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On April 22, 1987, a majority of the United States Supreme Court announced a startling and deeply disturbing opinion about race and the administration of criminal justice in the United States. Presented with overwhelming statistical evidence of racial bias in Georgia's use of the death penalty,[1] the Court ruled in *McCleskey v Kemp*[2] that race-based sentencing disparities for similarly situated defendants are "an inevitable part of our criminal justice system."[3] After expressing fear that responding to racial bias in death penalty cases might necessarily require confronting racial bias in other criminal cases,[4] the Court concluded that the Constitution does not

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1. The raw data from a study of murder cases in Georgia by Professor David Baldus of the University of Iowa constituted the statistical evidence in the case. *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 306-93 (1990). The Baldus study revealed that an accused is 8.3 times more likely to receive the death penalty for crimes committed against whites than crimes committed against blacks. *Id.* at 314. If the accused is black, he or she is 21 times more likely to be sentenced to death if the victim is white, as opposed to black. *See id.* at 315 (Table 50). Even after controlling for the effects of other variables influencing sentencing decisions in Georgia, a person accused of murdering someone white is 4.3 times more likely to be sentenced to death than someone accused of murdering a black person. *Id.* at 316.

2. 481 U.S. 279 (1987).

3. McCleskey v Kemp, 481 U.S. 279, 312 (1987).

4. The majority reasoned that "if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty " *Id.* at 315-16. In his dissent, Justice Brennan observed

place such "totally unrealistic conditions" on the use of capital punishment or the administration of criminal justice.[5]

Judicial Tolerance of Racial Bias

It seems unimaginable that the Supreme Court, an institution vested with the responsibility to achieve "equal justice under the law" for all Americans, could issue an opinion that accepted the inevitability of racial bias in an area as serious and final as capital punishment. However, it is precisely this acceptance of bias and the tolerance of racial discrimination that has come to define America's criminal justice system. The last thirty years have seen remarkable changes in America's relationship with people of color. The civil rights movement has ushered in significant developments in antidiscrimination law and has profoundly affected the status of African Americans. While enormous barriers still exist for many racial minorities, tremendous progress has been made in voting rights,[6] housing,[7] employment,[8] public accommodations,[9] and education[10] for African Americans and other historically disenfranchised people.

The impact of the civil rights movement is, however, noticeably missing from the realm of criminal justice. It is difficult to identify much evolution on the part of courts, legislators, or policymakers in appreciating the debilitating injustice that invidious racial bias represents in the administration of legal process. In fact, it is hard to find an area of public administration in which racial bias and discrimination is more tolerated and accepted.

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that "such a statement seems to suggest a fear of too much justice." *Id.* at 339.

5. *Id.* at 319 (quoting Gregg v Georgia, 428 U.S. 153, 199 n.50 (1976)).

6. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973-1973p (1988)).

7 *See* Civil Rights Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3614(a) (1988)).

8. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1988)).

9. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. II, 78 Stat. 243 (codified as amended at 42 U.S.C. §§ 2000a-2000a-6 (1988)); Heart of Atlanta Motel v United States, 379 U.S. 241 (1964); Katzenbach v McClung, 379 U.S. 294 (1964).

10. *See* Brown v Board of Educ., 347 U.S. 483 (1954).

Capital Punishment: Death is Not Different

As attorneys representing capital defendants and death row prisoners in the deep South, we see the pervasive presence of racial bias in painfully obvious ways in case after case. The death penalty is the criminal justice system's most serious and most notorious punishment.[11] How capital punishment is imposed reveals a great deal about the entire criminal justice system.

In 1972, the Supreme Court acknowledged severe problems in the administration of capital punishment, including its inexorable link with racial bias, and suspended use of the death penalty [12] However, some twenty-two years later, the death penalty remains a punishment that is applied disproportionately to African Americans and criminal defendants accused of killing people who are white. Since 1976, when the Supreme Court upheld new death penalty statutes, black men have accounted for 71% of the people executed in Georgia, 75% of those executed in Mississippi, and 70% of those executed in Alabama.[13] Even congressional studies have found that

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11. The Supreme Court has recognized "that the penalty of death is qualitatively different from a sentence of imprisonment" and that there is a heightened need for reliability in the proceedings and decisionmaking that surround a capital case. Woodson v North Carolina, 428 U.S. 280, 305 (1976).

12. Furman v Georgia, 408 U.S. 238 (1972). When the Supreme Court struck down Georgia's capital punishment statute, it observed that of the 455 persons sentenced to death for rape in this country since the Justice Department started keeping statistics in 1930, 405 were black. *Id.* at 364 (Marshall, J., concurring).

13. *See* NAACP LEGAL DEFENSE FUND, DEATH ROW U.S.A. (forthcoming Summer 1994). While the statistics cited above reflect what is happening in the deep South, it would be a mistake to conclude that the evidence of racial bias in the administration of the death penalty is limited to this region. Illinois has a death row population that is 61% black, Pennsylvania's death row is 59% black, and Maryland's death row is 79% black. *See id.* Even the administration of the federal death penalty that Congress approved in 1988 has not avoided the appearance of racial bias. The 1988 Anti-Drug Abuse Act provided for the death penalty for drug kingpins convicted of murder. 21 U.S.C. §§ 848(e)-(q) (1988). Every prosecution under this statute must be authorized by the Attorney General of the United States. To date, 78% of the defendants selected for prosecution have been African Americans. STAFF OF HOUSE JUDICIARY COMM., SUBCOMM. ON CIV AND CONST. RIGHTS, 103D CONG., 2D SESS., REPORT ON RACIAL DISPARITIES IN FEDERAL DEATH PENALTY PROSECUTIONS 2 (Comm. Print 1994). No one in law enforcement has suggested that three-fourths of the drug kingpins in America are black. These statistics, which reflect the decisionmaking of three different White House administrations, are deeply disturbing.

racial bias remains a dominant feature of America's use of the death penalty [14]

As disturbing as are the statistics and data that summarize racial bias, overt racial discrimination can also be seen in individual cases. What remains remarkable about race and criminal justice is not that bias and discrimination exist, but that they plainly are tolerated. When Florida prosecuted Anthony Ray Peek, an African American, for capital murder, the white judge who presided over the trial demonstrated prejudgments about Peek's guilt, improperly admitted evidence, and after successfully engineering a conviction for capital murder, stated from the bench: "Since the nigger mom and dad are here anyway, why don't we go ahead and do the penalty phase today instead of having to subpoena them back at cost to the state."[15] Mr. Peek was sentenced to death.

On appeal, the Florida Supreme Court reviewed the issue of racial bias stemming from the judge's remarks and simply admonished trial judges to be careful to "convey the image of impartiality "[16] While the judge's comments reflect the kind of racial bias that would have cost sportscasters or news commentators their jobs, a trial judge charged with making the ultimate decision between life and death continues to preside over capital cases and sentence black defendants with impunity Interestingly, Mr. Peek's conviction was overturned on other grounds, and he was later retried before a different judge and found innocent of all charges.

In 1989, Alabama executed Herbert Richardson, a Vietnam War veteran suffering from post traumatic stress disorder who returned home after experiencing a mental breakdown during combat duty in Vietnam. Mr. Richardson's death sentence came after the prosecutor urged the sentencing

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14. A 1990 study by the General Accounting Office that reviewed all studies of capital sentencing since resumption of the death penalty in 1976 concluded that significant evidence demonstrating bias in favor of the death penalty in white victim cases exists. U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).

15. Peek v Florida, 488 So. 2d 52, 56 (Fla. 1986). The penalty phase is the proceeding at which punishment is determined in a capital case. It follows a conviction at the first phase and is like a second trial in that separate witnesses, arguments, and instructions are required.

16. *Id.* at 56.

judge to impose the death penalty in part because of Mr. Richardson's alleged association with "the Black Muslim organization."[17]

Wilburn Dobbs remains on Georgia's death row even though his trial was undermined by racial bias on the part of virtually every decisionmaker who controlled his fate. Mr. Dobbs was tried in Walker County before a judge who as a member of the Georgia legislature had consistently voted in support of racial segregation. During the trial, the judge and the defense lawyer referred to Mr. Dobbs as "colored" and "colored boy," while the prosecutor called him by his first name.[18] Interviews with members of the all-white jury that convicted and sentenced Mr. Dobbs to death revealed that some jurors believed that the Ku Klux Klan did good things for the community and that African Americans were genetically predisposed to commit violent crimes.[19] Even Mr. Dobbs' defense attorney maintained views that could fairly be characterized as unashamedly racist.[20] After reviewing the evidence of racial bias presented by Mr. Dobbs, the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit held that he was not entitled to relief despite the racist conduct of the decisionmakers who held his life in their hands.[21]

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17 Trial Tr. at 28, State v Richardson, CC-77-318 (Houston County Cir. Ct. 1978).

18. Dobbs v Zant, 720 F Supp. 1566, 1578 (N.D. Ga. 1989), *aff'd*, 963 F.2d 1403 (11th Cir. 1991), *rev'd on other grounds*, 113 S. Ct. 835 (1993).

19. *Id.* at 1575-76.

20. The District Court made these findings concerning Dobbs' defense attorney:

> Dobbs' trial attorney was outspoken about his views. He said that many blacks are uneducated and would not make good teachers, but do make good basketball players. He opined that blacks are less educated and less intelligent than whites either because of their nature or because "my granddaddy had slaves." He said that integration has led to deteriorating neighborhoods and schools, and referred to the black community in Chattanooga as "black boy jungle." He strongly implied that blacks have inferior morals by relating a story about sex in a classroom. He also said that when he was young, a maid was hired with the understanding that she would steal some items. He said that blacks in Chattanooga are more troublesome than blacks in Walker County [Georgia].

Id. at 1577

21. Dobbs v Zant, 963 F.2d 1403, 1412 (11th Cir. 1991), *rev'd on other grounds*, 113 S. Ct. 835 (1993).

These examples of overt and gross racial bias are not isolated incidents, but very much reflect the character of criminal justice in America. Sadly, volumes could be written that document incident after incident in which racial bias has tainted and undermined the administration of criminal justice. While a handful of defense attorneys and civil rights groups continue to complain about a lack of progress in confronting racism in the criminal justice system, little effort has been made to respond to this enormous problem.[22] Many Americans, including elected officials, undoubtedly find comfort in the mistaken belief that because only "bad people"—those criminals whom we fear and despise—are at risk in the criminal justice system, the presence of racial discrimination is somehow tolerable. This view is terribly misguided. An honest and just determination of who is bad and who is not, who is guilty and who is not, can be made only when the legal process operates fairly and without racial bias. Racial bias within the legal system is not just an issue affecting how guilty people are treated in courtrooms across America, but rather one that implicates the moral authority of the law and the promise of equal justice. There is a clear relationship between race and the administration of criminal justice and race relations in this country The presence of racial bias in the justice system is central to the concerns of people of color precisely because our society defines itself by a commitment to law and fairness. To the extent that this commitment is compromised or even abandoned in the context of administering criminal law, African Americans are given every reason to view themselves as excluded from the system that dispenses justice.

That exclusion is manifest in a myriad of ways extending far beyond the treatment of individual defendants. For example, while juries are considered to be the ultimate link between the legal process and society at large, black Americans continue to be barred from serving on them. This is due to the fact that state officials regularly use their power to eliminate people of color who are summoned to and qualified for jury service. They

22. There has been an effort in Congress to create a legislative remedy to the kind of evidence of racial bias presented in *McCleskey*. The proposed Racial Justice Act has been introduced in Congress but has, to date, failed to pass. *See* Angela Dorn et al., *Too Much Justice: A Legislative Response to* McCleskey v Kemp, 24 HARV C.R.-C.L. L. REV 437, 438 (1989); Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV L. & SOC. CHANGE 777 (1990).

acomplish this largely by relying on their discretionary or "peremptory"[23] jury strikes to exclude whomever they wish from participation. Time and time again, those removed through this process are black.

While the suppression of black participation in public schools or in the electoral process has been the subject of intense litigation for nearly half a century, lawyers, lawmakers, and judges continue to condone the absence of minority group members from criminal juries. Particularly lamentable is the failure of the judiciary to prevent or even censure the wholesale removal of people of color from juries in criminal cases. The manner in which this exclusion is achieved and accepted provides a stunning illustration of how racial bias endures in the criminal courts.

Race and Peremptory Challenges

The judiciary's response to the deliberate exclusion of minorities from criminal juries has been one of blind indifference. From the first meager judicial gesture in the 1960s to the current pronouncements on jury selection, the courts have continued to show an extraordinary willingness to tolerate the kind of discriminatory practices that routinely are condemned outside the criminal justice system.

The Jurisprudence of the Peremptory Challenge

The Supreme Court's first comment on the issue in the modern era came in 1965 in *Swain v Alabama*.[24] A black man named Robert Swain was tried for rape and sentenced to death by an all-white jury in rural Talladega County, Alabama.[25] Swain protested that the prosecutor's ability to summarily dismiss all of the black jurors who managed to make it onto

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23. Peremptory strikes are distinguished from the "for cause" strikes that are granted to both parties when a jury is chosen. After voir dire, each side can raise "for cause" challenges to the ability of particular jurors to serve that are based on statutory or common law—e.g., the prospective juror is related to the defendant, is a convicted felon and, therefore, not permitted to serve, or has a personal or financial interest in the outcome of the case. These "cause" strikes will only be granted if based on solid legal grounds. Peremptories, on the other hand, are strikes that have historically been used at will. Each party is permitted to eliminate jurors for whatever reason it deems relevant until a jury of twelve is chosen.

24. 380 U.S. 202 (1965).

25. Swain v Alabama, 380 U.S. 202, 203, 205 (1965).

the venire deprived him of his right to a fairly selected jury of his peers.[26] Swain urged the Court to prevent the prosecution from accomplishing through peremptory challenges what had been outlawed through the eradication of exclusionary legislation.[27]

It was not to be: the Court turned a deaf ear to Swain's evidence and to the obvious problem he posed. It held that a defendant had no grounds for complaint regarding the use of discretionary challenges in *his* case.[28] Although it was clear that the ability to use peremptory strikes in any one case without restraint necessarily implied an ability to strike on the basis of race—and although an all-white jury was testimony to this fact—the Court refused to provide for any true redress. Instead, it held that discrimination could only be proved over a sustained period of time.[29] In other words, a black defendant was not denied a fair trial if the state systematically struck every black person summoned to hear his case, but only if it did exactly the same thing to every other defendant it tried in that county and only then if the defendant was able to marshal the facts to prove it. Thus, in each case a documented history was required to show that racism might have been at play

The *Swain* Court's foray into the realm of juror exclusion did nothing to address the problem. By asking defendants to look outside their own cases for proof of bias, the Court imposed a burden that was not only insurmountable, but also wholly unnecessary Why must one black defendant show that every other black defendant has also been subject to discrimination before he can insist on a fair trial in his own cause? If a district attorney commented on a defendant's right not to testify at trial, or if the police broke into his home without a warrant and seized evidence, he would not need to prove that these officials always ignored the Constitution in order to establish the violation in his case. Nor would an employee improperly fired from her job or a family denied a home in a new neighborhood have to prove racial bias in someone else's case before getting relief. Yet for the next two decades after *Swain*, the courts declined to see the deliberate dismissal of black jurors for what it was and insulated this form

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26. *Id.* at 210.

27 *See* Strauder v West Virginia, 100 U.S. 303, 310 (1880) (invalidating statute that permitted only whites to serve on juries).

28. *Swain*, 380 U.S. at 223.

29. *Id.* at 223-24.

of state-sponsored discrimination from review A different standard seemed to reign when racial inequity in criminal justice was at issue.

Unsurprisingly, litigants could not meet the burden imposed on them: *not a single defendant* prevailed on a *Swain* challenge in state or federal court before the requirements were changed.[30] Consequently, the effect of the first major case on racial bias in jury selection was to proclaim satisfaction with the status quo. Prosecutors understood that they could strike black jurors with impunity State trial and appellate judges knew that the elimination of every qualified black venire member from the capital murder trial of a black person accused of killing a white could be sustained within the confines of federal law Sadly, defense lawyers learned that challenging the exclusion of black people through peremptory strikes was futile.

Fortunately, *Swain* also received the universal condemnation of scholars and practitioners who were concerned about racial bias in the courts.[31] They understood that if defendants were forced to put the entire system on trial every time a single jury was chosen and if no real constraints were placed on the selection process, criminal juries would continue to resemble those of the eighteenth century A number of cases were brought to the Supreme Court's attention before it agreed to reconsider the issue in the mid 1980s.

The reluctant recognition that some change was necessary came in 1986 in *Batson v Kentucky*[32] *Batson* overruled *Swain* and held that a defendant could challenge the prosecutor's use of peremptory challenges in her own case.[33] In arriving at that conclusion, the Court finally began to confront both the painful history of minority exclusion from jury service and the fact that the *Swain* approach simply did not work. The Court at last con-

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30. After the Supreme Court modified the standard for evaluating peremptory challenges, some defendants whose trials were not covered by the modified standard were able to obtain relief under *Swain*. *See, e.g.*, Horton v Zant, 941 F.2d 1449, 1459 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1516 (1992); Jones v Davis, 906 F.2d 552, 554-55 (11th Cir. 1990).

31. *See, e.g.*, Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV 235 (1968); Roger C. Harper, Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV 1357 (1985); Comment, Swain v Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV 1157 (1966).

32. 476 U.S. 79 (1986).

33. Batson v Kentucky, 476 U.S. 79, 92-93 (1986).

ceded that the discretionary jury challenge could not be so sacrosanct as to be wholly shielded from the imperatives of racial equality and set out a procedure that enabled a defendant to attempt to prove that her jury was not fairly chosen.

The procedure was as follows: if a black defendant could establish a prima facie case of race discrimination, he could compel the state to justify its strikes with race-neutral reasons.[34] If the trial court deemed the reasons acceptable, the defendant lost the challenge. If, however, the state could not offer adequate explanations to the trier of fact, the state would be found to have violated the Fourteenth Amendment's equal protection guarantee, and a new jury would have to be chosen.

To its dissenters and critics, *Batson* heralded an unwarranted intrusion into the inviolable right of litigants to choose jurors in whatever manner they desired. This appraisal was true to a certain extent: prosecutors could no longer knock every black member off a venire list without facing even the *possibility* that some protest could be lodged. It is hard to fathom, however, why the freedom to choose with impunity should be exalted when it has been so clearly and routinely exercised in a racially discriminatory manner.[35] If high school principals, real estate brokers, and employers cannot select students, neighbors, or workers on the basis of race, surely the "right" to rely on race should be accorded little weight when the authority of the courts—to say nothing of a person's life or liberty—is at stake.

Yet if *Swain* gave the state free rein to discriminate, *Batson* provided few meaningful restrictions on discriminatory conduct. While *Batson* established a mechanism for a jury selection challenge, it also left ample room for racially biased practices to continue to flourish.[36] The Court failed to confront the enormity of the problem, both by neglecting to compel lower courts to reject unconvincing explanations for racist practices and by failing to make clear that the evidence of bias would at times be too strong to be

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34. *Id.* at 97

35. Recognizing this inevitability, Justice Marshall's concurrence in *Batson* called for the abolition of peremptory jury strikes. *Id.* at 102-08 (Marshall, J., concurring).

36. Despite the clear evidence of bias that pervaded the cases, the Court, holding that *Batson* was to apply only prospectively, denied countless defendants any chance at relief. *See* Griffith v Kentucky, 479 U.S. 314, 328 (1987) (holding that *Batson* applied retroactively only to cases "not yet final" when *Batson* was decided); Allen v Hardy, 478 U.S. 255, 257-58 (1986) (holding that *Batson* was not retroactively applicable to postconviction cases).

overcome by any self-serving excuses. Even with *Batson*, the high Court failed to truly stem the tide of juror exclusion based on race.

The Legacy of Swain *and* Batson: *Jury Selection in the 1980s and 1990s*

The reality of the administration of criminal justice in the South[37] is that a black defendant can still find himself facing a jury from which the overwhelming majority, if not all, of the prospective jurors of his race have been excluded. This is true even in counties that have black populations exceeding thirty or forty percent. Several factors contribute to this state of affairs. For one, the prosecutors overwhelmingly are white. Of the sixty-seven elected district attorneys in Alabama, one is black, and he is new to the job. None of Georgia's 159 counties has a black district attorney There are also few black judges. It still is not uncommon for a black defendant to find herself the only minority group member in the entire courtroom.

Many prosecutors rely on white jurors to respond to the type of tactics they hope will convict a black defendant. A prosecutor in Chambers County, Alabama, removed all black people from the jury *both* times the case was tried; he then commented throughout the trial on the race of various witnesses and made thinly-veiled racist arguments to the all-white panel about why the black defendant should be executed for the killing of a white man.[38] A Georgia prosecutor took a similar approach at the original capital trial of a black man accused of raping and killing a white woman when he also was able to eliminate all the black venire members.[39] Those usual arguments got little play when the case was retried several years later before a jury that included eight black members.[40]

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37 The authors practice in Alabama and are most intimately familiar with jury selection practices there and in neighboring southern states. The examples used in this Article are therefore taken from our experience litigating in this area.

38. *See* Trial Tr. at 164, State v Jefferson, CC-81-77 (Chambers County Cir. Ct. 1984) (urging jury to impose death to "stop them" from raping and shooting and "to show them we mean business" in burglary-murder case).

39. *See* Brooks v Kemp, 762 F.2d 1383, 1408-13 (11th Cir. 1985).

40. William Brooks was sentenced to death by an all-white jury in 1979 and to life in prison by a fairly constituted jury in 1991. *Compare* Brooks v State, 261 S.E.2d 379, 387 (Ga. 1979) (affirming death sentence for Brooks), *vacated*, 762 F.2d 1383 (11th Cir. 1985), *vacated and remanded*, 478 U.S. 1016 (1986), *reinstated*, 809 F.2d 700 (11th Cir.), *cert. denied*, 483 U.S. 1010 (1987) *with* Brooks v State, 415 S.E.2d 903, 903 (Ga. 1992)

In Alabama, which uses a "struck" jury system, producing an all or predominantly white jury takes a good deal of work. Alabama lawyers "strike down" to a jury; that is, they work from the entire venire list and eliminate every member until they are left with twelve names for the jury and two alternates. Thus, to achieve the desired result, the prosecutor in Jesse Morrison's case had to remove twenty of the twenty-one blacks who had qualified for jury service;[41] twelve of thirteen black venire members were eliminated from Darrell Watkins' capital trial;[42] Earl McGahee had to face an all-white jury after the state removed all sixteen black venire members;[43] David Freeman was convicted and sentenced to death by an all-white panel after the state removed nine of ten prospective black jurors;[44] and Albert Jefferson faced three all-white juries when the state used a total of twenty-four strikes to eliminate every black person summoned for service on each occasion.[45]

Prosecutors routinely use the overwhelming majority of their strikes against African Americans even when they make up a small percentage of the venire. In Dallas County, Alabama, the state used 77% of its strikes against black jurors in murder cases in a recent ten year period.[46] Although its billboards boast of the "historic civil rights" movement in Selma, the county has prevented over two-thirds of its black residents who have been

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(affirming imposition of life sentence).

41. Transcript of Postconviction Rec. at 122c, Morrison v. State, CC-78-10014 (Barbour County Cir. Ct. 1988), *aff'd*, 551 So. 2d 435 (Ala. Crim. App. 1989).

42. Watkins v State, 632 So. 2d 555, 558 n.1 (Ala. Crim. App. 1992).

43. McGahee v State, 554 So. 2d 454, 459-62 (Ala. Crim. App.), *aff'd*, *Ex parte* McGahee, 554 So. 2d 473 (Ala. 1989).

44. Freeman v State, CR 90-0279, slip op. at 3 (Ala. Crim. App. 1994).

45. Transcript of Postconviction Rec. at 39-56, Jefferson v State, CC-8-87 (Chambers County Cir. Ct. Jan. 25, 1989), *rev'd on other grounds*, CR 92-0158 (Ala. Crim. App. 1994).

46. Transcript of *Batson* Hearing at 106-07, Duncan v. State, CC-87-271 (Dallas County Cir. Ct. July 31, 1991) (describing proportion of district attorney's strikes used against African Americans in murder trials between 1981 and 1991).

Prosecutors' stereotypes about African Americans and fears about allowing them on juries come into play even when the defendant is white. The same pattern of exclusion is manifest in case after case regardless of the race of the accused. In 1991, the Supreme Court held that *Batson* also applied in cases with nonminority defendants. Powers v Ohio, 499 U.S. 400, 402 (1991). The holding in *Powers* rested in part on the ground that race discrimination harms the black jurors and the system as a whole as well as the accused.

summoned from serving on its juries. In Talladega County, where Robert Swain raised the issue thirty years ago, it still is routine to see prosecutors using twelve of their fifteen challenges or nineteen of the twenty-two strikes allotted them to remove black venire members from the jury [47]

Even in the post-*Batson* era, prosecutors are excluding black jurors with little resistance from the courts. If a defense attorney does not know the protocol and fails to object to the practice, rarely will the trial judge note the inequity on his own. (Indeed, *Batson* places the responsibility for addressing racial bias squarely on the shoulders of the defense and relieves both the court and the state from any duty to eradicate racial bias.)[48] If counsel raises the issue of the state's lopsided strikes, she still may not prevail in convincing the trial court that a prima facie case has been established. In one recent case in Montgomery County, no prima facie case was found despite the fact that the district attorney had used more than three-fourths of her peremptory challenges against black jurors[49] and that the Alabama Supreme Court had censured the same district attorney for continued *Batson* violations.[50]

The willingness of the courts to tolerate the sweeping exclusion of minorities from jury service is seen best in the reasons deemed acceptable to excuse the strikes, should the challenge get that far. In a 1986 case out of Emanuel County, Georgia, the prosecutor used all ten of his peremptory strikes to remove all ten African Americans from the venire.[51] When called upon to explain his reasons, he opined that he needed to strike one venire member because he looked "dumb as a fencepost" and another because he resembled the defendant.[52] The judge accepted these as valid

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47 Transcript of *Batson* Hearing at 37-38, Walker v State, CC-88-209, (Talladega County Nov 13, 1991) (describing *Watson* and *Calhoun* cases, among others).

48. In fact, when defense counsel fails to object adequately to the state's discriminatory conduct, the defendant will likely see the claim waived and will be precluded from litigating it. *See* Lindsey v Smith, 820 F.2d 1137, 1142-45 (11th Cir. 1987); Morrison v State, 551 So. 2d 435, 437 (Ala. Crim. App. 1989). Michael Lindsey was executed in 1989 with a defaulted jury challenge claim.

49 Harris v State, 632 So. 2d 503, 512-13 (Ala. Crim. App. 1992), *aff'd*, *Ex parte* Harris, 632 So. 2d 543 (Ala. 1993).

50. *Ex parte* Bird, 594 So. 2d 676, 681 (Ala. 1991).

51. Gamble v State, 357 S.E.2d 792, 793 (Ga. 1987).

52. *Id.* at 795.

reasons for removing the jurors, and the case proceeded to trial.[53] Another Georgia prosecutor maintained that he struck a black venire member because she worked in a video store and therefore would not be "good with people."[54] The trial court found this excuse perfectly adequate, along with the equally specious reasons offered for the eight other black people that the district attorney had removed.[55]

Sometimes the state all but admits striking jurors on the basis of race, and yet the reviewing courts ignore the obvious. One prosecutor gave as his reason for several strikes that the potential jurors were affiliated with Alabama State University—a predominantly black institution. This reason was considered race neutral.[56] Another capital conviction and death sentence were affirmed when the prosecutor struck several jurors because they lived in a "high-crime" neighborhood; she could not even come up with a reason for her elimination of one black woman.[57] The appellate courts were not perturbed when the state eliminated twelve of thirteen black jurors in a 1986 Alabama case on the basis of unsubstantiated rumors about their relatives provided by unknown third parties.[58] Although the prosecutor used twenty-one of his twenty-three strikes to remove black people from Victor Stephens' jury, the courts upheld the specious reasons given and refused to find a *Batson* violation.[59]

Quite often, the reasons are proved untrue, and the courts accept them anyway At one Dallas County *Batson* hearing held in 1991—in which twenty-three of twenty-eight strikes were used against African Americans—the district attorney stated that he struck a Ms. Johnson because she was related to various persons named Johnson whom he had previously prosecuted. When given the opportunity on voir dire, he declined to ask the venire member if she was indeed related to those who shared her common

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53. *Id.* at 794.

54. Ford v State, 423 S.E.2d 245, 247 (Ga. 1992).

55. *Id.* at 246.

56. Scott v State, 599 So. 2d 1222, 1227-28 (Ala. Crim. App.), *cert. denied*, 599 So. 2d 1229 (Ala. 1992).

57 *Ex parte* Bui, 627 So. 2d 855 (Ala. 1992).

58. State v Wilson, 571 So. 2d 1237, 1248-50 (Ala. Crim. App. 1989), *rev'd on other grounds*, 571 So. 2d 1251 (Ala. 1990).

59. *See* Stephens v State, 580 So. 2d 11, 15-21 (Ala. Crim. App. 1990), *aff'd*, *Ex parte* Stephens, 530 So. 2d 26 (Ala. 1991).

surname. Ms. Johnson then took the stand to say that she had never heard of these alleged relatives. Despite the fact that the asserted reason easily was proved false, the trial court denied the challenge.[60]

Precisely the same situation occurred in a Colbert County, Alabama case in which the trial judge sustained reasons based on alleged relations that did not actually exist.[61] Ricky Adkins' Alabama conviction was affirmed this year even though the prosecutor claimed to have struck a black juror because he "thought" the juror was single when the juror had in fact stood up in open court and plainly stated that he was married.[62] Courts have been so willing to bend over backwards to circumvent *Batson* that when a prosecutor said he could not accept a black juror because he belonged to a Masonic temple and Masons did not make good jurors, and the state later acknowledged that the man was in fact a *brick* mason, the trial judge ignored the discrepancy and found that there had been no discrimination in the selection of the jury [63]

No evidence of bias has been too blatant for state courts to ignore. A trial court found no proof of racial taint when the prosecution eliminated every black person from three different juries in a single case (one each to determine competency, guilt, and punishment), even when it was disclosed that the state had segregated the potential jurors into four lists denominated "strong," "medium," "weak," and "black" prior to trial and had struck every black individual in order from the list.[64] Another judge refused to allow the defense attorney to show that the reasons given for allegedly striking venire members applied equally to the white jurors and were thus evidence of pretext.[65] Courts have declined to take heed when issues that were

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60. Transcript of *Batson* Hearing at 429-30, Duncan v State, CC-87-271 (Dallas County Cir. Ct. July 31, 1991).

61. Guthrie v State, 598 So. 2d 1013, 1015, 1017 (Ala. Crim. App. 1991), *cert. denied*, 598 So. 2d 1020 (Ala. 1992).

62. Adkins v State, No. 7 Div 146, 1993 WL 56209, at *5 (Ala. Crim. App. Mar. 5, 1993) (Bowen, J., dissenting), *aff'd, Ex parte* Adkins, No. 1921371, 1994 WL 14018 (Ala. Jan. 21, 1994).

63. Gamble v State, 357 S.E.2d 792, 796 (Ga. 1987).

64. Transcript of Postconviction Rec. at 39-56, Jefferson v State, CC-8-77 (Chambers County Cir. Ct. Jan. 25, 1989), *rev'd on other grounds*, CR 92-0158 (Ala. Crim. App. 1994).

65. Transcript of *Batson* Hearing at 38-40, Walker v State, CC-88-209 (Talladega County Cir. Ct. Nov 13, 1991).

singularly unimportant to inquire about on voir dire suddenly have great weight when the state is asked to justify its strikes of black jurors.

These judges have often seen the same prosecutors practicing the same exclusionary tactics for years. In some counties, all that has changed is that defense attorneys now call upon prosecutors to justify their actions. The prosecutors have learned to work within the new rules. By allowing a few black people to sit on the jury and excluding the rest, they seek to avoid the threshold determination of a prima facie showing and often succeed. By finding out as much as they can about the black names on the venire list prior to trial, they prepare themselves with after-the-fact reasons if called upon to explain their strikes. One prosecutorial assistant acknowledged on the stand that he was ordered to "dig up dirt" on the black venire members, but never the white.[66] Some prosecutors rely on facts about the would-be jurors ("single," "unemployed") that are accurate, but irrelevant to any conceivable issue in the case.[67] Time and again, the trial courts give the seal of approval to manifestly fabricated explanations for the wholesale exclusion of minorities from jury participation.

The Cost of Juror Exclusion

The judiciary's response to the problem of racially biased exclusion of black venire members through peremptory strikes has been lethargic, reluctant, and uninspired. The courts have revealed an indifference to racial discrimination in jury selection that they do not tolerate in other areas. For many racial minorities, it has become increasingly difficult to believe that the criminal justice system works for people of color. In the deep South, black people have marched, fought, and died for the right to vote, serve on juries, and participate in making moral judgments for their communities. To be casually excluded from meaningful participation after enormous struggle is deeply discouraging and disheartening.

This is particularly true when the alchemy of race and crime has generated a whole host of issues and tensions that intensify judgments about

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66. *See* Parker v State, 610 So. 2d 1171, 1177 (Ala. Crim. App.), *aff'd*, *Ex parte* Parker, 610 So. 2d 1181 (Ala. 1992).

67 *See, e.g.*, Stephens v State, 580 So. 2d 11, 15, 19 (Ala. Crim. App. 1990), *aff'd*, 580 So. 2d 26 (Ala. 1991).

crime and criminal justice.[68] All elements of society pay a price for tolerating exclusion. Not only is the integrity of the trial process greatly undermined, but its accuracy and fairness are also compromised. Too often, juries content themselves with deciding criminal cases based on unconfronted racial stereotypes and presumptions about the guilt of some defendants—notably young black men—and without the deliberative struggle that is supposed to result in the truth. Systematic exclusion of black Americans from the jury process allows such decisionmaking to go unchecked.

The problems that flow from unrepresentative juries and racially discriminatiory selection procedures are serious and create significant barriers to fair and just review of criminal cases. When courts accept vague or pretextual explanations from prosecutors for peremptorily striking black venire members and otherwise fail to confront biased jury selection, the message that racially biased jury selection is an inevitable component of American criminal trials is hard to miss.

The Need for Reorientation

Courts, legislators, and decisionmakers within the criminal justice system make a serious mistake when they evaluate issues of racial bias solely in terms of prejudice to individual defendants. Black citizens unfairly excluded from jury service and others affected by criminal case determinations are alienated by the tolerance of racially discriminatory legal practices. As the review of peremptories and racial bias in jury selection illustrates, criminal defendants and the society as a whole are affected by the indifference to racial bias in criminal proceedings. It is significant that in the last quarter-century, America's most devastating domestic civil disturbances have been ignited by perceptions that the criminal justice system operates in a racially discriminatory manner.

Riots in Los Angeles, Miami, and Detroit, along with similar expressions of frustration and anger over the apparent tolerance of racial bias, reveal the importance of confronting any perception that racism in the administration of criminal justice is inevitable. While a host of socioeconomic factors underlies recent race riots and civil disturbances, these events clearly reflect a profound absence of hope in systems of justice and a belief

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68. A USA Today poll revealed that many white Americans are much more willing than nonwhites to presume that prosecutors and police officers are telling the truth in a criminal case and much less likely to regard a claim of racial bias seriously *'Gulf' Separates Races in Dealings With Police*, USA TODAY, Feb. 11, 1993, at 11A.

that the promise of equality and fairness for people of color is meaningless. In addressing the needs of the urban poor and many African Americans, contemporary philosophers have begun to recognize that confronting hopelessness and despair is as important as constructing specific remedies for perceived problems.[69]

A similar reorientation in the psyche of the justice system's key players is necessary to confront racial bias. Legal doctrines that accept the inevitability of racially tainted jury selection or sentencing have no place in a reoriented commitment to eliminate discrimination. In 1954, the Supreme Court could have declared racially segregated school systems that deny minority children equal educational opportunity the unavoidable result of a racially divided society However, in *Brown v Board of Education*,[70] the Court insisted on change. Unlike the cynicism and indifference that has characterized the Court's treatment of race bias claims in the criminal justice context, *Brown* reflected a vision of justice that differed greatly from what had previously been accepted as an inevitable and permanent feature of American education.

A similar conversion and a new vision of justice is essential to effective confrontation of racial bias in the criminal justice system. Eliminating the exclusion of people of color from jury service through peremptory strikes is a perfect place to start. The Court must reject its approach of cautious adjustment and reinvigorate its efforts to prevent the removal of even a single juror because of race.

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69 *See generally* CORNELL WEST, RACE MATTERS (1993). Cornell West describes the "nihilism that increasingly pervades black communities." *Id.* at 14. He states that "nihilism is to be understood here not as a philosophic doctrine that there are no rational grounds for legitimate standards or authority; it is, far more, the lived experience of coping with hopelessness." *Id.* (emphasis omitted). This problem is not unrelated to the abdication of justice revealed by the Court's "inevitability" doctrine in *McCleskey* and the cynicism behind many courts' treatment of racially biased use of peremptory strikes. Like the nihilistic threat West attempts to identify and challenge, the tolerance of bias in criminal justice must be confronted not simply with knowledge and mechanisms for reform, but also with conviction.

> Like alcoholism and drug addiction, nihilism is a disease of the soul. It can never be completely cured, and there is always the possibility of relapse. But there is always a chance for conversion—a chance for people to believe that there is hope for the future and a meaning to struggle.

Id. at 18.

70. 347 U.S. 483 (1954).

The legal community already possesses a tremendous amount of knowledge about the problems of racial bias in the administration of criminal justice, as well as many thoughtful proposed solutions. However, given the history of bias and exclusion that pervades criminal justice issues, it is abundantly clear that ideas and proposals will never be enough without some accompanying conviction and commitment. No matter what inventive and thoughtful strategies emerge in the next decade to reduce the appalling and debilitating presence of racial bias in America's criminal justice system, there must first be a recommitment to a new vision of justice. Any legal construct that determines that racial bias in the administration of criminal justice is "inevitable" must clearly be rejected. It is not only realistic to expect this society to eliminate racial bias in its justice system, but it is also necessary and essential to the moral authority of the law and the courts that such an expectation be articulated and enthusiastically pursued.