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# The Role of Race in the Memphis Courts

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I practiced law in Memphis, Tennessee, for sixteen years. During that time, I represented a number of defendants in capital cases as a part-time public defender. When I worked as a part-time public defender, we had a capital defense team composed of one full-time lawyer and two part-time lawyers. We also employed a full-time investigator and a full-time social worker who prepared primarily for the penalty phases of trials. From these experiences, I have learned that race plays a pervasive role in litigation outcomes, often to the detriment of minorities. Everytime I enter the courtroom door I recognize that race is an ever present factor. It is present with the judge. It is present with counsel. It is present with the jury. The question is whether and to what extent one should use race in our courts of law.

Those whose job it is to make the justice system function—clerks, bailiffs, witnesses, lawyers, and judges—have a legal and ethical responsibility to ensure the utmost fairness, decorum, and propriety in courtroom proceedings. Whenever possible, these courtroom principals should avoid injecting the influences of race into courtroom proceedings. Fortunately, ample tools and guidelines are available to minimize overt discrimination by courtroom principals. Covert discrimination, however, presents a more insidious problem. How the bailiff greets a minority defendant subtly suggests approval or disapproval. Whether counsel uses a courtesy title when addressing a minority witness indicates respect or lack of respect for that witness. A judge's dismissive treatment of a minority attorney encourages others to treat that attorney in the same way. While there is a great need for improved racial attitudes, increasing numbers of courtroom principals are sensitive to the requirements of racial fairness.

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Ensuring racial fairness in the operation of the jury system presents an even greater challenge. Even before the jury selection process begins, numerous factors have already limited the number of African-Americans and other minorities available to serve. Voter registration and driver's license lists, from which courts draw names of potential jurors, often contain disproportionately small numbers of minorities. Inadequate compensation keeps still more minorities from serving. Ten dollars per day is not likely to lure minority domestic workers, self-employed minorities, and minority employees of companies that do not compensate for jury duty. Nor is it likely to lure the minority mother who needs a baby-sitter for her children. Finally, Tennessee's required sequestration of juries in capital cases, the trials of which normally last a minimum of two weeks, makes it easier for minorities and individuals with low incomes to escape jury duty by claiming hardship. By the time a panel from which jurors will be selected is available, the cross-section has been severely eroded.

Racial factors also affect the jury selection process. Those of us who have been in the courtroom any length of time know that the defense in a capital case, regardless of the victim's race, tries to place as many blacks as possible on the jury, while the prosecutor attempts to select a predominantly white jury.

When attorneys select juries in capital cases, they select jurors who can serve during both the guilt phase and the penalty phase of the trial. A prosecutor, therefore, begins by asking jurors questions to determine whether they can impose the death penalty if the prosecution proves its case and aggravating circumstances outweigh mitigating circumstances. If a prosecutor detects the slightest hesitancy in a minority juror's voice, he will attempt to lure the juror into the trap of admitting that she is against the death penalty and would have difficulty objectively imposing it on the defendant. Defense counsel then faces an uphill battle trying to rehabilitate the minority juror so that she will not be excused on the basis of the capital punishment issue. Defense counsel will attempt to get her to admit that she could impose the death penalty if the case calls for it. Some minority jurors may attempt to use the capital punishment issue to escape jury duty. With the judge's indulgence, I have had to appeal to their sense of fairness and pride in this way: "Don't you think that this man has the right to a cross-section? Surely you want to help us make sure that this man gets a fair trial."

If an attorney cannot strike a juror for cause, the attorney must use a peremptory challenge. When I first began practicing in Shelby County,

attorneys would stand at counsel's table and say: "Your Honor, please, I excuse Juror number so-and-so." I prefer the open challenge process to today's secretive process in which jurors do not know who is cutting whom. Under the open challenge system, everybody in the courtroom knew that the whites were cutting the blacks and the blacks were cutting the whites. That prospective jurors knew early on that both sides were playing their racial cards enhanced my chances for racial sympathy in the jury room.

Racial considerations even influence what kinds of white jurors a prosecutor is likely to strike. A prosecutor wants white jurors who are more rigid, more conservative, and possibly more biased in matters of race. A prosecutor will likely strike the more open-minded white juror who has a history of involvement in bi-racial or liberal causes.

The fact that a jury's verdict in a criminal case must be unanimous for the prosecutor to obtain a conviction allows defense counsel to capitalize on or exploit the factor of race. I, as a defense lawyer, would always attempt to get some African-Americans on the jury. In fact, I never exercised a peremptory challenge on a black juror while I was practicing law. I always felt that the black juror's race created some kind of identification between herself and me and thus gave me a better shot at reaching her. I did not care if she empathized with my client. I did not care if she empathized with me. But I emphasized to her that she should stand her ground and not be bowled over during deliberations just because she was a minority. While I might not get an acquittal, the hold-out might force the jurors to compromise, and I might get a conviction for a lesser-included offense.

The *Batson* requirement that counsel present some nonracial reason for exercising a peremptory challenge is, at best, of limited effect. In Shelby County, the prosecutor generally is smart enough not to use his peremptory challenges on only black potential jurors. The prosecutor knows that leaving one black person on the jury usually will be sufficient to preclude a *Batson* claim. In fact, the issue of whether the prosecutor has a nonracial reason for exercising a peremptory challenge rarely arises because everyone knows that both sides are attempting to capitalize on race. If I had been asked about some of my reasons for excusing white jurors, they would have been just as far-fetched as the ones that prosecutors offer.

Besides being a part-time public defender, I also was one of those who represented black Memphis Congressman Harold Ford shortly after he was indicted for federal bank fraud in Knoxville in the late 1980s. I did not continue in the case, however, because too many lawyers were involved without clear lines of responsibility. Congressman Ford had his case

transferred from Knoxville, a largely white area, to Shelby County, which is about 46% black. The Congressman is very popular in Shelby County, and many people did not want to see him convicted regardless of the proof against him. When a minority defendant like Congressman Ford is well-known in the community, there are many angles one can use to prevent a conviction. And any defendant would be foolish not to exploit at least some of these angles.

Congressman Ford's first trial lasted for several weeks and ended with a hung jury. Judge Odell Horton, a black Memphis judge, presided over the case. During the first trial, the jury foreman's sister entered the courtroom almost arm-in-arm with one of Congressman Ford's close friends. In addition, Judge Horton had to excuse two jurors—black jurors interestingly—during the deliberations and replace them with alternates. The judge dismissed both jurors for failing to disclose previous run-ins with the law. Another juror refused to participate significantly in the deliberations. I have heard that this juror went into the jury room, lay down under the table, folded her arms, and went to sleep. Apparently, she was too close-minded to deliberate.

Judge Horton appeared to be frustrated with both the trial process and the conduct of some of the jurors in the first trial. Before the second trial, Judge Horton declared something along the lines of: "Well, I'm just tired of fooling with this jury here in Memphis. With the Congressman's popularity, I am not sure that the Government can get a fair trial." The judge's statement created quite an uproar. From Judge Horton's perspective, the black community would bend over backwards to give a black man like Congressman Ford, who was very popular and something of a hero in the black community, the benefit of the doubt. Therefore, Judge Horton decided to select a jury from Jackson, Tennessee, which is about ninety miles from Memphis and predominantly white, in the second trial. The judge had the jurors bused from Jackson to Memphis.

Congressman Ford, perhaps justifiably, was quite upset. Some blacks from Memphis picketed the federal courthouse in Jackson during the jury selection. The Congressional Black Caucus passed resolutions condemning Judge Horton's decision. Justice Department official Webster Hubbell became involved in the case, and the Justice Department joined Congressman Ford in filing an application to dismiss the Jackson jury and empanel another jury from Memphis; a local U.S. Attorney who disagreed with this move subsequently resigned. Judge Jerome Turner, who presided at the second trial, denied the application. The Congressman attempted an

interlocutory appeal, but the United States Court of Appeals for the Sixth Circuit refused to intervene.

The Jackson jury was largely white, in contrast to the Memphis jury that was mostly black. Congressman Ford, his lawyers, and his supporters brought the racial issue to the forefront of the trial. The white jurors doubtless were keenly aware of the race-based attacks directed at them. This uproar clearly aided Ford by sensitizing the jury to avoid even the hint of racial bias in their decision. Ultimately, the predominantly white jury that so alarmed Congressman Ford acquitted him.

The influence of race in court proceedings is both pervasive and complex. We should recognize its presence and seek to neutralize its negative aspects. But we should also capitalize on opportunities to focus race into a positive result.