districts.⁹ Combined, these decisions define the geographic boundaries within which potential jurors must reside.¹⁰ Second, judges or commissioners periodically create a *source list*, a list of names and addresses of residents available for jury service in a given district.¹¹ Third, jury commissioners or other officials select from the source list a group of potential jurors who meet qualifications specified by statute (the *qualified list*), and summon some or all of those qualified to come into court.¹² Fourth, from the group that responds to the summons (the *venire*), the judge and the parties choose the jurors who will serve on each trial jury. Judges will select grand jurors from the venire and will frequently choose the foreperson.

Procedures at each phase of jury selection continue to exclude greater percentages of minorities than whites. In highly publicized cases, changes of venue away from urban areas may decrease the percentage of minority jurors available.¹³ Voter registration lists, the most common

representation of Americans of Mexican descent in grand jury venire established prima facie case of intentional discrimination that was unrebutted by state).

⁹ Criminal cases are usually tried in the district in which the crime was committed. See generally Wayne R. LaFare & Jerold H. Israel, *Criminal Procedure* 737-60 (2d ed. 1992). When multiple venues are appropriate, the prosecutor may choose among them. See *id.* at 742-46. Also, in some circumstances, a trial judge may order that a trial be moved, upon motion of the defendant or, in some states, the prosecution. See *id.* at 747-49.

¹⁰ See, e.g., *Williams v. Superior Court*, 781 P.2d 537, 541 (Cal. 1989) (en banc) (noting discretion granted to governments to define boundaries of jury districts).

¹¹ In most states, officials create source lists using existing lists of residents, such as voter registration or driver's license lists. Some jurisdictions assign jury selectors the task of supplementing the designated list under certain circumstances. See, e.g., 28 U.S.C. § 1863(b)(2) (1988) (providing that sources of names other than lists of registered voters may be required to further policies of securing fair cross-section of community); Federal Judicial Center, *Handbook on Jury Use in the Federal District Courts* 12 (1989) [hereinafter *Federal Jury Handbook*] (discussing use of supplemental lists). Others grant considerable discretion to officials who create jury source lists. See note 46 *infra* (listing state statutes).

¹² In the federal system, the court will first choose a set number of jurors randomly from the source list to create a shorter source list, called the "master wheel," and then will choose qualified jurors from this master wheel. See *Federal Jury Handbook*, *supra* note 11, at 13-17.

¹³ See Timothy P. O'Neill, *Wrong Place, Wrong Jury*, *N.Y. Times*, May 9, 1992, at A23 (attributing acquittals of officers charged with beating African-American motorist Rodney

source of juror names,¹⁴ consistently underrepresent African-American and Hispanic citizens who would otherwise be eligible to serve as jurors.¹⁵

Also, some of the most common qualification procedures tend to

King to judge's decision to move trial from Los Angeles to predominantly white locality); Mary B.W. Tabor, *Jury Pool to Be Increased by 5000 in World Trade Center Bombing Trial*, N.Y. Times, Sept. 3, 1993, at B1, B2 (noting that defense lawyers say they are more likely to get ethnically diverse jury in New York area than anywhere else); see also Margolick, *supra* note 7, at 7 (quoting defense attorney who reasoned that from political, racial, and cultural perspective, Simi Valley was as different from downtown Los Angeles "as Manhattan is from the moon").

¹⁴ Only 12 federal districts use driver's license lists as source lists; the remaining districts use voter registration lists exclusively. See Larry Marks et al., *State of New York Unified Court System, Increasing Jury Representativeness* app. C (1992) (listing districts). The use of voter registration lists is also widespread in the states. See *id.* (listing 13 states that draw jurors exclusively from voter registration lists); see also Cynthia A. Williams, Note, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. Rev. 590, 592 (1990) (noting that vast majority of federal district courts rely exclusively on voter registration lists).

¹⁵ According to the 1990 census, for instance, 59% of voting-age African Americans said they were registered to vote, compared to 64% of voting-age whites. Of those registered, proportionately fewer African Americans than whites said that they actually voted (39% of African Americans compared to 47% of whites). The percentages of voting-age Hispanics who are registered or who vote are even lower: in 1990, only 32% of voting-age Hispanics said that they were registered and only 21% said they voted. See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1992*, at 269 (112th ed. 1992) (percentages rounded to nearest whole number); see also Hiroshi Fukurai et al., *Race and the Jury: Racial Disenfranchisement and the Search for Justice 18-21* (1993) [hereinafter H. Fukurai et al., *Race and the Jury*] (collecting studies documenting underrepresentation on voter registration lists).

Moreover, these figures underestimate the registration disparities between racial groups because the census tends to undercount the number of minority citizens in the population and relies on citizens to self-report their registration and voting history. Minorities tend to overreport registration and voting more than nonminorities. See *City of Detroit v. Franklin*, 4 F.3d 1367, 1371 (6th Cir. 1993) (noting that 1990 census undercount rate for African Americans was 4.8% compared to 1.7% for whites); Williams, *supra* note 14, at 607 (citing studies); see also Senate Comm. on Rules and Administration, *Report on the National Voter Registration Act of 1993*, S. Rep. No. 103-6, 103d Cong., 1st Sess. 17-18 (1993) [hereinafter *Senate Report*] (finding that most states remove people who do not actually vote from registration lists, "a practice which some believe tends to disproportionately affect persons of low incomes, and blacks and other minorities"); H. Fukurai et al., *Race and the Jury*, *supra*, at 50-51 (noting that combined voter registration and driver's license lists tend to duplicate names of white potential jurors more often than those of nonwhites, and noting difficulties of purging combined master file of duplicate names); Claude K. Rowland et al., *The Effects of Selection System on Jury Composition*, 4 *Law & Pol. Q.* 235, 246 (1982) (attributing lack of representation of Americans of Mexican descent on federal grand juries in Texas to underrepresentation on voter registration lists).

Studies show that many people do not register to vote because they know that the voter registration list is used as a source for jurors. See, e.g., Stephen Knack, *The Voter Participation Effects of Selecting Jurors From Registration Lists*, 36 *J.L. & Econ.* 99, 109 (1993) (concluding that juror-source practices are a powerful determinant of voter registration). The recently enacted National Voter Registration Act of 1993, 42 U.S.C. § 1973 (Supp. 1993) (popularly known as the "Motor Voter" law), which allows a citizen to apply for a driver's license and register to vote simultaneously, may reduce some disparity in voter registration rates.

screen out a greater proportion of minority jurors from source lists than whites. For instance, many jurisdictions "qualify" jurors by selecting only those who receive, complete, and return jury questionnaires. When jury administrators fail to revise source lists frequently,¹⁶ people who move often, particularly renters, never make it into the pool of qualified jurors. Because minorities are statistically more mobile than whites,¹⁷ a greater percentage of minorities than whites never receive jury questionnaires mailed to outdated addresses.¹⁸ Minorities also return jury questionnaires at lower rates than whites.¹⁹

From the group that does return questionnaires, jury selectors disqualify many, including those who they decide are not proficient in English²⁰ and those who have been convicted or charged with a felony.²¹

¹⁶ See, e.g., Federal Jury Handbook, *supra* note 11, at 17 (noting that court must update its master wheel every four years or less).

¹⁷ See H. Fukurai et al., *Race and the Jury*, *supra* note 15, at 22-23 (noting that 1986 study demonstrated that for whites, average length of stay at current address was approximately 10 years, compared with about 2.5 years for African Americans); *id.* at 37 n.9 (noting study that found over three years 48% of African Americans had moved, compared to approximately 25% of whites); Hiroshi Fukurai et al., *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, 22 *J. Black Stud.* 196, 202-03 (1991) [hereinafter Fukurai et al., *Jurors Go*] (discussing residential and economic mobility of minorities).

¹⁸ For instance, officials in Dane County, Wisconsin found that one-third of the jury questionnaires sent to African Americans were not deliverable, compared to only 14% of those sent to whites. See Dane County Jury Study Comm., *Final Report 7* (1993) [hereinafter *Dane County Report*]; see also H. Fukurai et al., *Race and the Jury*, *supra* note 15, at 48-51 (projecting that when source list is updated only every four years, 70.6% of African-American and Hispanic potential jurors under 30 years of age would be missed, compared to 63.8% of whites under 30, and that 43.4% of African Americans and Hispanics aged 30-54 would be missed, compared to 30.6% of whites aged 30-54); *id.* at 23-25 (noting that jury commissioners typically do not track down "undeliverables," though such follow-up is required by law); see also Hayward R. Alker, Jr. & Joseph J. Barnard, *Procedural and Social Biases in the Jury Selection Process*, 3 *Just. Sys. J.* 220, 226 (1977) (reporting study that found up to 14% of jury questionnaires were never delivered or were lost in mail); *id.* at 232 (noting that lower return rate in one community was due to out-of-date addresses on voter registration list); James Boudouris, *Jury Selection in Polk County, Iowa*, 1 *Forensic Rep.* 237, 242 (1988) (reporting study finding that 21.5% of jury questionnaires were undeliverable and 23.4% were not returned by recipients).

¹⁹ See Dane County Report, *supra* note 18, at 8 (noting that of questionnaires that were delivered but not returned, 26% were sent to African Americans compared to 6% to whites); H. Fukurai et al., *Race and the Jury*, *supra* note 15, at 54 (explaining that many minorities see no reason to participate in an institution "controlled by those who lord it over them"); R. Treece et al., *supra* note 7, at 25-29 (finding that return rate from zip codes for areas where residents are almost entirely non-Hispanic white was twice that of return rate from zip codes for areas where more nonwhites lived, a finding authors termed "astounding"); *id.* at 45 (noting that visible segment of minority community purposefully avoids jury service). In Dane County, when the undelivered and unreturned questionnaires were combined, the return rate for African Americans was about half that of whites (41% compared to 80%). See Dane County Report, *supra* note 18, at 8.

²⁰ See, e.g., Ala. Code § 12-16-59(b)(3) (1986) (requiring prospective juror to indicate whether she is "able to read, speak, understand and follow instructions given by a judge in the

Additionally, jury commissioners in several states must apply subjective criteria, selecting only the "most experienced, intelligent, and upright" members of the community.²² Of those who meet these qualifications, judges and jury clerks often excuse those who claim jury service would create financial hardship or pose transportation difficulties.²³ Because members of minority ethnic and racial groups are more likely to be less

English language"); Ark. Code Ann. § 16-31-102(a)(3) (Michie 1987) (disqualifying persons unable to speak or understand English); see also R.I. Gen. Laws § 9-9-1.1(a)(4) (Supp. 1992) (requiring that jurors be "able to understand and participate in the court proceedings"). But cf. R.I. Gen. Laws § 9-9-1.2(a) (Supp. 1992) (providing for sign language interpreter for hearing-impaired jurors).

²¹ See, e.g., 28 U.S.C. § 1865(b)(5) (1988), which provides:

In making such determination the chief judge of the district court . . . shall deem any person qualified to serve on grand and petit juries in the district court unless he . . . has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

Id.

²² Some states still give jury selectors the discretion to select as trial jurors only those citizens who are "intelligent and upright" and impose even stricter requirements for grand jurors. See, e.g., Ga. Code Ann. § 15-12-40 (1990) (requiring trial jurors to be "intelligent and upright," and grand jurors to be "among the most experienced, intelligent and upright persons of the county"). The Georgia Jury Commissioner's Handbook notes that in some circumstances, "the Commission must rely on its members' own personal knowledge of the county's residents to delete their names . . . from the voter's . . . list." Georgia Handbook, *supra* note 3, at 12; see also Ala. Code. § 12-16-60(a) (1986) ("A prospective juror is qualified to serve on a jury if the juror is generally reputed to be honest and intelligent and is esteemed in the community for integrity, good character and sound judgment . . ."); Ark. Code Ann. § 16-31-101(a)(7) (Michie 1987) (disqualifying "[p]ersons who are not of good character or approved integrity, are lacking in sound judgment or reasonable information, are intemperate, or are not of good behavior" from service as grand or petit jurors); Nijole Benokraitis, Racial Exclusion in Juries, 18 J. Applied Behav. Sci. 29, 33-35 (1982) (finding that in 1982 approximately 74% of jury officials in Virginia, 52% of officials in Alabama, 64% of officials in Arkansas, and 35% of officials in South Carolina disqualified the "non-intelligent," that 40-50% of officials in Louisiana, Mississippi, and North Carolina reported eliminating prospective jurors who were not of "good character," and that 25-35% of jury commissioners and district clerks in four Southern states eliminated prospective jurors who were deemed illiterate, although literacy was not a criterion specified by law). See generally Fukurai et al., Jurors Go, *supra* note 17. Many states, however, have abandoned such criteria. For example, West Virginia previously allowed a judge "in his discretion" to disqualify from the jury the following groups of people: "Idiots, lunatics, paupers, vagabonds, habitual drunkards, and persons convicted of infamous crimes." W. Va. Code § 52-1-2 (1981) (amended 1986). The state legislature recently removed these criteria and substituted two more specific categories of disqualified persons—citizens who have lost the right to vote because of criminal conviction and citizens convicted of perjury, false swearing, or other infamous offenses. See W. Va. Code § 52-1-8(b)(5), (6) (Supp. 1992).

²³ See, e.g., Task Force on Racial Composition of the Grand Jury, Office of the Hennepin County Attorney, Final Report 8 (1992) [hereinafter Hennepin County Report] (listing hardship as excuse); Alker & Barnard, *supra* note 18, at 236 (noting that federal jury clerks use their discretion to excuse potential jurors for hardship); Boudouris, *supra* note 18, at 245 (reporting that in one Iowa county 6.5% of those granted excuses were excused due to "financial" reasons). On the financial hardship imposed by jury service, see generally H. Fukurai et al., Race and the Jury, *supra* note 15, at 119-40.

proficient in English than whites,²⁴ to have fewer years of schooling,²⁵ to be charged with or convicted of felonies,²⁶ to be unable to afford unreimbursed costs of jury service,²⁷ use of these qualification and excuse

²⁴ See H. Fukurai et al., *Race and the Jury*, supra note 15, at 53-54 (discussing 1986 California study showing that inability to meet English proficiency requirement disqualified 37% of African-American and Hispanic males, 26% of African-American and Hispanic females, 25% of "other" males, 40% of "other" females, but only 7.5% of white males and 4.8% of white females) (percentages rounded); Benokraitis, supra note 22, at 35 (stating that "[s]ince disproportionate segments of the illiterate population are black . . . many may be disqualified because they are seen as 'not intelligent'"). When questionnaires ask potential jurors about their language skills, English proficiency may be self-assessed; otherwise an administrator or judge will review the questionnaire or question each juror in person to decide whether her answers are coherent enough to qualify.

²⁵ When jury selectors use years of education as a proxy for "intelligence," fewer African Americans are selected. See Fukurai et al., *Jurors Go*, supra note 17, at 211 n.5 (noting that because jury members are expected to have at least high school education and proportionately fewer African Americans finish high school, many African Americans are disqualified from jury lists); see also Robert A. Carp & Claude K. Rowland, *The Commissioner Method of Selecting Grand Jurors: A Case of a Closed and Unconstitutional System*, 14 *Hous. L. Rev.* 371, 393 (1977) (noting that commissioner-chosen grand juries tend to have higher education levels than federal grand juries).

In one study reported in 1982, "low intelligence" was the most common reason judges gave for excusing otherwise eligible African Americans from jury service. See Nijole Benokraitis & Joyce A. Griffin-Keene, *Prejudice and Jury Selection*, 12 *J. Black Stud.* 427, 437-38 (1982); see also Benokraitis, supra note 22, at 35 (noting that the three states that specified that prospective jurors must be "intelligent" also had largest underrepresentation of African Americans on jury lists and highest reported use by court officials of "intelligence" as screening factor, and quoting jury commissioner stating opinion that African Americans are less educated).

²⁶ See *United States v. Greene*, 995 F.2d 793 (8th Cir. 1993) (upholding disqualification of persons charged with felonies from jury pool despite disparate impact of such requirement on African Americans, reasoning that requirement furthers significant state interest); Committee on Jury Standards, ABA, *Standards Relating to Juror Use and Management* 39-40 (1993) [hereinafter *ABA Jury Standards*] (recommending that convicted felons "who have not had their civil rights restored" be excluded from jury service because many may resent the justice system and unduly favor criminal defendants, and noting that their presence on juries would weaken respect for judicial system). While African Americans make up only 12.4% of the population, 44.8% of those arrested for violent crimes and 34.6% of those arrested for all serious crimes in 1991 were African-American. See U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics—1992*, at 434 (1992). Nearly 47% of those convicted of felonies in state courts in 1990 were African-American. See *id.* at 528.

²⁷ Jurors might not be compensated for lost wages by employers. See Hiroshi Fukurai & Edgar W. Butler, *Organization, Labor Force, and Jury Representation: Economic Excuses and Jury Participation*, 32 *Jurimetrics J.* 49, 55 (1991). Although some states require that state employees be paid their regular wages during the time they serve as jurors, other employees who are not covered by these laws lose income when they serve as jurors. Juror fees are nominal, ranging from nothing to \$50 per day. See National Ctr. for State Courts, *The Relationship of Juror Fees and Terms of Service to Jury System Performance* 15, 37-47 (1991) [hereinafter *Juror Fees*] (noting that significant portion of jurors surveyed reported that jury service was financial burden).

Loss of income during jury service may hit members of minority groups particularly hard, as their earnings, on average, are lower than those of whites. See, e.g., *United States v. Leonetti*, 291 F. Supp. 461, 474 (S.D.N.Y. 1968) (observing that hardship excuse explains in sub-

procedures reduces the proportion of minority jurors in the jury pool even further.²⁸

Moreover, even though most jurisdictions randomly choose which qualified potential jurors to summon as veniremembers,²⁹ the summoning process itself sometimes yields a lower percentage of minorities than whites.³⁰ Proximity requirements, in particular, can disproportionately exclude minorities from jury service in urban areas where racial groups are residentially segregated and minority race precincts are not sampled because of their distance from the courthouse.³¹ Facially neutral criteria

stantial measure underrepresentation of poorer citizens on grand juries in district); *People v. Cerrone*, 854 P.2d 178, 190 (Colo. 1993) (concluding that trial judge's choice of veniremembers who had salaried jobs in order to prevent hardship constituted race-neutral reason for exclusion of Spanish-surnamed individuals). A recent survey noted that 22% of those with incomes over \$40,000 have served on a trial jury, compared to 15% of those who earn less than \$40,000. See Archie S. Robinson, *We the Jury: Who Serves, Who Doesn't*, USA Today, Jan. 1992, (Magazine), at 62.

Researchers attempting to determine the racial impact of excuses for economic hardship have reached mixed conclusions. Compare J. Van Dyke, *Jury Selection Procedures* 120-21 (1977) (stating economic hardship excuse reduces jury service by racial minorities) and National Minority Advisory Council on Crim. Just., *The Inequality of Justice: A Report on Crime and the Administration of Justice in the Minority Community* 207 (1980) (noting lack of public transportation to courthouses is factor that discourages participation of minorities in juries) with H. Fukurai et al., *Race and the Jury*, supra note 15, at 55 (discussing California study finding greater percentage of white than minority jurors requested to be excused because of economic hardship, although African-American and Hispanic jurors are more likely than white jurors to ask to be excused from jury service because of personal obligation or difficulties in traveling to courthouse) and *Juror Fees*, supra, at 52-53 (study of nearly 8500 persons who participated in jury service found that 18% of whites were granted "financially-based excuses" compared to only 9% of nonwhites).

²⁸ See *Juror Fees*, supra note 27, at 27 (noting that in comparison to state courts, "more black jurors are excused in the federal court which is probably related to the longer term of service"); R. Treece et al., supra note 7, at 29 (finding that for specific two-month period rejection and exemption rates for minority respondents were much higher than for nonminority respondents—11% and 8% respectively, compared to 4% and 2.5%).

²⁹ See, e.g., *Federal Jury Handbook*, supra note 11, at 35 (advising that clerk or jury staff select names of prospective jurors at random from qualified wheel).

³⁰ Because people from minority racial groups are statistically more transient than whites, time lags between the creation of qualified lists and the summoning stage will disproportionately exclude minority jurors unless efforts are taken to update addresses and to follow up on no-shows. See H. Fukurai et al., *Race and the Jury*, supra note 15, at 64 (noting that "residentially mobile groups of individuals are less likely to receive [jury] summonses"); cf. *Atwell v. Blackburn*, 800 F.2d 502, 506 & n.6 (5th Cir. 1986) (stating that service of jury summons in housing project was discontinued because of "fear of the [process server's] life"), cert. denied, 480 U.S. 920 (1987).

³¹ See, e.g., Hiroshi Fukurai et al., *Cross Sectional Jury Representation or Systematic Jury Representation? Simple Random and Cluster Sampling Strategies in Jury Selection*, 19 J. Crim. Just. 31, 33 (1991) ("Traditional methods of jury selection . . . [offer] no guarantee that areas with a concentration of Blacks will be sampled and therefore no guarantee that the list of potential jurors drawn will reflect the racial composition of the county."); see also, e.g., H. Fukurai et al., *Race and the Jury*, supra note 15, at 44 (noting that proximity requirements in San Bernadino exclude rural Hispanic and Native-American residents); id. at 56-62, 166-90 (noting that traditional methods of jury selection based on simple random sampling are inade-

for service as a grand juror or grand jury foreperson have also been applied by judges to exclude disproportionate numbers of racial and ethnic minorities.³² Finally, some evidence suggests that district attorneys continue to exercise peremptory challenges to exclude disproportionate numbers of minority veniremembers from trial juries.³³

Over the years, criminal defendants have challenged many selection procedures that yield disproportionately low numbers of African-American veniremembers, jurors, and forepersons. Courts, however, have struck down only those selection practices that challengers prove are *intentional* efforts to limit jury service opportunities by race³⁴ or those selection criteria that create substantial underrepresentation and cannot be justified by significant state interests.³⁵ Thus, the use of voter registration lists, literacy qualifications, and hardship excuses continues despite decades of litigation³⁶ and criticism by legal commentators.³⁷

quate because minority and ethnic groups are not equally distributed within jurisdiction and recommending sampling method that would draw qualified jurors from each geographic area in jury district).

A second wave of exemptions, deferrals, and excuses *after* jurors appear for service may further exacerbate underrepresentation. See Hennepin County Report, *supra* note 23, at 9-10 (noting that many potential grand jurors are excused at this point for hardship considering extended time commitment such service usually requires); see also H. Fukurai et al., *Race and the Jury*, *supra* note 15, at 137 (noting California study that found that twice as many minority women as white women asked to be excused after responding to summonses, and noting that further research is needed to determine whether occupational exemptions exclude disproportionately more minority jurors).

³² See, e.g., *People v. Cerrone*, 854 P.2d 178, 190 (Colo. 1993) (noting that judge's practice of picking veniremembers who are highly educated and paid by salary rather than wage disproportionately excluded Spanish-surnamed persons); *Andrews v. State*, 443 So. 2d 78, 81-83 (Fla. 1983) (upholding judge's failure to choose any African-American grand jury forepersons, given his explanation that he chose whoever demonstrated "[l]eadership and ability to preside over the deliberations").

³³ See, e.g., Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, 16 *Hamline L. Rev.* 477, 570-71 (1993) [hereinafter *Minnesota Task Force Report*] (stating that approximately half of all public defenders and judges surveyed believed prosecutors are more likely to use peremptory challenges against minorities).

³⁴ See note 8 *supra* (citing cases).

³⁵ See *Duren v. Missouri*, 439 U.S. 357, 367-70 (1979) (finding unconstitutional Missouri provision which provided automatic exemption for any women requesting not to serve); *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975) (holding that Louisiana's special exemption for women violated sixth and fourteenth amendments because it operated to exclude women from petit juries).

³⁶ Although challenges to selection procedures have at times prompted legislative reform, courts have for the most part upheld the exclusive use of voter registration lists to create jury lists. See *Floyd v. Garrison*, 996 F.2d 947, 949-50 (8th Cir. 1993) (upholding Arkansas's use of voter registration lists); *Williams*, *supra* note 14, at 592 n.17, 602 n.78, 626 n.246 (citing cases). But see *People v. Harris*, 679 P.2d 433, 446 (Cal.) (holding that sole use of voter registration list violates sixth amendment), cert. denied, 469 U.S. 965 (1984).

For further discussion, see *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 224 (1946) (suggesting that financial hardship excuse for wage earners is justifiable); *United States v. Benmuhar*, 658 F.2d 14, 18-20 (1st Cir. 1981) (noting that state's significant interest in having

The cumulative result is that in many communities across the country, the percentage of minority veniremembers, trial and grand jurors, and grand jury forepersons is significantly lower than the percentage of minority adults living in the communities from which they are drawn.³⁸

B. Race-Conscious Jury Selection

In order to avoid the undesirable consequences of racially unrepresentative juries (consequences I will explore in Part IV), administrators, courts, and legislators have turned to selection procedures that take account of race. These procedures are designed to prevent racial underrepresentation by ensuring a certain proportion of minority jurors. These jurymandering techniques take many forms.

branch of national court system operate in national language rebutted defendant's prima facie showing that English proficiency requirement for jurors resulted in underrepresentation), cert. denied sub nom. *Nieves v. United States*, 457 U.S. 1117 (1982); *Cerrone*, 854 P.2d at 193 (finding that judge's practice of picking most highly educated veniremembers, veniremembers paid by salary rather than wage, and geographically diverse residents for grand jury venire were race-neutral reasons that rebutted prima facie case of intentional discrimination against Spanish-surnamed persons); *State v. Paz*, 798 P.2d 1, 6-11 (Idaho 1990) (upholding English proficiency requirement, citizenship requirement, and existing follow-up procedures for those who fail to respond to questionnaires), cert. denied sub nom. *Paz v. Idaho*, 111 S. Ct. 2911 (1991); *Simon v. State*, No. 90-KA-0904, 1993 Miss. LEXIS 431 (Miss. Sept. 30, 1993) (en banc) (holding venue change that decreased opportunity of African-American defendant to obtain African-American jurors did not violate defendant's constitutional rights); *Mallet v. Missouri*, 769 S.W.2d 77, 79-81 (Mo. Sup. Ct. 1989) (same), cert. denied, 494 U.S. 1009 (1990); *People v. Guzman*, 457 N.E.2d 1143, 1146-49 (N.Y. 1983) (upholding use of questionnaires and summonses to select jurors despite lower response rate of Hispanics and higher disqualification rate for Hispanics on the basis of English literacy problems), cert. denied, 466 U.S. 951 (1984).

³⁷ In particular, legal commentators have repeatedly criticized the acceptance of voter registration lists as the sole source of juror names. See *Alker & Barnard*, supra note 18, at 237-39 (concluding that efficiency and competency rationales for requiring jurors to be drawn only from voter registration lists fail); *David Kairys et al., Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Cal. L. Rev. 776, 809-11 (1977) (arguing that states have no legitimate interest in declining to supplement voter registration lists with more representative lists); *Williams*, supra note 14, at 621-30 (noting that use of voter registration lists systematically underrepresents minorities and is not sufficiently related to significant state interest, and suggesting that judges would invalidate such plans more frequently if they were aware of inaccuracies in census data and if they better understood difference between sixth and fourteenth amendment challenge to underrepresentation).

³⁸ See ABA Task Force on Minorities & the Justice System, *Achieving Justice in a Diverse America* 15 (1992) [hereinafter ABA Report] ("Juror pools may be disproportionately Caucasian, and selection techniques that make juror pools a fairer cross-section of the community are not as widely implemented as they should be to ensure representative venires."); *Dane County Report*, supra note 18, at 6 ("The Committee heard a considerable amount of anecdotal information from judges, attorneys, and citizens indicating that there did not appear to be a fair cross-section of minorities and other segments of the community who may not be on the Department of Transportation lists. . . . The data . . . supported the anecdotal information and showed that African-Americans are underrepresented on actual juries in Dane County."); *H. Fukurai et al., Race and the Jury*, supra note 15, at 3 (citing sources).

1. *Venue Choices and Jury District Boundaries*

Following two recent, highly publicized cases in which a change of venue significantly altered the racial composition of the available jury pool,³⁹ legislators in several states introduced measures that would require courts to consider race when evaluating a request for a change of venue.⁴⁰ In Florida, for example, trial judges must now "give priority to any county which closely resembles the demographic composition of the county wherein the original venue would lie."⁴¹ Similar measures proposed in other states refer to race specifically.⁴² These rules would require judges to consider the race of potential jurors when deciding whether they will have the opportunity to serve as jurors in a particular case.⁴³

³⁹ I refer here to the state prosecution of the Los Angeles police officers charged with beating African-American motorist Rodney King and the Florida homicide trial of Miami police officer William Lozano. For a detailed description of these cases, see Gilbert, *supra* note 7, at 1868-82.

⁴⁰ Some sponsors of race-conscious initiatives have explicitly mentioned the Rodney King case as a reason for their proposals. See, e.g., New York State Assembly Memorandum in Support of Legislation 1 (1993) (Sen. Joseph L. Galiber, Senate Sponsor, Assembly Member G. Oliver Koppell, Assembly Sponsor) (supporting A.B. 3489, listing public concern about venue change in Rodney King case as justification for mandate to consider racial demographics of jury pool); New Jersey Supreme Court Ad Hoc Comm. on Jury Selection, Final Report 30-31 (Oct. 1993) [hereinafter *New Jersey Report*] (noting that court rule requiring consideration of demographics responds to concerns raised by King case). Pending bills as of February 1, 1994 include A.B. 1458, N.J. 205th Leg., 1st Reg. Sess. (1992-1993) and A.B. 3489, N.Y. Assembly Reg. Sess. (1993-1994). A bill in Texas recently died in committee. See S.B. 285, Tex. 73d Leg., 1st Reg. Sess. (1992-1993). A similar bill passed the California legislature, but was vetoed. See S.B. 159, Cal. Reg. Sess. (1993-1994) (vetoed by governor Sept. 7, 1993). In August of 1993, the American Bar Association approved its new Standards for Criminal Justice: Trial by Jury, including Standard 15-1.4 "Change of venue or continuance," reprinted in 53 *Crim. L. Rep. (BNA)* 2347, 2348 (Sept. 29, 1993)) [hereinafter *ABA Criminal Justice Standards*] (providing, *inter alia*, that court, in determining where to move trial, should consider "[t]he racial, ethnic, religious and other relevant demographic characteristics of the proposed venue, insofar as they may affect the likelihood of a fair trial by an impartial jury").

⁴¹ 1993 Fla. Laws ch. 225.

⁴² In New York, for example, the bill introduced last year would require judges to consider whether the destination county is similar to the original venue in terms of "racial, ethnic and other demographic composition." A.B. 3489, N.Y. Assembly Reg. Sess. (1992-1993). The Texas bill would have defined the "demographics" which judges must "most closely match" as "the relative proportion of racial minorities in the population, including the proportions of African-Americans, Asian-Americans, Latin-Americans, and Native-Americans." S.B. 285, Tex. 73d Leg., 1st Reg. Sess. (1993-1994).

⁴³ See, e.g., *Trial Is Moved for 2 Charged in Burning of Brooklyn Man*, N.Y. Times, June 23, 1993, at A9 (stating that Florida judge rejected Fort Myers as transfer site for Tampa case involving trial of two white men accused of burning African-American tourist "because the racial composition of its population was not similar to that of Tampa"); see also Gilbert, *supra* note 7, at 1882-86 (describing Mississippi judge's decision in murder prosecution of Byron De La Beckwith to select jurors from county that has racial composition similar to original location). The American Bar Association's recent decision to recommend that judges consider race when ordering change of venue in criminal cases, see note 40 *supra*, followed a task force

In New York, the Capital District Black Bar Association, in one of several reports now under consideration by The Jury Project, a special group appointed by the Chief Judge of the New York Court of Appeals, has recommended an additional method of structuring the racial composition of populations from which jurors are drawn. The report recommends that jury districts, similar to voting districts under the Voting Rights Act, be constructed with race in mind, in order to "increase, not minimize minority influence on those matters that transpire in the heart of their community."⁴⁴

2. Source Lists

Other jurisdictions have used racial classifications to ensure representativeness on their source lists.⁴⁵ In jurisdictions that delegate the creation of jury lists to commissioners or judges rather than adopting preexisting lists such as voter registration or driver's license lists, jury commissioners have used race to create lists of potential jurors that reflect the racial composition of the eligible population.⁴⁶ Other jurisdictions require officials to review the source list periodically and supple-

finding that the Los Angeles riots after the verdicts in *People v. Powell* "demonstrate the profound problems that attend a change of venue in a racially or ethnically charged case if the demographics of the county to which the case is removed are not similar to the demographics of the county where the incident occurred." ABA Report, *supra* note 38, at 14-15.

⁴⁴ R. Treece et al., *supra* note 7, at 52-54. The New Jersey Supreme Court's Ad Hoc Committee on Jury Selection in criminal cases also recently considered expanding the size of the district from which jurors are drawn in particular cases. The Committee ultimately rejected the option, concluding that efforts to classify those cases which required expanded pools would cause constitutional, fiscal, and logistical problems. See New Jersey Report, *supra* note 40, at 24-25.

⁴⁵ Related suggestions include requiring that a certain percentage of the jury commissioners who select jury lists be nonwhite. See *Carter v. Jury Comm'n*, 396 U.S. 320, 342-43 (1970) (Douglas, J., dissenting in part) (arguing that jury commissions must include representatives of minority races); cf. Larry Rohter, *Lozano Case Tests How Racially Balanced a Jury Must Be*, N.Y. Times, May 16, 1993, at D3 (noting Florida governor's veto of legislation that would have required proportional representation by race and sex on nonelective state boards and commissions).

⁴⁶ In Texas, commissioners are directed by statute to consider race in order to select grand jurors who represent a cross-section of the county population. Tex. Code Crim. Proc. Ann. art. 19.06 (West 1994); see also *Brooks v. Beto*, 366 F.2d 1, 5 (5th Cir. 1966) (noting that commissioners deliberately placed two African Americans on list of 16 potential grand jurors), cert. denied, 386 U.S. 975 (1967); *Collins v. Walker*, 329 F.2d 100, 104 (5th Cir.) (noting that commissioners specially included six African Americans on list of 20 potential grand jurors), cert. denied sub nom. *Hanchey v. Collins*, 379 U.S. 901 (1964); *Carp & Rowland*, *supra* note 25, at 381 (noting that most commissioners interviewed reported that their judges encouraged just enough diversity to immunize panel from later charge of grand jury discrimination, and noting that African-American jury commissioner understood his job was to pick several potential minority jurors); *Rowland et al.*, *supra* note 15, at 245-56 (noting that jury commissioners in two Texas counties were prompted by successful defense claims of jury discrimination to "exercise their discretion to encourage minority representation and to prevent the quashing of future indictments" and suggesting that lack of female representation on those same grand

ment it with other lists or with names of individuals if it underrepresents particular groups.⁴⁷

3. *Qualified Lists and Venires*

Some courts take an active role in ensuring that qualified lists or venires reflect the racial composition of the adult population.⁴⁸ For more than a decade, the United States District Court for the Eastern District of Michigan has adjusted its qualified juror list to reflect the racial com-

juries was due to failure of defense bar to challenge female exclusion).

At least five states in addition to Texas still delegate discretion to commissioners or others to select the original source list for grand or trial jurors, allowing them, perhaps, the opportunity to deliberately select a racially balanced list. See Conn. Gen. Stat. Ann. § 54-45(a) (West 1990) (stating that superior court selects grand jury); Ga. Code Ann. § 15-12-40 (1993) (requiring that commissioners select grand jury list from voter registration list and allowing commissioners to supplement this if not representative); La. Code Crim. Proc. Ann. art. 408 (West Supp. 1992) (requiring that commissioners compile at least 300 names for "general venire" and that names then should be drawn randomly from that pool for qualification into smaller venires); Tenn. Code Ann. § 22-2-302 (Supp. 1993) (allowing jury commissioners to supplement tax records and driver's license lists with "other available and reliable sources"); Va. Code Ann. § 19.2-194-195 (Michie Supp. 1993) (requiring that judges select between 60 and 120 people to be on grand jury list, then handpick five to seven of those to be summoned); Charles R. DiSalvo, *The Key-Man System for Composing Jury Lists in West Virginia—The Story of Abuse, the Case for Reform*, 87 W.Va. L. Rev. 219, 244-45 (1985) (noting that jury commissioner responsible for compiling list of about 2000 names for petit juries and 150 names for grand juries stated in 1982 that he "asked a couple of prominent coloreds" to give him "a list of about twenty or so to put in the box," and noting that commissioner stated that he too put names of about 20 African Americans on his half of list). But see Letter from Jerry P. Slonaker, Chief, Appellate Section, Office of the Attorney General, Commonwealth of Virginia, to author (Sept. 22, 1993) (on file with the New York University Law Review) (asserting that he is "aware of no effort to use or authorize racial criteria [in selecting juries in Virginia], albeit in terms of artificially infusing more minorities into the process").

⁴⁷ See *Berryhill v. State*, 291 S.E.2d 685, 690-91 (Ga. 1982) (upholding jury commissioner's decision to supplement source list drawn from voter registration list with target number of nonregistered women); Georgia Handbook, *supra* note 3, at 6-7 (allowing commissioners to supplement voter registration lists with names of new residents known to commissioners and those who have requested to serve); see also The Franklin H. Williams Jud. Comm'n on Minorities, *Commissioner of Jurors Survey 3* (1993) [hereinafter *Williams Commission Survey*] (noting that 74% of jury commissioners responding in New York State had prepared special mailings to minority organizations, congregations, or churches); cf. *United States v. Bennett*, 445 F.2d 638, 641 (9th Cir. 1971) (rejecting defendant's claim that use of voter registration list alone violated 28 U.S.C. § 1863(b)(2), which provides that other sources for juror names shall be used when voter registration lists fail to protect defendant's right to impartial jury drawn from fair cross-section of community), cert. denied, 404 U.S. 1023 (1972).

⁴⁸ See generally G. Thomas Munsterman & Janice T. Munsterman, *The Search for Jury Representativeness*, 11 Just. Sys. J. 59, 60 (1986) (describing process of separating or stratifying jury lists into cognizable groups and sampling each group to include desired representation of various strata, a process that can be used to select jury candidates from source or qualified list); *id.* at 74 ("With the understandable frustration of courts, which, despite multiple lists, still do not achieve acceptable representation of particular cognizable groups, a stratified selection technique could be attractive.").

position of the district. In 1982, the judges of the Eastern District revised their jury selection plan after discovering that the process of qualifying potential jurors with questionnaires randomly sent to residents listed on voter registration and driver's license lists yielded a qualified wheel⁴⁹ with only fourteen percent African Americans, a figure significantly lower than the nineteen percent African-American population in the Detroit administrative unit's district.⁵⁰ The court identified the number of additional African-American qualified jurors that it would need to increase the proportion of African Americans on each qualified list to the level reflected in the population and the number of questionnaires needed to generate that number. It then sent additional questionnaires to residents in areas in which African Americans constituted sixty-five percent or more of the population.⁵¹ This process, called "transfusion," produced a balanced qualified wheel.⁵² Subsequently, the Eastern District changed to a different, yet also race-conscious, technique for achieving balanced qualified lists. Instead of "transfusing" a carefully calculated number of African Americans into each randomly generated list, it has recently achieved the same results by "purging" (my term, not theirs) a carefully calculated number of whites.⁵³ The Jury Project in

⁴⁹ The "qualified wheel" consists of the names of all persons drawn from the master jury wheel who are determined by the clerk to be qualified as jurors and who are not exempted or excused pursuant to a district's jury plan. To be qualified, a person must promptly return a mailed questionnaire to the clerk, showing that he or she is a United States citizen, is able to read, write, speak, and understand English, is capable mentally and physically to serve, and has no pending criminal felony charges or felony convictions. Those in active military service, police officers, fire fighters, and public officials are exempt; those who are over 70 years of age, ambulance crewmembers, volunteer fire fighters, or recent jurors, and those for whom jury service "would entail undue hardship or extreme inconvenience" may also be excused from service. Federal Jury Handbook, *supra* note 11, at 19-29.

⁵⁰ See Robert A. Mossing, *Changes in the Eastern District of Michigan Detroit Administrative Unit's Jury System*, Mich. B.J. 33, 34 (Jan. 1984).

⁵¹ See *id.*

⁵² *Id.* A similar procedure was apparently inadvertently conducted by another federal court. See Alker & Barnard, *supra* note 18, at 235 (noting that according to court officials, African-American precincts in Boston area were mistakenly "oversampled").

⁵³ See U.S. District Court, Eastern District of Michigan, *Jury Selection Plan* (certified Apr. 1992):

The qualified jury wheel shall be composed of persons who represent a fair cross-section of the area of each place of holding court as set forth in Section III of this Plan. To this end, if the Court determines that a cognizable group of persons is substantially over-represented in the qualified jury wheel, the Chief Judge shall order the Clerk to remove randomly a specific number of names so that the population of each cognizable group in the qualified wheel closely approximates the percentage of the population of each group in the area of each place of holding court, according to the most recently published national census report.

Id. at VIII.B.

For example, on June 16, 1993, Chief Judge Julian Cook found that the list of 3914 qualified jurors randomly selected from source lists in the Ann Arbor jury district contained only 14.06% African Americans, compared to 23.41% African Americans in the district's six-

New York State is considering proposals for "weighted mailings" similar to those used by the federal court in Detroit;⁵⁴ some New York state courts have already used this targeted mailing technique.⁵⁵

In Georgia, the jury commissioner's handbook actually requires jury commissioners to engineer the racial composition of every list of qualified grand and petit jurors, a process it calls "balancing the box."⁵⁶ Each county's voter registration list, which by statute serves as the jury source list,⁵⁷ designates the race of registered voters. The handbook explains the method to be used whenever commissioners create their qualified list or "box" by hand rather than with a computer:⁵⁸

[A]s the Jury Commissioners qualify individuals, each person's name can be placed in the proper group such as black female, black male, white female, white male. At the end of the process, the names can be tallied for each group and compared to the county census figures [I]f there is a disparity for any identifiable group, the Jury Commissioners should supplement the list until the representation of that group parallels as closely as possible the members of the group in the community.⁵⁹

county population. He ordered the Clerk of the Court to remove 1574 "White and Other" jurors from this list. "As a result of this procedure," the order continued, "the 1993 Qualified Ann Arbor Wheel shall be composed of 548 Black Qualified Jurors and 1,792 White and Other Qualified Jurors." U.S. District Court, Eastern District of Michigan, Administrative Order No. 93-AO-057 (June 16, 1993). The jury administrator in Detroit described this system as much easier to implement than the earlier system of supplemental mailings. Telephone Interview with Jean Schmidt, Jury Administrator, United States District Court for the Eastern District of Michigan (June 7, 1993).

⁵⁴ See R. Treece et al., *supra* note 7, at 29.

⁵⁵ See Seventh Judicial District, News Release (Sept. 16, 1993) (noting that jury commissioner in Monroe County, New York, used zip code information to target mailing of over 143,000 juror qualification questionnaires to areas with large minority populations). Seventh Judicial District Administrative Judge Charles L. Willis stated in the release that the targeted mailings were an effort to "publicly reiterate[] the commitment of the Unified Court System to the integrity and fairness of the jury system with the goal of sharing the opportunity of jury service among the greatest number of our citizens." *Id.*; see also L. Marks et al., *supra* note 14, at 11 (noting that Schenectady County Commissioner of Jurors was recently reported to be targeting mailings to minority neighborhoods); Williams Commission Survey, *supra* note 47, at 3-4 (noting that 35% of 50 jury commissioners responding "increased the number of mailings to prospective minority jurors," and 74% "prepared special mailing to minority organizations" and "had increased the number of qualifying forms to the minority community").

⁵⁶ Georgia Handbook, *supra* note 3, at 18.

⁵⁷ See Ga. Code Ann. § 15-12-40(a)(1) (1990).

⁵⁸ Counties revise these lists every six months to two years. See *id.*

⁵⁹ Georgia Handbook, *supra* note 3, at 19-22. Georgia's jury commissioners are required by court rule to certify in every capital case that the qualified list from which a capital defendant's grand and trial juries were drawn reflects the racial and gender proportions in the population. See *id.* (explaining Unified App. Rule 34.3); see also Munsterman & Munsterman, *supra* note 48, at 75 (describing system in place in Savannah and Atlanta that selects jurors from voter registration lists according to their race and sex). Stratified selection procedures have been used for years to insure quotas for geographic representation. See *id.* at 74-75.

The handbook advises that counties with computerized selection systems can perform identical sortings by race.⁶⁰ Whenever the first random draw from the voter registration list fails to mirror the racial composition of the voting age population, commissioners then must go back to their voter registration lists to retrieve enough additional registered African Americans or other "identifiable groups" to "balance the box."⁶¹ In some counties, the representation of particular groups on the voter registration list (e.g., young African-American males) may be so far below that group's representation in the voting age population that even drawing from the voter list alone produces too few names. In such cases, commissioners must obtain names of people in the underrepresented groups from sources other than the voter registration list in order to produce a "balanced box."⁶²

Some courts may attempt to summon racially representative venires from their qualified lists.⁶³ In Kalamazoo County, Michigan, for instance, a judicial task force has recommended to the county judges that source lists and qualification questionnaires be modified to include information on race, so that jury officials can guarantee that "jury panels from which prospective trial jurors are selected have minority representation, black and Hispanic in particular, of at least 25 percent to reenfranchise the minority citizens who have been systematically excluded for at least the past five years."⁶⁴ Other judges may use affirmative action to diversify venires in individual cases. For instance, in a recent Minnesota case involving a Hispanic defendant, the judge ordered his jury clerk to add more Hispanics to the jury pool after learning that only one of the 173

⁶⁰ See Georgia Handbook, *supra* note 3, at 19.

⁶¹ Telephone Interview with Holly K.O. Sparrow, Senior Research Associate, Georgia Administrative Office of the Courts (July 2, 1993).

⁶² *Id.* For an example of a procedure similar to Georgia's, see Ronald W. Crenshaw, Note, Jury Composition—The Purposeful Inclusion of American Indians, 16 S.D. L. Rev. 214, 215-16 (1971) (describing federal court order requiring county jury selectors to submit qualified jury list that approximates racial composition of general population).

⁶³ Earlier examples of this technique include *James v. United States*, 416 F.2d 467, 472 (4th Cir. 1969) (approving plan under which Mississippi clerk summoned exact proportion of African Americans and women as appeared in census); *Mack v. Walker*, 372 F.2d 170, 172 (5th Cir. 1966) (approving Louisiana commissioner's system of summoning 20 jurors from qualified general venire of 300 by race in proportion to their population in the community, and also distributing them geographically); *Sewell v. Warden, Md. Penitentiary*, 306 F. Supp. 179, 180-81 (D. Md. 1969) (approving method whereby grand jurors were chosen randomly from box of 200 names which had been selected with race in mind).

⁶⁴ Kalamazoo Report, *supra* note 3, at 13-14; see also Roger S. Kuhn, Jury Discrimination: The Next Phase, 41 S. Cal. L. Rev. 235, 315-17 (1968) (proposing that in order to achieve fairer representation of African Americans on juries, African Americans should be summoned for jury service in greater numbers than they appear in population because they are disproportionately excused, and recommending system of group sampling).

prospective jurors was Hispanic.⁶⁵

4. *Grand Juries*

The most controversial efforts to achieve proportional representation involve race-based selection of grand jurors from the venire.⁶⁶ In Hennepin County, Minnesota, where about nine percent of the adult population is African-American, Asian-American, or Native-American,⁶⁷ the courts are implementing a new rule that requires judges to select at least two minority grand jurors for every twenty-three member capital grand jury so the racial composition of each grand jury would mirror that of the community. The experimental system works like this:

[If], after randomly selecting the first 21 grand jurors either only one or no minority persons appear on the panel, selection [shall] continue down the list of 55 randomly selected and qualified persons until there are at least two minority persons out of 23 on the grand jury. If no minorities appear in the list of 55 potential grand jurors, another 55 qualified persons should be selected until the goal of at least two minority jurors is obtained. If random selection of the first 21 grand jurors yields two or more minority persons, the selection should simply proceed to the next two persons on the list.⁶⁸

The Third Circuit, sitting en banc in *Ramseur v. Beyer*,⁶⁹ recently reviewed a judge's deliberate efforts to achieve proportional racial representation on a grand jury in New Jersey. The judge had stated candidly

⁶⁵ See Paul Gustafson, *Judges Study Ways to Raise Minority Count in the Jury Box*, Minneapolis Star Trib., Nov. 30, 1992, at 1A. This is somewhat like an intriguing alternative proposed by Professor Deborah Ramirez. See Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of "de medietate linguae"* (Feb. 22, 1994) (unpublished manuscript, on file with the New York University Law Review). Professor Ramirez's proposal allows litigants the opportunity to choose a smaller group who will form a mini-venire from the group of veniremembers remaining after the judge has excused those disqualified for cause. The judge and litigants would then select the jury from this mini-venire using traditional voir dire procedures. See *id.* Professor Ramirez suggests allowing litigants the option of choosing members of the mini-venire by race—what she calls "affirmative peremptory choice"—but prohibiting the final selection of jurors from the mini-venire by race. See *id.* at 58-62. The proposal does not guarantee minority representation on trial juries, but it provides a better chance for the litigant to obtain minority race jurors if she wants them and does not single out race as the only salient group characteristic that may be of importance to litigants.

⁶⁶ The practice of using race as a criterion for selecting grand jurors has a lengthy and uneven history. See, e.g., *Cassell v. Texas*, 339 U.S. 282 (1950) (described in text accompanying notes 86-88 *infra*); *Stephens v. Cox*, 449 F.2d 657, 661 n.8 (4th Cir. 1971) ("Consciousness of race in the selection process is sometimes necessary to avoid discrimination . . ."); *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966) (upholding race-based selection practice); *Fuller v. Cox*, 356 F. Supp. 1185, 1188-89 (W.D. Va. 1973) (striking down judge's practice of always including one African American on each of 47 different grand juries because this practice had exclusive effect).

⁶⁷ See Hennepin County Report, *supra* note 23, at 27.

⁶⁸ *Id.* at 45.

⁶⁹ 983 F.2d 1215 (3d Cir. 1992) (en banc), cert. denied, 113 S. Ct. 2433 (1993).

that he tried to select a "fair cross-section" when choosing grand jurors from the venire, a racial mix that he considered to be about 50/50 or 60/40 white/African-American.⁷⁰ Race balancing at these later stages of selection may be attractive in jurisdictions in which the race of potential jurors is not disclosed until the jurors respond to their summonses.⁷¹

It is impossible to say how widespread race-balancing of the type described in *Ramseur* or proposed in Hennepin County really is.⁷² However, at least five states do not require that grand juror names be drawn randomly from the grand jury venire and instead allow judges or commissioners the discretion to select who will actually serve as grand jurors.⁷³ This kind of discretion may enable local officials to "balance the

⁷⁰ *Id.* at 1223 n.4. The judges of the Third Circuit divided over whether this procedure violated the equal protection clause, and, if so, whether granting postconviction relief to the defendant was an appropriate remedy.

⁷¹ The trial judge in *Ramseur*, for example, did not know the race of potential jurors until they showed up in court. See *id.* at 1235-36. Jurisdictions that seek to employ race-conscious methods earlier in the process, of course, first must obtain racial information about those on their source or qualified lists. The Kalamazoo proposal described earlier, see text accompanying note 64 *supra*, also includes a recommendation that the court seek authority to specify race on driver's license lists to "insure greater minority participation in the jury selection process" and to "include race and ethnic group information on the jury qualification questionnaire" because "state court jury questionnaires do not contain race or ethnic information . . . [thus making] it impossible to know the makeup of the [venire] until the prospective jurors are actually seated in the courtroom at the time of jury selection." Kalamazoo Report, *supra* note 3, at 4, 14-15; see also Letter from Miriam S. Saxon, Court Management Specialist, Administrative Office of the Courts of North Carolina to author (Sept. 13, 1993) (on file with the New York University Law Review) (noting that in North Carolina, neither voter registration lists nor driver's license lists contain information about person's race).

⁷² While the court in *Ramseur* noted that it had been advised that the selection process of the New Jersey judge was no longer in effect, 983 F.2d at 1223 n.3, the judge's techniques are not unique. In 1985, a bill was introduced in California to achieve proportional racial representation on grand juries. See Charley Roberts, Test for Ethnic Makeup of Grand Juries Gains, *L.A. Daily J.*, May 16, 1985, at 2 (noting that California Assembly Bill 197, reported out of Ways and Means Committee to full Assembly, would require that judge appointing grand jurors consider county's demographics and would strive to achieve proportional representation based on race, ethnicity, and sex). And in a recent case from Colorado, a judge's "effort to affirmatively place people from minority groups on the grand jury" and his "sensitiv[ity] to having a good cross-section of women, blacks and Hispanics" helped the state supreme court to conclude that the total exclusion of Spanish-surnamed people from a defendant's grand jury venire was not attributable to intentional discrimination by the judge. See *People v. Cerrone*, 854 P.2d 178, 192 & n.24, 193 (Colo. 1993).

⁷³ See Conn. Gen. Stat. Ann. § 54-45(a) (West 1985) (providing that judge selects grand jury); La. Code Crim. Proc. Ann. art. 413(C) (West 1991) (providing that in New Orleans Parish judge selects 12 grand jurors and two alternates from randomly selected grand jury venire); Neb. Rev. Stat. § 25-1633 (1989) (providing that in larger counties commissioner randomly draws 40 names from randomly selected grand jury wheel and forwards those names to board—made up of presiding judge, commissioner, and one other person—that in turn selects from 40 names 16 to serve as grand jurors, plus three alternates); Nev. Rev. Stat. § 6.120 (1991) (providing that in smaller Nevada counties the clerk summons 36 people, whose names are generated by random and self-selection, and from these 36 people judges take turns selecting 17 grand jurors and 12 alternates); Va. Code Ann. § 19.2-194-195 (Michie 1990) (provid-

box" by race when they think it is appropriate to do so.

5. *Trial Juries*

No court or legislature has yet adopted rules that would require trial juries to contain certain percentages of minority jurors, despite repeated suggestions for such policies by academics.⁷⁴ In at least one state, these ideas have made it beyond the pages of law reviews into the legislature. Presently pending in Pennsylvania's House Judiciary Committee is a bill that would provide for a certain number of trial jurors who share the race of the defendant or victim, depending on the percentage of persons of that race in the population.⁷⁵ Others maintain that peremptory challenges of white jurors by African-American defendants should be exempt from the limitations imposed by the Supreme Court in *Georgia v. McCollum*.⁷⁶ This would allow African-American defendants to improve their chances of securing African-American jurors.⁷⁷ Yet another recent proposal recommends dividing urban jury districts into twelve geographic jury seat districts drawn along racial, ethnic, and economic divides, then filling each seat on every twelve-member criminal jury with one resident from each district.⁷⁸

ing that judges must select five to seven grand jurors from 60 to 120 they selected as veniremembers); *Jefferson v. Morgan*, 962 F.2d 1185, 1187 (6th Cir. 1992) (describing Tennessee system whereby judge picks grand jurors by hand).

⁷⁴ See, e.g., Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1698-99 (1984) (recommending that each jury have at least three jurors of same race as defendant); Tracy L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 Stan. L. Rev. 781, 806-08 (1986) (arguing that "[a]ffirmative selection" of juries is necessary to achieve proper representation of minorities); MacDougall, *supra* note 7, at 537 (proposing proportional representation scheme for trial juries); see also Diane Potash, *Mandatory Inclusion of Racial Minorities on Jury Panels*, 3 Black L.J. 80, 94-95 (1973) (arguing that judges and legislatures should compel those who select jurors to take account of race).

⁷⁵ See H.B. 1182, Pa. 176th Gen. Assembly, 1993-1994 Sess., 1993 (pending as of Mar. 1, 1994).

⁷⁶ 112 S. Ct. 2348 (1992) (discussed at text accompanying notes 111-13 *infra*).

⁷⁷ See Brief for the NAACP Legal Defense and Educational Fund, Inc. at 5, *McCollum* (No. 91-372) (as amicus curiae suggesting reversal); Jeanette M. Boerner, Note, *The Discriminatory Effect of the "Color-Blind" Jury: Georgia v. McCollum*, 112 S. Ct. 2348 (1992), 16 Hamline L. Rev. 975, 999-1000 (1993) (noting that Court has yet to determine whether Constitution permits minority defendant to use peremptory challenge to get more minority jurors). See generally Deborah Zalesne & Kinney Zalesne, *Saving the Peremptory Challenge: The Case for a Narrow Interpretation of McCollum*, 70 Denver U. L. Rev. 313 (1993) (arguing against reading of *McCollum* that would prohibit African-American defendant from using peremptory challenge to strike white potential jurors).

⁷⁸ See Lindsay R.M. Jones, *Democratizing the Jury Selection Process: A Multi-Pool Stratification Model 2-3* (1993) (on file with the New York University Law Review) (proposal for the Minneapolis Urban League and Attorney General of State of Minnesota). Apparently, Great Britain is also considering race-conscious trial jury selection techniques. See Michael Prescott, *Judges May Get Veto on All-White Juries*, *The Sunday Times* (London), July 4, 1993 (noting proposals by Royal Commission of Criminal Justice providing judges power to select

6. *Forepersons*

Finally, a judge may consider race when selecting who will serve as foreperson of a grand jury. Judges, trying to be fair or wary of claims that they discriminate when selecting grand jury forepersons, may intentionally appoint African Americans to lead grand juries as often as necessary to meet or exceed statistical probabilities. Again, proof that this happens is not easily available, but reported selection practices suggest that it does. In Louisiana, the Director of the Criminal Division of the Department of Justice noted a recent decision vacating a conviction due to a judge's failure to appoint African Americans as grand jury forepersons, and stated: "With that decision now on the books, it appears to me that Louisiana judges will begin considering policies that will allow them to take affirmative action to ensure that minorities are fairly represented as members and forepersons of grand and petit juries."⁷⁹ One 1979 case described a judge who "religiously alternates" between men and women in his selection of successive grand jury forepersons.⁸⁰ Another more recent case from North Carolina offers the following example of race-conscious foreperson selection: a judge quashed a defendant's indictment after the defendant successfully demonstrated discrimination in the selection of grand jury forepersons—no African American had ever been appointed grand jury foreperson in that county.⁸¹ At the suggestion of the prosecutor, the judge then replaced the foreperson of the grand jury, who was white, with an African-American grand juror.⁸²

II

EVALUATING RACE-CONSCIOUS SELECTION PROCEDURES AFTER *CROSON*, *SHAW*, AND *MCCOLLUM*

The subsequent events in the North Carolina foreperson case just described illustrate the constitutional difficulties such race-conscious jury selection practices may raise. After the judge replaced the white foreman with an African American, the grand jury with its new leader promptly re-indicted the defendant. The defendant then challenged the *second* indictment, *again* alleging intentional race discrimination in the selection of the grand jury foreperson. The state's high court agreed with the defendant that the judge had violated the rights of the white foreman whom

jurors on basis of race and ethnicity in order to further interests of justice).

⁷⁹ Letter from L.J. Hymel, Director, Criminal Division, Louisiana Department of Justice, to author (Sept. 10, 1993) (on file with the New York University Law Review).

⁸⁰ See *United States v. Jenison*, 485 F. Supp. 655, 665-66 (S.D. Fla. 1979) (finding that such practice does not constitute discrimination entitling accused to relief in federal courts).

⁸¹ See *State v. Moore*, 404 S.E.2d 845, 846 (N.C. 1991).

⁸² *Id.*

he had replaced, vacated the defendant's conviction, and instructed the trial court to start over.⁸³ While the North Carolina Supreme Court based its ruling on the equal protection guarantees of that state's constitution, federal equal protection guarantees in the fifth and fourteenth amendments provide grounds for similar defense challenges. The following Sections examine how such challenges would probably fare under the most recent equal protection decisions of the United States Supreme Court.

A. *The Presence of Equal Protection Injury and the Level of Scrutiny*

Supporters of jurymantering techniques have so far relied upon two alternative arguments for the claim that such initiatives are exempt from strict scrutiny or create no equal protection injury at all: (1) race-conscious selection practices are not objectionable because they "include" rather than "exclude" individuals based on their race;⁸⁴ and (2) such practices do not deprive whites who are potential jurors of any opportunities they deserve.⁸⁵ As passionately as these arguments have been made, they are unlikely to persuade the present Supreme Court, which has made it clear that it will apply the most exacting scrutiny to all state-initiated racial classifications, regardless of their alleged purpose or effect.

1. *Exclusion or Inclusion*

The modern effort to distinguish selection policies that "include" persons on the basis of race from policies that "exclude" persons on that basis apparently originated in a concurring opinion written forty-four years ago in *Cassell v. Texas*.⁸⁶ Because *Cassell* is the only case in which the Supreme Court has considered an equal protection challenge to a race-conscious jury selection practice that arguably achieved proportional minority representation, it merits some examination here.

Between 1942 and 1947, jury commissioners in Dallas County, Texas, allegedly chose exactly one African-American grand juror for each of twenty-one consecutive grand juries, so as to approximate the proportion of African Americans in the pool of eligible grand jurors.⁸⁷ A

⁸³ See *id.* at 848.

⁸⁴ See note 91 and accompanying text *infra* (noting contemporary examples of this argument).

⁸⁵ See notes 97-98 and accompanying text *infra* (noting contemporary examples of this argument).

⁸⁶ 339 U.S. 282 (1950).

⁸⁷ See *id.* at 286. In *Cassell*, the Court computed the number of African-American jurors that would have appeared in the grand jury absent discrimination by examining the racial composition of residents who had paid a poll tax. See *id.* at 285-87 (plurality opinion). Decades later, after the abolition of poll taxes, the Court in *Castaneda v. Partida*, 430 U.S. 482

defendant's challenge to this selection process reached the Supreme Court and produced a fractured decision granting the defendant relief. Writing for himself and two other Justices, Justice Frankfurter found that the record demonstrated that the commissioners intended to limit the number of African Americans on each grand jury to one and concluded that this constituted "purposeful, systematic *non-inclusion* because of color" in violation of the equal protection clause.⁸⁸

This phrase in Justice Frankfurter's opinion seemed to imply that purposeful, systematic *inclusion* because of color would have been permissible. Judge John Brown, writing sixteen years later for a majority of judges on the Fifth Circuit Court of Appeals thought so. In *Brooks v. Beto*, the Fifth Circuit upheld the decision of the VanZandt County, Texas, jury commissioners to include two people on its list of sixteen prospective grand jurors because they were African-American.⁸⁹ Judge Brown concluded that a majority of Justices on the Supreme Court had never adopted "the proposition that consciously to include, but not arbitrarily or proportionately to limit, transgresses constitutional demands."⁹⁰ Today, proponents of Hennepin County's plan to reserve at least two spots for nonwhites on every capital grand jury cite *Brooks* to defend their proposal under the equal protection clause, claiming that the plan does not fix a maximum number of spots for nonwhite jurors but merely designates two as a minimum.⁹¹

But even if a reading of *Cassell* once permitted a distinction between exclusive and inclusive race-based jury selection policies,⁹² the distinction

(1977), calculated this figure by examining the racial composition of the adult population, not the racial composition of those whom state law defines as eligible to vote or to serve as jurors. See *id.* at 495.

⁸⁸ *Cassell*, 339 U.S. at 291 (emphasis added).

⁸⁹ 366 F.2d 1, 8-9 (5th Cir. 1966) ("We must treat this case as one in which a substantial element of a collective body purposely selected two members for the list for the reason, among others, that they were Negroes.").

⁹⁰ *Id.* at 21. The first paragraph of Judge Brown's lengthy opinion clearly states his position: "Unlike the other cases heard en banc, this one does not challenge the *exclusion* of Negroes from grand or trial juries. Rather, this case seeking habeas from a Texas conviction for rape complains of purposeful *inclusion* of Negroes in the grand jury returning the indictment." *Id.* at 4; see also *United States v. Jenison*, 485 F. Supp. 655, 666 (S.D. Fla. 1979) ("It is well recognized that purposeful inclusion of distinct classes on grand or petit juries does not constitute discrimination violative of the federal constitution entitling an accused to relief in the federal courts.").

⁹¹ See Hennepin County Report, *supra* note 23, at 48; see also *Berryhill v. State*, 291 S.E.2d 685, 691 (Ga. 1982) (relying on *Brooks* in rejecting defendant's challenge to Georgia county jury commission's practice of supplementing jury list with "target figure" of women after determining that list would otherwise underrepresent women).

⁹² Arguably, the case suggested just the opposite. Justice Frankfurter's opinion stated elsewhere that "[t]he basis of selection cannot consciously take color into account." *Cassell*, 339 U.S. at 295 (Frankfurter, J., concurring). Four concurring justices insisted that neither exclusion nor inclusion on the basis of race is permissible. See *id.* at 287 (opinion of Reed, J.,

lends little aid to modern proponents of race-conscious selection procedures. For whenever the number of spots being filled is finite, the deliberate inclusion of one person entails the deliberate exclusion of someone else.⁹³ Every minimum or "floor" for nonwhite jurors is a maximum or "ceiling" for white jurors.⁹⁴ Indeed, what appears to have persuaded Judge Brown to approve race-conscious jury selection in *Brooks* is not the distinction between race-conscious jury selection practices that include and those that exclude, but the distinction between race-conscious selection practices that limit white or majority representation and those that limit African-American or minority representation.

This is one version of a position that proponents of affirmative action have championed for years: the constitutionality of a racial classification depends, at least in part, upon the nature of its effect or the identity of those affected. At least two generations of lawyers, judges, academics, and legislators have, like Judge Brown, attempted to distinguish between benign uses of race which do not require constitutional condemnation and invidious uses of race which do. Many of these theories would support lowered scrutiny for most of the race-conscious initiatives that I have described. For example,⁹⁵ racial juryman-dering may be

with Vinson, C.J., Black and Clark, J.J., concurring) (stating that defendant is "entitled to have charges against him considered by a jury in the selection of which there has been *neither inclusion nor exclusion* because of race"); *id.* at 297-98 (Clark, J., concurring) ("[R]epresentation on the grand jury by race in proportion to population is not permissible for there must be 'neither inclusion nor exclusion because of race.'").

Ultimately, these four justices based their finding of unconstitutional racial discrimination on a different ground. After noting the commissioners' assertions that they did not include more African Americans because they knew none who were qualified to be grand jurors, these Justices found that the failure of the commissioners to "familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color" denied the defendant his constitutional rights. *Id.* at 287-90 (opinion of Reed, J., with Vinson, C.J., Black and Clark, J.J., concurring); see also *Holland v. Illinois*, 493 U.S. 494, 510 (1990) (Stevens, J., dissenting) (quoting Frankfurter's opinion in *Cassell*); *Brown v. Allen*, 344 U.S. 443, 487 (1953) ("Our Constitution requires that jurors be selected without inclusion or exclusion because of race. There must be neither limitation nor representation for color."); *Cassell*, 339 U.S. at 296-98 (Clark, J., concurring). But see *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 316-17 (1986) (Stevens, J., dissenting) (arguing that only exclusionary, not inclusionary, race-conscious measures violate equal protection).

⁹³ See *Recent Decisions, Conscious Inclusion of Negroes on Grand Jury Venire Is Not Violative of Negro Defendant's Right to Equal Protection. Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966), 55 Geo. L.J. 942, 946 (1967) ("A system which includes jurors on the basis of race necessarily excludes other jurors on the basis of race.").

⁹⁴ Even Judge Brown warned that while jury commissioners have a duty to ensure a *fair* representation of races on the jury, "this must never, simply never, be done as the means of discrimination. It must never, simply never, be applied to secure *proportional* representation. It must never, simply never, be applied to secure a predetermined or fixed limitation." *Brooks*, 366 F.2d at 24 (emphasis added).

⁹⁵ I select these approaches as illustrations only. I do not mean to suggest that these theories are representative. As Professor Fiscus recently observed, so much has been written about affirmative action that any attempt to cite the voluminous commentary seems "slightly prepos-

justified in terms of distributive justice:⁹⁶ those chosen or rejected for jury service do not “lose” anything under plans that guarantee proportional racial representation⁹⁷ since each person’s rightful opportunity to be selected for jury service is defined and limited by the racial composition of the adult population.⁹⁸ Stated another way, if the underrepresentation of a minority group in jury pools is traceable to some form of racial discrimination against members of that group, restoring the proper balance of opportunity among racial *groups* does not deprive majority or white jury candidates of anything to which they were morally, politically, or constitutionally entitled.⁹⁹

Ely’s classic process-based claim that “it is not ‘suspect’ in a constitutional sense for a majority . . . to discriminate against itself”¹⁰⁰ would also support lowered scrutiny of most measures designed to enhance the jury service opportunities for African Americans while impairing those of whites.¹⁰¹ Other theorists have concluded that the equal protection clause by design extends more protection to African Americans than to other racial groups,¹⁰² protects only groups that have been in a position

terous.” Ronald J. Fiscus, *The Constitutional Logic of Affirmative Action* 130 n.7 (1992).

⁹⁶ See generally *id.*; Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707 (1993).

⁹⁷ See Letter from Sheri Lynn Johnson, *supra* note 7, at 3 (“The right is not bought at the expense of other possibly blameless individuals; neither white defendants nor white grand jurors ‘lose’ anything.”).

⁹⁸ See Letter from Albert Alschuler, *supra* note 7, at 4 (arguing that reserving two seats on every grand jury for nonwhites “does not stigmatize or disadvantage people on the basis of race at all”); Letter from Roy Brooks, *supra* note 7, at 3 (“Since the [Hennepin County] Task Force’s proposal does not subordinate whites—it is racially inclusive without subordinating whites—it should survive constitutional scrutiny under the Equal Protection Clause.”).

⁹⁹ See, e.g., R. Fiscus, *supra* note 95, at 51 (“[P]roportional quotas . . . do not violate the rights of any white individuals ‘on account of their race’ because they do not violate any rights those individuals have unless they can be said to have the right to profit from society’s racism.”). Theories of justice based on group power or influence, rather than proportional presence, would support procedures such as the proposal in Kalamazoo, that seek to include a *greater* percentage of minority jurors than that reflected in the adult population. See, e.g., Iris Marion Young, *Justice and the Politics of Difference* 15-38 (1991).

¹⁰⁰ John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 *U. Chi. L. Rev.* 723, 727 (1974); see also *id.* at 735 (“When the group that controls the decisionmaking process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking.”).

¹⁰¹ See Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 *Tul. L. Rev.* 1807, 1843-45 (1993).

¹⁰² See, e.g., Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 *U. Ill. L. Rev.* 1043, 1071-73 (justifying use of quotas or proportional representation in affirmative action programs because “the experience of blacks in American society is different than that of all other ethnic, racial, and religious groups in American society”); cf. Donald E. Lively, *Equal Protection and Moral Circumstance: Accounting for Constitutional Basics*, 59 *Fordham L. Rev.* 485 (1991) (arguing for greater attention to expectations of framers of fourteenth amendment).

of "perpetual subordination and circumscribed political power,"¹⁰³ and prohibits only "state action predicated on the view that one person is by virtue of race *inferior* to another"¹⁰⁴ or which "impose[s] racial subjugation."¹⁰⁵

Unfortunately for those who defend race-conscious selection policies, there is now little hope for these interpretations of the equal protection clause. For decades, the Court's badly split affirmative action opinions left open the possibility that it would eventually embrace one or more of these theories and apply something short of strict scrutiny to race-conscious efforts by government officials to rectify societal discrimination and enhance minority opportunities. In its decisions evaluating racial preferences in employment, education, and voting, for example, no majority position emerged concerning either the reasons to distinguish between benign racial classifications and invidious ones or the standards under which benign racial classifications should be judged.¹⁰⁶ Three re-

¹⁰³ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *Phil. & Pub. Aff.* 107, 155 (1976); see also L. Jones, *supra* note 78, at 15 (noting that allocating extra jury seats to minorities is constitutional, since equal protection guarantees were intended to protect civil rights of nonwhites from abuse by whites); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 *Stan. L. Rev.* 1, 63 (1991) ("[A] revised approach to race must recognize the systematic nature of subordination in American society . . . [R]acial subordination is inherently connected to other forms of subordination."); MacDougall, *supra* note 7, at 545 (noting that argument that deliberately including African Americans on juries is racism in reverse "is a particularly specious and pernicious one. . . . A white defendant, for example, does not have to battle the court to have his race fairly represented on the jury; the juries are all white").

¹⁰⁴ Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 *Colum. L. Rev.* 1023, 1030 (1979) (emphasis added).

¹⁰⁵ Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 *Harv. L. Rev.* 1327, 1336 (1986); see also Laurence H. Tribe, *American Constitutional Law* § 16-21, at 1515 (2d ed. 1988) ("A more promising theme in equal protection doctrine may well be an anti-subjugation principle, which aims to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens."); T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 *Colum. L. Rev.* 1060, 1116 (1991) ("Whether phrased as 'anti-caste,' 'anti-group disadvantage,' or 'anti-subjugation,' the task remains where it began: the ending of second class status of an historically oppressed group and the achieving of racial justice."). For another recent critique of the Court's color-blind stance against affirmative action, see generally Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 *Mich. L. Rev.* 213 (1991) (arguing that Court's hostility to minority racial preferences is inconsistent with political process theory and strict constructionism).

¹⁰⁶ See generally Andrew Kull, *The Color-Blind Constitution* 182-224 (1992); Michael Rosenfeld, *Affirmative Action and Justice* 163 (1991); Jessie H. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 *Iowa L. Rev.* 255 (1987).

Indeed, the majority in *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966), appeared to read the Court's decisions correctly when it declared in 1966 that the Court had not yet precluded affirmative action in jury selection. See notes 89-94 and accompanying text *supra* (analyzing *Brooks*); see also Hugh Gibson, *Racial Discrimination on Grand Juries*, 3 *Baylor L. Rev.* 29, 39 (1950) (arguing that *Cassell* could not have meant that purposeful inclusion by race is illegal but instead sought to distinguish between jury selection procedures that are designed to

cent cases finally ended the suspense.

A majority of the Court is now as suspicious of racial classifications that burden whites as it is of classifications that burden historically disadvantaged racial groups. In its 1989 decision in *City of Richmond v. J.A. Croson Co.*,¹⁰⁷ the Court refused to apply less than strict scrutiny to a state-sponsored set-aside program purportedly designed to rectify the racially disparate effects of deliberate discrimination. It expressly rejected arguments that “the level of scrutiny [should] vary according to the ability of different groups to defend their interests in the representative process,”¹⁰⁸ and declared that “the standard of review under the equal protection clause is not dependent on the race of those burdened or benefitted by a particular classification.”¹⁰⁹ The *Croson* majority asserted that “there is simply no way” to tell which racial classifications are “benign” and which are “illegitimate,” absent the “searching judicial inquiry” strict scrutiny affords.¹¹⁰

Three years later, the Court’s decision in *Georgia v. McCollum*¹¹¹ again suggested that it would apply its most rigorous equal protection standards to attempts by any state or state actor to secure greater representation of minorities on juries by deliberately limiting jury service opportunities for whites. *McCollum* held that a white defendant who used peremptory challenges to excuse African-American veniremembers violated the equal protection rights of those jurors.¹¹² Stating that “[i]t is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race,” Justice Blackmun’s opinion for the Court implied that it would have been equally intolerant of an African-American defendant’s use of peremptory challenges to excuse white veniremembers.¹¹³

preserve discrimination and those that are designed to *destroy* it).

¹⁰⁷ 488 U.S. 469 (1989).

¹⁰⁸ *Id.* at 495.

¹⁰⁹ *Id.* at 494 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986)).

¹¹⁰ *Id.* at 493.

¹¹¹ 112 S. Ct. 2348 (1992).

¹¹² *Id.* at 2350.

¹¹³ *Id.* at 2358; see also *id.* at 2360 n.2 (Thomas, J., concurring in the judgment) (“[I]t is difficult to see how the result could be different if the defendants here were black.”); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2095 (1991) (Scalia, J., dissenting) (“[T]he minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible.”); *Powers v. Ohio*, 499 U.S. 400, 423-24 (1991) (Scalia, J., dissenting) (“In fact, it would constitute discrimination to *exempt* [one group] from the peremptory-strike exposure to which all others are subject.”); *State v. Carr*, 427 S.E.2d 273, 274 (Ga. 1993) (on remand from Supreme Court for reconsideration in light of *McCollum*) (applying *McCollum* and ordering African-American defendant to articulate race-neutral reason for removing whites); *State v. Knox*, 609 So. 2d 803, 806 (La. 1992) (same); *Gilchrest v. State*, 627 A.2d 44, 53 (Md. 1993) (same); *Griffin v. State*, 610 So. 2d 354, 356 (Miss. 1992) (same); *People v. Yarbrough*, 589 N.Y.S.2d 891, 892 (N.Y. App. Div. 1992) (holding that *Batson* applies to

Finally, in its most recent equal protection decision, *Shaw v. Reno*,¹¹⁴ the Court this past term reiterated its color-blind position. *Shaw* declined to dismiss an equal protection challenge brought by white plaintiffs to a congressional redistricting plan that created two districts containing a majority of African-American voters. Relying on *Croson*, the *Shaw* majority rejected the dissenters' arguments that the constitutionality of a racial classification depends on whether or not it burdens or benefits the racial minority.¹¹⁵ In short, any distinction the Court once may have made between racially inclusive and racially exclusive policies has vanished.

African-American defendant's peremptory challenges); *People v. Gary M.*, 526 N.Y.S.2d 986, 998 (N.Y. Sup. Ct. 1988) (same); cf. *Echlin v. LeCureux*, 995 F.2d 1344, 1356 (6th Cir.) (Ryan, C.J., dissenting) ("Exclusion of a potential juror simply because he is white is no less racial discrimination than exclusion of a juror simply because he is black. . . . It is difficult to see any distinction in terms of degrees of harm to defendant, jurors, or the community if the racial roles are reversed . . . or if the group discriminated against happens to hold a majority position in the community."), cert. denied, 114 S. Ct. 552 (1993).

¹¹⁴ 113 S. Ct. 2816 (1993).

¹¹⁵ See *id.* at 2829. Interestingly, the Court's refusal to extend more protection to African Americans than to whites lessens the importance of one dispute between supporters and opponents of race-conscious jury selection. At least one opponent has claimed that selection systems that preference African Americans actually disproportionately burden African Americans, not whites, since most citizens regard jury service as something to avoid, not covet. See Kull, *supra* note 7, at 20 (noting "burden on black voters" imposed by Georgia system).

There is some merit to this appraisal. Jury service is compelled, not optional. Citizens are required by law to return their questionnaires, and they are summoned to serve under penalty of contempt. Studies show that citizens sometimes refuse to register to vote or to respond to questionnaires in hopes of evading a jury summons, see note 15 *supra* (citing study), and that the trauma experienced by some jurors in judging gruesome or violent criminal cases may last a lifetime. See generally Stanley M. Kaplan & Carolyn Winget, *The Occupational Hazards of Jury Duty*, 20 *Bull. Am. Acad. Psychiatry L.* 325 (1992); Marjorie O. Dobbs, Note, *Jury Traumatization in High Profile Criminal Trials: A Case For Crisis Debriefing?*, 16 *Law & Psych. Rev.* 201 (1992). The costs of jury service make it look to many less like a privilege one fights for—such as the vote, an education, or a good job—and more like a hardship one might prefer not to undergo—like combat duty or paying taxes. See *Duren v. Missouri*, 439 U.S. 357, 376-77 (1979) (Rehnquist, J., dissenting) (noting burdens of jury service and comparing jury selection to conscripting armies); Deirdre Golash, *Race, Fairness, and Jury Selection*, 10 *Behav. Sci. & L.* 155, 167 (1986) (comparing jury service to combat duty); Cynthia Penney, *Who—Me?*, *N.Y. Mag.*, Sept. 16, 1991, at 64, 64-65 (explaining how one might get out of jury duty); Stephen Knack, *Deterring Voter Registration Through Juror Source Practices: Evidence from the 1991 NES Pilot Study 8* (1992) (unpublished manuscript, on file with the New York University Law Review) (noting that 35% of over 700 respondents who were asked "If you were selected to serve on a jury, would you be happy to do it or would you rather not serve?" preferred not to serve).

On the other hand, evidence also suggests that most people view jury service as a privilege; that evidence includes a century of litigation by minorities and then women to obtain the right to serve. See, e.g., note 142 *infra* (listing civil cases). I believe that it does matter for equal protection purposes whose ox is gored by racial preferences in jury selection and that those *excluded* from jury service because of their race suffer greater harm than those *included* because of their race.

2. *Societal Harm and the Irrelevance of Group or Individual Injury*

Shaw, *McCollum*, and *Croson* also suggest that the Court will not be persuaded by claims like that made recently by the Georgia Supreme Court: that race-conscious jury selection policies preserve rather than skew *group* opportunities and are therefore less objectionable than other racial preferences.¹¹⁶ In *Meders v. State*, that court reasoned that the procedure used by Georgia's county jury commissioners to "balance the box" should be exempt from heightened scrutiny under the equal protection clause because it only duplicates the racial representation of the community and the source lists and thus does not give any group a distinct advantage over any other group.¹¹⁷

Although this position is consistent with the distributive justice theories described earlier, from the Supreme Court's present perspective it is all wrong. The first problem with this argument is that it elevates group rights above the rights of individuals,¹¹⁸ since all uses of race in jury selection burden individuals on the basis of their race to some degree. Even if the proportion of whites and nonwhites selected through such methods is exactly the same as their proportions in the source pool—preserving existing *group* opportunity—these techniques still condition the opportunities of some *individuals* to serve according to their race. The Hennepin proposal, for instance, which guarantees proportionate

¹¹⁶ See *Meders v. State*, 389 S.E.2d 320, 323 & n.2 (Ga. 1990).

¹¹⁷ *Id.* at 324 n.2. The court explained:

Assume a jury list of 1,000 persons, of whom 80% are white and 20% are black. If the computer is instructed randomly to select one hundred persons for a jury venire, then the odds that any one person is selected are 100/1000 or 1 in 10. If the list is broken down into two groups, one composed of 800 whites and the other of 200 blacks, and the computer randomly selects 80 of 800 and 20 of the 200 (which, in essence, is what happens in Glynn County), then a white person on the list has 80 chances in 800—or 1 in 10—of being selected, while a black person has 20 chances in 200—or 1 in 10—of being selected.

Id.; see also *id.* at 326 (Benham, J., concurring) (“[T]he venire selection process utilized here is race neutral in that it does not give any group a distinct advantage over any other group. . . . Unlike [*Croson*], . . . the process here neither benefits nor burdens any particular *class* of citizens; therefore, where no preferential treatment is given, there is no need for a heightened scrutiny”) (emphasis added).

It is, of course, doubtful that in every Georgia county this race-conscious selection system reproduces exactly the racial proportions of each preceding pool of names. Thus, racial groups *are* disparately burdened in those counties in which the selection system “improves” the ratio between African Americans and whites beyond that in the voter registration lists. The proposal of the Kalamazoo task force is another example of a race-conscious selection policy that imposes group burdens. The proposal recommends nearly tripling the percentage of minorities in the population for jury venires, see Kalamazoo Report, *supra* note 3, at 13-14 (recommending 25% minority representation in trial jury venires in county with about 9% minority adult population), a method that would make it three times more likely that any minority race person on the source list will be chosen for jury service than any white person on the list.

¹¹⁸ See Paul Brest, In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 48-52 (1976) (rejecting notion of group rights).

representation of nonwhites in capital grand juries, offers the clearest example of this. If the first twenty-one grand jurors selected are white, then the court must choose nonwhite veniremembers for the last two positions. At that point, the proposal increases the chances that remaining nonwhite veniremembers will be selected, but it eliminates any chance that remaining white veniremembers will be selected.¹¹⁹

Race-conscious measures adopted earlier in the selection process have similar effects. For example, supplementing source lists with the names of African Americans who have not registered to vote while not adding the names of unregistered whites creates disparate burdens among similarly situated individuals because of their race. The oversampling of groups that are underrepresented on voter registration lists may mean that the length of time between jury summonses for members of those groups is shorter than the interval between jury summonses for members of groups that are overrepresented on voter registration lists. One could even characterize a judge's consideration of race when choosing a trial venue as discrimination against racial groups or group members. If one assumes that all the eligible jurors in each potential destination venue have a right to be considered for jury service in the case being moved regardless of race, race-conscious venue selection violates the rights of each potential juror in those alternative venues.¹²⁰

¹¹⁹ See Hennepin County Report, *supra* note 23, at 45; see also Oscar Boswell, Casenote, Constitutional Law—Selection of State Grand Juries—Deliberate Inclusion of Negroes, 41 Tul. L. Rev. 473, 478-79 (1967) (criticizing purposeful inclusion in grand juries upheld in *Brooks* on ground that “a potential juror excluded from a venire because his race was already proportionately represented could argue that his exclusion violated his right to equal protection as an individual”).

¹²⁰ Compare Gilbert, *supra* note 7, at 1941 (defending constitutionality of proposals to consider race when choosing trial venues because they “are not affirmative inclusion measures . . . [but] merely mechanisms seeking to prevent an imbalance that would be created by a decision that would ordinarily not be made”) with commentators claiming that venue change decisions implicate the equal protection rights of potential jurors in rejected destinations, e.g., Lisa E. Alexander, Vicinage, Venue, and Community Cross-Section: Obstacles to a State Defendant's Right to a Trial by a Representative Jury, 19 Hastings Const. L.Q. 261, 287 (1991) (stating that venue change decisions which decrease available pool of minority jurors “discriminate[] against members of minority-dense communities by preventing participation in the judicial process” because “[t]he vicinage right belongs to the community as well as to the accused”) (alteration in original) (quoting *People v. Guzman*, 755 P.2d 917, 929 (Cal. 1989)); Out of the Frying Pan, *supra* note 7, at 718 (arguing that in some circumstances, venue change is “identical to one massive peremptory strike against minority jurors” and suggesting prosecutor should have standing to challenge equal protection injury to potential jurors).

Still, decisions to change trial venues may be distinguishable from the other selection procedures described here. Potential jurors may have no constitutionally protected interest as to where trials take place. The Constitution and statutes grant each defendant rights to a certain vicinage; some have suggested those guarantees also create rights in the community or the government. But individual jurors, such as those residents of Oakland County passed over by the judge who moved the Rodney King beating case to Ventura County, would seem to have no constitutionally protected interest here. A person's interest in being selected for jury

There is, however, an even deeper conflict between the Court's most recent decisions and the argument that racial jurymantering raises no equal protection concerns because it creates no disparate burdens for individuals or groups. For the Court, the "societal injury" created by the government's use of race to design juries—even without discernable effects on the opportunities of individuals or groups—is probably sufficient to trigger close scrutiny. In *Shaw*, the Court relied entirely on the potential threat of such systemic harm to justify its application of strict scrutiny to racially gerrymandered African-American-majority voting districts. The Court was unconcerned that the plaintiffs had failed even to allege that their opportunity to participate in the political process—either as individuals or as whites—had been in any way impaired by the redistricting plan, rejecting the arguments of dissenting Justices that redistricting with race in mind violates the equal protection clause only if it diminishes or dilutes a racial group's political strength.¹²¹ It apparently found such allegations unnecessary and instead declared "cognizable" two other "harms" created by "racial gerrymandering":¹²² the reinforcement of racial stereotypes and the threat to representative democracy posed by racial partisanship.¹²³ "Classifications of citizens solely on the

service in criminal and civil cases *already placed* in their community is at least more weighty than any interest they have in the placement of trials that *might be* moved there.

¹²¹ See *Shaw v. Reno*, 113 S. Ct. 2816, 2828 (1993). Justice White argued in his dissent that absent claims that the redistricting plan had "the intent and effect of unduly diminishing their influence on the political process," a racial group cannot claim a cognizable constitutional injury. *Id.* at 2834. "[T]he issue is whether the classification . . . discriminates against *anyone* by denying equal access to the political process." *Id.* at 2836 (White, J., dissenting). Also dissenting, Justice Blackmun explained that "[t]he conscious use of race in redistricting does not violate the equal protection clause unless the effect of the redistricting plan is to deny a particular group equal access to the political process or to minimize its voting strength unduly." *Id.* at 2843 (Blackmun, J., dissenting). Justice Stevens's dissenting opinion contended:

The difference between constitutional and unconstitutional gerrymanders has nothing to do with whether they are based on assumptions about the groups they affect, but whether their purpose is to enhance the power of the group in control of the districting process at the expense of any minority group, and thereby to strengthen the unequal distribution of electoral power. When an assumption that . . . a minority group . . . will vote in a particular way is used to *benefit* that group, no constitutional violation occurs.

Id. at 2844 (Stevens, J., dissenting). Justice Souter also agreed:

[T]he mere placement of an individual in one district instead of another denies no one a right or benefit provided to others. . . . [B]ecause the legitimate consideration of race in a districting decision is usually inevitable under the Voting Rights Act when communities are racially mixed, . . . and because without more, it does not result in diminished political effectiveness for anyone, we have not taken the approach of applying the usual standard of such heightened "scrutiny" to race-based districting decisions. . . . [A] gerrymandering claim cannot be proven without the element of harm.

Id. at 2846-47 (Souter, J., dissenting).

¹²² *Id.* at 2828 (O'Connor, J., for the Court).

¹²³ [R]eapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy

basis of race 'are by their very nature odious,'"¹²⁴ the Court wrote, and " 'serve to stimulate our society's latent race-consciousness.'"¹²⁵ The Court continued:

"When racial or religious lines are drawn by the state, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here."¹²⁶

"Indeed," the Court declared, "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally."¹²⁷ The Court's message is clear: "Racial classifications of *any sort* pose the risk of lasting harm to our society."¹²⁸

by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole. . . . Justice Souter does not adequately explain why these harms are not cognizable under the Fourteenth Amendment.

Id.

¹²⁴ Id. at 2824 (quoting *Hirabayashi v. United States*, 329 U.S. 81, 100 (1943)).

¹²⁵ Id. at 2825 (quoting *United Jewish Orgs. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part)).

¹²⁶ Id. at 2827-28 (quoting *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting)); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring) (terming "prophetic" Alexander Bickel's statement that a racial quota is "a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant").

Indeed, the rhetoric of *Shaw* has called into question the constitutionality of § 2 of the Voting Rights Act itself, see Aleinikoff & Issacharoff, *supra* note *, at 639; 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, 495-96 (1993), but these implications are beyond the scope of this Article.

¹²⁷ *Shaw*, 113 S. Ct. at 2829. In *Powers v. Ohio*, a recent jury selection case, the Court expressed a similar view about peremptory challenges:

We reject as well the view that race-based peremptory challenges survive equal protection scrutiny because members of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors. . . . It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.

499 U.S. 400, 410 (1991) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

¹²⁸ *Shaw*, 113 S. Ct. at 2832 (emphasis added). In contrast to *Shaw*, a majority of Justices in *United Jewish Organizations v. Carey* examined a race-conscious redistricting plan and stated:

There is no doubt that . . . the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment.

430 U.S. 144, 165 (1977). For more on the nature of the new equal protection injury recognized in *Shaw*, see Aleinikoff & Issacharoff, *supra* note *, at 609 (suggesting that *Shaw* prohibits " 'excessive' use of race"); Pildes & Niemi, *supra* note 126, at 506-07 (stating that *Shaw* was

Given these sweeping statements, and the many parallels between juries and legislatures,¹²⁹ it would be no stretch for the Court to conclude that using race to select juries creates similar harms. The Court has already observed that race-based peremptory challenges corrode public respect for and confidence in criminal proceedings.¹³⁰ The same Court appears poised to conclude that, like a legislature's use of race to create voting districts, even less overt uses of race in selecting jurors would "reinforce[] the perception that members of the same racial group . . . think alike"¹³¹ and would undermine our "progress as a multiracial democracy."¹³²

In sum, after *Shaw*, the absence of any discernible effect on individual or group opportunity will not shield race-conscious jury selection procedures from the strictest scrutiny. Those who litigate the constitutionality of these initiatives will face a Court that is unlikely to peek from behind its recently reinforced color-blinders. State and local¹³³ efforts to

concerned with "expressive harms").

¹²⁹ See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131, 1187-89 (1991) (exploring connections between juries and legislatures); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 *Va. L. Rev.* 1413, 1430 n.62, 1485-86 (1991) (drawing analogies between rights protected by Voting Rights Act and jury service rights); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 *Colum. L. Rev.* 725, 749-50 (1992) (characterizing electorate and jury as central institutions of representative government). It may very well be that the Court's concern about racial partisanship and its consequences for deliberation make the jury context the only logical subject, other than elections, of *Shaw*'s societal harm theory.

¹³⁰ See *Georgia v. McCollum*, 112 S. Ct. 2348, 2353-54 (1992) (noting harms to society and justice system when race discrimination occurs during voir dire).

¹³¹ *Shaw*, 113 S. Ct. at 2827 (citing *Holland v. Illinois*, 493 U.S. 474, 484 n.2 (1990)). In *Holland*, Justice Stevens noted in dissent:

[A] juror selected [by a computer selecting a mathematically correct number of members of demographic groups] might feel that she or he is filling some predetermined "slot" and might attempt to give the view generally associated with those demographic characteristics rather than the juror's personal feelings about the case. The jurors might find it harder to work together as a group because they may be more conscious of their identified differences than the much stronger common bonds that unite them as people.

493 U.S. at 512-13 n.10 (Stevens, J., dissenting) (quoting J. Van Dyke, *Jury Selection Procedures* 18 (1977)). Other judges share these sentiments. See, e.g., *Williams v. Superior Court*, 781 P.2d 537, 544 (Cal. 1989) (Kaufman, J., concurring) ("[H]eightedened race consciousness and utilization of criteria preferring one race over another, no matter how well intentioned, will in the long run be counterproductive to the common goal [of a color-blind society] and will tend to perpetuate racial bias and hostility.").

¹³² *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2088 (1991).

¹³³ The Court might evaluate federal congressional efforts differently, however. In the Court's most recent effort to consider the constitutionality of a federal race-conscious program designed to enhance minority opportunity, a narrow majority—including the now absent Justices White, Brennan, and Marshall—applied a less stringent standard, reasoning that the equal protection component of the fifth amendment's due process clause does not require strict scrutiny of congressionally crafted race-conscious measures. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) (upholding constitutionality of minority preference programs adopted by FCC). Alternatively, the Court could in the future apply lesser scrutiny to

increase minority participation in juries must now withstand the same strict scrutiny that would be applied to governmental racial classifications intended to bar minority group members from jury service entirely. The following Sections consider how challenges to affirmative selection procedures may be raised and how they might fare in light of the sentiments expressed in *Shaw* and *Croson*.

B. *Standing to Raise Equal Protection Challenges to Race-Conscious Jury Selection Procedures*

In its recent efforts to rein in both race-based peremptory challenges and the use of racial preferences in nonjury contexts, the Supreme Court has relaxed the showing of harm required of a complainant in order to establish standing to challenge such practices under the equal protection clause. These decisions have lengthened the list of potential challengers to racial preferences in jury selection, making these preferences more vulnerable to attack.

In *Powers v. Ohio*, the Court held that any criminal defendant may raise the equal protection rights of veniremembers excluded by a prosecutor's race-based peremptory challenges, whether or not the defendant shares the race of those excluded.¹³⁴ The Court concluded that a peremptory challenge based on race causes a defendant to suffer an injury in fact, that the possibility of postconviction relief makes the defendant an effective proponent of the excluded veniremember's rights, and that the excluded veniremember is not likely to assert those rights herself.¹³⁵

Powers eliminated the earlier requirement that a defendant challenging intentional discrimination must share the race of the target of discrimination in order to secure relief.¹³⁶ Now any defendant may seek relief from an indictment or a conviction in order to vindicate the rights of those excluded because of their race. The injury suffered by a defendant when race is used in jury selection is the same whether it takes place during early or late stages of selection, so long as the sorting has the

race-conscious congressional measures that are authorized by § 5 of the fourteenth amendment. See *Metro Broadcasting*, 497 U.S. at 563 (stating courts must grant "appropriate deference" to Congress when it employs its powers under fourteenth amendment (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980))); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (noting that § 5 grants Congress power to achieve equal protection mandates); *Fullilove*, 448 U.S. at 478 (holding that § 5 is an adequate basis for justifying congressionally mandated minority set-aside programs for government contracts). None of the initiatives discussed in this Article meet either of these criteria for relaxed scrutiny.

¹³⁴ 499 U.S. 400, 415 (1991).

¹³⁵ See *id.* at 411-15.

¹³⁶ See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (noting this requirement); *Castaneda v. Partida*, 430 U.S. 482, 496 (1977) (same).

potential to affect the racial composition of the resulting jury.¹³⁷ Regardless of the phase at which jury discrimination occurs, those excluded from jury service seem just as unlikely to seek redress for their own rights, and the defendant just as likely to be a strong advocate for relief.¹³⁸ As a result, lawmakers adopting race-conscious selection practices at any stage—even in the earliest stages such as venue selection or the selection of source lists—can now expect to litigate the constitutionality of these practices in post-conviction proceedings.

The Court also recently relaxed its standing requirements for plaintiffs who challenge race-conscious remedies in civil suits, making it easier for jury-eligible residents to bring equal protection claims.¹³⁹ This past term, in *Northeastern Florida Chapter of the Associated General Contrac-*

¹³⁷ Some of the language in *Powers*, however, leaves the Court the option of limiting the “actual injury” doctrine to discrimination during voir dire:

Unlike the instances where a defendant seeks to object to the introduction of evidence obtained illegally from a third party, . . . the primary constitutional violation occurred *during the trial* itself. A prosecutor’s wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed *in open court at the outset of the proceedings*. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. *The voir dire phase of the trial represents the “jurors’ first introduction to the substantive factual and legal issues in a case.” The influence of the voir dire process may persist through the whole course of the trial proceedings.*

499 U.S. at 412 (citations omitted) (emphasis added). Later the Court noted that the excluded juror and defendant have an interest in eliminating racial discrimination “from the courtroom.” *Id.* at 413; see also *Ramseur v. Beyer*, 983 F.2d 1215, 1246 (3d Cir. 1992) (en banc) (Alito, J., concurring) (arguing that trial judge’s efforts to pick racially balanced grand jury did not deny defendant’s equal protection rights, nor did defendant have standing to raise any violation of jurors’ rights to equal protection), cert. denied, 113 S. Ct. 2433 (1993).

For other standing cases with interesting implications for defendants’ jury challenges, see *United States ex rel. Chestnut v. Criminal Court*, 442 F.2d 611, 615 n.7 (2d Cir.) (granting standing to grand jury witness, who was fighting contempt for failing to testify, to challenge composition of grand jury list), cert. denied, 404 U.S. 856 (1971); *Mississippi State Bar v. Blackmon*, 600 So. 2d 166, 178-79 (Miss. 1992) (Banks, J., dissenting) (arguing that attorney who can prove race discrimination in selection of Committee on Professional Responsibility is entitled to relief from “any charge of misconduct originating with that committee”); see also David Kairys, *Juror Selection: The Law, A Mathematical Method of Analysis, and a Case Study*, 10 Am. Crim. L. Rev. 771, 783-85 (1972) (“Grand jury witnesses, who may also be potential defendants, are, therefore, within the class sought to be protected by constitutional requirements concerning composition.”).

¹³⁸ But see *Powers*, 499 U.S. at 415 (noting that barriers to suit by jurors excluded during peremptory challenges are higher than those excluded by “systematic practices of the jury clerk and commissioners,” because excluded veniremember would have difficulty showing “likelihood that discrimination against him at the *voir dire* stage will recur” (citing *Los Angeles v. Lyons*, 461 U.S. 95, 105-10 (1983))).

¹³⁹ As the Court stated in *Carter v. Jury Comm’n*, 396 U.S. 320 (1970): “People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion.” *Id.* at 329.

tors of America v. City of Jacksonville,¹⁴⁰ the Court held that an association of primarily white-owned construction contractors and firms had standing to challenge a city's set-aside program for minority-owned businesses, despite the association's inability to prove that without the program one or more of its members would have been awarded a contract. The Court reasoned that in order to show "injury in fact" sufficient to raise an equal protection challenge, a plaintiff need only show a "denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."¹⁴¹

The implications of *Northeastern Florida* for jury selection litigation are significant. So far, only minority groups have used civil suits to enjoin jury selection practices that are racially discriminatory.¹⁴² But the Court's decisions signal that white citizens who feel strongly enough about color-blind values to challenge selection practices that advantage minorities will be able to litigate the constitutionality of those practices in civil cases.¹⁴³ Just as white voters in *Shaw* were able to claim that racial gerrymandering violated their constitutional right to participate in a "color-blind" electoral process,¹⁴⁴ so too can potential jurors claim that racial jurymaning violates their right to participate in a "color-blind"

¹⁴⁰ 113 S. Ct. 2297, 2304-05 (1993).

¹⁴¹ *Id.* at 2303.

¹⁴² See *Turner v. Fouche*, 396 U.S. 346, 349-50 (1970) (alleging discrimination against African Americans); *Carter v. Jury Comm'n*, 396 U.S. 320, 322 (1970) (same); *Robinson v. Kimbrough*, 652 F.2d 458, 461 (5th Cir. 1981) (alleging exclusion of African Americans and women); *Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs*, 622 F.2d 807, 810 (5th Cir. 1980) (alleging exclusion of Americans of Mexican descent, women, young people, and poor people), cert. denied, 450 U.S. 964 (1981); *Porter v. Freeman*, 577 F.2d 329, 330 (5th Cir. 1978) (alleging discrimination against African Americans and women); *Berry v. Cooper*, 577 F.2d 322, 323 (5th Cir. 1978) (same); *Foster v. Sparks*, 506 F.2d 805, 805 (5th Cir. 1975) (same); *Salary v. Wilson*, 415 F.2d 467, 469 (5th Cir. 1969) (alleging discrimination against African Americans); *Pullum v. Greene*, 396 F.2d 251, 252 (5th Cir. 1968) (same); *Billingsley v. Clayton*, 359 F.2d 13, 15 (5th Cir.) (en banc) (same), cert. denied, 385 U.S. 841 (1966); *Newsom v. Daley*, 1987 U.S. Dist. LEXIS 2869, at *1 (N.D. Ill. 1987) (same); *Mann v. Cox*, 487 F. Supp. 147, 149 (S.D. Ga. 1979) (same); *Quandra v. Superior Court*, 378 F. Supp. 605, 609 (N.D. Cal. 1974) (challenging systematic exclusion of ethnic minorities, women, lower income persons, and young adults); *Jewell v. Stebbins*, 288 F. Supp. 600, 601 (E.D. Ark. 1968) (challenging exclusion of African Americans); *White v. Crook*, 251 F. Supp. 401, 402 (M.D. Ala. 1966) (alleging exclusion of African Americans and women); *Mitchell v. Johnson*, 250 F. Supp. 117, 119 (M.D. Ala. 1966) (challenging exclusion of African Americans). But see *Simmons v. Jones*, 478 F.2d 321, 329-30 (5th Cir. 1973) (holding that white plaintiff needed to show "systematic exclusion on the basis of race or some other ground forbidden by national policy" in order to have federal cause of action).

¹⁴³ Cf. *Gilbert*, supra note 7, at 1933 (proposing that when venue change decisions result in disproportionate underrepresentation of racial group in comparison with that group's representation in the county of origin, prosecutor should have standing to raise rights of jurors belonging to that group, and implying that excluded jurors may bring their own challenge).

¹⁴⁴ See *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993); see also *Hines v. Mayor of Ahuskie*, 998 F.2d 1266, 1274 (4th Cir. 1993) (finding that district court properly rejected proposed districting plan because plan would violate equal protection rights of white voters).

jury system.

*C. Applying Strict Scrutiny After Shaw and Croson:
A Bleak Forecast for Race-Conscious Jury Selection*

At the same time that the Court has made it easier for complainants to challenge affirmative action in jury selection, it has made defending these practices more difficult by limiting the theories under which these measures might survive strict scrutiny. Under strict scrutiny, a selection process that considers race violates the equal protection clause unless the measure is narrowly tailored and reasonably necessary to advance a compelling interest.¹⁴⁵ Although lawmakers who adopt race-conscious selection practices may be able to show that their reasons for adopting such techniques are compelling, few, if any, will be able to demonstrate to the present Court the requisite relationship between their objectives and the race-based methods they have chosen.

1. Identifying a Compelling Interest

a. Remediating Intentional Discrimination and Preventing Sixth Amendment Violations. For the Court, eliminating intentional race discrimination and its effects is a sufficiently important reason to justify the use of racial classifications.¹⁴⁶ Some jurisdictions may be able to show that this was indeed their purpose for adopting race-conscious measures by producing a "strong basis in evidence"¹⁴⁷ of past or continuing intentional racial discrimination during the jury selection process.¹⁴⁸ Jurisdictions that have traditionally delegated jury selection to the discretion of selectors, for instance, should be able to establish proof of past intentional discrimination simply by pointing to a prior judicial finding of discrimination or to one or more instances where a discretionary selection system has produced unrepresentative juries or jury pools.¹⁴⁹ However,

¹⁴⁵ See *Shaw*, 113 S. Ct. at 2824, 2831.

¹⁴⁶ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-507 (1989) (suggesting that allocation of public contracts on basis of race may be justified with adequate evidence of identified discrimination).

¹⁴⁷ *Shaw*, 113 S. Ct. at 2832; see also *Croson*, 488 U.S. at 500 (finding that there was no evidence of intentional discrimination "approaching a prima facie case").

¹⁴⁸ A state may establish a prima facie case of intentional discrimination in one of two ways: (1) by proving that the jury selection system creates an opportunity to discriminate on the basis of race and that the underrepresentation of minorities has resulted from that system; or (2) by showing that the selection process has resulted in substantial underrepresentation of minorities for a significant period of time. See *Castaneda v. Partida*, 430 U.S. 482, 493-94 (1977) (citing *Washington v. Davis*, 426 U.S. 229, 241 (1976) (discussing how defendant in criminal case can establish prima facie proof of discrimination in jury selection)).

¹⁴⁹ See, e.g., *People v. Cerrone*, 854 P.2d 178, 193-94 (Colo. 1993) (holding that defendant's proof that number of otherwise qualified Spanish-surnamed potential jurors were excluded by judge from grand jury venire, combined with proof that judge had opportunity to discriminate,

racial preferences in jury selection systems that are primarily random are not likely to be designed to remedy past or continuing intentional discrimination.¹⁵⁰ Alternative "compelling interests" must be found to justify these practices if they are to survive strict scrutiny.¹⁵¹

established prima facie case of intentional discrimination, even without showing of historical pattern of abuse); Crenshaw, supra note 62, at 215-16 (describing judicial order—entered after court found that former selection system violated equal protection—mandating that racial composition of qualified list approximate racial composition of population).

¹⁵⁰ Intentional discrimination in less discretionary systems would have to be demonstrated, if at all, by proof that lawmakers chose to perpetuate the underrepresentation of minority jurors by deliberately preserving ostensibly racially neutral criteria that screen out disproportionately more African Americans than whites. Cf. Kairys et al., supra note 37, at 815 ("The choice of which list or lists will be utilized, whether made by a legislature, by a court, or by selection officials, is an intentional act, and any resulting discrimination is systematic."). Although some lower courts continue to claim this method of proving intentional discrimination is available, see *Jefferson v. Morgan*, 962 F.2d 1185, 1191 (6th Cir. 1992) (noting that showing that defendant's race was underrepresented "on numerous grand juries over a significant period of time" raises "an inference that the state discriminated in selecting [the defendant's] particular grand jury"), I have not found a single case in which a court concluded that the defendant established *intentional* discrimination through proof of even protracted and significant unrepresentative effects alone; all have required, in addition, some proof that jury selectors had the opportunity to discriminate on the basis of race.

¹⁵¹ A majority of the Justices now on the Court has never declared that the *only* reason that will justify a State's use of racial classifications is discrimination itself, although the Court's opinion in *Croson* appeared to endorse this limitation. See *Croson*, 488 U.S. at 505 (holding municipality's failure to show "identified [local] discrimination" undermined its claim to have "compelling interest" for using racial classifications). Justice O'Connor's opinion (endorsed by Chief Justice Rehnquist, Justice White, and Justice Kennedy), see id. at 510-11 (emphasizing need for strong showing of identified local discrimination), as well as Justice Scalia's concurring opinion, see id. at 524 (asserting that states can use racial classifications only where "necessary to eliminate" prior official discrimination), suggest this also. Sorting out the votes on this point is a tricky business—given the 15 or so separate opinions in the Court's three most recent affirmative action decisions and the replacement of Justices Brennan, Marshall, and White—but the possibility that a majority will recognize alternative "compelling" interests remains.

Justices Blackmun, Stevens, and Ginsburg would probably consider interests other than that of remedying past intentional discrimination "compelling" for purposes of strict scrutiny. See *Shaw*, 113 S. Ct. at 2842 (White, J., joined by Blackmun and Stevens, J.J., dissenting) ("I have no doubt that a State's compliance with the Voting Rights Act clearly constitutes a compelling interest."); *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 568 n.15 (1990) (opinion of the Court, joined by Blackmun, J.) (noting possibility that other interests, including promoting racial diversity in higher education, may justify the use of affirmative action policies); *Croson*, 488 U.S. at 512 n.1 (Stevens, J., concurring in part and concurring in the judgment) ("I would not totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits."); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, C.J., concurring) (agreeing with Justice Stevens in *Croson* "that remedy for past wrong is not the exclusive basis upon which racial classifications may be justified"). Justice Souter's views on this subject appear only in *Shaw*, where he maintained that compliance with the Voting Rights Act justifies most racial classifications in redistricting under strict scrutiny. See *Shaw*, 113 S. Ct. at 2848 n.7 (Souter, J., dissenting). Justices Kennedy, Rehnquist, and O'Connor have recently hinted that compliance with the Voting Rights Act would offer a compelling justification which would permit racial classifications narrowly tailored to that goal. See id. at 2831-32; id. at 2842 (White J., dissenting) (noting that major-

One such interest may be the goal of ensuring the defendant's sixth amendment right "to a jury drawn from a venire constituting a fair cross section of the community."¹⁵² The sixth amendment imposes an affirmative duty to cure policies that result in underrepresentation of cognizable groups, unless those policies "manifestly and primarily" advance a significant state interest.¹⁵³ This express constitutional prohibition against systematic discrimination makes the government's interest in securing jury representativeness more important than its interest in, for example, promoting a "diversity of viewpoints" in broadcasting—a goal that several Justices recently termed "illegitimate" and "insubstantial."¹⁵⁴

Compliance with the sixth amendment's mandate of representative jury pools is also a more "specific and verifiable" objective than the general goal of remedying "societal discrimination," a purpose that a majority of Justices view as too "amorphous" to justify racial classifications.¹⁵⁵

ity "seemingly agree[s]" that Voting Rights Act compliance is compelling state interest). Justice Thomas joined Justice O'Connor's statement of this position in *Shaw*. See *id.* at 2819. Justice Scalia, however, remains opposed to the use of race by states except when "necessary to eliminate their own maintenance of a system of unlawful racial classification," *Croson*, 488 U.S. at 524 (Scalia, J., concurring), or to respond to "imminent danger to life and limb [such as] a prison race riot," *id.* at 521.

For a pre-*Shaw* vote-counting effort on this question, see T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. Colo. L. Rev. 325, 366-67 n.159 (1992) (predicting that Justices Blackmun and Stevens would permit race-conscious admission policies; Justices Kennedy, Scalia, White, Thomas, and Chief Justice Rehnquist would oppose such policies; Justice O'Connor would more than likely oppose them; and Justice Souter could vote either way). Lower courts since *Croson* have nearly always assumed that only the goal of remedying past racial discrimination will justify racial preferences. See, e.g., *Peightal v. Metropolitan Dade County*, 940 F.2d 1394, 1403 (11th Cir. 1991) ("The Constitution requires some showing of prior discrimination by the public employer to justify the use of race-preferential measures."), cert. denied, 112 S. Ct. 969 (1992); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 421-22 (7th Cir.) (stating that majority of Justices on Supreme Court would not employ racial classifications except to provide remedy for past discrimination), cert. denied, 111 S. Ct. 2261 (1991); *Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431, 437 (10th Cir. 1990) (assuming that purpose of race-conscious affirmative action is to address past wrongs against disadvantaged groups). But see *Hayes v. City of Charlotte*, 10 F.3d 207, 213 (4th Cir. 1993) (declining to decide whether promoting public respect for police is compelling interest that might justify race-based promotion decisions in police department).

¹⁵² *Holland v. Illinois*, 493 U.S. 474, 477 (1990) (recognizing cross-section right, but refusing to extend it to the voir dire stage of jury selection) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975)).

¹⁵³ *Duren v. Missouri*, 439 U.S. 357, 367 (1979); see *id.* at 363-64 ("[J]ury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.") (quoting *Taylor*, 419 U.S. at 538)). The right operates like equal protection might without the intent requirement. A prima facie showing of a sixth amendment violation can be established with statistics and is not rebuttable by proof of lack of deliberate discrimination.

¹⁵⁴ *Metro Broadcasting*, 497 U.S. at 613 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, J.J., dissenting).

¹⁵⁵ *Croson*, 488 U.S. at 497 (rejecting societal discrimination as "too amorphous a basis for

Because the Court has consistently circumscribed the scope of the cross-section guarantee, selection reforms intended to comply with the sixth amendment would support only "limited and carefully defined uses of racial classifications."¹⁵⁶ Specifically, a challenged reform would qualify as "remedial" only if existing procedures significantly underrepresented the preferred racial group¹⁵⁷ and, in addition, did not "manifestly and

imposing a racially classified remedy" (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986)).

In *Metro Broadcasting*, Justice O'Connor emphasized:

"[A]ttempt[s] to alleviate effects of societal discrimination" . . . would allow "remedies that are ageless in their reach into the past and timeless in their ability to affect the future" . . . [and] would allow distribution of goods essentially according to the demographic representation of particular racial and ethnic groups. . . . [Such attempts] would support indefinite use of racial classifications . . . first to obtain the appropriate mixture of racial views and then to ensure . . . that mixture.

497 U.S. at 614 (O'Connor, J., dissenting) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986)).

¹⁵⁶ *Metro Broadcasting*, 497 U.S. at 613 (O'Connor, J., dissenting).

¹⁵⁷ See *Duren*, 439 U.S. at 364 (noting that to establish prima facie violation of cross-section guarantee of sixth amendment defendant must show that representation of "distinctive" group in venires from which juries are selected is not "fair and reasonable" in relation to proportion of such persons in community). Despite scores of cases litigated on this topic, courts continue to debate what type of statistical analysis defendants may use to show either the absence of "fair" representation under the sixth amendment or "substantial underrepresentation" for equal protection analysis. See, e.g., *Floyd v. Garrison*, 996 F.2d 947, 950 (8th Cir. 1993) (rejecting comparative disparity analysis in favor of absolute disparity analysis); see also generally David C. Baldus & J. Cole, *Statistical Proof of Discrimination* (1980) (discussing use and interpretation of statistical proofs in discrimination cases); Sara Sun Beale, *Integrating Statistical Evidence and Legal Theory to Challenge the Selection of Grand and Petit Jurors*, 46 *Law & Contemp. Probs.* 269 (1983) (discussing use of statistical evidence in challenging jury selection); Kairys et al., *supra* note 37, at 796-97 (recommending that comparative disparity of 15% be adopted as statistical threshold for prima facie case of illegal underrepresentation); D.H. Kaye, *Statistical Analysis in Jury Discrimination Cases*, 25 *Jurimetrics J.* 274 (1985) (discussing use of statistical evidence in challenging jury selection). Also, the magnitude and regularity of underrepresentation necessary to qualify as "unfair" is not entirely certain. No consensus appears, for instance, on whether the statistical level of underrepresentation necessary for a prima facie case is the same for both equal protection and cross-section violations. See *United States v. Biaggi*, 909 F.2d 662, 678 (2d Cir. 1990) (holding that absolute disparity of 12% came close to, but did not violate, cross-section requirement). Some courts have held that absolute disparities as low as 5% and comparative disparities as low as 43% were sufficiently underrepresentative, while other courts have found that absolute disparities less than 10% and comparative disparities as high as 63% were not. See *United States v. Maskeny*, 609 F.2d 183, 190 (5th Cir.) (requiring showing of more than 10% absolute disparity), cert. denied, 447 U.S. 921 (1980); *Hillery v. Pulley*, 563 F. Supp. 1228 (E.D. Cal. 1983) (finding 5% absolute disparity sufficient); *In re Rhymes*, 217 Cal. Rptr. 439, 441-42, 445 (Cal. App. 2d 1985) (finding comparative disparity of 43% sufficient); *State v. Castonguay*, 481 A.2d 56, 64 (Conn. 1984) (finding no underrepresentation where comparative disparity was 63%). Courts also disagree about when and for how long the disparity must exist. Compare *Atwell v. Blackburn*, 800 F.2d 502, 505 (5th Cir. 1986) (requiring defendant to demonstrate underrepresentation in her particular venire), cert. denied, 480 U.S. 920 (1987) with *Singleton v. Lockhart*, 871 F.2d 1395, 1399 (8th Cir.) (requiring proof of sustained underrepresentation and finding that evidence of underrepresentation on single venire panel cannot demonstrate systematic exclusion),

primarily” advance a “significant state interest.”¹⁵⁸ Furthermore, the Court has explained that the cross-section requirement does not apply to the selection of trial jurors from the venire, so it could never justify racial consideration at that phase of jury selection.¹⁵⁹ A state would also have difficulty prevailing with the argument that the cross-section requirement justifies taking race into account when changing venues,¹⁶⁰ or when se-

cert. denied, 493 U.S. 874 (1989).

¹⁵⁸ *Duren*, 439 U.S. at 357, 367 (finding that blanket exemption from jury service for women is not tailored closely enough to state’s “important” interest in assuring that those members of family responsible for care of children are available to do so); see also *Holland v. Illinois*, 493 U.S. 474, 480-81 (1990) (holding that sixth amendment allows prosecutor to rely on “legitimate” state interests to exclude groups at voir dire stage); *Taylor v. Louisiana*, 419 U.S. 522, 533-35 (1975) (rejecting argument that automatic exception for women furthers state’s interest in family stability).

¹⁵⁹ See *Lockhart v. McCree*, 476 U.S. 162, 173 (1986) (finding no requirement that juries actually chosen reflect cross-section of community); *Duren*, 439 U.S. at 364 n.20 (same); *Taylor*, 419 U.S. at 538 (same). The majority in *Holland* most recently explained its refusal to extend the cross-section right to the petit jury. Justice Scalia reasoned that allowing each side to remove members of racial groups actually furthers the central purpose of the sixth amendment—obtaining an unbiased and impartial jury. See *Holland*, 493 U.S. at 481.

¹⁶⁰ The sixth amendment guarantees only a trial by an impartial jury “of the State and district wherein the crime shall have been committed.” U.S. Const. amend. VI. Thus, most courts have concluded that there can be no sixth amendment cross-section violation so long as a case is transferred within a federal district and the jury is drawn from a cross-section of that vicinage. See, e.g., *Hernandez v. Municipal Court*, 781 P.2d 547, 550 (Cal. 1989) (holding vicinage requirement is satisfied when defendant is tried in county which encompasses location of crime), cert. denied, 110 S. Ct. 3222 (1990); *Williams v. Superior Court*, 781 P.2d 537, 540-41 (Cal. 1989) (holding that sixth amendment places no limitations on state legislative decisions to define judicial districts and that such districts contain relevant community for sixth amendment purposes). Nor is there any sixth amendment injury if a defendant waives his right to a jury drawn from a cross-section of the community in which the crime was committed by moving for a change of venue. In order for a venue change to raise sixth amendment cross-section concerns, one must conclude either (1) that the community that must be cross-sectioned is not the entire federal district in which the crime was committed, but a more specific area, compare *Alvarado v. State*, 486 P.2d 891, 902-04 (Alaska 1971) (finding that community from which prospective jurors are drawn must include community in which crime was committed) and *Mareska v. State*, 534 N.E.2d 246, 248-50 (Ind. Ct. App. 1989) (holding that while city court could exercise county-wide jurisdiction, jury consisting of only city residents violated cross-section requirement when crime occurred outside city) with *United States v. Contreras-Ceballos*, 999 F.2d 432, 434 (9th Cir. 1993) (holding there was no sixth amendment right to venue change from Anchorage to Juneau when charged crime occurred few miles from Juneau but 570 miles from Anchorage, since both cities are within same federal judicial district); or (2) that the cross-section right guarantees a particular mix of potential jurors no matter where the trial is moved, see *People v. Goldswier*, 350 N.E.2d 604, 608 (N.Y. 1976) (noting in dicta that “within reasonable limits, the community to which the trial is transferred should reflect the character of the county where the crime was committed”); *Alexander*, supra note 120, at 292 (discussing proposal which would uphold jury pool not drawn from entire vicinage if it fairly represented vicinage as whole). In addition, one must conclude that a defendant who seeks a new venue does not waive either of these protections. Cf. *Scott Kafker, Note, The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. Chi. L. Rev. 729, 735-38 (1985) (discussing waiver issue and noting case in which federal district court chose to dismiss case rather than require defendant to

lecting grand juries and grand jury forepersons.¹⁶¹

These limits on the scope of the defendant's right under the sixth amendment may make the goal of protecting that right sufficiently unambiguous to qualify as "compelling." However, such judicial constraints also limit the ability of officials to prove that compliance with the sixth amendment actually motivated their race-conscious reforms. Since courts have consistently rejected cross-section challenges to many of the selection criteria that produce racial disparity in jury pools,¹⁶² it would be difficult for officials to persuade a court that they believed in good faith that failure to correct the underrepresentation caused by these criteria would violate the constitutional rights of criminal defendants.¹⁶³

choose between his right to impartial jury and his vicinage right). All three arguments are complex and controversial.

¹⁶¹ Most courts have concluded that selection procedures for state grand juries are not governed by federal cross-section limits. See, e.g., *State v. Fulton*, 566 N.E.2d 1195, 1198 (Ohio) (noting that sixth amendment's fair cross-section requirement does not apply to state grand juries), cert. denied, 112 S. Ct. 98 (1991). Some courts, however, continue to assume that the Constitution imposes some cross-section requirements for state grand jury selection. See, e.g., *People v. Guzman*, 457 N.E.2d 1143, 1146 (N.Y.), cert. denied, 466 U.S. 951 (1983). However, only a few have applied those requirements to procedures for selecting the grand jury's foreperson. Compare *Ramseur v. Beyer*, 983 F.2d 1215, 1237 (3d Cir. 1992) (en banc) (holding defendant cannot raise sixth amendment challenge to selection of state grand jury foreperson unless she demonstrates that foreperson alters representative character of jury by exerting "overpowering influence" over other jurors so that their views are "substantially diminished during the deliberative process"), cert. denied, 113 U.S. 2433 (1993) with *United States v. Perez-Hernandez*, 672 F.2d 1380, 1384-85 (11th Cir. 1982) (noting fair cross-section analysis is only applicable to groups which can represent society as whole, not single person).

¹⁶² For instance, Congress has considered registering to vote to be a good proxy for juror competence. See H.R. Judiciary Comm. Rep. No. 1076, 90th Cong., 2d Sess. 6 (1968) (noting "[v]oter lists contain an important built-in screening element in that they eliminate those individuals who are either unqualified to vote or *insufficiently interested in the world about them to do so*") (emphasis added). Despite proof that voter registration lists consistently underrepresent minorities, their use as jury source lists has been upheld in all but one or two reported cases since 1982. See, e.g., *Cunningham v. Zant*, 928 F.2d 1006, 1013 (11th Cir. 1991) (upholding use of voter registration lists as exclusive source of prospective jurors); *United States v. Biaggi*, 909 F.2d 662, 676-77 (2d Cir. 1990), cert. denied, 499 U.S. 904 (1991) (same); see also *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975) ("The States are free to grant exemptions from jury service to individuals in case of special hardship or incapacity and to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare."); *Smith v. Commonwealth*, 734 S.W.2d 437, 444 (Ky. 1987) (upholding system in which jurors *volunteer* to serve), cert. denied, 484 U.S. 1036 (1988); *Williams*, supra note 14, at 626 (noting that as of 1990 no sixth amendment challenge to exclusive use of voter registration lists as source lists had succeeded); *id.* at 626 n.246 (citing cases).

¹⁶³ I am not claiming that any judicial decision upholding a particular selection technique against a constitutional challenge precludes a subsequent finding of "strong evidence" of unconstitutionality. The equal protection clause does not require states to wait for courts to declare their policies unconstitutional before curing them. When the risk that a court may find that a practice is unconstitutional becomes high enough, a state should be permitted to take remedial action. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (O'Connor, J., concurring) (noting that requiring employers to make contemporary finding of past illegality "would severely undermine public employers' incentive to meet voluntarily their civil rights

b. Promoting the Integrity, Fairness, and Inclusiveness of Criminal Jury Proceedings. Other goals advanced by maximizing proportional racial representation on juries may justify carefully limited uses of race in jury selection, even if those goals are not explicitly enumerated in the Bill of Rights. Proponents of race-conscious selection practices have asserted three purposes for such proposals: (1) that racial diversity helps assure impartial decisionmaking,¹⁶⁴ (2) that it enhances public respect for criminal proceedings and acceptance of their results,¹⁶⁵ and (3) that it enables members of all groups in the community to enjoy the same opportunities to serve on criminal juries.¹⁶⁶ Because these very goals have animated the Court's jury discrimination decisions for decades,¹⁶⁷ the Court is un-

obligations"); cf. *Coral Constr. Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991) (allowing proof of discrimination after race-conscious remedial measures were enacted, because otherwise municipality would "face the dilemma of deciding whether to wait the months necessary for further development of the record, risking constitutional culpability due to its inaction, or to act and to risk liability for acting prematurely but otherwise justifiably"), cert. denied, 112 S. Ct. 875 (1992).

¹⁶⁴ See, e.g., Minnesota Task Force Report, *supra* note 33, at 573-74 (concluding that fair cross-section on grand jury decreases "the risks of miscommunication and racial or cultural bias in the process of receiving testimony and deliberation," that "[t]he ethnic, racial and sexual makeup of a jury affects the outcomes of cases," and that "[j]ack of understanding among whites creates an opening for unconscious prejudice and racial bias when evaluating the facts of a case concerning people of color").

¹⁶⁵ See, e.g., *id.* (finding that representation "enhanc[es] the perceived legitimacy and fairness of the grand jury," and stating that "[p]eople of color have a general distrust of the criminal justice system and exclusion from jury service fosters that distrust"). The Kalamazoo County, Michigan, proposal was also prompted by the belief that mixed-race juries will treat minority defendants more fairly and will be perceived as fairer. See Kalamazoo Report, *supra* note 3, at 1-7; see also Hennepin County Report, *supra* note 23, at 28-36 (finding that fair racial cross-section enhances perceived fairness of proceedings); Minnesota Task Force Report, *supra* note 33, at 574 (noting that representation "promot[es] greater cooperation between minority communities and law enforcement").

¹⁶⁶ See, e.g., Kalamazoo Report, *supra* note 3, at 12 (concluding that existing methods of selection have led to exclusion of minorities from jury process); R. Treece et al., *supra* note 7, at 57 (concluding that change is needed to counteract "public perception that [the jury system] has not done all that it can to be totally democratic, totally inclusionary").

¹⁶⁷ See, e.g., *Holland v. Illinois*, 493 U.S. 474 (1990), in which Justice Marshall stated in dissent that the cross-section requirement serves three purposes other than assuring impartiality:

"(1) 'guard[ing] against the exercise of arbitrary power' and ensuring that the 'common sense judgment of the community' will act as 'a hedge against the overzealous or mistaken prosecutor,' (2) preserving 'public confidence in the fairness of the criminal justice system,' and (3) implementing our belief that 'sharing in the administration of justice is a phase of civic responsibility.'"

Id. at 495 (Marshall, J., dissenting) (alteration in original) (quoting *Lockhart v. McCree*, 476 U.S. 162, 174-75 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975))); see also *Taylor*, 419 U.S. at 530-31 ("[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting))); *id.* at 530 (noting that community participation in administration of criminal law is "critical to public confidence in the fairness of the criminal

likely to maintain that they are illegitimate or trivial governmental goals. If these interests would fail as compelling goals, it is not because they are insufficiently important; rather, it is because they may be too difficult to define.¹⁶⁸ Still, each is more specific than the goal rejected by the Court as too vague—that of remedying “societal discrimination.”¹⁶⁹ Thus, together with the goals of remedying unconstitutional practices, these aims should satisfy the first part of the Court’s strict scrutiny test.¹⁷⁰ The more difficult hurdle for proponents of race-conscious jury selection procedures is demonstrating that such procedures are “reasonably necessary” to meet these objectives.

2. *Proving That Racial Classifications Are Reasonably Necessary to Achieve Compelling Objectives*

Even if the Court accepts the goals of remedying unconstitutional practices and promoting the fairness, integrity, and inclusiveness of criminal proceedings as sufficiently weighty and concrete reasons for adopting race-conscious procedures, proponents would still have to show that the procedures are narrowly tailored to accomplish these purposes. Language in the Court’s most recent opinions has made this task much more difficult.

First, the Court will insist on the prior consideration of race-neutral alternatives, and will be unlikely to accept a jurisdiction’s claim that there are no such options available to accomplish its aims.¹⁷¹ If a state

justice system”).

¹⁶⁸ That these goals are forward-looking rather than compensatory need not bar their recognition as “compelling.” See M. Rosenfeld, *supra* note 106, at 208-11 (noting that both O’Connor’s opinion and the dissenting opinion in *Crosby* recognized as compelling the forward-looking goal of preventing expenditure of public funds to further private racial discrimination).

¹⁶⁹ See note 155 and accompanying text *supra* (discussing Court’s rejection of this goal and citing cases).

¹⁷⁰ The Georgia Supreme Court suggested that race-conscious selection procedures would be justified by the state’s interest in complying with state statutory mandates. See *Meders v. State*, 389 S.E.2d 320, 323 (Ga. 1990), cert. denied, 113 S. Ct. 114 (1992). However, that court appears to have overlooked the fact that one of the primary targets of the equal protection clause is racially discriminatory state legislative action. Several Supreme Court Justices have suggested that complying with *federal* antidiscrimination statutes (such as Title VII or the Voting Rights Act) may constitute a compelling goal sufficient to justify the first prong of strict scrutiny, see note 151 *supra*, and Congress probably has more freedom to act under the equal protection clause than the states, see note 133 *supra*. Thus, state statutes granting defendants rights to racial representation on juries probably would not on their own justify race-conscious selection procedures. The same analysis would apply to state constitutional provisions.

¹⁷¹ See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 589-90 (1990) (upholding race-conscious program under intermediate scrutiny after noting that “the Commission established minority ownership preferences only after long experience demonstrated that race-neutral means could not produce adequate broadcasting diversity” and that “Congress agreed with the Commission’s assessment that race-neutral alternatives had failed to achieve the necessary pro-

wishes to compensate defendants or potential jurors for past intentional race discrimination, for instance, it is hard to see why racial sorting in subsequent cases is the best remedy. If a state's goal is to prevent future intentional discrimination in jury selection, the state could simply deprive jury selectors of the opportunity to discriminate by requiring mechanical or random selection, or by removing access to information about the race of potential jurors. For instance, if a jurisdiction that allows its judges to handpick grand jurors from an otherwise representative venire wants to prevent intentional discrimination, it need only provide that grand jurors be selected at random from the entire venire. It need not prescribe racial minimums or percentages. Similarly, grand jury forepersons could be chosen randomly from among the grand jurors. And if a jurisdiction learns that litigants are excluding disproportionately more minority veniremembers during voir dire, it could take the race-neutral step of reducing or eliminating the availability of peremptory challenges. Similarly, where reformers seek to remedy unintentional yet *systematic* underrepresentation caused by facially neutral jury selection criteria, such as status as a registered voter or the ability to write well in English, they could simply abandon those criteria.¹⁷²

Even in jurisdictions where lawmakers have adopted race-conscious policies in order to improve the integrity, fairness, and inclusiveness of criminal jury proceedings, race-neutral methods of increasing racial representation are often available.¹⁷³ The most obvious alternative is to adopt jury source lists that are more inclusive,¹⁷⁴ such as local tax rolls

gramming diversity"); *id.* at 623-24 (O'Connor, J., dissenting) (concluding that FCC's programs could not survive even intermediate scrutiny, because race-neutral and untried means of directly accomplishing governmental interest were readily available, and listing steps FCC could have taken but did not); *cf.* *United States v. Paradise*, 480 U.S. 149, 171 (1987) (listing following factors for courts to consider when evaluating whether program is narrowly tailored: "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties").

¹⁷² See ABA Jury Standards, *supra* note 26, at 34-40 (recommending that states use only objective standards for qualifying jurors—age, citizenship, residency, ability to communicate in English, and felony status).

¹⁷³ Many of the race-neutral reforms discussed at notes 174-83 and accompanying text *infra* are included in the ABA Jury Standards, *supra* note 26, now adopted by 14 states and followed by several more. See Letter from G. Thomas Munsterman, Director, Center for Jury Studies, National Center for State Courts, to author, at 2 (Nov. 22, 1993) (on file with the New York University Law Review). The Standards seek to make the jury source list as inclusive and representative as possible and then to use random selection methods to construct juries from that source list.

¹⁷⁴ See, e.g., Dane County Report, *supra* note 18, at 15 (recommending that in addition to licensed drivers and those holding state identification cards, high school students above age 18, and persons on general relief and AFDC should be included on source list); Georgia Handbook, *supra* note 3, at 8 (noting various sources of names for potential jurors—such as utility lists, telephone directories, and lists of licensed drivers—as well as groups each source is most

or lists of licensed drivers. Updating source or qualified lists more frequently can also increase the numbers of minority race citizens represented on those lists.¹⁷⁵ Jurisdictions can further improve the representativeness of qualified lists and venires by implementing one-step systems combining summonses and questionnaires,¹⁷⁶ by adopting the one-day/one-trial method of juror utilization to minimize inconvenience for jurors,¹⁷⁷ by increasing the compensation paid to all

likely to underrepresent); Hennepin County Report, *supra* note 23, at 37-44 (discussing relative potential of expanding representativeness through use of naturalization lists, tribal membership rolls, census data, welfare data, and community organization lists).

States that have switched from voter registration lists to driver's license lists as sources for juror names have noted a marked improvement in the diversity of their juror pools. See, e.g., Letter from Gary J. Barczak, Clerk of Circuit Court, Director of Court Services, Milwaukee County, to author (Oct. 6, 1993) (on file with the New York University Law Review) (noting that conversion to driver's license list "has resulted in a higher percentage of black minorities appearing for jury service"); Letter of William H. Lyons, Senior Assistant Attorney General, Criminal Justice Bureau, New Hampshire Department of Justice, to author (Sept. 9, 1993) (on file with the New York University Law Review) (noting that change to driver's license list made "composition of the jury pool much younger and [more] ethnically diverse"). Many states have switched precisely for this reason. See Letter from Lisa Rosenthal, Court Operations Consultant, Office of the Florida State Court Administrator, to author (Sept. 1993) (on file with the New York University Law Review) (noting that change was intended to increase representation of "especially those minorities underrepresented on the voters list"); see also R. Treece et al., *supra* note 7, at 38-40 (recommending that New York consider supplementing its source lists with more up-to-date utility lists, high school graduation lists, and lists of newly naturalized citizens and recipients of social service and unemployment benefits).

¹⁷⁵ See, e.g., Kalamazoo Report, *supra* note 3, at B-4 to B-5 (recommending that Secretary of State revise driver's license list annually or that new addresses be obtained from U.S. Postal Service); Alker & Barnard, *supra* note 18, at 236-37 (recommending that source lists should be more current and more carefully maintained); see also Senate Report, *supra* note 15, at 18-19 (describing National Change of Address program for updating voter registration lists with deaths and changes of residence as an option that is "efficient" and "cost-effective once the start-up computerization expenses are absorbed").

¹⁷⁶ See ABA Jury Standards, *supra* note 26, at 102-04; see also Telephone Interview with Errol Giddings, Management Analyst, Colorado State Court Administrator's Office (Sept. 9, 1993) (claiming this practice, in conjunction with addition of one-day/one-trial system, better follow-up on no-shows, enhanced juror compensation, and no proximity requirements, has significantly improved representation of low-income and minority race jurors in Colorado's courts).

¹⁷⁷ See Rorie Sherman, *Gripes Are Changing Jury Duty*, Nat'l L.J., Aug. 2, 1993, at 14 (quoting G. Thomas Munsterman, Director, Center for Jury Studies, National Center for State Courts, as stating that "more than 30% of the nation's citizens live in jurisdictions that have one-day/one-trial systems" in which a person's term of jury service is completed upon either serving for one day, if not selected, or for one trial). Similar reforms that would decrease the length of time that grand jurors must serve may make grand jury service more feasible for low-income persons. See Carp & Rowland, *supra* note 25, at 394 (endorsing Texas legislator's proposal that grand jury term be shortened from 90 to 30 days, that multiple grand juries be impaneled so that grand juries would not need to meet as often, and that grand jury sessions be scheduled during evenings or on Saturdays); Rowland et al., *supra* note 15, at 247 ("The greater time demands in Dallas County may represent a greater economic burden and, given the relatively low median income of minorities, may account for the lower levels of participation among minorities."). For an amusing account of one person's experience with jury duty

jurors,¹⁷⁸ by imposing penalties for employers that retaliate against employees summoned for jury service,¹⁷⁹ and by routinely following up on non-returned questionnaires and unanswered summonses.¹⁸⁰ If underrepresentation is traced to a selection system that draws jurors from areas containing disproportionately fewer African Americans, then an alternative sampling system that widens the area from which jurors are drawn and ensures representation by geography rather than race may improve jury representativeness.¹⁸¹ Expanding the size of criminal juries and reducing the number of peremptory challenges are other race-neutral measures that would probably produce more racially heterogeneous juries.¹⁸² Finally, if impartial juries are a state's goal, some improvements

in a court that does not use the one-day/one-trial system, see D. Keith Mano, *Jury-Duty Journal*, Nat'l Rev., Nov. 20, 1987, at 65.

¹⁷⁸ See, e.g., Dane County Report, *supra* note 18, at 18 (proposing raising juror fees); Hennepin County Report, *supra* note 23, at 55-57 (same); Kalamazoo Report, *supra* note 3, at 15 (same). Colorado reimburses jurors for their costs, including child care and transportation, for the first three days of service, and provides them \$50.00 per day thereafter. Telephone Interview with Errol Giddings, *supra* note 176; see also H. Fukurai et al., *Race and the Jury*, *supra* note 15, at 139 (noting that jurors are awarded \$5 per day in most state and federal courts in California); Carp & Rowland, *supra* note 25, at 394 (recommending that state systems strive to meet at least federal fee for grand juries). But see Shaun Sutner, *D.C. Plans to Cut Jury Duty Fee by \$30 per Day*, Wash. Post, June 13, 1991, at J1 (noting that court's executive officer reported that cut from \$32 to \$2 a day had not affected juror availability, that recent study showed that juror fee is "among the least important factors affecting their view of jury service," and that 85% of all businesses paid employees for time spent on short jury stints). The State of Hawaii once tried to require certain employers to compensate employees for jury service, but the Hawaii Supreme Court held that the statute was unconstitutional. See *Hasegawa v. Maui Pineapple Co.*, 475 P.2d 679, 683-84 (1970). The ABA recommends that employers be required to pay jurors' salaries for the first three days of jury service. See ABA Jury Standards, *supra* note 26, at 135.

¹⁷⁹ See, e.g., 28 U.S.C. § 1875 (1988) (employer who retaliates against any permanent employee as result of employee's jury service shall be liable for lost wages and subject to a civil penalty of up to \$1000); Ark. Code Ann. § 16-31-106 (Michie 1987) (employer subjecting employee to any form of penalty on account of her absence from employment by reason of jury duty is guilty of misdemeanor); Neb. Rev. Stat. § 25-1640 (1989) (same).

¹⁸⁰ See Dane County Report, *supra* note 18, at 16 (recommending that jury clerk pursue those who do not return questionnaires and those who fail to appear to maximum extent possible); Kalamazoo Report, *supra* note 3, at A-7 (noting that follow-up efforts for those who fail to respond to questionnaires were very effective—many people who had not replied were found, and most of those were qualified); Telephone Interview with Errol Giddings, *supra* note 176 (noting that Colorado's practice of sending "failure-to-appear" notice within one week to anyone who does not show up with her questionnaire succeeds in bringing in approximately 15% of those who do not show up first time).

¹⁸¹ See generally H. Fukurai et al., *Race and the Jury*, *supra* note 15, at 165-90 (describing such system). An Illinois statute, Ill. Ann. Stat. ch. 705, para. 310/9.2 (Smith-Hurd 1992), which allows courts in Cook County to draw jurors from predefined portions of Cook County, rather than its entirety, makes jury duty more convenient for those who may have difficulty travelling to distant courthouses but sometimes results in less racially diverse jury venires. Telephone Interview with Thomas Stringer, Special Projects Coordinator, Administrative Office of the Illinois Courts (Sept. 8, 1993).

¹⁸² See *Ballew v. Georgia*, 435 U.S. 223, 236 (1978) (discussing how reduction in jury size

may be possible without tinkering with racial composition. For instance, a court could expand voir dire procedures to permit litigants to learn more about juror attitudes.¹⁸³ In sum, a number of jury reforms exist that advance a state's compelling interests in fostering the legitimacy, impartiality, and inclusiveness of jury proceedings without the explicit use of racial criteria.

However, these race-neutral methods of enhancing minority representation often carry price tags that are higher than the cost of race-conscious policies which conveniently produce equally diverse jury pools. For instance, the political and fiscal costs of expanding source lists may be quite steep in states where the "key-man" system has been in effect for decades. In such states, a switch to random selection from voter registration or driver's license lists would require a change in state law and an overhaul of the selection system from the bottom up.¹⁸⁴ Even in primarily random systems that already use voter registration lists to generate juror names, supplementing those lists with driver's license lists may still be costly, especially where such alternative sources are not

decreases "representation of minority groups in the community"); ABA Jury Standards, *supra* note 26, at 158 & n.10 (same). Many have recently debated the wisdom of eliminating or reducing the number of peremptory challenges. See, e.g., Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 Temp. L. Rev. 369, 420-23 (1992).

¹⁸³ But cf. *United States v. Greer*, 968 F.2d 433, 437-38 (5th Cir. 1992) (en banc) (rejecting request of defendant charged with conspiracy against African-American, Hispanic, and Jewish citizens to ask jurors if they were Jewish), cert. denied, 113 S. Ct. 1390 (1993); Johnson, *supra* note 74, at 1673-75 (noting that few state courts recognize right to voir dire on racial prejudice and arguing that "voir dire [is] still ineffective in eliminating the effect of racial bias").

¹⁸⁴ Texas, for instance, still chooses grand jurors with the key-man system, see *Tex. Code Crim. Proc. art. 19.06* (West 1994), so that switching to another form of selection might entail significant costs at a time when the state is struggling to fund other reforms in criminal justice that are arguably just as urgently needed. See, e.g., Mark Hanse, *Death Penalty System in Turmoil*, A.B.A. J., July 1993, at 32 (noting that many consider reform of Texas's capital defense representation system desperately needed but unlikely, given that state "doesn't have a spare red cent"). But see *Carp & Rowland*, *supra* note 25, at 394-95 (opining in 1977 that replacing Texas jury commissioners with random selection methods "promises to be less costly and more efficient than the present system").

Consider also the Fifth Circuit's conclusion in *Brooks* that when Texas commissioners select a small group of citizens to serve as grand jurors they must be allowed to include minority jurors intentionally. See *Brooks v. Beto*, 366 F.2d 1, 24 (5th Cir. 1966), cert. denied, 386 U.S. 975 (1967). Under strict scrutiny, this makes sense only if Texas's key-man system is itself inviolate. If, on the contrary, the color-blind imperatives of the fourteenth amendment outweigh the state's interests in preferring its highly selective system to race-neutral, inclusive, and random alternatives, *Brooks* was wrongly decided. See Comment, *Jury Selection—Equal Protection—Deliberate Inclusion of Negroes on Grand Jury Held Constitutional*, 42 N.Y.U. L. Rev. 364, 367-68 (1967) (arguing that *Brooks* was justifiable since it was necessary to achieve state's compelling interest in "protecting the state's criminal processes from chaotic disruption, while ensuring that grand juries are fairly representative of a cross-section of the community"); see also R. Treece et al., *supra* note 7, at 43 (predicting that costly increase in juror fees would be difficult to achieve, given competing financial requirements of state court system).

computerized.¹⁸⁵

The validity of race-conscious selection practices may depend upon the extent to which the Court will allow states to forgo costly race-neutral reforms in favor of more expedient race-conscious means. The Court will not require a state to demonstrate that race-neutral means of improving representation are impossible—it seems to have conceded that there is a difference between alternatives which are realistic or reasonable and those which are not.¹⁸⁶ It has also stated repeatedly that states must be allowed “much leeway” in fashioning jury selection procedures and that the federal courts should avoid dictating how states select their juries.¹⁸⁷ But the Court’s recent equal protection decisions signal that any deference it has previously granted states in this context will not be extended when states choose *racial* criteria to select jurors. Indeed, I suspect that only if race-neutral methods of preventing the disproportionate exclusion of minorities are *prohibitively* expensive, would the Court find race-conscious methods to be “reasonably necessary.”¹⁸⁸

The Court’s more recent decisions provide another reason that race-

¹⁸⁵ Georgia provides an example. Administrative and fiscal costs have deterred lawmakers in Georgia from adopting proposals to supplement its juror source lists with driver’s license lists. The jury commissioners in each of 159 counties are instead required to ensure proportional representation by “oversampling” (my term) groups that are underrepresented on existing source lists. See text accompanying notes 56-62 *supra* (describing this system). The cost of supplementing the source lists in these counties, despite the automation of some aspects of voter registration and jury commission procedures, remains high. Each of Georgia’s counties has its own voter registration system and its own jury commission, with no conveniently accessible statewide list of registered voters. Many of Georgia’s voter registration lists and juror source lists are prepared or maintained without computers. However, those responsible for the statewide driver’s license list are permitted by state law to make the list available for jury commissioners to use. Telephone Interview with Holly K.O. Sparrow, *supra* note 61; see also Williams, *supra* note 14, at 632-33, 633 n.280 (noting that although cost of supplementing voter registration lists with driver’s license lists would not generally be “prohibitive,” in states that do not yet computerize their voter registration lists, computerization would involve significant expense).

¹⁸⁶ The majority in *Shaw* employed the term “reasonably necessary” to describe the appropriate relationship between means and end. *Shaw v. Reno*, 113 S. Ct. 2816, 2831 (1993).

¹⁸⁷ See *Taylor v. Louisiana*, 419 U.S. 522, 534, 538 (1975) (noting that states have discretion to grant exemptions from jury duty as well as to prescribe qualifications for jurors); see also *Carter v. Jury Comm’n*, 396 U.S. 320, 332 (1970) (“States remain free to confine the selection [of jurors] to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character.”) (footnotes omitted); *Brown v. Allen*, 344 U.S. 443, 473-74 (1952) (noting that proper source of jury lists should be left to states).

¹⁸⁸ Compare the analysis of the Georgia Supreme Court:

Appellant further argues that the commissioners’ bringing more women into the list after it was determined that they were underrepresented in the voter’s registration list set a “target figure” and therefore discriminated. . . . He stresses . . . that more women could have been included. However, there must of *necessity* be a “target figure” to meet the cross-section requirement.

Berryhill v. State, 291 S.E.2d 685, 691 (Ga.) (emphasis added), cert. denied, 459 U.S. 981

conscious proposals may not be deemed "reasonably necessary" or "narrowly tailored" to advance compelling interests. These decisions question not only the necessity but the very relevance of racial representation on juries to promoting jury impartiality and enhancing public respect for criminal proceedings—two of the compelling goals allegedly advanced by race-conscious selection practices.

First, since 1990 the Court disfavored linking racial composition to impartiality in juries. In that year, in *Metro Broadcasting v. FCC*,¹⁸⁹ the Court still assumed that race influences the viewpoint of individuals when it credited predictions that the type of programming that minority-owned radio stations would offer is different than the type that white-owned stations would offer.¹⁹⁰ Before 1990, the Court had recognized that a criminal defendant's chances of receiving a fair trial are affected by changes in the racial composition of his jury caused by the government's intentional or systematic exclusion of jurors by race,¹⁹¹ and had upheld

(1982).

The Hennepin proposal, which reserves two spots on every grand jury for minority members, may fail strict scrutiny for this reason. Indeed, the task force proposal itself recommended several race-neutral reforms which it expects would increase the representativeness of grand juries, including: (1) integrating of lists from the Immigration and Naturalization Service of recently naturalized citizens and tribal membership rolls into source lists; (2) raising the jury compensation fee to \$30.00 per day; and (3) setting up a day-care center for the children of jurors like the one operating in the District of Columbia Superior Court. See Hennepin County Report, *supra* note 23, at 55-58.

Numbers that would approximate proportional representation on Kalamazoo grand juries may apparently be achieved without the use of a 25% minority quota in every trial jury venire. The National Center for State Courts Technical Assistance Report for Kalamazoo County noted that "the primary reason for the lack of minority representation in the Circuit Court" was a computer software problem. The district courts were using up more of the city jurors, who were more likely to be African-American, before the circuit courts drew prospective jurors, a problem that the consultant suggested could be cured by allowing the circuit courts to select jurors randomly from the county-wide source list before prospective jurors were allocated to district courts. See Kalamazoo Report, *supra* note 3, at A-12 to A-13; Letter from G. Thomas Munsterman, *supra* note 173, at 2-3.

¹⁸⁹ 497 U.S. 547 (1990).

¹⁹⁰ See *id.* at 582-83. The Court added:

We have recognized . . . that the fair-cross-section requirement of the Sixth Amendment forbids the exclusion of groups on the basis of such characteristics as race and gender from a jury venire because "[w]ithout that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar dispositions." It is a small step from this logic to the conclusion that including minorities in the electromagnetic spectrum will be more likely to produce a "fair cross section" of diverse content.

Id. (citations omitted) (quoting *Holland v. Illinois*, 493 U.S. 474, 480-81 (1990)); see also *id.* at 636 (Kennedy, J., dissenting) ("Although the majority disclaims it, the FCC policy seems based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens.").

¹⁹¹ See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 86 & n.8, 87 (1986) (explaining why defendant's personal right to equal protection is violated by racial discrimination against

the deliberate creation of majority-minority voting districts under the Voting Rights Act.¹⁹² Since 1990, however, the Court has appeared to reject any assumption that the views of African Americans and whites can be predicted to differ under certain given circumstances.¹⁹³ Should a case squarely raising this issue reach the Court, this trend suggests that the Court will refuse to acknowledge that race has anything to do with the actual behavior of jurors or the outcome of jury proceedings.¹⁹⁴

veniremembers); *Brown v. Allen*, 344 U.S. 443, 471 (1953) (stating that jury discrimination denies "to an accused of the race against which such discrimination is directed" his rights to equal protection); see also *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), in which Justice Thomas stated:

[S]ecuring representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial. . . . [The public] apparently recognize[s] that conscious and unconscious prejudice persists in our society and that it may influence some juries. Common experience and common sense confirm this understanding.

Id. at 2360 (Thomas, J., concurring in the judgment). Justice Thomas later termed the Court's "assumption" in early cases that "all-white juries might judge black defendants unfairly" as "reasonable." *Id.*; see also *Holland v. Illinois*, 493 U.S. 474, 480-81 (1990) (noting that systematic exclusion of jurors by race when composing venire would lead to petit jury "disproportionately ill disposed towards one or all classes of defendants"); *Taylor v. Louisiana*, 419 U.S. 522, 531-32, 532 n.12 (1975) (holding that systematic exclusion of women from venire violated male defendant's sixth amendment rights in part because juror gender affects deliberations and results, and citing social psychology studies as support).

¹⁹² See *United Jewish Orgs. v. Carey*, 430 U.S. 144, 165-66 (1976).

¹⁹³ See *McCollum*, 112 S. Ct. at 2359 ("This Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror."); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (rejecting prosecutor's use of race-based peremptory challenges, stating, "We may not accept as a defense to racial discrimination the very stereotype the law condemns"). One of the most adamant advocates of color-blind principles, Justice O'Connor, seems to waffle on this particular question. Compare Justice O'Connor's dissent in *Metro Broadcasting*, 497 U.S. at 615 ("[T]he interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior.") with her dissent in *McCollum*, in which she stated:

It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence. . . . In a world where the outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors, there is cause to question the implications of this Court's good intentions.

112 S. Ct. at 2364.

The position of Justice Stevens is also difficult to divine. Compare *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313-14 (1986) (Stevens, J., dissenting) (noting that use of race is "absolutely prohibit[ed]" in selection of juries "because it is completely unrelated to any valid public purpose") with *Metro Broadcasting*, 497 U.S. at 601-02 (Stevens, J., concurring) (approving of race-conscious plan to achieve diversity in broadcasting, noting cross-section jury cases). Additional ambiguity arises from the tension between the Court's rejection of any link between racial composition and impartiality and its finding that a litigant suffers an "actual injury" sufficient to raise the rights of excluded jurors when those jurors are excluded because of their race. See text accompanying notes 134-44 *supra* (describing standing cases).

¹⁹⁴ Indeed, the Court's latest shifts undermine the very basis for the defendant's personal rights to a jury drawn from a venire that reflects a fair cross-section of the community, or to a

Some lower courts have already concluded that the Court's decisions render "untenable" any argument that juror race affects juror impartiality.¹⁹⁵

Second, the Court's insistence in *Shaw* that predictions of race-specific behavior damage the legitimacy of democratic institutions makes it particularly difficult for the Court to acknowledge that race-based jury selection could promote even the *appearance* of impartiality. In the view of the Court's current majority, attention to race increases and never decreases racial hostility and distrust, except perhaps when race is used to identify and compensate those wronged by prior intentional discrimination.¹⁹⁶ Taken at face value, the Court in *Shaw* may have effectively precluded arguments that attention to racial composition on juries can ever improve public respect for criminal jury proceedings.¹⁹⁷ In sum, judges reading recent Supreme Court opinions are not likely to consider race-conscious selection procedures "reasonably necessary" to achieve any of the goals lawmakers promoting them hope to achieve.

III

THE CASE FOR SOME RACE CONSCIOUSNESS: ADAPTING *CROSON* AND *SHAW* TO THE JURY CONTEXT

As more and more jurisdictions adopt race-conscious procedures in order to increase minority representation on juries,¹⁹⁸ courts are likely to

jury chosen without intentional discrimination against members of his race. See Underwood, *supra* note 129, at 727 (suggesting that focus on rights of excluded jurors rather than rights of defendants "provides a better explanation for the current structure of jury discrimination law").

¹⁹⁵ See, e.g., *United States v. Nururidin*, 8 F.3d 1187, 1190 (7th Cir. 1993) (rejecting African-American defendant's contention that all-white jury which convicted him of illegally possessing gun was biased because white jurors could not understand relationship between white Chicago police officers and inner-city African Americans and thus could not fairly assess credibility of white police officers who testified against him); see also King, *supra* note 1, at 105-08 (noting lower court resistance to recognizing that jury discrimination prejudices defendant). One judge, however, has granted a mistrial based on the relationship between race and impartiality. See *State v. Davis*, No. KO-92-600595 (Minn. Dist. Ct. Crim. Div., Oct. 1, 1993) (granting African-American defendants' motions for mistrial after concluding that all-white venire summoned to consider whether defendants had raped a "juvenile white woman" "created an atmosphere where [the judge] came to doubt that the litigants . . . would receive a fair trial").

¹⁹⁶ See notes 121-33 and accompanying text *supra* (discussing increased skepticism of factoring race into jury selection process).

¹⁹⁷ For a similar view, see Underwood, *supra* note 129, at 749 ("Courts that permit race-based jury selection present themselves to the public as hypocrites . . . Courts jeopardize their moral authority as chief enforcers of antidiscrimination norms, unless they impose the same requirements [of compliance with antidiscrimination law] on themselves.").

¹⁹⁸ Race-bias task forces calling for immediate reform are proliferating. See, e.g., ABA Report, *supra* note 38, at 1, 18 (noting reports on racial bias in justice system from several states and recommending that ABA make "any recommendations regarding federal and state

encounter challenges to such procedures by criminal defendants. The Supreme Court's recent decisions appear to leave judges little room to regard these jurymantering practices as anything but impermissible quick fixes for societal inequities. These decisions should deter risk-averse state officials confronted with urgent pleas for increased representation of minorities on juries from adopting race-conscious policies. The threat of lost convictions may cause such officials to tolerate existing policies that produce underrepresentative juries, but which have already weathered constitutional attack.

For adherents of color-blind principles, this is exactly the right result. I disagree. It is one thing to tell lawmakers that they need not remedy the unequal effects of race-neutral selection policies; it is an entirely different matter to tell them they must not do so. A virtual ban on race-consciousness in jury selection not only strikes me as unduly formalistic, but it also ignores the prominence of race in our understanding of jury fairness and the complexity of the Court's previous treatment of race and juries. A rigid application of *Shaw* and *Crosson* to race-conscious attempts to enhance minority presence on juries and in jury pools would underestimate the significant improvement in public support and respect for criminal jury decisions that racially representative juries and jury pools can produce. It would also overestimate the harms that flow from governmental recognition that racial composition ever matters. In *Shaw*, the Court suggested that the use of race to define or construct democratic institutions will plant the poisonous seed of racial balkanization—or at least fertilize what is already rooted.¹⁹⁹ However valid this prediction

jury pool policies *necessary to eliminate* [the] *discriminatory impact*" of existing policies) (emphasis added); Dane County Report, *supra* note 18, at 19 (recommending that "issues involving representation on juries be given highest priority"); *id.* at D-7 (noting that committee agreed "the goal of the system should be to insure that the pool of jurors actually summoned to the courthouse is representative of the community as a whole"); Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission, "Where the Injured Fly for Justice": Reforming Practices Which Impede the Dispensation of Justice to Minorities in Florida 28-30 (1991) [hereinafter Florida Report] (recommending that legislature adopt measures designed to increase diversity of juries in Florida); see also Suellyn Scarnecchia, State Responses to Task Force Reports on Race and Ethnic Bias in the Courts, 16 Hamline L. Rev. 923, 936-37 (1993) (noting that five published task force reports recommended reforms to increase representation of minorities on juries); Victoria Slind-Flor, Jury Commissions Hope for More Prominence, Nat'l L.J., May 18, 1992, at 31 (noting that 17 jurisdictions have convened commissions to address racial and ethnic bias in judicial system). One provision in the pending federal crime bill authorizes federal grants for states to study the role of race in their criminal justice systems and includes as one of the award criteria, "whether the state plan expressly considers the role of race in procedures for jury selection in the State." H.R. 3355, 103d Cong., 1st Sess. § 1021(b)(2) (1993); S. 1607, 103d Cong., 1st Sess. § 1021 (1993).

¹⁹⁹ See text accompanying notes 121-28 *supra*.

about the effects of race-consciousness may be in other contexts,²⁰⁰ it fails when applied uniformly to juries. Some race-conscious jury selection methods may have these effects; others will not.

I propose a modest three-part caveat to the harsh lessons of the Court's most recent cases: even if strict scrutiny is the appropriate method for evaluating these policies, courts that apply such scrutiny should recognize (1) that maximizing the appearance of fairness of criminal jury proceedings is a compelling governmental interest,²⁰¹ (2) that fair racial representation on juries is vital to the appearance of fairness in criminal jury proceedings, and (3) that in some circumstances race-conscious selection practices may improve, not impair, this appearance. In other words, government attention to the racial composition of criminal juries and jury pools may enhance rather than undermine race relations and the legitimacy of the criminal justice system.²⁰² This concession to color consciousness, circumscribed by the remaining requirements of strict scrutiny, could justify some carefully limited race-conscious reforms to improve racial representativeness in jury selection, even when existing procedures meet constitutional minimums. I argue that proportional representation need not be engineered for every jury in order to build and sustain multiracial support for jury proceedings, and that certain forms of jurymantering do more long-term damage to a bias-free image of our jury system than others. I conclude by suggesting some

²⁰⁰ In his dissent in *Shaw*, Justice Souter doubted the majority's prediction that race-conscious voter redistricting is socially harmful:

[I]t seems utterly implausible to me to presume, as the Court does, that North Carolina's creation of this strangely-shaped majority-minority district "generates" within the white plaintiffs here anything comparable to "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." As for representative democracy, I have difficulty seeing how it is threatened (indeed why it is not, rather, enhanced) by districts that are not even alleged to dilute anyone's vote.

Shaw v. Reno, 113 S. Ct. 2816, 2848 n.9 (1993) (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954); see also Bernard Grofman et al., *Minority Representation and the Quest for Voting Equality* 132 (1993) (claiming "there seems to be no factual basis for asserting that enforcement of the Voting Rights Act has led to an *increase* in racial polarization by making race a more salient feature of politics than it had been previously"); cf. Kennedy, *supra* note 105, at 1331 (arguing that stigmatization that results when African Americans are absent exceeds any stigma that affirmative action policies may cause).

²⁰¹ See text accompanying notes 164-66 *supra* (discussing goals related to maximizing appearance of fairness).

²⁰² A similar argument has been advanced to justify race-based promotion practices by a police department. See *Hayes v. City of Charlotte*, 10 F.3d 207, 213 (1993). The application of *Shaw* to racially gerrymandered voting districts may require a similar legitimacy-sensitive analysis. See Aleinikoff & Issacharoff, *supra* note *, at 647-49 (predicting that in order for Court to accept state's interest in "diversity" as compelling reason that would justify race-conscious districting, state must avoid "rigid quotas" and emphasize effects of diversity on legitimacy). I do not examine in this Article the applicability of this approach to nonjury contexts.

features that distinguish those affirmative action measures that are likely to improve public confidence in the fairness of our jury system to all groups from measures that are not likely to have this effect.

A. The Relationship Between Racial Representation on Juries and the Appearance of Fairness

Unrepresentative juries breed racial resentment. Many Americans already believe that the criminal justice system cannot be impartial to people of all races so long as juries continually fail to include a fair number of jurors from minority racial groups.²⁰³ Abundant evidence demonstrates that many whites distrust African-American jurors and that many African Americans distrust white jurors.²⁰⁴ The destructive impact of this resentment can be immediate and volatile.²⁰⁵ Or it can be

²⁰³ See Florida Report, *supra* note 198, at 29 (quoting African-American man who asked: "I have been registered [since 1950] and voted in every election. . . . I have yet to be selected for jury duty You're going to tell me that's fair?"); H. Fukurai et al., *Race and the Jury*, *supra* note 15, at 21 ("A wall of racial tensions may have been built between black and white populations, despite—and because of—structured practices like the underrepresentation of minority jurors and their ideological justification. Without jury participation by racial and ethnic minorities, racial dominance is structurally reinforced and perpetuated by individual racism and the withdrawal of support by minorities." (citation omitted)); Lawrence S. Wrightsman, *Psychology and the Legal System* 226-27 (1987) ("When the jury does not include all the components of the community, its voice is seen as false, and the community is likely to reject its outcome as invalid. . . . [A] defendant [might] reject the jury's decision if he or she is found guilty by a jury that has nothing in common with him or her. If members of underrepresented groups . . . do not serve, they are more likely to develop hostile attitudes toward the legal process."); Charles Whitaker, *Is There a Conspiracy to Keep Blacks off Juries?*, *Ebony*, Sept. 1992, at 54, 56 ("In the court of public opinion, the change of venue and other high profile examples of under-representation or complete lack of representation of Blacks on juries have the distinct smell of pure racism.").

²⁰⁴ See, e.g., King, *supra* note 1, at 126 nn.242-44 (citing sources); Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury*, 12 *Law & Hum. Behav.* 333, 347 (1988) (reporting study of 96 Northwestern University psychology students in which researchers found that subjects felt that overrepresentation of minorities, beyond their representation in community, jeopardizes fairness of jury); Daniel W. Shuman & Dr. Jean A. Hamilton, *Jury Service—It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors*, 46 *S.M.U. L. Rev.* 449, 456 (1992) ("Several . . . studies have . . . found that race influences perceptions of fairness in the judicial system."); see also R. Treece et al., *supra* note 7, at 1 (citing studies finding "general perception of bias in the court system and a high level of mistrust among the black and Hispanic persons surveyed").

²⁰⁵ The Rodney King case was a reminder that the lack of minority representation on criminal juries can trigger racial disillusion, frustration, and even violence. Cf. King, *supra* note 1, at 112 n.188, 124 n.234 (noting unrest precipitated by decisions of unrepresentative juries in Miami and in Tyler, Texas).

The Court itself has recognized that the "need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes." *Georgia v. McCollum*, 112 S. Ct. 2348, 2354 (1992) (citation omitted). The Court went on to explain that public confidence is undermined by convictions or acquittals obtained by the de-

less obvious. For instance, when an African-American defendant is convicted or sentenced to death and a white defendant is treated more leniently, or when a white victim is vindicated while an African-American victim is not,²⁰⁶ the absence of fair racial representation on the juries involved allows observers and participants to attribute these disparities to juror race. In other words, even if racial composition does not make much real difference in jury decisions,²⁰⁷ underrepresentation fuels the suspicion that it does and intensifies the skepticism about the race-neutrality of jury proceedings already felt by the public,²⁰⁸ as well as by many jurors themselves.²⁰⁹ As the Chair of The Jury Project of New

liberate use of peremptory challenges to exclude persons of one race. See *id.*

²⁰⁶ Several empirical analyses of death-sentencing decisions have found that the probability of receiving a death sentence is higher for African-American defendants or for defendants whose victims were white. See King, *supra* note 1, at 96-97 n.128 (citing studies).

²⁰⁷ I continue to believe that juror race can influence verdicts in some cases, but that premise is not essential to my argument here. See King, *supra* note 1, at 67-105 (reviewing empirical evidence on link between juror race and jury decisions); see also Herman, *supra* note 101, at 1836-39 (arguing that even proportional representation will fail to change many verdicts so long as African-American jurors remain minorities on juries).

²⁰⁸ See H. Fukurai et al., *Race and the Jury*, *supra* note 15, at 4 ("The persistent underrepresentation of racial minorities has contributed to public distrust and lack of faith in the legal system."); see also ABA Report, *supra* note 38, at 22 ("A justice system which is not a racial and ethnic cross-section of the community it serves fosters the perception of racial and ethnic discrimination."); MacCoun & Tyler, *supra* note 204, at 347 (finding that subjects' perceptions of fairness of jury depends on extent to which jury represents community); Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. Rev. 501, 557-60 (1986) (explaining "popular perceptions" of right to racial peers on criminal juries and arguing that exclusion of minority jurors "so distracts observers that they disregard the facts of the case altogether and begin to suspect, without more, that the outcome is unfair"); John Caher, *Study Urges Recruiting of Minority Jurors*, *Albany Times Union*, Apr. 12, 1993, at B2 ("If we continue to promote this disrespect for the law, which comes about when African-Americans and other people of color are left outside the process, we are going to continue to find that people are not going to respect law enforcement. . . . It is absolutely crucial. We have to overcome this perception that the system is inherently unfair.") (quoting Alice Green, Director, Center for Law and Justice, Albany, N.Y.); Gary A. Hengstler, *How Judges View Retrial of L.A. Cops*, *A.B.A. J.*, Aug. 1993, at 70, 71 (reporting survey of 401 state and federal judges which revealed that "34 percent of the judges concluded that race probably affects the verdict of an all-white jury when one of the parties on trial is black;" 23% conclude same is true when party is Hispanic; and 17% if party is "Asian or any other minority"); cf. Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 *Soc. Psychol. Q.* 67, 71 (1991) (reporting that study of 504 white and 136 African-American residents of Detroit area showed that "blacks are significantly more likely than whites to perceive [death] sentencing inequities," and concluding that attitudes of African Americans and whites toward criminal justice system are influenced by different factors).

²⁰⁹ A recent survey compared the attitudes of veniremembers who had been summoned and then released without being asked to serve on a criminal jury with those who ended up serving on criminal juries. See generally Shuman & Hamilton, *supra* note 204. The study showed that African Americans who had served as jurors perceived the jury system as less, not more, fair than African-American nonjurors. See *id.* at 464. Another recent survey touted as "the most extensive poll of former jurors ever conducted" found that African Americans who had served

York concluded in her introductory remarks to her commission: "Among minorities, a perception that they are not being called to serve in sufficient numbers exacerbates existing suspicions about whether the justice system works for minorities or is stacked against them."²¹⁰

It is not difficult to explain why racial diversity on juries is more important to us than racial diversity in other contexts. Jurors perform a special task shared only by judges themselves: they assign criminal liability and sometimes determine whether individuals live or die. Wielding this power, majority groups have used the criminal justice system to oppress members of minority groups throughout our country's history.²¹¹ The targets of other affirmative action efforts—unrepresentative faculties, boards of directors, even legislatures²¹²—lack this distinguishing feature.²¹³

The Supreme Court is not blind to the significance that litigants and court observers attach to the racial composition of juries. Indeed, the Court once appeared comfortable linking juror race to jury fairness. By concluding that intentional or systematic racial discrimination in the selection of criminal juries violated the constitutional rights of *the defendants tried by those juries*, the Court has enshrined the link between juror race and jury fairness in the Bill of Rights.²¹⁴ By interpreting the sixth amendment to prohibit not only intentional discrimination in jury selec-

on juries had significantly lower confidence in the race neutrality of the jury process than former jurors who were white, but it did not compare these findings to the attitudes of people who had never served on juries. *Racial Divide Affects Black, White Panelists*, Nat'l L.J., Feb. 22, 1993, at S8, S9 (reporting that 67% of black jurors versus only 33% of white jurors think that minority defendants are treated less fairly at trial than are white defendants, and that more than 66% of African-American jurors versus only 27% of white jurors agreed that African Americans unfairly receive death penalty more often than whites).

One cause of the negative attitudes by minorities reported in these sources appears to be underrepresentation itself. See Peggy C. Davis, *Law as Microaggression*, 98 Yale L.J. 1559, 1568-70 (1989) (relating stories of African Americans who had served on juries). If so, then improving racial representation on juries will improve the attitudes of African Americans toward the jury system, not damage it further.

²¹⁰ Memorandum from Colleen McMahon, Chair, to Members of The Jury Project, Introductory Remarks 2 (Aug. 13, 1993) (on file with the New York University Law Review).

²¹¹ See Coramae Richey Mann, *Unequal Justice: A Question of Color* 115-65 (1993) (providing history of American laws which have been used to oppress people of color); Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 Tul. L. Rev. 1739, 1743-66 (1993) (describing ways in which racial stereotypes are presented to juries in criminal cases).

²¹² Even elected bodies, which certainly have the power to oppress racial minorities, are more easily checked by the courts. They also do not sentence individuals.

²¹³ Indeed, there is evidence that some juries in early America were deliberately composed of both Native Americans and colonists to ensure the fairness and legitimacy of verdicts, and that the "mixed jury" or jury "de mediate linguae" was "alive and well" when the sixth amendment was adopted. Ramirez, *supra* note 65, at 24-25.

²¹⁴ See note 191 and accompanying text *supra* (citing leading cases); see also Herman, *supra* note 101, at 1819-24 (discussing link between racial discrimination in jury selection and defendant's right to verdict untainted by discrimination).

tion but also certain selection practices that are race-neutral but which systematically create significant disparate effects,²¹⁵ the Court has recognized that the Bill of Rights provides extraordinary remedies for jury discrimination beyond those typically required by the equal protection clause. The Court in these earlier cases was right. There is more to be concerned about when juries fail to reflect the racial diversity of the communities from which they are drawn than just the equal protection rights of potential jurors—the *very legitimacy of our jury system is at stake*.

Read as a whole, the jury decisions from the past two decades demonstrate that the Court is acutely aware of the inherent conflict between the two values or norms that dominate these cases: the importance of recognizing that racial composition affects fairness, or at least its appearance, and the imperative to avoid treating potential jurors differently because of their race or endorsing the legitimacy of racial discrimination. When the Court attempts to accommodate both of these concerns at once, we end up with a set of precedents premised upon reasoning that looks incoherent.²¹⁶ Depending on which of these values one holds most dear, the cases give one the impression that just when the Court gets going in the right direction, it forgets its destination and veers off the other way. The majority opinions in the most recent cases concerning peremptory challenges are typical. In those cases, the Court chides litigants for using racial predictions to secure more favorable verdicts, but then uses the same predictions itself to find that race-based peremptory challenges cause opposing litigants enough actual injury to satisfy standing requirements.²¹⁷

As merely the latest chapter in this long struggle, the language and reasoning in *Shaw*, *Crosby*, and *McCullom* do not definitively prohibit a state from ever considering racial composition when constructing juries or assessing jury fairness. Instead, the Court is likely to continue to treat race-consciousness in the jury cases the same way that some scholars have suggested the Court is treating race-consciousness in the voting context: defining, case by case, those situations in which one value should trump the other, attempting all the while to preserve a middle ground where both can coexist.²¹⁸ In the next Section, I offer a framework for

²¹⁵ See notes 152-53, 157, and accompanying text *supra* (discussing leading cases).

²¹⁶ See, e.g., note 193 *supra* (noting contradictory statements of Justices Stevens and O'Connor on these issues); see also King, *supra* note 1, at 67-69 (noting Court's contradictory statements about whether jury discrimination affects jury decisions).

²¹⁷ See text accompanying notes 134-38 *supra* (describing *Powers*).

²¹⁸ See Aleinikoff & Issacharoff, *supra* note *, at 640 (terming Court's approach to race-conscious districting decisions as "bobbing and weaving"); Pildes & Niemi, *supra* note 126, at 499-506 ("*Shaw* rests on the view that, in certain areas, the Court's role in construing the Constitution should be to require policymakers to accommodate and sustain the tension between conflicting values, rather than to permit one important value to subordinate all

defining this middle ground in a way that respects both competing threats to public confidence in the impartiality of the jury system—the risk of ignoring race and the risk of recognizing its significance.²¹⁹

B. Striking a Compromise: Assessing the Relationship Between the Use of Race in Jury Selection and the Appearance of Fairness, or How Much Attention to Race Is Too Much Attention to Race?

While racially representative juries can bring tremendous gains in public confidence in jury verdicts, those benefits will be in part dependent upon the fairness of the procedures used to impanel representative juries. The perceived impartiality of jury proceedings and their results depends upon more than the racial make-up of the juries; the views of court watchers and participants are also affected by the selection process itself. Selection practices may influence the appearance of fairness to different degrees and in different ways. Some of the more obvious or burdensome jurymantering practices may, as the Court in *Shaw* predicted, aggravate racial distrust of jury verdicts; other uses of race in the selection process may not, at least not to the same degree. The net effect of each jurymantering method on the general confidence in the fairness of jury verdicts is what matters. Any assessment of that net effect for each selection method must consider the relative ability of the method to secure racial diversity on jury panels as well as its relative tendency systematically to create and reinforce the perception that jurors of particular racial groups cannot be fair to litigants in particular cases. In other words, if the Court in *Shaw* found racial classifications constitutionally offensive *because* they ultimately deepen racial divides, it need not reject every use of race in jury selection.

This is, I admit, an argument that sometimes a little bit of racial sorting won't hurt. This position, however, is one I believe the Court should be prepared to take.²²⁰ I also concede that deciding which prac-

others.”).

²¹⁹ In seeking to accommodate both values, I disagree with Professor Andrew Kull, author of *The Color-Blind Constitution* (1992), who argues in his article, *Racial Justice: Trial By Cross-Section*, *New Republic*, Nov. 30, 1992, at 17, that *any* admission that juror race matters is too costly because it carries the same “repulsive implication[s]” of modern voting rights law, that “a person can neither represent another’s interest effectively nor judge him fairly unless he is of the same race.” *Id.* at 20. I do not deny that there is a price to be paid should courts uphold race-conscious selection practices. I believe, however, that the price is not constant, that the Court has willingly paid it in the past by recognizing a criminal defendant’s personal constitutional rights to a jury selected without systematic or intentional discrimination against members of his race, and that the price of ignoring underrepresentation entirely is probably much higher.

²²⁰ Cf. Aleinikoff & Issacharoff, *supra* note *, at 645 (characterizing *Shaw* as embodying an “it’s-OK-to-use-race-but-not-too-much” standard).

tices do more good than harm is a difficult task.²²¹ But the Court has already accepted a similar responsibility by interpreting the equal protection clause to allow those racial classifications that pass strict scrutiny.

I suggest that courts analyze which race-conscious reforms are reasonably necessary to maintain public confidence in the impartiality of jury proceedings by considering the following six circumstances. First, strict scrutiny's preference for race-neutral alternatives is a threshold consideration that courts can use to distinguish selection procedures that are "necessary" to the goal of minimizing race-based hostility to criminal jury proceedings from those that are not. The smaller the role that race plays in the selection process, the less likely it is that the process will be seen as endorsing or encouraging race-based decisionmaking. Thus, only if race-neutral methods of increasing racial representativeness on juries are impractical or have failed should race-conscious measures remain an option. Requiring the exhaustion of race-neutral alternatives is particularly sound in the jury context, where the kind of race-neutral reforms I have discussed in Part II tend to bring in representatives of many groups of people disproportionately excluded by traditional selection methods and afford the extra benefit of making jury service more convenient for all. Because race-neutral procedures can generate juries that are as diverse as those selected with race-conscious methods,²²² strict scrutiny's preference for race-neutral alternatives would invalidate many of the procedures described in Part I.

A second and related consideration should be whether or not the race-conscious jury selection measure is permanent or temporary. An affirmative selection policy is more likely to be perceived as narrowly tailored to the goal of improving the appearance of fairness of criminal jury proceedings if it has representative *race-neutral* procedures as its long-term goal.²²³ A trial run of race-conscious reforms may, for example, infuse enough minority community members into the system so that those who then participate may begin to counteract resistance in some minority communities to jury service.²²⁴

²²¹ See Pildes & Niemi, *supra* note 126, at 508 (stating that measuring message that governmental action conveys is exercise "fraught with complexity and unlikely to yield determinate, single right answers"); *id.* at 586 (noting that *Shaw* "is bereft of virtually any guidance as to how the elusive principles that underlie its holding are to be turned into an administrable set of standards").

²²² See text accompanying notes 171-83 *supra*.

²²³ Cf. Ira Glasser, *Affirmative Action and the Legacy of Racial Injustice*, in *Eliminating Racism: Profiles in Controversy* 341, 353 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988) (affirmative action remedies must be "temporary and measured" to avoid institutionalizing legitimacy of race bias).

²²⁴ See note 19 *supra* (noting that one cause of underrepresentation of minorities on qualified lists and venires may be low response rate to jury questionnaires in some minority communities); note 209 *supra* (suggesting that existing dissatisfaction with jury system felt by African

Four additional factors will help courts identify which race-conscious reforms are reasonably necessary to promote the appearance of fairness in criminal jury proceedings: the relative burdens that the procedure places on individuals,²²⁵ the specificity with which race is identified with fairness in particular cases or case-types, the extent to which race dominates selection criteria, and the identity of the group disadvantaged. The net gain in jury legitimacy from more diverse juries will be diminished or nullified completely when jurymaning becomes especially burdensome to individuals; when it is clearly linked to particular cases and their participants, intensifying the racial distrust in such cases; when it endorses race as the most salient determinant of a fair juror; or when it tends to favor historically advantaged groups. Race-conscious policies that best avoid these features should be constitutional.

Voir dire procedures that perfect the racial composition of each and every jury panel by sorting veniremembers by race are more likely to have the divisive effects that the *Shaw* Court predicted. First, an individual veniremember is more likely to notice and resent the effects of race on her opportunities for jury service, in part because she has much more to lose than potential jurors whose opportunities are decreased earlier in the process. When judges select summoned grand jury veniremembers by race or when litigants exercise peremptory challenges on the basis of race, those who are chosen and rejected may feel demeaned by the process. This "open and public"²²⁶ use of race causes veniremembers to suffer personal indignities they might not suffer had race been taken into account before the summoning process.²²⁷ Assurances that jurors are se-

Americans who have served as jurors would be reduced if more minorities served).

²²⁵ The Court has distinguished valid hiring preferences from invalid lay-off preferences by reasoning that losing one's job because of one's race is much more onerous than not getting a job or promotion for the same reason. Compare *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83 (1986) (Powell, J.) with *id.* at 319 n.14 (Stevens, J., dissenting) (calling Powell's distinction "wholly unpersuasive," "artificial," and having "no bearing on the equal protection question"); see also *Fullilove v. Klutznick*, 448 U.S. 448, 484-85 n.72 (1986) (upholding congressional minority set-aside policy in part because burden on nonminority businesses was light). The dissenters in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), referred to this "undue burden" test as an "independent requirement" of equal protection scrutiny, stating that "[t]he Government cannot employ race classifications that unduly burden individuals who are not members of the favored racial and ethnic groups." *Id.* at 630 (O'Connor, J., dissenting).

For a critique of this method of evaluating race-conscious measures, see L. Tribe, *supra* note 105, at 1536-37 ("Distinguishing between otherwise justified affirmative action plans on the basis of the degree of sacrifice they extract from equally innocent white workers . . . subordinates the achievement of racial justice to whatever pattern of economic distribution our discriminatory past happens to have produced.").

²²⁶ *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991).

²²⁷ See *Georgia v. McCollum*, 112 S. Ct. 2348, 2353 (1992) (noting that "the juror is subjected to open and public racial discrimination" when peremptory challenges are exercised on the basis of race); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (noting that stigma and dishonor

lected from the venire in proportion to the representation of their group in the community may not remove the sting of being chosen or rejected by race.²²⁸ Also, by the time a veniremember has responded to a jury summons, her life has been disrupted: she has arranged to miss work, made alternative arrangements for children and others in her care, paid for transportation and parking, and found her way to the courthouse.

Second, the more claim- or case-specific racial sorting appears, the greater the probability that observers and participants will assume that juror race will determine case outcome in similar circumstances. Certainly, all race-conscious selection procedures convey a similar message: "The government takes precautionary steps to prevent racially skewed jury pools because it wants everybody to have an equal opportunity to participate in the process and because juror race may matter in some cases to some people." This much strikes me as reasonable, even though it has the potential to "stimulate our society's latent race-consciousness."²²⁹ But when a judge or attorney uses race to choose individual grand jurors or trial jurors for a particular case, she sends a different, more offensive message. Race-based voir dire procedures say to the excluded veniremember: "Because of your race, we don't trust you to be fair *in this case*." The included veniremember hears, "You are included *in this case* because you are the right color," and the litigant learns, "Jurors of different races will vote differently *in your case*." These lessons have a much more sinister and destructive quality because of their personal, case-specific, and immediate nature. Finally, the race-based selection of veniremembers for grand and trial juries is difficult to recast as a race-neutral, or even a mixed-motive process, unlike some other race-conscious selection methods.²³⁰ These combined effects of race-based exclusion at the voir dire stage outweigh the advantages of having a perfectly representative panel for each case.²³¹

accompany race-based peremptory challenges).

²²⁸ In *Holland v. Illinois*, 493 U.S. 474 (1990), Justice Marshall explained in dissent:

That the juror may eventually be seated on a jury in another case is immaterial; no one can be expected to perceive himself to be a full participant in our system of criminal justice, or in our society as a whole, when he is told by a representative of the government that, because of his race, he is too stupid or too biased to serve on a particular jury. That he might not have to suffer such an indignity in every case is not an answer to the injury inflicted by the one instance of racism he is forced to endure.

Id. at 497 (Marshall, J., dissenting).

²²⁹ *Shaw v. Reno*, 113 S. Ct. 2816, 2825 (1993) (quoting *United Jewish Orgs. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part)).

²³⁰ See text accompanying note 235 *infra*. The Court has been somewhat more open to race-consciousness when race is only one of many factors decisionmakers take into account. See Aleinikoff & Issacharoff, *supra* note *, at 608-18 (comparing *Shaw's* excessive reliance approach with Court's earlier approach in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

²³¹ As Justice Marshall stated in his dissent in *Holland*:

If some race-conscious selection procedures are necessary, lawmakers should choose measures that are least burdensome to potential jurors, least likely to cause resentment, and which do not depend on the type of case or litigant that the jury will consider. Officials who trace underrepresentation on trial juries to their qualified lists, for example, should attempt to use race to construct qualified lists that are more representative instead of ignoring underrepresentation on the qualified lists and manipulating voir dire procedures to obtain representative juries. Under this framework, it would be difficult to justify the methods of grand jury selection proposed in Hennepin County or used by the trial judge in *Ramseur* if less burdensome methods were available to ensure racial representation in grand jury venires and grand jurors and their forepersons could be chosen randomly from those venires.²³²

Some race-conscious procedures that are case-specific may be more tolerable than race-sorting of a summoned venire, applying these criteria. A venue change statute like the one in Florida²³³ is an example of a race-conscious selection practice that prevents more bad will than it creates. Even though a decision to change venue is case- and party-specific, the burdens it places upon individual potential jurors because of their race are minuscule.²³⁴ A judge's effort to reproduce the racial composition of the population surrounding the original trial site when changing venues may vastly improve public acceptance of the jury verdict in the transferred case, while creating relatively little race-based resentment about the actual process of selecting that jury.²³⁵ This is especially likely when race is only one of several demographic features the judge attempts to

The public is unlikely to perceive that our system of criminal justice is unfair simply because a particular jury does not represent every segment of the community, especially where the jury's composition is merely the result of a spin of the jury wheel. Public confidence is undermined by the appearance that the government is trying to stack the deck against criminal defendants and to remove African Americans from jury service solely because of their race. No similar inference can be drawn from the operations of chance.

493 U.S. at 499; cf. *Golash*, supra note 115, at 174-77 (arguing that Court's ban on intentional discrimination in courtroom in *Batson* and *Powers* furthers appearance of fairness rather than actual fairness).

²³² See Comment, supra note 184, at 368-70 (arguing that, while deliberate inclusion of minority jurors on source lists may be at least temporarily necessary to ensure that racial groups are not excluded, "deliberate inclusion on the intermediate panel seems almost impossible to justify").

²³³ See note 41 and accompanying text supra.

²³⁴ See note 120 supra (considering harms to residents of rejected trial destinations).

²³⁵ Cf. *Gilbert*, supra note 7, at 1927-28 ("[The] appearance of bias in the creation of the jury by virtue of the change of venue [from a location with a substantial representation of people of color to a location with fewer or none of the same people] causes continuing distrust and cynicism about the operation of the criminal justice system with respect to the excluded group."); *id.* at 1932 (arguing that "a consciousness of the need for inclusion . . . should be injected into the court's considerations in the change of venue decision especially in racially

duplicate. Such procedures help prevent those observing and participating in jury proceedings from readily attributing outcomes to juror race, and encourage them instead to focus debates about fairness away from juror race to other aspects of criminal proceedings.

To illustrate this approach in hypothetical terms, assume that Mr. Doe (who is African-American) and Ms. Smith (who is white) are residents of Diver City, an urban area with twenty-five percent African-American, sixty-five percent white, and ten percent other-race adult residents. Assume that a judge from Publi City, a city in another county, in which half the adult population is African-American, decides that she must grant a motion for a change of venue in a case filed there. If she rejects Diver City as a potential venue and chooses another site because the racial demographics of the jury pool there more closely match those of Publi City, what is the impact on Mr. Doe and Ms. Smith? They are deprived of a very small chance to serve as jurors in that case, simply because there are too many whites and not enough African Americans living in Diver City. Considering that their expectations for serving as jurors in a case from another county must be very slim to begin with and that their opportunities for serving on juries in every other case filed in Diver City have not been affected at all, the disadvantage each suffers is minimal. And even if that disadvantage is attributable to race, it is not their own race that made the difference, but the collective racial composition of their community. From the perspective of Mr. Doe or Ms. Smith, then, the decision does not appear particularly unfair. From the perspective of the litigants and their respective supporters, the decision enhances fairness by preventing what might otherwise have been perceived as a demographic windfall for one side.

Consider a second example, involving the race-conscious construction of qualified juror lists. Assume that the jury source list for Diver City (a combined driver's license list and voter registration list) reflects a fair cross-section of the African-American adult residents (twenty-five percent), but by the time potential jurors are qualified through questionnaires, the percentage of African Americans on the qualified list drops to fifteen percent. Assume that in order to boost the number of African Americans on the qualified list back up to twenty-five percent, the jury administrator decides to send more questionnaires to African-American residents—to oversample the names of African-American residents on

sensitive cases so as to diminish both the appearance and the actuality of bias”).

In an ABA-sponsored Gallup telephone survey of 401 state and federal judges taken in June of 1993, 15% said a judge should *always* “take into account the racial makeup of the community in change-of-venue trials,” 13% said it should be “a factor ‘*most of the time*,’” and 31% said it should “‘*rarely*’ be taken into account.” Hengstler, *supra* note 208, at 71 (emphasis added).

the source list. Assume also that had Diver City used a random selection method, so that each person on the source list, including Mr. Doe and Ms. Smith, could probably expect a jury questionnaire every five years. Under the race-conscious system, whites are mailed jury questionnaires less frequently than African Americans. Mr. Doe will be sent a questionnaire more often—say once every three or four years—while Ms. Smith will receive a questionnaire less often—say once every five or six years. From their perspectives, they may know that some African Americans receive jury questionnaires more often than some whites, but neither is being excluded from a particular trial, or a particular venire, because of race. Once the questionnaires are sent, the remainder of the selection process is random or race-neutral.

Compare these effects to the experiences Mr. Doe and Ms. Smith would have if the jury selectors of Diver City sorted prospective jurors by race later in the process. If both were summoned but then learned that Ms. Smith was not chosen for a particular venire because she was white, each might come away from the experience even more convinced that juror race matters to the outcome of jury decisions. And if Mr. Doe's or Ms. Smith's race played a role in determining his or her opportunity to sit on a jury that will consider known charges against known litigants, the selection process may teach them that a jury which is too homogeneous would be unfair in that particular type of case.

In sum, even assuming that citizens were fully informed of the extent to which race is used in selecting juries, they would be more likely to accept last-resort race-conscious procedures early in the selection process—such as stratified questionnaire techniques or the consideration of race in venue selection—than to accept racial sorting of veniremembers. Early stage procedures are more easily perceived as efforts to offer an equal opportunity for all residents of a community to serve as jurors and to improve the appearance of fairness of the jury system as a whole, rather than efforts to provide more favorable juries to particular litigants at the expense of particular jury-eligible citizens.

Finally, any assessment of the degree to which a court's particular use of race in the jury selection process increases distrust of jury proceedings must consider the identity of the group disadvantaged by the policy. Socioeconomic realities assure that, for now, attempts to "balance" jury pools will inevitably involve efforts to increase the jury service opportunities of minorities and reduce existing opportunities for whites. A proposal that has the opposite effect, that of decreasing existing opportunities for minorities to serve as jurors and increasing those of whites, will be perceived more negatively. There is a palpable difference between race discrimination that perpetuates a disadvantage that American citizens have struggled for decades to surmount and discrimination that lacks

this tragic tradition.²³⁶ Even though this distinction has not impressed the Court as an appropriate dividing line between those uses of race which deserve strict scrutiny and those which do not, it can at least serve as one factor informing a judge's assessment of the effect of race-conscious selection practices on the appearance of fairness.²³⁷

A related point deserves attention here. One might object that group preferences in jury selection can never be narrowly tailored to the goal of maximizing the appearance of fairness if they are limited to members of only one race, or even to members of only racial groups. Underrepresentation of other groups on juries might promote resentment and distrust as well. If fairness or its appearance requires the presence of peers of both the victim and the defendant, for instance, then race-conscious selection policies that provide only proportional representation of one or two targeted groups will be underinclusive at least part of the time. Many have argued that the impossibility of fashioning a jury that represents all potentially salient groups—not just racial, ethnic, and gender, but also sexual-preference, religious, etc.—is a reason for refusing to extend the cross-section right to trial juries.²³⁸ In my view, the same impracticality should also furnish a defense to the charge that these race-conscious policies do not go far enough. The imperfect accomplishments of race-conscious jury selection techniques should not prove fatal unless something better could be devised; reformers should be able to tackle

²³⁶ For example, as one group of commentators has explained:

While the Supreme Court has stated that all governmental uses of race are subject to strict scrutiny, nearly all members of the Supreme Court have recognized that there is a critical moral and constitutional difference between governmental interests in employing race to correct historic discrimination—or even to promote diversity—and governmental interests in using race to advance debilitating stereotypes and the perpetuation of racial exclusion.

Joint Statement of 30 Constitutional Scholars, 98 *Yale L.J.* 1711, 1712-13 (1989).

²³⁷ I recognize that these predictions about public reaction to various aspects of the jury system are my own hypotheses, as yet untested. The Court also failed to cite empirical support when it predicted in *Shaw* that the use of race in voter redistricting threatens public confidence in the governmental bodies forming and formed by those districts, as well as deepens racial divides. See Aleinikoff & Issacharoff, *supra* note *, at 612-13 (noting that Court's description of legitimacy in *Shaw* seemed "rather thin" and suggesting that Court could have been wrong about effects of redistricting decision in that case). Gathering empirical support on these issues will be a challenge for anyone litigating the validity of race-conscious voter redistricting or jury selection decisions after *Shaw*, and I hope that one of the by-products of the decision will be more research testing the rhetoric about the effects of race-based decisions on perceptions of fairness.

²³⁸ See, e.g., *Holland v. Illinois*, 493 U.S. 474, 488 (1990) (Kennedy, J., concurring) (failing to find limiting principle to make fair-cross-section requirement workable in practice); James J. Gobert, In Search of the Impartial Jury, 79 *J. Crim. L. & Criminology* 269, 296 (1988) ("[T]he cross-section requirement and the nondiscrimination principle, regardless of theoretical merit, are doomed in practice.").

injustice a piece at a time.²³⁹

Whether any of the particular policies canvassed earlier would survive the analysis proposed in this Article would of course depend on the surrounding circumstances, including an assessment of whether race-neutral reforms or less intrusive race-conscious reforms were feasible. Those willing to adopt race-conscious proposals should thoroughly document existing underrepresentation and its causes, investigate race-neutral procedures to reduce racial disparity, and then, if race-neutral procedures would continue to generate unrepresentative jury pools, prefer early, rather than late-stage, race-conscious methods of increasing representation.²⁴⁰

CONCLUSION

Jury discrimination litigation is not winding down.²⁴¹ It has been

²³⁹ Cf. *Fullilove v. Klutznick*, 448 U.S. 448, 485 (1980). Responding to a similar claim of underinclusiveness, the Court asserted:

There has been no showing in this case that Congress has inadvertently affected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the [race-conscious] program.

Id. (emphasis added).

²⁴⁰ These tasks are daunting to most court systems. Courts and legislatures are reluctant to collect and document jury underrepresentation for fear that the statistics will be used by defendants to challenge convictions. Of the states that have adopted the jury selection procedures proposed by the ABA, two have rejected the recommendation to monitor the representation of groups in jury pools. See ABA Jury Standards, *supra* note 26, at xviii (Standard 12: Monitoring the Jury System) ("Courts should collect and analyze information regarding the performance of the jury system on a regular basis in order to ensure . . . the representativeness and inclusiveness of the jury source list . . ."); Letter from G. Thomas Munsterman, *supra* note 173; Telephone Interview with G. Thomas Munsterman, Director, Center for Jury Studies, National Center for State Courts (June 9, 1993) (characterizing response of most court personnel to this recommendation as "Why should we do something that can only hurt us?"); cf. *Johnson v. Transportation Agency*, 480 U.S. 616, 652-53 (1987) (O'Connor, J., concurring) (noting that employers are trapped between liability to minorities for failing to remedy apparent discrimination and liability to nonminorities for premature affirmative action).

An alternative method of insulating race-conscious methods of jury selection from constitutional attack might be to seek explicit authorization for these proposals from Congress. See *Fullilove*, 448 U.S. at 478 (upholding federal set-aside laws as valid use of Congress's power under § 5 of fourteenth amendment). For a description of one federal act that would have regulated state jury selection systems, see William K. Hayes, Note, Jury Selection and the Equal Protection Clause, 2 U.C.L.A.-Alaska L. Rev. 141, 154-56 (1973). But see *Shaw v. Reno*, 113 S. Ct. 2816, 2831 (1993) (stating that Court leaves open possibility that § 2 of Voting Rights Act itself is unconstitutional to extent that it requires adoption of racially gerrymandered districts); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 14.10, at 658-59 (4th ed. 1991) ("It is doubtful that even a federal law establishing an affirmative action racial classification would be upheld if the law used a racial quota system, which fixed the share of benefits that would be allocated to different groups of persons by race.").

²⁴¹ Some have optimistically claimed that it is. See, e.g., Marvin E. Frankel & Gary P. Naftalis, *The Grand Jury: An Institution on Trial* 33-34 (2d ed. 1977).

transformed. Formerly, minority litigants protested the exclusion of minority jurors. Now every defendant and every affected white citizen is a potential opponent of measures adopted to ensure minority representation on juries and in jury pools.²⁴² Jury selection litigation is poised to experience the same shift of focus that other race-discrimination litigation experienced over the last twenty-five years.²⁴³ Courts that were once enlisted to strike down classifications that limit the opportunities of African Americans and other historically disadvantaged groups will be asked with increasing frequency to strike down affirmative action efforts that impair, even marginally, existing opportunities for whites to serve on criminal juries.

If applied inflexibly to the jury context, the Court's most recent equal protection rhetoric may have the fortunate effect of prompting jury administrators to opt for more inclusive, race-neutral methods of increasing racial representation on criminal juries. But it may in the process also discourage laudable race-conscious reforms. Any evaluation of jury selection practices that are race-conscious must recognize the importance of race to the public's perceptions of the fairness of jury proceedings. The Court's latest opinions suggest that a majority of Justices may be losing this appreciation; I suggest they reconsider. A century of incremental reform has begun to reduce racial underrepresentation on criminal juries and its destructive consequences. This is no time to turn back.

²⁴² See, e.g., Matthew Kauffmann, *Death Row Inmate Says Jury Selection Flawed*, *Hartford Courant*, Dec. 3, 1993, at C1 (noting African-American defendant who challenged his conviction, claiming that judge's effort to include more African Americans in jury pool was illegal).

²⁴³ See, e.g., Donald E. Lively, *The Constitution and Race 177* (1992) (referring to present anomaly of Court's approach noting that "the harshest standard of review, for practical purposes, has been reserved primarily for constitutional claims by the dominant racial group" and that "[a]nalytical standards introduced to repair process defect thus may be responsible for its aggravation"); cf. Aleinikoff & Issacharoff, *supra* note *, at 638 (stating that Court has left us with "the gnawing impression that the rules of the game were changed only when minorities started to figure out how to play").