Democracy, Epistemology and the Problem of All-White Juries

Abstract

Cheryl Thomas’ report for the Ministry of Justice, *Are Juries Fair?*, attracted considerable media attention for its claim that all-white juries in the UK are fair, because they do not discriminate against either non-white defendants or non-white victims of crime. However, her study also shows that all-white juries are significantly less likely to convict a black defendant than a white one, even when the only factual difference in the cases is the race of the defendant, and that all-white juries are more likely to convict defendants, whatever their race, than juries which are racially mixed. Hence, Thomas seems to have uncovered some disturbing ways in which the experience of race shapes jury trials in the UK, although Thomas seems not to have recognized the significance of her findings.

Thomas assumes that as long as all-white juries do not discriminate against minority defendants or victims we can call them fair. But, while her study suggests that all-white juries are as concerned for minority defendants and victims of crime as mixed race ones, her study is very far from showing us that all-white juries are fair. For example, Thomas shows that all jurors are more likely to convict a white defendant of assault than a Black or Asian one. This differential willingness to convict emerges from experiments in which the only difference in facts facing the jury is the race/ethnicity of the defendant and/or victim. In Winchester, an area that is almost completely white, the all-white jurors found 43% of the white defendants in the experiment guilty, as opposed to 35% of the Asian defendants and only 25% of the Black defendants. In Nottingham, an area with a substantial minority enclave in a predominantly white town, the comparable figures were 39%, 34% and 21%; and for Blackfriars in London, the most racially mixed of the three areas, and the only one which had mixed race, as well as all-white juries, the figures were 14%, 10% and 7%.

So, your likelihood of being convicted for assault, Thomas’ study suggests, can vary from 43% to 7% depending on the area of the country you are in, and on the racial composition of the jury, because white jurors convict at different rates depending on the race or ethnicity of the defendant.

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1 UK law forbids the social scientific investigation of jury deliberation – or the effort to find out how a given jury reached its decision and why. The study of jury deliberation therefore has to work with simulations. Unfortunately, the current, fascinating study by Cheryl Thomas, *Are Juries Fair?*, published by the UK Ministry of Justice in 2010 shows no interest in comparing all-white juries to all-black ones, or considering the different dynamics and outcomes that might result from ‘racially mixed’ juries with only one or two black members, and ones on which black members are more numerous or, even, form a small majority of the jury. Thus, what counts as a ‘racially mixed’ jury in her study is unclear and the possibility that we are talking about juries with only one or two minority members means that we must be cautious about the conclusions we draw about racially mixed, as opposed to all-white juries. Thomas’ study can be found at [http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf](http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf). My comments below are an expanded version of a short piece, ‘Justice, Race and Fairness’, available online at [http://www.legalnewscentral.co.uk/2010/03/03/the-complexity-of-race-and-juries-annabelle-lever/](http://www.legalnewscentral.co.uk/2010/03/03/the-complexity-of-race-and-juries-annabelle-lever/). The piece was originally published on *The Guardian*’s ‘comment is free’ website on March 3, 2010, as a response to Marcel Berlins’ uncritical celebration of the supposed fairness of UK juries in his *Guardian* column of Monday, 22 Feb., 2010.

2 Cheryl Thomas, pp. ii, 16-19

3 P. 16 Thomas notes that Winchester has only 3% minority population, as compared to 33% for Blackfriars, which is one of the most diverse areas in the country.

4 See Thomas’ figures 3.2 and 3.3 on pp. 17 – 18.
the defendant and victim and on the race/ethnicity of their fellow jurors. The fact that these disparities appear to favour rather than disadvantage racial minorities hardly shows that all-white juries are fair. Nor, as Thomas appears to believe, has she shown that race has not adversely influenced the outcome of jury trials. On the contrary, Thomas’ findings imply that there are very large and unexplained disparities in conviction rates for seemingly similar crimes in the UK, which appear to reflect the dynamics, beliefs and intuitions of jurors depending on their ethnic and racial characteristics, and those of the defendants and victims whose fate they must consider.

This paper builds on my previous articles on racial profiling and race and jury trials to try to understand Thomas’ findings and to highlight their significance for jury selection in the UK. Specifically, it claims that Thomas’ experiments illustrate the intersectionality of race, class and sex and the importance of considering the application to jury selection of epistemological arguments for descriptive representation in the case of legislatures. These arguments highlight the importance of drawing juries from racially mixed pools, so far as possible, and the importance of avoiding the sort of 'gerrymandering' of juries typical of American practices of jury selection. The article concludes that the UK should consider redrawing the boundaries within which juries are selected to make possible majority-minority juries (ie juries where racial and ethnic minorities form a majority), as well as to increase the possibility that more juries will include at least two members from racial or ethnic minorities.

Thomas, pp. 16. She also shows (p.19) that male jurors almost never change their mind and are, therefore, slightly more likely to convict than are female jurors. More details about variations by race, within this over-all trend which is, apparently, cross-racial, would be interesting to investigate.