

# Race and the Jury

Illegal Discrimination in Jury Selection



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# Introduction

In too many communities, the fairness, reliability, and integrity of the legal system have been compromised by clear evidence of racial bias in the selection of juries.<sup>1</sup> Unrepresentative juries not only exclude and marginalize communities of color, they also produce wrongful convictions and unfair sentences that disproportionately burden Black people and people of color. Our failure to remedy this longstanding problem of racial bias imperils the legitimacy of the U.S. legal system.

The Supreme Court has repeatedly recognized that an “[e]qual opportunity to participate in the fair administration of justice is fundamental to our democratic system.”<sup>2</sup> The Court has insisted that eliminating racial bias in the selection of juries is necessary “to preserve the public confidence upon which our system of criminal justice depends.”<sup>3</sup>





This all-white, all-male jury acquitted two white men, Roy Bryant and his half-brother, J.W. Milam, who were charged with torturing and murdering 14-year-old Emmett Till in Sumner, Mississippi, in 1955. Both men later admitted to the crime. (Getty Images)

In most communities in America, Black people and people of color are significantly underrepresented in the jury pools from which jurors are selected. The law requires that the proportion of Black people in a jury pool must match Black representation in the overall population,<sup>4</sup> but courts routinely fail to enforce these requirements. Legal standards created by the courts make it difficult to prove discrimination and have led to a failure to address racially discriminatory practices.

When Black people and people of color do get called for jury service, they are still removed unfairly. There is widespread racial bias in the selection of key leadership roles such as the grand jury foreperson—who has significant power to shape the conduct and outcome of legal proceedings, at least in some jurisdictions.<sup>5</sup> In criminal trials, prosecutors and judges often remove Black people after unfairly claiming they are unfit to serve on juries.

Even if people of color successfully navigate all of these barriers to jury service, they can be excluded by lawyers who have the right to use “peremptory strikes” to remove otherwise qualified jurors for virtually any reason—or no reason at all.

Courts allowed prosecutors to use peremptory strikes to prevent Black people from serving on juries throughout most of the 20th century. In a landmark case in 1986, the Supreme Court finally changed the legal requirements for proving a peremptory strike is racially biased.<sup>6</sup> But the Court’s decision in *Batson v. Kentucky* did not eliminate racial discrimination.





Decisions from the U.S. Supreme Court have not succeeded in eliminating illegal racial discrimination in jury selection. (AP Photo)

Representative juries selected without racial bias or discrimination are essential in our democracy. They are especially important because Black people are underrepresented in prosecutors' offices and in the judiciary. More than 40% of Americans are people of color, but 95% of elected prosecutors are white.<sup>7</sup> Similar disparities exist within the judiciary.<sup>8</sup>

Courts, lawyers, states, and communities must make a renewed effort to address racial bias in jury selection. This problem can be solved, but it will require a more committed and determined effort than has been seen to date.

1.

# A History of Discrimination in Jury Selection





**The right to a jury of one's peers is enshrined in the U.S. Constitution as a safeguard against abuses of power by state and federal governments.<sup>9</sup>**

A jury made up of ordinary citizens acts as a “bulwark” of liberty for individuals accused of a crime by reining in overzealous or corrupt prosecutors and exposing judges who fail to protect the rights of the accused.<sup>10</sup>

In addition to shielding individual defendants from government overreach, juries embody and sustain democracy itself by providing an “opportunity for ordinary citizens to participate in the administration of justice.”<sup>11</sup>

*“Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.”*

*Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019).

Jury service empowers ordinary citizens to become “instruments of public justice” in their own communities.<sup>12</sup>

But throughout our country’s history, perpetrators of racial violence, terrorism, and exploitation of disfavored groups have escaped accountability because their criminal behavior has been ignored by all-white juries.

## **Black people have been excluded from jury service since America’s founding.**

To justify the mass enslavement of Black people in a country that espoused freedom and liberty,

an elaborate and complex mythology emerged based on the idea that Black people were not fully human and were inherently inferior to white people. This false narrative was woven into the legal system, which became a critical mechanism to enforce white supremacy.



Jury deliberation room, 1954. Until the 1970s, jury service was largely reserved for white men. (Bettman/Getty Images)

The Constitution denied Black people the right to serve on juries<sup>13</sup> by classifying enslaved Black people as property.<sup>14</sup> Most states also excluded free Black people from jury service and denied them the right to a jury trial,<sup>15</sup> leaving African Americans unprotected from abusive prosecutions and unfair convictions and sentences. This exclusion also allowed for the murder, rape, assault, and economic exploitation of Black women and men, because all-white juries refused to hold the perpetrators accountable.

Black citizens made progress toward political equality during the 12-year period after the Civil War known as Reconstruction. Under the protection of federal troops stationed in the South to enforce the newly established rights of formerly enslaved people, many Black men voted and were elected to local, state, and federal government positions, including 16 African Americans who served in Congress.<sup>16</sup>



In 1952, this all-white, all-male jury convicted Walter Lee Irvin, an innocent Black man, of the kidnapping and rape of a Florida woman. Mr. Irvin and three other innocent Black men who were falsely accused of the crime became known as the “Groveland Four.” (Bettman/Getty Images)

Congress passed the Civil Rights Act of 1875, which outlawed race-based discrimination in jury selection.<sup>17</sup> The Fourteenth and Fifteenth Amendments, ratified in 1868<sup>18</sup> and 1870,<sup>19</sup> respectively, guaranteed Black men the right to vote and serve on juries and provided legal protections against racial discrimination.<sup>20</sup>

Racially integrated juries in some jurisdictions enforced the rights of Black defendants and held white perpetrators of racial violence accountable for their crimes.<sup>21</sup> In most of the South, however, the failure to enforce anti-discrimination laws meant that Black people continued to be denied the basic rights of citizenship, including jury service.<sup>22</sup>

## White resistance to racial equality grew increasingly violent during this period.

From 1865 to 1876, more than 2,000 African Americans were the victims of racial terror lynchings.<sup>23</sup> Racially motivated massacres and public spectacle lynchings were widespread, with thousands of white people participating in public acts of torture.

Perpetrators of terror—who included community leaders, elected officials, and law enforcement officers—committed brutal acts of violence in broad daylight, sometimes “on the courthouse lawn,”<sup>24</sup> with no fear of prosecution or conviction in an all-white legal system. As a Select Committee of the Senate outlined in the Report on Alleged Outrages in the Southern States in 1871, “In nine cases out of ten the men who commit the crimes constitute or sit on the grand jury, either they themselves or their near relatives or friends, sympathizers, aiders, or abettors.”<sup>25</sup>





The racial terror lynching of Henry Smith, a Black 17-year-old, drew the entire white population of Paris, Texas, on February 1, 1893. (Library of Congress/Getty Images)



**The same all-white juries that refused to hold white people accountable for killing Black people readily convicted Black people and imposed severe punishments for minor crimes, even in cases with little to no evidence.**

As one Louisiana paper wrote toward the end of the nineteenth century, hostility to the Black citizen was such that “juries...seem to think that it is their bounden duty to render a verdict of ‘guilty as charged,’ because the accused has black skin.”<sup>26</sup> The rise of the convict leasing system in the South created an additional incentive to criminalize Black people.<sup>27</sup> Of growing conviction rates among Black people during this era, abolitionist author Frank B. Sanborn wrote:

[S]o customary had it become to convict any Negro upon a mere accusation, that public opinion was loathe to allow a fair trial to black suspects, and was too often tempted to take the law into its own hands. Finally the state became a dealer in crime, profited by it so as to derive a net annual income from her prisoners...The Negroes lost faith in the integrity of courts and in the fairness of juries.<sup>28</sup>



Southern states used a loophole in the Thirteenth Amendment—which banned slavery except as punishment for crime—to establish convict leasing. (Library of Congress, Prints & Photographs Division, Detroit Publishing Company Collection, LC-D428-850)

Continued white resistance to racial equality undermined the legal protections enacted by Congress during Reconstruction, while the Supreme Court largely turned a blind eye to racial violence and widespread refusal to enforce federal law.<sup>29</sup> Federal laws required Southern lawmakers and judges to eliminate from state statutes language that expressly excluded Black people from jury service. But

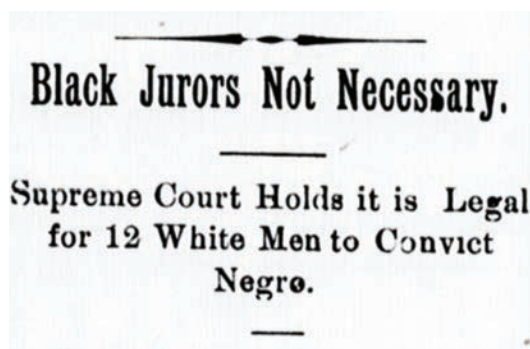
they swiftly enacted new laws and practices that had the same discriminatory purpose and the same exclusionary effect.

For example, in 1898, Louisiana lawmakers amended the state constitution to “establish the supremacy of the white race.”<sup>30</sup> The new constitution diluted the participation of Black jurors by permitting a felony conviction as long

as nine out of 12 jurors voted to convict.<sup>31</sup> As a practical matter, this meant that if three Black jurors voted to acquit a Black defendant, the other nine white jurors' votes were still enough to convict the defendant. The law effectively made the participation of Black people on juries meaningless. Despite its explicitly stated purpose to maintain white supremacy, this practice was not struck down by the Supreme Court until 2020.<sup>32</sup>

Throughout the early 20th century, state and local officials continued to use discriminatory tactics to keep Black people out of the jury box. Such tactics were often obvious—many local officials simply removed the names of Black people from jury rolls.<sup>33</sup> Others were less blatant but no less exclusionary. The “key-man” system, for example, called for prominent white citizens to submit lists of suitable jurors to jury commissioners.<sup>34</sup>

**From the end of Reconstruction through the early 1930s, “the systematic exclusion of black men from Southern juries was about as plain as any legal discrimination could be short of proclamation in state statutes or confession by state officials.”<sup>35</sup>**



A newspaper clipping from the March 14, 1903, Lancaster Ledger of Lancaster, South Carolina, covering the U.S. Supreme Court's rejection of a jury discrimination claim in *Brownfield v. South Carolina*. Mr. Brownfield was convicted by an all-white jury despite the fact that Black people represented 80% of the population of registered voters in the county. (Library of Congress)

The Supreme Court was indifferent to this rampant and illegal exclusion of Black people from juries. The Court repeatedly deferred to state court decisions finding no discrimination and rejected complaints about racially biased jury selection, even in cases involving the death penalty.<sup>36</sup>

In the early 1900s, the Court addressed the total exclusion of African Americans from jury service in multiple cases where an all-white jury sentenced a Black man to death in a Texas county where African Americans comprised 25% of the population.<sup>37</sup> Even though not one Black person appeared on a jury in any of these capital cases, the Supreme Court found that no illegal racial discrimination had occurred.<sup>38</sup>



The "Scottsboro Boys," 1931. (Bettman/Getty Images)

Not until 1935, in *Norris v. Alabama*, did the Supreme Court call out local and state officials for illegally excluding Black people from juries because of their race. *Norris* involved the wrongful convictions and death sentences of

nine Black teenagers charged with raping two white women in Scottsboro, Alabama, despite overwhelming evidence of their innocence.<sup>39</sup> The teens were tried and convicted by an all-white jury; no African American had served on a jury in Scottsboro in living memory.<sup>40</sup>

After advocacy organizations including the NAACP launched a campaign on behalf of the nine teenagers that garnered national attention for months, the Supreme Court reversed the convictions and admonished the jury commissioner for excluding all African Americans from the jury pool.<sup>41</sup> The Court reversed six other convictions on similar grounds over the next 12 years.<sup>42</sup>

**But racially discriminatory practices remained widespread even after *Norris* as state officials used “more covert and less overt” methods of exclusion.<sup>43</sup>**

Many jurisdictions continued to exclude Black potential jurors by saying that they lacked the requisite “intelligence, experience, or moral integrity”<sup>44</sup> to serve, and lawyers continued to remove Black jurors using peremptory strikes.<sup>45</sup>

Local officials in Georgia printed the names of Black residents on colored paper so they could avoid picking a Black person during the “random” drawing of names for the jury pool. Other officials kept Black people out of jury pools by relying on tax returns that were segregated by race.<sup>46</sup>






Potential jurors arrive for check-in at the jury pool room in an Oklahoma courthouse. (Mike Simons/Tulsa World)

In 1945, a decade after *Norris*, the Supreme Court upheld a Texas county's policy of allowing exactly one African American to serve on each grand jury, even after jury commissioners testified that they had "no intention of placing more than one negro on the panel."<sup>47</sup>

The Supreme Court addressed racially discriminatory peremptory strikes in *Swain v. Alabama* in 1965,<sup>48</sup> but its decision made it impossible to prove intentional discrimination even when prosecutors excluded every single African American from the jury.<sup>49</sup>

Growing criticism finally forced the Court to adjust the legal standard for proving racial bias in jury selection. In 1986, the Court overruled *Swain* and held in *Batson v. Kentucky* that a defendant can prove racial discrimination in jury selection based on an assessment of the prosecutor's strikes at the defendant's trial.<sup>50</sup> But prosecutors soon found ways to avoid *Batson's* new standard.

# 2. Why Representative Juries Are Necessary



**We rely on jurors to decide questions of guilt and innocence and to assess appropriate punishments because they are more grounded in the values and norms of their own communities.**



Unlike judges, who are typically appointed by government officials or elected after expensive political campaigns, jurors are community members with diverse experiences and backgrounds who better reflect the “conscience of the community.”<sup>51</sup>

As the Supreme Court has noted, “Community participation in the administration of the criminal law...is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.”<sup>52</sup>

The constitutional right to a jury of one’s peers empowers community members to shield defendants from unfair or excessive treatment by police, prosecutors, and judges. People of color are significantly underrepresented in these positions of power. The absence of Black representation means that decisions about who to arrest, which crimes to prosecute, and how to punish people are made primarily by individuals who have less experience contending with racial bias.<sup>53</sup>

## **More than 40% of Americans are people of color. But nearly every single elected prosecutor in America today is white.**<sup>54</sup>



Despite the fact that people of color make up 51% of the state population, the Nevada Supreme Court, pictured here in 2020, is all white.

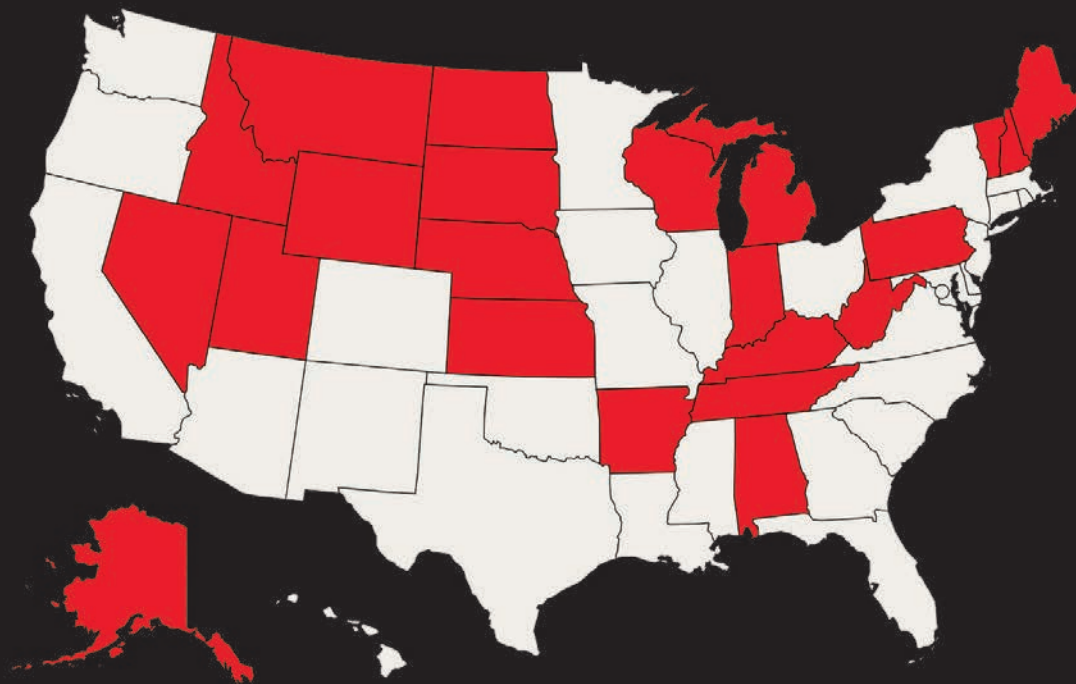
And almost all of our nation’s judges are white, too. In Alabama, for example, all 19 appellate judges are white—even though people of color make up 35% of the population.<sup>55</sup> No African

American judge has ever been elected to an intermediate appellate court in Alabama, and in its 200-year history the Alabama Supreme Court has had only three African American justices—two of whom were the only African Americans ever elected to a statewide office in Alabama.<sup>56</sup>

Alabama is not alone. Twenty-two states currently have all-white supreme courts, including 11 states in which people of color comprise at least 20% of the population.<sup>57</sup> In 16 states—nearly a third of the country—there has never been a Black supreme court justice.<sup>58</sup>

Data on federal judges likewise reveal a stark lack of diversity. The judges on the Fifth Circuit Court of Appeals, which covers Texas, Louisiana, and Mississippi, are 82% white, even though more than half of the circuit’s population is





■ Twenty-two states currently have all-white supreme courts.

nonwhite.<sup>59</sup> Similarly, the Seventh Circuit Court of Appeals, which includes Indiana, Illinois, and Wisconsin, has just one judge of color, even though 30% of the circuit's population are people of color.<sup>60</sup>

Other groups subject to centuries of unfair bias and exclusion are also underrepresented on state and federal courts. For instance, Native Americans make up 28% of the population in Alaska and 15% in New Mexico, but no Native American has served on the supreme court in either state.<sup>61</sup> Nationwide, only three Native Americans have ever served on a state supreme court, two of whom were appointed in 2019.<sup>62</sup> The underrepresentation of Native Americans persists in the federal court system as well, where only one of more than 800 federal judges is Native American.<sup>63</sup>

**In too many parts of this country, law enforcement agencies likewise do not represent the communities they serve and in many smaller police departments, Black representation remains virtually nonexistent.**<sup>64</sup>

Jury service is often the only opportunity for a community perspective to impact the outcome of a case in America's legal system.

# Gender-Based Jury Exclusion



A group of women registering for jury duty in Portland, Oregon, in 1912. It was not until 60 years later that the Supreme Court found gender-based jury exclusion to be unconstitutional. (Gardiner P. Bissel/Oregon Journal)

For centuries, state laws barred women from jury service on the theory that women were too fragile to participate in public life and needed protection from the “indecent” aspects of criminal trials.<sup>65</sup> Three states—Alabama, Mississippi, and South Carolina—statutorily barred women from serving on juries well into the 1960s.<sup>66</sup>

States that did not categorically exclude women nonetheless enforced gender-based barriers to jury service, such as requiring women to register with the clerk of court if they wanted to volunteer for jury service.<sup>67</sup>

Not until 1975 did the Supreme Court determine that excluding women from jury service violates the requirement that a jury be drawn from a fair cross-section of the community.<sup>68</sup> Despite this ruling, lawyers continued to use peremptory strikes to eliminate women from juries until the Supreme Court decided in 1994 that gender-based strikes violate the Fourteenth Amendment right to equal protection.<sup>69</sup>


## **In many states, the history of gender-based jury exclusion tracks the history of opposition to women’s suffrage.**

Alabama voted against ratification of the Nineteenth Amendment in 1919 and did not officially endorse suffrage for women until 1953.<sup>70</sup> Similarly, Alabama statutorily barred women from serving on juries until 1967.<sup>71</sup> For the next 11 years, state law authorized judges to exclude women—and only women—from jury service if a good reason could be articulated.<sup>72</sup>

This gender-based exemption systematically excluded women from juries.<sup>73</sup> During the early 1990s, Alabama prosecutors admitted to striking Black women from juries, explicitly stating “because she was a woman” as their rationale, which the state appellate courts accepted as a valid, race-neutral reason.<sup>74</sup>

# 3. How Juries Are Selected





**Today, Black people and other people of color are excluded from participating in our jury system at every step of the jury selection process: when the court system creates lists of potential jurors, when potential jurors are notified to come to court, when judges decide which potential jurors are qualified to serve, and when prosecutors use peremptory strikes to remove potential jurors.**

# Jury Pools



The first step in the jury selection process is the creation of a pool of potential jurors that is supposed to reflect the community's demographics. But Black people and nonwhite people are often underrepresented in jury pools, and courts consistently tolerate this underrepresentation even though the Constitution requires that jurors be chosen from a "fair cross-section" of the community.<sup>75</sup>

People of color are underrepresented in jury pools because they are often underrepresented

in the source lists—typically voter registration databases—used to create the pools. Socioeconomic, historical, and geographic obstacles to voter registration mean that many racial and ethnic groups are not fully represented on voter registration lists.<sup>76</sup> Despite evidence that relying on voter rolls systematically excludes Black people, federal district courts use voter registration records as the primary source for jury pools, and many state courts rely on these records as well.<sup>77</sup>





Black women and men in Selma, Alabama, wait in line to take a voter registration test, February 17, 1965. (Associated Press)

Some states supplement voter registration lists with driver's license lists, but those also tend to disproportionately exclude people of color. A 2005 study in Wisconsin found that while about 80% of white residents had driver's licenses, only about half of African American and Latino residents had them.<sup>78</sup>

After the jury list is compiled, the court selects people from the pool and mails summonses directing them to come to court. This initial selection is usually done randomly, but this process can still create racial disparities. For example, nationally, an average of 12% of jury summons are returned as "undeliverable," a deficit that some experts believe to be a significant drain on the number of available jurors. Many courts fail to regularly update mailing address records and people with low income levels, who are more likely to move frequently, have a higher rate of undeliverable summonses than middle or high income people.

Black people and people of color, who are disproportionately burdened by poverty, are more likely than white prospective jurors to be excluded because of this practice.<sup>79</sup>

To create jury pools that better reflect the makeup of the community, some jurisdictions have begun drawing names from state income tax rolls, public benefits lists, and unemployment compensation lists.<sup>80</sup> New Mexico, for example, supplements voter registration and driver's license records with state income tax rolls that more accurately reflect a fair cross-section of the community.<sup>81</sup>

Courts also can use computer programs that track demographic information to create representative lists of potential jurors. And they can take simple steps like checking the change of address registry to ensure that potential jurors receive the summons notifying them to come to court for jury service.<sup>82</sup>



**Most courts still have not adopted the readily accessible procedures needed to achieve full representation.<sup>82</sup>**

This lack of commitment to representative juries is also reflected in the wholesale failure of appellate courts to enforce the fair cross-section requirement when legal challenges are made.

While the procedures used by local court systems have led to rampant underrepresentation of people of color in jury pools, appellate courts have made it all but impossible for a defendant to show that underrepresentation in the jury pool is “significant” enough to warrant a remedy. 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.”<sup>84</sup> For a court to find that a group is significantly underrepresented, the absolute disparity typically must be greater than 10%.<sup>85</sup>

For example, in 2015, the percentage of Hispanic citizens in one California community was 23.1%, but jury pools were only 16.9% Hispanic. The California Supreme Court decided that the resulting absolute disparity of 6.2% was not “constitutionally significant” even though it meant that more than a quarter of Hispanic residents were excluded from participating in the jury system.<sup>86</sup>

The 10% cutoff for showing significant underrepresentation means that, if a group constitutes less than 10% of the population, courts will uphold even the most blatant and intentional exclusion of every member of that group.<sup>87</sup> In San Francisco, where the African American population is 5.7%, courts have tolerated jury pools with no African Americans.<sup>88</sup> While better methods exist for measuring the degree of underrepresentation, the larger problem with requiring proof that any underrepresentation is “significant” is that it suggests *some* underrepresentation is acceptable.

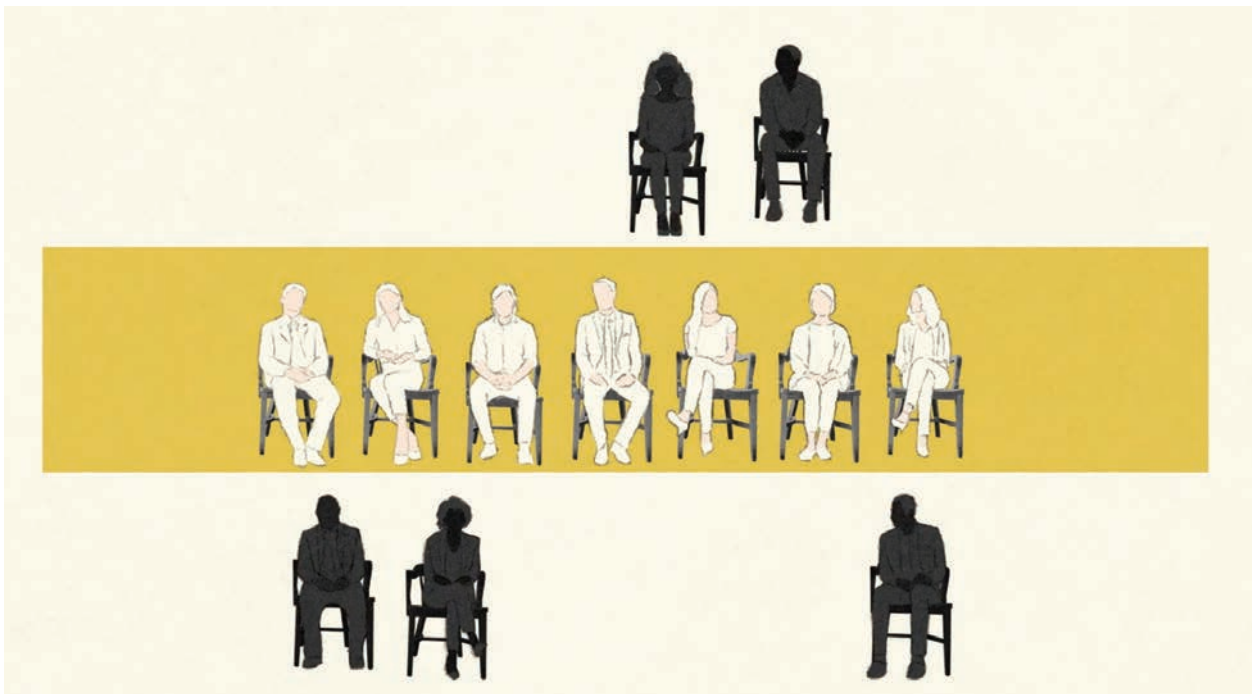


A second problem is that appellate courts will not provide a remedy unless there is explicit evidence of intentional racial discrimination or proof that a specific “systematic” practice causes underrepresentation.<sup>89</sup> Defendants rarely succeed in showing systematic exclusion because they have difficulty accessing jury records.<sup>90</sup> Courts rarely view factors that influence underrepresentation—such as voting patterns, access to driver’s licenses, and socioeconomic status—as “systematic.”<sup>91</sup>

**In practice, the constitutional right to a representative jury pool is close to meaningless.**

Only one fair cross-section claim has succeeded in the last 10 years in any state or federal court in the entire country.<sup>92</sup> Courts have rejected challenges where a computer glitch in the county’s jury selection software excluded all African Americans, where the disparity between Latinos in the community and the jury pool was 38.5%, and where African Americans comprised 17% of the county’s population but made up only 8% of the jury pool.<sup>93</sup>

Widespread tolerance of underrepresentation in our jury pools has adverse consequences for defendants and for citizens who are denied the right to serve on a jury. It undermines the legitimacy of the legal system and exacerbates discrimination at other points in the selection process. When the jury pool is not representative, it is far less likely that grand juries and trial juries will reflect the entire community.



# Grand Jury

A grand jury determines whether enough evidence exists to charge someone with a crime and, if so, it produces an indictment.

High-profile cases involving allegations of racial bias are often shaped by the decisions of grand juries. The failure of grand juries to authorize criminal prosecutions against police officers involved in the murders of Eric Garner, Michael Brown, and Breonna Taylor underscores the importance of grand juries in the criminal legal process.<sup>94</sup>

Each grand jury has a foreperson who questions witnesses, administers oaths, requests that prosecutors call other witnesses or present additional evidence, and signs indictments. Forepersons are typically selected by a judge or by their fellow grand jurors.<sup>95</sup>

The process for selecting a grand jury foreperson, and sometimes the grand jury itself, is ripe for racial discrimination because judges—who are disproportionately white—often have unfettered discretion.<sup>96</sup>



Jury qualification laws disparately impact people of color and diminish the quality of jury deliberations. (Illustration by Leonardo Santamaria)

**While racial discrimination in the selection of the grand jury members or foreperson is supposed to be unconstitutional, it has been almost universally tolerated by state and federal courts.**<sup>97</sup>

Even judges who have never selected a Black person to preside as foreperson are shielded from review as long as they can assert some general basis for their selection other than race,

such as education, English proficiency, income, or the judge's subjective perceptions of potential grand jurors' leadership skills.<sup>98</sup>

In some jurisdictions, including the federal system, courts have refused to provide a remedy for racial discrimination in the selection process because the foreperson's responsibilities are not significant and are merely "ministerial."<sup>99</sup> But this overlooks the profound injury to Black people who are the victims of discrimination and have to serve on grand juries without being accorded the same dignity and respect as white grand jurors.





HOW JURIES ARE  
SELECTED

A crowd gathers to protest a grand jury's failure to charge an N.Y.P.D. officer in the death of Eric Garner, December 2014. (Craig Ruttle/Redux)



# Juror Qualifications

When potential jurors report for jury duty, they are asked whether they meet the legal qualifications for jury service.<sup>100</sup> Judges dismiss those who do not qualify, and they can also exempt people from jury service if it would be a hardship for them. Predictably, exemptions designed to protect prospective jurors from undue financial hardship tend to deny people with low incomes and limited resources the opportunity to serve on juries.<sup>101</sup>

**In most jurisdictions, employers are not required to compensate employees for jury duty.<sup>102</sup>**

And most states fail to make up the difference. Only New Mexico pays jurors a minimum wage.<sup>103</sup> Some states do not pay jurors for the first few days of jury service and some jurisdictions pay jurors as little as \$5 per day.<sup>104</sup> For many people, the cost of jury service may be “a missed rent payment or skipped meals [or] come at the cost of a job.”<sup>105</sup> Parents who are the sole caregivers for their children likewise face a daunting choice, as they cannot serve without access to

affordable childcare. People living in poverty are often unable to obtain transportation to come to court.

Individuals who overcome such obstacles may still be excused if they fail to meet the statutory requirements for jury service under state and federal law. In most states, being charged with or convicted of a criminal offense can result in lifetime exclusion from jury service.<sup>106</sup> Even misdemeanor convictions result in lifetime exclusion in Maryland, New Jersey, Oregon, Pennsylvania, South Carolina, and Texas.<sup>107</sup> Just being charged with a felony is cause for temporary exclusion in Connecticut, Kentucky, Louisiana, and Massachusetts.<sup>108</sup>

**Florida, Maryland, Texas, and Washington, D.C., exclude potential jurors who have merely been *charged* with a misdemeanor offense.<sup>109</sup>**

# Challenges “For Cause”

Potential jurors who meet the legal qualifications and are not excused because of a hardship can still be excluded if a judge finds that they cannot be fair and impartial. During this step in the jury selection process, lawyers can challenge potential jurors “for cause,” and judges have wide discretion to grant or deny these challenges.

## **Challenges for cause result in the removal of people of color at disproportionately high rates.<sup>110</sup>**

A study involving 1,300 felony trials and almost 30,000 prospective jurors throughout North Carolina found that trial judges were 30% more likely to remove prospective jurors of color for cause than white prospective jurors.<sup>111</sup>

A 2020 study of challenges for cause in nearly 400 criminal trials in Louisiana and Mississippi found that Black potential jurors were more than three times as likely as white potential jurors to be excluded by prosecutors for cause.<sup>112</sup> Louisiana prosecutors used 58.9% of their challenges for cause to remove Black prospective jurors, even though only 33% of the potential jurors were Black. In Mississippi, the numbers were even

more striking: prosecutors used 79.5% of their challenges to remove Black prospective jurors, even though only 34% of prospective jurors were Black.<sup>113</sup>

## **Racial disparities in challenges for cause are often the result of systemic racial bias in the legal system.**

Prosecutors challenge potential jurors who acknowledge having been victimized by racial bias, experiencing racial discrimination, or having concerns about the reliability of the criminal legal system.<sup>114</sup>

To ensure that Black jurors are not disproportionately removed for cause, courts must recognize the experiences of African Americans in the context of this country’s history of slavery, lynching, segregation, and racial bigotry. The perspective of people who have been disfavored in American society is not a credible basis for exclusion. Rather, their participation is essential to ensure that our system is reliable and fair.



# Lezmond Mitchell

On August 26, 2020, over the steadfast objections of Navajo leaders, the U.S. government executed Lezmond Mitchell, the first and only Native American in modern history to be sentenced to death by the federal government for a crime committed against another Native American on tribal land.<sup>115</sup>

Racial bias against Native Americans infected Mr. Mitchell's case from the start. At the government's request, his trial was moved from the Navajo Reservation to Phoenix, Arizona,<sup>116</sup> where the population was only about two percent Native American.<sup>117</sup>

The federal trial judge excluded for cause all but one of the 30 Native Americans who appeared for jury service.<sup>118</sup> Four were excluded because they spoke Navajo as their first language.<sup>119</sup> Eight were excluded because they opposed capital punishment.<sup>120</sup>

The judge asked several Native American potential jurors if they could be fair and impartial in a case with a Native American defendant, and dismissed one juror because he said he was "a traditional Navajo" who believed in the value of life.<sup>121</sup>

**Mr. Mitchell was convicted and sentenced to death by a jury made up of 11 white people and one citizen of the Navajo Nation.**<sup>122</sup>

The exclusion of Native Americans from federal jury service is not new. In 1884, the Supreme Court exempted Native Americans born on tribal lands from birthright citizenship, meaning that Native Americans were excluded from federal jury service until Congress declared them citizens in 1924.<sup>123</sup>

Around the same time, in 1885, Congress expanded federal jurisdiction over crimes committed by Native Americans on tribal land, which allowed the federal government to try offenses committed there in federal courts that excluded Native Americans from juries, rather than in tribal courts, even when both the victim and the alleged perpetrator were Native American.

## **Today, federal courts continue to disproportionately exclude Native Americans from jury service.**<sup>124</sup>

Most federal courts create their jury pools using state voter rolls that exclude Native Americans who are not registered to vote. And courts refuse to provide the resources, like transportation, that would make it possible for Native Americans living in poverty or on reservations hundreds of miles from a federal courthouse to serve on federal juries.<sup>125</sup>

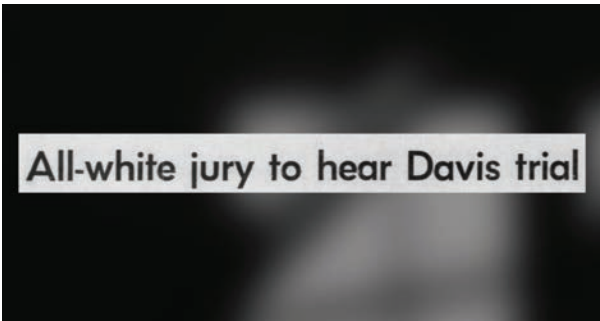


Lezmond Mitchell, a Native American man, was convicted and sentenced to death by a jury made up of 11 white people and one citizen of the Navajo Nation. He was executed by the U.S. Government in 2020 over the steadfast objections of Navajo leaders. (Auska Kee Mitchell)



# Peremptory Strikes

Prospective jurors who meet the legal requirements for jury service and remain after challenges for cause are called “qualified jurors.” There are almost always more jurors who are qualified to serve on a case than are needed for a trial. To narrow them down to the final jury that actually hears a case, prosecutors and defense attorneys use peremptory strikes. Unlike challenges for cause, peremptory strikes can be used to remove qualified jurors for “any reason at all.”<sup>126</sup>



All-white jury to hear Davis trial

Civil rights activist Angela Davis was tried before an all-white jury in 1972. Her attorneys noted they had accepted the jury because they saw “no chance of getting a [B]lack juror on the panel.” (Battle Creek Enquirer, March 15, 1972)

## **Peremptory strikes have historically and routinely been used to discriminate against Black jurors.**

The Supreme Court first addressed the discriminatory use of peremptory strikes in 1965. In *Swain v. Alabama*, the prosecutor had used peremptory strikes to remove all six Black prospective jurors, resulting in an all-white jury.<sup>127</sup>

The Supreme Court held that such blatant racial bias in a single case was not enough to prove a constitutional violation. To prove discrimination, a defendant would have to present evidence of “repeated striking of blacks over a number of cases.”<sup>128</sup> Neither Mr. Swain nor subsequent defendants could meet this high burden.<sup>129</sup>

Not until 1986 did the Court recognize that the “reality of practice, amply reflected in many state- and federal-court opinions, shows that the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors.”<sup>130</sup>



**In an attempt to make it more feasible for defendants to prove a constitutional violation, the Court in *Batson v. Kentucky* established a three-step legal standard that is still used today.**

Step one requires the defendant to challenge the strike of a juror based on racial discrimination by showing “that the facts and any other relevant circumstances raise an inference” that the prosecutor excluded the juror based on race.<sup>131</sup> This is called a “prima facie case” of discrimination, and if a prima facie case is established, the court moves to step two.

At step two, the burden shifts to the prosecutor to provide “a neutral explanation” for the strike that is not based on race.<sup>132</sup> This is an extremely low bar—the only requirement is the reason must be race-neutral on its face. The Court has been clear that the reason does not need to be persuasive or even plausible.<sup>133</sup>



Justice Thurgood Marshall, photographed on October 2, 1967, the day he was sworn in as the first Black United States Supreme Court Justice. (Getty)

Finally, at step three, the trial court must decide based on the totality of the circumstances whether the defendant has established “purposeful discrimination” or that the reason was merely a pretext for racial discrimination.<sup>134</sup> This requires the trial judge to assess the credibility of the prosecutor.

Then-Supreme Court Justice Thurgood Marshall expressed concern that this three-step process would not actually reduce racial bias in peremptory strikes.

“[T]he decision today will not end the racial discrimination that peremptories inject into

the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.” - Justice Thurgood Marshall (*Batson*, 476 U.S. at 102-03).

Like the federal statutes, constitutional amendments, and Supreme Court decisions that came before, *Batson* made clear that excluding even a single person from jury service on the basis of race is unconstitutional.

But the absence of a commitment to eliminate racially discriminatory peremptory strikes has allowed illegal racial discrimination in jury selection to persist.

# 4. Who Is Responsible for Discrimination



**For nearly 150 years, it has been a federal crime to exclude any person from a jury because of their race, but prosecutors—whose job is to enforce the law—continue to engage in illegal racial discrimination during jury selection.**



In the 35 years since the Supreme Court decided *Batson v. Kentucky*, prosecutors across America have continued to use peremptory strikes to exclude Black people and other people of color, and courts have continued to tolerate illegal exclusions despite compelling evidence of racial bias.

Numerous studies analyzing prosecutors' use of peremptory strikes reach the same conclusion—peremptory strikes unquestionably are used in a racially discriminatory manner.

For example, a recent study in Mississippi spanning a 25-year period ending in 2017 found that Black prospective jurors were four times more likely to be struck than white prospective jurors.<sup>135</sup> Similarly, an analysis of more than 5,000 Louisiana cases from 2011 to 2017 found that prosecutors struck Black jurors at 175% the

expected rate based on their proportion of the jury pool.<sup>136</sup>

In California, a study examining nearly 700 criminal cases decided by the state appellate courts between 2006 and 2018 found that prosecutors used their peremptory strikes to remove Black jurors in nearly 72% of cases while using peremptory strikes against white jurors in less than 1% of cases.<sup>137</sup>

Some defense lawyers have successfully used *Batson* to remedy racial discrimination in jury selection, especially in death penalty cases.<sup>138</sup> But prosecutors, defense lawyers, trial judges, and appellate courts largely remain indifferent to the need for representative juries and have shown no real commitment to enforcing clearly established laws against racial discrimination in jury selection.



Illustration by Cathryn Virginia

# Prosecutors

The *Batson* decision did not deter prosecutors from engaging in illegal race-based peremptory strikes so much as it incentivized them to find ways to keep striking Black jurors without triggering a *Batson* objection.

## **Many prosecutors have been explicitly trained to provide “race-neutral” reasons for strikes against people of color.**

For example, the North Carolina Conference of District Attorneys hosted training sessions in 1995 and 2011 to teach prosecutors how to strike Black prospective jurors without triggering judicial scrutiny.<sup>139</sup>

A 2004 Texas District and County Attorney Association trial skills course encouraged prosecutors to offer reasons like “watching gospel TV programs” and “views in favor of the O.J. Simpson verdict” to justify strikes against Black jurors.<sup>140</sup>

The 2016 edition of a prosecutors’ training manual used in Santa Clara County, California, provides a 30-page list of 77 justifications that reviewing courts have deemed acceptable

reasons for striking people of color, including the prospective juror’s “clothing, hairstyle, or other accoutrements.”<sup>141</sup>

Litigation guides continue to advise prosecutors to avoid jurors who are the same race as the defendant and encourage reliance on racial stereotypes in jury selection.<sup>142</sup>

## **Prosecutors continue to assert justifications for removing Black jurors that are clearly pretexts for discrimination and are often rooted in pernicious racial stereotypes.**

It is not uncommon for prosecutors to assert that they struck a Black juror because of “low intelligence” or an alleged lack of education.<sup>143</sup> In a Louisiana case, the prosecutor commented that a Black prospective juror was “too stupid to live much less be on a jury.”<sup>144</sup> In a recent trial in Maine, the prosecutor asserted that he struck the sole potential juror of color because he had an 11th-grade education.<sup>145</sup>

Low intelligence is a negative stereotype that has been used throughout our nation's history to illegally exclude African Americans from jury service and is therefore "a particularly suspicious explanation."<sup>146</sup>

In *Neal v. Delaware*, the Supreme Court found that Delaware's statute, which resulted in the uniform exclusion of African Americans, violated the Fourteenth Amendment, noting that the state court indulged in "a violent presumption... that such uniform exclusion of [African Americans] from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience or moral integrity, to sit on juries."<sup>147</sup>

Similarly, prosecutors claim to have struck Black jurors because they are unemployed or "unskilled." A defendant in Texas was tried by an all-white jury after the prosecutor removed all three Black jurors because their employment involved "unskilled labor," even though two had college degrees.<sup>148</sup>

Prosecutors often say they struck Black jurors because they lived in a "high crime area," which is generally used as code for a predominantly Black neighborhood.<sup>149</sup>

In a recent case in Baltimore, the prosecutor said he used two peremptory strikes to remove Black jurors because they lived in a "bad zip code."<sup>150</sup> A prosecutor in Kentucky asserted that he struck a Black prospective juror because her nephews lived in the same predominantly Black housing project as the defendant, even though there was no indication that she or her nephews actually knew the defendant.<sup>151</sup>

## **Prosecutors frequently offer unverifiable assertions about Black potential jurors' appearance or demeanor to justify their strikes.**

A study of illegal racial discrimination in California courts found that prosecutors used racial stereotypes about demeanor to justify peremptory strikes in more than 40% of cases.<sup>152</sup> In one Georgia case, the prosecutor's only reason for removing a Black prospective juror was his vague assertion that he was unable to "establish a rapport" with the juror.<sup>153</sup>

In a Kentucky case, the prosecutor asserted that he removed a Black juror because the juror did not laugh at his jokes.<sup>154</sup> A prosecutor explained in a different Kentucky case that he had been "watching [an African American woman] from the minute she came into the courtroom" and struck her because her body language changed when she learned the defendant was "a black man accused of doing this horrible thing to a white man."<sup>155</sup>

## **Appearance-based reasons are often rooted in troubling racial stereotypes.**

In a Louisiana case, the prosecutor claimed that a Black prospective juror "looked like a drug dealer."<sup>156</sup> An Alabama prosecutor's reasons for striking Black prospective jurors included wearing sweatpants, having gold teeth, and wearing an earring.<sup>157</sup>



A prosecutor in North Carolina struck a prospective juror of color because he was “heavily tattooed” and “attired in baggy jeans hanging low.”<sup>158</sup> A New York prosecutor asserted that he struck a Black woman because she was too “outspoken.”<sup>159</sup>

## **There are rarely consequences for prosecutors who engage in racially discriminatory jury selection.**

The Civil Rights Act of 1875 made it a federal crime to exclude any citizen from a jury on the basis of race.<sup>160</sup> No one has ever been convicted under this statute.<sup>161</sup>

Instead, prosecutors with proven track records of discriminatory conduct are regularly re-elected. After the Supreme Court found that Mississippi district attorney Doug Evans illegally removed Black prospective jurors in multiple capital prosecutions of Curtis Flowers, he was re-elected to an eighth term in 2019.<sup>162</sup>

Engaging in illegal racial discrimination in jury selection also violates the ethical standards that attorneys are sworn to follow. But recent studies have failed to identify a single case of a prosecutor being found guilty of an ethics violation for violating *Batson*.<sup>163</sup>



After Mississippi district attorney Doug Evans illegally removed Black prospective jurors in multiple capital prosecutions of Curtis Flowers, he was re-elected to an eighth term in 2019. (Taylor Kuykendall/Associated Press, The Greenwood Commonwealth)

# Courts

EJI surveyed all 50 states and found abundant evidence of courts' indifference to racial bias in jury selection, even in cases with glaring levels of exclusion.

**The highest courts in 32 states have considered hundreds of illegal racial discrimination claims over the last decade, and not one found that a prosecutor violated the Constitution by removing a juror of color.**<sup>164</sup>

Instead, appellate courts in several states have *reversed* lower court findings that prosecutors engaged in illegal racial discrimination.<sup>165</sup>

The Georgia Supreme Court has consistently failed to find that Black prospective jurors were discriminated against, even where the prosecution used 80% of its strikes to remove Black jurors.<sup>166</sup> At the same time, the court has repeatedly found that white jurors were victims of illegal racial discrimination during jury selection.<sup>167</sup>

Courts in other states have likewise upheld convictions where the prosecution used all of its peremptory strikes against people of color or struck every person of color from the jury.<sup>168</sup>

In reviewing a 2014 case, the Mississippi Supreme Court acknowledged that the prosecutor "struck African-American members at a rate more than twice as often as the rate at which African Americans appeared in the [jury] pool" but still refused to find discriminatory conduct.<sup>169</sup> Last year, the Alabama Court of Criminal Appeals found no racial bias where the prosecutor used 80% of his strikes to remove Black prospective jurors even though African Americans comprised less than half of the qualified venire.<sup>170</sup>

In an Arkansas case, a defendant was tried by an all-white jury after the prosecutor struck all three Black potential jurors, including one Black woman who was removed because the prosecutor wondered if she could "appreciate the gravity of a child-rape case" given that she did not have any children.<sup>171</sup>



*“When the trial judge, as a gatekeeper, enforces a discriminatory peremptory challenge, the court itself becomes a party to racism, and has elected to use its power and prestige to enforce discrimination.”*

**- Former Louisiana Supreme Court Chief Justice  
Bernette Johnson**

Alex v. Rayne Concrete Serv., 951 So.2d 138, 158 (La. 2007)  
(Johnson, J., concurring in part and dissenting in part).

Instead of performing their clear constitutional duty to eliminate even the appearance of racial bias in a jury trial, some courts evince callousness towards Black potential jurors, who are insulted, humiliated, and excluded from jury service, and express disdain for defendants who protest racially biased jury strikes.

## **Courts refuse to find discrimination even when confronted with evidence that the prosecutor treated Black and white jurors with similar characteristics differently.**

In case after case, prosecutors have given reasons for excluding Black jurors that were not applied to white jurors who served on the jury.<sup>172</sup> The Missouri Supreme Court found no racial discrimination where a Black prospective juror who asked questions about the different degrees of murder was struck for showing too much “initiative,” even though a white juror who asked similar questions was not removed.<sup>173</sup>

Similarly, the Texas Court of Criminal Appeals upheld a finding of no racial bias where the prosecutor struck a Black prospective juror for needing an “enormous amount of evidence” to find a defendant showed future dangerousness but did not strike a white juror who needed to be “99.999’ [percent] sure” or another white juror who needed to be “really convinced.”<sup>174</sup>

The Louisiana Supreme Court building.







**Some judges have recognized that it is too easy for prosecutors to avoid the requirements of *Batson* and that courts too often fail to remedy illegal racial discrimination.**

Justice Elsa Alcala of the Texas Court of Criminal Appeals recently wrote:

If any implausible or outlandish reason that was never even discussed with a prospective juror can be accepted as a genuine race-neutral strike by a trial court, as here, and if appellate courts simply defer to trial courts, as here, then *Batson* is rendered meaningless, and it is time for courts to enact alternatives to the current *Batson* scheme to better effectuate its underlying purpose.<sup>175</sup>

In a dissenting opinion in 2020, a presiding justice of the Mississippi Supreme Court wrote that the court had shown no interest in holding prosecutors accountable for striking Black jurors. “A deferential standard of review is not (and should not be) a rubber stamp on trial court decisions,” he wrote, “yet, that is how this Court has wielded it in *Batson* cases.”<sup>176</sup>

## Courts invoke procedural rules to avoid reviewing the merits of racial discrimination claims.

State and federal appellate courts have responded to *Batson* by using procedural rules to prevent review of these claims.

Many state appellate courts will not address a claim of illegal jury discrimination if the trial lawyer did not object at trial or on appeal.<sup>177</sup> In some states, one objection is not enough—Florida and Maryland require multiple objections before a *Batson* claim can be reviewed on appeal.<sup>178</sup>



Robert Tarver was sentenced to death by a jury of 11 white jurors and one Black juror in Russell County, Alabama, after the prosecutor used 13 of his 14 strikes to remove African Americans. At the time of the trial, Russell County was nearly 40% Black. Mr. Tarver was executed in the electric chair in 2000.

Robert Tarver, a 36-year-old Black man, was convicted and sentenced to death for the murder of a white convenience store owner in Russell County, Alabama, despite significant evidence that his co-defendant was responsible for the shooting.<sup>179</sup>

Although Russell County was nearly 40% Black at the time of the trial, Mr. Tarver was tried by a jury of 11 white jurors and one Black juror after the prosecutor used 13 of his 14 strikes to remove African Americans.<sup>180</sup>

The assistant district attorney later admitted that the prosecution intended to exclude jurors on the basis of race.<sup>181</sup> The trial court found the prosecutor violated *Batson*, but the appeals court refused to grant relief because the trial lawyer had failed to object at trial and did not properly raise the issue on appeal.<sup>182</sup> Mr. Tarver was executed in the electric chair in 2000.<sup>183</sup>

In case after case, issues of racial bias and illegal discrimination go unaddressed and unremedied because, like state appellate courts, federal courts refuse to review claims of racially biased jury selection that were not raised in state court, even when there is strong evidence of discriminatory conduct.

After the prosecutor in a Texas capital case struck every single prospective juror of color, a 20-year-old Black man was convicted and sentenced to death by a nearly all-white jury.<sup>184</sup> In rejecting James Broadnax’s claim of racially discriminatory jury selection, the federal courts said procedural rules prevented them from considering spreadsheets that the District Attorney’s Office created to record the race and ethnicity of each prospective juror.<sup>185</sup> The same prosecutor’s office had previously been rebuked by the Supreme Court for illegal racial discrimination during jury selection.<sup>186</sup>



Death Row Unit at Holman Prison in Atmore, Alabama. The State of Alabama executed Robert Tarver even though the prosecution admitted they intentionally excluded Black people from his jury.

Despite the importance of eliminating discriminatory jury selection in the courtroom, some jurisdictions subject racial bias claims to *more* onerous procedural requirements than all other claims challenging evidentiary rulings or improprieties at trial.<sup>187</sup>

## **Excluded jurors frequently have no remedy for challenging discrimination.**

The Supreme Court has recognized that individuals excluded from jury service on the basis of race are “as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion.”<sup>188</sup> But numerous obstacles prevent excluded jurors from challenging racial discrimination in jury selection.

Prosecutors are protected by absolute immunity from lawsuits seeking money damages for their past actions during a trial, including racial discrimination.<sup>189</sup> This means that jurors who have been discriminated against cannot receive compensation, and prosecutors do not have to worry about paying damages for their illegal behavior.

Courts have also denied excluded jurors the right to sue to prevent racial discrimination in jury selection. In 2011, Black citizens who had been excluded from jury service in Houston and Henry counties in Alabama brought a suit to stop then-District Attorney Doug Valeska from engaging in racial discrimination in the exercise of peremptory strikes.<sup>190</sup> The federal courts accepted the truth of the allegations about the prosecutor’s racially discriminatory conduct over many years but dismissed the lawsuit, ruling that federal courts could not intervene in state proceedings.<sup>191</sup>

Other courts have reached similar conclusions.<sup>192</sup> These rulings have left illegally excluded jurors with no way to vindicate their rights.

# Defense Lawyers

Prosecutors and judges are duty bound to enforce constitutional prohibitions against racial discrimination in jury selection, but the Supreme Court's *Batson* decision puts the primary burden for policing racially biased strikes on defense lawyers.<sup>193</sup>

If a defense lawyer fails to object to a prosecutor's racially biased strike and does not persuade the judge by presenting some evidence of illegal discrimination, the discrimination is ignored: the prosecutor does not have to explain the strike, the trial judge does not have to decide if the strike was racially biased, and in most jurisdictions, appellate courts do not have to address the claim on appeal.<sup>194</sup>

In the majority of criminal cases that involve indigent defendants, defense lawyers often are overwhelmed, overworked, and underfunded.<sup>195</sup> Rarely do they have the resources or training necessary to effectively raise and prove a claim of racial discrimination.<sup>196</sup>

**Generally, defense lawyers are reluctant to accuse prosecutors of racial bias and many share prosecutors' and judges' indifference to the value of diverse juries.**

Most defense lawyers are white.<sup>197</sup> They work in judicial systems where they are in court with the same prosecutors and judges every day. And they are not immune to implicit biases that make them less likely to identify and challenge racial bias in the courtroom.

In fact, defense lawyers are sometimes the perpetrators of racial discrimination.

In one Alabama capital trial, the judge asked whether defense counsel wished to raise an objection to the district attorney's removal of African Americans from jury service.<sup>198</sup> Instead of objecting, defense counsel sided with the prosecutor. His client, a young Black man, was convicted and sentenced to death by 11 white jurors and one Black juror in a county that was more than a quarter Black.<sup>199</sup> The prosecutor's strikes against African American jurors were challenged on appeal, but the Alabama appellate court relied on the defense attorney's concession and denied relief.<sup>200</sup>

In a criminal case out of Mobile County, Alabama, the defense lawyer illegally removed African Americans from the jury. The defendant challenged his lawyer's discriminatory conduct on appeal, but the Alabama appellate court failed to find intentional discrimination. Instead, it concluded, without evidence, that the defense attorney's racially discriminatory actions were "a matter of trial strategy."<sup>201</sup>



# Curtis Flowers



Curtis Flowers and his sister, Priscilla Ward, leaving the Winston Choctaw Regional Correctional Facility in Louisville, Mississippi, in December 2019. (Rogelio V. Solis/AP)

Curtis Flowers, who is African American, was convicted of the murder of four employees at a furniture store in Winona, Mississippi, and spent nearly 24 years in solitary confinement on death row at Mississippi's Parchman Prison.<sup>202</sup>

The State's case against Mr. Flowers was entirely circumstantial, largely based on testimony regarding his whereabouts on the morning of the murders and alleged confessions he made to jailhouse informants that were later recanted.<sup>203</sup> Many of the witnesses were threatened with jail or promised leniency in exchange for their testimony.<sup>204</sup>

In his relentless pursuit of a death sentence for Curtis Flowers, district attorney Doug Evans—elected in 1991 and re-elected to his eighth term in 2019—repeatedly violated *Batson* by removing nearly all of the Black jurors at each of the six trials that occurred over the course of 23 years.<sup>205</sup>

As the Supreme Court put it: "The State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury."<sup>206</sup>

At the first trial in 1997, Mr. Evans removed every Black juror. An all-white jury convicted Mr. Flowers and sentenced him to death. The Mississippi Supreme Court overturned the conviction based on numerous instances of prosecutorial misconduct, including reliance on evidence not introduced at trial.<sup>207</sup>

At the second trial in 1999, Mr. Evans again used his peremptory strikes to remove all five qualified Black jurors. Although the trial judge found that Mr. Evans had violated *Batson*, the judge simply returned one of the struck Black jurors to the jury, and the jury of 11 white people and one Black person convicted Mr. Flowers and

sentenced him to death.<sup>208</sup> Again, the Mississippi Supreme Court overturned the conviction due to the prosecutor's misconduct.<sup>209</sup>

At the third trial in 2004, Mr. Evans used all 15 of his strikes against Black prospective jurors; the lone Black juror on the otherwise all-white jury was seated after the State ran out of peremptory strikes.<sup>210</sup> In finding a *Batson* violation, the Mississippi Supreme Court recognized that the case presented "as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge."<sup>211</sup>

The fourth trial took place in 2007, and once again, Mr. Evans used all 11 peremptory strikes against Black jurors but did not have enough strikes to remove all of the Black prospective jurors.<sup>212</sup> The jury of seven white jurors and five Black jurors could not reach a unanimous verdict, and a mistrial was declared.<sup>213</sup>

At the fifth trial in 2008, a jury of nine white jurors and three Black jurors could not reach a unanimous verdict, resulting in a second mistrial.<sup>214</sup> Remarkably, the hold-out juror, who was Black, was arrested and charged with perjury for purportedly lying during jury selection, although the charges were later dropped.<sup>215</sup>

In the sixth and final trial, Mr. Evans used five of his six peremptory strikes against Black prospective jurors, leaving one Black juror and 11 white jurors.<sup>216</sup> The Supreme Court found that Mr. Evans had violated *Batson*, noting that over the course of six trials, he struck 41 of the 42 qualified Black prospective jurors. He "appeared to proceed as if *Batson* had never been decided," the Court observed.<sup>217</sup>

Only after this sixth reversal did the State drop its case against Mr. Flowers, who has always maintained his innocence. He was released from prison in 2020.<sup>218</sup>

# 5. Harm Caused by Racially Biased Jury Selection



**Representative juries are indispensable to reliable, fair, and accurate trials, especially in serious criminal cases. The absence of racial diversity on juries leads to outcomes that are less reliable, inflicts injury on people of color who are excluded, and undermines the integrity of the entire criminal legal system.<sup>219</sup>**



# Wrongful Convictions and Excessive Sentences

In order to serve “as a vital check on the wrongful exercise of power by the State and its prosecutors,” juries must require the State to prove that the defendant—who is supposed to be presumed innocent—is guilty beyond a reasonable doubt.<sup>220</sup>

**Compared to representative juries, however, all-white juries spend less time deliberating, consider fewer perspectives, and make more mistakes.<sup>221</sup>**

Black people are often treated unfairly in the criminal legal system. Our country’s long history of racial injustice has led to a presumption that people of color, particularly Black people, are suspicious and dangerous. Implicit bias has been shown to affect all aspects of the criminal legal system from policing to charging decisions.<sup>222</sup> These strong unconscious associations between Blackness and criminality increase the risk of wrongful convictions and unfair sentences.

All-white and nearly all-white juries are less likely to hold prosecutors to their burden of proof, especially when the defendant is not white, because they apply a presumption of guilt rather than a presumption that the defendant is innocent.



A young boy holds a sign that reads “Am I next?” while attending a protest after the death of George Floyd. (Christian Monterrosa/AP Photo)

Research demonstrates that white jurors are more likely to view Black defendants as cold-hearted, remorseless, and dangerous.<sup>223</sup> They also tend to treat Black defendants more punitively than white defendants.<sup>224</sup>

In contrast, racially representative juries engage in a more thoughtful and deliberative fact-finding process. Studies have found that they consider more factual information, are more likely to discuss missing evidence, and are more willing to discuss issues that are often overlooked by all-white juries, like racial profiling.<sup>225</sup>

Likewise, representative juries are better able to assess the reliability and credibility of witness testimony, evaluate the accuracy of cross-racial identifications, and avoid presuming the defendant is guilty.<sup>226</sup>

These improvements are seen only when there is meaningful representation on the jury. Token diversity does not increase the quality of deliberations, because African Americans serving on white-dominated juries, especially when they are in a “minority of one,” are more vulnerable to the formidable pressure exerted by the majority.<sup>227</sup>

Sentencing disparities also decline when juries are not skewed by illegal racial discrimination.<sup>228</sup> The more white people there are on a jury, the more harshly a Black defendant will be sentenced—especially if the victim is white.<sup>229</sup> Latino defendants also receive longer sentences from majority-white juries.<sup>230</sup>



A man sentenced to death is strapped into the electric chair at Sing Sing Correctional Facility in New York, circa 1900. (William M. Van der Weyde)

In cases where the death penalty is a possible punishment, the absence of meaningful representation on juries shapes sentencing outcomes, making them less reliable and credible.<sup>231</sup> The effect is greatest for non-white defendants, as studies show that less representative juries convict and sentence Black defendants to death at significantly higher rates than white defendants.<sup>232</sup> White jurors are also less likely to consider critical mitigating evidence supporting a life sentence, rather than the death penalty, for Black defendants.<sup>233</sup>

## Recent exonerations of condemned individuals across the country highlight erroneous convictions rendered by juries from which people of color were unlawfully excluded.

In 1976, Johnny Lee Gates, a Black man, was charged with the robbery, rape, and murder of a white woman.<sup>234</sup> Prosecutors tracked the race of prospective jurors, made derogatory comments about Black people, and struck all prospective Black jurors.<sup>235</sup> The all-white jury deliberated for less than two hours before returning a guilty verdict and took less than an hour to impose the death penalty.<sup>236</sup>

In 2018, DNA testing proved that Mr. Gates was not the killer. His conviction was overturned and, in 2020, he was released after spending 43 years in prison and 26 years on death row.<sup>237</sup>



Johnny Lee Gates walks out of the Muscogee County Jail on May 15, 2020, after serving more than 43 years for a crime that he did not commit. (Georgia Innocence Project)





Glenn Ford, photographed in New Orleans in 2014 shortly after being freed from death row. Mr. Ford passed away from lung cancer less than 16 months after his release. (Henrietta Wildsmith/The Shreveport Times)

In 1984, Glenn Ford, a Black man, was charged with the robbery and murder of a white man in Shreveport, Louisiana.<sup>238</sup>

There was no physical evidence linking Mr. Ford to the crime. The State's case was based primarily on the testimony of a witness who recanted on the stand and admitted the police coerced her to fabricate her testimony. The all-white jury deliberated for less than three hours before returning a guilty verdict.<sup>239</sup>

When someone else confessed to committing the murder, Mr. Ford was released after spending 29 years on death row. The prosecutor

in the case admitted that he purposefully struck all Black prospective jurors from Mr. Ford's jury, apologized for his role in Mr. Ford's prosecution, and became an advocate for abolition of the death penalty.<sup>240</sup>

Representative juries not only ensure representation of minority voices, but "also motivate all jurors to perform their duty diligently and thoughtfully regardless of the defendant's race."<sup>241</sup> When juries represent a fair cross-section of the community, as the Constitution requires, the reliability and accuracy of criminal trials are improved and the integrity of the entire legal system is upheld.<sup>242</sup>

# Harm to Excluded Jurors

Discriminatory jury selection violates the constitutional rights of prospective jurors and can cause them lasting harm.<sup>243</sup> People of color have reported for jury duty only to be targeted by harassment, subjected to unnecessary and embarrassing questioning, and confronted with harmful stereotypes. These humiliating experiences “reinvoke a history of exclusion from political participation” and send the message that people of color “are presumed unqualified by state actors to decide important questions.”<sup>244</sup>

Black men and women have long suffered the indignity of being turned away from jury service because of their race. Black Americans have been falsely labeled biased or unfair, characterized as unable or unwilling to follow the law, or otherwise deemed unworthy of exercising the full rights of citizenship.<sup>245</sup> Many prospective jurors who have been excluded have overcome racial terrorism and segregation only to face discrimination in their county courthouse.



A photo of segregated drinking fountains at the Dougherty County Courthouse in Albany, Georgia. (Danny Lyon/Library of Congress)

**Citizens excluded from jury service on the basis of race have been burdened with profound and lasting pain and humiliation.**<sup>246</sup>

Timothy Foster, who is Black, was convicted of murder and sentenced to death by an all-white jury in Georgia after the prosecutor struck every eligible Black prospective juror.<sup>247</sup> Trial

notes discovered years later revealed that the prosecutor circled and highlighted the names of Black prospective jurors, marked them with the letter “B,” and placed them on a list of “Definite NO’s.”<sup>248</sup> Under one of the names, the prosecutor wrote, “If it comes down to having to pick one of the black jurors, this one might be okay.”<sup>249</sup>

One of the Black people struck from Mr. Foster’s jury was Marilyn Garrett.<sup>250</sup> Ms. Garrett attended segregated schools in the 1950s and 1960s in Floyd County, Georgia.<sup>251</sup> A mother of two, she was working as a Head Start teacher’s aide and in a textile factory at the time of the trial. She later recalled that when she reported for jury duty the prosecutor “ask[ed] me over and over why I had two jobs.”<sup>252</sup> Ms. Garrett felt she had been treated like a criminal during jury questioning. “I didn’t expect to be treated like that,” she said. “It was really humiliating.”<sup>253</sup>

The prosecutor claimed he removed Ms. Garrett, 34, because she was too close in age to Mr. Foster, who was 18 at the time of the alleged crime.<sup>254</sup> Tellingly, the prosecutor did not strike a 21-year-old white man who was eventually seated on the jury.<sup>255</sup> The harm of this experience persisted long after Ms. Garrett was removed from Mr. Foster’s jury. “After that,” she said, “I felt like I never wanted to be on a jury [again] because of the way I was treated.”<sup>256</sup>



Melodie Harris was struck from a jury in Lee County, Mississippi, where she had lived for a decade, after a prosecutor claimed she had “no ties to the community.” (Deondra Scott)

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.<sup>257</sup> Ms. Harris knew that she and other Black jurors had been treated unfairly. “It was just so blatant,” she said.

Ms. Harris returned to the courthouse every day to observe the trial of Alvin Robinson, a Black man who was chased and assaulted by a white man following a traffic altercation but was charged with murder for retaliating in fear.<sup>258</sup>

Ms. Harris was aghast as she watched three jurors sleep through portions of the trial before voting guilty.

A former bank teller who had worked two jobs most of her life, Ms. Harris considered herself a supporter of law enforcement. But watching the discriminatory tactics used to ensure Mr. Robinson would go to prison shook her faith in a system she wanted to trust. “I thought justice was supposed to be blind,” she said. But she has not been able to square that belief with what she observed in Mr. Robinson’s case.<sup>259</sup>





Brenda Greene was struck from a capital jury in Alabama after a prosecutor falsely portrayed her as being actively involved in drug dealing. (Deondra Scott)

Brenda Greene and her husband Homer worked hard their whole lives at a small-town textile mill in Talladega County, Alabama. In his 50s, Mr. Greene took on a second job at McDonald's. Despite their years of hard work, the Greens were falsely portrayed as actively involved in drug dealing by a prosecutor grasping for reasons to keep Black citizens off a capital jury.

The prosecutor said he struck Mrs. Greene because her husband sold drugs and was involved with stolen property, and that she was friends with drug dealers prosecuted by his office.<sup>260</sup> Mrs. Greene was shocked by these false

accusations. "You're kidding me! That's a lie! At our house?" she said after reading the court record. Mrs. Greene recalled the only contact she actually had with a drug investigation was when police were chasing a suspect through her neighborhood and she pointed in the direction he fled.<sup>261</sup>

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# People Have Been Executed Despite Evidence of Racial Bias



Keith Tharpe holding his grandchild. (Georgia Resource Center)

Courts have repeatedly upheld convictions and allowed executions to go forward despite evidence of illegal racial discrimination.

In 2016, the State of Georgia executed Kenneth Fults, a Black man who challenged the legality of his conviction and sentence after it was established that one of the jurors held deeply racist views.

The juror told an investigator after the trial, “I don’t know if he ever killed anybody, but that n— got just what should have happened.”<sup>262</sup> And “[o]nce he pled guilty, I knew I would vote for the death penalty because that’s what that n— deserved.”<sup>263</sup>

Federal courts refused to address the merits of Mr. Fults’s claim because his lawyer did not properly object in state court. The claim was deemed “procedurally defaulted” and dismissed.<sup>264</sup>

Keith Tharpe, a Black man with no previous criminal record, was charged with shooting and killing a woman while he was under the influence of drugs. Investigators discovered after his trial that a juror’s racial bigotry informed his decision to sentence Mr. Tharpe to death.

“[T]here are two types of black people: 1. Black folks and 2. N—s,” the juror said. Because Mr. Tharpe was the latter type, he “should get the electric chair.” The juror said in a sworn statement that “after studying the Bible, I have wondered if black people even have souls.”<sup>265</sup>

Mr. Tharpe appealed his conviction and death sentence, arguing that racial bias had tainted the jury’s deliberations in his case. Every court, including the Supreme Court, refused to consider the merits of the claim because they said his lawyers discovered the juror’s racism

too late.<sup>266</sup> Mr. Tharpe died in prison in 2020 before the state could carry out his execution.

Napoleon Beazley, Brian Baldwin, Robert Tarver, and Harvey Green are among scores of other condemned prisoners who were executed despite dramatic evidence that racial bigotry contributed to their convictions and death sentences. In each case, federal courts refused to address evidence of racial bias because of procedural defaults.

In November 2020, Orlando Hall was executed by the U.S. government despite significant evidence that illegal racial discrimination during jury selection resulted in an all-white jury.<sup>267</sup> In December 2020, the federal government executed Brandon Bernard even though one of the prosecutors from his trial acknowledged that the nearly all-white jury may have been influenced by racial bias.<sup>268</sup>



Brandon Bernard holds a picture of his family up in a photo taken by his defense team. Mr. Bernard was convicted and sentenced to death by a jury with 11 white jurors. At the time of his execution on December 10, 2020, five of the nine surviving jurors had stated that they no longer believed the death penalty was appropriate in his case.

# Compromising the Integrity of the System





Juries made up of ordinary citizens are critical to ensure public confidence in the fairness of the legal system.

The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset.<sup>269</sup>

Excluding people of color from jury service causes serious collateral consequences. The credibility, reliability, and integrity of the legal system are compromised when there is even an appearance of bias or discrimination.<sup>270</sup> Tolerating discrimination “invites cynicism respecting the jury’s neutrality and its obligation to adhere to the law.”<sup>271</sup>

The lack of representative juries in cases involving allegations of racial bias has frequently triggered outrage in communities where serious

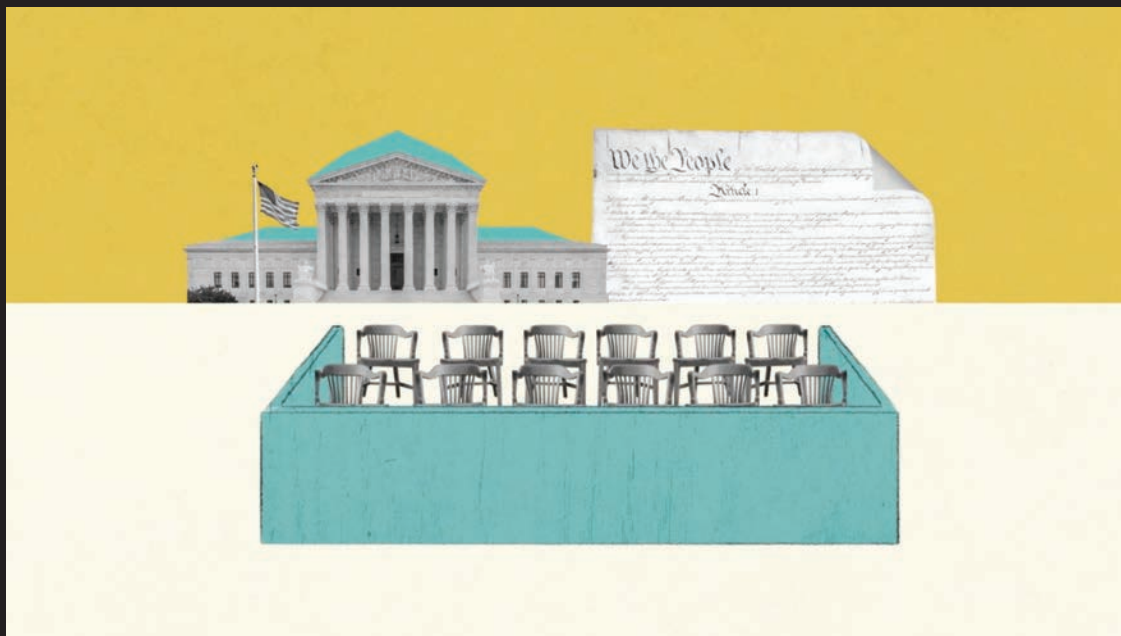
concerns about the fairness and reliability of the criminal legal system have persisted for decades. In a 2019 survey, 87% of Black adults expressed their opinion that Black people are treated less fairly than white people by the criminal legal system, and 61% of white people agreed.<sup>272</sup>

## **It is difficult for the public to have confidence in the fairness of verdicts when juries do not represent their communities.**

A system that tolerates racial bias in jury selection and fails to provide remedies for the victims of racial bias undermines the “very foundation of our system of justice—our citizens’ confidence in it.”<sup>273</sup>

# 6. What Needs to Happen

**Now, more than ever, it is clear that we must confront racial bias in the courts. We can no longer accept racial bias in jury selection as “unfixable.” Lawmakers and public officials can—and must—take action now to eliminate illegal racial discrimination in jury selection.**



## Recommendation One

# Remove Procedural Barriers to Reviewing Claims of Racial Bias in Jury Selection



The Supreme Court has made the prohibition against racial discrimination involving jurors “a visible, and inevitable, measure of the judicial system’s own commitment to the commands of the Constitution. The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition.”<sup>274</sup> But in case after case, issues of racial bias and illegal discrimination go unaddressed and unremedied because federal and state laws create procedural barriers that block merits review of these fundamental errors.

In state courts, the general rule is that claims can be reviewed on appeal only if they were preserved with a contemporaneous objection at trial. If the defense lawyer failed to object to discrimination during jury selection or the trial court failed to intervene, state appellate courts will refuse to address these claims on appeal.

When a defendant loses a challenge to discriminatory jury selection in the state courts, federal courts are required to defer to state court decisions unless those decisions are unreasonable.<sup>275</sup> The Supreme Court has

said that this standard is “difficult to meet”<sup>276</sup> and interpreted that language to bar any relief in federal court unless there was an “extreme malfunction[] in the state criminal justice system[]”<sup>277</sup> about which no fair-minded judge could possibly disagree. This requirement has severely restricted enforcement of basic constitutional rights.

It is critically important to require state courts to review *on the merits* any claim of illegal discrimination during jury selection, whether or not an objection was made in the trial court. Likewise, it is imperative that federal courts be required to review *on the merits* any claim that is based on illegal racial discrimination.

States should also remedy the lingering injustice of racially discriminatory convictions by retroactively applying the rule of *Batson* to cases that were final before *Batson* was decided.<sup>278</sup>

## Recommendation Two

# Commit to Fully Representative Jury Pools

It is critical that state and federal courts adopt policies and procedures to ensure that people of color are fully represented in the source pools from which jurors are selected.

Jurisdictions should rely on multiple source lists that accurately represent the proportion of Black citizens and citizens of color in the population.<sup>279</sup>

The National Center for State Courts recommends that a master jury list should include at least 85% of the jury-eligible population in a jurisdiction.<sup>280</sup> To meet this threshold, jurisdictions should use additional

juror source lists, such as driver's license or state identification card databases, records of individuals who have applied for or received unemployment insurance, lists of income tax filers, or child support payor and payee records.<sup>281</sup>

Representation through more inclusive and accurate source lists is a necessary first step, but other strategies should be employed to ensure that a representative number of jurors are summoned and actually appear at the courthouse for service.

Court systems must commit to frequent renewal of the source data to improve the accuracy of the information. For example, courts should update the master jury wheel annually<sup>282</sup> and regularly submit names on the master jury list to a change of address database for correction.<sup>283</sup> Such measures are straightforward and cost-effective ways to increase representation in the jury pool.<sup>284</sup>

**Jurisdictions are obligated to take all necessary steps to ensure that the jury accurately represents the community.**

Some have adopted weighted summons procedures that use geography as a proxy for racial or ethnic representation. Such mechanisms may involve dividing the jury district into smaller geographic units and requiring proportional representation of jurors from each ZIP code or geographic unit.<sup>285</sup>

Courts have also implemented targeted ZIP code mailings to send a replacement summons to an address in the same ZIP code or geographic unit.<sup>286</sup> Local judges may be required to take action in individual cases to ensure a representative jury.<sup>287</sup>



## Recommendation Three

**Create  
Accountability  
for Decision  
Makers Who  
Engage in Racially  
Discriminatory  
Jury Selection**





One of the most vexing aspects of racial discrimination in jury selection is *impunity*. Even when a court finds that a prosecutor has intentionally and illegally discriminated on the basis of race in an individual case, the prosecutor rarely suffers any adverse consequence.

Section 1983 of the U.S. Code is a federal law that provides citizens a right to sue state officials whose actions violate their constitutional rights. Federal courts have created procedural barriers to protect prosecutors from federal oversight of their jury selection tactics and shield them from financial liability.

A finding that a prosecutor or attorney has excluded people from jury service on the basis of race or gender must be taken seriously.

States should enact legislation to create a state law private right of action for illegally excluded jurors, especially those who are wrongfully insulted and demeaned by state officials.

Likewise, Congress should reassess doctrines of immunity for state officials under Section 1983 and remove the procedural barriers created by federal courts. Congress should also create a federal private right of action to give illegally excluded jurors the power to file a civil challenge under federal law and seek financial penalties against prosecutors for engaging in racially discriminatory jury selection.

## Recommendation Four

**When Faced with  
Clear Evidence  
of Racial Bias,  
Courts Should  
Adopt a Meaningful  
Presumption of  
Discrimination**



In the 21st century, legal standards make it difficult to remedy racial bias even when it is clear that it exists.

Courts should adopt new standards that reflect this challenge and provide appropriate remedies. For example, courts should end the practice of using the “absolute disparity” between the representation of the group in the jury pool and the representation of the group in the population to measure whether a colorable claim of racial bias exists.<sup>288</sup>

Likewise, judges should be required to intervene and address racial bias, even in the absence of an objection. Finally, a prosecutor’s history of discriminatory conduct should trigger more scrutiny by both trial courts and appellate courts in determining whether racial bias exists.

# Examples From Across the Country

## Increasing the Diversity of Jury Pool Lists and Creating New Summons Procedures

Courts have used additional source lists to address underrepresentation in jury pools. To increase Native American representation on juries, North Dakota's legislature amended the state's jury selection procedures in 2019 to permit court officials to use tribal identification and enrollment records.<sup>289</sup>

Nevada amended its jury selection law in 2017 to mandate the use of public utility records, which extensive research showed would most effectively include people of color, young people, and rural residents in jury pools.<sup>290</sup>

## Adopting a Less Burdensome Test for Evaluating Underrepresentation

Over the past decade, courts have recognized the utility and feasibility of replacing or supplementing the absolute disparity test with an alternative method.

Last year, at the urging of the NAACP, Iowa adopted a standard deviation calculation to assess race-based exclusion from jury pools. The Iowa test asks whether statistics support a finding that a disparity in representation occurred due to random chance. Iowa courts find a constitutional violation when Black representation on the master jury list falls more than one standard deviation below the representation of Black citizens in the local population.<sup>291</sup>

## Reforming the Use of Peremptory Strikes

In 2021, Arizona eliminated peremptory strikes in civil and criminal trials.<sup>292</sup>

Washington and California have adopted procedures specifically designed to prevent prosecutors from evading *Batson* by giving reasons for using peremptory strikes that courts have generally found to be "race-neutral."

In 2018, Washington's Supreme Court adopted General Rule 37, which designates a list of reasons for a peremptory strike that judges must treat as presumptively invalid because they have been "associated with improper discrimination



in jury selection.”<sup>293</sup> The presumptively invalid reasons include:

- having prior contact with law enforcement officers;
- expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
- having a close relationship with people who have been stopped, arrested, or convicted of a crime;
- living in a high-crime neighborhood;
- having a child outside of marriage;
- receiving state benefits; and
- not being a native English speaker.

California enacted legislation in 2020 that expands on Washington’s rule by presuming a strike is invalid if the reason for the strike is based on the juror’s appearance, dress, or demeanor, employment in a field disproportionately occupied by workers of color, or apparent friendliness with another juror of a shared racial background.<sup>294</sup>

Other state court systems, including Connecticut,<sup>295</sup> Massachusetts,<sup>296</sup> and New Jersey,<sup>297</sup> are considering similar reforms to address the illegal use of peremptory strikes.

## Using Civil Remedies to Hold Prosecutors Accountable for Discriminatory Conduct

Federal appellate courts rejected previous attempts by excluded jurors to utilize civil remedies and the Civil Rights Act of 1875 to hold prosecutors accountable for illegal racial discrimination in jury selection.

But new approaches have proven successful. In 2019, relying on 42 U.S.C. § 1983, a federal judge in Louisiana permitted Black citizens excluded from jury service to pursue damages claims against the Caddo Parish District Attorney based on the office’s long record of race-based exclusion in jury selection.<sup>298</sup>

## Reviewing Jury Discrimination Claims Despite Procedural Barriers

The general rule is that claims can be reviewed on appeal only if they were preserved with a contemporaneous objection at trial. But Alabama, Delaware, Idaho, Indiana, Kentucky, Michigan, Missouri, New Mexico, Ohio, Oklahoma, Utah, Virginia, Washington, West Virginia, and Wisconsin permit appellate courts to review unpreserved *Batson* claims on their merits in certain cases.<sup>299</sup> And courts in Pennsylvania and South Dakota review *Batson* claims on their merits even if a claimant raises the issue for the first time during postconviction litigation.<sup>300</sup>

Another procedural barrier to reviewing a *Batson* claim is the retroactivity doctrine, which holds that decisions like *Batson* cannot be applied to cases that have already completed the direct appeal process when the decision is announced. Many people with strong *Batson* claims are barred from review because their cases were “final” when *Batson* was decided.<sup>301</sup> But because race-based exclusion compromises the “essential, decisional, truth-finding function of juries,” Pennsylvania courts have extended *Batson* relief retroactively.<sup>302</sup>

# Racial Justice Acts of North Carolina and California



A photo of Tilmon Golphin, held by his uncle, Willie McCray. On September 25, 2020, Tilmon Golphin was taken off death row and given a life sentence under North Carolina's Racial Justice Act.

Racial discrimination in jury selection represents just one of the myriad ways that race infects the criminal justice system. Recognizing the scope of the problem, North Carolina and California responded to systemic racial injustice with far-reaching solutions.

Enacted in 2009, North Carolina's Racial Justice Act (RJA) required courts to vacate a death sentence if race was a factor in the imposition of the death penalty.<sup>303</sup>

Pursuant to the RJA, North Carolina courts conducted two evidentiary hearings related to four death-sentenced individuals: Marcus Robinson, Tilmon Golphin, Christina Walters, and Quintel Augustine.<sup>304</sup> The evidence established that prosecutors in Cumberland County struck Black jurors at two to three times the rate of non-Black jurors and that Black jurors



Marcus Robinson listens as Cumberland County Senior Resident Superior Court Judge Greg Weeks finds that racial bias played a role in his trial and sentencing and that he should be removed from death row and serve a life sentence instead. (Shawn Rocco/The News & Observer via Associated Press)

faced a risk of exclusion four times higher than non-Black jurors in Cumberland County death penalty trials.<sup>305</sup>

The RJA hearings also uncovered evidence of two *Batson*-evasion training sessions hosted by the North Carolina Conference of District Attorneys in 1995 and 2011.<sup>306</sup> These trainings have “emphasized how to avoid a *Batson* violation rather than how to avoid conscious or unconscious discrimination.”<sup>307</sup>

Prior to the RJA, North Carolina appellate courts had found *Batson* error in only one case.<sup>308</sup> Cumberland County Superior Court Judge Weeks, who presided over the RJA evidentiary hearings, noted in his first order granting relief that, despite *Batson*, discrimination had remained “a significant problem that will not be corrected without a conscious and overt commitment to change.”<sup>309</sup> Judge Weeks granted RJA relief in all four cases and removed all four claimants from death row.<sup>310</sup>

Researchers analyzed the impact of North Carolina's RJA on jury selection in cases following its enactment. The researchers found that although prosecutors continued to use peremptory strikes at a higher rate against Black jurors than against all other jurors, the disparity decreased after the passage of the RJA.<sup>311</sup> Further, by putting race at the forefront of the entire legal system and by holding prosecutors accountable for the *process* rather than just the *outcome* of the case, the RJA may be more

effective than *Batson* at preventing attorneys from relying on race during the jury selection process.<sup>312</sup>

In the face of overwhelming evidence that racial bias had infected death penalty cases in North Carolina, the state legislature repealed the RJA in 2013, made the repeal retroactive, and returned the four successful RJA claimants back to death row.<sup>313</sup>

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*With 100% of claimants successfully proving their entitlement to relief and with more than 100 additional RJA claims filed, the vast majority of individuals on death row were on the precipice of an opportunity to individually demonstrate that the proceedings in which they were sentenced to death were fundamentally flawed by racial animus. Rather than allowing these proceedings to follow their course, the General Assembly repealed the Act.<sup>314</sup>*

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Shirley Burns, right, hugs a family friend after Superior Court Judge Greg Weeks deemed that the prosecutors in the trial of her son Marcus Robinson had engaged in racially discriminatory behavior. (Raleigh News & Observer/Getty)

In June 2020, the North Carolina Supreme Court declared the repeal's retroactivity provision unconstitutional and upheld the previous grants of relief, thereby protecting the rights of over 100 death-sentenced North Carolinians to continue litigating RJA claims filed prior to the repeal.<sup>315</sup>

In 2020, California became the second state to pass legislation addressing racial discrimination in the criminal justice system. California's Racial Justice Act extends beyond capital cases and makes it illegal for any state actor to obtain a conviction or sentence on the basis of race.

Evidence of bias includes racially discriminatory language, racial discrimination in jury selection, or evidence that state actors sought or obtained convictions for more serious crimes or imposed more severe sentences against individuals of color.<sup>316</sup>

The California RJA empowers trial judges to remedy violations by dismissing sentence enhancements, vacating convictions or sentences, and exempting defendants' executions.

Assemblyman Ash Kalra, an author of the California act, encouraged legislatures in other states to enact similar legislation. "We can no longer accept racial bias in the criminal justice system as unfixable," he said in a statement. "State legislatures concerned about racial bias in the criminal justice system should act to address it."<sup>317</sup>

# Notes

1. See Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (June 2010), <https://eji.org/reports/illegal-racial-discrimination-in-jury-selection/>.
2. *J.E.B. v. Alabama*, 511 U.S. 127, 145 (1994).
3. *Foster v. Chatman*, 136 S. Ct. 1737, 1760 (2016) (Alito, J., concurring).
4. See *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975).
5. *Rose v. Mitchell*, 443 U.S. 545 (1979).
6. *Batson v. Kentucky*, 476 U.S. 79 (1986).
7. “QuickFacts: United States,” United States Census Bureau, accessed Nov. 18, 2020, <https://www.census.gov/quickfacts/fact/table/US/PST045219>; Reflective Democracy Campaign, *Tipping the Scales: Challengers Take On the Old Boys’ Club of Elected Prosecutors* (Oct. 2019), 2, <https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf>.
8. See, e.g., Janna Adelstein and Alicia Bannon, *State Supreme Court Diversity — April 2021 Update*, Brennan Center for Justice (April 2021), <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-april-2021-update>.
9. See *Duncan v. Louisiana*, 391 U.S. 145, 151-53, 156 (1968). Further, the right to a jury trial represents the only individual right enumerated in the 1789 Constitution, and the only right guaranteed in both the Constitution itself and in the Bill of Rights. U.S. Const. art. III, § 2, cl. 3 (“The trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”); U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...”); U.S. Const. amend. VII (establishing right to jury trial in civil cases where value at issue exceeds \$20).
10. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (describing the right to trial by jury as a “bulwark of [citizens’] liberties”) (quoting William Blackstone, *Commentaries on the Laws of England 2* (San Francisco: 1916), 2584); see also *Duncan*, 391 U.S. at 156-57; *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (“The very idea of a jury is a body...composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.... The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge.”).
11. *Powers v. Ohio*, 499 U.S. 400, 406 (1991).
12. *Ballew v. Georgia*, 435 U.S. 223, 237 (1978) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)); see also Albert W. Alschuler & Andrew G. Deiss, “A Brief History of the Criminal Jury in the United States,” *University of Chicago Law Review* 61 (1994): 876 (“Jury trial was a valued right of persons accused of crime, and it was also an allocation of political power to the citizenry.”); see also *Powers*, 499 U.S. at 406.
13. At the time of independence, federal law granted individual states the discretion to determine juror qualifications, see Federal Judiciary Act of 1789, An Act to Establish the Judicial Courts of the United States § 29, 1 Stat. 73, 88 (1789) (“[J]urors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens...”) and most states linked jury eligibility to voting. See also Alschuler & Deiss, “A Brief History of the Criminal Jury,” 867, 877-79.
14. U.S. Const. art. IV, § 2, cl. 3 (“No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due”).
15. See, e.g., An Act for the Better Ordering of Slaves (1690), reprinted in *The Statutes at Large of South Carolina* 7, ed. David McCord (Columbia: 1840), 343-47; An Act for the More Speedy Prosecution of Slaves Committing Capital Crimes (1692), reprinted in *Statutes at Large; Being A Collection of All the Laws of Virginia from the First Session of the Legislature, in the Year 1619* 3, ed. William Henning (Richmond: 1823), 102-03; An Act for the Trial of Negroes (1700), reprinted in *The Statutes at Large of Pennsylvania from 1682 to 1801* 2, eds. James T. Mitchell and Henry Flanders (Harrisburg: 1896), 77-78 (limiting jury service to freeholders, for trials of Black people); *State v. Ben*, 8 N.C. 434, 435-36 (1821) (describing North Carolina’s system, which denied enslaved people the right to jury trial); An Act for the Better Ordering and Governing Negroes and Other Slaves in this Province (1755), reprinted in *The Colonial Records of the State of Georgia* 18, ed. Allen Candler (Atlanta: 1910), 102, 108-110 (limiting jury service in trials of free and enslaved Black people to freeholders). Other laws prohibited free and enslaved Black people from testifying in court, making exceptions only in cases involving charges against other Black people, where “other evidence proved insufficient,” or where the charges involved conspiracy to harm a white person. See, e.g., An Act For Regulating of Slaves (1702), reprinted in *The Colonial Laws of New York from the Year 1664 to the Revolution* 1, ed. J.B. Lyon (Albany: 1894), 519-21; An Act Relating to Servts [sic] and Slaves (1715), reprinted in *Archives*

of Maryland, *Proceedings and Acts of the General Assembly of Maryland April 1715-August 1716* 30, ed. William Browne (Baltimore: 1910), 283-292; *Against Whom Slaves and Other Persons of Colour May Be Witnesses (1777) in An Act Concerning Slaves and Free Persons of Color, Revised Code of North Carolina No. 105* (1855).

16. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper Collins, 2014), 352-55. ("Despite the overall pattern of white political control, the fact that well over 600 blacks served as legislators...represented a stunning departure in American politics.").
17. Currently codified at 18 U.S.C. § 243 (2010) ("No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude.").
18. U.S.C.A. Const. amend. XIV.
19. U.S.C.A. Const. amend. XV.
20. While the Fifteenth Amendment prohibited the exclusion of Black men from voting, see U.S. Const. amend. XV, it left women of all races disenfranchised until the adoption of the Nineteenth Amendment in 1920, which established the voting rights of American women. U.S. Const. amend. XIX. In practice, the vast majority of Black men and women remained disenfranchised throughout much of the 20th century as a result of racially discriminatory state laws in the South and federal non-enforcement of the Fifteenth Amendment. It was not until the passage of the Voting Rights Act of 1965 that Black voting rights became a widespread reality. See *Henry Louis Gates Jr., Stony the Road: Reconstruction, White Supremacy, and the Rise of Jim Crow* (New York: Penguin Press, 2019).
21. See Douglas L. Colbert, "Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges," *Cornell Law Review* 76, no. 1 (1990): 55 (noting twelvefold increase in federal prosecutions of perpetrators of racial violence between 1870 and 1872; in 1872, over 90% of those cases resulted in jury verdicts of guilt).
22. See James Forman, Jr., "Juries and Race in the Nineteenth Century," *The Yale Law Journal* 113, no. 4 (2004): 931 ("[A]ccording to black papers of the day, exclusion was the more common phenomenon in most counties.").
23. Equal Justice Initiative, *Reconstruction in America: Racial Violence After the Civil War, 1865-1876* (2020), 44, 48-51, <https://eji.org/report/reconstruction-in-america/>. EJI documented 34 mass lynchings during the Reconstruction era. *Id.* at 5.
24. Sherrilyn Ifill, *On the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-First Century* (Boston: Beacon Press, 2007).
25. *Report on the Alleged Outrages in the Southern States by the Select Committee of the Senate* (Washington, D.C.: 1871), 179 (quoting Judge Daniel Russell of North Carolina); Cong. Globe, 42d Cong., 1st Sess. 158 (1871) (statement of Senator Sherman quoting the report).
26. "Prejudiced Verdicts," *Opelousas Courier*, Oct. 26, 1895.
27. The abolition of slavery dealt a severe economic blow to Southern states whose agricultural economies relied on the labor of enslaved people. Using a loophole in the Thirteenth Amendment, Southern state legislatures created a system of convict leasing to restore the economic benefits of slavery. After enacting discriminatory "Black Codes," which criminalized newly freed Black people as vagrants and loiterers, states passed laws authorizing prisoners to be leased to private industries. Through convict leasing, Southern states and private companies derived enormous wealth from the labor of mostly Black prisoners who earned little or no pay and faced inhumane and often deadly work conditions, generations after slavery was formally abolished. See generally "A Different Kind of Slavery," EJI, July 25, 2018, <https://eji.org/news/history-racial-injustice-different-kind-of-slavery/>; Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (New York: Anchor Books, 2009).
28. Frank B. Sanborn, "Negro Crime" in *Some Notes on Negro Crime, Particularly in Georgia*, ed. W.E.B. Du Bois (Atlanta: The Atlanta University Press, 1904), 5.
29. In *Strauder v. West Virginia*, the Court overturned a West Virginia state statute that explicitly restricted jury service to white citizens as a violation of the Equal Protection Clause of the Fourteenth Amendment, while endorsing the use of other "qualifications" to restrict jury service. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (approving laws limiting jury service to certain groups such as "to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications").
30. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020) ("Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to 'establish the supremacy of the white race[.]'"). Oregon also operated under a nonunanimous jury system, see *Apodaca v. Oregon*, 406 U.S. 404 (1972), enacted in 1934 in response to anti-semitism and xenophobia. See *Ramos*, 140 S. Ct. at 1394 ("Adopted in the 1930s, Oregon's rule permitting nonunanimous



verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute ‘the influence of racial, ethnic, and religious minorities on Oregon juries.’”); see also “Modify the Jury Law,” *Statesman Journal*, Nov. 26, 1933 (“[T]he vast immigration into America [of people] from southern and eastern Europe... make[s] the jury of twelve increasingly unwieldy and unsatisfactory.”).

31. *Ramos*, 140 S. Ct. at 1393-94 (Ramos was convicted by a nonunanimous jury with 10 jurors voting to convict him and two jurors voting to acquit).
32. Louisiana voters approved an amendment to the Louisiana Constitution that required unanimous jury verdicts in 2018. La. Const. art. 1, § 17, amended by 2018 La. Acts 722. In 2020, the Supreme Court determined that the statute permitting nonunanimous felony convictions violated the Sixth Amendment. *Ramos*, 140 S. Ct. at 1408.
33. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 41-42, 55; Neil Vidmar and Valerie P. Hans, *American Juries: The Verdict* (Amherst, New York: Prometheus Books, 2007), 71-72.
34. Randall Kennedy, *Race, Crime, and the Law* (New York: Vintage Books, 1997), 182-84.
35. Benno C. Schmidt, Jr., “Juries, Jurisdiction, and Race Discrimination: The Lost Promise of *Strauder v. West Virginia*,” *Texas Law Review* 61, no. 8 (May 1983): 1406.
36. See *Franklin v. South Carolina*, 218 U.S. 161, 168, 172 (1910) (denying relief to Black defendant sentenced to death where Court found no proof that grand jurors were excluded on basis of race: “Under this statute the Supreme Court of South Carolina held that the jury commissioners were only required to select men of good moral character, and that competent colored men were equally eligible with others for such service. We find no denial of Federal rights in this provision of the statute.”); see also *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Smith v. Mississippi*, 162 U.S. 592 (1896); *Murray v. Louisiana*, 163 U.S. 101 (1896); *Williams v. Mississippi*, 170 U.S. 213 (1898); *Tarrance v. Florida*, 188 U.S. 519 (1903); *Brownfield v. South Carolina*, 189 U.S. 426 (1903); but see *Carter v. Texas*, 177 U.S. 442 (1900) (reversing where defendant not provided opportunity to prove claim of racially discriminatory jury exclusion); *Rogers v. Alabama*, 192 U.S. 226 (1904) (same).
37. *Martin v. Texas*, 200 U.S. 316, 318, 320-21 (1906) (denying relief to Black defendant sentenced to death for murder where, despite fact that African American population of Tarrant County was 25%, no African American jurors had ever been seated on grand or petit juries); *Thomas v. Texas*, 212 U.S. 278, 280-81 (1909) (regarding Harris County).
38. *Martin*, 200 U.S. at 320-21; *Thomas*, 212 U.S. at 281-83.
39. Dan T. Carter, *Scottsboro: A Tragedy of the American South* (Baton Rouge: Louisiana State University Press, 1969); “Calls for Defense of Scottsboro Boys,” *The Press-Forum Weekly*, March 5, 1932; “Release of Negroes Demanded by Group,” *The Anniston Star*, July 28, 1931.
40. *Norris v. Alabama*, 294 U.S. 587, 596 (1935).
41. *Norris*, 294 U.S. at 598-99.
42. *Norris*, 294 U.S. 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).
43. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2240 (2019).
44. *Hill*, 316 U.S. at 401, 405 (local jury commissioners used purportedly race-neutral requirement that a grand juror must be “a householder” of “sound mind and good moral character” to exclude Black prospective jurors); see also *Pierre*, 306 U.S. at 359-61 (although half of parish was Black, jury venire did not include a single Black citizen where local officials used statutory qualifications like ability to read and write and “good character” to exclude Black prospective jurors).
45. See, e.g., Thomas W. Frampton, “The Jim Crow Jury,” *Vanderbilt Law Review* 71, no. 5 (2018): 1620; Vivien Toomey Montz and Craig Lee Montz, “The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law,” *University of Miami Law Review* 54, no. 3 (2000): 456 (“Restrictive laws on voting rights and, therefore, juror qualifications were implemented in many states, resulting in the discriminatory use of the peremptory to prevent African-Americans from serving on the petit jury when selective qualification requirements failed to eliminate them from the venire.”); see also April J. Anderson, “Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners’ Trial Manuals,” *Stanford Journal of Civil Rights & Civil Liberties* 16, no. 1 (2020): 19, 43-45.
46. *Avery v. Georgia*, 345 U.S. 559, 560-61 (1953) (not a single Black person selected from a jury panel of approximately 60 names drawn from a box containing names of prospective white jurors, printed on white tickets, and names of prospective Black jurors, printed on yellow tickets); *Whitus v. Georgia*, 385 U.S. 545, 548-49 (1967) (noting that prior to 1965, Georgia state tax returns were “white for white taxpayers and yellow for Negro taxpayers,” that the

"1964 tax digest, and all digests prior to 1964, were made up from these segregated tax returns," that the "Negroes whose names were included in the tax digest were designated by a '(c),' and that the "jury lists for each county are required by law to be made up from the tax digest").

47. *Akins v. Texas*, 325 U.S. 398, 406-07 (1945).
48. *Swain v. Alabama*, 380 U.S. 202 (1965).
49. *Flowers*, 139 S. Ct. at 2240 ("But *Swain's* high bar for establishing a constitutional violation was almost impossible for any defendant to surmount, as the aftermath of *Swain* amply demonstrated.").
50. *Batson v. Kentucky*, 476 U.S. 79 (1986).
51. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) ("[A] jury that must choose between life imprisonment and capital punishment can do little more---and must do nothing less---than express the conscience of the community on the ultimate question of life or death.").
52. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).
53. See Drew Desilver, Michael Lipka, and Dalia Fahmy, *10 Things We Know About Race and Policing in the U.S.*, Pew Research Center (June 3, 2020), <https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/> (finding that Black adults were five times as likely to report having been unfairly stopped by police because of their race; 75% of white adults but only 33% of Black adults thought police use the right amount of force in each situation and 35% of Black adults thought police treat racial groups equally; 92% of white police officers, but only 29% of Black officers, felt that "our country has made the changes needed to give blacks equal rights with whites").
54. Reflective Democracy Campaign, *Tipping the Scales*, 2-4 (reporting that 95% of 2,442 elected prosecutors across the country are white). The disparity is especially glaring in states with the most diverse populations, such as California (population is 63% nonwhite, 10% of prosecutors are nonwhite), Texas (58%, 13%), Nevada (51%, 6%), Georgia (47%, 10%), Florida (46%, 10%), New York (45%, 5%), Arizona (45%, 6%), and Louisiana (41%, 7%). "QuickFacts: United States," United States Census Bureau, accessed July 23, 2021, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.
55. Samantha Cowan, "The Problem with Having All-White State Supreme Courts," *Take Part*, Sept. 16, 2016, <http://www.takepart.com/article/2016/09/16/alabama-judges>; "QuickFacts: Alabama," United States Census Bureau, accessed July 23, 2021, <https://www.census.gov/quickfacts/fact/table/AL/PST0452>.
56. Cowan, "The Problem."
57. Janna Adelstein and Alicia Bannon, *State Supreme Court Diversity — April 2021 Update*, Brennan Center for Justice (April 2021), <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-april-2021-update>.
58. Prior to 2019, the number of states was 18, but the Delaware Supreme Court and the Rhode Island Supreme Court have since gained their first Black justices. See Nick Ciolino and Sophia Schmidt, "Delaware's First African-American Supreme Court Justice Sworn In," *Delaware Public Media*, Jan. 3, 2020; Bay Gammans and Logan Wilber, "Melissa Long Sworn in as First Black Justice in RI Supreme Court," *WPRI 12*, Jan. 11, 2021; Adelstein and Bannon, *State Supreme Court Diversity — April 2021 Update*; see also Laila Robbins and Alicia Bannon, *State Supreme Court Diversity*, Brennan Center for Justice (July 2019), 2, [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_State\\_Supreme\\_Court\\_Diversity.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_State_Supreme_Court_Diversity.pdf).
59. "Judicial Nominations," American Constitution Society, June 28, 2021, <https://www.acslaw.org/judicial-nominations/>; "QuickFacts: Texas," United States Census Bureau, accessed July 7, 2021, <https://www.census.gov/quickfacts/TX>; "QuickFacts: Louisiana," United States Census Bureau, accessed July 7, 2021, <https://www.census.gov/quickfacts/LA>; "QuickFacts: Mississippi," United States Census Bureau, accessed July 7, 2021, <https://www.census.gov/quickfacts/MS>.
60. "Judicial Nominations," American Constitution Society; see also Lynn Sweet, "Senate Confirms Jackson-Akiwumi for 7th Circuit Court of Appeals: Only Black Judge on Chicago Panel," *Chicago Sun-Times*, June 24, 2021; "QuickFacts: Illinois," United States Census Bureau, accessed July 7, 2021, <https://www.census.gov/quickfacts/IL>; "QuickFacts: Indiana," United States Census Bureau, accessed July 7, 2021, <https://www.census.gov/quickfacts/IN>; "QuickFacts: Wisconsin," United States Census Bureau, accessed July 7, 2021, <https://www.census.gov/quickfacts/WI>.
61. "Demographics," National Congress of American Indians, June 1, 2020, <https://www.ncai.org/about-tribes/demographics>; Alicia Bannon and Janna Adelstein, *State Supreme Court Diversity — February 2020 Update*, Brennan Center for Justice (Feb. 2020), <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-february-2020-update>.
62. Bannon and Adelstein, *State Supreme Court Diversity — February 2020 Update*.
63. Kalle Benallie, "Native American Judge Blazes Trail in Federal Courts," *The Salt Lake Tribune*, March

14, 2020 (noting that U.S. District Judge Diane Humetewa is the lone active Native American on the federal bench; Judge Frank H. Seay took senior status in 2003); “Judicial Vacancies,” United States Courts, accessed July 24, 2021, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> (listing 890 authorized federal judgeships and 82 vacancies).

- 64.** Across the country, the percentage of white officers is “more than 30 percentage points higher than in the communities they serve.” In Maple Heights, Ohio, in the Cleveland metro area, the police department is 70 percentage points more white than the community. Douglasville, Georgia’s police force is 57 percentage points more white than the Douglasville community. Montclair, California’s police department is 69 percentage points more white than residents in the community. Many New Jersey towns have a police force that is at least 50 percentage points more white than the communities they serve. Jeremy Ashkenas and Haeyoun Park, “The Race Gap in America’s Police Departments,” *New York Times*, April 8, 2015. Only 4% of police chiefs nationwide are Black. Shelley S. Hyland and Elizabeth Davis, *Local Police Departments, 2016: Personnel, Bureau of Justice Statistics* (Oct. 2019), <https://bjs.ojp.gov/content/pub/pdf/lpd16p.pdf>.
- 65.** See, e.g., *Bailey v. State*, 219 S.W.2d 424, 428 (Ark. 1949) (“Criminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady.”); William Blackstone, *Commentaries on the Laws of England Volume 2* (San Francisco: 1916), 1962 (English common law categorically excluded women from juries based on “propter defectum sexus (because not of the male sex)”).
- 66.** *Hoyt v. Florida*, 368 U.S. 57, 62 n.5 (1961) (noting that women were eligible for jury service in all states except Alabama, Mississippi, and South Carolina) (citing Ala. Code, 1940 (Recompiled Vol. 1958), Tit. 30, § 21; Miss. Code Ann., 1942 (Recompiled Vol. 1956), § 1762; S.C. Code, 1952, § 38-52).
- 67.** See, e.g., Fla. Stat. § 40.01(1) (1959) (“[T]he name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list.”); La. Stat. Ann. § 15:172.1 (1950); N.H. Rev. Stat. Ann. § 500:1 (1955).
- 68.** *Taylor v. Louisiana*, 419 U.S. 522 (1975).
- 69.** *J.E.B. v. Alabama*, 511 U.S. 127 (1994).
- 70.** S.J. Res. 79, 1953 Reg. Sess. (Ala. 1953) (enacted) (“Whereas this Amendment, which gives women the right to vote, has been the law of the land since August 26, 1920, and the women in our State have been voting and holding public office for many years...the Legislature desires to record its approval of extending the right of suffrage to women”).
- 71.** 1966 Ala. Laws 427 (Act No. 284); 1966 Ala. Laws 428 (Act No. 285 amending Section 21 of Title 30, Code of Alabama 1940, which had excluded women from jury service); see also *Carter v. Jury Comm’n of Greene Cty.*, 396 U.S. 320, 327 (1970) (“In 1967, following a statutory amendment, the [Alabama] commission added women to the jury roll.”); *White v. Crook*, 251 F.Supp. 401, 409-10 (M.D. Ala. 1966) (holding Alabama’s statutory exclusion of women unconstitutional and mandating that Alabama end such exclusion by June 1, 1967).
- 72.** 1966 Ala. Laws 428 (Act No. 285: “When any female shall have been summoned for jury duty she shall have the right to appear before the trial Judge, and such Judge, for good cause shown, shall have the judicial discretion to excuse said person from jury duty. The foregoing provision shall apply in either regular or special venire.”); 1978 Ala. Laws 712, enacting Ala. Code § 12-16-62 (“No qualified prospective juror is exempt from jury service.”).
- 73.** See *Penn v. Eubanks*, 360 F. Supp. 699, 703 (M.D. Ala. 1973) (rather than conduct hearings on gender-based exemptions from service, Alabama courts simply excluded women from jury rolls).
- 74.** See, e.g., *Bankhead v. State*, 625 So. 2d 1141, 1142 (Ala. Crim. App. 1992); *Fisher v. State*, 587 So. 2d 1027, 1037 (Ala. Crim. App. 1991).
- 75.** *Duren v. Missouri*, 439 U.S. 357, 363 (1979).
- 76.** See, e.g., Julie A. Cascino, Note, “Following Oregon’s Trail: Implementing Automatic Voter Registration To Provide for Improved Jury Representation in the United States,” *William and Mary Law Review* 59, no. 6 (2018): 2575, 2578-79 (“Due to the low registration rates of these groups, voter rolls often do not accurately represent the proportion of eligible minority, low-income, or young voters in a specific community. Accordingly, jury pools are less representative of that community as well.”); Camille Fenton, “A Jury of Someone Else’s Peers: The Severe Underrepresentation of Native Americans from the Western Division of South Dakota’s Jury-Selection Process,” *Texas Journal on Civil Liberties & Civil Rights* 24, no. 1 (Fall 2018): 119, 139.
- 77.** 28 U.S.C. § 1863(b)(2) (names of prospective jurors “shall be selected from the voter registration lists or the lists of actual voters”); see, e.g., *United States v. Jackson*, 768 F. App’x 400, 405 (6th Cir. 2019) (finding that “[v]oter registration lists are the presumptive statutory source for potential jurors... No circuit court has ever held that a trial court needs to supplement the voter rolls with additional names”

- and declining to find constitutional problem where reliance on voter rolls produced venire of nearly 550 people that included only four Black jurors); *United States v. Green*, 435 F.3d 1265, 1272 (10th Cir. 2006) (“[P]ersons holding a driver’s license but choosing not to vote simply do not comprise a distinct group.”); *United States v. Rodriguez-Lara*, 421 F.3d 932, 945 (9th Cir. 2005) (rejecting defendant’s attempt to “link [ ] sole reliance on voter-registration lists for jury selection to current systematic exclusion of Hispanics”); National Council of State Courts Center for Jury Studies, “State of the States Comparative Data: Jury Selection Executive Summary,” accessed July 7, 2021, [https://www.ncsc-jurystudies.org/\\_data/assets/pdf\\_file/0018/5319/sos\\_exec\\_sum.pdf](https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0018/5319/sos_exec_sum.pdf) (state data indicating that 38 states mandate use of voter registration records alone or in combination with other databases in compiling jury lists; 19 states only mandate the use of driver’s license and voter registration records).
- 78.** Forrest Wickman, “Why Do Many Minorities Lack ID?,” *Slate*, Aug. 21, 2012 (noting as one potential reason for this disparity that people of color are less likely to drive because they are more likely to live in urban areas or lack access to a vehicle due to poverty).
- 79.** Nina W. Chernoff, “Black to the Future: The State Action Doctrine and the White Jury,” *Washburn Law Journal* 58, no. 1 (Winter 2019): 103, 120-121 (noting that nationally, 12% of jury summons returned as undeliverable and explaining that “because of correlations between race and income levels” and fact that “[p]eople with lower income levels move more frequently” people of color have higher rate of undeliverable summonses); Jeffrey Abramson, “Jury Selection in the Weeds: Whither the Democratic Shore?,” *University of Michigan Journal of Law Reform* 52, no. 1 (2018): 1, 10-11 (studies of jury selection procedures in federal courts in Massachusetts, Illinois, Florida, and California revealed “mounting loss of minority jurors...due primarily to the disproportionate impact [of] undeliverable qualification questionnaires and non-response to jury forms”); see also *Israel v. United States*, 109 A.3d 594, 604 (D.C. 2014) (“The expert reports that were before the court indicated that African Americans were overrepresented among those whose summonses were returned to the Juror Office as undeliverable.”).
- 80.** Paula Hannaford-Agor, “A New Take on How Jury Service is Akin to Voting,” *Jury News*, Nov. 2017; see also Alexander E. Preller, “Jury Duty Is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service,” *Columbia Journal of Law & Social Problems* 46, no. 1 (2012): 1, 42-48 (containing a 50-state survey of sources of juror information that identifies states using voter registration lists, as well as tax, utility, motor vehicle, and other social service records to create their lists of potential jurors).
- 81.** “Jury,” The Judicial Branch of New Mexico, accessed July 13, 2021, <https://jury.nmcourts.gov/jury-statutes/>.
- 82.** See Abramson, “Jury Selection in the Weeds,” 1, 42 (“At a minimum, courts should update the addresses on the [master jury wheel] annually, using the National Change of Address (NCOA) list maintained by the United States Postal Service.”); Judge William Caprathe (ret.), Paula Hannaford-Agor, Stephanie McCoy Loquvam and Shari Seidman Diamond, “Assessing and Achieving Jury Pool Representativeness,” *Judges Journal* 55, no. 2 (Spring 2016): 19 (“Using NCOA not only to update the master jury list, but also to update addresses for jury summonses and qualification questionnaires, is an effective way to minimize undeliverable rates.”).
- 83.** Hannaford-Agor, “Systematic Negligence in Jury Operations,” 761, 788 (“As discussed in the previous section, trial courts have substantial ability to minimize the impact of nonsystematic exclusion through routine jury system management. They can update the master jury lists at least annually and employ NCOA updates to reduce the impact of undeliverable summonses. They can enforce the jury summons through effective follow-up programs to reduce the impact of nonresponse rates. In addition, they can minimize the term of service and increase juror compensation to facilitate the ability of jurors to serve if summoned. These efforts not only help secure a jury pool that reflects a fair cross section of the community, but they also improve the efficiency of jury operations through increased jury yield and enhanced public perceptions about the jury system.”).
- 84.** See, e.g., *United States v. Fernetus*, 838 F. App’x 426, 435 (11th Cir. 2020); *State v. Townes*, 208 A.3d 774, 780 (Me. 2019); *State v. Gonzalez*, No. 2019-67-C.A., 2021 WL 2760088, at \*5 (R.I. July 2, 2021) (citing *United States v. Royal*, 174 F.3d 1, 6-7 (1st. Cir. 1999)); *United States v. Scott*, No. 20 CR. 332 (AT), 2021 WL 2643819, at \*8 (S.D.N.Y. June 28, 2021) (“Of these, in the Second Circuit, the absolute disparity method is the favored approach for Sixth Amendment claims.”) (citing *United States v. Rioux*, 97 F.3d 648, 655 (2d Cir. 1996)); *United States v. Erickson*, 436 F. Supp. 3d 1242, 1254 (D.S.D. 2020), *aff’d*, 999 F.3d 622 (8th Cir. 2021) (“The United States Court of Appeals for the Eighth Circuit has used the ‘absolute disparity calculation’ in evaluating whether there is prima facie evidence of underrepresentation of Native Americans on District of South Dakota petit juries.”).
- 85.** 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); *United States v. Tuttle*, 729 F.2d 1325, 1327 (11th Cir. 1984); *United States v. Butler*, 611 F.2d 1066, 1069-70 (5th Cir. 1980); see also Abramson, “Jury Selection in the Weeds,” 19 (“Problems with



the absolute disparity test are compounded by the traditional rule that the absolute disparity must exceed a 10% threshold for it to be constitutionally suspect.”).

86. *People v. Cunningham*, 352 P.3d 318, 351-52 (Cal. 2015).
87. See *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1161 (9th Cir. 2014) (“Indeed, we have specifically highlighted the fact that if a minority group makes up less than 7.7% of the population in the jurisdiction in question, that group could *never* be underrepresented in the jury pool, even if none of its members wound up on the qualified jury wheel.”) (emphasis in original); *United States v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000) (“Yet absolute disparities are of limited value when considering small populations.”); see also *Berghuis v. Smith*, 559 U.S. 314, 329 (2010) (“Absolute disparity and comparative disparity measurements, courts have recognized, can be misleading when, as here, “members of the distinctive group comp[ose] [only] a small percentage of those eligible for jury service.”) (internal citation omitted).
88. Vivian Ho, “For SF’s Black Defendants, It’s Hard to Find Jury of Peers,” *San Francisco Chronicle*, March 4, 2017.
89. Hannaford-Agor, “Systematic Negligence in Jury Operations,” 761, 769; Annie Sloan, “‘What to do About *Batson*?’: Using a Court Rule to Address Implicit Bias in Jury Selection,” *California Law Review* 108, no. 1 (Feb. 2020): 233, 235.
90. Many clerks of court refrain from tracking demographic information about their jury lists, see Jonathan Abel, “*Batson*’s Appellate Appeal and Trial Tribulations,” *Columbia Law Review* 118, no. 3 (April 2018): 713, 728, and courts frequently refuse criminal defendants access to information about jury selection, see Nina W. Chernoff, “No Records, No Rights: Discovery & the Fair Cross-Section Guarantee,” *Iowa Law Review* 101, no. 5 (July 2016): 1719, 1755.
91. Hannaford-Agor, “Systematic Negligence in Jury Operations,” 761, 772.
92. *Garcia-Dorantes v. Warren*, 801 F.3d 584, 587 (6th Cir. 2015); Abel, “*Batson*’s Appellate Appeal and Trial Tribulations,” 713, 729.
93. *Ambrose v. Booker*, 801 F.3d 567, 568 (6th Cir. 2015); *State v. Perez*, No. 119,336, 2019 WL 1746762, at \*3 (Kan. Ct. App. Apr. 19, 2019); *United States v. Savage*, 970 F.3d 217, 255-258 (3d Cir. 2020).
94. J. David Goodman and Al Baker, “Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case,” *New York Times*, Dec. 3, 2014; Monica Davey and Julie Bosman, “Protests Flare After Ferguson Police Officer Is Not Indicted,” *New York Times*, Nov. 24, 2014; Rachel Tresiman, Brakkton Booker, and Vanessa Romo, “Kentucky Grand Jury Indicts 1 of 3 Officers in Breonna Taylor Case,” *NPR*, Sept. 23, 2020.
95. See, e.g., Ala. R. Crim. P. 12.5(a) (“The court shall appoint the foreman of the grand jury and an acting foreman to serve in the absence of the foreman.”); Fla. Stat. § 905.08 (“After the grand jury has been impaneled, the court shall appoint one of the grand jurors as foreperson and another to act as foreperson during absence of the foreperson.”); Minn. Stat. Ann. § 628.56 (“From the persons summoned to serve as grand jurors and appearing, the court shall appoint a foreperson”); Ga. Code Ann. § 15-12-67(a) (“The judge of the superior court may appoint the foreman of the grand jury or may direct the grand jury to elect its own foreman....”); Ky. R. Crim. P. 5.04 (“The grand jury shall elect one of its members to be foreperson, who shall administer an oath, prescribed by the Supreme Court, to each witness who testifies before the grand jury.”).
96. Harvey Gee, “Weighing Prosecutorial Power and Discretion: Fixing the Imbalance,” *Valparaiso University Law Review* 44, no. 2 (Winter 2010): 379, 384-87.
97. Nancy J. King, “Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection,” *New York University Law Review* 68, no. 4 (Oct. 1993): 707, 717-18.
98. Hiroshi Fukurai, “Critical Evaluations of Hispanic Participation on the Grand Jury: Key-Man Selection, Jurymantering, Language, and Representative Quotas,” *Texas Hispanic Journal of Law and Policy* 5 (2001): 10 n.11.
99. *Hobby v. United States*, 468 U.S. 339, 345 (1984).
100. See, e.g., ABA Principles for Juries and Jury Trials princ. 2(A) (2005) (recommending that jury eligibility requirements should disqualify persons who (1) are younger than 18; (2) non-citizens; (3) not residents of the summoning jurisdiction; (4) “not able to communicate in the English language and the court is unable to provide a satisfactory interpreter”; or (5) “[h]ave been convicted of a felony and are in actual confinement or on probation, parole or other court supervision”).
101. See Juan R. Sánchez, “A Plan of Our Own: The Eastern District of Pennsylvania’s Initiative to Increase Jury Diversity,” *Temple Law Review Online* 91 (2019): 14 (“Where jurors receive compensation from the court, the payments are often inadequate to make up for the lost wages and fail to take into account other incidental costs, like securing childcare or transportation to and from the courthouse....”);

- Preller, "Jury Duty Is A Poll Tax," 2 ("For many, this inadequate compensation is simply inconvenient, but for those who are self-employed, hold multiple part-time jobs, or are dependent on tips as part of their compensation, the potential loss of income is critical and they do whatever they can to avoid [jury duty]."); Mitchell S. Kuklie, "Comment: Rethinking the Fair Cross-Section Requirement," *California Law Review* 84 (1996): 146-47.
- 102.** Anna Offit, "Benevolent Exclusion," *Washington Law Review* 96, no. 2 (June 1, 2021): 653.
- 103.** N.M. Stat. Ann. § 38-5-15 ("Persons summoned for jury service and jurors shall be compensated for their time in travel, attendance and service at the highest prevailing state minimum wage rate.").
- 104.** Offit, "Benevolent Exclusion," at 655 n.261-63.
- 105.** *Rocha v. King Cty.*, 435 P.3d 325, 336 (Wash. Ct. App. 2019) (Bjorgen, J., dissenting) (citing survey demonstrating that 77% of Latino jurors in Washington State indicated willingness to serve on jury if paid at rate at least comparable with minimum wage).
- 106.** Ginger Jackson-Gleich, *Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People with Criminal Records*, Prison Policy Initiative, Feb. 18, 2021, <https://www.prisonpolicy.org/reports/juryexclusion.html>.
- 107.** Jackson-Gleich, *Rigging the Jury*.
- 108.** Jackson-Gleich, *Rigging the Jury*.
- 109.** See, e.g., Tex. Code Crim. P. Ann. art. 35.16 (allowing challenge for cause against prospective jurors convicted, indicted, or under "legal accusation" of either felony or misdemeanor theft); see also Anna Roberts, "Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions," 98 *Minnesota Law Review* 98 (2013): 597; Jackson-Gleich, *Rigging the Jury*.
- 110.** Thomas Ward Frampton, "For Cause: Rethinking Racial Exclusion and the American Jury," *Michigan Law Review* 118 (2020): 792; see also *People v. Suarez*, 10 Cal. 5th 116, 194 (2020) (Liu, J., concurring) ("[A]lthough much attention has appropriately been paid to the inefficacy of *Batson v. Kentucky*, 476 U.S. 79 (1986), in combating racial discrimination in peremptory strikes, there is significant evidence that removal of jurors for cause is an equally if not more significant contributor to the exclusion of Black jurors, which may result in juries with higher levels of implicit bias.").
- 111.** See Ronald F. Wright et al., "The Jury Sunshine Project: Jury Selection Data As A Political Issue," *University of Illinois Law Review* (2018): 1410; Mary R. Rose, "The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County," *Law and Human Behavior* 23 (1999): 698 (study found that Black jurors were moderately overrepresented among those excluded for cause across 13 felony trials from a single North Carolina county; they made up 32% of the venire and 38% were struck for cause); see also, e.g., *McGahee v. Alabama Dep't of Corr.*, 560 F.3d 1252, 1259 (11th Cir. 2009) (finding pattern of discrimination when "[t]he State used challenges for cause to remove [8] African-American jurors and [16] of [22] peremptory challenges to remove all of the remaining African-American jurors," leaving an all-white jury in a county that was 55% African American).
- 112.** Frampton, "For Cause," 790-95, 792; Jeff Adelson, "Download Data Used in The Advocate's Exhaustive Research in 'Tilting the [S]cales' Series," Nola.com, Apr. 1, 2018, [https://www.nola.com/article\\_25663280-c298-53ef-8182-9a8de046619c.html](https://www.nola.com/article_25663280-c298-53ef-8182-9a8de046619c.html).
- 113.** Frampton, "For Cause," 796-98, 796 n.44; Will Craft, "Mississippi D.A. Doug Evans Has Long History of Striking Black People from Juries," *APM Reports*, June 12, 2018.
- 114.** See, e.g., *DeVaughn v. State*, 769 S.E.2d 70, 74 (Ga. 2015) (upholding strikes for cause to two Black jurors who had negative experiences with the police or the criminal legal system); *Lindsey v. State*, 916 N.E.2d 230, 236 (Ind. Ct. App. 2009) (upholding strike for cause of Black prospective juror who stated that his son's arrest for marijuana possession left a "bad taste in [his] mouth as far as police in general" and that the "bad taste would come from my being Black"); *United States v. Wilson*, 493 F. Supp. 2d 445, 449 (E.D.N.Y. 2006) (upholding challenge for cause to Black juror who stated his belief that "the court works with the policeman").
- 115.** Hailey Fuchs, "Justice Dept. Executes Native American Man Convicted of Murder," *New York Times*, Aug. 26, 2020; Lauren Gill, "U.S. Executes Lezmond Mitchell Over Objections of the Navajo Nation," *The Appeal*, Aug. 26, 2020, <https://theappeal.org/u-s-executes-lezmond-mitchell-over-objections-of-the-navajo-nation/>; "Ignoring Tribal Sovereignty, Federal Government Executes Native American Death-Row Prisoner Lezmond Mitchell," Death Penalty Information Center, Aug. 27, 2020, <https://deathpenaltyinfo.org/news/ignoring-tribal-sovereignty-federal-government-executes-native-american-death-row-prisoner-lezmond-mitchell>.
- 116.** Memorandum in Support of Petition for Clemency and Commutation of Death Sentence at 3, *In re Lezmond Charles Mitchell* (July 31, 2020); Appellant's Replacement Opening Brief, *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007) (No. CR-01-1062), 2006 WL 2951921.

117. American Community Survey Demographic and Housing Estimates, U.S. Census Bureau, tbl. DP05 (2019), <https://www.census.gov/quickfacts/fact/table/phoenixcityarizona/PST045219>.
118. *United States v. Mitchell*, 502 F.3d 931, 953 (9th Cir. 2007).
119. *Mitchell v. United States*, No. CR-01-1062-PCT-MHM, 2010 WL 3895691, at \*18 (D. Ariz. Sept. 30, 2010), aff'd, 790 F.3d 881 (9th Cir. 2015). Federal courts and most state courts restrict the rights of people with limited English proficiency to serve on juries. See, e.g., Jury Selection and Service Act of 1968, 28 U.S.C. § 1865 (citizens not qualified to serve on grand or petit juries in federal district court if they are “unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form” or “unable to speak the English language”); Ala. Code § 12-16-59 (citizens qualified to serve as jurors must be “able to read, speak, understand and follow instructions given by a judge in the English language”); Cal. Civ. Proc. Code § 203 (disqualifying from jury service “[p]ersons who are not possessed of sufficient knowledge of the English language”); Conn. Gen. Stat. Ann. § 51-217 (citizens disqualified from jury service if they are “not able to speak and understand the English language”); La. Code Crim. Proc. Ann. art. 401 (citizens qualified to serve on juries must “[b]e able to read, write, and speak the English language and be possessed of sufficient knowledge of the English language”); Mo. Ann. Stat. § 494.425 (disqualifying from jury service “[a]ny person unable to read, speak and understand the English language”); Pa. Cons. Stat. § 4502 (citizens not qualified to be jurors if they are “unable to read, write, speak and understand the English language”); Vt. Stat. Ann. tit. 4 § 962 (citizens qualified to be jurors must be “able to read, write, understand, and speak the English language”). Eighty-seven percent of people with limited English proficiency in the United States are people of color, so in jurisdictions with large numbers of people with limited English proficiency, these restrictions tend to produce juries that are not representative of the community. Jasmine B. Gonzales Rose, “Language Disenfranchisement in Juries: A Call for Constitutional Remediation,” *Hastings Law Journal* 65 (2014): 814-15.
120. Memorandum in Support of Petition for Clemency and Commutation of Death Sentence at 20, *In re Lezmond Charles Mitchell* (July 31, 2020).
121. Appellant’s Replacement Opening Brief, *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007) (No. CR-01-1062), 2006 WL 2951921.
122. Memorandum in Support of Petition for Clemency and Commutation of Death Sentence at 3, *In re Lezmond Charles Mitchell* (July 31, 2020). The prosecution attempted to use a peremptory strike against the remaining Navajo veniremember, but the district court disallowed the challenge on *Batson* grounds. *Mitchell*, 502 F.3d at 956-57.
123. *Elk v. Wilkins*, 112 U.S. 94, 102 (1884); An Act to Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians, 43 Stat. 253, ch. 233 (June 2, 1924) (codified as amended at 8 U.S.C. § 1401(b)); Albert W. Alschuler and Andrew G. Deiss, “A Brief History of the Criminal Jury in the United States,” *University of Chicago Law Review* 61 (1994): 884 n.87; see also Amy R. Motomura, “The American Jury: Can Noncitizens Still Be Excluded?” *Stanford Law Review* 64 (2012): 1504 & n.1 (“In the United States, all jurors must be U.S. citizens”); Willard Hughes Rollings, “Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830-1965,” *Nevada Law Journal* 5 (2004): 127.
124. Kevin K. Washburn, “American Indians, Crime, and the Law,” *Michigan Law Review* 104 (2006): 750.
125. Washburn, “American Indians, Crime, and the Law,” 748-49.
126. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).
127. *Swain v. Alabama*, 380 U.S. 202, 205 (1965).
128. *Batson*, 476 U.S. at 92.
129. *Batson*, 476 U.S. at 92-93.
130. *Batson*, 476 U.S. at 99.
131. *Batson*, 476 U.S. at 96.
132. *Batson*, 476 U.S. at 97.
133. *Purkett v. Elem*, 514 U.S. 765, 768 (1995).
134. *Batson*, 476 U.S. at 98.
135. Will Craft, “Peremptory Strikes in Mississippi’s Fifth Circuit Court District,” *APM Reports* (2018), 2, [https://features.apmreports.org/files/peremptory\\_strike\\_methodology.pdf](https://features.apmreports.org/files/peremptory_strike_methodology.pdf). Yet, since *Batson* was decided, the Mississippi Supreme Court has affirmed trial court findings that prosecutors did not discriminate on the basis of race in 95% of cases it has reviewed. The Mississippi Supreme Court last reversed a trial court’s denial of a *Batson* challenge in 2007. *Flowers v. State*, 947 So. 2d 910 (Miss. 2007).
136. Thomas Ward Frampton, “The Jim Crow Jury,” *Vanderbilt Law Review* 71 (2018): 1621, 1626-27. Another study revealed that from 2003 to 2012, prosecutors in Caddo Parish, Louisiana, struck 46% of Black prospective jurors compared to 15% of prospective jurors who were not Black. Ursula Noye, “Blackstrikes: A Study of the Racially Disparate Use of

Peremptory Challenges by the Caddo Parish District Attorney's Office," Reprieve Australia (Aug. 2015), [https://www.prisonpolicy.org/scans/reprieve\\_australia/Blackstrikes\\_Caddo\\_Parish\\_August\\_2015.pdf](https://www.prisonpolicy.org/scans/reprieve_australia/Blackstrikes_Caddo_Parish_August_2015.pdf).

- 137.** Elisabeth Semel et al., "Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors," Berkeley Law Death Penalty Clinic (June 2020), vi, <https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf>. Yet the California Supreme Court has found error in only 2.1% of the cases it has reviewed. Likewise, a South Carolina study revealed that from 1997 to 2014, prosecutors struck 29% of Black jurors and 12.5% of white jurors. Ann M. Eisenberg et al., "If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2014," *South Carolina Law Review* 68, no. 373 (Spring 2017): 388-89. And, a study of peremptory strikes in capital cases in North Carolina found that 16.3% of strike-eligible jurors were Black but prosecutors used 52.6% of their strikes to remove Black people from juries. Catherine M. Grosso and Barbara O'Brien, "A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials," *Iowa Law Review* 97 (2012): 1548.
- 138.** See, e.g., *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); *Foster v. Chatman*, 136 S. Ct. 1737 (2016).
- 139.** Order Granting Motion for Appropriate Relief at 115, *State v. Robinson*, No. 91 CRS 23143 (Cumberland Cnty. Sup. Ct. April 20, 2012) (Robinson I); Order Granting Motion for Appropriate Relief at 3, *State v. Golphin, Walters, & Augustine*, Nos. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079 (Cumberland Cnty. Sup. Ct. Dec. 13, 2012).
- 140.** Brief for the ACLU of Southern California et al. as Amici Curiae Supporting Petitioner at 23, *Smith v. State*, No. 18-7094 (filed Jan. 18, 2019) (citing Texas District & County Attorney Association 2004 Prosecutor Trial Skills Course at 11).
- 141.** Santa Clara County District Attorney's Office, *The Inquisitive Prosecutor's Guide* (June 10, 2016), 51-80, <https://www.sccgov.org/sites/da/Documents/IPG%20Memos/IPG19%20BATSON-WHEELER%20OUTLINE.pdf>.
- 142.** Jury Selection: The Law, Art and Science of Selecting a Jury § 14:14 (Jan. 2020 update).
- 143.** See, e.g., *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1265 (11th Cir. 2009); *Jackson v. State*, 5 So. 3d 1144, 1147-48 (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 (Ga. 2005); *State v. Crawford*, 873 So. 2d 768, 784 (La. Ct. App. 2004).
- 144.** *Crawford*, 873 So. 2d at 784.
- 145.** *State v. Hollis*, 189 A.3d 244, 246 (Me. 2018).
- 146.** *McGahee*, 560 F.3d at 1265; see also *Norris v. Alabama*, 294 U.S. 587, 590, 598-99 (1935) (jury selection practices deemed unconstitutional where statute required that jury commissioners select "honest and intelligent men" to serve on juries; no African Americans had ever served on a jury; and jury commissioner testified that he "d[id] not know of any negro in Morgan County" who met jury qualifications); *Hillery v. Pulley*, 563 F. Supp. 1228, 1248, 1252 (E.D. Cal. 1983) (granting habeas corpus relief where defendant demonstrated that African Americans were systematically excluded from grand jury service, and noting that "[i]ntelligence, moral 'uprightness,' 'better types,' and 'proper' jurors provide no standards at all, but inevitably are merely the subjective judgment of the selector"); *State v. Washington*, 375 So. 2d 1162, 1164 (La. 1979) ("[I]t is not unfair to characterize the prosecutor's basis for an almost automatic peremptory challenge to blacks to an assumption that many of them might not possess the intelligence and education requisite to sit on the case.").
- 147.** *Neal v. Delaware*, 103 U.S. 370, 397 (1880).
- 148.** *Tennyson v. State*, No. PD-0304-18, 2018 WL 6332331, at \*4 (Tex. Crim. App. Dec. 5, 2018) (Alcala, J., dissenting).
- 149.** See, e.g., *Bogan v. State*, 811 So. 2d 286, 288 (Miss. Ct. App. 2001); *Robinson v. State*, 773 So. 2d 943, 948 (Miss. Ct. App. 2000).
- 150.** *Johnson v. State*, No. 1822, 2020 WL 1244577, at \*3, 5 (Md. Ct. Spec. App. Mar. 16, 2020).
- 151.** *Wilson v. Commonwealth*, 2014-SC-000392-MR, 2015 WL 5655524, \*3-4 (Ky. Sept. 24, 2015).
- 152.** Semel et al., "Whitewashing the Jury Box," 15.
- 153.** *George v. State*, 588 S.E. 2d 312, 316 (Ga. Ct. App. 2003).
- 154.** *Smith v. Commonwealth*, 2016-SC-000542-MR, 2017 WL 6380631, at \*1 (Ky. Dec. 14, 2017).
- 155.** *Mash v. Commonwealth*, 376 S.W.3d 548, 554 (Ky. 2012).
- 156.** *State v. Crawford*, 873 So. 2d 768, 783 (La. Ct. App. 2004).
- 157.** *Jackson v. State*, 169 So. 3d 1, 21, 22-23 (Ala. Crim. App. 2010).



- 158.** *State v. Headen*, 697 S.E.2d 407, 411 (N.C. Ct. App. 2010).
- 159.** *People v. Ardrey*, 92 A.D.3d 967, 969 (N.Y. App. Div. 2012).
- 160.** Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336 (codified as amended at 18 U.S.C. § 243).
- 161.** Frampton, “The Jim Crow Jury,” 1643 (finding “no reported criminal prosecutions under Section 4 of the Act” since *Ex parte Virginia*). Although the Supreme Court upheld the constitutionality of this provision in *Ex parte Virginia*, 100 U.S. 339, 349 (1879), the prosecutions at issue in that case were later either dismissed or resulted in acquittals. See Orville Vernon Burton and Armand Derfner, *Justice Deferred: Race and the Supreme Court*, 1st ed. (Cambridge: Harvard University Press, 2021), 75. In addition, the only penalty for conviction is a fine of not more than \$5,000. That amount was set in 1875 and has not been adjusted since then. The equivalent amount in today’s dollars should be more than \$100,000. “How Much Is a Dollar from the Past Worth Today,” July 19, 2021, <https://www.measuringworth.com/dollarvaluetoday/?amount=5000&from=1875>; “\$5,000 in 1875 Is Worth \$122,361.36 Today,” July 19, 2021, <https://www.officialdata.org/us/inflation/1875?amount=5000>.
- 162.** Parker Yesko, “Judge Dismisses Lawsuit Against DA Doug Evans,” *American Public Media Reports*, Sept. 11, 2020.
- 163.** Parker Yesko, “Why Don’t Prosecutors Get Disciplined?,” *American Public Media Reports*, Sept. 18, 2018. One study reviewed a report of 2,012 cases in which a conviction was reversed, sentence reduced, or charges dismissed based in part on prosecutorial misconduct during trial. The prosecutor was disciplined in just 44 of those cases and only two resulted in the prosecutor being disbarred. None of those involved racially discriminatory jury selection. Yesko, “Why Don’t Prosecutors Get Disciplined?”; Neil Gordon, “Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct,” *Center for Public Integrity*, June 26, 2003, updated Jan. 24, 2018, <https://publicintegrity.org/politics/state-politics/harmful-error/misconduct-and-punishment>.
- 164.** Those States are Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Dakota, North Carolina, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Vermont, and Wisconsin.
- 165.** See, e.g., *State v. Bender*, 152 So. 3d 126 (La. 2014); *Blackman v. State*, 414 S.W.3d 757 (Tex. Crim. App. 2013); *Nieto v. State*, 365 S.W.3d 673 (Tex. Crim. App. 2012); *Hassan v. State*, 369 S.W.3d 872 (Tex. Crim. App. 2012); *Cartwright v. State*, 962 N.E.2d 1217 (Ind. 2012); *Grant v. State*, 325 S.W.3d 655 (Tex. Crim. App. 2010).
- 166.** See, e.g., *Myrick v. State*, 834 S.E.2d 542, 545, 547 (Ga. 2019).
- 167.** *Griffin v. State*, 847 S.E.2d 168 (Ga. 2020); *Hogan v. State*, 839 S.E.2d 651, 660 (Ga. 2020); *Daniels v. State*, 832 S.E.2d 372, 377-78 (Ga. 2019); *Dunn v. State*, 821 S.E.2d 354, 359 (Ga. 2018); *Rose v. State*, 695 S.E.2d 261, 264 (Ga. 2010). Courts in other states have expressed hypervigilance in upholding so-called “reverse-Batson” challenges, where defense counsel is accused of discriminating against white jurors. In 95% of the cases raising a challenge to the removal of Black jurors, the Mississippi Supreme Court has found that no *Batson* violation took place. In contrast, since *Batson* was decided, the Mississippi Supreme Court has reviewed 13 cases with reverse-*Batson* challenges and found a violation 11 times. *Eubanks v. State*, 291 So. 3d 309, 325 (Miss. 2020) (King, J., dissenting). Likewise, the South Carolina Supreme Court has upheld challenges to the removal of white jurors for reasons that contradict their rulings when the challenge is to the removal of a Black juror. In one case, a defendant who represented himself explained that he struck white jurors because he “did not feel the jurors were right for the jury.” *State v. Giles*, 754 S.E.2d 261, 262 (S.C. 2014). The South Carolina Supreme Court upheld the trial court’s refusal to let the defendant strike the juror, stating that although the defendant’s explanation for its strikes was “technically, semantically and intellectually racially neutral,” it “was not race neutral for *Batson* purposes.” *Giles*, 754 S.E.2d at 265-66.
- 168.** See, e.g., *People v. Sepulveda*, 2019 IL App (1st) 160515-U, ¶¶ 1-2 (finding no *Batson* violation where State used all six peremptory strikes to remove four Hispanic and two African American prospective jurors); *Davis v. State*, 76 So.3d 659, 660, 663-64 (Miss. 2011) (finding no *Batson* violation where State used all six peremptory strikes against Black prospective jurors and asserted that one prospective juror “seemed ‘hostile’ and refused to make eye-contact” as sole reason for removal).
- 169.** *Corrothers v. State*, 148 So. 3d 278, 307-08 (Miss. 2014).
- 170.** *Graham v. State*, 299 So. 3d 273, 298-99 (Ala. Crim. App. 2019).
- 171.** *Hawkins v. State*, 2011 Ark. App. 164, at 6-7, 2011 WL 714991, at \*3.
- 172.** See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 244, 248 (2005).

- 173.** *State v. Bateman*, 318 S.W.3d 681, 691-92, 693 (Mo. 2010) (en banc).
- 174.** *Davis v. State*, 329 S.W.3d 798, 815-16, 818 (Tex. Crim. App. 2010).
- 175.** *Tennyson v. State*, No. PD-0304-18, 2018 WL 6332331, at \*7 (Tex. Crim. App. Dec. 5, 2018) (Alcala, J., dissenting).
- 176.** *Eubanks v. State*, 291 So. 3d 309, 325 (Miss. 2020) (King, J., dissenting).
- 177.** These jurisdictions include Arizona, Arkansas, Colorado, Florida, Georgia, Louisiana, Montana, Nevada, New York, North Dakota, and Texas. See *State v. Holder*, 745 P.2d 141, 144 (Ariz. 1987) (en banc); *Brent v. State*, 1997 WL 189283, at \*1; *People v. Richardson*, 486 P.3d 282, 294 (Colo. App. 2018); *Truehill v. State*, 211 So. 3d 930, 942-43 (Fla. 2017); *Childs v. State*, 357 S.E.2d 48, 61 (Ga. 1987); *State v. Juniors*, 915 So. 2d 291, 316 (La. 2005); *State v. Parrish*, 111 P.3d 671, 674-75 (Mont. 2005); *Rhynne v. State*, 38 P.3d 163, 170 (Nev. 2002); *People v. Jones*, 284 A.D.2d 46, 48 (N.Y. App. Div. 2001); *State v. Steffes*, 500 N.W.2d 608, 615 (N.D. 1993); *Batiste v. State*, 888 S.W.2d 9, 17 n.5 (Tex. Crim. App. 1994).
- 178.** *State v. Johnson*, 295 So.3d 710, 716 (Fla. 2020); *Worrell v. State*, No. 2878, 2020 WL 3639863, at \*6-7 (Md. Ct. Spec. App. July 6, 2020). Despite this rule requiring defense counsel to make a second objection at the end of jury selection, defendants may not make a claim of ineffective assistance of counsel if their trial attorney fails to follow the rule. See, e.g., *Worrell*, 2020 WL 3639863, at \*8.
- 179.** *Tarver v. Hopper*, 169 F.3d 710, 716 (11th Cir. 1999) (“very little evidence made Robert Tarver a better candidate than [his co-defendant] to be found to be the actual killer”).
- 180.** Petition for Relief from Judgment, *Tarver v. State*, No. CC84-50.62 (Russell County Cir. Ct. Apr. 5, 2000).
- 181.** Petition for Relief from Judgment, *Tarver*, A (Affidavit of Mark Carter at 2).
- 182.** *Tarver v. Hopper*, 169 F.3d 710, 712 (11th Cir. 1999) (“The trial court then said that, but for the procedural bar to the *Batson* claim, he also would find a *Batson* violation in *Tarver’s* trial.”).
- 183.** Robin Demonia, “Tarver Executed for 1984 Slaying,” *Birmingham News*, Apr. 14, 2000.
- 184.** *Broadnax v. Lumpkin*, 987 F.3d 400, 410 (5th Cir. 2021).
- 185.** *Broadnax*, 987 F.3d at 405, 412.
- 186.** *Miller-El v. Dretke*, 545 U.S. 231, 237 (2005) (noting previous review of “Miller-El’s extensive evidence of purposeful discrimination by the Dallas County District Attorney’s Office before and during his trial”); *Miller-El*, 545 U.S. at 266 (“If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection, as shown by their notes of the race of each potential juror. By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.”).
- 187.** Arizona, for example, specifically exempts *Batson* challenges from a rule allowing for review of issues that were not objected to at trial. *State v. Holder*, 745 P.2d 141, 143 (Ariz. 1987). And some states that review unpreserved *Batson* claims apply a heightened level of scrutiny that makes it more difficult for victims of racial discrimination to obtain relief. Those states include Alabama, Colorado, Delaware, Illinois, Indiana, Michigan, Missouri, New Mexico, North Dakota, Ohio, Oklahoma, Tennessee, Utah, Virginia, and West Virginia. See *Ex Parte Ryan Clark Peterson*, No. 1180504, 2020 WL 4913645 (Ala. Aug. 21, 2020) (Mitchell, J., concurring); *People v. Valdez*, 966 P.2d 587, 594-95 (Colo. 1998); *Dickens v. State*, 950 A.2d 658, 2008 WL 880162, at \*3 (Del. 2008); *People v. Mitchell*, 604 N.E. 2d 877, 884 (Ill. 1992); *Addison v. State*, 962 N.E.2d 1202, 1213 (Ind. 2012); *People v. Brooks*, No. 338267, 2019 WL 573049, at \*2-3 (Mich. Ct. App. Feb. 12, 2019); *State v. Miller*, 162 S.W.3d 7, 16 (Mo. 2005); *State v. Wilson*, 868 P.2d 656, 662 (N.M. 1993); *State v. Flanagan*, 680 N.W. 2d 241, 247 (N.D. 2004); *State v. Ballew*, 667 N.E. 2d 369, 378-79 (Ohio 1996); *Coddington v. State*, 142 P.3d 437, 444-45 (Okla. Crim. App. 2006); *State v. Minor*, 546 S.W.3d 59, 68-69 (Tenn. 2018); *State v. Harris*, 289 P.3d 591, 596-97 (Utah 2012); *Buck v. Commonwealth*, 443 S.E.2d 414, 453 (Va. 1994); *State v. Harris*, 432 S.E.2d 93, 95 n.1 (W. Va. 1993). Additionally, every federal circuit that reviews unpreserved *Batson* challenges does so through Federal Rule of Criminal Procedure 52, the federal plain error rule, which forecloses relief in all but the most egregious cases. See, e.g., *United States v. Thomas*, 724 F.3d 632, 643 (5th Cir. 2013); *United States v. Harbin*, 250 F.3d 532, 538-39 (7th Cir. 2001).
- 188.** *Carter v. Jury Comm’n of Greene Cnty.*, 396 U.S. 320, 329 (1970).
- 189.** David Keenan et al., “The Myth of Prosecutorial Accountability After *Connick v. Thompson*: Why Existing Professional Responsibilities Measures Cannot Protect Against Prosecutorial Misconduct,” *Yale Law Journal* 121 (2011): 213; see also *Imbler v. Pachtman*, 424 U.S. 409 (1976).
- 190.** *Hall v. Valeska*, 849 F. Supp.2d 1332, 1334-35 (M.D. Ala. 2012).

- 191.** *Hall*, 849 F. Supp. 2d at 1334; *Hall v. Valeska*, 509 Fed.Appx. 834, 835-36 (11th Cir. 2012).
- 192.** *Attala Cnty. NAACP v. Evans*, No. 4:19-CV-167-DMB-JMV, 2020 WL 5351075, at \*1 (N.D. Miss. Sep. 4, 2020); *Pipkins v. Stewart*, No. 5:15-cv-2722, 2019 WL 1442218, at \*11 (Apr. 1, 2019).
- 193.** *Rose v. Mitchell*, 443 U.S. 545, 558 (1979) (recognizing that “challenges to unconstitutional state action by defendants has been, and is, the main avenue by which Fourteenth Amendment rights are vindicated”).
- 194.** Ashley C. Harrington, “*Batson Versus Strickland*: Evaluating Ineffective Assistance of Counsel Claims Resulting from the Failure to Object to Race-Based Peremptory Challenges,” *New York University Law Review* 89 (2014): 1019 (“[W]hen trial counsel fails to make the objection altogether, defendants lose even the slight protection that *Batson* does provide.”); see also Brent E. Newton, “An Argument for Reviving the Actual Futility Exception to the Supreme Court’s Procedural Default Doctrine,” *The Journal of Appellate Practice & Process* 4, no. 12 (2002): 560 (“All jurisdictions in this country apply some form of the contemporaneous objection rule, in criminal and civil cases alike, which requires an objection at the trial level in order to preserve an argument for appeal.”).
- 195.** Bryan Furst, “A Fair Fight: Achieving Indigent Defense Resource Parity,” *Brennan Center for Justice*, Sept. 9, 2019), [https://www.brennancenter.org/sites/default/files/2019-09/Report\\_A%20Fair%20Fight.pdf](https://www.brennancenter.org/sites/default/files/2019-09/Report_A%20Fair%20Fight.pdf) (describing “overwhelmed indigent defense systems,” with “only 27% of county-based and 21% of state-based public defender offices hav[ing] enough attorneys to adequately handle their caseloads”); Harrington, “*Batson Versus Strickland*,” 1018 (“Even *Batson*’s low standard is often not effectively challenged by defense counsel, a pattern that is at least partially due to the poorly resourced indigent defense system.”); Penny J. White, “Mourning and Celebrating Gideon’s Fortieth,” *University of Missouri Kansas City Law Review* 72 (2003): 517 (describing crisis in indigent defense in the country’s criminal defense systems).
- 196.** And even with training, defense lawyers are often precluded from accessing the data necessary to make such challenges. Many clerk’s offices refrain from tracking demographic information about their jury lists---a decision that appears to have been made to preclude challenges to underrepresentation in the jury pool. Jonathan Abel, “*Batson*’s Appellate Appeal and Trial Tribulations,” *Columbia Law Review* 118 (2018): 728. In Louisiana, for example, “the Orleans Parish Criminal Jury Commissioner does not maintain records relating to the race of the members of the jury pool in any given month.” *State v. McElveen*, 73 So. 3d 1033, n.10 (La. Ct. App. 2011). Even if the information exists, state courts frequently fail to grant criminal defendants access to information about jury selection. See Nina W. Chernoff, “No Records, No Rights: Discovery & The Fair Cross-Section Guarantee,” *Iowa Law Review* 101 (2016): 1755.
- 197.** Only five percent of practicing lawyers in the U.S. today are African American. “ABA Profile of the Legal Profession,” American Bar Association, July 2020, <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>.
- 198.** *Townes v. State*, 253 So. 3d 447, 469 (Ala. Crim. App. 2015).
- 199.** *Townes*, 253 So. 3d at 469.
- 200.** *Townes*, 253 So. 3d at 470-71 (“Further, defense counsel assured the circuit court that the State had not used its peremptory challenges in a racially discriminatory manner. Based on the record and defense counsel’s assurance, this Court cannot say that plain error resulted from the circuit court’s failure to sua sponte require the State to give its reasons for striking African-American veniremembers.”); see also *Rivers v. Quarterman*, 661 F.Supp. 2d 675, 701 (S.D. Tex. 2009) (noting defense counsel “conceded that objective factors other than race made the jurors unfavorable to the State”); *People v. Hernandez*, 266 A.D.2d 311, 312 (N.Y.S. 1999) (noting that “defense counsel conceded that there was a race-neutral reason for excluding a third black prospective juror”).
- 201.** *Hamilton v. State*, 599 So. 2d 1274, 1274 (Ala. Crim. App. 1992).
- 202.** Parker Yesko, “It’s Over: Charges Against Curtis Flowers Are Dropped,” *American Public Media Reports*, Sept. 4, 2020; Nicholas Bogel-Burroughs, “After 6 Murder Trials and Nearly 24 Years, Charges Dropped Against Curtis Flowers,” *New York Times*, Sept. 4, 2020.
- 203.** Yesko, “It’s Over”; Bogel-Burroughs, “Charges Dropped Against Curtis Flowers.”
- 204.** Parker Yesko, “What Exactly Are Prosecutors Allowed To Do?” *American Public Media Reports*, May 15, 2018; Parker Yesko, “Clemmie Fleming Becomes Second Major Witness to Recant in Curtis Flowers Case,” *American Public Media Reports*, July 2, 2019; Associated Press, “What’s Next for Curtis Flowers? New Mississippi AG Reviewing 6-Trial Murder Case,” *Clarion Ledger*, Feb. 10, 2020.
- 205.** Parker Yesko, “The Rise and Reign of Doug Evans,” *American Public Media Reports*, June 12, 2018; Parker Yesko, “Judge Dismisses Lawsuit Against DA Doug Evans,” *American Public Media Reports*, Sept. 11, 2020; Alissa Zhu, “Curtis Flowers: What You Need to Know About the Winona Furniture Store Quadruple Homicides,” *Clarion Ledger*, March 18, 2019.

- 206.** *Flowers v. Mississippi*, 139 S. Ct. 2228, 2246 (2019).
- 207.** *Flowers*, 139 S. Ct. at 2236.
- 208.** *Flowers*, 139 S. Ct. at 2236.
- 209.** *Flowers*, 139 S. Ct. at 2236.
- 210.** *Flowers*, 139 S. Ct. at 2236.
- 211.** *Flowers v. State*, 947 So.2d 910, 935-936 (Miss. 2007).
- 212.** *Flowers*, 139 S. Ct. at 2237.
- 213.** *Flowers*, 139 S. Ct. at 2237.
- 214.** *Flowers*, 139 S. Ct. at 2237.
- 215.** Lacey McLaughlin, "Majority White Jury in Flowers Trial," *Jackson Free Press*, June 11, 2010.
- 216.** *Flowers*, 139 S. Ct. at 2237.
- 217.** *Flowers*, 139 S. Ct. at 2246.
- 218.** Bogel-Burroughs, "Charges Dropped Against Curtis Flowers."
- 219.** Samuel R. Sommers, "On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations," *Journal of Personality and Social Psychology* 90, no. 4 (2006): 606-08; Liana Peter-Hagene, "Jurors' Cognitive Depletion and Performance During Jury Deliberations as a Function of Jury Diversity and Defendant Race," *Journal of Law and Human Behavior* 43, no. 3 (2019): 247.
- 220.** *Powers v. Ohio*, 499 U.S. 400, 411 (1991).
- 221.** Peter-Hagene, "Jurors' Cognitive Depletion," 240-41 (finding that, in cases with Black defendant, all-white juries spent less time analyzing case facts and less time deliberating than racially mixed juries); Sommers, "On Racial Diversity," 600, 606 (studying mock jurors and finding that diverse groups deliberated longer, considered a wider range of information, raised more case facts, made fewer factual errors, and were more willing to discuss race-related issues than homogeneous groups); William J. Bowers, Marla Sandys and Thomas W. Brewer, "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," *DePaul Law Review* 53, no. 4 (2004): 1497, 1507-08, 1511, 1531 (finding tendency of jurors on diverse juries to acknowledge how race affects their perspective and that of other jurors).
- 222.** Jennifer L. Eberhart, *Biased: Uncovering the Hidden Prejudice that Shapes What We See, Think, and Do* (New York: Viking 2019); Equal Justice Initiative, Presumption of Guilt, accessed July 12, 2021, <https://eji.org/issues/presumption-of-guilt/>.
- 223.** Mona Lynch and Craig Haney, "Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the 'Empathic Divide,'" *Law & Society Review* 45, no. 1 (2011): 91-92 (study of 539 death-qualified mock jurors in California which found that white male jurors viewed Black defendants as less redeemable, more cold-hearted, more remorseless, and more likely to reoffend); Bowers, Sandys, and Brewer, "Crossing Racial Boundaries," 1507-08, 1511, 1531 (in study of 1,198 jurors from 353 capital trials in 14 different states, finding that, in cases with Black defendants and white victims, white jurors much more likely to view defendants as dangerous, remorseless, unlikeable, and acting inappropriately during trial); William J. Bowers, Benjamin D. Steiner, and Marla Sandys, "Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition," *University of Pennsylvania Journal of Constitutional Law* 3, no. 1 (2001): 171, 215-16, 222-23, 235-36.
- 224.** Lynch and Haney, "Mapping the Racial Bias" 1507-08, 1511, 1531; Bowers, Steiner, and Sandys, "Death Sentencing in Black and White," 215-16, 222-23, 225-26, 235-36.
- 225.** See, e.g., Peter-Hagene, "Jurors' Cognitive Depletion," 243 (finding that "diversity helps jurors perform better during a complex, group deliberation setting"); Samuel R. Sommers, "Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications and Directions for Future Research," *Social Issues and Policy Review* 2, no. 1 (2008): 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, and include more accurate information in deliberations); Justin D. Levinson, "Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering," *Duke Law Journal* 57, no. 345 (2007): 414-15 (discussing studies indicating that racially diverse juries may make fewer cognitive errors than homogenous jurors); Kim Taylor-Thompson, "Empty Votes in Jury Deliberations," *Harvard Law Review* 113, no. 6 (2000): 1262, 1285-95, 1298-1300 doi:10.2307/1342350 (discussing effects of gender and race in jury deliberation); Nancy J. King, "Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions," *Michigan Law Review* 92, no. 1 (1993): 63, 75-100 (discussing social science studies examining influence of jury discrimination on jury decisions).
- 226.** Studies have shown that cross-racial facial identification is subject to error. See "Cross-Racial Facial Identification: A Social Cognitive Integration,"



*Personality and Social Psychology Bulletin* 18, 3 (1992): 296; Ralph Richard Banks, "Race-based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse," *UCLA Law Review* 48, no. 27 (2001): 1103-04.

- 227.** Sommers, "On Racial Diversity," 600; see also Sommers, 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."); King, "Postconviction Review," 98-99 (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").
- 228.** Shamena Anwar, Patrick Bayer, and Randi Hjalmarsson, "The Impact of Jury Race in Criminal Trials," *Quarterly Journal of Economics* 27, no. 2 (2012): 1019, 1048 (when examining felony jury trials in Sarasota and Lake Counties, Florida in the 2000s, researchers found that, when there were no Black people in the jury pool, Black defendants were convicted at a significantly higher rate (81%) than white defendants (66%). When there was at least one Black potential juror, the conviction rates were almost identical: 71% for Black defendants and 73% for white defendants.); Bowers, Steiner, and Sandys, "Death Sentencing in Black and White," 193-94, 243 (in a national study of capital jurors' decision making based upon interviews with 1,155 capital jurors from 340 trials in 14 states, researchers found that, in cases with a Black defendant and a white victim, all-white juries imposed the death penalty 71.9% of the time while juries with one or more Black male imposed the death penalty 37.5% of the time. In contrast, in cases where the defendant and the victim were of the same race, "jury composition had little discernible influence.").
- 229.** See Bowers, Steiner, and Sandys, "Death Sentencing in Black and White," 188, 193, 195 (finding that likelihood of death sentence in Black-defendant white-victim case was "dramatically increased" with presence of five or more white males on jury as compared to intra racial defendant-victim cases); Mark Bradbury and Marian Williams, "Diversity and Citizen Participation: The Effect of Race on Juror Decision Making," *Administration & Society* 45, 5 (2013): 575 (finding that juries with a higher percentage of white people were more likely to convict Black defendants); Melissa Burek and Marian Williams, "Justice, Juries, and Convictions: The Relevance of Race in Jury Verdicts," *Journal of Crime and Justice* 31, 1 (2008): 149-69; David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, and Barbara Broffitt, "The Use of Peremptory Challenges in Capital Murder Trials: A Legacy and Empirical Analysis," *University of Pennsylvania Journal of Constitutional Law* 3, no. 124 (2001) (studying capital trials in Philadelphia between 1981 and 1997 and concluding predominantly African American 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"); Mona Lynch and Craig Haney, "Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination," *Law and Human Behavior* 33, no. 6 (2009): 485 (finding proportion of whites on jury to be significant predictor of death verdicts for Black defendants and finding highly significant difference in frequency with which white male jurors opted for death depending on race of defendant).
- 230.** See Russ K. E. Espinoza, Cynthia Willis-Esqueda, Suzette Toscano, and Jennifer Coons, "The Impact of Ethnicity, Immigration Status, and Socioeconomic Status on Juror Decision Making," *Journal of Ethnicity in Criminal Justice* 13, no. 3 (2015): 197-216 (finding that, in cases with Mexican and Canadian defendants, all-white juries more likely to convict and severely sentence Mexican defendants); Sommers, "Determinants and Consequences of Jury Racial Diversity," 83, 84 (citing studies of actual and mock juries with white and Latino defendants); Howard C. Daudistel, Harmon M. Hosch, Malcolm D. Holmes, and Joseph B. Graves, "Effects of Defendant Ethnicity on Juries' Dispositions of Felony Cases," *Journal of Applied Social Psychology* 29, no. 2 (1999): 317-36 (finding majority-white juries significantly harsher towards Latino defendants compared to Latino-majority juries).
- 231.** See Baldus et al., "The Use of Peremptory Challenges," 124; Mona Lynch and Craig Haney, "Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries," *Law and Policy* 40, no. 2 (2018): 164 (finding that white respondents significantly were more likely than African American respondents to misuse mitigating evidence---evidence offered to support a sentence of life---and instead weigh it in favor of a death sentence).
- 232.** Baldus et al., "The Use of Peremptory Challenges," 124; Anwar, Bayer, and Hjalmarsson, "The Impact of Jury Race," 1019, 1048 ; Bowers et al., "Death Sentencing in Black and White," 193; Lynch and Haney, "Capital Jury Deliberation," 493.
- 233.** Lynch and Haney, "Mapping the Racial Bias," 88-89; Bowers, Sandys and Brewer, "Crossing Racial Boundaries," 1511, 1517; Lynch and Haney, "Capital Jury Deliberation," 496 ("We view the racial differences in the use and misuse of mitigating evidence...as stemming largely from our participants' inability or unwillingness to empathize with the plight of Black defendants, especially in the case where their victim was White.").
- 234.** Georgia Innocence Project, "Johnny Lee Gates," accessed Oct. 23, 2020, <https://www.gi.org/cases/johnny-lee-gates/>

georgiainnocenceproject.org/cases/freed-clients/johnny-lee-gates/.

- 235.** Andrew Cohen, "A Murder Case Unravels," *Marshall Project*, May 6, 2018, <https://www.themarshallproject.org/2018/05/06/a-murder-case-unravels>; "Georgia Supreme Court Votes 9-0 for New Trial for Former Death-Row Prisoner Johnny Gates," Death Penalty Information Center, March 16, 2020, <https://deathpenaltyinfo.org/news/georgia-supreme-court-votes-9-0-for-new-trial-for-former-death-row-prisoner-johnny-gates>.
- 236.** Cohen, "A Murder Case Unravels;" Georgia Innocence Project, "Johnny Lee Gates;" "Georgia Supreme Court Votes 9-0," Death Penalty Information Center.
- 237.** "Former Georgia Death Row Prisoner Johnny Lee Gates Released After 43 Years in Prison," American Bar Association, July 24, 2020, [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2020/summer/johnny-lee-gates-released/](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/summer/johnny-lee-gates-released/).
- 238.** "Glenn Ford," National Registry of Exonerations, last modified June 29, 2015, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4395>.
- 239.** "Glenn Ford," National Registry of Exonerations.
- 240.** "Glenn Ford," National Registry of Exonerations; Charles Ogletree, "The Death Penalty's Last Stand," *Slate*, Jan. 6, 2016, <https://slate.com/news-and-politics/2016/01/the-death-penaltys-last-stand.html>; A.M. "Marty" Stroud III, "Lead Prosecutor Apologizes for Role in Sending Man to Death Row," *Shreveport Times*, March 20, 2015.
- 241.** Peter-Hagene, "Jurors' Cognitive Depletion," 247; Lynch and Haney, "Capital Jury Deliberation," 493 (finding that significant differences in sentencing based on a defendant's race are "primarily a problem for White jurors, underscoring the importance of obtaining racially diverse juries in these kinds of cases").
- 242.** See *Powers v. Ohio*, 499 U.S. 400, 411-12 (1991) ("Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." (citations and quotation marks omitted)); *Turner v. Murray*, 476 U.S. 28, 35-36 (1986) (finding "especially serious" risk of racial prejudice undermining reliability and accuracy of capital sentencing proceedings); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (noting that "a jury will come to such a [commonsense] judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate on the question of a defendant's guilt" (quotation marks, ellipses, and brackets omitted)).
- 243.** *Powers v. Ohio*, 499 U.S. 400, 414 (1991); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).
- 244.** *J.E.B.*, 511 U.S. at 145.
- 245.** See, e.g., Annie Sloan, "'What To Do About Batson?': Using a Court Rule to Address Implicit Bias in Jury Selection," *California Law Review* 108, no. 1 (Feb. 2020): 237 ("Throughout American history, racial discrimination has been rampant in jury selection."); Barbara J. Falk & Jeremy Patrick, "The 'Red Menace' on Trial: Jury Discrimination in Dennis," *University of La Verne Law Review* 37 (2016): 289 (noting that, in 1949, "racial discrimination in jury selection had been formally prohibited for almost eighty years, but was still rampant"); *State v. Robinson*, 846 S.E.2d 711, 716 (N.C. 2020) ("After the Civil War and Reconstruction, however, racism and legal segregation remained rampant in North Carolina and across the South. Facially race-neutral statutes, such as poll taxes and literacy tests, and the 'separate but equal' fallacy were instituted to legally discriminate against African-Americans. In the early 1900s, African-Americans were excluded from jury service in North Carolina through laws requiring that jurors: (1) had paid taxes the preceding year; (2) were of good moral character; and (3) possessed sufficient intelligence.").
- 246.** See, e.g., Michael Mechanic, "This Is How Prosecutors (Still) Keep Black People Off Juries," *Mother Jones*, Nov. 5, 2015, <https://www.motherjones.com/crime-justice/2015/11/timothy-foster-supreme-court-smoking-gun-black-jurors/>; *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); *Foster v. Chatman*, 136 S. Ct. 1737 (2016).
- 247.** *Foster*, 136 S. Ct. at 1742.
- 248.** *Foster*, 136 S. Ct. at 1743-44.
- 249.** *Foster*, 136 S. Ct. at 1744.
- 250.** *Foster*, 136 S. Ct. at 1748.
- 251.** Stephanie Mencimer, "Black Juror: Prosecutors Treated Me 'Like I Was a Criminal,'" *Mother Jones*, Nov. 5, 2015, <https://www.motherjones.com/politics/2015/11/black-woman-kicked-off-foster-jury-supreme-court/>.
- 252.** Mencimer, "Black Juror."
- 253.** Mencimer, "Black Juror."
- 254.** *Foster*, 136 S. Ct. at 1748, 1750-51.
- 255.** *Foster*, 136 S. Ct. at 1748, 1750-51.
- 256.** Bill Rankin, "High Court Finds Race Discrimination

in Georgia Death Case,” *Atlanta Journal-Constitution*, Sept. 3, 2016.

- 257.** See *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, Equal Justice Initiative, at 28 (Jun. 2010), <https://eji.org/reports/illegal-racial-discrimination-in-jury-selection/>.
- 258.** *Robinson v. State*, 773 So. 2d 943, 944-45 (Miss. Ct. App. 2000).
- 259.** *Illegal Racial Discrimination in Jury Selection*, at 28.
- 260.** *Walker v. State*, 611 So. 2d 1133, 1135 (Ala. Crim. App. 1992). The prosecutor’s explanation for striking Mrs. Greene was 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.
- 261.** *Illegal Racial Discrimination in Jury Selection*, at 29.
- 262.** *Fults v. GDCP Warden*, 764 F.3d 1311, 1315 (11th Cir. 2014).
- 263.** *Fults*, 764 F.3d at 1315.
- 264.** *Fults*, 764 F.3d at 1316-21.
- 265.** *Tharpe v. Warden*, 898 F.3d 1342, 1348 n.3 (11th Cir. 2018) (Wilson, J., specially concurring).
- 266.** See *Tharpe*, 898 F.3d at 1347; see also *Tharpe v. Ford*, 139 S. Ct. 911 (2019).
- 267.** Debra Cassens Weiss, “Federal Inmate Tried by All-White Jury Is Executed after Supreme Court Lifts Execution Stay,” *ABA Journal*, Nov. 20, 2020, <https://www.abajournal.com/news/article/federal-inmate-tried-by-all-white-jury-is-executed-after-supreme-court-lifts-execution-stay> (noting Supreme Court’s refusal to consider whether racial discrimination in jury selection led to all-white jury).
- 268.** Associated Press, “Brendan Bernard Is 9th Federal Inmate Executed by US in 2020,” *Al.com*, Dec. 10, 2020, <https://www.al.com/news/2020/12/brendan-bernard-is-9th-federal-inmate-executed-by-us-in-2020.html> (noting that prosecutor at Bernard’s trial called for review of role racial bias played in his conviction and sentence); Angela Moore, “Op-Ed: I Helped Put Brandon Bernard on Federal Death Row. I Now Think He Should Live,” *IndyStar*, Nov. 18, 2020 (“Brandon Bernard was seen less for his youth, more for his race.”).
- 269.** *Powers v. Ohio*, 499 U.S. 400, 413 (1991); see also *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (“A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.”); *Georgia v. McCollum*, 505 U.S. 42, 49-50 (1992) (recognizing that “the very foundation of our system of justice [is] our citizens’ confidence in it” (citation omitted)); *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975) (noting that juries are “critical to public confidence in the fairness of the criminal justice system”).
- 270.** See, e.g., Ronald F. Wright et al., “The Jury Sunshine Project: Jury Selection Data as a Political Issue,” *University of Illinois Law Review* 2018 (2018): 1434 (“A homogenous jury, on the surface, does not look like a fair jury. The appearance of prejudice in the jury selection process leads to continuing pessimism and distrust concerning the operation of the criminal justice system among the omitted groups.”); see also *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) (noting that “the very integrity of the courts is jeopardized when a prosecutor’s discrimination invites cynicism respecting the jury’s neutrality and undermines public confidence in adjudication” (quotation marks and citation omitted); *Powers v. Ohio*, 499 U.S. 400, 413 (1991) (“The verdict will not be accepted...if the jury is chosen by unlawful means at the outset.”); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (“Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”).
- 271.** *Powers v. Ohio*, 499 U.S. 400, 412 (1991).
- 272.** John Gramlich, “From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System,” Pew Research Center, May 21, 2019, <https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/>.
- 273.** *Georgia v. McCollum*, 505 U.S. 42, 49-50 (1992) (citation omitted).
- 274.** *Powers v. Ohio*, 499 U.S. 400, 416 (1991).
- 275.** 28 U.S.C. § 2254(d).
- 276.** *Metrish v. Lancaster*, 133 S. Ct. 1781, 1786 (2013).
- 277.** *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011).
- 278.** See *Allen v. Hardy*, 478 U.S. 255, 257-58 (1986) (holding that federal law did not require that *Batson* decision be applied to defendants whose cases were final before 1986).
- 279.** Judge William Caprathe (ret.) et al., “Assessing and Achieving Jury Pool Representativeness,” *Judges’ Journal* 55, no. 2 (Spring 2016): 16 (citing to standards

for the jury system adopted by the American Bar Association, Principle 10(A)(1) (“names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction”).

- 280.** See Paula Hannaford-Agor, “Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded,” *Drake Law Review* 59 (2011): 761, 779.
- 281.** See “Letter to Clerk, Southern District of California Regarding Proposed Changes to Jury Selection Plan,” Dec. 30, 2020 (“The use of supplemental source lists, including driver’s license and state ID lists, could improve the diversity of the jury pool.”); Caprathe et al., “Assessing and Achieving Jury Pool,” 18 (“If the master jury list does not meet this threshold, supplementing with additional juror source lists such as welfare, unemployment, or state income tax rolls should be encouraged.”); Hannaford-Agor, “Systemic Negligence,” 780 (noting that the “vast majority of state courts and a sizeable number of federal courts” have adopted the use of multiple lists: “The use of multiple source lists to improve the demographic representation of the master jury list is perhaps the most significant step courts have undertaken since they abandoned the key-man system in favor of random selection from broadbased lists.”); see also Jeffrey Abramson, “Jury Selection in the Weeds: Whither the Democratic Shore?,” *University of Michigan Journal of Law Reform* 52 (2018): 1, 36-37 (noting studies in Oklahoma and Oregon indicating that supplementation of lists increases diversity of jury pool).
- 282.** Hannaford-Agor, “Systemic Negligence,” 761, 782 (commenting that “[f]requent renewal of the master jury list is an essential task in contemporary jury system management,” and noting that “[t]he ABA’s Principles for Juries and Jury Trials recommended the lists be updated at least annually.”).
- 283.** See Abramson, “Jury Selection in the Weeds,” 42 (“At a minimum, courts should update the addresses on the [Master Jury Wheel] annually, using the National Change of Address (NCOA) list maintained by the United States Postal Service.”); see also Hannaford-Agor, “Systemic Negligence,” 782-83.
- 284.** Caprathe et al., “Assessing and Achieving Jury Pool,” 19 (“While the cost of NCOA updates varies by vendor, courts report that the service pays for itself in reduced printing and postage costs.”); see also Hannaford-Agor, “Systemic Negligence,” 783.
- 285.** See, e.g., Jury Selection Task Force, Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson (Connecticut: State of Connecticut Judicial Branch, Dec. 31, 2020), 6, [https://jud.ct.gov/Committees/jury\\_taskforce/ReportJurySelectionTaskForce.pdf](https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf) (current jury summoning process is “random where it is required to be random, and it samples the various communities (e.g., cities and towns) in a manner that acceptably favors the larger cities within each Judicial District.”); *United States v. Williams*, No. 3:13-cr-00764-WHO-1, 2019 WL 1987038, at \*3 (N.D. Cal. May 3, 2019) (“the Clerk’s Office has designed a system that seeks to ensure—to the extent possible—proportionate representation from all ZIP codes in the district”); Bob Cohen and Janet Rosales, Racial and Ethnic Disparity in Manhattan Jury Pools: Results of a Survey and Suggestions for Reform (Albany: Citizen Action of New York, 2007), 17; Leslie Ellis and Shari S. Diamond, “Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy,” *Chicago-Kent Law Review* 78, no. 3 (2003): 1033, 1056 (“A court can examine the yield in various political units (such as wards, districts, or precincts), ZIP codes, or other geographic units within its jurisdiction and compare it with the representation of jurors from a particular area in the census or in the initial list of addresses of prospective jurors to whom questionnaires were sent.”); *State v. Gibbs*, 254 Conn. 578, 587 (Conn. 2000) (“Because the master list is pulled from the source list based on town population, it is referred to as a ‘stratified’ list.”).
- 286.** See, e.g., Judicial Council of the Seventh Circuit, “Plan for Random Selection of Jurors,” Northern District of Illinois, Jan. 8, 2020, 5-6 (where summons returned as “undeliverable,” clerk directed to issue same number of new juror summons to addresses within same ZIP code; for “non-responding jurors,” after sending follow-up, clerk directed to issue same number of new juror summons to addresses within same ZIP code); Judicial Council, “2021 Jury Selection Plan,” United States Court of Appeals for the Fourth Circuit, Jan. 15, 2021, 5 (when mailed juror qualification is undeliverable, or no response is received, clerk “may randomly draw a replacement name from the master jury wheel from the same ZIP code”); Phyllis J. Hamilton, “General Order No. 6: In re Plan for the Selection of Jurors in the United States District Court for the Northern District of California,” July 2017, 3 (where no response received to juror summons or summons returned as undeliverable, clerk “will randomly draw the name of another person residing in the same ZIP code and mail a new juror summons and qualification notice to that person”); Rules of Practice & Procedure for the District of Kansas, United States District Court of Kansas, Rule 38.1(g) (2) (Kansas: March 17, 2016) (for all juror qualification forms returned as undeliverable or where no response received after a follow-up attempt, clerk “must issue the same number of new juror qualification forms to be mailed to addresses with the same ZIP code area”); Order No. 15-3, “In re Jury Selection Plan for the District of Massachusetts,” United States District Court District of Massachusetts, Nov. 1, 2015; Order No. 13-AO-016, “In re Jury Selection Plan for the United States District Court for the Eastern



- District of Michigan,” United States District Court Eastern District of Michigan, March 18, 2013; Plan for the Random Selection of Grand and Petit Jurors, United States District Court for the Eastern District of Washington, Jan. 2, 2017; see also Connecticut Judicial Branch, “Minutes of the Jury Selection Task Force,” Sept. 4, 2020; Chief Judge Juan R. Sánchez, “A Plan of Our Own: The Eastern District of Pennsylvania’s Initiative to Increase Jury Diversity,” *Temple Law Review* 91 (2019): 1, 19.
- 287.** See, e.g., Annie Sweeney and Cynthia Dizikes, “The Balancing Act of Jury Selection,” *Chicago Tribune*, Mar. 27, 2013 (noting that U.S. District Judge Miton Shadur ordered a new jury panel in federal trial of an African American man in Chicago where only one Black juror appeared).
- 288.** See, e.g., *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1164 (9th Cir. 2014) (“it is appropriate to abandon the absolute disparity approach”); *State v. Lilly*, 930 N.W. 2d 293, 302 (Iowa 2019) (rejecting absolute disparity in favor of standard deviation test); *State v. Hester*, 324 S.W.3d 1, 43 n.38 (Tenn. 2010) (“relying on the absolute disparity test alone would have the functional effect of excluding the representation of small minority groups from the protections of the Sixth Amendment”).
- 289.** N.D. Cent. Code § 27-09.1-05 (2019).
- 290.** Nev. Rev. Stat. Ann. § 6.045 (2017).
- 291.** *State v. Lilly*, 930 N.W. 2d 293, 302 (Iowa 2019).
- 292.** Arizona Supreme Court, “Arizona Supreme Court Eliminates Peremptory Strikes of Jurors,” Aug. 30, 2021, <https://www.azcourts.gov/Portals/201/Press%20Releases/2021/083021Jury.pdf?ver=2021-08-30-165533-300>.
- 293.** Wa. Sup. Ct. GR 37; see also Associated Press, “Washington Supreme Court Adopts Rule to Ensure Unbiased Jury,” *Seattle Times*, Apr. 9, 2018.
- 294.** A.B. 3070, 2019-2020 Leg., Reg. Sess. (Cal. enacted Sept. 30, 2020).
- 295.** Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson, Dec. 31, 2020.
- 296.** S918, 2021-2022, 192nd General Court (Mass. 2021) (legislation to address racial disparity in jury selection); see also Thy Vo, “Racial Discrimination Still Exists in Jury Selection. Colorado’s Supreme Court Rejected a Proposal Meant to Fix That,” *Colorado Sun*, July 21, 2021.
- 297.** *State v. Andujar*, No. 084167, 2021 WL 2932543, at \*6 (N.J. July 13, 2021) (recognizing that “our understanding of bias and discrimination has evolved considerably since the nineteenth century” and calling for a Judicial Conference on Jury Selection to recommend improvements to the jury selection process).
- 298.** Order Denying Motion to Dismiss, *Pipkins v. Stewart*, No. 5:15-cv-02722-DDD-MLH, 2019 WL 2592634 (W.D.La. June 21, 2019), ECF No. 63.
- 299.** *Wilson v. State*, 142 So. 3d 732, 747-48 (Ala. Crim. App. 2010); *Dickens v. State*, 950 A.2d 658, No. 443, 2006, 2008 WL 880162, at \*3 (Del. Apr. 2, 2008); *State v. Edmonish*, No. 45345, 2020 WL 1846927, at \*13-14 (Idaho April 13, 2020); *Addison v. State*, 962 N.E.2d 1202, 1213 (Ind. 2012); *Sanders v. Commonwealth*, 801 S.W.2d 665, 668, 673 (Ky. 1990); *People v. Dewulf*, No. 258148, 2007 WL 1488389, at \*2-3 (Mich. Ct. App. May 22, 2007); *State v. Miller*, 162 S.W.3d 7, 16 (Mo. Ct. App. 2005); *State v. Wilson*, 868 P.2d 656, 662 (N.M. Ct. App. 1993); *State v. Ballew*, 667 N.E. 2d 369, 378-79 n.4 (Ohio 1996); *Coddington v. State*, 142 P.3d 437, 444-45 (Okla. Crim. App. 2006); *State v. Harris*, 289 P.3d 591, 596-97 (Utah 2012); *Buck v. Commonwealth*, 443 S.E.2d 414, 453 (Va. 1994); *State v. Sassen Van Elsloo*, 425 P.3d 807, 813 n.3 (Wash. 2018); *State v. Harris*, 432 S.E.2d 93, 95 (W. Va. 1993); *State v. Walker*, 453 N.W.2d 127, 132 (Wis. 1999).
- 300.** *Commonwealth v. Uderra*, 862 A.2d 74, 85-87 (Pa. 2004); *Rodriguez v. Weber*, 617 N.W.2d 132, 14 (S.D. 2000).
- 301.** See *Allen v. Hardy*, 478 U.S. 255, 257-58 (1986) (federal law does not require that *Batson* decision be applied to defendants whose cases were final before 1986).
- 302.** *Commonwealth v. McCormick*, 519 A.2d 442, 448-451 (Pa. Super. Ct. 1986).
- 303.** N.C. Gen. Stat. § 15A-2010 (2009).
- 304.** Order Granting Appropriate Relief, *State v. Robinson*, No. 91 CRS 23143 (N.C. Cumberland Co. Super. Ct. Apr. 20, 2012); Order Granting Appropriate Relief, *State v. Golphin*, No. 97 CRS 47314-15 (Golphin), No. 98 CRS 34832, 35044 (Walters), No. 01 CRS 65079 (Augustine) (N.C. Cumberland Co. Super. Ct. Dec. 13, 2012).
- 305.** Order Granting Appropriate Relief at 174-75, *State v. Robinson*, No. 91 CRS 23143; Order Granting Appropriate Relief at 66-69, 72, *State v. Golphin*, No. 97 CRS 47314-15 (Golphin), No. 98 CRS 34832, 35044 (Walters), No. 01 CRS 65079 (Augustine).
- 306.** Order Granting Appropriate Relief at 111, *State v. Robinson*, No. 91 CRS 23143; Order Granting Appropriate Relief at 4-5, *State v. Golphin*, No. 97 CRS 47314-15 (Golphin), No. 98 CRS 34832, 35044 (Walters), No. 01 CRS 65079 (Augustine).

- 307.** Order Granting Appropriate Relief at 76, *State v. Golphin*, No. 97 CRS 47314-15 (Golphin), No. 98 CRS 34832, 35044 (Walters), No. 01 CRS 65079 (Augustine); Order Granting Appropriate Relief at 111, *State v. Robinson*, No. 91 CRS 23143.
- 308.** *State v. Robinson*, 846 S.E.2d 711, 716 & n.4 (N.C. 2020).
- 309.** Order Granting Appropriate Relief at 115, *State v. Robinson*, No. 91 CRS 23143.
- 310.** Order Granting Appropriate Relief at 110-11, *State v. Robinson*, No. 91 CRS 23143; Order Granting Appropriate Relief at 210, *State v. Golphin*, No. 97 CRS 47314-15 (Golphin), No. 98 CRS 34832, 35044 (Walters), No. 01 CRS 65079 (Augustine).
- 311.** Barbara O'Brien and Catherine M. Grosso, "Beyond *Batson's* Scrutiny: A Preliminary Look at Prosecutorial Peremptory Strikes Following the Passage of the North Carolina Racial Justice Act," *University of California at Davis Law Review* 46 (2013): 1637.
- 312.** O'Brien and Grosso, "Beyond *Batson's* Scrutiny," at 1654.
- 313.** Repeal of Racial Justice Act, S.L. 2013-154, 2013 Gen. Assemb., § 5.(a) (N.C. 2013).
- 314.** *Robinson*, 846 S.E.2d 711 at 714.
- 315.** *State v. Burke*, 843 S.E.2d 246, 249 (N.C. 2020) (finding RJA repeal unconstitutional and authorizing RJA movants who filed before the repeal to continue litigating their claims of racial discrimination); *State v. Ramseur*, 843 S.E.2d 106 (N.C. 2020) (same); *Robinson*, 846 S.E.2d 711 (upholding commutation of Mr. Robinson's death sentence).
- 316.** A.B. 2542, 2019-2020 Leg., Reg. Sess. (Cal. 2020).
- 317.** *The California Racial Justice Act, Hearing on A.B. 2542, Before the S. Pub. Safety Comm.*, 2019-2020 Leg., Reg. Sess. (Cal. 2020) (statement of Ash Kalra, Assembly Member and bill author).

EJI provides support and information to courts, lawyers, advocates, and community groups concerned about racial bias in jury selection. For more information, please visit [eji.org](http://eji.org).



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