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A jury of whose peers? The impact of selection procedures on racial composition and the prevalence of majority-white juries

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ABSTRACT

Racially mixed criminal juries deliberate better and are viewed by the public as more legitimate than all-white and mostly-white juries. The constitution forbids racial discrimination in jury selection, and courts favor racially heterogeneous jury venires. Despite this, racial minorities continue to be under-represented on criminal juries. Limited information exists about the specific sources of these disparities and the frequency of all-white and mostly-white juries. This study compares the racial diversity of venires to that of panels, and both to the general population, to identify the steps in the jury-selection process that appear to be most strongly implicated in the loss of minorities. Additionally, the present analyses examine the for-cause and peremptory-challenge removals of jurors of different races. Finally, this study investigates the prevalence of all-white and mostly-white juries. The results have implications for enhancing the representation of minorities on both venires and panels.

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Introduction

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. –Justice Thurgood Marshall, *Peters v. Kiff* (1972, 503–504)

It is a mainstay of jury research and analysis that minorities are, and have always been, under-represented on juries. Historically, the exclusion was intentional (*Strauder v. West Virginia* 1880). The passage of the Fourteenth Amendment launched significant changes in US Supreme Court jurisprudence on the matter, as well as in the procedures permissible in selecting jurors. Major Court cases, such as *Swain v. Alabama* (1965) and *Batson v. Kentucky* (1986), explicitly linked jury selection to the Fourteenth's equal protection clause; the Court has repeatedly held that excluding prospective jurors from service on the basis of their race is a violation both of the excluded individuals' right to equal protection of law and of that of defendants who are of the same race as the excluded jurors (see *Batson*).

Despite efforts to equalize jury-selection procedures, and in spite of numerous declarations by courts that racially diverse juries are superior to white-only ones (Wilkenfeld 2004), minorities continue to be systematically – and often severely – under-represented on criminal trial juries. Some factors are institutional or social (Fukurai, Butler, and Krooth 1991). Others imply lingering intentional discrimination (Wilkenfeld 2004). The proposed causes vary, but there is consensus regarding the outcome: Juries are far from a fair cross-section of the community.

Inadequate jury diversity threatens the appearance of justice (Ellis and Diamond 2003; MacCoun and Tyler 1988) and the operation of the criminal court system. Whites are more punitive toward defendants of color (Sommers 2007), particularly when whites constitute the numerical majority on the jury (Lynch and Haney 2011). The presence of minorities on the jury can mean the difference between life and death for defendants accused of capital crimes (Bowers, Sandys, and Brewer 2004). The racial composition of criminal juries, then, materially impacts the manner in which justice is delivered in the US. As the opening quote from former Justice Marshall contends, diverse juries have a multitude of benefits over homogenous ones, and it may be impossible to measure or quantify the full range of advantages reaped by diversity in the jury venire and panel.

Race and juries have been the subject of a large body of empirical study. Much of this work focuses on answering the question of whether whites and minorities differ in their beliefs about defendants and their tendencies to vote for conviction (Sommers 2007). This body of research has relied primarily on mock-jury experiments (see, e.g. Saks and Marti 1997). Another body of work has built up around the link between jury racial composition and case outcomes (e.g. Anwar, Bayer, and Hjalmarsson 2012). These studies rely on official data on jury racial makeup, and many focus on capital juries.

What has been relatively uncommon in jury research are examinations of the reality of jury racial composition. Understanding the link between race and outcomes is important, but it begs the question of what juries in the US 'look' like in practice. It is clear that racially diverse juries are better than racially homogenous ones (Cornwell and Hans 2011) and the public prefers them (Fukurai and Davies 1997), so the next step in this area of study is to determine how often defendants are judged by homogenous juries as compared to heterogeneous ones. The existing research has also not spoken directly to the sources of under-representation. Many questions remain about the extent to which juries' 'whiteness' is attributable to institutional factors that homogenize the venire itself (Wilkenfeld 2004), or to processes within the court system (such as attorneys' use of peremptory strikes) that may be intentionally or inadvertently discriminatory (Diamond et al. 2009).

This study seeks to address these gaps in the literature. Using original data containing demographic information about venirepersons and impaneled jurors, this study will compare the racial diversity of venires to that of panels, and both to the general population, to identify the steps in the jury-selection process that appear to be most strongly implicated in the loss of minorities. Additionally, the present analyses will examine the for-cause and peremptory-challenge removals of jurors of different races to determine whether and to what extent minorities on venires suffer disproportionate removals of specific types. Finally, this study investigates the prevalence of all-white and mostly-white juries to determine how often minority jurors appear in numbers sufficient to give them a meaningful voice in the jury's operations. The results have implications for enhancing the representation of minorities on both venires and panels.

Constitutional background: the right to race-neutral selection procedures

It is not quite true that criminal defendants have a right to a jury of their peers. The US Supreme Court has explicitly declined to require jury panels to be of any particular demographic makeup. What the Court has declared is that the selection procedures by which the venire is constructed and jurors are chosen must be race neutral. The Court has invalidated state laws limiting jury service to whites (*Strauder v. West Virginia* 1880) and prosecutorial efforts to eliminate blacks from venires when defendants are also black (*Swain v. Alabama* 1965). It is constitutional dogma that defendants' Sixth Amendment right to trial by an impartial jury means that they must be tried by juries *derived from* fair cross-section of communities; however, no defendant is guaranteed that the jury will mirror that cross-section (Fukurai and Davies 1997) or, indeed, that the jury will contain even a single juror who is demographically similar to the defendant.

Complementing the Sixth Amendment right to a jury selected using race-neutral methods is the requirement that the state not exclude persons from jury service on the basis of their race. This right flows from the Fourteenth Amendment's equal protection clause. The rule applies to both prospective jurors and to defendants and was created to protect minorities' ability to serve on juries, as well as

minority defendants' right to race-neutral procedures (see *Batson v. Kentucky* 1986; *Powers v. Ohio* 1991).

The US Supreme Court has presumed that nondiscriminatory selection procedures will produce impartial juries. At the same time, the Court has recognized that even with substantial gains in social and political equality over the past decades, minorities continue to be seriously under-represented on juries nationwide (Gastwirth and Pan 2011). Nonetheless, the Court has made it difficult for defendants to prevail on claims alleging racial discrimination in selection methods (Wilkenfeld 2004). Commentators have pointed out that *Batson v. Kentucky* – a landmark case allowing defendants to challenge prosecutors' use of peremptory strikes when used against minorities of the defendants' race – is implemented inconsistently across trial courts (Hopper 1989) and poses no genuine impediment to prosecutorial attempts to remove minorities from venues (Mintz 1987). Overall, the Court's efforts have been summarized as enhancing the appearance of justice more than the delivery of it (Golash 1992).

Minority juries and jurors: individual and composition effects

Prior research on minorities' involvement as jurors in criminal cases can be divided into two types. The first focuses on individual jurors and examines whether minorities and whites differ in their attitudes toward defendants. Much of this research is based on mock-jury experiments. The second body of work revolves around the jury as a group and whether racial composition plays a role in jury deliberations, conviction likelihood, and sentence recommendations.

Individual effects

Research on the impact of race on individuals' views on offenders has shown that race matters, though some studies yield inconsistent results (Sommers 2007). Whites and minorities tend to view defendants' culpability differently and, indeed, to have discrepant viewpoints about the credibility and trustworthiness of the trial process itself (Farrell, Pennington, and Cronin 2013). Skolnick and Shaw (1997) conducted a mock-jury study in the wake of the O.J. Simpson acquittal to determine what impact race had on potential jurors' beliefs about black defendants. Results showed that black mock jurors sitting in judgment of a hypothetical defendant on trial for murdering his wife were significantly more likely to vote to acquit the black defendant over the white one, and more often recommended life in prison instead of death. White jurors' voting behavior, by contrast, did not differ across white and black defendants; in fact, white jurors were fairly lenient overall. Sommers and Ellsworth (2000), similarly, found that white mock jurors judged white and black defendants equally harshly, whereas black mock jurors rated white defendants as significantly more culpable and black defendants as deserving of leniency. Likewise, Bowers, Sandys, and Brewer (2004) discovered that black jurors were more likely to see black defendants as remorseful, while white jurors viewed them as dangerous.

Composition effects

Composition effects have been argued to be as – or more – important than the race of individual actors in shaping the impact of race on group processes and outcomes. Small-group research shows that diversity improves performance. Racial, gender, and ethnic variation increases the quality of discussions and decisions and enhances innovation and problem-solving (for reviews, see Elsass and Graves 1997; Kirchmeyer and Cohen 1992).

Research on jury composition has likewise uncovered several positive aspects of racial diversity. While it is impossible to evaluate jury decisions about guilt and sentencing as 'correct' or 'incorrect', researchers have examined the quality of deliberations and the variability in verdicts and sentences as a function of racial heterogeneity. All-white and mostly-white juries display greater punitiveness, especially toward black and Latino defendants (Sommers 2007). Williams and Burek (2008) analyzed case outcomes for non-capital felonies where defendants were black and found that all- or mostly-white juries were more likely to convict. In an analysis of capital-case outcomes for both white and black defendants, Bowers,

Sandys, and Brewer (2004) discovered that white juries had a greater tendency to sentence defendants to death, whereas the presence of blacks on the jury significantly increased the probability that a defendant would receive a life sentence instead. This gap widened in cases with black defendants and white victims. Sommers' (2006) mock-jury experiment showed that diverse groups exchanged a broader array of information during deliberations compared to all-white juries. The evidence, in total, is clear that racial heterogeneity is desirable in criminal trial juries.

Tokens and viable minorities

The theory of tokenism (Kanter 1977) predicts that when minorities constitute a very small fraction of the whole, their impact on group processes and outcomes is limited. These token minorities also experience a range of negative consequences, such as feelings of marginalization and alienation. According to this theory, it is only when a numerical minority achieves sizeable representation that the benefits of diversity are realized.

Research on small groups confirms that token racial minorities participate less, have little or no impact on outcomes, and feel dissatisfied with the experience (Goar 2007; Kirchmeyer and Cohen 1992). Valenti and Downing (1975) developed the theory of the viable minority, which predicts that minorities can materially impact jury decision-making only when their numbers are great enough. In other words, it is not enough to have one minority juror in an otherwise all-white group. The lone minority may withdraw or feel pressured into conforming to the majority's viewpoint. In contrast, by 'providing the minority member with an ally' (657), the more diverse jury increases minority members' ability to resist majority pressure and to have their voices heard (see also Li, Karakowsky, and Siegel 1999).

Jury 'whitening': causes of lost diversity

Most juries in most locations throughout the US are majority white (Fukurai and Davies 1997; King 1993; Wilkenfeld 2004). This poses dual challenges. First, as reviewed earlier, racially heterogeneous juries perform better than all-white ones and ones containing token minority representation. Second, the appearance of justice suffers when minorities seem to be systematically excluded from jury service. Members of the public view verdicts – particularly convictions of minority defendants – as more legitimate when juries contain minorities (Ellis and Diamond 2003; Wilkenfeld 2004). Minority under-representation further alienates minority citizens from the criminal-justice system (King 1993). The public also views minority representation as critical to fairness (Fukurai and Davies 1997), and procedural fairness likewise the crux of correct outcomes (MacCoun and Tyler 1988). The mostly and all-white jury, then, continues to pose a significant challenge for the credibility and legitimacy of the criminal court system.

Some scholars searching for explanations for minority under-representation have accused prosecutors of using their peremptory strikes to remove minorities from venires under the presumption that minority jurors would be sympathetic to minority defendants (Wilkenfeld 2004). There is, indeed, a danger that peremptory strikes can be racially motivated (e.g. *Batson v. Kentucky* 1986); however, Diamond et al. (2009) compared venires to panels in a sample of civil jury trials and found minimal differences between the two. During voir dire, blacks were more likely to be peremptorily removed by the defending party, while they were less likely to be struck by the plaintiff. The countervailing effects canceled each other out. Hispanics and Asians were disproportionately removed, but their removals were pursuant to for-cause (not peremptory) challenges, and these generally revolved around language barriers. This suggests that the whitening process cannot be entirely – or even mostly – attributed to pernicious use of peremptory strikes.

Some scholars have argued that the critical source of disparity is the process used to select and summon people to the venire. Evidence suggests that the methods counties typically use to create master lists are deficient (Re 2007). Voter registration and drivers' license databases systematically under-represent minorities (Fukurai and Davies 1997), and minorities are more residentially transient

and thus harder to reach by mail (Fukurai et al. 1991). Some counties update their lists of eligible jurors infrequently (e.g. every 4 years), which also disproportionately disadvantages minorities (Fukurai and Davies 1997). Finally, counties provide very low daily compensation to jurors and do not offer childcare, which hampers low-income and unemployed citizens' participation (Boatright 1998) and, by extension, harms minority representation. The real cause of whitening may be rooted in the institutional methods used to select the pool. Minority under-representation could then be compounded by the effects of discriminatory peremptory challenges, which are relatively small, yet potentially impactful in light of the racial lopsidedness of the pool by the time it reaches voir dire. Scant empirical evidence, however, exists to either validate or refute these propositions.

Current study

This study is intended to contribute to contemporary understanding of jury racial representativeness. Three research questions are posted. First, how does the racial composition of jury venires compare to that of jury panels, and how closely do each reflect the general population from which the venires were drawn? As summarized earlier, most research has focused on determining whether white and minority jurors differ in their attitudes or whether minority participation alters' juries voting behavior. There is relatively little documentation of the extent to which the jury pool matches (or diverges from) the general population. This empirical void is important because it is possible for criminal defendants to allege that their Sixth Amendment rights to a fair cross-section have been violated by the procedures used to select jury pools without having to prove discriminatory intent on the part of officials responsible for creating the pools (Gastwirth and Pan 2011). Statistical analyses comparing pools to populations have been limited to Court cases, however (e.g. *Berghuis v. Smith* 2011), and are not something social scientists have examined in detail. This study is not an effort to prove (non)discrimination; what will be contributed is a greater understanding of the disparity between the local population, the venire, and the panel.

The second research question is as follows: Are venirepersons of certain races more likely than others to be selected to serve as jurors, or face elevated risk of being excused for cause or by peremptory strike? Peremptory strikes by both the prosecution and defense will be considered so as to determine what the overall impact on jury composition might be (see Diamond et al. 2009).

Third, the analyses will document the composition of empaneled juries to answer the question, What percentage of empaneled juries are all white, mostly white, or mixed race? Three numbers will be reported: the percentage of all juries that are all-white; the percentage that have one minority; and the percentage that have two or more minorities. The jurisdiction under examination uses six-person juries, so a viable minority (Valenti and Downing 1975) is operationalized here as two minorities per jury (that is, 2/6 or 33.3%). These results will speak to the percentage of juries that contain sufficient numbers of minorities such that these minorities have the potential to make a material impact on juries' deliberations and decisions (see Li et al. 1999; Roper 1980).

Methods

Data

The three research questions will be answered using data on the demographic characteristics of jury venire and panel members in one local judicial circuit in a state in the southeastern US. The data were collected in 2013 and 2014 by public defenders and reflect the population of felony defendants who were represented by public defenders and who invoked their right to trial by jury. Nationwide, more than 80% of felony defendants in urban jurisdictions are represented by court-appointed counsel (Harlow 2000), so the present sample includes the majority of all felony defendants who invoked their trial rights during the data-collection period. The court in which the trials occurred serves two adjacent counties that contain a mixture of urban and rural areas. The counties are racially diverse and thus serve as an ideal location for a study of this nature.

Attorneys collecting the data were provided with standardized forms to fill out during voir dire for each trial in which they represented a criminal defendant. The attorneys recorded various types of information about defendants, potential and impaneled jurors, and victims. While it is possible that attorneys did not always identify race correctly (e.g. marking a light-skinned Latino individual as being white), this strategy is preferable to asking jurors to self-report their race because it captures what courtroom actors saw in each juror and how they reacted to their perceptions, even if those subjective judgments were objectively wrong.

Variables and analyses

The first set of analyses will compare the racial composition of the counties (using data from the US Census), the venires, and the panels. The second will analyze the overlap between outcomes (removal for-cause, peremptory-strike removal, and seating) and race. The third will focus on the racial composition of impaneled juries. Univariate descriptive statistics and bivariate inferential analyses will be used to answer the three research questions.

Results

Population, venire, and panel demographics

The first matter to be examined is the racial breakdown across venires and panels, as compared both to one other and to the county population from which each venire was drawn.^{1,2} This information sets a baseline for understanding the similarities and differences across groups. Table 1 displays the results.

Three main findings emerge from Table 1. First, jurors in both counties were predominantly white. Roughly two-thirds of jurors in each county were white. Second, whites were overrepresented as jurors relative to their prevalence in the population. Pine County is 49.5% white, yet 66.1% of its jurors were white. Similarly, Ocean County is 43.6% white, compared to 60.0% of jurors. These findings echo prior research showing that whites are overrepresented on juries relative to their prevalence in the population at-large (see Gastwirth and Pan 2011).

The third main point pertains to the reason for this overrepresentation. As reviewed earlier, whitening can occur at the venire-selection stage, the voir dire process, or both. Prior research has suggested that the bulk of the disparity happens during venire selection, as the databases and methods used for selecting potential jurors systematically disfavor minorities (Fukurai et al. 1991; Wilkenfeld 2004). The present results bear out this same conclusion. The largest racial discrepancies are located between the population and the venire. In Pine County, whites make up roughly half of the adult population, but nearly two-thirds of its venirepersons. In Ocean County, whites are actually a minority at only 43.6% of the population, yet nearly 58% of venirepersons are white. By contrast, the differences between the venires and the panels are small.

There are, nevertheless, discrepancies between venires and panels. In particular, whites are slightly more likely to become jurors, relative to their presence on venires. This number is roughly 3% age points higher in both counties. There are no material differences in blacks' representation on venires vs. juries.

Table 1. Racial composition of counties, venires, and juries (percentages).

Race	Pine ^a			Ocean B ^b		
	Pop.	Venire	Jury	Pop.	Venire	Jury
White	49.5	63.2	66.1	43.6	57.6	60.0
Black	18.0	16.1	16.3	8.7	9.4	10.3
Hispanic or Latino	25.2	16.8	14.9	42.8	30.7	27.6
Asian	5.0	2.6	1.6	2.8	1.3	0.8
Other	2.3	1.2	1.0	2.1	1.1	1.4

^aTotal population 18 and older = 875,809.

^bTotal population 18 and older = 198,269.

Hispanic/Latino venirepersons, however, are marginally less likely to become jurors; the difference is approximately 2% points in each county. Asians suffer a loss of only 1% point in Pine and one-half of 1% point in Ocean. The venire-vs.-panel differences for other races are negligible.

Overall, while it seems clear that venire-selection procedures are the primary cause of whitening and that voir dire is a comparatively minor contributor to the problem, an analysis of removals (peremptory and for cause) is warranted. Because summoned minorities arrive in court already disadvantaged in their numerical representation, even a few race-based removals can eliminate all or most minorities from the venire. This would reduce the chances for there being any minorities on the jury at all and would virtually eradicate the possibility that a viable minority would be impeded.

The second set of analyses examines the relationship between venireperson race and outcome.³ Four primary outcomes are possible: removal for cause; removal pursuant to a peremptory strike; not being reached; or being seated as a juror or alternate. The 'not reached' category contains those individuals who never had the opportunity to be removed or seated because a jury was selected before their numbers could be called. The present analysis is limited to jurors who were reached, as these are the only ones about whom a decision was made.⁴

There are subtypes within each removal category. For-cause strikes can be based on partiality (doubt about whether the person could analyze evidence objectively and make unbiased decisions), hardship (such as serious financial consequences due to wage loss), or language barriers. Peremptory strikes can be levied by the prosecution or by the defense. No stated rationale is required.⁵ The broad categories are presented in Table 2, and the removal subgroups in Table 3.

It can be seen in Table 2 that race was related to outcome; the association was statistically significant ($\chi^2 = 107.678, p < .001$). Perhaps the most important finding is that whites were more likely than any other racial group to be seated as jurors or alternates. Slightly more than 37% of whites were seated, compared to 36% of blacks, 32% of Hispanic/Latinos, 19.9% of Asians, and 33.3% of other races. Because whites were the largest group in terms of raw numbers ($n = 3245$), their high probability of being selected as jurors foreshadows a high prevalence of all-white and mostly-white juries. This point will be revisited shortly.

Turning to peremptory strikes, which have gained notoriety in the debate about jury racial composition, it can be seen that whites were, perhaps unexpectedly, more likely than any other group to

Table 2. Venireperson outcome by race (row percentages).

Race	Outcome			
	Peremptory	For cause	Seated	Total
White	34.9	27.9	37.2	100 ($n = 3,245$)
Black	29.8	34.2	36.0	100 ($n = 781$)
Hispanic or Latino	26.2	41.9	32.0	100 ($n = 1,020$)
Asian	28.7	51.5	19.9	100 ($n = 136$)
Other	21.2	45.5	33.3	100 ($n = 66$)
Total	$n = 1687$	$n = 1,698$	$n = 1863$	$N = 5248$

$\chi^2 = 107.678, p < .001$.

Table 3. Race and peremptory strikes, by party (row percentages).

Race	Striking party		Total
	Prosecution	Defense	
White	39.2	60.8	100 ($n = 1,134$)
Black	60.9	39.1	100 ($n = 233$)
Hispanic or Latino	53.2	46.8	100 ($n = 267$)
Asian	41.0	59.0	100 ($n = 39$)
Other	42.9	57.1	100 ($n = 14$)
Total	$n = 751$	$n = 936$	$N = 1687$

$\chi^2 = 46.561, p < .001$.

be subject to peremptory strikes, with nearly 35% of white venirepersons being removed this way. By contrast, roughly 30% of blacks, 26% of Hispanic/Latinos, 29% of Asians, and 21% of other races were struck peremptorily. These numbers are difficult to interpret, though, without considering the racial distribution across the subtypes of removals. Table 3 displays these numbers for peremptory strikes and Table 4 shows the breakdown among persons removed for cause.

The results in Table 3 reveal stark differences across race in the probability that a venireperson would be struck by the prosecution as compared to the defense. Whites who were struck were far more likely to be removed by the defense (60.8%) than the prosecution (39.2%); this trend is nearly perfectly reversed for blacks, with the majority (60.9%) removed by the prosecution and roughly one-third (39.1%) excused peremptorily by the defense. This finding mirrors the results uncovered by Diamond et al. (2009), who discovered that blacks were more likely to be struck by the prosecution, and whites by the defense, and that in the aggregate these countervailing trends canceled one another out. The present findings appear to confirm that although the racial discrepancies between the venire and the panel are slight for whites and blacks (refer to Table 1), this aggregate similarity obscures a very real race-based pattern across the prosecution and the defense in the use of peremptory strikes. This finding will be discussed in detail later.

Turning to Hispanics and Latinos, the results in Table 3 suggest that members of this group were more likely to be struck by the prosecution (53.2%) than by the defense (46.8%), but this discrepancy is of modest magnitude. Perhaps surprisingly in light of the common allegations against prosecutors for racial discrimination (Wilkenfeld 2004; see also Hopper 1989), Asians and persons of other races who were struck peremptorily were substantially more likely to be removed by the defense than by the prosecution. This finding is tentative, however, due to extremely small sample sizes.

Table 4 offers a picture of the pattern of for-cause removals. Racial differences again emerged and were statistically significant ($\chi^2 = 189.478, p < .001$). Whites and blacks had similar chances of being removed for partiality, hardship, and language barriers. Hispanics and Latinos stood out markedly, however, with members of this group substantially more likely to be removed for hardship (47.1%) or language (8.4%). Asians followed a similar pattern (45.5% hardship and 10.6% language). This result is identical to the pattern Diamond et al. (2009) found. They, too, discovered that Hispanics and Asians stood relatively high chances of being removed for problems with English proficiency. Despite the small sample size for Asians in the current analyses, then, this finding appears robust. In this study, persons of other racial groups also had elevated chances of being removed for hardship or language, but this finding is limited by the small sample size.

All told, these numbers appear to confirm prior commentators' arguments that persons of color face serious economic obstacles to jury service (Boatright 1998). In the present analysis, venirepersons' probabilities of removal for hardship varied markedly by race. Using total sample sizes for each race as the denominator (see Table 2), it can be determined that whites stood a relatively low chance of removal for hardship (5.5% of all whites on the venire), blacks had a slightly higher chance (8.5%), Hispanics/Latinos were markedly higher (18.1%), Asians were at even greater risk (22.1%), and those of other races also faced a high probability (15.2%). The brunt of financial hardship imposed by jury service falls disproportionately upon persons of color, particularly Hispanics/Latinos, Asians, and those of other non-white races.

Table 4. Race and for-cause removals, by reason (row percentages).

Race	For-cause removal reason			Total
	Partiality	Hardship	Language	
White	78.2	21.4	0.5	100 ($n = 829$)
Black	72.5	26.3	1.2	100 ($n = 251$)
Hispanic or Latino	44.5	47.1	8.4	100 ($n = 393$)
Asian	43.9	45.5	10.6	100 ($n = 66$)
Other	55.2	34.5	10.3	100 ($n = 29$)
Total	$n = 1050$	$n = 468$	$n = 50$	$N = 1568$

$\chi^2 = 189.478, p < .001$.

Thus far, the findings have painted a complicated picture of racial disparities in selection into the venire, as well as disparate outcomes for those subject to voir dire. These results speak to the process by which a racially diverse population gradually whitens, leaving relatively few minorities on venires and an even smaller number on juries. Individual outcomes tell only part of the story, however.

For the other part, group-level analyses are needed. The third primary goal of this study was to determine the prevalence of all-white and mostly-white juries. For this portion of the analysis, the sample was narrowed to impaneled jurors (excluding alternates) broken apart by cases such that the unit of analysis is the jury. Only six-person juries are considered here,⁶ and the sample is limited to cases for which complete information for all six jurors was available ($n = 229$ cases). Figure 1 contains the results.

The pattern that emerged from this analysis suggested a tendency for juries to be mostly white or all white. The modal racial composition was four whites of six (66% white); this composition appeared in 25.3% of cases. In 24% of cases, five of six (83%) of jurors were white, and a full 13.1% of cases were tried by all-white juries. In total, nearly two-thirds (62.4%) of juries were majority white or all white.

The theories of tokenism and viable minorities suggest that minority jurors can only meaningfully impact deliberations or the verdict when their numerical representation is great enough to ensure that they will not be marginalized, alienated, or intimidated. There is no agreed upon percentage at which point a minority loses token status and becomes viable; however, Kanter (1977) suggested that this number was 15% and Roper (1980) used the example of two of six jurors (33%). For present purposes, Roper's (see also Valenti and Downing 1975) definition is adopted.

To determine how often minorities, when present at all, reach viability, Table 5 limits the analysis to juries containing at least one minority ($n = 199$). It can be seen that when minorities were present on juries, they experienced a mix of token and viable statuses. They were tokens on 27.6% of juries and reached the bare minimum for viability in 29.1% of cases. They held a majority 15.6% of the time.

Three conclusions flow from this portion of the analysis. First, all-white and mostly-white juries appear to be the norm; nearly two-thirds of criminal defendants in this court sit before juries where minorities are absent or outnumbered. Second, when minorities are present, they are frequently tokens. In more

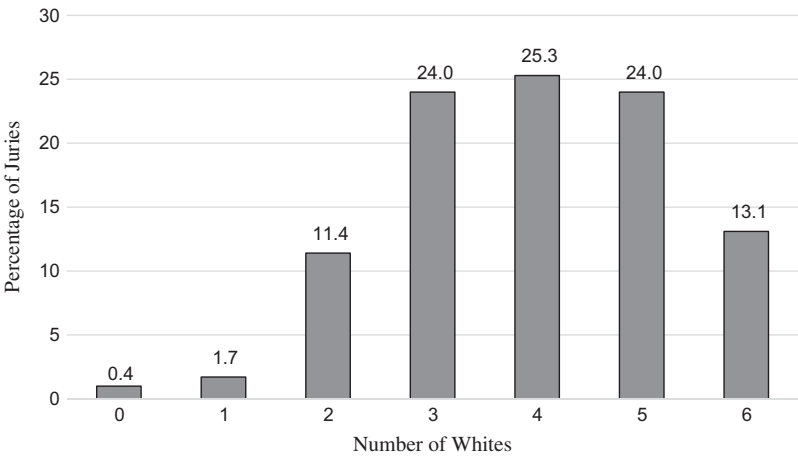


Figure 1. Racial composition of six-person juries.

Table 5. Minority representation on mixed-race juries.

Numerical representation	Percentage of cases
1 Minority	27.6
2 Minorities	29.1
3 Minorities	27.6
4+ Minorities	15.6
	100.00

than one-fifth of the mixed-race juries, minorities had such small numerical representation that theory would suggest they were unable to meaningfully participate in deliberations or materially impact the verdict. Third, however, it is worthy of note that minorities attained viability on two-thirds of all juries and on nearly three-quarters of mixed-race juries. Nonetheless, they were in the numerical minority or, at best, were evenly split with whites on most of these juries; only 13.5% of all juries were majority-minority. This result occurred in spite of minorities having a strong presence in the population of this judicial circuit. The appearance of justice may still suffer, then (Fukurai and Davies 1997; MacCoun and Tyler 1988) even if theory is correct and these viable minorities are indeed able to exert influence over deliberations and verdicts.

Discussion

The present analyses were undertaken with the goal of contributing to the empirical literature on the racial composition of juries and the processes by which racially diverse populations can be transformed into all-white and mostly-white criminal juries. Prior research has demonstrated that race matters, both in terms of each juror's individual characteristics and in the context of the racial makeup of the group as a whole. Jury racial diversity is also important for maintaining the credibility and legitimacy of the court system. The present results revealed a selection process that systematically whitens venires and panels, producing juries that are frequently all white or that contain only a token minority member. Three main conclusions flow from these findings.

First, juries in this jurisdiction are predominantly white, despite marked racial variety in the two counties from which jury venires are drawn. One county is approximately half white, and in the other, 'minorities' constitute the majority of the local adult population. In spite of this, 13% of criminal juries contain no minorities, and 62% are majority white. This contrast demonstrates that under-representation of minorities on juries is an ongoing problem.

Second, the primary source of whitening appears to be the procedures by which venires are pulled from the population. Peremptory strikes and for-cause removals contribute less to the under-representation of minorities on juries. This is perhaps an ironic finding, given the heated debates surrounding voir dire – especially the use of peremptory strikes (Hopper 1989; Wilkenfeld 2004) – and the fact that the US Supreme Court has devoted so much case law to ensuring racial neutrality in venire selection. There appears to be lingering deficiencies with the process for selecting potential jurors, delivering summons to them, and ensuring their appearance in court for jury service.

Third, although most of the filtering occurs prior to voir dire, peremptory strikes and for-cause removals continue to be systematically related to race. Historically, prosecutors have been accused of using their allotted peremptory strikes to eliminate minorities from venires; indeed, the landmark *Batson v. Kentucky* case revolved around a prosecutor who used his strikes to remove all three black venirepersons and ensure the impaneling of an all-white jury to sit in judgment of a black defendant. The present results confirm that prosecutors appear to use their strikes disproportionately against black venirepersons.

At the same time, defense attorneys also appeared to systematically target white venirepersons. This finding mirrors Diamond et al.'s (2009) results. Some legal scholars have advocated for a form of affirmative action in jury selection, given the persistent problems seating minority jurors. Calls have gone out for race-conscious methods of selecting and summoning minorities (Wilkenfeld 2004), a plan that has been dubbed 'jurymandering' (King 1993). In one noteworthy case, the judge in a racially and ethnically sensitive hate-crime trial actively sought to impanel a diverse jury in anticipation of the potential social and political fallout that would occur should a jury containing no members of the victim's ethnicity acquit the defendant. The defendant was convicted, but the Second Circuit Court of Appeals vacated the conviction on the grounds that the judge had committed serious constitutional error (*United States v. Nelson* 2002).

In combination, these various sources of evidence suggest the presence of a race conflict happening in criminal courts. This conflict appears to be silent and largely invisible – and undoubtedly not openly acknowledged in most jurisdictions – yet the mounting evidence is difficult to ignore. Each side in

criminal trials may be attempting both to remove jurors of the non-preferred race (blacks for the prosecution, whites for the defense) and to counteract the racially disparate impact that they know the other side will have on the composition of the jury. This topic warrants further academic and legal analysis to uncover additional nuances and reveal the underlying workings of race-based peremptory strikes.

This study's findings have implications for policy. First and foremost, counties should seek improved methods for drawing venires. Voter registration and driver's license data bases are flawed; moreover, minorities tend to be harder to track down by mail and are less financially capable of participating in jury service. Counties should consider a broader range of sources for names of potentially eligible venirepersons, should update their data bases regularly to ensure they have current data on all eligible citizens, and should consider ways of encouraging or requiring employers to pay full days' wages to workers who are summoned for jury duty. Second, flowing from the finding that Hispanics and Asians were lost disproportionately due to language difficulties, counties and trial courts should consider ways of either better communicating with persons for whom English is a second language, or offering English-proficiency classes for those whose language barriers prevent them from participating in jury service. Finally, courts at both the trial and appellate level should continue pursuing ways of reducing race-based peremptory strikes. While in the aggregate, the countervailing efforts by prosecutors and defense attorneys largely cancel each other out, a race-neutral outcome does not justify racially discriminatory procedures.

This study has limitations. The data come from only one jurisdiction, were collected only on indigent defendants represented by public defenders, and were gathered by those public defenders. This limits the generalizability of the present findings and means that there is an unknown level of error in the data. Additionally, it is not known whether the prosecutors in these cases perceived venirepersons' race the same way that the defenders did. Finally, no data were collected from venirepersons and jurors themselves, so there is no way to tap into their personal opinions, thoughts about the case, biases, and so on. Future studies should continue examining racial composition, in addition to the ways in which certain levels of homo/heterogeneity impact jury deliberations and decisions.

In conclusion, this study contributes to the understanding of contemporary racial diversity on criminal juries. The overarching goal was to determine the primary sources of whitening (that is, minority attrition) during the jury-selection process. The summons stage turned out to be the largest apparent problem in the recruitment of minorities for jury service, a problem compounded by racial disparities in removals for cause and via peremptory strike. These findings lend themselves to suggestions for improving selection procedures. Locating the sources of racial disparities is the first step in reducing and eliminating them; with such an effort, juries may finally become cross-section they were intended to be.

Notes

1. The county population is narrowed to citizens 18 and older, as persons younger than 18 are ineligible for jury duty.
2. County names are pseudonyms.
3. This study does not analyze defendant race as potentially shaping the removal of venirepersons by race. It could be that the racial dynamics of removal differ across white and non-white defendants; however, this inquiry is beyond the scope of this study.
4. In this courthouse, jurors are assigned to particular seating arrangements randomly according to their juror identification numbers. When the prosecution, defense, and judge sit down at the end of voir dire to make decisions about strikes and seating, they begin with the first juror in the first row, and they work their way toward the back of the room until six jurors and one alternate are reached (or 12 and 2, in capital cases). In this study, the not-reached persons are excluded from analysis because these venirepersons were never considered for potential jury service. That is, there was no opportunity for them to have been struck or seated. Additionally, there is no plausible way that racial biases could influence the not-reached decision, as juror seating is random. As such, the present analyses are limited to those venirepersons about whom decisions to remove or seat were made.
5. In the state in which the current study took place, each side is allotted three peremptory strikes for misdemeanors, six for non-capital felonies, and 10 where the alleged offense is punishable by life in prison or by death. In each type of case, the sides get an additional strike for the alternate.
6. The data contain full information on only five capital cases, so it is not possible to compare 6-person to 12-person juries in this study.

Disclosure statement

No potential conflict of interest was reported by the author.

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References

- Anwar, S. P., P. Bayer, and R. Hjalmarsson. 2012. "The Impact of Jury Race in Criminal Trials." *The Quarterly Journal of Economics* 127: 1017–1055.
- Boatright, R. G. 1998. *Improving citizen response to jury summonses: A report with recommendations*. Chicago, IL: American Judicature Society.
- Bowers, W. J., M. Sandys, and T. W. Brewer. 2004. "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: 1497–1538.
- Cornwell, E. Y., and V. P. Hans. 2011. "Representation through Participation: A Multilevel Analysis of Jury Deliberations." *Law and Society Review* 45 (3): 667–698.
- Diamond, S. S., D. Peery, F. J. Dolan, and E. Dolan. 2009. "Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge." *Journal of Empirical Legal Studies* 6 (3): 425–449.
- Ellis, L., and S. S. Diamond. 2003. "Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy." *Chicago-Kent Law Review* 78 (3): 1033–1058.
- Elsass, P. M., and L. M. Graves. 1997. "Demographic Diversity in Decision-making Groups: The Experiences of Women and People of Color." *Academy of Management Review* 22 (4): 946–973.
- Farrell, A., L. Pennington, and S. Cronin. 2013. "Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases." *Law and Social Inquiry* 38 (4): 773–802.
- Fukurai, H., E. W. Butler, and R. Krooth. 1991. "Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection." *Journal of Black Studies* 22 (2): 196–215.
- Fukurai, H., and D. Davies. 1997. "Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennipin Model and the Jury de medietate linguae." *Virginia Journal of Sociology, Policy and Law* 4: 645–681.
- Gastwirth, J. L., and Q. Pan. 2011. "Statistical Measures and Methods for Assessing the Representativeness of Juries: A Reanalysis of the Data in Berghuis v. Smith." *Law, Probability and Risk* 10 (1): 17–57.
- Goar, C. D. 2007. "Social Identity Theory and the Reduction of Inequality: Can Cross-cutting Categorization Reduce Inequality in Mixed-race Groups?" *Social Behavior and Personality: An International Journal* 35 (4): 537–550.
- Golash, D. 1992. "Race, Fairness, and Jury Selection." *Behavioral Sciences and the Law* 10 (2): 155–177.
- Harlow, C. W. 2000. *Defense Counsel in Criminal Cases (NCJ 17023)*. Washington, DC: Bureau of Justice Statistics.
- Hopper, D. D. 1989. "Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?" *Virginia Law Review* 74 (4): 811–841.
- Kanter, R. M. 1977. "Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women." *American Journal of Sociology* 82 (5): 965–990.
- King, N. J. 1993. "Racial Jurymantering: Cancer or Cure—A Contemporary Review of Affirmative Action in Jury Selection." *New York University Law Review* 68 (4): 707–776.
- Kirchmeyer, C., and A. Cohen. 1992. "Multicultural Groups: Their Performance and Reactions with Constructive Conflict." *Group and Organization Management* 17 (2): 153–170.
- Li, J., L. Karakowsky, and J. P. Siegel. 1999. "The Effects of Proportional Representation on Intragroup Behavior in Mixed-race Decision-making Groups." *Small Group Research* 30 (3): 259–279.
- Lynch, M., and C. Haney. 2011. "Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide"." *Law and Society Review* 45 (1): 69–102.
- MacCoun, R. J., and T. R. Tyler. 1988. "The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency." *Law and Human Behavior* 12 (3): 333–352.
- Mintz, J. B. 1987. "Batson v. Kentucky: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges under the Heavier Confines of Equal Protection)." *Cornell Law Review* 72 (5): 1026–1046.
- Re, R. M. 2007. "Re-justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury." *The Yale Law Journal* 116 (7): 1568–1614.
- Roper, R. T. 1980. "Jury Size and Verdict Consistency: 'A Line Has to Be Drawn Somewhere'?" *Law and Society Review* 14 (4): 977–995.
- Saks, M. J., and M. W. Marti. 1997. "A Meta-analysis of the Effects of Jury Size." *Law and Human Behavior* 21 (5): 451–467.

- Skolnick, P., and J. I. Shaw. 1997. "The O. J. Simpson Criminal Trial Verdict: Racism or Status Shield?" *Journal of Social Issues* 53 (3): 503–516.
- Sommers, S. R. 2006. "On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations." *Journal of Personality and Social Psychology* 90 (4): 597–612.
- Sommers, S. R. 2007. "Race and the Decision Making of Juries." *Legal and Criminological Psychology* 12 (2): 171–187.
- Sommers, S. R., and P. C. Ellsworth. 2000. "Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions." *Personality and Social Psychology Bulletin* 26 (11): 1367–1379.
- Valenti, A. C., and L. L. Downing. 1975. "Differential Effects of Jury Size on Verdicts following Deliberation as a Function of the Apparent Guilt of a Defendant." *Journal of Personality and Social Psychology* 32 (4): 655–663.
- Wilkenfeld, J. 2004. "Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of *Grutter v. Bollinger*." *Columbia Law Review* 104 (8): 2291–2327.
- Williams, M. R., and M. W. Burek. 2008. "Justice, Juries, and Convictions: The Relevance of Race in Jury Verdicts." *Journal of Crime and Justice* 31 (1): 149–169.

Cases cited

- Batson v. Kentucky* 476 U.S. 79 (1986).
- Berghuis v. Smith* 559 U.S. 314 (2011).
- Peters v. Kiff* 407 U.S. 493 (1972).
- Powers v. Ohio* 499 U.S. 400 (1991).
- Strauder v. West Virginia* 100 U.S. 303 (1880).
- Swain v. Alabama* 380 U.S. 202 (1965).
- United States v. Nelson* 277 F.3d 164 (2002).