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Democracy, Epistemology and the Problem of All-White Juries

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ABSTRACT Does it matter that almost all juries in England and Wales are all-White? Does it matter, even if this result is the unintended and undesired result of otherwise acceptable ways of choosing juries? Finally, does it matter that almost all juries are all-White if this has no adverse effect on the treatment of non-White defendants and victims of crime? According to Cheryl Thomas, there is no injustice in a system of jury selection, which predictably results in juries with no minority members, so long as this result is not deliberate and does not adversely affect the treatment of minority defendants and victims of crime. My view is different. In and of itself, I believe, something is wrong with a system of jury selection that predictably results in all-White juries in a diverse society, such as our own. Absent reason to believe that we lack a better alternative to current modes of jury selection, a commitment to democratic government and to the equality of citizens – or so I will argue – condemns existing arrangements as unjust, whether or not they have adverse effects on jury decisions, or on the ways in which our society approaches issues of race and crime.

Does it matter that almost all juries in England and Wales are all-White? Does it matter, even if this result is the unintended and undesired result of otherwise acceptable ways of choosing juries? Finally, does it matter that almost all juries are all-White if this has no adverse effect on the treatment of non-White defendants and victims of crime?

These questions arise unavoidably from Cheryl Thomas' research for the Department of Justice on juries in England and Wales. This consists in two big studies. The first, from 2007, is called 'Diversity and Fairness in the Jury System' (*DFJS*) and the second, from 2010, is called 'Are Juries Fair?'¹ The former showed that racially mixed juries are only likely to exist in courts where Black and Minority Ethnic groups (BME) make up at least 10% of the entire juror catchment area.² 79% of the Crown Courts in England and Wales will not meet this criterion. So in her 2010 study, Thomas used experiments with jurors to investigate whether all-White juries are likely to be unfair to Black and Minority Ethnic (BME) defendants or victims of crime and the answer, she argued, is 'no' (THOMAS, 2007: IV, THOMAS, 2010: II). Thomas' work, then, forcefully raises the question, 'does it matter if our juries are almost all-White if this has no unfair impact on the protection of BME defendants and victims of crime?'

According to Thomas, there is no injustice in a system of jury selection, which predictably results in juries with no minority members, so long as this result is not deliberate and does not adversely affect the treatment of minority defendants and victims of crime (THOMAS, 2007: III). Her findings show that there is no significant under-representation of BME groups among those summoned for jury service, and a survey conducted for her project found that BME and White respondents were equally willing to do jury duty and were both highly supportive of the jury system (THOMAS, 2007: I). The main factor affecting disparities in jury service, therefore, were the high residential mobility of BME groups (THOMAS, 2007: II). Hence, Thomas believes, while current methods of jury selection in England and Wales raise worries about the *appearance* of injustice, it is not unjust to continue to select juries in the way that we currently do (THOMAS, 2010: 25). Only 20 Crown Courts in England and Wales have a BME population of 10% or more, and of these 12 are found in London, where 45% of the non-White population live. Nonetheless, catchment areas which have fewer than 10% minority members overall may have significant clusters of BME members, sometimes amounting to nearly 30% of the population of an area (THOMAS, 2007: III-IV, THOMAS,

2010: 9). So, Thomas thinks, we should explain clearly why our juries are likely to be all-White, even in areas with significant BME populations, and in which courts will likely be faced with a high proportion of BME defendants and at least some cases of racially-aggravated crime (THOMAS, 2010: III).

My view is different. In and of itself, I believe, something is wrong with a system of jury selection that predictably results in all-White juries in a diverse society, such as our own. Absent reason to believe that we lack a better alternative to current modes of jury selection, a commitment to democratic government and to the equality of citizens – or so I will argue – condemns existing arrangements as unjust, whether or not they have adverse effects on jury decisions, or on the ways in which our society approaches issues of race and crime.

However, epistemic arguments for descriptive representation in our legislatures suggest that the quality of deliberation and decision making by all-White juries is likely to be inferior to that made by mixed juries, all-else equal. Moreover, the absence of minority members on juries likely reinforces racist ways of talking about crime outside the court-room, though Thomas' study suggests that jurors make great efforts to be fair to those they suspect of suffering from discrimination. Unfortunately, in Thomas' simulations, those efforts meant that all jurors were much more likely to convict White defendants than Black defendants, and significantly more likely to convict Asian than Black Defendants in experiments where the only variable was the race/ethnicity of the defendant and victim.³ Consequently, while I will argue that racial justice and democratic principle require us to reform the way we select juries in England and Wales, the deliberative advantages of racially mixed juries depends on the confidence with which jurors feel able openly to discuss fraught issues of race and crime and their bearing on the evidence that they must consider. Such confidence, I suspect, will require considerable change in our society.⁴

I will start by outlining Thomas' findings and the methodology she used to reach them, before explaining why democratic principles make the under-representation of minorities on juries as problematic as is the under-representation of minorities in legislatures. Democratic equality requires more than procedural fairness when selecting bodies whose purpose is to set and enforce the rules, which govern us all, because procedural fairness is not enough to remedy structural injustices inherited from the past. The conclusion briefly draws out the significance of my arguments for our practices of jury selection in England and Wales.

To avoid any misunderstandings, however, I should just note at the outset that I adopt a social-constructionist, and critical perspective on race. That is, I assume that ‘race’ refers to socially constructed hierarchies of power and privilege, rather than to some biological or metaphysical essence, and I assume that, in the world as we know it, there is much about these socially constructed hierarchies which is unjust and in need of change. A *critical* perspective on racial categories and racial hierarchies, is therefore in order. Such a critical perspective, I assume, follows from and reflects upon our commitments to *other forms* of justice, because what our place on racial hierarchies implies for our wellbeing, our rights and our status depends unavoidably on our place on *other* hierarchies of power and privilege in our societies.⁵

A. *Summary of Cheryl Thomas’ studies*

In England and Wales it is illegal to film or study juries making decisions. So how can we open up the ‘Black Box’ of jury deliberations in order to shed light on one of our most popular and well-known institutions? Thomas’ idea – and it is a great one – is to take actual juries, whose cases have been dismissed, and to ask them to participate in experiments based on a case of ‘actual bodily harm’ which was tried before a jury in England and Wales (THOMAS, 2010: 8). In order to make the experiments as realistic as possible, she filmed a trial based on this case, which had been edited to alter the race and ethnicity of the defendant and victim, while maintaining the realism of a jury trial in all other respects –for example, by using actual judges, barristers, court-rooms and personnel and actors who played witnesses. Building on her 2007 study, which used 27 sets of experimental jury decisions in a Blackfriars Crown Court in London, her 2010 study aimed to focus attention on the way all-White jurors and juries behave, using 41 all-White juries from Winchester and Nottingham Crown Courts. In order to explore issues of racial justice, the actual legal case was recorded and presented to the jurors with all-White, all-BME defendants and victims, as well as with victims and defendants who were racially distinct. In addition to studying the results of her experiments at the level of juries, Thomas also tried to look at the decisions made by individual jurors, and the ways in which these were affected by the racial composition of juries.

The findings of Thomas’ studies are that all-White juries did not discriminate against BME defendants, hence, Thomas concludes, ‘These findings strongly suggest that racially

balanced juries are not needed to ensure fair decision-making in jury trials with BME defendants'. However, concerns about the *appearance* of fairness may remain. 'To address these concerns, HMCS should ensure that court users understand how jury pools are selected and how representative they are of their locality' (THOMAS, 2010: 25).

It is not to detract from the inventiveness and interest of Thomas' methodology to note that it has several difficulties, and may seriously underestimate the effects of race on jury decisions. The most obvious problem is that her method means that we never study juries with no White members, and have only one example of a 'majority-minority' jury. For example, in her Blackfriars experiments, only one jury had 7 BME members, one had 6 members and one had 5 members. Outside London, 'mixed-race' juries are likely to be juries with one non-White member. This is insufficient to appreciate the difference in dynamics and outcome that race makes to jury decisions – whether we are concerned with majority or minority racial groups – and insufficient to distinguish the effects of race and ethnicity from the effects of living in London. It is deeply improbable that living in London, one of the largest and most diverse cities in Europe, and the political and legal capital of the United Kingdom, has no influence on the way that jurors approach questions of race and ethnicity. Thus, the inability to disentangle the racial/ethnic composition of a jury from the effects of living in London is a serious limitation of Thomas' study, and one which merits more attention than it receives.

Most jury trials in England and Wales result in a verdict, and 64% of those verdicts are convictions. However, the case on which Thomas' experiments were built resulted in a hung jury, and this was reflected in the difficulties that her experimental juries had in reaching a verdict, too (about half the time they couldn't reach a verdict either). Hence, it is possible that the experiment underestimates the effects of race on jury trials because of the atypical features of the case. While, as Thomas says, 'the original jury's inability to reach even a majority verdict suggested that the case facts were likely to present an opportunity for jurors' views about the case to differ' (THOMAS, 2010: 15), and might therefore serve as a sort of Rorschach test for people's perceptions of race and ethnicity, in practice the fact that the case was so atypical casts doubt on its usefulness as a guide to juror judgement.

Finally, we should note that Cheryl Thomas uses the term BME in her studies, which, as in much usage in the UK, refers to *non-White ethnic groups* and generally, though not exclusively, to people of Indian or Pakistani origin. Clearly, the appeal of the term BME is that

it cuts across familiar racial and ethnic distinctions, while also preserving them.⁶ It also appears to be consistent with critical theories of race, on which racial distinctions refer to politically constructed hierarchies of power and privilege, rather than to biologically distinct populations.⁷ For our purposes, however, the category of ‘BME’ is unfortunate because it lumps together phenomena that questions of racial justice require us to separate. Aware of this problem, Thomas sometimes distinguishes BME defendants, victims and jurors as Black or Asian (THOMAS, 2010: 22, and more systematically 179-183). However, she does not try to break down the group ‘White’, which is ethnically diverse and may even count as racially diverse, depending on whether one considers people who are Jewish to be members of a distinctive racial group.

Thomas’ findings, then, are important but they may well underestimate and, perhaps, misidentify the effects of race on juries, depending on the conception of race that one holds and how one applies it in practice. However, for the purposes of this paper Thomas’ findings will be used merely for illustrative purposes. Indeed, when there were 16,556 verdicts by deliberation in England and Wales in 2004, it is difficult to attach much significance to the results of 41 all-white experimental juries and 27 experimental BME juries, important though Thomas’ work is as a first step in the study of juror decisions in England and Wales.⁸

Justice, Democracy and Jury Participation

It is now time to return to the three questions with which we started, and to ask if it is unjust to use otherwise fair procedures for jury selection if these mean that most juries in England and Wales have no racial minority members?

The answer, I believe, is ‘yes’. Our judicial system is meant to reflect our judgements as a community, and to bind us collectively, as well as individually. This is not possible if, however unintentionally, significant numbers of our population have little if any chance of contributing to those decisions themselves, or of seeing others like them doing so, either. One of the advantages of juries, compared to judicial systems which use only professionals to administer justice, is the greater scope for democratic participation which they make possible. Although a commitment to democratic government does not mean that we must use lay juries to decide questions of guilt or innocence – anymore than it tells us which cases, or how many cases, should be decided by jury trials – lay juries have an obvious appeal on democratic principles, reflecting the fact that the administration of justice is as much a part of government as is the passing of legislation, or its enforcement.⁹

I therefore share Albert Dzur's concern about the decline in jury trials in England and Wales, as well as in the US.¹⁰ Citizen's active engagement in the doing of justice reflects the political importance of correctly applying law to particular cases, and the scope for reasonable disagreement on what is to count as a successful application. Moreover, deliberating together as equals on a task whose importance is evident affirms and reinforces the idea that ordinary people, with their familiar moral failings and limited but real capacities for virtue, can govern themselves, and should be free to do so. Given the complexities of modern life, we have few opportunities to see the effects of our civic engagements on others; nor do we have many opportunities to deliberate with strangers as equals. So while I doubt that democratic principles mean that lay juries are necessary for justice, they provide an appropriately democratic response to the inescapably political aspects of justice, and an appealingly deliberative and conscientious form of civic engagement. As Dzur puts it, 'Lay participation in criminal justice...brings otherwise attenuated people into contact with human suffering, draws attention to the ways laws and policies and institutional structures prolong that suffering'.¹¹

The distinctively democratic appeal of juries is threatened when procedures of jury selection mean that some groups, who are otherwise willing and able to serve, find it much harder to do so than others. Absent evidence that there is no better way to select jurors – or none which does not have comparably exclusionary effects on others – the use of such procedures will be unjust, because it fails to take seriously people's interests in publicly representing their society's commitment to justice. That is not to say that jury service isn't burdensome, and something which people sometimes try to avoid. Rather, it is to accept Rawls' point about 'the realization of self which comes from a skilful and devoted exercise of social duties'¹² and to recognise that fulfilling public duties – particularly duties as important as the doing of justice – confirms one's status as a full member of society, and as a trusted member of one's community.

This first reason to believe that existing arrangements are unjust applies to any arrangements for jury selection which, albeit unintentionally, predictably exclude a numerically significant section of the population from serving on juries.¹³ It would apply, in other words, as much to the rich and the powerful as to the poor and disadvantaged. However, the second reason to believe that existing arrangements are unjust reflects the reasons for believing that

procedural fairness is insufficient for democratic legitimacy, given historical injustice – whether we are concerned with the selection of judicial, executive or legislative bodies.

Without measures specifically designed to remedy, or to neutralise, structural injustices our ways of selecting people for positions of power and responsibility will, predictably, reproduce injustices inherited from the past. For example, the venerable union rule ‘last hired, first fired’ was designed to protect the most senior and expensive workers from being replaced by younger and cheaper ones. But in a world where White men had privileged access to paid employment compared to everyone else, such a rule predictably reproduced racial and sexual injustice.¹⁴ Likewise, apparently fair procedures for selecting legislators – competitive elections with universal suffrage and one person, one vote – predictably leads to legislatures dominated by wealthy middle-aged White men unless efforts are made to give women and racial minorities a chance to contest ‘safe’ seats and, therefore, to be treated as central, rather than peripheral, members of their political parties.¹⁵

In short, on democratic principles existing forms of jury selection are unjust because they fail to address the ways that racial exclusion and marginalisation have affected people’s housing patterns and rates of mobility and, therefore, their ability to meet the criteria for civic service and participation. Existing forms of jury selection also ignore the extent to which poverty and race-based patterns of poverty affect people’s ability to pay for, or find, temporary help with care duties, in order to engage in public service. It is an important feature of democratic juries that employers must release employees for jury service and that some small daily stipend is paid to serving jurors, as these enable ordinary people to fulfil a civic role that they might otherwise be unable to undertake. Thomas’s study, however, shows that these are insufficient for justice in jury selection, because poverty can prevent jury service via its effects on residency requirements, and because the needs of employers are not the only constraint on our ability to represent our society.¹⁶

Of course, funds are limited and the expense of jury trials may be a reason why only a tiny fraction of legal cases in England and Wales now go to a jury. Still, it is not unreasonable to believe that, as a society, we should set aside funding to help those with dependent relatives who would otherwise be able to act as jurors, but who are unable to do so without financial aid. Nor is it unreasonable to believe that we should reconsider the use of electoral rolls in the selection of jurors if the consequence of this method is that those who move within a city, or within different parts of the country, find themselves excluded from jury service. Above all, it

looks as though we may need to reconsider the way districts are drawn for the purposes of jury selection, and may need to use techniques of over-sampling and the like, in order to ensure that our processes of random selection result in juries that adequately reflect the judicial capacities of citizens, and their interests in developing and exercising those capacities.

B. Epistemology and Democracy: Courts and Legislatures

We have just looked at two reasons for thinking that existing forms of jury selection are unjust, even if racially mixed juries are not necessary to improve the quality of jury decisions in England and Wales. However, we have good theoretical reasons to believe that, all else equal, mixed race juries will improve the quality of jury decisions compared to all-White juries in societies, such as our own, where there are significant concentrations of BME groups in jury catchment areas that have fewer than 10% BME members overall. Just as the non-instrumental arguments for reform reflect the similarities between the legislative and judicial aspects of government on democratic principles, so the instrumental arguments that we will now consider reflect the implications for judicial arrangements of *epistemic* arguments for descriptive representation in legislatures. Descriptive or mirror representation, as it is sometimes called, refers to the idea that a representative body should look like the people who are to be represented. Roughly, if 50 percent of the population are women, then the representative body should contain about 50 percent women if it is to be descriptively representative; if 25% of them are farmers, then roughly 25% of the representatives should be farmers too and so on for the political representation of other socially salient groups.¹⁷

Most of our major institutions are not descriptively representative – whatever their other virtues – and women, racial and ethnic minorities, as well as members from low-income groups have little presence in the decision-making bodies of most democracies, including our own. Two main reasons to be concerned about this are commonly offered¹⁸: the first is a straightforward argument from equality of opportunity, based on the fact that people with similar motivations and aptitudes for political responsibility face dramatically different chances of developing and exercising those aptitudes, given inequalities of power, wealth and status in our society. The second main reason to be concerned with the lack of descriptive representation in our legislatures, we can call ‘the epistemic argument for descriptive representation’. That argument is based on the thought that the social and political cleavages in our societies – cleavages reflecting hierarchies of power, authority, status and wealth – have consequences for

the lives that people lead and for the ways that they see and understand the world. As Iris Marion Young puts it, ‘special representation of otherwise excluded social perspectives reveals the partiality and the specificity of the perspectives already politically present’; and as Williams says, ‘since members of privileged groups lack the experience of marginalization, they often lack an understanding of what marginalized groups’ interests *are* in particular policy areas’ (YOUNG: 144, WILLIAM: 193).

If you lead a privileged life in which violence is rare, it will be much easier to ‘blame the victim’ or to suppose that people who suffer violence may be in some way responsible for what happened to them, than if you live in a world in which violence is frequent, often random and self-evidently not a reflection of people’s deserts.¹⁹ Likewise, people whose well-being depends on pleasing others often have an acute sense of the likes and dislikes, of the needs, moods, abilities and dispositions of those on whom they depend – whereas those who have others to take care of their needs and whims are often unaware of the most basic facts about their helpers, and often unaware of their presence altogether. Such observations have long been a staple of critical thought, and reflect the ways in which socio-political divisions can have epistemic consequences even in societies, such as our own, where freedoms of association, expression and movement mean that knowledge can be widely shared.

According to political theorists such as Jane Mansbridge, Anne Phillips, Iris Marion Young and Melissa Williams, the socio-political cleavages in our societies mean that the epistemic quality of legislative decisions would be better if our legislatures were more descriptively representative than they are at present. This isn’t because the interests of men and women, for example, are inevitably opposed, nor that members of the one group cannot promote the interests of the other. The point, rather, is that even when we conscientiously try to represent the best interests of those whose lives are very different from our own, we may fail to understand the practical importance of information that we have, may attach too much importance to what we know, and fail adequately to imagine alternatives or possibilities which would have been obvious to someone else. In short, epistemological arguments for measures that would diversify our legislative bodies – measures such as proportional representation, the prioritisation of under-represented groups by political parties, active efforts to recruit candidates more widely and better to support them once selected – reflect the thought that our legislative bodies will have more insight and be able to deliberate better on matters of collective importance when they reflect the lived experience and knowledge of the diverse groups in society.

These arguments suggest an epistemic case for racially mixed juries, even when we are not worried that racial prejudice and hostility will undermine the fair consideration of evidence. Indeed, I would be inclined to suppose that all-White juries are undesirable for epistemic reasons even in cases that only concern White people, and where we would not expect racial prejudice to be a factor. We do not well understand the ways in which race intersects with social cleavages based on class, sex, or religion and, consequently, have a poor sense of how racial distinctions shape White people's expectations of other White people – of the way they should behave, the motives they should have, the sorts of homes, jobs, sexual partners and tastes they should have and so on. For example, the legacy of White superiority may mean that some people appear more 'White' than others, even when they fall on the 'White' side of our colour hierarchies because to be 'White' is to be privileged, rather than underprivileged, to be rich, rather than poor, to be Christian rather than Buddhist, Muslim or Jewish. White people can therefore disadvantage other White people because of the assumptions about White people that they unconsciously hold, just as Black people may disadvantage other Black people because they are thought not to be Black in the right way, or to the right degree, and so on.²⁰

A racially mixed jury is more likely to pick up these problems than one that is composed of White members only, in part because Black people may be more attuned to the ways that White people make racial judgements because of their race, and because the presence and comments of White jurors may sensitise Black jurors to the ways in which Black people may favour or disfavour other Black people because of their skin colour, wealth, education and other attributes. Hence even when we are not concerned with racial prejudice, there are good reasons to want a racially mixed jury.²¹ The reasons are that this fosters reasoned assessment of the evidence; enables people to reflect on their own assumptions, knowledge and experience; and exemplifies the qualities of free, fair and equal deliberation which give juries their democratic appeal. Epistemic arguments for racially mixed juries do not imply that injustice to defendants inevitably follows from juries that are made up of only one racial group, any more than they imply that legislatures which are disproportionately composed of wealthy, middle-aged White men do not pass important measures which promote sexual and racial justice. The point, rather, is that they increase the chance of unfairness in legislative and judicial outcomes because they increase the chance that deliberation will fail to attend to matters of fact and of value which were relevant to the outcome.

In general, there are many different paths by which a given group of people could have reached the decision they actually reached – whether we are referring to a group of jurors, of

legislators, of employers or of union officials. So it is often difficult conclusively to demonstrate that changing the composition of a decision-making group would materially have altered the outcome they reached, or the process by which they did so. Thomas' simulations show that White *jurors* are individually much less likely to vote to convict a defendant if they are members of *juries* that contain at least one BME juror.²² However, her simulations give us no sense of why this happened. Indeed, it seems likely that the changes in readiness to convict, which Thomas has identified are at least partly an artefact of the much lower conviction rates of all jurors in London than elsewhere in England and Wales, and so cannot be wholly attributed to some special effect of non-White jurors on White jurors. So, unfortunately, the evidence from Thomas' study is inconclusive on this matter.

C. Race and The Face of Crime and Justice

The arguments I have made, thus far, give us instrumental and non-instrumental reasons to favour descriptively representative juries over others, all else equal. But these arguments would apply whether we are concerned with juries that were 80% male rather than 80% White. That is not so for my final reason for believing that justice requires us to revise existing forms of jury selection, because this reason is intimately connected to problems of racial inequality in our society, and to the ways in which our experiences of crime and justice help to shape and give content to those inequalities.

The non-specific arguments for racial inclusion, if I may call them that, are just as important to our reasons for revising jury selection in England and Wales as the racially-specific argument which I will present. The fact that our reasons for seeking racially inclusive juries condemn *other forms* of exclusion is no reason to underestimate their significance for racial justice in our societies. What it means to be black, rather than white, in our societies, depends very much on the nature and justification of actual practices of exclusion, whether or not these are exclusive to people who count as 'black'. That is why practices of jury selection, or of police profiling can have a significance for a critical philosophy of race, illuminating the way in which racial hierarchies are constructed, justified and given specific content, although social facts of this type might be irrelevant, misleading, or given a different interpretation on other ways of thinking about race.²³ However, the fact that there are racially specific reasons to revise our forms of jury selection – and, if I am right, reasons that are particularly pertinent to democratic ideals of freedom, equality and solidarity – suggests that considerations of racial justice alone

give us sufficient reason to rectify the racially exclusionary character of our practices of jury selection.

Whatever may once have been the case, the police and criminal justice system are, now, primary ways in which racialised disadvantages are justified and reproduced in our society.²⁴ It would be too sanguine to say that employment or housing discrimination are things of the past, but it is clear that the idea that some jobs can only be held by people with a certain skin colour or morphology no longer determines people's life chances to the extent, and in the ways, that it once did. Perhaps more strikingly, within the professions efforts to break down hierarchies of privilege in recruitment and promotion are helping to challenge the idea that prestigious jobs ought to be the preserve of those who look 'White'. By contrast, it is increasingly through their experiences of the police and criminal justice system that young men come to see themselves as members of a disadvantaged racialised group – for example, as targets of police 'stop and search' tactics – and to feel the consequences of policing and of law enforcement on their educational, occupational and residential opportunities. Put simply, even when educational and employment opportunities for young Black men are improving in ways that might lessen the association of skin colour with poverty and disadvantage, the consequences of our practices of policing and law enforcement work in the opposite direction.

If I am right in thinking that the criminal justice system, now, plays a particularly important part in the process through which skin colour and morphology are given an oppressive socio-political meaning, the avoidable absence of members of racialised individuals from juries becomes especially grave. Their absence reinforces the association of Black people with crime, which underpins racialised practices of policing and security. More inclusive juries are only one of many different measures required to unpick the racialised hierarchies in our society. Still, if racially and ethnically mixed juries were a regular part of our lives, rather than a relatively rare exception, this would have positive effects on the way cases are treated by court professionals as well as by the police. More generally, if the 'face of justice' were less uniformly White, it would counteract confused, prejudiced and mistaken perceptions about the propriety of taking a relatively small number of violent youngsters as a guide to the conduct, attitudes and beliefs of other people.²⁵ If people generally lived and worked together in less racially segregated ways, such lessons might not be necessary. But outside London, this may still be very rare. So even if mixed juries were not necessary to ensure justice for particular defendants

and victims of crime, they may be necessary to counter divisive and unjustified fear and hostility in our society.

Concluding Thoughts

It is a settled principle of democratic government that people are entitled to participate in the decisions that bind them, and that set the terms of their life together. They are entitled to do so though they lack any special knowledge, virtue, resources or lineage, and though other people might actually make better decisions for them than they do for themselves.

But even people who support democratic government may wonder how far – or whether – democratic principles apply to the selection of jurors who must, after all, decide on the guilt or innocence of particular individuals, rather than on the merits of alternative policy proposals. For those – such as Andrei Poama – who think this way,²⁶ the only grounds to argue against existing jury arrangements in England and Wales is to show that they result in injustice to defendants or victims of crime. I believe that such a perspective is mistaken. Assuming sufficient levels of competence and motivation to serve as a juror – whatever those levels are – I've argued that people have instrumental and non-instrumental reasons to reject existing jury selection practices. Democracy, as I understand it, is about governing, not just electing those who govern; and governing is not simply about passing laws, but about the administration of justice, and the execution of policy. While democratic principles may not pick out juries as the uniquely acceptable way to determine questions of guilt or innocence, some form of lay participation in the doing of justice is a requirement of democratic justice, as I understand it.²⁷

To be clear – I don't suppose that all juries must be racially mixed, nor do I suppose that juries made up of 12 people can, or should, be descriptively representative. As a general matter, that is simply impossible. But at the level of the *jury system*, we have good reason to seek more descriptively representative decision-making bodies, or so I have argued. To avoid misunderstanding, I should also make it plain that my arguments for more descriptively representative juries provide no justification at all for the gerrymandering of juries and the highly manipulative treatment of jurors characteristic of jury trials in the USA. The practice of race-based strikes, and of arguments designed expressly to mobilise racial prejudice and ignorance are at odds with both the egalitarian and epistemic arguments for reform which I have

presented, even when they are used to create racially-mixed juries and to protect minority defendants.

Race-based strikes undermine the idea that ordinary people are capable of doing justice and are entitled to represent justice in their society, whatever their race or ethnicity. Race-based strikes imply that a person's race is sufficient to render them incapable of deliberating fairly with others. Such a view cannot be consistent with democratic principles, and race-based strikes, therefore, are likely to undermine democratic practices of citizenship. Likewise, the epistemic arguments for reform, which I have presented, are inconsistent with the idea that legal professionals should be able to accept or reject jurors as they see fit, in order to create a jury as favourable to their preferred legal strategy and forms of argument as possible. It is sad and regrettable, then, that earlier efforts to promote racial equality in the United States have left in place a practice which encourages the manipulation and use of racial prejudice and stereotypes and makes it difficult for jurors critically to evaluate the evidence they are legally sworn to consider. In short, the reasons to revise our practices of jury selection are reasons to eschew some ways of creating racially mixed juries. But that is hardly surprising, if you care about racial equality.

This paper has presented four reasons for reconsidering the way that we currently select juries in England and Wales. These reasons are diverse and while, cumulatively, I hope that they provide a compelling argument for such reconsideration, I believe that each, individually, provides a sufficient justification to do so. There is still much pertinent philosophical and empirical work to be done before the claims presented here can be deemed conclusive. However, I hope to have shown that there are important ethical questions to be asked about the way we select our juries and that these ethical questions do not depend on scepticism about the sincerity or good intentions of jurors. Finally, I hope to have drawn attention to the ethical interest of Thomas' pioneering studies, but also to their methodological and interpretative limitations. As we have seen, the ethics of jury selection are inseparable from democratic norms of racial equality, respect and mutual concern. My hope is that this article will spur further reflection on the subject, and encourage philosophers of race, democratic theorists and those working in applied ethics to build upon each other's work.

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NOTES

- ¹ THOMAS, Cheryl, A. (2010). *Are Juries Fair ?*, Ministry of Justice, UK.
THOMAS, Cheryl, A, BALMER, Nigel, J. (2007). *Diversity and Fairness in the Jury System*, Ministry of Justice, UK. The reports can be downloaded at www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf and <http://4wardeveruk.org/wp-content/uploads/2009/08/p.Diversity-Fairness-in-the-HJury-System.pdf>
- ² For a discussion of the term BME and its significance for this paper, see endnote 6. I will be assuming that ‘race’ refers to socially constructed hierarchies based on colour and morphology, whereas ethnicity refers to ways of grouping people based on their real or presumed language and culture.
- ³ At the level of *jury* decisions the disparities are less evident, because there was a high number of hung juries. However, at the level of individual *juror* reviews the discrepancies are interesting, though based on such small samples that it is impossible to draw any statistically significant conclusions about jurors in England and Wales more generally. In Nottingham, experiments with all-White juries found that 4% of jurors thought the defendant guilty when there was both a White defendant and White victim, but 61% thought the defendant guilty when there a White defendant and a BME victim. 25% thought the defendant guilty when there was a BME defendant and White victim compared to 35% who thought the defendant guilty when there was a BME defendant and a BME victim. The differences were less dramatic in Winchester, but jurors tendencies to find the defendant guilty still varied from 44% when there was a White defendant and BME victim to 27% when there was a BME defendant and a White victim – this in a jury catchment area that was 92% White (THOMAS, 2010: 18). At Blackfriars, Thomas’ findings suggest that White jurors on racially mixed juries were over 60% likely to find a White defendant guilty when the victim was Black, as opposed to less than 25% when the victim was Asian and just over 25% when the victim was White. When the defendant was Black they were likely to find him guilty 30% of the time when the victim was White or Black but only 15% of the time when he was Asian. When the defendant was Asian, they were likely to find him guilty nearly 50% of the time when the victim was Black as opposed to around 25% of the time when he was Asian or White (THOMAS, 2007: 184). How far these results are generalizable, however, is unclear.
- ⁴ I therefore share Lynn Sanders’ worry that deliberation will just reproduce hierarchy unless efforts are made both to increase the representation of the under-represented *and* to ensure that deliberative settings do not drown out their voices. Court personnel and, in particular, judges have an important role to play in licensing the expression of disagreement and in emphasising the importance of deliberating *as equals*. Sanders, Lynn M., ‘Against Deliberation’, *Political Theory* 25, 3 (1997): 347-376.
- ⁵ My thinking on race was formed by concerns about the treatment of black women in feminist theory and practice, by works such as Bell Hooks, *Feminist Theory: From Margin to Center*, (Pluto Press, 2000); Barbara Smith, *The Truth That Never Hurts: Writings on Race, Gender and Freedom* (Rutgers University Press, New Jersey, 2000); *Critical Race Feminism A Reader*, ed. Adrien Katherine Wing, (New York University Press, 1997); Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought*, (Beacon Press, Boston, 1990). It has subsequently been shaped by grappling with sociological as well as philosophical writings on racial injustice such as those listed in endnotes 7, 14, 24 and 26, as well as by Brian Barry’s scathing critique of racial injustice in the contemporary USA in *Why Social Justice Matters*, (Polity Press, 2005), ch. 7: The Making of the Black Gulag.
- ⁶ Perhaps the category BME is useful for administrative purposes but it is *not* an especially good category for determining the effects of *race*, understood as a system of hierarchy based on skin colour

and morphology, or *ethnicity* understood as a based on real or supposed linguistic and cultural groupings. It provides no means to distinguish Black people whose ethnicities are different (Caribbean rather than Middle Eastern or African, say), and occludes differences of class and of religion other than Islam. On the other hand, because Poles and Irish people count as a White, although they are minority ethnic groups in the England and Wales, the category BME does not include all minority ethnic groups under its umbrella.

⁷ For the significance of these differences, see Sally Haslanger *Resisting Reality: Social Construction and Social Critique*, (Oxford University Press, 2012) especially chapters 7-11 and Naomi Zack 'Race and Racial Discrimination' in *The Oxford Handbook of Practical Ethics*, ch. 10 and L.K. McPherson and T. Shelby, 'Blackness and Blood: Interpreting African-American Identity', *Philosophy and Public Affairs*, 32.2, pp. 171-92.

⁸ The figure on the total number of jury verdicts in England and Wales comes from Thomas, 2007 p. 3, footnote 16. Of these 16,556 verdicts 7,123 were acquittals and 9,433 were convictions. By contrast, six of the twenty experimental juries in Nottingham were unable to reach a decision, and the same was true of twelve out of the twenty-one experimental juries in Winchester. (Thomas, 2010, p.15). Once one realises that these experimental juries were then split in order to distinguish the effects of the race of defendant *and* of victim, we are talking about extremely small samples, which may explain why Thomas presents key findings in terms of *juror* rather than *jury* decisions, (for example at Thomas, 2010 p. 18). Unfortunately, in 'Treating People as Equals: Ethical Objections to Racial Profiling and the Composition of Juries', *Journal of Ethics* 15.1 (2011): 61-78. I failed adequately to distinguish collective and individual decisions at pp. 74-5. That is an important limitation of this article.

⁹ Historically, legislation was a much less significant part of government than it is today, even under constitutional governments. For their medieval predecessors legislation was clearly a much less significant part of governing than the doing of justice or the conduct of diplomacy and war. Moreover, as Locke implied in his *Second Treatise of Government*, it is the lack of a *common judge*, rather than the lack of a *common body of law*, that distinguishes the state of nature from civil society, because laws are not self-enforcing and people may be bound (as Locke believed that they were bound) by unwritten 'laws of nature', or by custom, even in the absence of statutory law. That is not to say that it is desirable or necessary for lay people to be involved in all forms of administration – tax law, perhaps, should be left to experts. But in the United Kingdom, legislation is drafted by experts, not by lay people – a matter that is of significance for the treatment of private members' bills. A priori, then, expert help could be made available to lay people in other matters, too. There is therefore no reason to suppose that legislating is of inherently more importance to government than the enforcement and administration of policy and law. For information on the drafting of legislation, see Peter G. Richards, *Parliament and Conscience*, (London: Allen and Unwin, 1971) pp. 30-31 and 33; and for its significance for the democratic justification of judicial review, see Annabelle Lever, 'Democracy and Judicial Review: Are They Really Incompatible?', *Perspectives on Politics*, 7.4. (2009), footnote 79, p. 820.

¹⁰ Over 98% of all criminal cases in England and Wales are non-jury trials heard by magistrates alone. Only the most serious criminal offences must be tried by a jury in the Crown Court. There are just over 30,000 potential criminal jury trials in the Crown Courts a year, according to Thomas. *DFJS* p.3. For the situation in America, see Albert W. Dzur, 'Twelve Absent Men: Rebuilding the American Jury', *The Boston Review* 38.4 (July/Aug 2013): 30-35. See also his magnificent *Punishment, Participatory Democracy and the Jury*, (Oxford: Oxford University Press, 2012).

¹¹ Dzur, *Boston Review*, p. 32. In ch. 2 of this book, on 'the myth of penal populism', Dzur does much to demolish the idea that ordinary people are prone to want especially harsh prison sentences for crime, a finding that reinforces evidence from France, discussed by Andrei Poama in 'Whither Equality? Securing the Lay Citizen's Place Inside the Criminal Justice System', *Swiss Political Science Review*, 19.4 (2014): 472-491.

¹² John Rawls, *A Theory of Justice*, (Oxford: Oxford University Press 2005 – a republication of the original edition), p. 84; ch. 2, section 14, 'Fair Equality of Opportunity and Pure Procedural Justice'.

¹³ Democratic jury service does not require that everyone be called to serve on a jury, and it is likely that particularly small and dispersed groups – say, the group of people over 7 foot tall – may be unlikely to be called for statistical reasons. But this is rather different from the cases with which we are concerned, where despite concentrations approaching 30 percent of the population in some areas, our

current system of jury selection makes it all but impossible to select even one minority juror outside London. Moreover, if there were a way to arrange juries so that people over 7 foot tall would be as likely to be called as other people, I believe that it *would* be unjust to exclude them – *provided that* a system that equalised their chances of serving on a jury adequately answered to our other demands for fairness, efficiency in the doing of justice and publicity.

¹⁴ A classic presentation of the problem of intersectionality is that of Kimberlé Crenshaw, ‘Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’, excerpted in Alison M. Jaggar ed., *Living With Contradictions: Controversies in Feminist Social Ethics* (Boulder, Colorado: Westview Press, 1984): 39-52.

¹⁵ The classic texts on the topic, on which I rely in this paper, are Anne Phillips, *The Politics of Presence*, (Oxford: Oxford University Press, 1995); Melissa S. Williams, *Voice, Trust and Memory: Marginalised Groups and the Failure of Liberal Representation*, (Princeton: Princeton University Press, 1998) and Iris Marion Young, *Inclusion and Democracy*, (Oxford: Oxford University Press, 2002). See also Jane Mansbridge, ‘Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes”’, *Journal of Politics*, 61.3 (Aug. 1999): 628-657.

¹⁶ *DFJS* p.101, ‘Black summoned jurors were over-represented among those looking after family and looking for work, two groups which were less likely to serve’.

¹⁷ What matters to philosophical arguments for descriptive representation is that a functionally adequate *threshold level* of representation is secured for groups in legislative bodies, rather than strict proportionality between legislative and population numbers. In some cases this may require *more* representatives of a small minority than the language of ‘mirroring’ would suggest. See Anne Philips supra, ch. 3. The reason is this: that we are concerned with securing adequate *political* representation for individuals who, under current electoral systems, may find it much more difficult to secure political representation than other people because of the ascriptive social groups to which they belong. Although in principle we might be as concerned about the descriptive representation of blue-eyed people as women or racial minorities, in practice we have no reason to suppose that the former *are* under-represented politically at present, or to suppose that they are likely candidates for discriminatory treatment were they in fact to suffer from some form of under-representation. The latter is not true for red-headed people, who appear to be the target of quite significant levels of violence and so, if it turned out that red-headed people are politically under-represented *and* this under-representation is related to the mistreatment that they face, we would have reasons of justice to try to improve their representation. For a very helpful discussion of these issues, see Williams, ch. 6.

¹⁸ See Williams, Young and Mansbridge, supra. Williams, 193; Young, 144 and Mansbridge, supra.

¹⁹ Thomas’ findings in her 2007 study (*DFJS*) are quite mixed here. On the one hand, BME jurors ‘were strongly of the view that ethnic minorities are treated more harshly by the courts than White people, while White jurors clearly disagreed with the statement’, p.173. On the other hand, ‘BME jurors [were] more likely to believe the police evidence and believe it was important to the case than White jurors. It was also curious that BME jurors had similarly high levels of trust and confidence in the courts as White jurors, given that BME jurors clearly believed courts treat ethnic minority defendants more harshly than White defendants’. Clearly, further studies of this matter are in order.

²⁰ The memoir, *The Colour of Water* provides some examples of the way racism works to disadvantage people who would morphologically count as ‘White’ but otherwise lack the social attributes of Whiteness. For the process in reverse, see *How the Irish Became White*. In her Tanner Lectures on American citizenship, Judith Shklar highlighted the importance to White American workers of their status as wage labourers, not slave labourers – and the ways that the contrast with slave labour gave waged work a cachet quite different from that in Europe while, simultaneously, giving the threat of unemployment a particularly threatening racial dimension for White workers. See James McBride, *The Colour of Water: A Black Man’s Tribute to his White Mother*, (USA: Riverhead Books, 1995); Noel Ignatiev, *How the Irish Became White*, (UK: Routledge, 1995); and Judith N. Shklar, *American Citizenship: The Quest for Inclusion*, (Cambridge, MA: Harvard University Press, 1995).

²¹ It is interesting that Thomas’ 2007 study (*DFJS*) found that deliberation made BME jurors less likely to find the White defendant guilty. (p.171). But as BME jurors were *always* less likely to convict after deliberation than before it is difficult to know how much weight to attach to this finding. By contrast White jury conviction rates were virtually unaffected by deliberation *except* that the ‘White juror

conviction rate for the BME defendant fell after deliberation in cases where race was an explicit issue in the case'. p. 170.

²² Thomas *AJF* p. ii and p. 20, 'The only difference between White jurors serving on racially mixed and on all-White juries was that White jurors on racially mixed juries had lower conviction rates overall. The comparison, in this case, is of all-White juries in Winchester, with a catchment area that is 97% White and all-White juries in Nottingham, which is 94% White, but where parts of the catchment area have a BME population of 28%. (*AJF* p. 9) and Blackfriars, in London which had racially mixed juries and a 33% BME catchment area. (p. 16). It is therefore difficult to distinguish the effect of having a BME juror on White jurors from the effects of living in London, because the conviction rates for Blackfriars jurors in Thomas' study were very much lower than those in Nottingham, which was lower again than those in Winchester. It is also worth noting that White *jurors* had the same overall pattern of decision-making for White, Asian and Black defendants as BME jurors: 'They were least likely to convict the Black defendant and most likely to convict the White defendant' – and this in experiments which used the *same* evidence each time. At the level of *juries* rather than jurors, most cases resulted in hung verdicts, and even in Winchester only 4/20 experimental trials resulted in a guilty verdict. So at the level of *juries* the dramatic racial differences seen at the level of *jurors* do not appear. But the *juror-level* findings are sufficiently distressing that it seems premature to celebrate the fairness of our jury system in the way that journalists, such as Marcel Berlins, do. See *The Guardian*, headline of 17.2.2010: 'The Verdict on Juries: Fair, Effective and Efficient', a headline that was typical of newspaper reporting of Thomas' study. www.theguardian.com/uk/2010/feb/17/juries-fairness-research.

²³ This point is particularly well-made by McPherson and Shelby, *supra*, and in Haslanger's articles on gender and race in *Resisting Reality*, ch. 7. The point, essentially, is this: that the precise content of our hierarchies of colour or of sex is pretty indeterminate – so what it means to be a 'woman' or 'black' cannot be read off biological facts about us, or through philosophical reflection on metaphysical attributes. Hence, the point about studying practices of jury exclusion, or of racial profiling, as I see it, is not simply to see how contemporary social practices can *reproduce* past forms of inequality, but to see how they can *create* new forms of justice or injustice. See, for example, Naomi Zack, *White Privilege and Black Rights: the Injustice of U.S. Police Racial Profiling and Homicide*, (Rowman and Littlefield, New York, 2015); R.J. Sampson and J. W. Wilson, 'Towards a Theory of Race, Crime and Urban Inequality', in *Crime and Inequality* eds. J. Hagan and R. D. Peterson, (Stanford University Press, 1995): 37-54; Randall Kennedy, *Race, Crime and the Law*, (Vintage Books, New York, 1998); Annabelle Lever, 'Racial Profiling and the Political Philosophy of Race', forthcoming in Naomi Zack ed., *The Oxford Handbook of the Philosophy of Race*, (Oxford University Press, 2016).

²⁴ I'm no expert, but this is the conclusion that I draw from my philosophical research on racial profiling and from recent sociological studies on the racial dimensions and effects of the increasingly punitive legal systems in Britain and the United States. See, for example, Bruce Western, who notes that "despite the end of welfare as we knew it, government had not withdrawn from the lives of America's poor: its role had simply changed. More punitive than limited, government had reached deeply into poor urban communities by sending record numbers of young men to prison and jail at a time when crime rates were at their lowest levels in thirty years," *Punishment and Inequality in America*, (New York: Russell Sage Foundation, 2006), xi. Of course, in America, those poor urban young men are disproportionately non-White. For some of the story as regards Black women, see Dorothy Roberts, *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* (New York: Pantheon Books, 1997). See also *Crime and Inequality*, ed. J. Hagan and R. D. Peterson (Stanford: Stanford University Press, 1995) and Brian Barry's excellent *Why Social Justice Matters*, (UK: Polity Press, 20015), especially ch. 7 'The Making of the Black Gulag', pp 95-100. See also Annabelle Lever, 'Why Racial Profiling is Hard to Justify: A Response to Risse and Zeckhauser', *Philosophy and Public Affairs*, 33.1 (2005): 94-110; and 'What's Wrong with Racial Profiling? Another Look at the Question', in *Criminal Justice Ethics*, 26.1, (2007): 20-28.

²⁵ For the colour of the 'face of crime', see David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New York: New Press, 2003): 169. See also Steve Holbert and Lisa Rose, *The Color of Guilt and Innocence: Racial profiling and Police Practices in America*, (Page Marque Press, California, 2004).

²⁶ As a 'subordinate foundational good', as Poama assumes. There is no particular reason to believe that subordinate foundational goods can only be of instrumental value. As Poama says, 'one of the chief rationales of any judicial system is that of ensuring the defendants' equality of protection', (p.2) and as he notes, in criminal justice 'what matters most is making sure that verdicts are right and rightly reached' (footnote 19, p. 8). I therefore agree with him that the 'revolutionary' view of justice (p.4) is wrong, as jurors' convictions cannot be 'the ultimate measure of justice'. However, the fact that justice is not reducible to the views of jurors, however conscientious, scarcely means that lay participation must be an *instrumental* good only. It merely shows that it is not an *absolute* one.

²⁷ See Annabelle Lever, 'Democracy and Judicial Review: Are They Really Incompatible?', *Perspectives on Politics*, 7.4. (2009), pp. 805-22. By contrast, Robert Badinter believes that because 'Judging is a profession that requires (...) knowledge [and] human experience', the use of lay judges must reflect distrust of magistrates and count as a form of penal populism. See Poama *supra*, p. 4, from which the quotation is drawn.