

Illegal Racial Discrimination in Jury Selection: A Continuing Legacy

Equal Justice Initiative

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EXECUTIVE SUMMARY

Today in America, there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries. Nearly 135 years after Congress enacted the 1875 Civil Rights Act to eliminate racially discriminatory jury selection, the practice continues, especially in serious criminal and capital cases.

The staff of the Equal Justice Initiative (EJI) has looked closely at jury selection procedures in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee. We uncovered shocking evidence of racial discrimination in jury selection in every state. We identified counties where prosecutors have excluded nearly 80% of African Americans qualified for jury service. We discovered majority-black counties where capital defendants nonetheless were tried by all-white juries. We found evidence that some prosecutors employed by state and local governments actually have been trained to exclude people on the basis of race and instructed on how to conceal their racial bias. In many cases, people of color not only have been illegally excluded but also denigrated and insulted with pretextual reasons intended to conceal racial bias. African Americans have been excluded because they appeared to have “low intelligence”; wore eyeglasses; were single, married, or separated; or were too old for jury service at age 43 or too young at 28. They have been barred for having relatives who attended historically black colleges; for the way they walk; for chewing gum; and, frequently, for living in predominantly black neighborhoods. These “race-neutral” explanations and the tolerance of racial bias by court officials have made jury selection for people of color a hazardous venture, where the sting of exclusion often is accompanied by painful insults and injurious commentary.

While courts sometimes have attempted to remedy the problem of discriminatory jury selection, in too many cases today we continue to see indifference to racial bias in jury selection. Too many courtrooms across this country facilitate obvious racial bigotry and discrimination every week when criminal trial juries are selected. The underrepresentation and exclusion of people of color from juries has seriously undermined the credibility and reliability of the criminal justice system, and there is an urgent need to eliminate this practice. This report contains recommendations we believe must be undertaken to confront the continuing problem of illegal racial bias in jury selection. We sincerely hope that everyone committed to the fair administration of law will join us in seeking an end to racially discriminatory jury selection. This problem has persisted for far too long, and respect for the law cannot be achieved until it is eliminated and equal justice for all becomes a reality.



Bryan A. Stevenson
Executive Director

SUMMARY OF FINDINGS AND RECOMMENDATIONS

FINDINGS

1. The 1875 Civil Rights Act outlawed race-based discrimination in jury service, but 135 years later illegal exclusion of racial minorities persists.
2. Racially biased use of peremptory strikes and illegal racial discrimination in jury selection remains widespread, particularly in serious criminal cases and capital cases.
3. The United States Supreme Court's 1986 decision in *Batson v. Kentucky* has limited racially discriminatory use of peremptory strikes in some jurisdictions, but the refusal to apply the decision retroactively has meant that scores of death row prisoners have been executed after convictions and death sentences by all-white juries, which were organized by excluding people of color on the basis of race. Moreover, dozens of condemned prisoners still face execution after being convicted and sentenced by juries selected in a racially discriminatory manner.
4. Most state appellate courts have reversed convictions where there is clear evidence of racially discriminatory jury selection. However, by frequently upholding convictions where dramatic evidence of racial bias has been presented, appellate courts have failed to consistently and effectively enforce anti-discrimination laws and adequately deter the practice of discriminatory jury selection.
5. EJI studied jury selection in eight states in the southern United States: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee. State appellate courts in each of these states – except Tennessee, whose appellate courts have never granted *Batson* relief in a criminal case – have been forced to recognize continuing problems with racially biased jury selection. The Mississippi Supreme Court concluded in 2007 that “racially profiling jurors and [] racially motivated jury selection [are] still prevalent twenty years after *Batson* was handed down.”
6. Alabama appellate courts have found illegal, racially discriminatory jury selection in 25 death penalty cases in recent years and compelling evidence of racially biased jury selection has been presented in dozens of other death penalty cases with no relief granted.
7. In some communities, the exclusion of African Americans from juries is extreme. For example, in Houston County, Alabama, 80% of African Americans qualified for jury service have been struck by prosecutors in death penalty cases.
8. The high rate of exclusion of racial minorities in Jefferson Parish, Louisiana, has meant that in 80% of criminal trials, there is no effective black representation on the jury.

9. There is evidence that some district attorney's offices explicitly train prosecutors to exclude racial minorities from jury service and teach them how to mask racial bias to avoid a finding that anti-discrimination laws have been violated.
10. Hundreds of people of color called for jury service have been illegally excluded from juries after prosecutors asserted pretextual reasons to justify their removal. Many of these assertions are false, humiliating, demeaning, and injurious. This practice continues in virtually all of the states studied for this report.
11. There is wide variation among states and counties concerning enforcement of anti-discrimination laws that protect racial minorities and women from illegal exclusion.
12. Procedural rules and defaults have shielded from remedy many meritorious claims of racial bias.
13. Many defense lawyers fail to adequately challenge racially discriminatory jury selection because they are uncomfortable, unwilling, unprepared, or not trained to assert claims of racial bias.
14. Even where courts have found that prosecutors have illegally excluded people of color from jury service, there have been no adverse consequences for state officials. Because prosecutors have been permitted to violate the law with impunity, insufficient disincentives have been created to eliminate bias in jury selection.
15. In some communities racial minorities continue to be underrepresented in the pools from which jurors are selected. When challenges are brought, courts use an inadequate and misleading measure of underrepresentation known as "absolute disparity," which has resulted in the avoidable exclusion of racial minorities in many communities.
16. Under current law and the absolute disparity standard, it is impossible for African Americans to effectively challenge underrepresentation in the jury pool in 75% of the counties in the United States. For Latinos and Asian Americans, challenges are effectively barred in 90% of counties.
17. The lack of racial diversity among jurors in many cases has seriously compromised the credibility, reliability, and integrity of the criminal justice system and frequently triggered social unrest, riots, and violence in response to verdicts that are deemed racially biased.
18. Research suggests that, compared to diverse juries, all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives.

19. Miami; New York; Los Angeles; Hartford, Connecticut; Jena, Louisiana; Powhatan, Virginia; Milwaukee, Wisconsin; and the Florida Panhandle are among many communities that have seen unrest, violence, or destruction in response to non-diverse criminal jury verdicts.
20. The lack of racial diversity among prosecutors, state court judges, appellate judges, and law enforcement agencies in many communities has made jury diversity absolutely critical to preserving the credibility of the criminal justice system.

RECOMMENDATIONS

1. Dedicated and thorough enforcement of anti-discrimination laws designed to prevent racially biased jury selection must be undertaken by courts, judges, and lawyers involved in criminal and civil trials, especially in serious criminal cases and capital cases.
2. The rule banning racially discriminatory use of peremptory strikes announced in *Batson v. Kentucky* should be applied retroactively to death row prisoners and others with lengthy sentences whose convictions or death sentences are the product of illegal, racially biased jury selection but whose claims have not been reviewed because they were tried before 1986.
3. To protect the credibility and integrity of criminal trials, claims of illegal racial discrimination in the selection of juries should be reviewed by courts on the merits and exempted from procedural bars or technical defaults that shield and insulate from remedy racially biased conduct.
4. Prosecutors who are found to have engaged in racially biased jury selection should be held accountable and should be disqualified from participation in the retrial of any person wrongly convicted as a result of discriminatory jury selection. Prosecutors who repeatedly exclude people of color from jury service should be subject to fines, penalties, suspension, and other consequences to deter this practice.
5. The Justice Department and federal prosecutors should enforce 18 U.S.C. § 243, which prohibits racial discrimination in jury selection, by pursuing actions against district attorney's offices with a history of racially biased selection practices.
6. States should provide remedies to people called for jury service who are illegally excluded on the basis of race, particularly jurors who are wrongly denigrated by state officials. States should implement strategies to disincentivize discriminatory conduct by state prosecutors and judges, who should enforce rather than violate anti-discrimination laws.

7. Community groups, civil and human rights organizations, and concerned citizens should attend court proceedings and monitor the conduct of local officials with regard to jury selection practices in an effort to eliminate racially biased jury selection.
8. Community groups, civil and human rights organizations, and concerned citizens should question their local district attorneys about policies and practices relating to jury selection in criminal trials, secure officials' commitment to enforcing anti-discrimination laws, and request regular reporting by prosecutors on the use of peremptory strikes.
9. States should strengthen policies and procedures to ensure that racial minorities, women, and other cognizable groups are fully represented in the jury pools from which jurors are selected. States and local administrators should supplement source lists for jury pools or utilize computer models that weight groups appropriately. Full representation of all cognizable groups throughout the United States easily can be achieved in the next five years.
10. Reviewing courts should abandon absolute disparity as a measure of underrepresentation of minority groups and utilize more accurate measures, such as comparative disparity, to prevent the insulation from remedy of unfair underrepresentation.
11. State and local justice systems should provide support and assistance to ensure that low-income residents, sole caregivers for children or other dependents, and others who are frequently excluded from jury service because of their economic, employment, or family status have an opportunity to serve.
12. Court administrators, state and national bar organizations, and other state policymakers should require reports on the representativeness of juries in serious felony and capital cases to ensure compliance with state and federal laws barring racial discrimination in jury selection.
13. The criminal defense bar should receive greater support, training, and assistance in ensuring that state officials do not exclude people of color from serving on juries on the basis of race, given the unique and critically important role defense attorneys play in protecting against racially biased jury selection.
14. Greater racial diversity must be achieved within the judiciary, district attorney's offices, the defense bar, and law enforcement to promote and strengthen the commitment to ensuring that all citizens have equal opportunities for jury service.

THE HISTORY OF RACIAL DISCRIMINATION IN JURY SELECTION

From the earliest days of the American republic, the jury system has served as a symbol of American democracy and a “bulwark of liberty” for citizens who stand accused.¹ The right to trial by jury is enshrined in our foundational legal documents, from the Magna Carta to the Declaration of Independence and the Bill of Rights, and in every state constitution.² Yet, like the larger democracy it represents, the jury’s history as a guarantor of liberty and freedom has been haunted by race-based exclusion and discrimination.

Throughout the Civil War era, jury service was almost universally restricted to white men. (The first African-American juror in a criminal case served in 1860 in Massachusetts.) In many parts of the country, government officials flatly excluded African Americans from jury service for another century after Reconstruction.³ Today, African Americans have secured a place on the jury rolls, but many prosecutors continue to prevent their service on juries by illegally excluding jurors based on their race.

THE FIRST BARRIER – TOTAL EXCLUSION

In the period directly following the Civil War, African-American jury service – with other African-American civil and political rights – featured prominently in debates about the new shape of society, particularly in the South. Black citizens pressed for representative grand juries and trial juries to ensure fair treatment of black people accused of crimes and enforcement of the law against white defendants accused of terror and violence against African Americans.⁴

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Proponents of equal jury rights met with some success during Reconstruction as legislatures, with black participation, repealed formal race-based jury requirements in many Southern states.⁵ Congress included in the Civil Rights Act of 1875 a provision outlawing race-based discrimination in jury service.⁶ The peak of this early progress toward equality and inclusion in jury service occurred in 1880 with the United States Supreme Court’s decision in *Strauder v. West Virginia*, which overturned a state statute that restricted jury service to whites. The

The Civil Rights Act of 1875 outlawed race-based discrimination in jury service.

strongly-worded decision condemned the statute as a violation of the equal protection of the laws guaranteed to black citizens by the newly adopted Fourteenth Amendment to the Federal Constitution.⁷

Strauder, however, marked the high point in the struggle for minority jury participation for over 50 years. By 1880, a backlash against black enfranchisement and political participation was already underway in the South, and the Jim Crow era of white supremacy, state terrorism, and apartheid had begun.⁸ The jury service provision of the Civil Rights Act of 1875 was

rarely enforced and had little effect on the conduct of local officials.⁹ Despite its forceful condemnation of race-based exclusion, the rule of *Strauder* was easily circumvented.¹⁰ States abandoned statutes that expressly restricted jury service to whites, but local officials achieved the same result by excluding African Americans from jury rolls and implementing ruses to exclude black citizens.¹¹ In some jurisdictions, names of black residents were included on the lists from which jury panels or “venires” were drawn, but were printed on a different color paper so they could be easily avoided during the supposedly random drawing of the venire.¹² Theoretically valid but vague requirements for jury service – such as intelligence, experience, or good moral character – were applied in practice to mean “no blacks allowed.”¹³ Another method subject to abuse and manipulation was the key man system, in which prominent citizens submitted lists of suitable jurors to jury commissioners.¹⁴

Using these techniques to exclude all African Americans from jury service clearly flouted the Constitution, but the Supreme Court was unwilling or unable to enforce the law during this period.¹⁵ Even if a black defendant could afford a lawyer, and even if that lawyer was willing to challenge local racial orthodoxy to raise the issue, the Court almost invariably accepted local jury commissioners’ assertions that the total exclusion of African Americans was based not on discrimination but on their inability to find any African Americans qualified for jury service.¹⁶

Southern white commentators threatened that insistence on black jury participation would justify a return to lynching.

Southern white commentators defended farcical summary trials of black defendants by all-white juries on the ground that at least they were better than lynching. These observers threatened that insistence on constitutional requirements such as black jury participation would justify a return to lynching.¹⁷

The reality behind this threat was demonstrated by the case of Ed Johnson. Johnson was falsely accused of raping a white woman and convicted and sentenced to death by an all-white jury in Tennessee in 1906.¹⁸ He appealed to the Supreme Court and challenged the racial composition of his jury. The Court agreed to hear the case, but on the same day the telegram reached Chattanooga, a mob lynched Johnson with the acquiescence of the local sheriff.¹⁹ A note left on Johnson’s body informed the Court, “Come get your nig--r now.”²⁰

Trials in many parts of the South during this period took place against the background of state-sponsored and -condoned terror, in the form of lynch mobs and extra-judicial killings. During the 1920s and 30s,



A lynching in Marion, Indiana, 1930. Donated by Corbis-Bettmann ©.

In 1935, the Supreme Court finally confronted the rampant exclusion of African Americans from jury pools. The case of *Norris v. Alabama*²¹ involved the appeal of one of the “Scottsboro Boys” – nine black teenagers wrongly convicted for raping two white women on a train in Scottsboro, Alabama, despite overwhelming evidence of their innocence.²² The Scottsboro cases dominated national headlines for months. The teens were tried by all-white juries; no African American had served on a local jury in living memory.²³ A jury commissioner testified he did “not know of any negro . . . who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment.”²⁴ This time, however, the Supreme Court found it “impossible to accept such a sweeping characterization.”²⁵ It reversed Norris’s conviction and later reversed six other cases on similar grounds over the next 12 years.²⁶



Nine African-American teens ranging in age from 13 to 19 were wrongly arrested, convicted, and originally sentenced to death for raping two white women in Scottsboro, Alabama.

testified he did “not know of any negro . . . who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment.”²⁴ This time, however, the Supreme Court found it “impossible to accept such a sweeping characterization.”²⁵ It reversed Norris’s conviction and later reversed six other cases on similar grounds over the next 12 years.²⁶

The Supreme Court in 1945 found no constitutional violation in a Texas policy that allowed exactly one African American to serve on each grand jury.

The next 30 years nonetheless saw continued resistance to African-American jury service, as well as evasions such as tokenism.²⁷ In a 1945 case, the Supreme Court found no constitutional violation in a Texas county’s policy of allowing exactly one African American to serve on each grand jury.²⁸ Not until the 1960s and 70s, when the Court adopted a “fair cross-section” standard requiring jury and grand jury pools to hew closely to the demographics of the community,²⁹ did representation of minority citizens in jury pools improve. Pockets of resistance remained, as demonstrated by a memorandum from a Georgia district attorney that surfaced in a 1988 capital case, which instructed local jury commissioners to place in the jury pool the smallest number of African Americans and women that would allow the county to avoid a finding of discrimination.³⁰ Although the conviction in that case was overturned, the district attorney served until his retirement in 1994.³¹

THE SECOND BARRIER – DISCRIMINATORY SELECTION

By the 1960s, as discriminatory exclusion from jury lists and venires waned somewhat, the main front of the jury discrimination battle was shifting to the jury selection process at

trial. Jury selection begins with a jury panel or “venire,” which usually contains between 40 and 150 potential jurors drawn from a master list. Trial lawyers question the potential jurors (a process called “voir dire”) to determine possible bias and may then challenge “for cause” any juror they believe will not be able to try the case fairly and impartially. After removals for cause, the lawyers exercise “peremptory strikes” to remove additional jurors for any reason. The actual jury is chosen from the group that remains after “for cause” and peremptory strikes.

Gains in minority inclusion on jury lists and venires in the 1960s and 70s were immediately counteracted by discrimination in the use of peremptory challenges. In 1965, the Supreme Court addressed this issue for the first time in *Swain v. Alabama*.³² Robert Swain, a black man, was sentenced to death in 1962 by an all-white Alabama jury for the rape of a white woman. Some African Americans were included on jury panels in Talladega County but were removed by peremptory strikes, so that no African American had served on a trial jury since 1950.³³ The six African Americans on Mr. Swain’s jury panel were struck by the prosecutor, over the objections of Mr. Swain’s attorneys.³⁴

The Supreme Court found no constitutional violation. Conceding it would be illegal to use peremptory strikes to intentionally exclude African Americans from jury service because of their race, the Court found that the facts in Mr. Swain’s case did not prove the prosecutor intentionally discriminated against black potential jurors.³⁵ It set the bar so high for proving discriminatory intent that no litigant won a *Swain* claim for 20 years.³⁶ As a result, defendants continued to be convicted and executed based on verdicts by all-white juries.

The 1965 decision in *Swain v. Alabama* set the bar so high for proving discriminatory intent that no litigant was able to win a jury discrimination claim for 20 years.

After years of heavy criticism of the *Swain* standard and its repudiation by several state courts, the Supreme Court reconsidered the question in a 1986 case called *Batson v. Kentucky*.³⁷ In *Batson*, the Court overruled *Swain* and held that a prosecutor cannot use peremptory strikes to exclude a potential juror because of his or her race.³⁸ It lowered the standard of proof by holding that, where the circumstances at trial support a mere inference of discrimination in the use of peremptory strikes, the prosecutor must explain why he or she removed black potential jurors. If the prosecutor fails to give a legitimate, non-racial reason for each strike, the trial court can conclude that the prosecutor acted on the basis of race and put the struck jurors back on the jury venire.³⁹

Batson held that a prosecutor cannot exclude any potential juror because of his or her race.



Batson created a new legal standard and a new opportunity to challenge discrimination in jury selection. But *Batson* did not apply retroactively, so that death row prisoners and capital defendants whose appeals were completed before 1986 could not benefit from the new rule, even if they were tried by all-white juries selected in blatant violation of the Constitution.⁴⁰

Scores of people have been executed despite dramatic evidence of illegal racial bias in jury selection.

Some defendants convicted in such unreliable trials are still serving prison sentences and many have been executed. Edward Horsley, a black man, was convicted of murder and sentenced to death by an all-white jury in Monroe County, Alabama – which is 39% black – after the prosecutor struck all eight African Americans from the jury venire.⁴¹ In 1988, the Alabama Court of Criminal Appeals ruled that Mr. Horsley could not raise a *Batson* challenge.⁴² He was executed in 1996.⁴³ In Utah, William Andrews was executed after his jury discrimination claims were rejected in a case where a member of his all-white jury handed the bailiff a drawing of a man hanging from a gallows with the inscription, “Hang the Nig--rs.”⁴⁴ Clarence Brandley, a black man, was convicted by an all-white jury of murdering a white child in Texas amid evidence of racial bias by the prosecution.⁴⁵ Because he was convicted before *Batson*, Brandley could not challenge this discrimination effectively. He was saved from execution and exonerated only after the TV program *60 Minutes* brought to light serious problems with the evidence in his case.⁴⁶

In the modern era, scores of people have been executed despite dramatic evidence of illegal and unconstitutional racial bias in jury selection that was never addressed because of the Court’s decision not to apply *Batson* retroactively. Dozens of condemned persons still face execution despite unreviewed evidence of racially biased jury selection. Thousands more remain incarcerated despite their discriminatory convictions.⁴⁷



Herbert Richardson was convicted and sentenced to death by an all-white jury in Houston County, Alabama, which is 27% black, after African Americans were excluded from jury service on the basis of race. The prosecutor made racial remarks during closing arguments, including an appeal for a death sentence because Mr. Richardson was “a Black Muslim from New York.” Mr. Richardson was executed in 1989 after courts ruled that laws requiring new trials because of illegal jury discrimination did not apply retroactively.

THE CONTINUING LEGACY OF ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION

Today, peremptory strikes are used to exclude African Americans and other racial minorities from jury service at high rates in many jurisdictions, particularly in the South. In courtrooms across the United States, people of color are dramatically underrepresented on juries as a result of racially biased use of peremptory strikes. This phenomenon is especially prevalent in capital cases and other serious felony cases. Many communities have failed to make juries inclusive and representative of all who have a right to serve.

From 2005 to 2009, in cases where the death penalty has been imposed, prosecutors in Houston County, Alabama, have used peremptory strikes to remove 80% of the African Americans qualified for jury service.⁴⁸ As a result, half of these juries were all-white and the remainder had only a single black member, despite the fact that Houston County is 27% African-American.

Prosecutors in Houston County, Alabama, have used peremptory strikes to remove 80% of the African Americans qualified for jury service.

In 2003, the Louisiana Crisis Assistance Center found that prosecutors in Jefferson Parish felony cases strike African-American prospective jurors at more than three times the rate that they strike white prospective jurors.⁴⁹ Louisiana allows convictions in many cases even if only 10 of 12 jurors believe the defendant is guilty. The high rate of exclusion means that in 80% of criminal trials, there is no effective black representation on the jury because only the votes of white jurors are necessary to convict, even though Jefferson Parish is 23% black.⁵⁰

The high rate of exclusion in Jefferson Parish, Louisiana, has meant that in 80% of criminal trials, there is no effective black representation on the jury.

In the years before and after *Batson*, Georgia prosecutors in the Chattahoochee Judicial Circuit used 83% of their peremptory strikes against African Americans, who make up 34% of the circuit's population.⁵¹ As a result, six black defendants have been tried by all-white juries.⁵²

In Dallas County, Alabama, the State has used the majority of its peremptory strikes against black potential jurors in 12 reported cases since *Batson* was decided. In those cases, the prosecutor used 157 of 199 peremptory strikes (79%) to eliminate black veniremembers.⁵³ In cases where the death penalty was imposed, the data shows the Dallas County district attorney used peremptory strikes to exclude 76% of African Americans qualified for jury service.⁵⁴

These extremely high rates of exclusion indicate that, even today, African Americans continue to be denied the right to sit on juries because of their race.

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Tutwiler Prison, Wetumpka, Alabama. The United States has the highest rate of incarceration in the world.

WHY THE PROBLEM CONTINUES

To understand why racial bias in jury selection persists, it is important to understand the framework courts use to analyze claims of discrimination. In *Batson v. Kentucky*,⁵⁵ the Supreme Court outlined a three-step process for a defendant to establish that the prosecutor removed jurors based solely on their race. If the defense suspects that the prosecutor's peremptory strikes are racially biased, it must first establish that the prosecutor's actions during jury selection, along with any other relevant circumstances, raise an inference or "prima facie" case of discrimination.⁵⁶ The

defense may rely on evidence such as the prosecutor's pattern of strikes against veniremembers of color and suspicious questions or statements made by the prosecutor during voir dire.⁵⁷ To rebut the inference of discrimination, the prosecutor must then offer nonracial or "race-neutral" explanations for its challenged strikes.⁵⁸ This burden is exceedingly low. The Supreme Court has emphasized that the prosecutor's race-neutral reason need not be plausible, let alone persuasive.⁵⁹ At the final stage, the trial court must assess all relevant circumstances and determine if the defense has proven that the prosecutor intentionally discriminated against veniremembers of color.⁶⁰

1. Inference of discrimination

2. Reason for strike

3. Find intentional discrimination

Though *Batson* recognized it is unconstitutional for a prosecutor to exclude even a single juror on the basis of race, the decision fell short of providing the tools to adequately combat racial discrimination during jury selection. Justice Thurgood Marshall, the first of only two African Americans appointed to the Supreme Court, noted in his concurring opinion in *Batson*, “Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.”⁶¹

Experience has borne out Justice Marshall’s concerns.⁶² In a number of jurisdictions across the country, district attorney’s offices have trained prosecutors how to mask their efforts to exclude racial minorities from jury service. Almost immediately after the 1986 *Batson* decision, Philadelphia assistant district attorney Jack McMahan recorded a training session for Pennsylvania prosecutors on how to question African Americans during voir dire in order to later provide race-neutral reasons for their strikes.⁶³ Similarly, prosecutors in Dallas County,

Texas, maintained a decades-long policy of systematically excluding African Americans from jury service in criminal cases and codified it in a training manual.⁶⁴ For the district attorney’s office in Tuscaloosa County, Alabama, relying on peremptory strikes and other tactics to exclude black potential jurors was “standard operating procedure” and led to African Americans

District attorney’s offices specifically train prosecutors how to mask their efforts to exclude racial minorities from jury service.

being underrepresented in 70% of the county’s criminal trials.⁶⁵ Thus, despite *Batson*’s mandate, prosecutors continue to succeed in excluding large numbers of African Americans from jury service.



John Spencer of Eufaula, Alabama, above with his wife Ruby, was one of 20 African-American potential jurors illegally struck from the capital murder trial of Jesse Lee Morrison in Barbour County. Mr. Morrison is black; the victim in the case was white. In 1996, a federal appeals court reversed his conviction, finding that the South Alabama prosecutor failed even to question the black veniremembers before systematically using his first 20 peremptory strikes to remove all but one African American qualified to sit on Mr. Morrison’s jury.

PROSECUTORS OFTEN ASSERT PRETEXTUAL “RACE-NEUTRAL” REASONS

In cases where the exclusion of African Americans from juries has been challenged, many of the reasons given by prosecutors for striking African-American potential jurors obviously are a guise for race-based exclusion of potential jurors.

A Georgia prosecutor struck a juror because he was black and had a son in an interracial marriage.

all-black jury⁶⁷ and asserted in other cases that he struck African Americans because he wanted to ensure other jurors, who happened to be white, served on the jury.⁶⁸ In a Georgia case, the prosecutor stated he struck a juror because he was black and had a son in an interracial marriage.⁶⁹ Faced with such blatantly race-based reasoning, appellate courts in these cases were forced to conclude that these peremptory strikes were the result of illegal racial discrimination. Where the prosecutor's reason does not explicitly mention race, however, enforcement of anti-discrimination law has been much more difficult.

A startlingly common reason given by prosecutors for striking black prospective jurors is a juror's alleged "low intelligence" or "lack of education."⁷⁰ Courts have recognized this "is a particularly suspicious explanation given the role that the claim of 'low intelligence' has played in the history of racial discrimination from juries."⁷¹ In several cases, appellate courts have struck down this type of reason because there is no evidence of low intelligence. A federal court reversed an Arkansas conviction where the prosecutor claimed a black juror was illiterate based solely on his statement that he had not read about the case in the newspaper, without ever asking about his reading ability.⁷² In other cases, however, strikes based on "low intelligence" have been upheld, including a Louisiana case in which the prosecutor said the excluded black prospective juror was "too stupid to live much less be on a jury."⁷³

Prosecutors' other reasons for striking African Americans often correlate strongly with racial stereotypes. Prosecutors frequently claim to strike African Americans because they live in a "high crime area"⁷⁴ (meaning a predominantly black neighborhood); are unemployed or receive food stamps;⁷⁵ or had a child out of wedlock.⁷⁶ These types of reasons are not always recognized as pretexts for discrimination. An Alabama court upheld as race-neutral a prosecutor's strike based on the juror's affiliation with an historically black university.⁷⁷ But other courts have struck down as illegal racial discrimina-

Sometimes these "race-neutral" reasons explicitly incorporate race. In a recent Louisiana case, the prosecutor said he removed a juror because he was a "single black male with no children."⁶⁶ An Alabama prosecutor said he struck African Americans because he wanted to avoid an

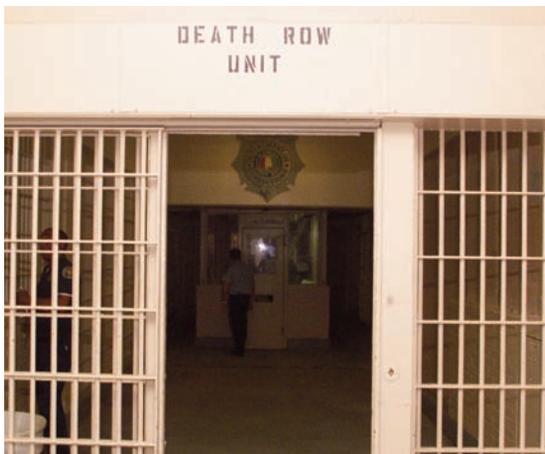


Prosecutors claimed they struck potential juror Israleen Chambers for wearing her glasses, which are tinted, in a Montgomery, Alabama courtroom. An appeals court later found that Mrs. Chambers was one of four African Americans illegally struck from the jury of a black defendant on trial for a drug charge. Prosecutors offered reasons such as gum-chewing and traffic tickets for other illegal strikes. In reversing the conviction, the appeals court noted that Montgomery County prosecutors have a history of illegally excluding black prospective jurors.

An Alabama court upheld as race-neutral a prosecutor's strike based on the juror's affiliation with an historically black university.

Another stereotype-based reason given by prosecutors to justify excluding black jurors is the assumption that the potential jurors are related to other African Americans with similar but very common last names who have been prosecuted by the district attorney's office. Prosecutors chose not to simply ask prospective jurors if they knew individuals involved in other cases before striking them. This behavior has been upheld in some courts and struck down in others as a pretext for discrimination.⁸⁰

Prosecutors frequently justify strikes by making unverifiable assertions about African-American potential jurors' appearance and demeanor. In one South Carolina case, the prosecutor stated he struck a black veniremember because he "shucked and jived" as he walked.⁸¹ A Georgia prosecutor explained his removal of a black prospective juror only by vaguely asserting he was unable to "establish a rapport"⁸² with the juror.



Prosecutors' stereotypes about African Americans and fears about allowing them on juries are exacerbated in capital trials because, in most states, juries decide not only whether the accused is guilty or innocent but, if convicted, also decide the sentence. This has meant that racially discriminatory jury selection is especially prevalent – and often extreme – in capital cases. For example, in Albert Jefferson's capital trial in Chambers County, Alabama, prosecutors segregated potential jurors into lists titled "strong," "medium," "weak," and "black," and then struck all 26 African Americans on the black list. The trial judge found insufficient evidence of racial bias. Mr. Jefferson was tried by an all-white jury and sentenced to death.⁸⁷

tion prosecutors' assertions that they struck jurors who believed police sometimes engage in racial profiling⁷⁸ and a juror who had filed a civil suit alleging racial discrimination at his job.⁷⁹

In a South Carolina case, the prosecutor struck a black potential juror because he "shucked and jived" as he walked.

A Louisiana court allowed the prosecutor to strike a black prospective juror because the prosecutor thought he "looked like a drug dealer."⁸³ An Arkansas prosecutor was permitted to rely on a "hunch" that an African American would be unfavorable to the State, without asking the juror about her actual views.⁸⁴ Courts have upheld the exclusion of black jurors for "race-neutral" reasons such as having dyed red hair⁸⁵ and wearing a large white hat and sunglasses.⁸⁶

A Louisiana court allowed the prosecutor to strike a black juror who he thought "looked like a drug dealer."

These thinly-veiled excuses for removing qualified African Americans from juries show that many prosecutors have failed to take seriously the Constitution's requirement that every citizen has an equal right to sit on a jury.



African Americans who appear for jury service must walk past Confederate symbols and markers that adorn courthouses in some Southern counties, many of which were erected in the 1950s and 60s in opposition to civil rights and anti-discrimination laws. Caddo Parish Courthouse, Shreveport, Louisiana, 2010.

APPELLATE COURTS HAVE NOT REVIEWED CLAIMS OF RACIAL BIAS CONSISTENTLY

Appellate court cases from the Deep South states investigated for this report attest to the undeniable existence of racial discrimination in jury selection. Alabama provides the most disturbing example, as racially-tainted jury selection required reversal of over 80 trials, nearly 98% of which were criminal cases.⁸⁸ Alabama’s “struck-jury system”⁸⁹ makes racially discriminatory use of peremptory strikes much more common. In Alabama, there is no prescribed limit on peremptory strikes in criminal cases. The parties strike down to a jury from the veniremembers that remain after for-cause challenges. This process requires the parties to alternate their strikes of veniremembers until only 12 individuals remain.⁹⁰ Alabama’s process maximizes the potential exposure of its citizens to discriminatory strikes.

The highest state courts in Mississippi and Arkansas have openly acknowledged that racial discrimination in jury selection remains widespread since *Batson*.

But other states are not far behind. In Florida, 33 criminal convictions have been invalidated because the prosecutor struck jurors based on race. The highest state courts in Mississippi and Arkansas, with ten reversals each, have openly acknowledged that racial discrimination in jury selection has remained widespread since *Batson*.⁹¹ Louisiana has seen 12 criminal verdicts reversed because prosecutors violated *Batson*, including in a recent decision from the United States Supreme Court.⁹² Georgia, with eight *Batson* reversals in criminal cases, similarly has struggled to eliminate race-biased jury selection by prosecutors. The clear outlier in this analysis is Tennessee, whose appellate courts have never granted *Batson* relief in a criminal case.⁹³

Tennessee courts have never reversed a conviction on a claim of racially biased jury selection under *Batson*.

This anomaly can be traced to defense attorneys' failure to object properly to prosecutors' racially biased strikes – making it harder for reviewing courts to review prosecutors' behavior – and a reluctance by appellate judges to find racial bias when claims are presented.⁹⁴

Most *Batson*-related reversals came immediately following the decision. During this period, prosecutors frequently offered blatantly race-based reasons for their strikes. In *Goggins v. State*,⁹⁵ a Mississippi case decided two years after *Batson*, the prosecutor admitted he struck two African-American potential jurors from serving in an armed robbery trial because he had been instructed to do so at a training course on jury selection.

A Mississippi prosecutor admitted he struck two African American jurors because he had been trained to do so at a course on jury selection.

*Congdon v. State*⁹⁶ dealt with a prosecutor in a murder case who struck all four African Americans in the venire because they lived in Ringgold, Georgia. The prosecutor based his strikes on the advice of Ringgold's sheriff, who testified he had a troubled relationship with some members of the town's African-American community and was uncomfortable with any of his town's black residents serving on the jury. In the Louisiana case of *State v. Lewis*,⁹⁷ the appellate court reversed a conviction for cocaine distribution after the prosecutor acknowledged he struck an African-American juror in order to seat a white juror.

Several Alabama cases display similarly unnerving expressions of racial bias. At a federal court hearing to review a capital murder conviction, a Birmingham prosecutor admitted his office followed a policy of striking African Americans because of their race.⁹⁸ A Montgomery



Cherry Finley was born in Selma, Alabama. Her great-grandparents were enslaved. Her grandparents and parents were sharecroppers in the Black Belt region. Ms. Finley began picking cotton when she was six years old. She endured the brutal realities of Jim Crow and racial segregation: white and colored drinking fountains; having to step off the sidewalk when white people passed; the constant threat of racial violence. Her family was threatened with eviction and joblessness by white landowners in the 1950s if they associated with civil rights workers. Ms. Finley registered to vote after the Voting Rights Act passed in 1965. She has lived in Dallas County her entire life but has never served on a jury. She was called for jury service and illegally excluded on the basis of race by the prosecutor, who said she should not serve because she was “separated from her husband” even though whites who were divorced or separated were permitted to serve.

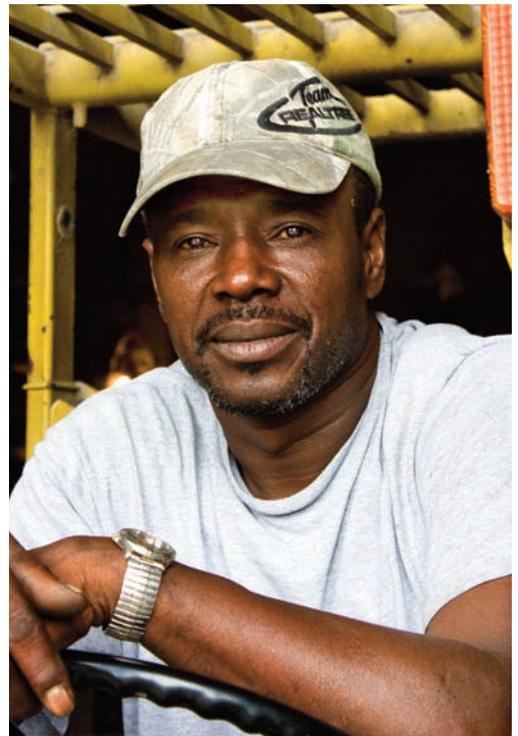
County prosecutor confessed in response to a *Batson* motion that he struck a 23-year-old black male veniremember for fear that “he might assimilate [sic] with the [African-American] defendant . . . [and] there were no other young black males that I could see on the jury venire.”⁹⁹ In *McCray v. State*, a capital case in Houston County, the prosecutor used seven strikes to remove African Americans because “if I hadn’t have [sic], we would have had an all black jury.”¹⁰⁰

In an Alabama capital murder case, the prosecutor removed African Americans because he did not want too many black people to serve on the jury.

Such unvarnished racial bias drove the higher rate of reversals in the few years following *Batson*, though comparably extreme cases have arisen in recent years.¹⁰¹ Unfortunately, these glaring violations may have distracted courts from the necessity of policing more embedded forms of racial bias, while simultaneously suggesting to *Batson*-weary prosecutors the level of savvy necessary to avoid detection. The lower rate of reversals following this initial period can be attributed to prosecutors carefully disguising their racial bias, a practice regrettably abetted by trial and appellate courts’ abdication of their duty to combat racial discrimination in the justice system.

Exacerbating this problem is that, when appellate courts find that the State has illegally excluded people of color from jury service, prosecutors face few, if any, personal consequences for their malfeasance. Prosecutors who engage in illegal racial discrimination rarely receive public scrutiny, which leaves the general public ignorant that their district attorney’s office has intentionally excluded African Americans from jury service. Perhaps because of this silence, repeat violators of *Batson* remain in office – like the district attorney for Montgomery County, Alabama. The Alabama Supreme Court has criticized her office’s history of racial discrimination and state and federal appellate courts have reversed her cases 13 times for *Batson* violations, but she remains in office.¹⁰² In Houston County, Alabama, the district attorney’s office continues to secure all-white or nearly all-white juries in capital cases despite five *Batson* reversals by the Alabama courts in just a seven-year period from 1991 to 1998.¹⁰³ Similarly, the district attorney in Jefferson Parish, Louisiana, has retained his position despite five *Batson* reversals since his initial election in 1996.¹⁰⁴

Prosecutors who illegally exclude people of color from juries face few, if any, consequences for their racially discriminatory conduct.



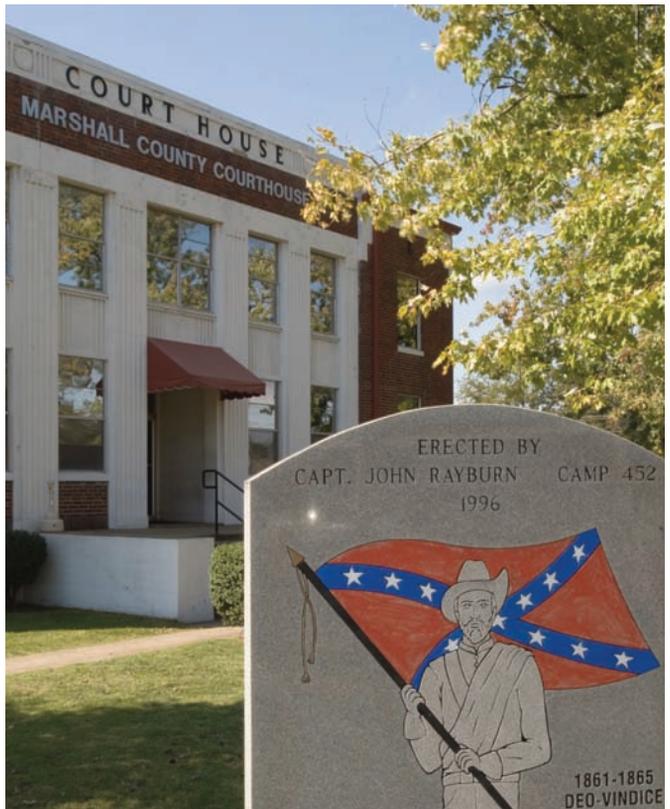
Many black residents of Southern counties have never been called for jury service or permitted to serve.

Continued tenure by prosecutors who have demonstrated racial bias reveals an indifference to racial discrimination in jury selection that allows it to persist. Absent vigilant enforcement of *Batson* by the courts, citizens of color are left powerless to combat their deliberate exclusion from the justice system.

Absent vigilant enforcement of anti-discrimination law by the courts, citizens of color are left powerless to combat their deliberate exclusion from the justice system.

VARIATION AMONG STATE COURTS

The states analyzed for this report are addressing claims of racially biased jury selection in a variety of ways. Although in every state there is evidence of general indifference to the seriousness of excluding people from jury service based on race and of impunity for discriminatory actors who rarely are held accountable for bias, some states seem particularly resistant to enforcing every citizen's right to serve on a jury. Moreover, courts are inconsistent and can be skeptical about the presence of racial bias even when the history and evidence strongly suggest that relief should be granted. As techniques to avoid detection of discriminatory practices have grown more sophisticated, so has the need grown for greater accountability from prosecutors, trial judges, and appellate courts that review claims of racially discriminatory jury selection and too often tolerate racial bias.



Marshall County Courthouse, Alabama, 2008

NEAR-TOTAL DEFERENCE TO PROSECUTORS IN TENNESSEE

More than 100 criminal defendants have raised *Batson* claims on appeal in Tennessee, but this state's courts have never reversed a criminal conviction because of racial discrimination during jury selection. While this might seem to indicate that Tennessee is free from race discrimination, the reality is that proving discrimination in Tennessee is extraordinarily difficult because state courts tend to accept at face value prosecutors' explanations for striking jurors of color – even reasons that are implausible or not supported by the record. In the 2007 case of *State v. Hill*, the prosecutor struck all but one African American, leaving a black man to be tried by a nearly all-white jury.¹⁰⁵ The prosecutor claimed he struck one African-American man

because he was “not very bright” and “went on some diatribe” during voir dire. The appellate court found no such “diatribe” in the record, but still upheld the case.¹⁰⁶ In a similarly disturbing case from 2006, *State v. Tyler*, the prosecutor struck only African Americans, and both the trial and appellate courts accepted his explanation that he struck one black juror for being “tentative and timid” and another for wearing a large hat and sunglasses.¹⁰⁷ These cases demonstrate a failure by Tennessee courts to critically evaluate whether a prosecutor’s explanations are mere pretexts for discrimination and a tendency, instead, to accept almost any reason that is not openly or concededly discriminatory.



Lee Bowdry was illegally excluded from jury service on the basis of race in Lee County, Mississippi. The prosecutor attempted to mask the racial basis for Mr. Bowdry’s exclusion by telling the court that he was excluded because he “looked hostile.”

BUILDING BLOCKS FOR MEANINGFUL REVIEW IN FLORIDA

Florida has crafted unique provisions under its own state laws to protect jurors from racial discrimination. Indeed, Florida law is more protective than federal anti-discrimination law in several respects. Once a prosecutor has given a race-neutral reason for striking a particular juror, Florida judges must assess whether the reason is “genuine” by considering factors such as whether (1) the prosecutor actually questioned the excluded juror; (2) the juror was singled out during voir dire or manipulated into providing answers that would tend to disqualify him from jury service; (3) the prosecutor’s reason for the strike was related to the facts of the case, and (4) other jurors gave similar answers but were not struck. Under Florida law, the prosecutor’s reason for the strike *must be supported by the record*, which makes it much harder for the prosecutor to manufacture explanations after the fact.¹⁰⁸ Florida’s rule stands in stark contrast with states like Tennessee where prosecutors are allowed to rely on reasons that are not supported by the record.

Florida’s protections effectively discourage overt discrimination in jury selection, but the state is far from perfect. In recent years, Florida courts in a fair number of cases have failed to recognize shocking examples of racial discrimination in jury selection.¹⁰⁹ Relative to its Southern neighbors, though, Florida’s state law framework creates a much better environment for remedying racial discrimination in jury selection.

ONGOING PROBLEMS IN LOUISIANA

Historically, Louisiana has not been particularly receptive to jury discrimination claims. A recent United States Supreme Court decision criticizing the state courts’ failure to carefully

scrutinize a prosecutor’s exclusion of African-American jurors highlighted the problems of racially biased jury selection there. In 2008, the Court decided *Snyder v. Louisiana*, in which a black college student was excluded from jury service along with all other African Americans in the venire.¹¹⁰ The Court found the prosecutor’s asserted reason for striking the student – he “looked nervous” and was concerned the trial might interfere with his student teaching obligations – was a pretext for discrimination, and it implicitly recognized that Louisiana courts failed to appropriately scrutinize the prosecutor’s explanation.¹¹¹ Since *Snyder*, the Louisiana Supreme Court has reversed a case after finding racial bias in jury selection.¹¹² However, that court also reinstated a conviction after an intermediate court had found illegal discrimination in jury selection.¹¹³ While there are signs that courts in Louisiana have become slightly more attentive to discrimination claims since *Snyder*, a great deal of work clearly is needed to effectively deter and eliminate racially biased jury selection in this state.

CONTINUED RACIAL DISCRIMINATION IN MISSISSIPPI, GEORGIA, AND ARKANSAS

The Mississippi Supreme Court has recognized that racial discrimination in jury selection continues to be a serious problem in Mississippi. In 2007, the court expressed frustration that “attorneys of this State persist in violating the principles of *Batson* by racially profiling jurors” and found that “racially-motivated jury selection is still prevalent twenty years after *Batson* was handed down.”¹¹⁴ The court threatened to change its system of peremptory challenges if things did not improve.¹¹⁵ Among other remedies, it would consider limiting the number of peremptory strikes or enhancing voir dire.¹¹⁶

In 2007, the Mississippi Supreme Court expressed frustration that “racially-motivated jury selection is still prevalent twenty years after *Batson* was handed down.”

It is encouraging that the Mississippi Supreme Court has acknowledged the problem, admitted that *Batson* has not ended juror discrimination, and proposed other remedies. But Mississippi courts continue to credit highly dubious explanations for prosecutor’s exclusion of jurors of color. In a 2008 case where the prosecutor used his first eight peremptory challenges



EJI studied jury selection practices in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee.

against African Americans, Mississippi courts credited the prosecutor’s claim that he struck two black jurors because they had “only” a twelfth-grade education and struck an African-American engineer because she was “inattentive” and dyed her hair.¹¹⁷ In another 2008 case, state courts accepted a prosecutor’s explanation that he excluded an African-American woman because she had lived in the county for “only” 22 months and did not make eye contact with

him and that he struck a black information technology specialist because he might blame the state for the lack of audio and video evidence in the case.¹¹⁸ The deference given to these prosecutors reveals that, despite the Mississippi Supreme Court's strong language regarding the need to end juror discrimination, the state's trial and appellate courts are failing to exercise meaningful oversight.

Individuals seeking to raise *Batson* claims in Georgia face even higher barriers to relief. It is particularly difficult to show that a poor person has been the victim of racial discrimination in Georgia because state courts have upheld strikes based on income-related characteristics, such as a juror's place of residence, perceived lack of education,

and perceived lack of employment history. In *Smith v. State*, Georgia courts accepted the prosecutor's explanation that he struck two African-American jurors because they lived in public housing projects with prevalent gang activity and might be prejudiced against state witnesses who were gang members.¹¹⁹ In the 2005 case of *Taylor v. State*, the prosecutor used all five peremptory strikes to remove African Americans from the jury, explaining that he struck people who lacked education or work experience, and that one juror also "seemed odd."¹²⁰ Georgia courts upheld this explanation as race-neutral, noting that the one African American who served on the jury was a college student, consistent with the prosecutor's stated desire for a well-educated jury. The court did not explain why jurors needed such a high level of education to sit on a straightforward case in which the defendant was accused of robbing and shooting a man he believed had raped his girlfriend.¹²¹ Georgia courts' willingness to uphold strikes based on residence in a particular neighborhood, a perceived lack of education, or a perceived lack of employment history provides a shield for prosecutors to strike poor people and may lead to the disproportionate exclusion of people of color from juries.

Arkansas courts have upheld strikes of African Americans based on a prosecutor's descriptions of the jurors' demeanor, body language, tone, or other amorphous characteristic that cannot be disproved by the record.

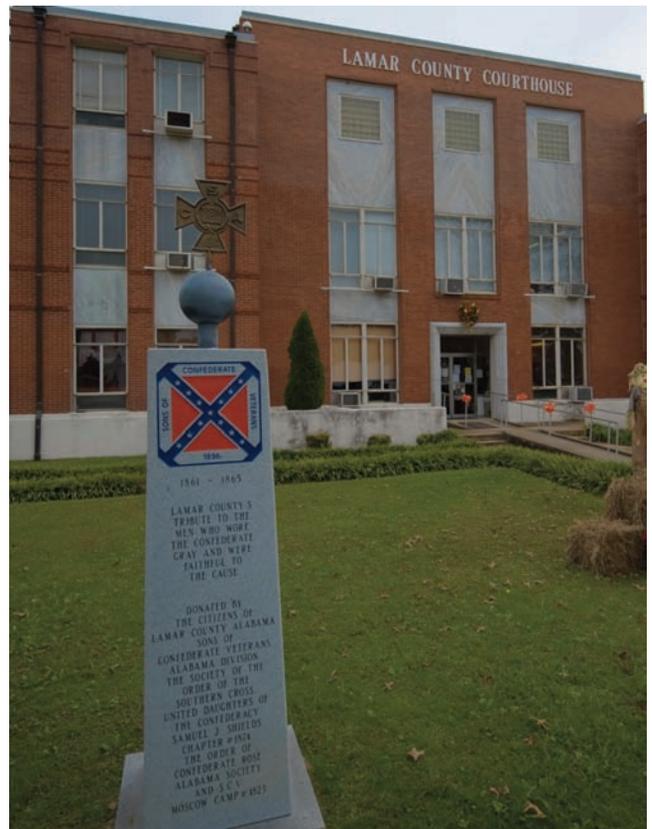
Georgia courts' willingness to uphold strikes based on residence in a particular neighborhood, a perceived lack of education, or a perceived lack of employment history provides a shield for prosecutors to strike poor people.

Arkansas similarly is resistant to successful *Batson* claims, and Arkansas law has several features which make it particularly difficult to prove racial discrimination in jury selection. First, an Arkansas court typically will credit a prosecutor's explanation for a peremptory strike even when the strike is based on information known only to the prosecutor's office which cannot be verified by the record.¹²² In *Thornton v. State*, the prosecutor claimed to

have struck a juror because of a "hunch" that the juror was related to a criminal defendant in another case, and this strike was upheld as race-neutral.¹²³ In several other cases, Arkansas courts have accepted strikes of African-American jurors based in part on a prosecutor's descriptions of the jurors' demeanor, body language, tone, or other amorphous characteristic

that cannot be disproved by the record.¹²⁴ Finally, Arkansas courts repeatedly have found that the presence of any African American on a jury is strong evidence that the prosecution has not engaged in racial discrimination.¹²⁵ This overly simplistic approach ignores Supreme Court precedent holding that the presence of a single African-American juror does not disprove discriminatory intent on the part of the prosecutor,¹²⁶ and that removing even a single juror on the basis of race violates the Equal Protection Clause.¹²⁷ Moreover, when coupled with the Arkansas courts' deference to prosecutors and acceptance of peremptory strikes not supported by the record, it effectively exempts prosecutors from any meaningful review of peremptory strikes.

THE ROLE OF DISPARATE TREATMENT IN ALABAMA AND SOUTH CAROLINA



Lamar County Courthouse, Alabama, 2008

Throughout the South, a common method of demonstrating racial discrimination in jury selection is to show that the prosecutor treated jurors of color differently from similarly situated white jurors.¹²⁸ When the prosecution claims it struck an African-American juror for a race-neutral reason – such as the juror’s industry or profession – but does not strike white jurors who share the same characteristic, this “disparate treatment” provides strong evidence of discrimination.¹²⁹ Disparate treatment may be the only sign as to whether a prosecutor’s explanation for a peremptory strike is genuine.

Alabama and South Carolina take opposite approaches to *Batson* challenges based on disparate treatment. South Carolina initially refused to uphold reasons for striking black jurors that applied equally to whites,¹³⁰ but in the early 1990s the South Carolina Supreme Court retreated from enforcement of anti-discrimination laws. In *Sumpter v. State*, that court considered the prosecutor’s strike of a black veniremember who had a “prior DUI involvement” in light of evidence that the prosecutor did not strike a white juror with a DUI conviction.¹³¹ The court upheld the strike as race-neutral, noting the African-American juror’s case, but not the white juror’s case, was handled by the same prosecutor’s office.¹³² In *State v. Dyar*, the prosecutor claimed he struck an African American because he had prosecuted the potential juror, but did not strike two white jurors who also had criminal charges.¹³³ The South Carolina Supreme Court again upheld the strike, accepting the prosecutor’s explanation that, unlike the white jurors, he personally prosecuted the black juror.¹³⁴ In dissent, two justices wrote, “It does not require a deep analysis to realize that today’s rule is fraught with enough practical problems to render a defendant powerless to counter invidious discrimination.”¹³⁵ The dis-

sent called this departure from South Carolina precedent “alarming.”¹³⁶ Indeed, no criminal defendant has won a *Batson* challenge in the state since 1992.

Alabama courts, in contrast, have been reluctant to grant *Batson* relief in recent years *without* evidence of disparate treatment.¹³⁷ This has meant that even when a prosecutor uses all or almost all of his or her peremptory strikes to exclude people of color, Alabama courts often refuse to find a *Batson* violation unless a clear case can be made that an excluded African-American veniremember was similarly situated to a white juror. In the 2008 case of *Floyd v. State*,¹³⁸ the prosecutor peremptorily struck 10 of 11 African Americans in the venire; the black defendant was tried by an all-white jury with one African-American alternate juror. When asked to explain his peremptory strikes, the prosecutor asserted he struck one juror because of her body language and demeanor, struck another juror because she was quiet during voir dire, and could not fully recall the reason for a third strike.¹³⁹ Finding no disparate treatment, the Alabama courts accepted these reasons as race-neutral even though the prosecutor had excluded a shocking number of African Americans from Mr. Floyd’s jury.¹⁴⁰

It is clear that, without greater consistency and commitment to enforcing anti-discrimination laws, racially discriminatory use of peremptory strikes will continue. Lack of enforcement is a primary reason why exclusion of people of color from juries remains widespread in nearly all of the states studied for this report.

Even when prosecutors use all or almost all of their peremptory strikes to exclude people of color, Alabama courts often refuse to find a *Batson* violation.



RACE DISCRIMINATION'S OTHER VICTIMS: JURORS WRONGLY EXCLUDED

Racial discrimination in jury selection violates the constitutional rights of the jurors themselves. In *Powers v. Ohio*,¹⁴¹ the United States Supreme Court held that jurors have a right not to be excluded based on their race, yet race-based exclusion continues to stigmatize growing numbers of Americans. EJI staff interviewed scores of people of color who had been excluded from jury service across the Southeast to document the impact of discrimination on citizens denied the right to serve. These African-American citizens dutifully reported for jury service only to be turned away because their race created a false presumption that they could not be fair, could not follow the law, or are somehow unworthy for full civic life. Many had overcome the legacy of the Jim Crow South to serve in the military, own businesses, and send their children to college, only to find discrimination still as close as their county courthouse.

African Americans dutifully reported for jury service only to be turned away because their race created a false presumption that they could not be fair or were unworthy for full civic life.

The sting of mistreatment can linger for years. Byron Minnieweather was wrongly struck in 2004 and has since moved away from his hometown of Columbia, Mississippi. Memories of the racially-charged trial still trouble him. He told EJI, “It was my civil right to participate as a juror.”

Melodie Harris had lived in Lee County, Mississippi, for a decade and worked for the same local company for six years when a prosecutor claimed she had “no ties to the community” and struck her from a jury. Ms. Harris knew she and most of the other black jurors had been treated unfairly. “It was just so blatant,” she said. Instead of turning away, Ms. Harris chose to bear witness and take action. She returned to the courthouse every day for the trial of Alvin Robinson, a black man who had been chased and assaulted by a white man following a traffic altercation, then charged with murder for retaliating in fear.¹⁴² Ms. Harris was aghast as she watched three jurors sleep through portions of the trial, then vote guilty. A former bank teller in her 40s who has worked two jobs most of her life, Ms. Harris considered herself a supporter of law enforcement. “I like the police. I’ll dial 911 in a second,” she said. But watching the discriminatory tactics used to ensure Mr. Robinson would go to prison has shaken her faith in a system she wanted to trust. “I thought justice was supposed to be blind, and just sitting there, how could anybody vote guilty listening to the evidence with those jury instructions?” After the trial, Ms. Harris visited Mr. Robinson in prison and helped him with his appeal. Eventually, the Mississippi Court of Appeals confirmed her suspicions. The court reversed Mr. Robinson’s manslaughter conviction because of race-based strikes in selecting the jury. The reasons offered by the State were “so contrived, so strained, and so improbable,” the court found, that they were unquestionably pretexts for purposeful discrimination.¹⁴³



Excluded jurors and their families spoke about suffering shame and humiliation as a result of false inferences that criminal activity made them unfit to serve. In Montgomery County, Mississippi, Vickie Curry was illegally struck by a prosecutor who claimed her husband had a felony record.¹⁴⁴ The prosecutor mistook her husband for someone else, and the falsehood resurfaces each time the case appears in media reports. Charles Curry, retired from the National Guard after 23 years of service, is deeply disturbed that the district attorney suggested he does not respect the law. This common tactic thoughtlessly tarnishes the reputations of African Americans living lives of quiet decency. A prosecutor in Talladega County, Alabama, sought to characterize Ruth Garrett, a deeply religious woman who works as a school bus driver, as unfit for jury service because she was related to criminals.¹⁴⁵ In fact, Mrs. Garrett had never met the family who shared her last name, but the prosecutor never bothered to ask her.

Another common theme among illegally struck jurors is the sad recognition that their individual experiences were small pieces in the structure of racism that envelops their communities. “I’m not surprised because that’s how the system is around here,” said Gerald Mercer, who was struck from a Russell County, Alabama, jury because he had traffic tickets and expressed hesitation about the death penalty, while white jurors with similar circumstances remained on the jury.¹⁴⁶ “They do a lot of stuff around here that is unequal justice.” Vickey Brown was illegally struck from a jury in Houston County, Alabama, by a prosecutor who admitted he wanted to avoid “an all-black jury.”¹⁴⁷ Although Mrs. Brown had encountered racist treatment in job interviews, she was



Brenda Greene and her husband Homer worked hard their whole lives at a small-town textile mill in Talladega County, Alabama – humble, honest work that was not easy. In his 50s, Mr. Greene took on a second job at McDonald’s. The Greens tried to instill color-blind attitudes in their children and grandchildren – not a small task in Sylacauga, where racial divisions limit opportunities in business, schools, and local government, which are dominated by whites. For their efforts, the Greens were falsely portrayed as active members of the drug culture by a prosecutor grasping for reasons to keep blacks off a capital jury. The prosecutor said he struck Mrs. Greene because her husband sold drugs and was involved with stolen property and she was friends with drug dealers prosecuted by his office.¹⁴⁸ Before being contacted by EJI, Mrs. Greene was unaware of these false accusations. She was shocked by the information. “You’re kidding me! That’s a lie! At our house?” she said after reading the court record. Mrs. Greene desperately wanted to clear her family’s name, even though the statements were made in 1992. Her family’s shared history with the prosecutor reaches back even further. Her mother was employed by his family and cleaned his boyhood home. Still, the truth did not get in the way of the prosecutor’s efforts to secure a mostly white jury. Mrs. Greene recalled the only contact she actually had with a drug investigation: when police were chasing a suspect through the neighborhood, she pointed in the direction he fled.

Excluded jurors and their families spoke about suffering shame and humiliation from false inferences that criminal activity made them unfit to serve.

particularly offended at the district attorney's suggestion that she would be lenient on a black defendant because she is black. "I was shocked when I found out," she said. Alice Branham, a 31-year veteran of the Florida Department of Corrections, was illegally struck from a jury in Jefferson County, Florida. When forced to provide a race-neutral reason for excluding her, the prosecutor noted only her work for the State.¹⁴⁹ Ms. Branham was so accustomed to institutional racism that she had no idea this was a violation of her rights. After all, when she started working for the prison system, her supervisor informed her he did not like black people, and only grew to accept her after she started bringing homemade cookies and collard greens to the office.

Alice Branham, a 31-year veteran of the Florida Department of Corrections, was illegally struck from a jury in Jefferson County, Florida. When forced to provide a race-neutral reason for excluding her, the prosecutor noted only her work for the State.



Ruth Scurry, along with all eight other qualified African-American potential jurors, was excluded from serving on a felony trial jury in Jefferson County, Florida. A 20-year veteran of the Department of Corrections, Ms. Scurry expressed surprise about the prosecutor's accusations but noted the continuing challenges of racial bias in her community.

For many excluded black jurors, the pretexts provided to refute claims of discrimination add another layer of injury. A Baldwin County, Alabama, prosecutor characterized potential juror Allen Mason as "not very well educated" and having "difficulty understanding the concepts that the state asked him" even though Mr. Mason answered every question, "Yes, sir" or "No, sir," and clearly explained his beliefs.¹⁵⁰ Nearly 20 years later, Mr. Mason grew emotional as he recalled how the prosecutor's racist actions made him feel unworthy. Elsewhere, prosecutors have countered *Batson* claims by describing African Americans in the jury pool as inattentive, unresponsive, or hostile.¹⁵¹ Black men have been struck for wearing jeans or an earring.¹⁵² A Mobile, Alabama, prosecutor claimed he struck Carolyn Hall because "she works at a retarded place" and he did not want jurors who were sympathetic to the disadvantaged.¹⁵³ While Mrs. Hall remains committed to the mentally disabled people she cares for, she told EJI staff that her work would not have affected her ability to be fair.

Hester Webb (right) owns a successful child care center. She was struck from a jury in Montgomery, Alabama. When asked for a race-neutral reason, the prosecutor said Ms. Webb was chewing gum and was hesitant to answer questions, which led him to suspect she had prior knowledge of the case.¹⁵⁴ Ms. Webb was stunned at the suggestion she did something so wrong: "It needs to stop. It's not right. It's not fair."



"It needs to stop."

— Hester Webb

EARL MCGAHEE

In 1986, Earl Jerome McGahee, who is black, was charged with two counts of capital murder in the deaths of his ex-wife and her classmate in Selma, Alabama. Mr. McGahee was tried by an all-white jury in a county that was more than 55% African-American after Dallas County District Attorney Ed Greene removed every one of the 24 African Americans who qualified for jury service.¹⁵⁵

When asked to explain why he removed so many African Americans from Mr. McGahee's jury, the district attorney said he believed many of these people were of "generally low intelligence," despite the lack of any evidence suggesting this was the case.

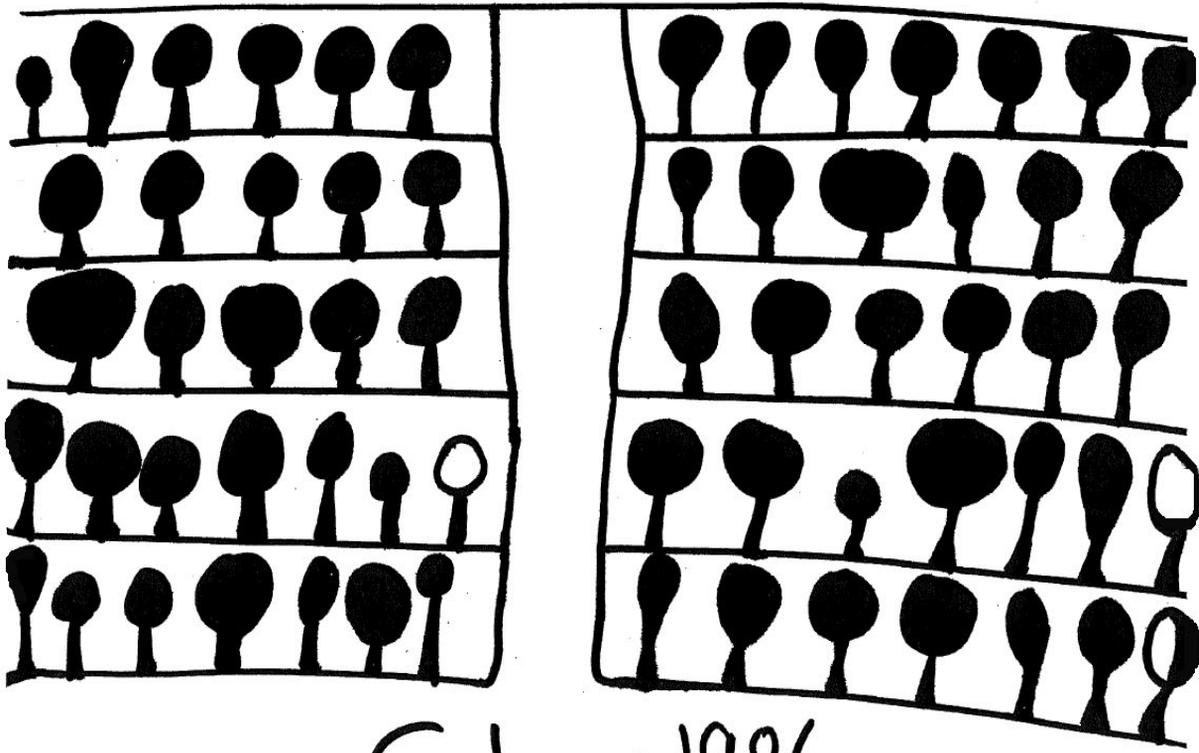
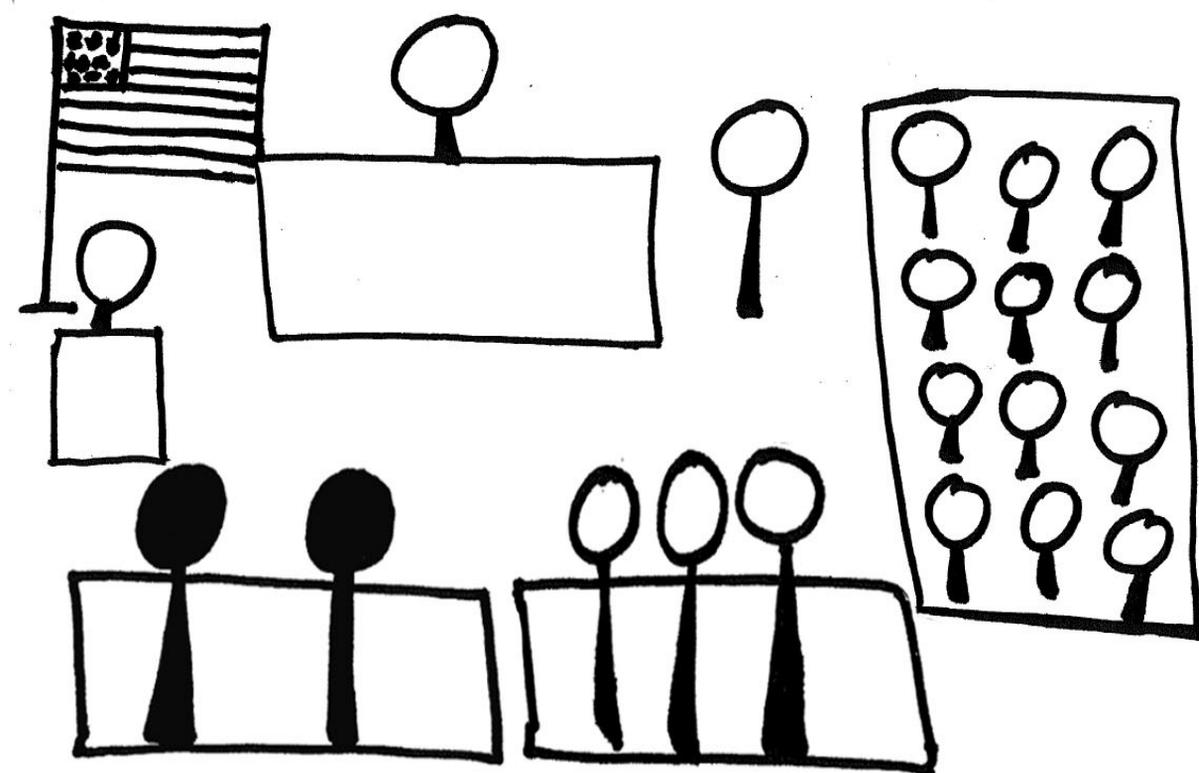
When asked to explain why he removed so many African Americans from Mr. McGahee's jury, the district attorney stated that he believed many of these individuals were of "low intelligence," despite the lack of any evidence suggesting this was the case.¹⁵⁶ Indeed, the prosecutor did not ask these veniremembers any questions about their educations and most of the questions he asked were answered by a show of hands.¹⁵⁷ His baseless assertion of "low intelligence" as a reason to exclude African Americans from Mr. McGahee's jury was particularly insulting because similar claims historically have been used to prevent African Americans

from serving on juries.¹⁵⁸ Remarkably, the prosecution asserted that more than one-third of the African Americans called for jury service in Mr. McGahee's case were of "low intelligence."¹⁵⁹ The struck jurors included mechanics, ministers, and community leaders, many of whom participated in the Selma Civil Rights Movement.



Edith Ferguson was barred from jury service in Dallas County, Alabama, along with all 23 other African Americans who were called for Earl McGahee's trial. Ms. Ferguson was one of six black prospective jurors struck by the prosecutor because, he asserted, they were of "low intelligence."¹⁶³ Ms. Ferguson had worked for the Selma Police Department for many years as a crossing guard. Her son, Charles Morton (above), served 27 years in the United States Army before retiring. Both expressed great anguish over the prosecutor's exclusion of African Americans and insulting comments, as well as the continuing problem of racial bias in their community. In 2009, a federal appeals court found the racially biased exclusion of jurors in this case to be "astonishing."¹⁶⁴

In 2009, Mr. McGahee was granted a new trial after a federal court relied on the district attorney's "astonishing pattern" of removing qualified African-American jurors as evidence of racially discriminatory jury selection.¹⁶⁰ This was not the first time the Dallas County District Attorney had been caught engaging in racial discrimination during jury selection: in 12 reported cases from 1988 to 2001, he used 79% of his peremptory strikes to exclude African Americans from jury service, resulting in many all-white or nearly all-white juries in a majority black county.¹⁶¹ Since 1990, five individuals have won new trials because African Americans were illegally excluded from jury service in Dallas County.¹⁶²



Selma, 1986

ROBERT TARVER

In 1984, Robert Tarver (*right*), a 36-year-old black man, was charged with the robbery-murder of a 63-year-old white male convenience store owner in Cottonwood, Alabama. Mr. Tarver consistently maintained his innocence, even passing a polygraph test when denying he killed the victim.¹⁶⁵ Only one witness placed Mr. Tarver at the scene of the crime: his co-defendant, Andrew Lee Richardson.¹⁶⁶ As the United States Court of Appeals for the Eleventh Circuit acknowledged, “very little evidence made Robert Tarver a better candidate than Richardson to be found the actual killer.”¹⁶⁷ At trial, the State’s main evidence against Mr. Tarver was Richardson’s testimony. Though the district attorney denied that a deal had been struck with Mr. Richardson, shortly after Mr. Tarver’s trial ended, Mr. Richardson pleaded guilty to a single count of robbery and received a 25-year sentence.¹⁶⁸



Russell County is nearly 40% African-American, but Mr. Tarver was tried and convicted of capital murder by a jury comprised of 11 white jurors and only one black juror. The prosecutor later admitted that black people had been excluded on the basis of race.

their race.¹⁷¹ After Mr. Tarver challenged the prosecutor’s race-based discrimination, the trial judge found the prosecutor had discriminated against black jurors but refused to grant a new trial because Mr. Tarver’s lawyer had failed to properly object at trial.¹⁷² Despite the recognized merits of the claim, the lawyer’s failure to object meant that subsequent courts similarly refused to grant relief.¹⁷³

Russell County is nearly 40% African-American, but Mr. Tarver was tried and convicted of capital murder by a jury comprised of 11 white jurors and only one black juror.¹⁶⁹ During jury selection, the prosecutor used peremptory strikes to exclude 13 of 14 black people who were qualified for jury service.¹⁷⁰ The assistant district attorney later admitted that the prosecutor intended to exclude black people from Mr. Tarver’s jury because of

After convicting Mr. Tarver of capital murder, the jury sentenced him to life in prison without parole by a vote of seven to five. Alabama’s override provision nonetheless allowed the trial judge to sentence Mr. Tarver to death.¹⁷⁴ On April 14, 2000, Mr. Tarver was executed by the State of Alabama in the electric chair.¹⁷⁵

FRANCES WATSON

Prosecutors are not alone in disregarding the law prohibiting race-based jury selection. Judges have displayed similar reluctance to address race bias in the courtroom. In 1991, Little Rock, Arkansas, resident Frances Watson was tried for battery.¹⁷⁶ When the prosecution used a peremptory strike to remove a black woman from the jury, Ms. Watson's African-American attorney objected that the juror was removed exclusively because of her race, citing *Batson*.¹⁷⁷ Over defense counsel's protests, the trial judge encouraged the prosecutors to explain, in front of the jury, that they were not discriminating.¹⁷⁸ The judge silenced defense counsel, who moved for a mistrial, arguing that the determination of racial bias should "be made by the Court and solely by the Court outside the hearing of the jury."¹⁷⁹ The judge overruled the motion and Ms. Watson was convicted and sentenced to 14 years in prison. On appeal, the Arkansas Supreme Court found the trial judge's behavior "unacceptable," noted that race is a "combustible and volatile issue," and held that an accusation of racism by one attorney against another could easily prejudice the jurors for or against the defendant.¹⁸⁰ Ms. Watson was granted a new trial.¹⁸¹

ADA TOMLIN

Some trial judges not only fail to prevent race discrimination but become collaborators with state prosecutors, as in the trial of Ada Tomlin, a black woman charged with driving under the influence.¹⁸² When Ms. Tomlin's attorney argued that the prosecutor's removal of four qualified black jurors was racially biased, the prosecutor explained he struck one black female juror because she was "slow, talked low, and was somewhat aged" and he doubted she could endure or understand deliberations.¹⁸³ Although the juror was only 43 years old, the judge agreed that the woman was "sluggish" and would be mere "filler" on the jury.¹⁸⁴ Neither did the judge question the prosecutor's assertion that he struck a black man because he "shucked and jived" when he walked to the witness box.¹⁸⁵ The prosecutor and trial judge's reliance on racial stereotypes to justify the dismissal of otherwise qualified African-American jurors later was declared illegal by the South Carolina Supreme Court.¹⁸⁶

Ciudadanos de los EE.UU. que son bilingües no deben ser excluidos de los jurados porque tienen capacidades lingüísticas adicionales.

U.S. citizens who are bilingual should not be excluded from jury service because they have additional language skills.

Bilingual citizens have the right to serve on juries. Latinos and foreign-born citizens often are excluded from juries because of their race or ethnicity, but prosecutors successfully have used language as a "race-neutral" reason to justify their exclusion. In 1991, the United States Supreme Court upheld the exclusion of Latinos based on the prosecutor's assertion that Spanish speakers would refuse to defer to the official translation of trial testimony.¹⁸⁷ Noting the "harsh paradox that one may become proficient enough in English to participate in trial, only to encounter disqualification because he knows a second language as well,"¹⁸⁸ the Court nonetheless allowed the prosecutor to exclude Latino prospective jurors. The Court tolerated this bias because the prosecutor carefully avoided saying he did not want Spanish-speaking jurors.¹⁸⁹ The Court's indifference to the State's discriminatory behavior allowed its exclusionary conduct to go uncorrected.

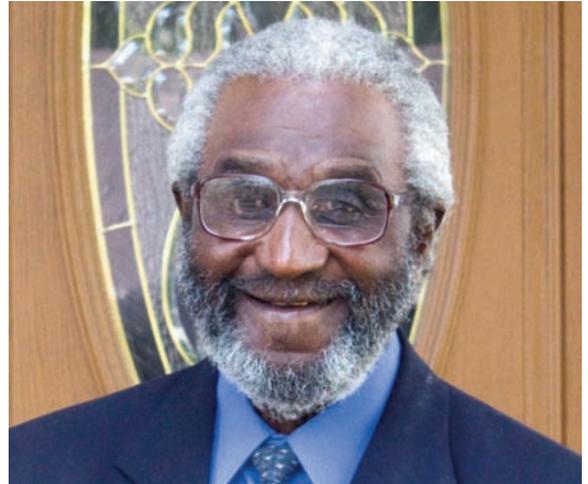
ADDITIONAL BARRIERS TO REPRESENTATIVE JURIES

In addition to peremptory strikes, other mechanisms work to keep juries unlawfully homogenous. The jury in a particular case is drawn from a larger pool of potential jurors, and frequently this pool (or “jury box”) does not adequately reflect the entire community. Underrepresentation in the jury pool creates yet another barrier to jury service among people of color, women, and other minorities.

UNDERREPRESENTATION OF RACIAL MINORITIES IN JURY POOLS

The Constitution requires that the jury pool be fairly representative of the community.¹⁹⁰ The process for selecting the jury pool must not systematically exclude any cognizable group.¹⁹¹ A group is cognizable when it is sufficiently distinctive from the rest of society.¹⁹² Women and African Americans are cognizable groups.¹⁹³ Such groups also include other racial or ethnic minorities, daily wage earners, and unregistered voters.¹⁹⁴ Despite the Supreme Court’s long-established rule requiring the jury pool to fairly reflect the community, disparities between the racial make-up of the jury pool and the community persist.

The problem stems in part from the way courts evaluate whether a particular group is underrepresented in the jury pool. Courts generally look at the difference between the percentage of a particular group in the community and the percentage of that group in the pool, often called the “absolute disparity.”¹⁹⁵ Historically, courts have required an absolute disparity of greater than 10% to find a group is underrepresented.¹⁹⁶ The absolute disparity actually reveals little about the degree of underrepresentation because it does not show how large a portion of the cognizable group is being excluded.



At 61, Rev. Bernard Martin had never been called for jury duty in Elmore County, Alabama, where he had lived nearly all his life. In 1999, with seven other life-long residents, he filed a federal lawsuit challenging the county’s unlawful exclusion of African Americans from the jury pool.¹⁹⁷

Henrietta Hunt, a 64-year-old African-American woman, joined the suit. In the 1950s, she was one of the first black citizens in Elmore County to register to vote, but not before she was forced to pass a “poll test” designed to prevent African Americans from voting.¹⁹⁸ Over 40 years later, Ms. Hunt had never been called for jury service.¹⁹⁹

Though African Americans comprised about 22% of the county’s population, they were only 15% of the jury pool.²⁰⁰ About 30% of black residents were not represented in the jury pool.²⁰¹ Confronted with this compelling evidence of discrimination, state officials agreed to expand the jury lists and the Alabama Supreme Court changed its rules to allow counties like Elmore to supplement their jury selection procedures to create representative jury pools.²⁰²

Given that it fails to take into account the size of the excluded group, use of the absolute disparity test may permit almost complete exclusion of small groups, while invalidating moderate underrepresentation of large groups. Indeed, if a group constitutes less than 10% of the population, the 10% absolute disparity requirement allows even the most blatant and intentional exclusion of every member of that group to go unremedied.²⁰³ This means it is impossible for African Americans to challenge underrepresentation in 75% of counties in the United States.²⁰⁴ For Latinos and Asian Americans, such challenges are impossible in more than 90% of counties, and for other people of color this constitutional protection is practically non-existent.²⁰⁵

It is impossible for African Americans to challenge underrepresentation in 75% of counties in the United States. For Latinos and Asian Americans, challenges are impossible in more than 90% of counties.

A better method for measuring underrepresentation is to divide the absolute disparity by the percentage of the group in the broader community. This ratio is referred to as the “comparative disparity” and reveals the percentage of the cognizable group that is excluded, ranging from 0% (perfect representation) to 100% (total exclusion).²⁰⁶ The comparative disparity



test may overstate the significance of disparities where the total population of a cognizable group is very small, such that a difference of only a few individuals can create a large disparity.²⁰⁷ But such situations are not difficult to identify, and comparative disparity remains the only method to accurately measure the degree of underrepresentation. Although the comparative disparity reveals much more than the absolute disparity about whether a jury pool fairly represents the community, few courts have embraced it and some have explicitly mandated exclusive use of the absolute disparity test.²⁰⁸

Unfortunately, the Supreme Court recently declined an opportunity to make clear that the comparative disparity should be considered in determining whether a group is underrepresented in the jury pool.²⁰⁹ In *Berghuis v. Smith*, the Court rejected a challenge to a jury pool with an 18% comparative disparity in the representation of African Americans because it found the African-American defendant (who had been convicted by an all-white jury) had not presented sufficient evidence that a particular practice used by the county had caused the underrepresentation.²¹⁰ In the wake of *Berghuis*, even where significant underrepresentation persists, it remains difficult to remedy.

EXCUSING JURORS “FOR CAUSE”

The composition of the jury pool also may be affected greatly by the way each jurisdiction decides whom to excuse from jury service. States set statutory qualifications for jury service and judges also excuse jurors from serving if it would be a hardship for the juror. The youngest and oldest members of the community are often excluded. In some states, the minimum age for jury service is 21, even as increasingly younger children are facing criminal jury trials.²¹¹ Many states also exempt individuals over age 70 from jury service, even if they are able to serve.²¹²

Other exemptions tend to deny people with low incomes the opportunity to serve on a jury.²¹³ Individuals who work for an hourly wage cannot afford to miss work because they will not get paid. Parents who are the sole caregivers for their children cannot serve unless they have access to affordable child care. People living in poverty often are unable to obtain transportation, or their addresses are not current in court files, so they do not receive a summons or appear in court unless additional efforts are made to serve them.

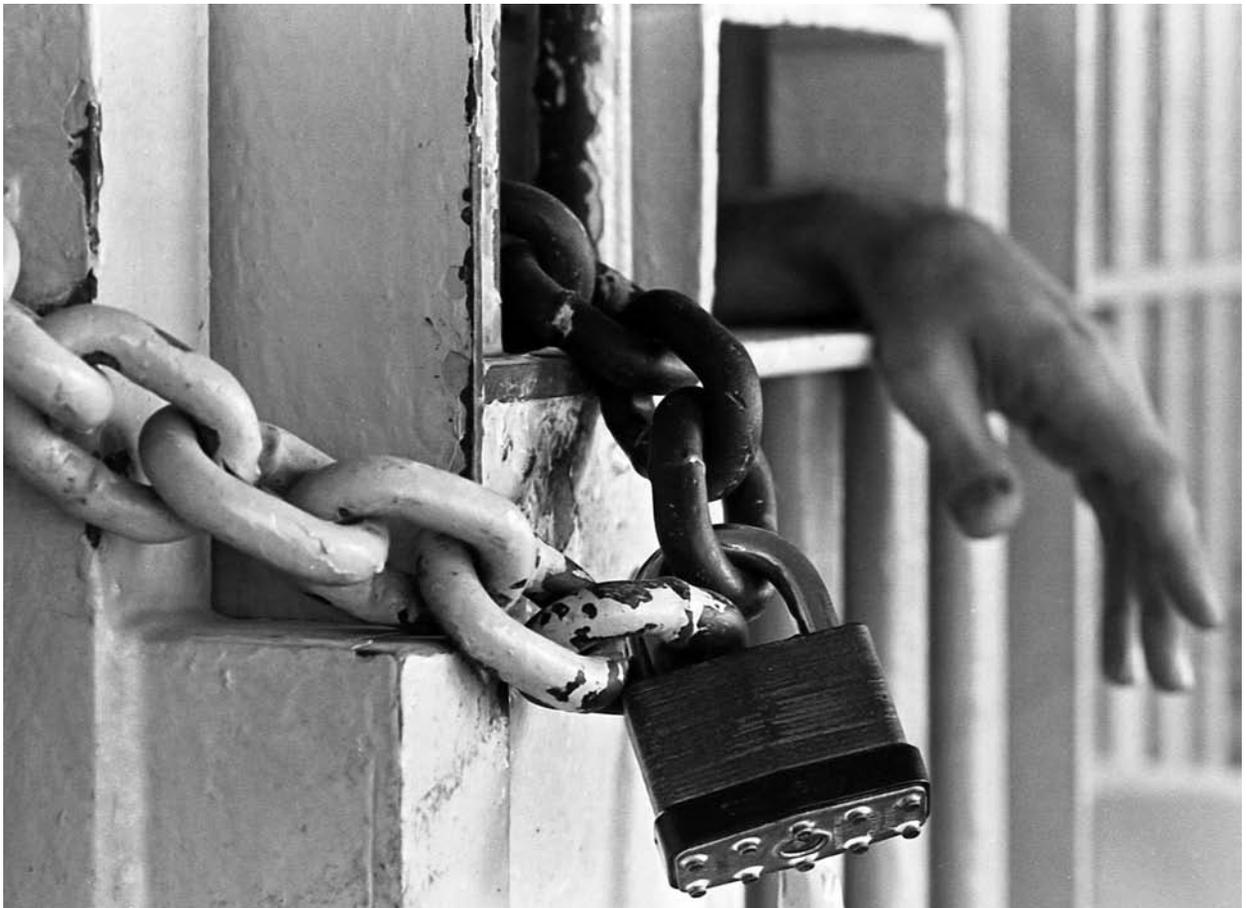
Many local court practices tend to deny people with low incomes and people of color the opportunity to serve on a jury.

Only rarely do lawyers seek an order to provide accommodations to low-income prospective jurors, such as providing child care or other assistance. As a result, many poor and low-income people and parents without child care options never serve on a jury and an important perspective is excluded from civil and criminal proceedings.

THE PERCEIVED AND ACTUAL INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

Excluding racial minorities from juries causes serious collateral consequences: the credibility, reliability, and integrity of the criminal justice system is compromised when there is even an appearance of bias and discrimination. Communities of color across the country have rejected and continue to reject criminal verdicts handed down by all- or predominantly-white juries. During the 1980s, race riots twice erupted in Miami after all-white juries acquitted police officers charged with shooting African-American men. In 1980, an all-white jury acquitted four white Dade County policemen in the beating death of Arthur McDuffie, a black insurance salesman.²¹⁴ The trial had been moved to Tampa in order to give the defendants “a fair trial.”²¹⁵ The all-white jury’s acquittal of the officers outraged people of color in Miami and triggered violent unrest. Riots lasted for three days and left 18 people dead and \$200 million in property damage.²¹⁶ A biracial committee appointed by the Governor of Florida later concluded the riots resulted from “racism and the blacks’ perception of racism.”²¹⁷

Riots in Miami lasted for three days and left 18 people dead and about \$200 million in property damage.



In 1984, another all-white jury acquitted police officer Luis Alvarez in the shooting death of Nevell Johnson, Jr., in Miami.²¹⁸ Protests began after the police shooting, and though there was less violence, unrest after the verdict led to hundreds of arrests.²¹⁹ One community leader reported, “[t]he community has gotten to the point where it expects an all-white jury when we have this kind of killing.”²²⁰

Perhaps the best known example of racial conflict and violence after a verdict by a non-diverse jury is the 1992 Los Angeles Riots. The trial of one of the white police officers accused of beating Rodney King, a black man, was moved from Los Angeles to majority-white, rural Simi Valley.²²¹ No African Americans served on the jury, comprised of ten whites, one Asian American, and one Latino.²²² The jury’s verdict finding police not guilty of excessive force in a beating that lasted 81 seconds and included 56 blows²²³ led to three days of violent protests, 60 deaths, more than 16,000 arrests, and almost \$1 billion in property damage.²²⁴

The Rodney King verdict led to three days of protests, 60 deaths, 16,000 arrests, and almost \$1 billion in property damage.

More recently, an all-white jury acquitted a white former Hartford, Connecticut, police detective who shot and killed Jashon Bryant, 18, and injured Brandon Henry, 21, African American youths from Hartford’s predominantly black North End.²²⁵ A police investigation revealed that Bryant and Henry were unarmed at the time of the shooting.²²⁶ The acquittal brought shock and outrage from the victims’ families and demonstrations by community members questioning the legitimacy of the verdict and the judicial process.²²⁷ The *Hartford Courant* reported that “[t]he case stirred lingering frustration and mistrust of police and the criminal justice system among residents of the city’s North End, including questions about why no minorities were selected for the jury.”²²⁸

A Hartford police shooting case “stirred lingering frustration and mistrust of police and the criminal justice system among residents of the city’s North End, including questions about why no minorities were selected for the jury.”

While acquittals might have been produced by juries that fairly represented African Americans and other racial minorities, the absence of diversity makes a questionable jury verdict unacceptable. In Long Island, New York;²²⁹ Jena, Louisiana;²³⁰ Powhatan, Virginia;²³¹ Panama City, Florida;²³² and Milwaukee, Wisconsin,²³³ recent verdicts by all-white juries or by juries perceived as unrepresentative have triggered widespread unrest and outrage in poor and minority communities where serious concerns about the fairness and reliability of the justice system have emerged.

Social science research helps to explain these and other examples from around the country of community rejection of criminal verdicts handed down by unrepresentative juries. As a general matter, people are willing to accept the legitimacy of an authority and defer to the

decisions made by that authority when they perceive the decision-making procedures as fair.²³⁴ Conversely, decisions seen as the result of an unfair – biased, dishonest, or inconsistent – process are more likely to be rejected.²³⁵ This is true of people’s perceptions of jury verdicts in criminal cases.

Research has shown that observers are more likely to conclude that a trial is unfair when an all-white jury finds a defendant guilty.²³⁶ Token representation by minorities is similarly inadequate to address the problem. African Americans serving on white-dominated juries – especially when they are in a “minority of one” – are more likely to remain quiet and give in to the pressures of the majority.²³⁷ The few African Americans who actually manage to serve on capital juries may be “especially discontented with their own experiences” and critical of the jury’s deliberative process.²³⁸



Thousands of people traveled to Jena, Louisiana, in September 2007 to protest the appearance of racial bias in the outcomes of criminal trials involving six black teens who became known as the “Jena Six.” (AP Photo/Frank Franklin II)

Beyond perceptions about the criminal trial process and the negative experience of lone minority jurors, the racial composition of juries also influences the reliability of outcomes. In death penalty cases, the absence of diversity appears to shape sentencing outcomes, making them less reliable and credible.²³⁹ The effect is greater for non-white defendants, especially when the defendant is black and the victim is white.²⁴⁰

Research suggests that, compared to diverse juries, all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives.²⁴¹ Moreover, even though bifurcated capital trials require separate deliberations regarding guilt/innocence and sentencing, it is not uncommon for all-white juries to decide on punishment during guilt/innocence deliberations, before they have heard any mitigation evidence.²⁴²

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The nature and quality of jury deliberations is better when jury diversity is greater:²⁴³

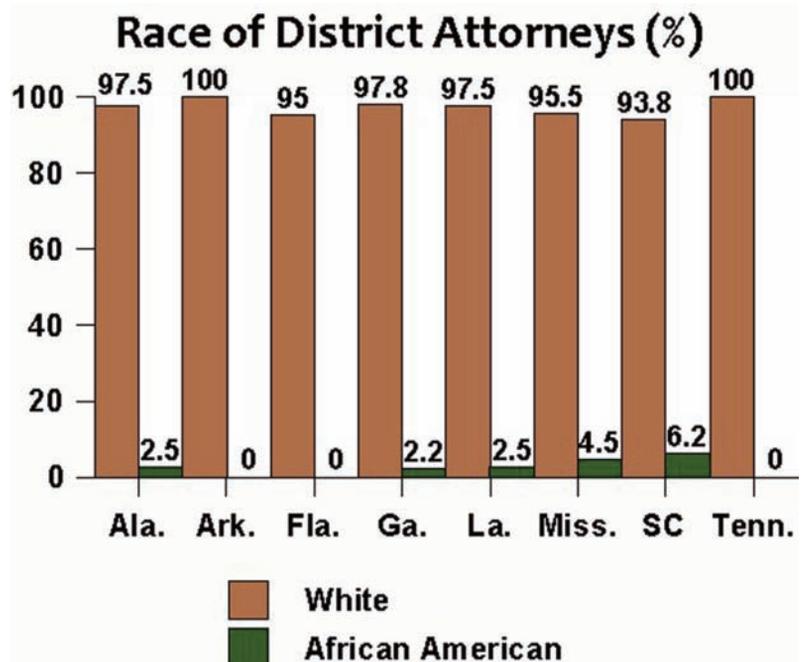
By every deliberation measure . . . heterogeneous groups outperformed homogeneous groups. First, diverse groups spent more time deliberating than did all-White groups. . . . us[ing] their extra time productively, discussing a wider range of case facts and personal perspectives. . . . Even though they deliberated longer and discussed more information, diverse groups made fewer factual errors than all-White groups. Moreover inaccuracies were more likely to be corrected in diverse groups. . . . [D]iverse groups were also more open-minded in that they were less resistant to discussions of controversial race-related topics.²⁴⁴

Racial diversity significantly improves a jury's ability to assess the reliability and credibility of witness testimony, evaluate the accuracy of cross-racial identifications, avoid presumptions of guilt, and fairly judge a criminally accused.²⁴⁵ Accordingly, the reliability and accuracy of the criminal justice system is greatly enhanced when juries represent a fair cross-section of the community as the Constitution requires.²⁴⁶

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THE ABSENCE OF RACIAL DIVERSITY IN OTHER DECISION-MAKING ROLES

Racial diversity on juries is especially critical because the other decision-making roles in the criminal justice system are held mostly by people who are white, from police officers who decide whom to stop and arrest, to prosecutors who decide what charges are brought against which defendants, to trial and appellate judges whose decisions impact powerfully on outcomes at each stage of the criminal justice process. As a National District Attorney's Association publication put it:



“In criminal courtrooms across the nation the outlook can be daunting for people of color.

The accused is typically a person of color, who is often arrested, prosecuted and sentenced by a courtroom of white men and women.”²⁴⁷

While black employment in law enforcement has increased during the last three decades in major metropolitan departments, racial diversity remains virtually nonexistent in some smaller Southern jurisdictions. In Houston County, Alabama, where the population is 27% African-American, the local police department is nearly 94% white.²⁴⁸



A gathering of innocent people formerly sentenced to death, 1998.

“I looked around the courtroom. The judge was white. The prosecutor was white. My lawyer was white. The jury was white. Even though I was innocent, I knew I had no chance.”

- Exonerated Death Row Prisoner

State and federal prosecutors also are mostly white. Approximately 98% of district attorneys in states that apply the death penalty are white.²⁴⁹ As the chart opposite shows, African Americans are vastly underrepresented among district attorneys in each of the eight Southern states analyzed in this report.²⁵⁰ The latest data show no black district attorneys in Arkansas, Florida, or Tennessee.²⁵¹

Nationwide, of over 12,000 state and federal judges, 90% are white, even though the population is more than 25% minorities. None of Alabama’s 19 appellate judges is black.

Data on the racial diversity of the American judiciary reveal that it continues to be overrepresented by whites in both the federal and state courts. Nationwide, of a total of over 12,000 state and federal judges, approximately 90% are white, even though racial minorities make up more than 25% of the population nationwide.²⁵²

People of color are most underrepresented in the state courts. African Americans constitute 12% of the United States population but fewer than 6% of the bench at all state court levels.²⁵³ Underrepresentation among appellate judges in the states EJI studied is significant. African Americans comprise 26% of Alabama’s population but none of the state’s 19 appellate judges is black.²⁵⁴ According to the American Bar Association’s National Database on Judicial Diversity in State Courts, Alabama has the smallest percentage of black judges statewide of the studied states, followed by Tennessee.²⁵⁵

Just 4.2% of lawyers and judges in the United States are African-American,²⁵⁶ which means that, in addition to being arrested, prosecuted, and judged by whites, defendants typically are represented by white lawyers.

Too often, the only opportunity for racial minorities to influence decision-making in America's criminal justice system is to serve on a jury. Exclusion of qualified citizens of color from jury service amounts, then, to the near-complete absence of minority perspective, influence, and power in the criminal justice system.

THE ROLE OF DEFENSE COUNSEL

While the criminal defense bar also is not as racially diverse as the communities in which many public defenders and appointed counsel work, the defense attorney has an uniquely important responsibility to protect the rights of the criminally accused and people of color whose trials may be subject to illegal racial discrimination in jury selection. Whether the accused is white, black, or a member of some other racial or ethnic group, counsel must be attentive to challenging racially biased jury selection.²⁵⁷ The United States Supreme Court has empowered defense counsel to represent the interests of excluded jurors as well as the accused when facing discriminatory conduct by prosecutors and non-responsive trial judges.²⁵⁸ However, in too many cases the defense lawyer does not object to racially biased jury selection, or fails to challenge adequately the discriminatory use of peremptory strikes or underrepresentation of cognizable groups in the jury pool.

Illegally excluding racial groups from jury service not only violates the rights of excluded jurors but also diminishes the opportunity for a criminally accused person to receive a fair trial. The criminal defense bar can and should do much more to eliminate racially biased jury selection practices by prosecutors and court officials. In some jurisdictions, the low number of court decisions reversing discriminatory conduct reflects a lack of diligence by the criminal defense bar and reluctance by some lawyers to challenge conduct that involves the sensitive issues of race and discrimination.

The criminal defense bar can and should do much more to eliminate racially biased jury selection practices by prosecutors and court officials.

The entire community – including prosecutors, judges, court administrators, civil rights and community groups, and elected officials – has a role to play in addressing this issue, but racial bias in the courtroom cannot be confronted effectively without vigilance and advocacy by defense lawyers. Criminal defense attorneys who need support and assistance in confronting racially discriminatory jury selection should contact the Equal Justice Initiative.

RECOMMENDATIONS

There is much work to be done to eliminate illegal racial discrimination in jury selection. The following recommendations outline some concrete steps that can be taken by court officials, administrators, legislators, judges, prosecutors, defense attorneys, civil and human rights groups, community groups, and ordinary citizens to end racially biased jury discrimination. This is not a complete or comprehensive list; many other tasks and initiatives must be considered and undertaken to fully address this problem. For additional information about implementing the recommendations below and for other ideas about ending jury discrimination, please contact the Equal Justice Initiative. It is critical to increase coordinated efforts to eliminate illegal exclusion and discrimination in jury selection.

- 1. Dedicated and thorough enforcement of anti-discrimination laws designed to prevent racially biased jury selection must be undertaken by courts, judges, and lawyers involved in criminal and civil trials, especially in serious criminal cases and capital cases.**

The principle of anti-discrimination in jury selection has been well-established for some time, but realizing that principle on the ground has been too slow in coming. And while macro-level decision-makers, such as legislatures and appellate courts, must continue to establish and enforce anti-discrimination norms, the responsibility to end discrimination in our courtrooms necessarily rests in large part with the professionals who spend their daily lives in those courtrooms. The documented and continued exclusion of people of color from juries in many places in this country – more than 20 years after *Batson v. Kentucky* – is evidence of the indifference with which too many actors in the criminal justice system regard the exclusion playing out in courts across America today. Discrimination in jury selection will end when every decision-maker with a role in the process values diversity, commits to enforcing the right of all community members to participate equally in civic life, and prioritizes the enforcement of anti-discrimination rules.

- 2. The rule banning racially discriminatory use of peremptory strikes announced in *Batson v. Kentucky* should be applied retroactively to death row prisoners and others with lengthy sentences whose convictions or death sentences are the product of illegal, racially biased jury selection but whose claims have not been reviewed because they were tried before 1986.**

Two months after its historic 1986 decision in *Batson v. Kentucky*, the United States Supreme Court decided a lesser-known case, *Allen v. Hardy*, ruling summarily (without the ordinary process of briefing and argument) that *Batson* would not apply retroactively. As a result, *Batson* does not apply to defendants whose trials were final before 1986. Many of these defendants still sit in prisons and on death rows across the country, even though indisputable evidence of racially biased jury selection exists. The Court in *Allen* stated that prosecutors in pre-1986 trials had relied justifiably on pre-*Batson* law when conducting jury selection. But using peremptory strikes to discriminate based on race has been illegal since *Swain v. Alabama* was decided in 1965. The Court should not sanction illegal discrimination simply because a

prosecutor selecting a jury during the period of time between *Swain* and *Batson* reasonably may have expected to *get away with* illegal discrimination.

The *Allen* Court also worried that allowing pre-1986 claims to be brought would unduly burden the justice system. Even if this concern – aptly described in a similar case as “a fear of too much justice” – was reasonable at the time, there remains only a small cohort of egregious cases in which prisoners are incarcerated (and in some cases facing execution) based on decades-old, illegal convictions. Correcting these injustices would not unduly burden the system. Moreover, *Allen* was decided under federal law and provides no obstacle to state legislatures’ or state courts’ actions under state law. States should remedy the lingering injustice of racially discriminatory convictions by retroactively applying *Batson* under state law and providing procedures to hear claims of illegal conviction.

- 3. To protect the credibility and integrity of criminal trials, claims of illegal racial discrimination in the selection of juries should be reviewed by courts on the merits and exempted from procedural bars or technical defaults that shield and insulate from remedy racially biased conduct.**

Across the country, hundreds of well-documented claims of racial discrimination in jury selection are unremedied because of procedural defaults (or “procedural bars”). Procedural defaults are rules that prevent a party from raising a claim in a legal case if a court determines that the party had a prior opportunity to raise the claim but failed to do so. These rules apply to claims of racially discriminatory jury selection as they would any other claim. But jury-selection claims are fundamentally different. Procedural bars are used to weigh the State’s interest in finality against the defendant’s individual rights. Yet the Supreme Court has recognized that the injury caused by racially discriminatory jury selection extends beyond the individual criminal defendant because it harms the excluded minority jurors and their communities. Accordingly, the rationale of procedural bar does not apply to racial bias claims as it does to ordinary claims, such as those involving erroneous jury instructions, denials of due process, or illegal searches. When documented acts of illegal discrimination against minority citizens go unremedied, the integrity and credibility of the criminal justice system itself suffers, and excluded jurors and communities lose faith in the system. Because these long-term, systemic issues are at play, procedural default rules should be modified to allow courts to review illegal discrimination claims on the merits at any time. Such changes should be implemented by courts and/or legislatures as required by the law of each jurisdiction.

- 4. Prosecutors who are found to have engaged in racially biased jury selection should be held accountable and should be disqualified from participation in the retrial of any person wrongly convicted as a result of discriminatory jury selection. Prosecutors who repeatedly exclude people of color from jury service should be subject to fines, penalties, suspension, and other consequences to deter this practice.**

One of the most vexing aspects of the continuing problem of racial discrimination in jury selection is *impunity*. In most cases where a court finds that a prosecutor intentionally has engaged in racial discrimination while selecting a jury, the prosecutor suffers no adverse

consequences. Indeed, the same attorney often represents the State at a retrial. Once an attorney is found to have intentionally discriminated in the jury selection process, barring his or her participation in any subsequent proceedings should be the *minimum* consequence, yet no jurisdiction is known to have even this basic rule. Beyond this bare minimum, prosecutors who repeatedly misuse their public authority to stigmatize and humiliate citizens because of their race by excluding them from jury service should be subject to more serious consequences, including fines, penalties, suspension from practice, public shaming, and in extreme cases, criminal prosecution.

Courts, bar associations, and legislatures should play a role in enforcing anti-discrimination norms and deterring misconduct. But discipline should be focused on the district attorney's office itself. No district attorney committed to upholding the law should tolerate violations of the law by his or her prosecutors. In no other circumstances could a state agent be caught intentionally discriminating on the basis of race and keep his or her job without adverse consequences, and the district attorney's office should be no exception. Under current practices, young prosecutors too often absorb the lessons that racial discrimination is a regular part of the business of obtaining convictions and that findings of discrimination are an incidental cost of doing business. Applying proper discipline to prosecutors who violate the law would send the opposite message: racial discrimination in jury selection constitutes shameful professional misconduct that could cost a prosecutor his or her reputation and career.

5. The Justice Department and federal prosecutors should enforce 18 U.S.C. § 243, which prohibits racial discrimination in jury selection, by pursuing actions against district attorney's offices with a history of racially biased selection practices.

The provisions codified at 18 U.S.C. § 243 have existed in substantially the same form since they were enacted in 1875, but there have been few documented prosecutions under the statute.²⁵⁹ The statute forbids the racially discriminatory exclusion of any person from a grand jury or a trial jury in any state or federal court by any “officer or other person charged with any duty in the selection or summoning of jurors.”²⁶⁰ The United States Department of Justice and United States Attorneys should prioritize enforcement of this statute against district attorney's offices that engage in systematic denial of citizens' civil rights. Congress should increase the current penalty of \$5000 per violation – which has not been adjusted since 1875²⁶¹ – but even this modest amount may allow for fines sufficient to deter future misconduct when multiplied by each juror excluded on the basis of race. More importantly, such prosecutions possess immense symbolic value and would send a message to excluded communities that no one is above the law and that recourse is available when the law is broken by those responsible for enforcing it.

- 6. States should provide remedies to people called for jury service who are illegally excluded on the basis of race, particularly jurors who are wrongly denigrated by state officials. States should implement strategies to disincentivize discriminatory conduct by state prosecutors and judges, who should enforce rather than violate anti-discrimination laws.**

The personal profiles in this report demonstrate that citizens excluded from participation in civic life on account of their race suffer humiliation and denigration, which often causes lasting psychological harm. Excluded jurors, who suffer measurable and real victimization at the hands of government prosecutors, should have access to civil remedies. The availability of such remedies would engender respect for the system as a whole by providing relief when the system is misused. At a minimum, potential jurors subject to discrimination are owed a public apology from the discriminating prosecutor.

- 7. Community groups, civil and human rights organizations, and concerned citizens should attend court proceedings and monitor the conduct of local officials with regard to jury selection practices in an effort to eliminate racially biased jury selection.**

Top-level commitment to diversity from legislatures, appellate courts, and high executive officials is needed, but discrimination in individual courtrooms also is a local problem for which local solutions can be highly effective. One factor enabling the continued cycle of exclusion in jury service, particularly in criminal trials, is the insularity of the setting: criminal courtrooms often are populated by the same small group of participants day after day, and these participants may become immune to “business as usual,” even when it involves illegal discrimination. Committed organizations and groups of citizens can shine a light on what transpires in local courtrooms by exercising their constitutional right to attend public criminal trial proceedings. Local groups should attend court proceedings and document the exclusion of minorities from jury service. Because court proceedings can be opaque, uninitiated monitors should undergo basic training in local court procedures in order to provide accurate and complete reports. Especially in jurisdictions with a history of systematic exclusion, documenting and bearing witness to the conduct of local officials is a powerful and necessary step in holding those officials accountable and ultimately changing their behavior.

- 8. Community groups, civil and human rights organizations, and concerned citizens should question their local district attorneys about policies and practices relating to jury selection in criminal trials, secure officials’ commitment to enforcing anti-discrimination laws, and request regular reporting by prosecutors on the use of peremptory strikes.**

District attorneys committed to upholding the law should not tolerate discrimination in jury selection by any of their prosecutors. Local organizations and citizens should ask their district attorneys about what steps are taken to ensure non-discrimination and to guarantee citizens full and equal access to jury service. Citizens have a right to expect from all public officials a commitment to enforce anti-discrimination laws and to transparency, and should demand from their officials regular data documenting prosecutorial use of peremptory strikes.

- 9. States should strengthen policies and procedures to ensure that racial minorities, women, and other cognizable groups are fully represented in the jury pools from which jurors are selected. States and local administrators should supplement source lists for jury pools or utilize computer models that weight groups appropriately. Full representation of all cognizable groups throughout the United States easily can be achieved in the next five years.**

The Constitution mandates that a jury pool be fairly representative of the broader community. Racial minorities, women, and other cognizable groups nonetheless continue to be underrepresented at the initial stage of the jury selection process. This is especially problematic because minority groups, particularly people of color, are more vulnerable to removal at a later stage of the process through the use of peremptory strikes. Effective administrative procedures to ensure that all citizens are fairly represented in jury pools are now well-known and are not burdensome to implement. States should commit to ending underrepresentation in every county within five years.

By drawing juries from a diverse pool, states and local communities will increase the probability that trial juries will represent a fair cross-section of the community. State and local communities therefore should commit to achieving diversity at the initial stage of the jury selection process. Representative jury pools are achievable in the short term in every state with the use of simple, non-burdensome reforms. For example, rather than relying solely on voter registration rolls as the source for the jury pool, juries in Minnesota are randomly drawn from a source list generated by compiling voter registration, driver's license, and state identification lists, which more accurately reflects a fair cross-section of the community.²⁶² In Dallas County, Texas, officials implemented new computer programs to address the "skewed" jury pool after recognizing in 2005 that Latino prospective jurors comprised only 11% of those reporting for jury duty in felony court but made up 26% of adults in the county.²⁶³ The new reforms include updating addresses annually, removing repeat addresses, using computer-based jury forms and questionnaires, and raising juror's daily pay from \$6 to \$40.²⁶⁴

- 10. Reviewing courts should abandon absolute disparity as a measure of underrepresentation of minority groups and utilize more accurate measures, such as comparative disparity, to prevent the insulation from remedy of unfair underrepresentation.**

Courts evaluating underrepresentation challenges have applied the "absolute disparity" measure, which compares the percentage of a minority group in the community to the percentage of that group in the jury venire, and have required an absolute difference of 10% to conclude the minority group is underrepresented in the jury pool. This approach leaves minorities in most communities with no remedy for discrimination because no absolute disparity of 10% is possible when the group comprises less than 10% of the county's population. Courts should abandon this method and adopt measures that more accurately assess underrepresentation in the jury pool, such as comparative disparity (obtained by dividing the absolute disparity by the minority group's percentage of the population).

- 11. State and local justice systems should provide support and assistance to ensure that low-income residents, sole caregivers for children or other dependents, and others who are frequently excluded from jury service because of their economic, employment, or family status have an opportunity to serve.**

In *Thiel v. Southern Pacific Co.*,²⁶⁵ the United States Supreme Court struck down the systematic exclusion of low-income wage earners from jury service, holding that sanctioning such intentional exclusion would “encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status [and] breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged.”²⁶⁶ Today, many potential jurors who earn low incomes continue to be excluded from jury service because of their child care responsibilities, lack of transportation, and inability to obtain reimbursement from work. Exclusion of individuals in this category has a heightened adverse impact on communities of color, whose members disproportionately are low-income wage earners.

State and local justice systems should provide the assistance necessary to allow all citizens, including those earning a low wage, the opportunity to serve. By paying jurors an adequate daily wage, courts will increase the likelihood that low-income wage earners can serve on juries. This reform currently is in place in several states²⁶⁷ and recently was implemented in Dallas County, Texas.²⁶⁸ The federal judicial system pays jurors \$40 per day (which increases to \$50 per day after more than 30 days of service).²⁶⁹ Some states, like Connecticut, offer to reimburse eligible jurors for out-of-pocket expenses associated with jury service, such as child care, parking, and transportation costs.²⁷⁰ Eliminating economic barriers to jury service is absolutely critical to ensure that juries are representative and fair.

- 12. Court administrators, state and national bar organizations, and other state policymakers should require reports on the representativeness of juries in serious felony and capital cases to ensure compliance with state and federal laws barring racial discrimination in jury selection.**

The legal community must monitor court processes to ensure that juries, particularly those in felony and capital cases, are representative of the community, as required by state and federal anti-discrimination laws. National and state bar associations, community leaders, non-profit organizations, and other interested parties should request that court officers in their jurisdictions monitor and report demographic information to facilitate tracking of underrepresentation of minority groups on juries. Data on the number of juries selected in felony and capital cases and the racial, ethnic, and gender composition of each jury will permit policymakers to measure and document diversity ratings for individual cases and for each county.

- 13. The criminal defense bar should receive greater support, training, and assistance in ensuring that state officials do not exclude people of color from serving on juries on the basis of race, given the unique and critically important role defense attorneys play in protecting against racially biased jury selection.**

Anti-discrimination law that protects against racially biased jury selection likely will not be enforced without criminal defense attorneys aggressively challenging discriminatory jury selection. Many attorneys have not received adequate training and preparation to confront biased jury selection and need additional support and education. State defender organizations should make challenging racially biased jury selection a priority. State and federal governments should encourage criminal defense attorneys and reinforce the critical role they play in protecting the integrity of the criminal justice system by providing the defense bar with funding for training and assistance on this issue. State bar organizations also should lend support to indigent defense providers and defender organizations who report continuing problems with racially discriminatory jury selection in particular communities. Since defense lawyers frequently are the only witnesses to discriminatory jury selection, defender organizations should consider reporting and documenting bias in jurisdictions where the problem persists.

- 14. Greater racial diversity must be achieved within the judiciary, district attorney's offices, the defense bar, and law enforcement to promote and strengthen the commitment to ensuring that all citizens have equal opportunities for jury service.**

In many counties across the country, no people of color serve as prosecutors and few sit as trial judges, which leaves the jury as the singular decision-making role in which people of color can participate and shape the judicial process. It is essential that the judiciary, prosecutor's offices, the criminal defense bar, and law enforcement become more diverse. Greater minority participation in these roles will reduce pressure on minority jurors, who should not be burdened with the impossible task of equalizing a system so unbalanced by the absence of people of color in decision-making roles.

NOTES

1. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (quoting William Blackstone’s Commentaries describing right to trial by jury as “bulwark of [citizens’] liberties”).
2. See *Duncan v. Louisiana*, 391 U.S. 145, 151-53 (1968).
3. See Neil Vidmar & Valerie P. Hans, *American Juries* 71-72 (2007); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 884, 894 (1994).
4. See generally, e.g., James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 910, 914-20 (2004); Michael J. Klarman, *From Jim Crow to Civil Rights* 39-40 (2004); Mary Ellen Curtin, *Black Prisoners and Their World, Alabama, 1865-1900* 59-60 (2000).
5. See, e.g., Klarman, *supra* note 4, at 10, 39; Eric Foner, *Reconstruction* 362-63 (1988).
6. See Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336 (codified as amended at 18 U.S.C. § 243).
7. 100 U.S. 303, 306-10 (1880).
8. See, e.g., Randall Kennedy, *Race, Crime, and the Law* 39-47 (1997); Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 Tex. L. Rev. 1401, 1407-12 (1983).
9. See Kennedy, *supra* note 8, at 172.
10. See, e.g., Schmidt, *supra* note 8, at 1419-20.
11. See, e.g., Klarman, *supra* note 4, at 41-42; Vidmar & Hans, *supra* note 3, at 71-72.
12. See Vidmar & Hans, *supra* note 3, at 72.
13. See Kennedy, *supra* note 8, at 182; Klarman, *supra* note 4, at 41-42, 55.
14. See Kennedy, *supra* note 8, at 182-84.
15. See, e.g., Kennedy, *supra* note 8, at 175-76; Klarman, *supra* note 4, at 55-56; Schmidt, *supra* note 8, at 1419, 1482-83.
16. See Kennedy, *supra* note 8, at 175; Klarman, *supra* note 4, at 42.
17. See Klarman, *supra* note 4, at 119-20.
18. See Mark Curriden & Leroy Phillips, Jr., *Contempt of Court: The Turn-of-the-Century Lynching That Launched a Hundred Years of Federalism* xiv, 12-15 (Anchor Books 2001) (1999).
19. *Id.* at 195-96, 213-14.
20. *Id.* at 214. The note read in full: “To Justice Harlan. Come get your nigger now.” Johnson’s case was also notable because he was represented after trial by two African American lawyers who were willing to challenge the racial makeup of the jury.
21. 294 U.S. 587 (1935).
22. See generally Dan T. Carter, *Scottsboro: A Tragedy of the American South* (rev. ed. 1979); *Scottsboro: An American Tragedy* (Social Media Productions 2000).
23. *Norris*, 294 U.S. at 596.
24. *Id.* at 598.
25. *Id.* at 599.
26. *Id.* at 599; see also *Patton v. Mississippi*, 332 U.S. 463 (1947); *Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Hollins v. Oklahoma*, 295 U.S. 394 (1935).
27. See Kennedy, *supra* note 8, at 177-80; Klarman, *supra* note 4, at 154-55.
28. *Akins v. Texas*, 325 U.S. 398 (1945).
29. See *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975).
30. See *Amadeo v. Zant*, 486 U.S. 214 (1988).
31. See Kennedy, *supra* note 8, at 274-75.
32. 380 U.S. 202 (1965).
33. *Id.* at 205.
34. *Id.* at 210.
35. *Id.* at 224-26.
36. See Jeffrey Abramson, *We, The Jury* 134 (1994).
37. 476 U.S. 79 (1986).
38. *Id.* at 100 & n.25.
39. *Id.* at 100.

40. See *Allen v. Hardy*, 478 U.S. 255, 257-58 (1986).
41. See *Horsley v. State*, 527 So. 2d 1355, 1356 (1988).
42. See *id.* at 1356-57 (holding that *Batson v. Kentucky* did not apply to Horsley's case because Horsley's appeal was final two months before *Batson* was decided).
43. Stephen B. Bright, *The Electric Chair and the Chain Gang: Choices and Challenges for America's Future*, 71 Notre Dame L. Rev. 845, 854-55 (1996) (describing Horsley's execution).
44. See *Andrews v. Shulsen*, 485 U.S. 919 (1988) (Marshall, J., dissenting from denial of certiorari). Because the court refused to hold a hearing, it was never determined if the drawing was by one of the jurors, or delivered to them in an attempt to influence their verdict. Bright, *supra* note 43, at 855.
45. See Abramson, *supra* note 36, at 235-37; Kennedy, *supra* note 8, at 125-27.
46. See Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 Ga. St. U.L. Rev. 817, 827-28 (1998).
47. See Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 Wash. & Lee L. Rev. 509, 518 n.36 (1994).
48. *State v. McKinnis*, CC-06-1431 (Houston County Cir. Ct.); *State v. Sale*, No. CC-06-112 (Houston County Cir. Ct.); *State v. Gobble*, No. CC-05-299 (Houston County Cir. Ct.); *State v. McCray*, No. CC-05-1532 (Houston County Cir. Ct.); *State v. Floyd*, No. CC-04-167 (Houston County Cir. Ct.); *State v. Wilson*, CC-04-112 (Houston County Cir. Ct.).
49. Richard Bourke, Joe Hingston, & Joel Devine, Louisiana Crisis Assistance Center, *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges By the Jefferson Parish District Attorney's Office 2* (2003), available at <http://www.blackstrikes.com>.
50. *Id.*
51. Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 455-56 (1995).
52. *Id.*
53. See *McGahee v. Allen*, 560 F.3d 1252, 1257 & nn.4, 5 (11th Cir. 2009); *Lee v. State*, 898 So. 2d 790, 812-13 (Ala. Crim. App. 2001); *Drake v. State*, 668 So. 2d 877, 878 (Ala. Crim. App. 1995); *Stokes v. State*, 648 So. 2d 1179, 1181 (Ala. Crim. App. 1994); *Ex parte Thomas*, 601 So. 2d 56, 57 (Ala. 1992); *Thomas v. State*, 611 So. 2d 416, 417 (Ala. Crim. App. 1992); *Duncan v. State*, 612 So. 2d 1304, 1307 (Ala. Crim. App. 1992); *Johnson v. State*, 601 So. 2d 1147, 1148 (Ala. Crim. App. 1992); *Clark v. State*, 621 So. 2d 309, 311 (Ala. Crim. App. 1992); *Huff v. State*, 596 So. 2d 16, 23 (Ala. Crim. App. 1991); *Marks v. State*, 581 So. 2d 1182, 1186-87 (Ala. Crim. App. 1990); *Pollard v. State*, 549 So. 2d 593, 595 (Ala. Crim. App. 1989).
54. *McGahee*, 560 F.3d at 1257 & n.5; *State v. Lee*, No. CC-99-21 (Dallas County Cir. Ct.); *State v. Reeves*, CC-97-31 (Dallas County Cir. Ct.).
55. 476 U.S. 79, 96-98 (1986).
56. *Id.* at 96.
57. *Id.* at 97.
58. *Id.* at 97.
59. *Purkett v. Elem*, 514 U.S. 765, 768 (1995).
60. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).
61. *Batson*, 476 U.S. at 106 (Marshall, J, concurring).
62. *Miller-El*, 545 U.S. at 268-69 (Breyer, J, concurring); see also, e.g., Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 Mich. L. Rev. 2001, 2015, 2021 (1998) (noting that courts have declined to find racial discrimination under *Batson* by accepting "a sweeping scope of permissible neutral explanations for prosecutorial strikes" even though such explanations "often [were] correlated to some degree with race").
63. Nancy S. Mander, *The Jurisprudence of Justice Stevens: Justice Stevens, the Peremptory Challenge, and the Jury*, 74 Fordham L. Rev. 1683, 1726 (2006).
64. *Miller-El*, 545 U.S. at 264.
65. *Jackson v. Thigpen*, 752 F. Supp. 1551, 1554-55 (N.D. Ala. 1990).
66. *State v. Harris*, 2001-0408 (La. 6/21/02); 820 So. 2d 471, 477.
67. *McCray v. State*, 738 So. 2d 911, 912-13 (Ala. Crim. App. 1998).
68. *Id.*
69. *McCastle v. State*, 622 S.E.2d 896, 897-98 (Ga. Ct. App. 2005).

70. *McGahee v. Allen*, 560 F.3d 1252, 1265 (11th Cir. 2009); *Jackson v. State*, 5 So. 3d 1144, 1147 (Miss. Ct. App. 2008); *State v. Hill*, No. M2005-02347-CCA-R3-CD, 2007 WL 1774275, at *6 (Tenn. Crim. App. June 20, 2007); *Taylor v. State*, 620 S.E.2d 363, 366-67 (Ga. 2005); *State v. Crawford*, 03-1494 (La. App. 5 Cir. 4/27/04); 873 So. 2d 768, 784; *Ford v. Norris*, 67 F.3d 162, 168 (8th Cir. 1995); *Givens v. State*, 619 So. 2d 500, 501-02 (Fla. Dist. Ct. App. 1993); *Conerly v. State*, 544 So. 2d 1370, 1371-72 (Miss. 1989); *State v. Tomlin*, 384 S.E.2d 707, 708 (S.C. 1989).
71. *McGahee v. Allen*, 560 F.3d 1252, 1265 (11th Cir. 2009).
72. *Ford v. Norris*, 67 F.3d 162, 168 (8th Cir. 1995).
73. *State v. Crawford*, 03-1494 (La. App. 5 Cir. 4/27/04); 873 So. 2d 768, 784.
74. *Bogan v. State*, 811 So. 2d 286, 288 (Miss. Ct. App. 2001); *Robinson v. State*, 773 So. 2d 943, 948 (Miss. Ct. App. 2000); *Jessie v. State*, 659 So. 2d 167, 168 (Ala. Crim. App. 1994); *Cox v. State*, 629 So. 2d 664, 666 (Ala. Crim. App. 1992); *Bui v. State*, 627 So. 2d 849, 851 (Ala. Crim. App. 1992); *Sims v. State*, 587 So. 2d 1271, 1276-77 (Ala. Crim. App. 1991); *Ex parte State (Harrell v. State)*, 555 So. 2d 263, 265 (Ala. 1989); *Williams v. State*, 548 So. 2d 501, 505 (Ala. Crim. App. 1988).
75. *Robinson v. State*, 858 So. 2d 887, 895 (Miss. Ct. App. 2003); *Berry v. State*, 728 So. 2d 568, 572 (Miss. 1999); *Files v. State*, 613 So. 2d 1301, 1304 (Fla. 1992); *State v. Tomlin*, 384 S.E.2d 707, 708-09 (S.C. 1989).
76. *Bogan v. State*, 811 So. 2d 286, 288 (Miss. Ct. App. 2001); *Robinson v. State*, 773 So. 2d 943, 947-48 (Miss. Ct. App. 2000).
77. *Scott v. State*, 599 So. 2d 1222, 1227 (Ala. Crim. App. 1992).
78. *Turnbull v. State*, 959 So. 2d 275, 276-78 (Fla. Dist. Ct. App. 2006).
79. *State v. Coleman*, 2006-0518 (La. 11/2/07); 970 So. 2d 511, 514-15.
80. *State v. Smith*, No. E2004-02272-CCA-R3-CD, 2005 WL 1827848, at *3 (Tenn. Crim. App. Aug. 3, 2005) (upheld); *Griffin v. State*, No. CACR 97-843, 1998 WL 744261, at *2 (Ark. Ct. App. Sept. 30, 1998) (upheld); *Ridely v. State*, 510 S.E.2d 113, 116 (Ga. Ct. App. 1998) (struck down).
81. *Tomlin*, 384 S.E.2d at 708-09.
82. *George v. State*, 588 S.E.2d 312, 316 (Ga. Ct. App. 2003).
83. *State v. Crawford*, 03-1494 (La. App. 5 Cir. 4/27/04); 873 So. 2d 768, 783.
84. *Thornton v. State*, CACR 93-452, 1994 WL 114350, at *3-4 (Ark. Ct. App. Mar. 30, 1994).
85. *Jackson v. State*, 5 So. 3d 1144, 1149-50 (Miss. Ct. App. 2008).
86. *State v. Tyler*, No. M2005-00500-CCA-R3-CD, 2006 WL 264631, at *8 (Tenn. Crim. App. Feb. 1, 2006).
87. Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 Wash. & Lee L. Rev. 509, 520, 523 (1994).
88. See, e.g., Bryan A. Stevenson, *Pro Se Litigation Ten Years After AEDPA: Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 Harv. C.R.-C.L.L. Rev. 339, 347-48 (2006) (detailing 23 Alabama death penalty cases reversed because of racially discriminatory jury selection at trial).
89. *Swain v. Alabama*, 380 U.S. 202, 210 (1965).
90. *Ex parte Branch*, 526 So. 2d 609, 617-18 (1987).
91. *Flowers v. State*, 947 So. 2d 910, 937-39 (Miss. 2007); *Ward v. State*, 733 S.W.2d 728, 731 (Ark. 1987).
92. *Snyder v. Louisiana*, 552 U.S. 472 (2008).
93. Data on the reversed cases in each state is on file with the Equal Justice Initiative.
94. See, e.g., *State v. Logan*, No. W2008-00736-CCA-R3-CD, 2009 WL 782757, at *3 (Tenn. Crim. App. Mar. 25, 2009) (defendant failed to make prima facie showing of racial discrimination and did not elaborate on reasons for objections to prosecutor's strikes); *Williams v. State*, No. M2007-02070-CCA-R3-PC, 2008 WL 5272556, at *7 (Tenn. Crim. App. Dec. 19, 2008) (defendant failed to raise *Batson* objection at trial or on direct appeal, forfeiting the claim); *State v. Howard*, No. E2007-00178-CCA-R3-PC, 2008 WL 1805758, at *16 (Tenn. Crim. App. Apr. 22, 2008) (defendant failed to raise *Batson* objection at trial and only did so on motion for new trial, forfeiting issue on appeal).
95. 529 So. 2d 649 (Miss. 1988).
96. 424 S.E.2d 630 (Ga. 1993).
97. 01-155 (La. App. 5 Cir. 8/28/01); 795 So. 2d 468.
98. *Cochran v. Herring*, 43 F.3d 1404, 1410-11 (11th Cir. 1995).
99. *Carrick v. State*, 580 So. 2d 31, 31-32 (Ala. Crim. App. 1990).
100. 738 So. 2d 911, 912 (Ala. Crim. App. 1998).

101. See, e.g., *Flowers v. State*, 947 So. 2d 910 (Miss. 2007); *McCastle v. State*, 622 S.E.2d 896 (Ga. Ct. App. 2005); *Lucy v. State*, 785 So. 2d 1174 (Ala. Crim. App. 2000).
102. *Bui v. Haley*, 321 F.3d 1304 (11th Cir. 2003); *Ex parte Yelder*, 630 So. 2d 107 (Ala. 1992); *Ex parte Bird*, 594 So. 2d 674 (Ala. 1991); *Pruitt v. State*, 871 So. 2d 101 (Ala. Crim. App. 2004); *Freeman v. State*, 651 So. 2d 576 (Ala. Crim. App. 1994); *Moss v. City of Montgomery*, 588 So. 2d 520 (Ala. Crim. App. 1991); *Sims v. State*, 587 So. 2d 1271 (Ala. Crim. App. 1991); *Carrick v. State*, 580 So. 2d 31 (Ala. Crim. App. 1990); *Parker v. State*, 568 So. 2d 335 (Ala. Crim. App. 1990); *Powell v. State*, 548 So. 2d 590 (Ala. Crim. App. 1988); *Williams v. State*, 548 So. 2d 501 (Ala. Crim. App. 1988); *Williams v. County of Montgomery*, 525 So. 2d 831 (Ala. Crim. App. 1987).
103. *McCrary v. State*, 738 So. 2d 911 (Ala. Crim. App. 1998); *Ashley v. State*, 651 So. 2d 1096 (Ala. Crim. App. 1994); *Andrews v. State*, 624 So. 2d 1095 (Ala. Crim. App. 1993); *Williams v. State*, 620 So. 2d 82 (Ala. Crim. App. 1992); *Bush v. State*, 615 So. 2d 137 (Ala. Crim. App. 1992); *Roger v. State*, 593 So. 2d 141 (Ala. Crim. App. 1991).
104. *Snyder v. Louisiana*, 552 U.S. 472 (2008); *State v. Harris*, 2001-0408 (La. 6/12/02); 820 So. 2d 471; *State v. Myers*, 1999-1803 (La. 4/11/00); 761 So. 2d 498; *State v. Cheatteam*, 07-272 (La. App. 5 Cir. 5/27/08); 986 So. 2d 738; *State v. Lewis*, 01-155 (La. App. 5 Cir. 08/28/01); 795 So. 2d 468.
105. *State v. Hill*, No. M2005-02437-CCA-R3-CD, 2007 WL 1774275, at *5-7 (Tenn. Ct. Crim. App. June 20, 2007).
106. *Id.* at *6.
107. No. M2005-00500-CCA-R3-CD, 2006 WL 264631, at *8 (Tenn. Crim. App. Feb. 1, 2006).
108. See, e.g., *Cobb v. State*, 825 So. 2d 1080 (Fla. Dist. Ct. App. 2002).
109. See, e.g., *Files v. State*, 613 So. 2d 1301, 1304 (Fla. 1992); *Cobb v. State*, 825 So. 2d 1080, 1085-86 (Fla. Dist. Ct. App. 2002).
110. 552 U.S. 472 (2008).
111. *Id.* at 482-85.
112. *State v. Cheatteam*, 07-272 (La. App. 5 Cir. 5/27/08); 986 So. 2d 738.
113. *State v. Jacobs*, No. 2009-K-1304, 2010 WL 1286899 (La. Apr. 5, 2010).
114. *Flowers v. State*, 947 So. 2d 910, 939 (Miss. 2007).
115. *Id.*
116. *Id.*
117. *Jackson v. State*, 5 So. 3d 1144, 1147-49 (Miss. Ct. App. 2008).
118. *Newberry v. State*, 19 So. 3d 752, 754-55 (Miss. Ct. App. 2008).
119. 448 S.E.2d 179, 181-82 (Ga. 1992).
120. 620 S.E.2d 363, 366 (Ga. 2005).
121. *Id.*
122. See, e.g., *Cleveland v. State*, 930 S.W.2d 316, 319 (Ark. 1996); *Jackson*, 954 S.W.2d 894, 895-96 (Ark. 1997); *Griffin v. State*, No. CACR 97-843, 1998 WL 744261, at *2 (Ark. Ct. App. Sept. 30, 1998).
123. No. CACR 93-452, 1994 WL 1143350, at *3 (Ark. Ct. App. Mar. 30, 1994).
124. See, e.g., *Stokes v. State*, 194 S.W.3d 762, 765 (Ark. 2004); *London v. State*, 125 S.W.3d 813, 817 (Ark. 2003); *MacKintrush v. State*, 978 S.W.2d 293, 297-98 (Ark. 1998).
125. See, e.g., *Ratliff v. State*, 199 S.W.3d 79, 83 (Ark. 2004); *Jackson v. State*, 954 S.W.2d 894, 895 (Ark. 1997); *Mitchell v. State*, 913 S.W.2d 264, 268 (Ark. 1996).
126. See *Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005).
127. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).
128. See, e.g., *Preachers v. State*, 963 So. 2d 161, 167-70 (Ala. Crim. App. 2006); *Burnett v. State*, 27 S.W.3d 454, 458-59 (Ark. Ct. App. 2000); *Randall v. State*, 718 So. 2d 230, 232-33 (Fla. Dist. Ct. App. 1998); *Ford v. State*, 423 S.E.2d 245, 247 (Ga. 1992).
129. See, e.g., *Mayer v. State*, 550 So. 2d 496, 498-99 (Fla. Dist. Ct. App. 1989).
130. *State v. Oglesby*, 379 S.E.2d 891, 892 (S.C. 1989).
131. 439 S.E.2d 842, 844 (1994).
132. *Id.*
133. 452 S.E.2d 603, 603-04 (S.C. 1994).
134. *Id.* at 604.
135. *Id.* at 605 (Toal, J., dissenting).
136. *Id.*
137. See, e.g., *Preachers v. State*, 963 So. 2d 161, 167-70 (Ala. Crim. App. 2006); *Yancey v. State*, 813 So. 2d 1, 5 (Ala. Crim. App. 2001); *McElemore v. State*, 798 So. 2d 693, 700-01 (Ala. Crim. App. 2000).

138. No. CR-05-0935, 2007 WL 2811968 (Ala. Crim. App. Aug. 29, 2008) (opinion on return to remand).
139. *Id.*
140. *Id.*
141. 499 U.S. 400 (1991).
142. *Robinson v. State*, 773 So. 2d 943, 944-45 (Miss. Ct. App. 2000).
143. *Id.* at 949-50.
144. *Flowers v. State*, 947 So. 2d 910, 923-26 (Miss. 2007).
145. *Walker v. State*, 611 So. 2d 1133, 1136 (Ala. Crim. App. 1992). The appeals court found that the prosecutor illegally struck Mrs. Garrett and other potential jurors after presuming they were related to people involved in illegal activity because of their last names, and never asking follow-up questions to confirm or refute the presumptions.
146. *Yancey v. State*, 813 So. 2d 1, 5-7 (Ala. Crim. App. 2001).
147. *McCray v. State*, 738 So. 2d 911, 914 (Ala. Crim. App. 1998).
148. *Walker v. State*, 611 So. 2d 1133, 1135. (Ala. Crim. App. 1992). The prosecutor's explanations for striking Mrs. Greene were based on information he told the court he had received from a police investigator. The appeals court found that none of this information matched the prosecutor's own notes taken during voir dire. Because the prosecutor failed to provide race-neutral reasons for striking Mrs. Greene and nine other black jurors, the conviction was reversed.
149. *Bellamy v. Crosby*, No. 4:05-cv-00182-MP-EMT, 2008 U.S. Dist. LEXIS 68208, at *4 (N.D. Fla. Sept. 8, 2008).
150. *Neal v. State*, 612 So. 2d 1347, 1349-50 (Ala. Crim. App. 1992).
151. See, e.g., *State v. Williams*, 89-KA-31 (La. App. 5 Cir. 6/7/89); 545 So. 2d 651, 655.
152. See *Shelley v. State*, No. 2008-KA-01284-COA, 2010 WL 702606, at *3 (Miss. Ct. App. Mar. 2, 2010); *State v. Johnson*, 00-KA-1552 (La. App. 5 Cir. 3/28/01); 783 So. 2d 520, 526.
153. See Transcript of Record at 81, *Jessie v. State*, 659 So. 2d 167 (Ala. Crim. App. 1994).
154. *Sims v. State*, 587 So. 2d 1271, 1276 (Ala. Crim. App. 1991).
155. *McGahee v. Allen*, 560 F.3d 1252, 1265 (11th Cir. 2009).
156. *Id.* at 1267.
157. *Id.*
158. *Id.*
159. *Id.* at 1265; see also Transcript of Record at 1277-80, *McGahee v. State*, 554 So. 2d 454 (Ala. Crim. App. 1989).
160. *McGahee*, 560 F.3d at 1270.
161. See *supra* note 53.
162. *McGahee*, 560 F.3d at 1270; *Ex parte Thomas*, 601 So. 2d 56, 59 (Ala. 1992); *Lucy v. State*, 785 So. 2d 1174, 1178 (Ala. Crim. App. 2000); *Kynard v. State*, 631 So. 2d 257, 270 (Ala. Crim. App. 1993); *Duncan v. State*, 612 So. 2d 1304, 1311 (Ala. Crim. App. 1992).
163. *McGahee*, 560 F.3d at 1265.
164. *Id.* at 1270.
165. *Tarver v. Hopper*, 169 F.3d 710, 715 (11th Cir. 1999).
166. *State v. Tarver*, 629 So. 2d 14, 19 (Ala. Crim. App. 1994).
167. *Tarver*, 169 F.3d at 716.
168. *Tarver*, 629 So. 2d at 19.
169. Robin DeMonia, *Tarver Executed for 1984 Slaying*, Birmingham News, Apr. 14, 2000.
170. Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, *Tarver v. State*, No. CC84-450.62 (Russell County Cir. Ct. Apr. 5, 2000).
171. *Id.*, Attached Affidavit at 2.
172. *Tarver v. State*, No. CC84-450.01 (Russell County Cir. Ct. May 19, 1999); *Tarver*, 169 F.3d at 712.
173. *Tarver*, 169 F.3d at 714; *Tarver*, 629 So. 2d at 17-18.
174. *Tarver v. State*, 500 So. 2d 1232, 1241 (Ala. Crim. App. 1986).
175. DeMonia, *supra* note 169. For more information about the Robert Tarver case, see *Race to Execution* (Lioness Media Arts, Inc. 2007) and *Black Death in Dixie* (RTE 2006).
176. *Watson v. State*, 825 S.W.2d 569, 570 (Ark. 1992).
177. *Id.*
178. *Id.* at 570-71.

179. *Id.* at 571.
180. *Id.*
181. *Id.* at 573.
182. *State v. Tomlin*, 384 S.E.2d 707, 708 (S.C. 1989).
183. *Id.*
184. *Id.*
185. *Id.* at 708-09.
186. *Id.* at 710.
187. *Hernandez v. New York*, 500 U.S. 352, 361, 371 (1991).
188. *Id.* at 371 (internal citation omitted).
189. *Id.* at 371-72.
190. *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979).
191. *Id.*
192. *Id.* at 364; *Casteneda v. Partida*, 430 U.S. 482, 494 (1977).
193. See *Strauder v. West Virginia*, 100 U.S. 303 (1880) (African Americans); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (women).
194. *Hernandez v. Texas*, 347 U.S. 475, 479-80 (1954) (Mexican Americans); *United States v. Cabrera-Sarmiento*, 533 F. Supp. 799, 804 (S.D. Fla. 1982) (Latinos in Miami area); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 222 (1946) (daily wage earners); *State ex rel. Gregg v. Maples*, 239 So. 2d 198, 203 (Ala. 1970) (unregistered voters).
195. See, e.g., *Swain v. Alabama*, 380 U.S. 202, 208-09 (1965); *Floyd v. Garrison*, 996 F.2d 947, 950 (8th Cir. 1993); *United States v. Grisham*, 63 F.3d 1074, 1078-79 (11th Cir. 1995).
196. See *supra* note 195 and cases cited therein.
197. Joan Biskupic, *The Push Is On for More Diverse Juries*, USA Today, Aug. 28, 2001, at 14; see also Complaint at 3, *Hunt v. Reynolds*, No. 98-A-1305-N (M.D. Ala. May 10, 1999).
198. Biskupic, *supra* note 197, at 8A.
199. Complaint, *supra* note 197, at 3.
200. Biskupic, *supra* note 197, at 1A.
201. Complaint, *supra* note 197, at 6-7.
202. Biskupic, *supra* note 197, at 8A.
203. See Cynthia A. Williams, Note: *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. Rev. 590, 612 (1990).
204. See Brief for Social Scientists, Statisticians, and Law Professors, Jeffrey Fagan, et al., as Amici Curiae Supporting Respondent, at 22, *Berghuis v. Smith*, No. 08-1402, 2010 WL 1189555 (Mar. 30, 2010).
205. *Id.*
206. See Williams, *supra* note 203, at 610.
207. See, e.g., *United States v. Hafen*, 726 F.2d 21, 24 (1st Cir. 1984); *United States v. Whitley*, 491 F.2d 1248, 1249 (8th Cir. 1974). Another possible measure could be to consider whether a given level of underrepresentation is statistically significant. See, e.g., *United States v. Rioux*, 97 F.3d 648, 655 (2d Cir. 1996); *Ford v. Seabold*, 841 F.2d 677, 684 n.5 (6th Cir. 1988); see also Michael O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338 (1996). However, as most courts to consider the issue have recognized, statistical significance does not measure the degree of underrepresentation but looks only at the probability that a given degree of underrepresentation occurred by chance. It is heavily dependant on the sample size, with even small disparities being statistically significant given a large enough sample size. See Brief for Social Scientists, *supra* note 204, at 27-29.
208. See, e.g., *United States v. Carmichael*, 560 F.3d 1270, 1280 (11th Cir. 2009) (requiring use of absolute disparity); *United States v. Yanez*, 136 F.3d 1329, *2 (5th Cir. 1998) (using absolute rather than comparative disparity); *Floyd*, 996 F.2d at 950 (declining to adopt comparative disparity); *United States v. Sanchez-Lopez*, 879 F.2d 541, 547-48 (9th Cir. 1989) (rejecting comparative disparity analysis).
209. See *Berghuis v. Smith*, No. 08-1402, 2010 WL 1189555, at *10 & n.4 (Mar. 30, 2010).
210. *Id.* at *5-6, 11-12.
211. See Miss. Code Ann. § 13-5-1 (West 2010); Mo. Rev. Stat. § 494.425(1) (West 2010).

212. See, e.g., Fla. Stat. Ann. § 40.013(8) (West 2010); Md. Code Ann., Cts. & Jud. Proc. § 8-306(1) (West 2010); Okla. Stat. Ann. tit. 38, § 28(B) (West 2010).
213. See Mitchell S. Zuklie, *Comment: Rethinking the Fair Cross-Section Requirement*, 84 Calif. L. Rev. 101, 146-47 (1996).
214. George Volsky, *Miami Riot Report Gets Mixed Reaction*, N.Y. Times, Dec. 7, 1980, § 1, at 28.
215. Patrice Gaines-Carter, *McDuffie: The Case Behind Miami's Riots*, Southern Changes, Vol. 2, No. 7, at 21 (1980), available at http://beck.library.emory.edu/southernchanges/article.php?id=sc02-7_009&mid=sc02-7_001.
216. Volsky, *supra* note 214.
217. *Id.*
218. Rick Atkinson, *Miami Jury Acquits Policeman in Fatal Shooting of Black*, Wash. Post, Mar. 15, 1984, at A2.
219. Reginald Stuart, *Police Occupy Tense Areas in Miami After 300 Arrests*, N.Y. Times, Mar. 17, 1984, § 1, at 6.
220. Atkinson, *supra* note 218.
221. John Riley, *Race, Defense Lapses Seen as Keys to Verdict*, Newsday, Apr. 30, 1992, at 4.
222. *Id.*
223. *Id.*
224. Mark Hansen, *Different Jury Different Verdict?*, 78 A.B.A. J. 54 (1992). A second, federal trial resulted in guilty verdicts for two of the police officers involved in the beating. Michael Rezendes, *LA Relaxes in Wake of a Riot That Wasn't*, Boston Globe, Apr. 19, 1993, at 1. The jury in this case consisted of “nine whites, two blacks and one Hispanic” from Los Angeles. *Id.* The city did not riot after these verdicts were handed down. *Id.*
225. Alaine Griffin & Vanessa De La Torre, *Anger Files; After Former Cop's Acquittal, Dead Man's Family Lets Loose*, Hartford Courant, Dec. 9, 2009, at A1.
226. *Id.*
227. *Id.*
228. *Id.*
229. In New York, John White, an African American man was found guilty of second-degree manslaughter in an incident where he and his son were threatened by a “lynch mob” outside their home in Long Island. The jury included only one black juror, who was asked by the other members to share his views on race and the use of the “N-word.” The guilty verdict led Rev. Al Sharpton to plan a protest at the courthouse. Corey Kilgannon, *Jury's Deliberations May Be a Focal Point of Appeal*, N.Y. Times, Jan. 1, 2008, available at <http://www.nytimes.com/2008/01/01/nyregion/01white.html>.
230. In the highly-publicized Jena 6 case, Mychal Bell was convicted by an all-white jury of assault in a climate of rising racial tension triggered when three white students hung nooses from a tree on the high school campus. Howard Witt, *Louisiana Teen Guilty in School Beating Case*, Chicago Tribune, June 29, 2007, available at http://www.chicagotribune.com/services/chi-jena_witt.1jun29,0,4233447.story. No African Americans were on the voir dire panel. Todd Lewan, *Black and White Becomes Gray in La. Town*, FOXNEWS.com, Sept. 22, 2007, available at http://www.foxnews.com/printer_friendly_wires/2007Sep22/0,4675,APlaceCalledJena,00.html. The verdict was later thrown out. *Court Overturns Conviction in Jena 6 Beating*, MSNBC, Sept. 15, 2007, available at <http://www.msnbc.msn.com/id/20779755/>.
231. Two white men were acquitted of murder in Powhatan, Virginia, outside of Richmond, in the shooting death of Tahliek Taliaferro. The jury of eleven whites and one black member found the defendants guilty of involuntary manslaughter, after they testified that they had lost control of an assault rifle. About 300 protestors marched around the Powhatan County courthouse to protest the verdict. A later news story stated that the jurors were dismayed to be accused of being racists. Bill McKelway, *About 300 Marchers in Powhatan Protest Taliaferro Verdict*, Richmond Times-Dispatch, Mar. 30, 2009, at B1, available at http://www2.timesdispatch.com/rtd/news/local/article/POWH30_20090329-222921/243957/; Bill McKelway, *A Look Inside the Taliaferro Jury*, Richmond Times-Dispatch, June 28, 2009, available at http://www2.timesdispatch.com/rtd/news/local/crime/article/POWW28_20090627-221404/276839/pa.immigrant.beating/index.html.

232. In Panama City, Florida, eight boot camp officers, including one who was African American and one Asian were acquitted in a videotaped beating death of Martin Lee Anderson. The all-white jury decided in just 90 minutes that Anderson died of a previously undiagnosed blood disorder. About 150 protestors marched to the state capitol in protest. *Boot Camp Death Verdict Sparks Outrage*, ABCNews.com, Oct. 13, 2007, available at <http://abcnews.go.com/GMA/story?id=3726041&page=1>; Melissa Nelson, *Guards Acquitted in Boot Camp Case*, USA Today, Oct. 12, 2007, available at http://www.usatoday.com/news/nation/2007-10-11-3868327840_x.htm?csp=34.
233. In Milwaukee, Wisconsin three white police officers were acquitted by an all-white jury in the beating of Frank Jude, an African American man. The verdict led to a march by several thousand people. Georgia Pabst, Jesse Garza & Bob Purvis, *Thousands March to Protest Verdict*, Milwaukee Journal-Sentinel, Apr. 19, 2006, available at <http://www3.jsonline.com/story/index.aspx?id=417026>. Later federal proceedings resulted in seven officers receiving prison time. John Diedrich, *New Sentencing Ordered for Ex-Officer in Jude Beating Case*, Milwaukee Journal-Sentinel, June 8, 2009, available at <http://www.jsonline.com/news/milwaukee/47232467.html>.
234. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 Int'l J. Psychol. 117, 119-20 (2000).
235. *Id.*
236. Leslie Ellia & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033, 1048 (2003).
237. See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation*, 90 J. Personality and Soc. Psychol. 597, 600 (2006); see also *id.* at 608 (“[S]urveys have found that people often feel marginalized or threatened by minority status in a group and are therefore skeptical that their arguments will be taken seriously.”); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63, 98-99 (1993) (concluding that a minority of one rarely influences a jury’s verdict and that “[a]dditional studies have shown that black jurors themselves believe that they have significantly less impact on deliberations than white jurors”).
238. See William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 240 (2001) (concluding that blacks on white male dominated capital juries “were critical of the jury’s decision-making process and especially discontented with their own experiences as capital jurors”).
239. See David C. Baldus, et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 124 (2001) (studying capital trials in Philadelphia between 1981-1997 and concluding predominantly African Americans juries were less likely to impose death sentences than juries with fewer African Americans and explaining disparity due to “substantially higher death-sentencing rate in black defendant cases . . . when jury was predominantly non-black”).
240. See *id.*; Bowers, *supra* note 238, at 188 (interpreting Baldus study and concluding that “tendency for Black defendants to be treated more harshly than whites ones as the number of whites on the jury increases holds especially for black-defendant/white-victim cases” (citing Baldus, *supra* note 239 at tbl. 8); see also Bowers, *id.* at 195 (finding that the likelihood of a death sentence in black-defendant white-victim case was “dramatically increased” with the presence of five or more white males on the jury as compared to intra racial defendant-victim cases). Like African American defendants, Latino defendants were more likely to receive harsher judgments from majority-white juries. See Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications and Directions for Future Research*, 2 Soc. Issues & Policy Rev. 65, 83, 84 (2008) (citing studies of actual and mock juries with white and Latino defendants).
241. Sommers, *supra* note 237, at 609. The study consisted of mock jurors recruited from an actual jury pool while on jury duty shown trial of black defendant. *Id.* at 600. Cf. William J. Bowers et. al, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, 53 DePaul L. Rev. 1497, 1531 (2004) (finding tendency of jurors on diverse juries to acknowledge how race affects their perspective and that of other jurors).
242. See Bowers, *supra* note 241, at 1520; see also *id.* at 1532 (finding that mitigation is voiced and considered when there are African Americans or at least one African American male on a jury as opposed to on white male dominated juries where there is a lack of serious discussion of mitigation).

243. Sommers, *supra* note 237, at 608 (“Jury representativeness can be more than a moral or Constitutional ideal; it is sometimes an ingredient for superior performance.”); Neil Vidmar & Valerie P. Hans, *American Juries: The Verdict* 74 (2007) (concluding that claim that diverse juries are better fact-finders is supported by research on heterogeneous decision-making groups) quoted in *Jury Pool Diversity in New York State*, Statement of Prof. Valerie Hans to Assembly Standing Comm. on Judiciary and Codes, New York State Assembly (Apr. 30, 2009), available at http://juries.typepad.com/files/assembly_statement_draft_4-29-09-1.pdf.
244. Sommers, *supra* note 237, at 608.
245. See, e.g., Sommers, *supra* note 240, at 86-87 (discussing studies finding that diverse juries consider more factual information, were more likely to talk about missing evidence that they wished had been presented at trial, more willing to discuss controversial issues such as racial profiling, include more accurate information in deliberations); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 414-15 (2007) (discussing studies indicating that racially diverse juries may make fewer cognitive errors than homogeneous jurors); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1285-95, 1298-1300 (2000) (discussing effects of gender and race in jury deliberation); King, *supra* note 237, at 75-100 (discussing social science studies examining influence of jury discrimination on jury decisions). Studies also suggest that cross-racial facial identification is subject to error. See *Cross-Racial Facial Identification: A Social Cognitive Integration*, 18 Personality & Soc. Psych. Bulletin 296, 296 (1992); R. Richard Banks, *Race-based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 U.C.L.A. L. Rev. 1075, 1103-04 (2001).
246. See generally *Taylor v. Louisiana*, 419 U.S. 522, 527-29 (1975).
247. Patricia L. Gatling & Majorie Heidseick, *The Effects of Diversity in the Office*, The Prosecutor, National District Attorneys Ass’n (2001), available at http://www.ndaa.org/publications/ndaa/effects_diversity_in_office_may_june_2001.html.
248. U.S. Dep’t of Justice, Bureau of Justice Statistics, *Local Police Departments, 2003* at 7 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/lpd03.pdf>. Studies have found that, while police departments have grown much more diverse since the 1950s and 60s (especially in major cities), there is no clear evidence that black officers differ appreciably from white officers in their on-the-job behavior, including the frequency of shootings, arrests, citizen complaints, and instances of prejudice against black citizens. See David Alan Sklansky, *Not Your Father’s Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. Crim. L. & Criminology 1209, 1224-25 (2006); see also U.S. Dep’t of Justice, Bureau of Justice Statistics, *Law Enforcement Management and Admin. Statistics, 1993*, at Table 4a (1993), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tab4.pdf>.
249. Rachel Lyon, *Media, Race, Crime, and Punishment: Re-Framing Stereotypes in Crime and Human Rights Issues*, 58 DePaul L. Rev. 741, 752 (2009) (“as of 1994, 97.5% of district attorneys in states that apply the death penalty were white and male, while African Americans made up only 3.9% of all lawyers in death penalty cases”); see also Jeffrey J. Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 Cornell L. Rev. 1811, 1817-18 (1998) (indicating that approximately 98% of all death penalty prosecutors are white, 1% is black, 1% is Latino and in the 38 death penalty states, prosecutors are exclusively white).
250. Pokorak, *supra*.
251. *Id.* In Florida, 5% of the prosecutors are Latino. *Id.* at 1817.
252. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 Wash. U. L. Rev. 1117, 1125 (2009); see also A.B.A. Comm’n on Racial and Ethnic Diversity in the Profession, *Statistics about Minorities in the Profession from the Census* (2000), at <http://www.abanet.org/minorities/links/2000census.html> (last visited Apr. 22, 2010) (nationwide, more than 83% of judges, magistrates, and other judicial workers are white, and 62% are male). National demographic data from U.S. Census Bureau, *Fact Sheet: United States, 2006-2008 American Community Survey 3-Year Estimates*, at http://factfinder.census.gov/servlet/ACSSAFFacts?_submenuId=factsheet_1&_sse=on (last visited Apr. 19, 2010).
253. Chew & Kelley, *supra* note 252, at 1122.
254. *Id.*
255. A.B.A. National Database on Judicial Diversity in State Courts, at <http://www.abanet.org/judind/diversity/states.html> (last visited Apr. 23, 2010).

256. A.B.A. Comm'n on Racial and Ethnic Diversity in the Profession, *Goal IX Report 2005-2006*, at 8 (compared to 12.9% of the general population, African Americans account for 4.2% of lawyers and judges), available at http://www.abanet.org/minorities/publications/g9/GoalIX_0506.pdf.
257. *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (criminal defendant may object to race-based exclusion of jury members, whether or not defendant and jurors share the same race, "An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.").
258. *Powers*, 499 U.S. at 413 (reaffirming that defendant has standing to challenge discriminatory jury selection, noting that "[b]oth the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom."); see also *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (defense attorneys prohibited from engaging in discriminatory jury selection).
259. *Rose v. Mitchell*, 443 U.S. 545, 558 (1979) (describing such prosecutions as "rare"); see also, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 262 (1986) (citing statistics showing no prosecutions under statute in preceding nine years).
260. 18 U.S.C. § 243.
261. See Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336.
262. See, e.g., Minnesota Judicial Branch Website, <http://www.mncourts.gov/?page=1341#HowWasISelected> (last visited Apr. 26, 2010).
263. Jennifer Emily, *Jury Pool System Gets an Upgrade, More Notices, Improved Tracking Designed to Boost Participation*, Dallas Morning News, Sept. 14, 2009, at 1B.
264. *Id.*
265. 328 U.S. 217 (1946).
266. *Id.* at 223-24.
267. See, e.g., Colorado State Judiciary Website, <http://www.courts.state.co.us/Jury/FAQs.cfm> (last visited Apr. 26, 2010) (\$50 per day); New York State Uniform Court System Website, <http://www.nyjuror.gov/users/wwwucs/juryQandA.shtml> (last visited Apr. 26, 2010) (explaining that jurors are paid \$40 per day, and that for jurors whose wage for time missed from work is lower than this jury fee, the State pays the difference between the wage and the jury fee); Clark County, Nevada Court Website, <http://www.clarkcountycourts.us/ejdc/juror-information/> (last visited Apr. 26, 2010) (\$40 per day).
268. Jennifer Emily, *supra* note 263 (documenting Dallas County raising juror pay from \$6 to \$40 per day).
269. Federal Judiciary Website, <http://www.uscourts.gov/jury/jurypay.html> (last visited Apr. 26, 2010).
270. State of Connecticut Judicial Branch Website, <http://www.jud.ct.gov/jury/faq.htm> (last visited Apr. 26, 2010) (explaining that State will pay all jurors \$50 per day starting with sixth day of jury service, and will reimburse jurors up to \$50 per day for out of pocket expenses for the first five days of jury service); see also, e.g., Iowa Judicial Branch Website, http://www.iowacourts.gov/Jury_Service/Frequently_Asked_Questions/ (last visited Apr. 26, 2010) (allowing reimbursement for travel expenses).

CREDITS

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