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Racial Disparities in the Capital System: Invidious or Accidental?

Kathryn Roe Eldridge*

I. Introduction

The use of the death penalty is a divisive issue in modern society. Human rights organizations protest frequently that the death penalty itself is a crime against society.¹ Constitutional scholars make arguments that it is cruel and inhuman.² Various other groups have criticized the accuracy of the system, which, has of late, prompted action such as the Illinois moratorium.³ One area which has received substantial comment and criticism, is the way in which race affects the capital punishment system. An article appearing in *Workers World* stated that "it is the super-rich ruling class—whose members never receive death sentences—that benefits from this form of racist repression."⁴ The NAACP Legal Defense and Educational Fund has made a persuasive argument that racism is inherent in the death penalty.⁵ *The American Lawyer*, in an article focusing on the problematic capital prosecutions in Danville, Virginia, also criticized the way race

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1. See Amnesty International, *USA: Arbitrary, Discriminatory, Cruel, Futile—25 Years of Judicial Killing*, at <http://www.web.amnesty.org/ainsf/Index/AMR510072002?OpenDocument&tof=THEMES\DEATH+PENALTY> (last visited Feb. 14, 2002) (stating that the United States is not a champion of human rights due to its use of the death penalty); Equal Justice USA, at <http://www.quixote.org/ej> (last visited Feb. 14, 2002) (stating that the organizations purpose is "to build public scrutiny and protest of human rights in the U.S. legal system abolishing the death penalty being a top priority").

2. See generally *Gregg v. Georgia*, 428 U.S. 153, 231 (1976) (Brennan, J., dissenting) (stating that "death is today a cruel and unusual punishment"); *Gregg*, 428 U.S. at 231 (Marshall, J., dissenting) (stating that "[t]he death penalty, I concluded, is a cruel and unusual punishment").

3. See Ken Armstrong, *Ryan Suspends Death Penalty; Illinois First State to Impose Moratorium on Executions*, CHI. TRIB., Jan. 31, 2000, at C1 (outlining the reasons for the imposition of a moratorium on the Illinois death penalty).

4. Monica Morehead, *Reno Feigns Surprise: Government Report Shows Death Penalty is Racist*, WORKERS WORLD, (Sept. 28, 2000), available at <http://www.workers.org/ww/2000/deathpen0928.html> (last visited Feb. 13, 2002).

5. NAACP Legal Defense and Educational Fund, Inc., *Inherent Racism of the Death Penalty: The History of the Death Penalty in the United States has been Marked by Racism and Inequality*, at <http://www.igc.org/africanam/archives/eh2/factsheet.html> (last visited Feb. 13, 2002).

may impact prosecutors in the system.⁶ In short, many organizations and individuals in this country, including former Attorney General, Janet Reno, are concerned and speaking out about the problems posed by issues of race in the capital punishment system.⁷

This article will examine and analyze statistical racial disparities in capital jurisprudence. The analysis will focus on the federal system as well as several states, including Virginia and Texas. The primary concentration will be on the role of race and the jury, specifically, the composition of jury pools, stereotypes of jurors based on race, and the effect of race on the decision to charge a crime as capital and to seek the death penalty. The body of information available indicates that race is a significant factor in ultimately determining who receives a death sentence: African Americans and Hispanics are far more likely to receive a death sentence than are white individuals. The majority of studies, reports and articles support this conclusion. The analysis will show that African Americans are less likely to be included in the venire or selected to be on a jury and are more likely to be struck from the jury by the prosecution because of the stereotype that African Americans are pro-life jurors.⁸ Furthermore, statistics indicate that prosecutors tend to seek death more often in cases where an African American has killed a white than vice-versa.⁹ Although, Attorney General Ashcroft believes that racism is not the cause of these disparities, other scholars disagree.¹⁰ This article concludes that the problem stems not from blatant racism, but from subconscious bias, which has the ability to infect the system from prosecutorial discretion to an individual juror's vote.

The capital punishment system can be divided into four parts for this analysis. Each may allow racial bias to enter the system. First, the prosecutor has discretion in how he chooses to proceed against a defendant. Second, if the venire is not a broad and true cross section of the community, minorities will be poorly represented. Third, during voir dire, challenges for cause and peremptory challenges can be used to further reduce minority representation on the jury. Lastly, the jury that results from the latter two processes can have a significant impact on whether the jury is inherently biased against the defendant during sentencing.

6. Nathan Koppel, *Selective Execution*, THE AMERICAN LAWYER, Sept. 2001, at 110.

7. See David A. Vise, *Disparities Found in U.S. Death Penalty Prosecutions*, WASH. POST, Sept. 13, 2000, at A17; Robert L. Jackson, *Study Finds Racial Gap on Death Row*, L.A. TIMES, Sept. 13, 2000, at A5.

8. See *infra* Parts II.B-C.

9. See *infra* Part II.A.

10. See U.S. DEPT OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW, at 1 (2001) (saying "the cause of this disproportion is not racial or ethnic bias"). But see, e.g., AMNESTY INTERNATIONAL, KILLING WITH PREJUDICE: RACE AND DEATH PENALTY IN THE USA, at <http://www.amnestyusa.org/rightsforall/dp/race/index.html> (last visited Nov. 16, 2001).

Several major studies of the capital system at the federal and state levels have recently been released.¹¹ In September 2000, the Department of Justice ("D.O.J."), under Attorney General Janet Reno's supervision, released a report that indicated through disparate numbers a possible major racial problem in the implementation of the federal capital punishment system.¹² As a result of this study, a second study was undertaken to ascertain whether the numerical racial disparities, especially with respect to the men on death row, were a result of invidious discrimination or unaccounted for random factors.¹³ The second study was released by the D.O.J., under the guidance of Attorney General John Ashcroft.¹⁴ The study concluded that the disparities were not caused by racial motivations, but were a result of the higher frequency of minority crime.¹⁵ States have also individually undertaken review of their capital punishment systems. In Virginia, the Joint Legislative Audit and Review Commission ("JLARC") of the General Assembly undertook to assess the capital system.¹⁶ It concluded that race does not play a role in prosecutorial discretion.¹⁷ Conversely, the Texas Defender Service, a private non-profit organization undertook a review of the Texas capital system and concluded that racism is apparent at the prosecutorial discretion stage as well as in the selection of juries.¹⁸ The contradiction between the studies is interesting, and a comparative analysis of the four studies reveals that there are significantly troubling statistical racial disparities in the system. The only true explanation for the degree to which they are present is a combination of the factors discussed above, all of which allow racial bias to permeate subtly the capital system and negatively affect a defendant's prospect of death.

11. See generally U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000) (2000); U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001); J. LEGIS. AUDIT AND REVIEW COMM'N, REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT (2002); TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, at <http://www.texasdefender.org/study/study.html> (last visited Jan. 10, 2002).

12. See generally U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000) (2000).

13. U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001).

14. *Id.*

15. See generally U.S. DEP'T OF JUSTICE, *supra* note 10.

16. See generally J. LEGIS. AUDIT AND REVIEW COMM'N, REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT (2002) (reviewing and analyzing accumulated data on the Virginia capital system in three primary areas: prosecutorial discretion, judicial review, and executive clemency).

17. *Id.*

18. See generally TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, at <http://www.texasdefender.org/study/study.html> (last visited Jan. 10, 2002).

II. Stages of the Capital Scheme in Which Bias May Interfere

A. Charging and Seeking Death: Prosecutorial Discretion

By law, the prosecutor has discretion in choosing who is going to be charged, and how that person will be charged. In Virginia, a defendant may be charged with capital murder only under Code Section 18.2-31.¹⁹ A significant number of murders could potentially fall under the statute and thus be charged as capital murders. However, it is up to the prosecutor in the jurisdiction to decide to charge capitally and then to decide whether death will be sought. Thus, if a prosecutor does not believe that death is warranted for a particular defendant, he may charge him with a lesser murder or manslaughter offense. At this stage, racial bias has the opportunity to infect the capital system.²⁰ A prosecutor motivated by racism could choose to seek death for all possible black defendants while only seeking death in the most heinous murders committed by white defendants. Another possibility is that the prosecutor could be motivated by a racist electorate which pushes for capital convictions when an African American kills a white community member. Thus, racial bias from a variety of sources can permeate the capital system at this early stage.

Similarly, in the federal system, United States Attorneys have discretion, although by Department of Justice policy they must seek approval from the Attorney General before they may proceed.²¹ Crimes warranting the federal death penalty are detailed in Title 18 of the United States Code at §§ 1111 and 3591-3598 and in § 848 of Title 21.²² Thus, at the federal and state levels (using Virginia as an example in this case), prosecutors have a great deal of independence and discretion in determining who will be charged with a capital crime and also face the death penalty.

The Department of Justice ("D.O.J.") report issued in September of 2000 was a largely numerical study of decisions to seek death, approval of that decision, and sentences imposed after approval.²³ The bulk of the survey is comprised of charts and graphs detailing the breakdown of the various subjects addressed. Importantly, the survey focuses on race and how it statistically breaks

19. See VA. CODE ANN. § 18.2-31 (Michie Supp. 2001) (allowing capital murder to be charged under one of twelve subparts for murder in connection with abduction, robbery, rape, sodomy, the killing of another in the same act, the killing of another within three years, certain drug offenses, as well as killing for hire, killing by a prisoner, killing a law enforcement officer, killing a child under fourteen, and killing a pregnant woman in order to kill the fetus).

20. Prior to the decision to charge, the police also have discretion on the street in who they choose to arrest and cite with criminal violations.

21. See U.S. DEPT. OF JUSTICE, *supra* note 10, at 4.

22. 18 U.S.C. §§ 1111, 3591-3598 (Supp. V. 1999) (defining murder in the first degree and describing the requirements for imposition of death sentence); 21 U.S.C. § 848(e) (1994) (defining the so-called "kingpin" murders, wherein a death sentence may result from ordering, commanding, procuring, or causing a killing).

23. U.S. DEPT. OF JUSTICE, *supra* note 12, at 34.

down within the system.²⁴ The study divides the analysis between two time periods: first, pre-protocol 1988-1994 and second, post protocol 1995-2000.²⁵ During the pre-protocol period, D.O.J. policy only required the submission of cases in which the United States Attorney wished to seek the death penalty.²⁶ In 1995, the "death penalty 'protocol'" was instituted which requires the submission of all cases in which the defendant is charged with a crime that makes the defendant death eligible.²⁷ During the pre-protocol period, seventy-five percent of the cases submitted to the Attorney General's office for approval involved African American defendants, while only thirteen percent of the cases involved white defendants.²⁸ In the post-protocol period there was still a large disparity between the two groups: forty-eight percent of the cases involved African Americans while only twenty percent involved whites.²⁹ This disparity raises the question of the effect of the race of the defendant on prosecutorial discretion. The survey aptly points out that the protocol now in place "does not require United States Attorneys to submit to the Attorney General *all* potentially capital-eligible defendants."³⁰ Excluded from the statistics are cases in which prosecution was deferred to the state level, a lesser offense was charged, or a plea agreement was made.³¹

The disparity in the numbers could come from several sources. First, African Americans could commit crimes at almost two and one half times the rate of whites.³² A second possible reason for this disparity is that white defendants more frequently receive the benefit of plea bargains or the prosecutor's decision to charge with a lesser offense.³³ The survey has no data on this information. It does however, have information on pleas given after the death notices were given in the cases. The numbers for plea agreements in both periods suggest that race could be a motivating factor in determining who is given the opportunity to plead guilty and thus avoid a death sentence. In the pre-protocol era, forty-three percent of the white defendants received pleas in contrast to twenty-nine percent of the African American defendants; in the post-protocol period forty-eight percent of whites and twenty-five percent of African Americans received the benefit of a plea.³⁴

24. *Id.*

25. *Id.* at 5.

26. *Id.*

27. *Id.*

28. *Id.* at 9.

29. *Id.*

30. *Id.* at 12.

31. *Id.*

32. *Id.* at 9. Using only the post-protocol numbers there were 134 white defendants and 324 black defendants resulting in a ratio of 2.47:1. *Id.*

33. *Id.* at 32-36.

34. *Id.* at 33-34.

While the numbers in the survey alone indicate a racial incongruity, the release of the survey sparked a debate.³⁵ With the release of the report, Attorney General Reno stated, "The survey today finds that minorities are over-represented in the federal death penalty system, as both victims and defendants, relative to the general population."³⁶ One article in the wake of the study's release commented:

Questions about the role of race in the imposition of the death penalty have been an enduring source of controversy, with many civil rights leaders . . . expressing suspicions that subtle influences or outright discrimination lead the justice system to place a lower value on the lives of black defendants and victims. Surveys consistently show much lower levels of support for the death penalty among blacks than within other racial groups.³⁷

Other commentators referred to the survey results as "the worst sort of racial profiling," and that "[n]o state . . . has produced such a racially lopsided death sentencing record as has the federal government."³⁸ These responses to the report prompted Attorney General Reno to request further study to determine the source of the disparities.³⁹ Notably, another analysis was made in the wake of the report: "Ms. Reno's review process has reduced the apparent bias."⁴⁰ The numbers in the report show that the ratios between whites and non-whites narrowed to a degree, however a "reduction" in apparent bias is not good enough when death is at stake.⁴¹

On June 6, 2001, the supplemental data report was issued by the D.O.J.⁴² The report suggested that no invidious discrimination has occurred in the imposition of the federal death penalty.⁴³ The first major analysis of the study looked at the system itself, with the result that "the administrative procedures that currently govern federal capital cases incorporate extensive safeguards against any influence of racial or ethnic bias."⁴⁴ The report places great reliance

35. See, e.g., Vise, *supra* note 7; Jackson, *supra* note 7.

36. Beverly Lumpkin & Geraldine Sealey, *Report Shows Death Penalty Disparity*, ABCNEWS.COM: *Justice Report on Death Penalty Shows Bias*, at <http://my.abcnews.go.com/sections/us/DailyNews/feddeathpenalty000912.html> (last visited Jan. 10, 2002).

37. Mike Dorning, *Reno Won't Delay U.S. Executions Report Details Wide Racial Disparities*, CHI. TRIB., Sept. 13, 2000, at N1.

38. Marc Lacey & Raymond Bonner, *Reno Troubled by Death Penalty Statistics*, N.Y. TIMES, Sept. 12, 2000, at <http://www.deathpenaltyinfo.org/NYT-Reno.html> (last visited Nov. 16, 2001).

39. Gregory D. Stanford, *Racial Disparity on Death Row Shows There Isn't Justice for All*, MILWAUKEE J. SENT., Sept. 17, 2000, at J4.

40. Raymond Bonner & Marc Lacey, *Perusie Disparities Found in the Federal Death Penalty*, N.Y. TIMES, Sept. 12, 2000, at <http://www.deathpenaltyinfo.org/NYT-FedDP.html>.

41. See U.S. DEPT OF JUSTICE, *supra* note 12, at 358 tbl.24-1, 359-61 tbl.24-2.

42. See generally U.S. DEPT OF JUSTICE, *supra* note 10.

43. *Id.*

44. *Id.* at 5.

on the fact that a "prosecutor is constitutionally prohibited from engaging in discrimination," and if a potential juror is biased, "defense counsel can challenge the person 'for cause,' and the court will exclude the person from the jury."⁴⁵ These lofty ideals are not necessarily effective in practice. The State is constitutionally prohibited from acting in a discriminatory manner in a variety of areas; these prohibitions, however, have not been enough to stop the behavior completely.⁴⁶ Furthermore, what juror would be willing to admit in open court that he is biased against one group or another? Thus, the report's stress on safeguards clearly ignores reality.

The 2001 report next addresses the studies instituted after the first survey of the system.⁴⁷ Due to great complexity and time, the D.O.J. decided not to pursue external sources of research in order to obtain a comprehensive understanding of the statistics in the system.⁴⁸ However, the D.O.J. did endeavor to study the cases omitted by the first study, which included cases that could have been charged capitally but were not.⁴⁹ This additional data enlarged the total number of defendants to 973, seventeen percent of whom were white and forty-two percent were African American.⁵⁰ The report concludes that the disparity in these numbers is a result of African Americans' propensities to commit the certain types of crimes which are more likely to be charged at the federal level rather than the state level, and African Americans commit those crimes in geographic areas which focus more heavily on these specific crimes.⁵¹ The numbers are also justified under the theory that the geographical disparity in prosecutions is natural because "[o]ther districts may not prioritize such prosecutions to the same degree because (for example) drugs are generally less of a problem in their areas."⁵² When a death sentence is the result of certain crimes, the frequency with which those crimes appear in a community should not be the determinative factor as to whether a person receives a death sentence. While there may be fewer prosecutions in one jurisdiction because that region faces fewer capital crimes each year, there is no explanation for some jurisdictions having zero prosecutions and others having sixty-six.⁵³ This geographic disparity may not be discriminatory, but the uneven application of the death penalty,

45. *Id.* at 6.

46. *See* Cole, *infra* note 110.

47. U.S. DEPT OF JUSTICE, *supra* note 10, at 10.

48. *Id.* at 9.

49. *Id.* at 10.

50. *Id.*

51. *Id.* at 11.

52. *Id.* at 16.

53. *Id.* at 12-13. In explaining why the docket of the United States District Court for the Eastern District of Virginia has a high number of capital prosecutions the report lists numerous factors, however, it should be noted that these factors are primarily the same in the Western District of Virginia.

wherein someone receives a greater penalty solely because of the location the crime is committed, is disquieting and does not rule out possible prejudice.

Lastly, the study looked at plea agreement proportionality by comparing favorably treated cases with cases treated unfavorably.⁵⁴ The study considered a case as being treated favorably if the defendant was offered a plea and accepted it and included both pleas for reduced sentences and reduced charges.⁵⁵ The report criticizes the inference of bias by asserting that non-invidious causes must be excluded before bias can be assumed.⁵⁶ Furthermore, the study combines all non-capital treatment of cases at every stage and concludes that eighty-one percent of African Americans receive favorable treatment during the entirety of the process as compared to only seventy-four percent of the white defendants.⁵⁷

Despite the report concluding that bias did not exist, the protocol system was subsequently modified.⁵⁸ Review by the D.O.J. is now somewhat expanded in that U.S. Attorneys must submit an evaluation form in cases that could be charged as a capital offense.⁵⁹ Thus, as of June 6, 2001, the federal system has declared itself free of racial bias, at least in the area of prosecutorial discretion.

Similarly, the Commonwealth of Virginia conducted a self-analysis and concluded that race was not a factor in the prosecutorial decision to make a case capital.⁶⁰ The Joint Legislative Audit and Review Commission ("JLARC") began a study of Virginia's capital scheme in November of 2000, in part because of "serious complaints . . . that the system is racially biased, systematically exposing black persons who are arrested for capital murder to the death penalty in larger percentages than their white counterparts."⁶¹ The study emphatically found to the contrary: "[T]he findings clearly indicate that local prosecutors do not base the decision of whether to seek the death penalty in capital-eligible cases on the race of the defendant or the race of the victim."⁶² The study, which focused on crimes committed between 1995 and 1999, found that eighty-nine percent of white defendants who committed a crime eligible for a capital prosecution were indicted for capital murder while only seventy-two percent of African American defendants were similarly indicted.⁶³ Further, once a defendant was indicted, the prosecutor sought death against forty-seven percent of the white defendants but only thirty percent of the African American defendants.⁶⁴ These statistics seem

54. *Id.* at 16-18.

55. *Id.* at 17.

56. *Id.*

57. *Id.* at 18.

58. *Id.*

59. *Id.* at 19.

60. *See generally* J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 16.

61. *Id.* at I.

62. *Id.* at 27.

63. *Id.* at 33 fig.12.

64. *Id.* at 41 fig.16.

to prove that racial bias did not affect prosecutorial discretion, but it must be noted that there were 129 African American defendants while there were only 85 white defendants who were eligible for a capital indictment.⁶⁵

While the study concludes that the race of the victim does not play a role in the prosecutor's decision-making process, this conclusion must be scrutinized more carefully. After declaring that race has no role, the commission states: "Defendants who murdered white victims were also more likely to be indicted for capital murder and face prosecution than are [sic] defendants who murdered black victims."⁶⁶ The raw numbers show that in seventy percent of the cases in which the prosecutor sought the death penalty, at least one victim was white.⁶⁷ These numbers indicate that while prosecutorial discretion may not be biased in terms of the defendant's race, it may be biased in terms of the victim's race. This idea is advanced by the study's revelation that "Commonwealth's Attorneys from high-density areas stated that in deciding whether to seek a capital murder indictment, they are influenced by the nature of the victim . . . defendants who are charged with a capital-eligible murder involving victims with whom juries are likely to sympathize will usually be indicted for capital murder."⁶⁸ The commission found the evidence about race of the victim "not [to be] statistically significant and therefore . . . [not to] be treated as a reliable predictor of whether a prosecutor will seek the death penalty."⁶⁹ The study concluded that instead of race being the statistically significant factor, it was the victim's character that created the statistical difference because "data . . . revealed that black victims in death-eligible cases were more likely to be involved in illegal activities" and thus were not victims who would garner sympathy with the jury.⁷⁰ This conclusion raises one question: why would the victim's sympathy factor so closely parallel the victim's race? One possibility is that juries are primarily white and thus sympathize with a white victim on a more personal level.⁷¹ A second viable theory is that factors an average juror would not find sympathetic are more likely to be present in the minority community. For instance, because crack cocaine more predominately affects the African American community, a crack deal gone wrong, resulting in a murder, is more likely to involve an African American victim than a white victim.⁷² Therefore, while prosecutors may not be basing their decisions on race, the fact that jurors are basing their decisions on factors

65. *Id.*

66. *Id.* at 28.

67. *Id.* at 37 fig.13 (noting that there are possibly high error rates).

68. *Id.* at 32.

69. *Id.* at 43.

70. *Id.*

71. See Johnson, *infra* note 83.

72. See David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283, 1289 (1995) (stating that for a one year period in the 1990s African Americans constituted 91% of all federal crack defendants).

that are closely associated to race is troubling and further investigation needs to be undertaken to determine the reasons for this result.

B. *The Venire*

Racial bias can also permeate the capital system by the method in which the venire is called. The Sixth Amendment to the Constitution provides that “[i]n 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 previously ascertained by law.”⁷³ In *Taylor v Louisiana*⁷⁴ the Supreme Court extended this to the venire: “[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.”⁷⁵ Federal law provides the means by which the venire lists are to be created and jurors selected.⁷⁶ Virginia law similarly prescribes that lists be drawn at random, include the names, addresses and occupations of the inhabitants of the community, and also allows for objections.⁷⁷ The possible race problems are not immediately apparent from these statutes.

The problems are revealed however, with the manner by which the total pool of potential jurors is actually gathered. In the Western District of Virginia, for example, the plan adopted by the court requires the clerk solely to use the voter registration lists for the venire.⁷⁸ While in some geographic regions, the population as a whole may be adequately represented by the registered voting population, recent voter registration statistics released by the Census Bureau show that only sixty-two percent of voting age adults were registered in 1998.⁷⁹ While approximately sixty-eight percent of whites are registered to vote, only sixty-one percent of blacks, twenty-nine percent of Asians, and thirty-four percent of Hispanics are registered.⁸⁰ The 2000 census revealed that there are approximately 273 million people in the United States and 212 million are

73. U.S. CONST. amend. VI.

74. 419 U.S. 522 (1975).

75. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

76. See 28 U.S.C. §§ 1861, 1862, 1867 (1994) (mandating that juries be “selected at random from a fair cross section of the community in the district or division where in the court convenes,” that under § 1862 no citizen shall be excluded on account of race, and under § 1867 the processes by which the venire was compiled may be challenged).

77. See VA. CODE ANN. §§ 8.01-343 to -352 (Michie 2000) (requiring appointment of commissioners to compile potential jury lists and to select jurors at random).

78. U.S.D.C. W.D. VA. PLAN 28 (2001) (requiring that in selecting a jury pool the clerk use voter registration lists because “[v]oter registration lists represent a fair cross section of the persons residing in the community”).

79. U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1998, at 4 tblB, (2000), at <http://www.census.gov/prod/2000pubs/p20-523.pdf> (last visited Feb. 14, 2002).

80. *Id.*

white.⁸¹ Thus, the fact that a greater number of white individuals live in the United States combined with the fact that a greater number of those white individuals register to vote naturally skews jury pools compiled from voter registration in favor of white jurors. Furthermore, minorities are more likely to be excluded because of eligibility requirements, for example felony convictions are more prominent in the African American community (possibly because of race based enforcement of the laws) and thus a greater percentage of African Americans are ineligible to register to vote.⁸² Therefore, if the initial list used by the clerk to develop a venire list is not a fair cross-section, the actual venire and eventual jury has little chance of being a fair cross-section. In this way, minority groups who may be under-represented on the lists from which the venire is drawn will be under-represented in the venire. While this article does not argue that one race cannot be fair to another, there is evidence that a juror is more likely to be sympathetic to a defendant with whom he can identify.⁸³ Thus, an all white jury is less likely to contain a juror who is sympathetic to an African American defendant and the jury is more likely to impose the death penalty out of fear or racial bias.

A recent exposé on the city of Danville, Virginia, highlights the operation of this problem in the capital system.⁸⁴ Most glaring is the fact that "only black men have been sentenced to death in Danville."⁸⁵ The article goes further to reveal that this number is extremely disproportionate to the population of the city and can be linked with sub-par representation of African Americans on juries because of "underrepresent[ation] on the town's voting lists."⁸⁶ Virginia has also received criticism about racial bias invading the capital system from the American Civil Liberties Union ("ACLU").⁸⁷ The report released by the ACLU in 2000, was critical of Virginia's system and its arbitrariness.⁸⁸ Bias towards the race of the victim was the main focus of the study which found that while forty-one

81. U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, at QT-01, at http://factfinder.census.gov/servlet/QTTable?ds_ (last visited Feb. 14, 2002).

82. See John J. Donahue, III & Steven D. Levitt, *The Impact of Race on Policing and Arrests*, 44 J.L. & ECON. 367, 367 (2001) (stating that African Americans only comprise 12% of the population but 44% of the felony conviction population).

83. See Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1625-34 (1984).

84. See generally Koppel, *supra* note 6.

85. *Id.* at 112. Since the date of this article one white defendant has been sentenced to death in Danville.

86. *Id.* at 127. The population of Danville is fifty-four percent white and forty-four percent black. U.S. CENSUS BUREAU, *State and City Quickfacts*, at <http://quickfacts.census.gov/qfd/states/51/5190.html> (last visited Feb. 14, 2002).

87. AM. CIVIL LIBERTIES UNION OF VA., UNEQUAL, UNFAIR AND IRREVERSIBLE: THE DEATH PENALTY IN VIRGINIA, at 32-37, at http://members.aol.com/_ht_a/acluva/DPSTUDY.doc (last visited Feb. 3, 2002).

88. *Id.*

percent of the victims of capital crimes were African American, only twenty percent of the death sentences imposed were for the murder of an African American.⁸⁹ Virginia thus, seems to have a problem, not of invidious discrimination wherein only African Americans are prosecuted, but a covert bias in that jurors tend to sympathize more with white victims rather than non-white victims. This conclusion is harmonious with JLARC's appraisal. This bias could be a result of juries being predominately white combined with the fact that a white identifies more with a fellow white.

C. *Voir Dire*

Jurors may be struck for cause by the court and in a capital case cause is often found in the juror's personal views on capital punishment. In 1968, the Supreme Court held in *Witherspoon v Illinois*⁹⁰ that pursuant to the Sixth and Fourteenth Amendments, a juror may not be excluded "for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."⁹¹ Thus, the State could not strike a juror for cause simply because he was more prone to vote for life.⁹² This ruling was later modified by *Wainwright v Witt*,⁹³ and *Morgan v Illinois*.⁹⁴ In *Witt*, the Court held that the appropriate standard for excusing a juror for cause "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"⁹⁵ In *Morgan*, the Court held that a defendant had the right to question jurors directly about their views on imposing death because a juror who would automatically vote for imposing a death sentence must be excluded from the jury to ensure a fair and impartial verdict and sentence.⁹⁶

Constitutionally, a fair and impartial jury is required.⁹⁷ However, a jury which represents a fair cross-section of the community is also constitutionally required.⁹⁸ These two guarantees come into tension when views on capital punishment are statistically linked to community subsets. Race as it is linked to views on the death penalty may work to exclude jurors. In a survey conducted

89. *Id.* at 32.

90. 391 U.S. 510 (1968).

91. *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968) (holding that a juror may not be excluded for cause based only on general objections to the death penalty).

92. *Id.*

93. 469 U.S. 412 (1985).

94. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (holding that the standard for excluding a juror for cause is if the juror could not follow the oath); *Morgan v. Illinois*, 504 U.S. 719, 735 (1992) (holding that the defendant may directly question jurors about their views on the death penalty).

95. *Witt*, 469 U.S. at 424.

96. *Morgan*, 504 U.S. at 735.

97. U.S. CONST. amend. VI.

98. *Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding that the fair cross-section requirement is inherent to the right to a jury trial).

in 1996, only fifty-three percent of black females supported the death penalty as compared with their white counterparts of whom seventy-six percent supported the death penalty.⁹⁹ Similarly, eighty-five percent of white males were in favor of the death penalty while only sixty-seven percent of African American males were in support.¹⁰⁰ A Gallup poll released in late 2000, only four years later, shows that the views of whites and non-whites are even further divided: seventy-two percent of whites support the death penalty while only forty-two percent of non-whites support capital punishment.¹⁰¹ Thus, when less than half of minorities support capital punishment, minorities as a group are very likely to be struck from a capital jury for cause because they are life jurors. This only exacerbates the problems which begin with under-representation on lists used to compose the venire. This result is not the cause of invidious discrimination, but it may allow race to enter the capital system by requiring minority defendants to face all white juries. Those jurors may vote for death because the individual either generally favors the death penalty or suffers from unconscious racism.

Such facets of the system are shown to be problems in cases such as *Yeatts v Commonwealth*.¹⁰² Ronald Dale Yeatts ("Yeatts") was convicted of capital murder in conjunction with a robbery and sentenced to death based on the future dangerousness predicate.¹⁰³ During voir dire, the Commonwealth had nine potential jurors struck for cause based on the fact that they were opposed to the death penalty.¹⁰⁴ All nine jurors were African American, as was Yeatts.¹⁰⁵ On appeal the Supreme Court of Virginia upheld the strikes for cause because "the record contain[ed] no hint of racial discrimination in their exclusion."¹⁰⁶ Thus, Yeatts faced a jury with significantly fewer African Americans, not necessarily as a result of bias, but as a result of the correlation between race and views on capital punishment. Extending this idea, even if there is no bias in the system, all capital defendants are unlikely to face a jury which is a true cross-section of the community. Furthermore, an African American is more likely to face a jury which will be more prone to sentence him to death on the future dangerousness predicate out of subconscious fears based on his race.

After strikes for cause have been made, potentially striking most of the African American jurors, defense counsel and the Government exercise the use

99. THE NATIONAL OPINION RESEARCH CENTER, RACE AND GENDER BY ATTITUDES TOWARD CAPITAL PUNISHMENT, at <http://www.trinity.edu/~mkearl/cappun.jpg> (last visited Nov. 16, 2001).

100. *Id.*

101. See Joseph Carroll, *Poll Summary: Where America Stands on Death Penalty*, <http://www.gallup.com/poll/releases/pr001214b.asp> (Dec. 14, 2000).

102. *Yeatts v. Commonwealth*, 410 S.E.2d 254 (Va. 1991).

103. *Id.* at 256.

104. *Id.* at 262.

105. *Id.* at 263.

106. *Id.*

of peremptory strikes. Under the Federal system, each side in a capital case is entitled to twenty peremptory challenges.¹⁰⁷ In the Virginia system, there are no additional strikes for a capital case: "[T]welve persons from a panel of twenty shall constitute a jury in a felony case," thus each side gets four strikes.¹⁰⁸ However, neither the government nor the defendant may use the peremptory challenges on the sole basis of a prospective juror's race.¹⁰⁹ When an objection is made to the opposing counsel's use of a challenge on *Batson* grounds, counsel must provide a non-discriminatory reason.¹¹⁰ The effectiveness of these rules in practice have little strength.¹¹¹ A crafty prosecutor could strike every African American juror and have a valid, race-neutral reason for the court. Likewise, defense counsel for a white murderer of an African American, could just as easily strike all African American jurors and have a non-invidious reason for doing so. Thus, while the United States Supreme Court has attempted to establish principles to eliminate the consideration of race from jury selection with cases such as *Batson*, it is not clear that these principles are entirely effective, or effective at all, in preventing racially motivated peremptory strikes.

Gallup polls detailing minority groups' views are available to the public in a wide variety of sources and are thus available to prosecutors who select juries.¹¹² If a prosecutor has no greater information by which to decide which jurors to strike, why would he not strike the jurors who are statistically more likely to be in favor of life imprisonment? The facts indicate that this practice is followed in many capital and non-capital cases.

The Texas study found exactly this problem. Examining the use of peremptory strikes to exclude African American jurors, the study found both a deeply rooted history of the practice, and modern practitioners admitting to the continued use of race based peremptory strikes.¹¹³ Further, the study found that the Supreme Court's seemingly pivotal decision in *Batson* has only effected a reversal in one case over a fifteen year span.¹¹⁴

Other jurisdictions are plagued by the same problem. In 1997, a tape was released to the public which showed that a Philadelphia prosecutor had systematically violated *Batson*, and instructed others to do the same.¹¹⁵ The tape was of

107. FED. R. CRIM. P. 24.

108. VA. CODE ANN. § 19.2-262 (Michie 2000); see also *Buchanan v. Commonwealth*, 384 S.E.2d 757, 767 (Va. 1989) (holding that additional strikes in capital cases are unnecessary).

109. See *Batson v. Kentucky*, 476 U.S. 79, 84 (1986) (holding that racially discriminatory peremptory challenges by the state violate equal protection); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (extending *Batson* to apply to the defendant's use of peremptory challenges).

110. DAVID COLE, *NO EQUAL JUSTICE* 120 (The New Press 1999).

111. *Id.* at 120-22 (stating that "*Batson* does nothing to address this problem, and is generally ineffective at stopping even blatant racists").

112. See Carroll, *supra* note 101.

113. See generally TEXAS DEFENDER SERVICE, *supra* note 18, at 2.

114. *Id.* at 7.

115. Michael Janofsky, *Under Siege, Philadelphia's Criminal Justice System Suffers A rather Blow*, N.Y.

an Assistant District Attorney lecturing young prosecutors on jury selection in which he told them that "young black women are very bad" and "blacks from low-income areas are less likely to convict."¹¹⁶ The release of this information has generated petitioners seeking relief under *Batson*.¹¹⁷ The majority of these cases have been found to be procedurally defaulted and thus, whether prosecutors were unconstitutionally excluding jurors based on race has not been fully addressed.¹¹⁸ Philadelphia is not the only jurisdiction plagued by blatant racism on the part of prosecutors in their use of peremptory strikes.

In 1995, the United States Court of Appeals for the Eleventh Circuit dealt precisely with this issue. In *Jackson v Herring*¹¹⁹ the Eleventh Circuit reversed a district court finding that the prosecution had unconstitutionally struck all of the potential black jurors.¹²⁰ The district court found that "[t]he standard operating procedure of the Tuscaloosa County District Attorney's Office . . . was to use the peremptory challenges to strike as many blacks as possible from the venires" and the "prosecutors also manipulated the trial docket in their effort to preserve the racial purity of criminal juries."¹²¹ Furthermore, the prosecutor testified to his reasons for striking African American potential jurors: "[B]lack people were less receptive to a state's case . . . and would be less likely to give the State a fair trial."¹²² Jackson's racial claim was premised on an ineffective assistance claim which the court found was procedurally barred because she "fail[ed] to show that her counsel's deficient performance [in not objecting to the prosecutor's use of peremptory strikes] prejudiced her defense."¹²³ Thus, while the court admitted that there were blatant constitutional violations in the selection of the jury that convicted Jackson, the result was not harmful. This decision raises two problems with peremptory strikes: (1) they may be used in a race conscious manner; and (2) race based use is not readily reviewed and reversed.

The dramatic effect of combining strikes for cause and peremptory strikes is a narrowing function, especially when the original venire was drawn from a

TIMES, Apr. 10, 1997, at A14.

116. *Id.*

117. See generally *Peterkin v. Horn*, 988 F. Supp. 534 (E.D. Pa. 1997) (denying Peterkin's request to amend his petition to include a *Batson* claim because procedurally defaulted); *Commonwealth v. Lark*, 746 A.2d 585 (Pa. 2000) (holding that the McMahon tapes were not sufficient evidence to revive a waived *Batson* claim). But see *Commonwealth v. Basemore*, 744 A.2d 717 (Pa. 2000) (reversing a denial of post-conviction relief for further assessment of discrimination claim).

118. See *Peterkin*, 988 F. Supp. at 534; *Lark*, 746 A.2d at 585. But see *Basemore*, 744 A.2d at 717.

119. 42 F.3d 1350 (11th Cir. 1995).

120. *Jackson v. Herring*, 42 F.3d 1350, 1353 (11th Cir. 1995).

121. *Id.* at 1356.

122. *Id.* at 1357 n.5.

123. *Id.* at 1358.

skewed list. *Gray v Commonwealth*¹²⁴ illustrates this point.¹²⁵ Coleman Wayne Gray was convicted and sentenced to death by an all white jury.¹²⁶ The venire called consisted of thirty-three whites and ten African Americans.¹²⁷ Of these forty-three, thirty-six underwent voir dire, only eight of these possible jurors were African American.¹²⁸ Six of the eight African Americans were struck for cause "because each voiced unequivocal objections to the imposition of the death penalty."¹²⁹ The remaining two African Americans were struck by the defense and the Commonwealth respectively.¹³⁰ Gray's counsel struck juror Holt because his father had been the victim of a similar crime.¹³¹ The Commonwealth did not give a reason for its strike.¹³² On appeal, the Supreme Court of Virginia upheld all of the strikes.¹³³ The court held that the strikes for cause were proper because the jurors "could not apply the laws of the Commonwealth."¹³⁴ Furthermore, the court disregarded Gray's argument "that because of the views blacks purportedly hold respecting imposition of the death penalty, their exclusion" violated Batson because "Gray presented no empirical data supporting his conclusion that blacks as a group oppose the death penalty."¹³⁵ The court upheld the Commonwealth's peremptory strike because Gray's counsel failed to object properly and the juror gave inconsistent responses about his abilities to impose death.¹³⁶ The way in which Gray's jury resulted in being all white is a prime example of the way the mechanisms of the system in combination result in siphoning out all minority jurors.

D. Racial Bias in the Sentencing Phase

Racial bias can also play a devastating role during capital sentencing. At this point, any individual juror's bias, or the bias of the jury as a whole, may affect a defendant's sentence. An all white jury may react differently to a white defendant than to a Hispanic defendant.¹³⁷ Similarly, a predominately African American jury may be predisposed to impose life, while a predominately white jury may be

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124. 356 S.E.2d 157 (Va. 1987).
 125. *Gray v. Commonwealth*, 356 S.E.2d 157 (Va. 1987).
 126. *Id.* at 160, 169-70.
 127. *Id.* at 168.
 128. *Id.*
 129. *Id.*
 130. *Id.* at 168-69.
 131. *Gray*, 356 S.E.2d at 168.
 132. *Id.* at 170.
 133. *Id.*
 134. *Id.* at 169.
 135. *Id.* at 169, 169 n.5.
 136. *Id.* at 170-71.
 137. See Johnson, *supra* note 83, at 1625-34.

more predisposed to impose death.¹³⁸ Thus, if as discussed above, the problems that can arise in the venire and voir dire, do arise, a biased jury could easily be empaneled to decide a defendant's fate. This bias could result in unfair disparities in the imposition of the death penalty, which have the effect of taking one individual's life while sparing the similarly situated individual.

The first D.O.J. report also contains some data on trial and sentencing. For all cases between 1988 and 2000, eight white defendants and fourteen African American defendants were sentenced to death.¹³⁹ While the survey does not make mention of the jury composition, it does break down the victims' and defendants' races.¹⁴⁰ Of all defendants sentenced to death by a jury, six of the twenty-six, or twenty-three percent, were black defendants who killed white victims.¹⁴¹ Only one defendant, Timothy McVeigh, was a white defendant who killed a victim of another race.¹⁴² These facts suggest, but do not prove, that federal juries may be operating on the presumption that when a white kills a non-white, the crime does not warrant the death penalty as it does when an African American kills a white victim.

A study conducted on the capital system in Texas also reveals disparities.¹⁴³ Racial bias was found to have infected prosecutorial discretion, jury selection, and sentencing.¹⁴⁴ Using one county as a sample for the time period of 1995 to 1999, the study found that while thirty-one percent of the homicides were against non-white victims, not a single death sentence was imposed, and only two of fifty-five cases for the death of a non-white were tried as compared with ninety percent of the cases where the victim was white.¹⁴⁵ Not only does sociological evidence indicate that a white jury may be inherently biased against a black defendant, the study found specific instances in which prosecutors encouraged racial stereotyping to promote a finding of future dangerousness.¹⁴⁶ Interestingly the study concludes that the racism in the system is not a result of invidious hateful behavior, but instead stems from the fact that "racism is imbedded in the very fabric of our social relations, informing both consciously and unconsciously."¹⁴⁷

As this conclusion aptly points out, racial bias can permeate the system through individual jurors who may be outwardly racist or, as is more likely the case, unconsciously so. The sentencing phase of a capital trial is essentially the

138. See Carroll, *supra* note 101.

139. See U.S. DEP'T OF JUSTICE, *supra* note 12, at 358 tbl.24-1.

140. *Id.* at 359-61 tbl.24-2.

141. *Id.*

142. *Id.*

143. See generally TEXAS DEFENDER SERVICE, *supra* note 18.

144. *Id.* at 1-8.

145. *Id.* at 2.

146. *Id.* at 7-8 (describing one prosecutor who called an expert on future dangerousness to testify that the defendant's Hispanic race was a factor in his propensity towards future crimes).

147. *Id.* at 8.

weighing of factors with the end goal of deciding on life or death. What makes a juror decide in one way or another can depend on personal feelings of the individual juror: whether the individual finds the crime in question to be particularly vile, or whether the individual finds that the defendant was a by-product of a miserable childhood. Just as these non-discriminatory reasons may influence an individual juror's vote, unidentifiable discriminatory reasons may influence a death sentence. These subtle influences begin with the basic statistics that whites on average are more favorable towards the death penalty than are minorities.¹⁴⁸ If an all white jury is empaneled it is more likely than not that the majority on the panel have favorable attitudes towards the death penalty and thus may not scrutinize the State's case as closely as would a juror who was concerned with the use of capital punishment. Extending this argument, to achieve an impartial jury that would staunchly apply law to fact, the system should select, and not dismiss jurors who question the death penalty and would truly hold the State to its burden of proving that death is warranted.

The United States Supreme Court recognized the viability of jurors harboring racism in its decision in *Turner v Murray*.¹⁴⁹ The Court specifically stated: "Because of the range of discretion entrusted to a jury in a capital sentencing hearing there is a unique opportunity for racial prejudice to operate but remain undetected . . . a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief."¹⁵⁰ The Court thus held "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."¹⁵¹

The conclusion that race plays a factor in the sentence of death does not seem inaccurate when returning to the data for convicted defendants awaiting death. There is a numerical disparity. The federal government's death row is eighty-seven percent minority.¹⁵² Furthermore, of the defendants executed in the entire United States since 1976, approximately eighty-one percent of their victims were white.¹⁵³

III. Suggested Solutions

The first step to ensure that racism is not afflicting prosecutorial discretion is a self-study like that conducted by the D.O.J. and Virginia. While JLARC concluded that race was not a problem for prosecutors in Virginia, the D.O.J.

148. See Carroll, *supra* note 101 and accompanying text.

149. *Turner v. Murray*, 476 U.S. 28 (1986).

150. *Id.* at 35.

151. *Id.* at 36-37.

152. THE CAPITAL PUNISHMENT PROJECT OF THE NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW USA, Fall 2001, at <http://www.deathpenaltyinfo.org/DeathRowUSA/Recent.pdf> (last visited Jan. 10, 2002).

153. *Id.*

found numerical disparities and instituted a more probing study and modified its protocol. This further study and alteration of the system by the D.O.J. is a model of how every state that uses capital punishment should operate. Despite this progressive step, more needs to be done to ensure uniformity in the application of capital punishment.¹⁵⁴ The D.O.J. clearly needs to institute an overall review process wherein every single death eligible case is submitted for review. Monitoring who is offered plea bargains or charged with a lesser offense must be done. The Attorney General and State Attorneys General can then make some form of uniform policy in order to govern how like cases are treated. It would not be difficult to conduct something of a proportionality review prior to charging. Heads of state legal systems could easily issue protocol which dictate a review of other cases and how they were tried, pleaded, or dealt with and then require uniform treatment of like cases or a review if different treatment is desired in a particular case. Our system of capital punishment will continue to appear arbitrary and unfair until consistency is achieved.

The problems arising in the selection of the venire could also be altered in order to avoid the inadvertent racial problems that it creates. Clerks should, instead of using only the voter registration lists, use a combination of several lists. The voter registration list is a good starting point, but if public assistance lists and water and electric subscriber lists are all used in combination, the ultimate venire list may still not be perfect, but it will be much closer to the desired cross-section requirement. Some jurisdictions have attempted to cure the problem by strategically selecting the venire in proportions to match the community from which they are drawn, however the constitutionality of this process is questionable.¹⁵⁵ For these reasons, a venire list that perfectly matches the community may never be attainable because of the limits imposed on jury service. However, a list that is composed of a *more* representative breakdown of the community will be far better than the venire lists currently used in some jurisdictions.

The problems of racial bias impacting voir dire should and can be dealt with by the courts. Courts should be wary of applying *Witt* to the exclusion of *Witherspoon*: just because a juror has "religious scruples" against the death penalty does not mean that the juror could not consider death "in accordance with his instructions."¹⁵⁶ Strikes for cause should be made very cautiously, especially when a pattern emerges, as it did in *Yeatts*, that all minority jurors are being struck for cause. Furthermore, the courts need to give *Batson* some bite. It is tragic that

154. Cases can be appealed for review in appellate courts, however this does not ensure uniformity. At the state level there may be statutorily mandated review, such as in Virginia where the Supreme Court of Virginia is required to review all death sentences for proportionality. VA. CODE ANN. § 17.1-313 (Michie 1999).

155. See generally Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993) (analyzing proposed solutions to racial deficiencies in jury composition).

156. *Witherspoon*, 391 U.S. at 521-22 (1968); *Witt*, 469 U.S. at 424 (1985).

a minority defendant could face an all white jury that was achieved through blatant discrimination and have no recourse because his counsel at the time did not properly raise the objection. Incidents such as that in Philadelphia and Texas are unbelievable attacks on any person's notion of justice, and yet the racism in those cases is not being reviewed because of court procedural rules. If *Batson* is to have effect in the system, the court must demonstrate to prosecutors the risk of ignoring its holding. Furthermore, ensuring a broad venire and enforcing *Batson* must be done in conjunction because leaving either problem unamended is an open door for these practices to continue.

No individual can so control another's thoughts so as to make someone avoid acting in a racist manner. Thus, the problems that arise in sentencing are much more difficult to deal with than are those in the other three areas of the system. However, changes in the other three areas will drastically reduce the likelihood that a minority defendant will face an entirely white jury. This, in turn will curb the power of subconscious racism to play into the sentencing decision. The more diverse the jury, the less probable that one juror will be able to avoid applying law to fact to return a sentence, because the other jurors will demand an accurate result. In sum, the problems in the system are for the most part fixable with time and effort.

IV. Conclusion

Closely scrutinizing the Texas, JLARC and D.O.J. reports leads one to the conclusion that race may not be an obvious or blatant factor in the capital system but instead a covert and subtle factor that has an unacceptable effect. The majority of the reports conclude that race is not a factor in prosecutorial charging. Rather, they find that charging is affected by geography.¹⁵⁷ If these analyses are correct, racism still may have a significant effect in the capital system by way of the jury. The public should not, therefore, be satisfied with the harmonious conclusions of Attorney General Ashcroft and the JLARC study.

Racial issues have been a concern in the capital system for some time and have recently culminated in several states and the federal government doing self-analyses of the possibility of prejudice in the capital system. JLARC and the D.O.J. have both concluded that their respective systems, at least in prosecutorial discretion, do not harbor invidious racism creating racial disparities. Perhaps, these results are accurate and racism has been successfully eradicated from prosecutorial discretion. However, neither the D.O.J. report or the JLARC study assessed the possibility of bias in other areas of the capital scheme. The ability of race to affect every aspect of the jury, directly and indirectly, is extremely disconcerting. In *Turner*, the United States Supreme Court showed an immense concern for the ability of racial bias to infect the capital system and thus unfairly

157. See generally J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 16; U.S. DEP'T OF JUSTICE, *supra* note 10.

send some to death.¹⁵⁸ This concern, however, has not revived itself in other critical areas such as the peremptory strikes issue discussed in Part II.C. The Court needs to deal with the racial issues across the board by strengthening the abilities of capital defendants to get post-conviction relief on these issues. Furthermore, trial courts need to do more to police the conduct of lawyers and jurors. Only a combination of these factors can possibly deal with the problems which are obviously pervasive in the system and possibly giving some defendants an unfair trial for their lives.

158. *Turner*, 476 U.S. at 35-36.

