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RACE AND THE JURY: HOW THE LAW IS KEEPING MINORITIES OFF THE JURY

STEPHANIE ADAMAKOS

The modern jury focuses on three main ideas: impartiality, as laid out in the Sixth Amendment, jury of one's peers, stemming from the Magna Carta, and a jury that represents a fair cross-section of the community. The cross-section idea has been developed by case law, but originates from the Sixth Amendment, under the belief that jury selection that does not systematically discriminate against members of the community and has a jury pool represents a cross-section of the community is likely to be impartial. Jurors are likely to draw upon their own experiences when deliberating, so having a variety of experiences and perspectives can make for a more well-balanced discussion. An additional hope is that when selecting from a cross-section, it makes the jury more representative of the community and increases the legitimacy of the jury. However, just because the jury pool may represent a cross-section of the community, the final jury may not.

TRIAL BY AN IMPARTIAL JURY

The modern American jury system devolves from medieval England, where King Henry II established a trial of twelve self-informed freeman to resolve legal disputes. United States citizens are granted a right to a jury trial in the Sixth Amendment of the United States Constitution, which reads as follows:

“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....”

The Sixth Amendment’s reference to an “impartial jury” is the only section of the United States Constitution that discusses juries. A common misconception about our right to a jury trial is that we are also assured a jury of our peers. This phrase is not actually found in any American legal documents. It stems from the English Magna Carta of 1215 and was tossed around during the First Continental Congress in 1774, but never worked its way into official writings. The phrase “jury of one’s peers” is also often misinterpreted. Its traditional English Middle Ages

meaning does not mean that someone must be tried by someone of the same race, gender, social class, profession, etcetera, but rather a fellow nobleman, as opposed to the king. The modern equivalent would be a guarantee of a jury of fellow citizens.

The modern jury focuses on three main ideas: impartiality, as laid out in the Sixth Amendment, jury of one's peers, stemming from the Magna Carta, and a jury that represents a fair cross-section of the community. The cross-section idea has been developed by case law, but originates from the Sixth Amendment, under the belief that jury selection that does not systematically discriminate against members of the community and has a jury pool represents a cross-section of the community is likely to be impartial. Jurors are likely to draw upon their own experiences when deliberating, so having a variety of experiences and perspectives can make for a more well-balanced discussion. An additional hope is that when selecting from a cross-section, it makes the jury more

representative of the community and increases the legitimacy of the jury. However, just because the jury pool may represent a cross-section of the community, the final jury may not. The Supreme Court firmly established this idea of a community-based representative jury in *Smith v. Texas* (1940), but also has clearly stated that there is no right to a racially mixed jury or a racially representative jury (*Apodaca v. Oregon* (1972), *Holland v. Illinois* (1990)).

The jury selection system works under the assumption that while each juror does not have an individually impartial mindset, the jury as a whole should be impartial because it comes from a random sample. Like in statistical modeling, using a random sample omits the need for a control. However, the current jury selection process results in the systematic underrepresentation of minorities, disturbing the impartiality of the jury pool.

JURY SELECTION

The process of selecting a supposedly impartial jury is a complicated multi-step process, starting with the

venue choice for trial and ending with the selection of a foreperson. Each of these steps plays a role in the final makeup of the jury, and ultimately results in low numbers of minority jurors.

First, the venue is selected for the trial. When a trial may be racially sensitive, it is more likely for the trial to be moved to another location due to “media hype.”¹ This means there is a possibility the trial could be moved from a minority-heavy area to a minority-light area. This means there could be less minorities in the jury pool.

After the venue is selected, source lists are created. Federal statute requires that registered-voters (ROV) lists be used as source lists, but many states supplement with Department of Motor Vehicle (DMV) records of people with licenses. While the use of more source lists increases the potential juror pool, which is a good thing, this system causes several problems when creating a master list from

¹ Fukurai, Hiroshi, and Richard Krooth. *Race in the Jury Box: Affirmative Action in Jury Selection*. Albany, NY: State U of New York, 2003. Print. p. 2.

the source lists. Right from the start, minorities are less likely to be included in the DMV and ROV source lists than whites, but additionally, whites are more likely to be included in both of these source lists. Due to technical difficulties and infrequent updating, the duplicate names of people on both DMV and ROV are often not eliminated, resulting in people on both lists having higher chance of being selected. This results in an overrepresentation of whites on the master list.

From the master list, a qualified-jurors file is created. This contains all the potential jurors who meet the qualifications and do not have exemptions and excuses. A juror must be of eighteen years of age, a U.S. citizen, fulfil the residency requirement, have sufficient knowledge of English, have ordinary intelligence and good judgement, and not have a previous felony conviction. Peace officers and military personnel are automatically exempt from jury service. Jurors who meet all the qualifications and do not qualify for an exemption may offer excuses. Excuses

include having a physical or mental disability, significant economic hardship, transportation or travel difficulty, or having served on a jury in the past twelve months.

Qualifications such as the residency requirement or not having a previous felony conviction eliminate minorities as potential jurors at higher rates than whites. Pay for jurors is extremely low (\$15/day in California), and would be unlikely to equate to a full day's work elsewhere or cover the cost of child or elderly care, causing people to claim economic hardship as an excuse not to serve on a jury. This excuse has also often led to the exclusion of poor and minority jurors.

A random selection of jurors from the qualified-jurors file are issued jury summons. The summons list an appearance date and court assignment. While it may seem like this process should not affect the racial makeup up the jury pool due to its randomness, it does. Geographically mobile groups, like minorities and poor citizens, often fail to receive jury summons, so they never show up to court

to serve. Even potential jurors who receive their summons may choose not to show up. Evidence suggest that mistrust of a white-dominated judicial system can lead minorities to ignore these summons, and the consequences for not appearing are almost null.² This leads to an underrepresentation of minorities who appear in court for jury duty.

Once jurors have arrived in court, there is a jury panel and venire where it is verified that the potential jurors meet the necessary qualifications and do not qualify for exemption or excuses. Then, there is voir dire. Attorneys for both sides question the potential jurors to root out possible biases. Based on potential jurors' answers, they may be challenged for cause or stricken using a peremptory challenge. Lawyers get unlimited challenges for cause, but they must state a reason as to why they believe the potential juror is unable to be

² Fukurai, Hiroshi, and Richard Krooth. *Race in the Jury Box: Affirmative Action in Jury Selection*. Albany, NY: State U of New York, 2003. Print. p. 2.

impartial. Lawyers only get a limited number of peremptory challenges (the exact number varies by state, but in non-capital cases is somewhere between 3 and 20), but a reason need not be given.³ Peremptory challenges integrate opportunities for minorities not only be systematically excluded, but purposefully excluded, a point discussed later in this paper.

Once the jurors and alternates are selected, the final step is choosing a jury foreperson. The juror foreperson is not selected through a race-neutral or random process, but rather selected by either the judge, bailiff, or jurors. Especially when voted on by fellow jurors, because of the low amount of minorities on juries, it is less likely that the foreperson is of a minority race. The influence of the foreperson should not be discounted. Studies show that the jury foreperson speaks three times as much as the

³ Rose, Mary R. *Privacy, Race, and the Distribution of a Duty: The Procedural Justice of Jury Selection*. Chicago, IL: American Bar Foundation, 2000. Print. p. 4.

average juror, meaning they play a significant part in shaping jury deliberations.⁴

THE PROBLEM WITH THE SYSTEM

At each step of the way, we see minorities getting weeded out as jurors. This weakens the criminal justice system's structure of checks and balances. Thomas Jefferson described juries as "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."⁵ The jury is supposed to serve as a "check" on the prosecutor and police, but without minority jurors, internal biases and prejudices may influence verdicts. Police and prosecutors may get away with using discriminatory processes or presenting racist evidence. Because the high likelihood of an all-white jury is commonly known, minority defendants often take

⁴ Fukurai, Hiroshi, and Richard Krooth. *Race in the Jury Box: Affirmative Action in Jury Selection*. Albany, NY: State U of New York, 2003. Print. p. 4.

⁵ "Part I: The History of the Trial by Jury." *Dialogue on the American Jury: We the People in Action*. American Bar Association Division for Public Education, n.d. Web. 9 Dec. 2015. p. 1.

plea bargains to avoid going to trial, and prosecutors may overcharge minority defendants in criminal courts. Once the trial begins, the lack of jury diversity may cause a lower presumption of innocence and lower credibility of evidence and testimony.⁶ Ultimately, these factors lead to a higher chance of a wrongful conviction.

While diversity on a jury should help deliberations be fairer, it can also help the *perception* of fairness. A lack of diversity on a jury can hurt the legitimacy of court decisions. Court cases where the public views the decision as unfair have erupted in public outrage in the past. Black defendants convicted by all-white juries and white defendants acquitted of killing blacks by all-white juries have been viewed as suspect. Sociologist Hiroshi Fukurai, who specializes in work on race and juries, noted, "There were three cases in Florida in the 1980s involving white police officers accused of killing African Americans. All

⁶ Fukurai, Hiroshi, and Richard Krooth. *Race in the Jury Box: Affirmative Action in Jury Selection*. Albany, NY: State U of New York, 2003. Print. p. x.

three were acquitted by all-white juries, and each time the acquittals sparked rioting in the streets because people did not believe in the system. And there were the Los Angeles riots after the Rodney King beating trial, which failed to include a single African American on the jury."⁷

The Rodney King trial is an unfortunately excellent example of how the system worked against a minority in a racially sensitive case, and how such an outcome can affect legitimacy. Mr. King was filmed being severely beaten by four white police officers, who ended getting tried for assault and excessive use of force, but were acquitted by an all-white jury. This trial is an example of one moved from a minority-heavy area (Los Angeles) to a minority-light area (Simi Valley), which possibly influenced the likelihood of having minorities on the jury.⁸ The acquittals

⁷ McNulty, Jennifer. "Sociologist Testifies About How to Overcome Racial Bias in Jury Selection." *Currents*. University of California, Santa Cruz, 3 Mar. 1997. Web. 09 Dec. 2015.

⁸ Fukurai, Hiroshi, and Richard Krooth. *Race in the Jury Box: Affirmative Action in Jury Selection*. Albany, NY: State U of New York, 2003. Print. p. 3.

triggered the Los Angeles Riots of 1992, which resulted in the deaths of over fifty people, injuries to over one thousand people, and property damage totaling \$1 billion.⁹ The Miami cases, where white police officers acquitted of all charges involving the death of a black motorist, similarly triggered riots resulting in the deaths of eighteen people and \$800 million in property damage.¹⁰ The public can lack trust in verdicts without racially diverse juries where race seems to play a role in the trial, and can sometimes express that trust in violent, and even deadly, ways.

INSTITUTIONALIZED DISCRIMINATION

The jury selection process systematically underrepresents minorities, but stereotyping gets incorporated into the process, as well. Because peremptory challenges do not force attorneys to give

⁹ "Los Angeles Riots Fast Facts." *CNN*. N.p., 28 Apr. 2015. Web. 11 Dec. 2015.

¹⁰ Fukurai, Hiroshi, and Richard Krooth. *Race in the Jury Box: Affirmative Action in Jury Selection*. Albany, NY: State U of New York, 2003. Print. p. 12.

reasons for striking jurors, lawyers often use group affiliations, rather than individual characteristics, to strike jurors, under the assumption that that juror may be more or less sympathetic to the defendant. For lawyers, peremptory challenges are about playing the odds to get the jury that is most favorable or unfavorable to the defendant. This means that jurors are often stricken because of their race. To think that race does not matter is to be naïve. In a public opinion survey on *People v. Eugene "Bear" Lincoln* (1997), a case where a Native American defendant was accused of killing a white police officer, “80 percent of whites in Mendocino County believe[d] Lincoln [was] guilty, compared to 80 percent of Native Americans who believe[d] he [was] innocent.”¹¹ Empathy often translates to leniency. Professors Kalven and Zeisel from the University of Chicago completed a study that found that sympathy causes jurors to disagree with a judge on

¹¹ McNulty, Jennifer. "Sociologist Testifies About How to Overcome Racial Bias in Jury Selection." *Currents*. University of California, Santa Cruz, 3 Mar. 1997. Web. 09 Dec. 2015.

the outcome of a case 22% of the time.¹² Legal scholar Jeffrey Abramson says, “Jurors are not disembodied angels; each hears the evidence from perspectives rooted in personal experience as well as in the experiences of others on the jury.”¹³ People who share similarities with the defendant, racial or otherwise, are likely to be more empathetic. As law Professor Douglas O. Linder points out, “The low probability that white jurors will empathize with African-American defendants is not simply a function of race, but also of the linguistic, cultural, experiential, and economic differences that divide whites and blacks in America.”¹⁴ Race is merely an indicator for the possibility, or lack thereof, of shared experiences which may contribute to empathy.

¹² Linder, Douglas O. "Juror Empathy and Race." *Tennessee Law Review*, n.d. Web. 09 Dec. 2015.

¹³ Abramson, Jeffrey B. *We, the Jury: The Jury System and the Ideal of Democracy*. New York, NY: Basic, 1994. Print. p. 10.

¹⁴ Linder, Douglas O. "Juror Empathy and Race." *Tennessee Law Review*, n.d. Web. 09 Dec. 2015.

Since the 1986 Supreme Court case, *Batson v. Kentucky*, attorneys cannot legally strike jurors based on race. If someone believes a juror has been stricken based on race, they must build a prima facie case for the discrimination, and if met, the responding attorney must provide a race-neutral explanation that appeases a judge. However, there are dozens of “race-neutral” reasons for striking jurors that result in striking minority jurors far more often than whites, mostly due to the fact that race and class are systematically linked. Just some such “race-neutral” reasons are having a prior criminal record, knowing close friends/relatives of defendant/witness, speaking Spanish, being overweight, living in a high-crime area, having been the victim of a crime, being a welfare recipient, and having been stopped by the police before. The unenforceability of *Batson* and easy workarounds mean that peremptory strikes may still target potential minority jurors.

FIXING A BROKEN SYSTEM

Sociologists have suggested several options for improving the current jury selection system to result in greater numbers of minority jurors. Proposals to decrease the systematic underrepresentation of minorities have included the minimization of economic hardship excuses, increased pay for jurors, mandatory company compensation for jury service, the use of additional source lists, and affirmative action in jury selection. More specifically, three different types of jury affirmative action have been proposed: the “split jury” model, where if the defendant is a racial minority, half the members of the jury are from the minority and half from the majority, the Hennepin Model, where the jury composition must match the composition of the local area, and the Social Science model, which requires that three of the twelve jurors must be minorities.¹⁵

¹⁵ McNulty, Jennifer. "Sociologist Testifies About How to Overcome Racial Bias in Jury Selection." *Currents*. University of California, Santa Cruz, 3 Mar. 1997. Web. 09 Dec. 2015.

I believe that the minimization of economic hardship excuses would cause more problems that it would solve and that affirmative action in jury selection would be improper, if not unconstitutional. As discussed earlier, the principle on which our jury selection system rests is that by taking a random sample we will end up with an impartial jury. To weight the jury using race by taking away the randomness would destroy that principle. The most viable remedies would be using more source lists and increasing pay for jurors. The current limited pay and source lists severely limit jury participation across the board, especially with minorities. Massachusetts already uses state resident lists (based on the census) to supplement its DMV and ROV source lists, and other lists, like tribe lists, could be used as well.¹⁶ While this would not solve the problem of duplicate names, improvements in technology could hopefully fix that problem over time.

¹⁶ Bueker, John P. "Jury Source Lists: Does Supplementation Really Work." *Cornell Law Review* 82.2 (1997): 391. Web. 11 Dec. 2015.

Despite *Batson*, there are still serious challenges with peremptory challenges. The majority opinion of *Batson* only imposes vague standards, does not outline a remedy, and still allows for “race-neutral” strikes that are not actually race-neutral. Professor Leonard Cavise said, “Only the most overtly discriminatory or impolite lawyer will be caught in *Batson*’s toothless bite and, even then, the wound will only be superficial.”¹⁷ In most *Batson* standard cases, both the prima facie case and the race-neutral explanation are accepted by a judge, indicating either that the *Batson* standard are too low, or that acceptable “race-neutral” strikes can/appear to target minorities. In order to eliminate a significant source of discrimination in jury the selection, the best option is to eliminate peremptory strikes. Any jurors that are shown to be truly biased can be stricken through challenges for cause. While some people

¹⁷ Cavise, Leonard. "The *Batson* Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection." *DePaul University College of Law Legal Studies Research Paper Series* (2012): 501. Web. 11 Dec. 2015.

believe the peremptory challenges result in striking the extreme jurors on either end of the spectrum, peremptory challenges are really based on guesswork and group affiliation. *Batson* allows potential jurors to be stricken for *other* reasons that may cause them to be or not be empathetic towards a defendant because it apparently affects a juror's thought process, even though race can matter in the same way (i.e. the creation of empathy). The elimination of peremptory strikes would help maintain impartiality through randomness. It maintains the idea that while we cannot guarantee the impartial mindset of each individual juror, we can hopefully obtain an impartial jury from drawing randomly from our community.

The elimination of peremptory strikes would also help the perception of the court and the judicial system. According to a study by the American Bar Foundation, jurors who are stricken report less satisfaction with the jury selection process and regard the decision for them to

be stricken as less fair.¹⁸ The ability to completely fill one's duty as a juror can lead to positive feelings about the jury selection process.¹⁹ As pointed out earlier, the perception of the process can influence the legitimacy of the decision. By decreasing juror strikes and eliminating those where a reason is not given, we can leave jurors and potential jurors with a better feeling about the system. Combined with hopefully increasing diversity on juries and increasing the quality of trial, this should lead to increased legitimacy and acceptance of judicial decisions.

¹⁸ Rose, Mary R. *Privacy, Race, and the Distribution of a Duty: The Procedural Justice of Jury Selection*. Chicago, IL: American Bar Foundation, 2000. Print. p. 20.

¹⁹ *Ibid.* p. 27.

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